

No. 20-8390

**ORIGINAL**  
Supreme Court, U.S.  
FILED  
**JUN 17 2021**  
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IN THE  
SUPREME COURT OF THE UNITED STATES

**GARY L. WORKMAN**

*PETITIONER*

**v.**

**WARDEN JASON KENT, et al.**

*RESPONDENT*

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE U.S. FIFTH CIRCUIT COURT OF APPEALS

**PETITION FOR WRIT OF CERTIORARI**

**GARY L. WORKMAN**  
*PRO SE*

**DIXON CORRECTIONAL INSTITUTE**

**P.O. BOX 788/UNIT II: DORM - 12**

**JACKSON, LA 70748**

**PHONE # 225-634-1200**

## QUESTIONS PRESENTED

Was Petitioner denied his right to compel witnesses when counsel failed to subpoena an expert that had found exculpatory evidence and this evidence was found in the police and prosecutor files?

Was counsel's performance deficient when counsel failed to examine the police and prosecutor files and conduct an independent investigation after a retained expert found exculpatory evidence in these files and did this deficient performance prejudice Petitioner?

Was Petitioner prejudiced where counsel's deficient performance rendered the state court record insufficient and precluded from federal review and can Petitioner overcome the bar of *Harrington v. Richter* and *Cullen v. Pinholster*, when it is this ineffectiveness of counsel that obstructed the preservation and conservation of the state court record?

If the State utilizes evidence outside the state court record, is the bar of *Harrington v. Richter* and *Cullen v. Pinholster*, overcome under 28 §2254(d)(2) when the use of such evidence resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Do *voir dire* statements by the defense open the door to allow the State to bypass fair notice and the balancing test of relevancy concerning the introduction of inadmissible evidence under state and federal law?

## 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 subject of this petition is as follows:

District Attorney, Paul D. Connick, Jr.  
24<sup>th</sup> Judicial district, Louisiana  
200 Derbigny St. 5<sup>th</sup> Floor  
Gretna, LA 70053

Warden Jason Kent  
Dixon Correctional Institute  
5568 Hwy 68  
Jackson, LA 707748

## RELATED CASES

*Workman v. Kent*, NO. 20-30501, U. S. Court of Appeals for the Fifth Circuit. Judgment. (April 1, 2021.).

*Workman v. Kent*, NO. 18-13175 Section "H" (2) (E.D. La., July 22, 2020).

*Workman v. Kent*, NO. 18-13175 Section "H" (2) (Magistrate Report and Recommendation. (USDC, E.D. La, September 6, 2019).

*State v. Workman*, NO.12-2204 Louisiana 24<sup>th</sup> Judicial District Court 255 So.3d 697, 2018 La. LEXIS 2853 (La. Supreme Court, No. 2017-KH-0985, Oct. 29, 2018).

*State v. Workman*, NO. 12-2204 Louisiana 24<sup>th</sup> Judicial District Court, 255 So.3d 579, 2018 La. LEXIS 2853 (La. Supreme Court, No. 2017-KP-0716, Oct. 29, 2018).

*State v. Workman*, NO. 12-2204 Louisiana 24<sup>th</sup> Judicial District Court. (La. 5<sup>th</sup> Cir. 17-KH- 134, April 4, 2017)

*State v. Workman*, NO. 12-2204 Louisiana 24<sup>th</sup> Judicial District Court, (February 1, 2017)

*State v. Workman*, NO. 12-2204 Louisiana 24<sup>th</sup> Judicial District Court, 255 So.3d 579, 2018 La. LEXIS 2853 (La. Supreme Court, No. 2015-KO- 0909, March 24, 2016).

*State v. Workman*, NO. 12-2204 Louisiana 24<sup>th</sup> Judicial District Court. (La. 5<sup>th</sup> Cir. 14-KA- 559, April 15, 2015).

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**APPENDIX A:** The opinion of the U.S. Fifth Circuit Court of Appeals and denial of Certificate of Appealability is attached as **Appendix “A”**. No. No. 20-30501.

**APPENDIX B:** The Order of the United States Western District Court denying a Certificate of Appealability is attached hereto as **Appendix “B”**. No. 18-13175 Section "H" (2).

**APPENDIX C:** The Report and Recommendation by the U. S. Magistrate Judge in the Eastern District of Louisiana is attached as Appendix “C”, No. 18-13175 Section "H" (2)

**APPENDIX D:** Louisiana Supreme Court order denying post-conviction application for relief is attached as Appendix “D”. NO. So.3d 697, 2018 La. LEXIS 2853.

**APPENDIX E:** Louisiana Supreme Court order denying post-conviction application for relief is attached as Appendix “E”. NO. So.3d 579, 2018 La. LEXIS 2853.

**APPENDIX F:** Opinion of the Louisiana Fifth Circuit Court of Appeals denying writ of review of Post-Conviction Application is attached as Appendix “F”. NO. 17-KH-134.

**APPENDIX G:** Opinion of the Twenty-fourth Judicial District Court denying Post-Conviction Relief is attached as Appendix “G”. NO. 12-2204. (February 1, 2017).

**APPENDIX H:** Opinion of the Louisiana Supreme Court denying Certiorari is attached as Appendix “H”. NO. 2015-KO-0909. *State v Workman*, 190 So. 3d 1189. (March 24, 2016).

**APPENDIX I:** Opinion of the Louisiana Fifth Circuit Court of Appeals, affirming the conviction, remanding to correct commitment order is attached as Appendix “I”. NO. 14-KA-559. *State v Workman*, 170 So. 3d 279. (April 15, 2015.)

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## STATUTES AND RULES

18 USC §2252.

28 U. S. C. § 1254(1).

28 U. S. C. § 1257(a).

28 U.S.C. 2254 (a).

Fed. R. Evid. 403

Federal Rule of Civil Procedure 5(a), 10(c), 81(a) (2).

U. S. Constitutional Amendment VI.

U. S. Constitutional Amendment XIV. Sec. 1.

Louisiana Constitution Art. I, § 2.

Louisiana Constitution Art. I, § 13.

Louisiana Constitution Art. I, § 16.

La. Const. Art. 1, 9.

La. C. of Crim. P., Art. 731.

Louisiana Constitution Art. I, § 19.

LA. R.S 14:27.42.

LA. R.S 14:81.1.

LA. C. Cr. P. 403.

**OTHER:**

**VOLUMES:**

**ONE:** Appendixes.

**TWO:** State Review.

**THREE:** § 2254.

**FOUR:** Pertinent Transcripts.

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

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

**OPINIONS BELOW**

**For cases from federal courts:**

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

not yet published or reported.

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

Reported at *Workman v Kent*, 2020 U.S. Dist. LEXIS 129817, U. S. District Court for the Eastern District of Louisiana. (July 22, 2020).

**For cases from state courts:**

The opinion of the highest state court to review the merits appears at Appendix "D" to the petition and is

Reported at So.3d 697, 2018 La. LEXIS 2853. and So.3d 579, 2018 La. LEXIS 2853.

The opinion of the Louisiana Fifth Circuit Court of Appeals appears at Appendix "F" to the petition and is unpublished.

The opinion of the highest state court to review the merits appears at Appendix "H" to the petition and is

Reported at *State v Workman*, 190 So. 3d 118.

The opinion of the Louisiana Fifth Circuit Court of Appeals appears at Appendix "I" to the petition and is reported at *State v Workman*, 170 So. 3d 279

## **JURISDICTION**

The date on which the United States Fifth Circuit Court of Appeals decided the case was April 1, 2021 and the jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

The date on which the Louisiana Supreme Court decided the case was March 24, 2016 and on October 29, 2018 and the jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The following statutory and constitutional provisions are involved in this case.

### **U. S. Constitutional Amendment VI. Rights of the accused.**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

### **U. S. Constitutional Amendment XIV. Sec. 1. [Citizens of the United States.]**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Louisiana Constitution Art. I, § 2, Due Process of Law**

No person shall be deprived of life, liberty, or property, except by due process of law.

**Louisiana Constitution Art. I, § 13. Rights of the Accused.**

When any person has been arrested or detained in connection with the investigation or commission of any offense, he shall be advised fully of the reason for his arrest or detention, his right to remain silent, his right against self-incrimination, his right to the assistance of counsel and, if indigent, his right to court appointed counsel. In a criminal prosecution, an accused shall be informed of the nature and cause of the accusation against him. At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment. The legislature shall provide for a uniform system for securing and compensating qualified counsel for indigents.

**Louisiana Constitution Art. I, § 16. Right to a Fair Trial**

Every person charged with a crime is presumed innocent until proven guilty and is entitled to a speedy, public, and impartial trial in the parish where the offense or an element of the offense occurred, unless venue is changed in accordance with law. No person shall be compelled to give evidence against himself. An accused is entitled to confront and cross-examine the witnesses against him, to compel the attendance of witnesses, to present a defense, and to testify in his own behalf.

However, nothing in this Section or any other section of this constitution shall prohibit the legislature from enacting a law to require a trial court to instruct a jury in a criminal trial that the governor is empowered to grant a reprieve, pardon, or commutation of sentence following conviction of a crime, that the governor in exercising such authority may commute or modify a sentence of life imprisonment without benefit of parole to a lesser sentence which includes the possibility of parole, may commute a sentence of death to a lesser sentence of life imprisonment without benefit of parole, or may allow the release of an offender either by reducing a life imprisonment or death sentence to the time already served by the offender or by granting the offender a pardon.

**Louisiana Constitution Art. I, § 19. Right to Judicial Review**

No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based. This right may be intelligently waived. The cost of transcribing the record shall be paid as provided by law.

**28 U.S.C. 2254: (a):**

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

## **STATEMENT OF PROCEEDINGS**

Appellant was convicted on February 27, 2014. He was sentenced on March 10, 2014, at which time a motion for new trial was entered and denied. He appealed the conviction to the La. Fifth Circuit Court of Appeal<sup>1</sup> and on April 15<sup>th</sup>, 2015 the court denied Appellant's appeal.<sup>2</sup> Appellant filed an Application for Writ of Certiorari to the Louisiana Supreme Court<sup>3</sup> and on March 24<sup>th</sup>, 2016 was denied.<sup>4</sup> On December 15<sup>th</sup>, 2016 Appellant timely filed an Application for Post-Conviction Relief to the 24th Judicial District Court of Louisiana.<sup>5</sup> On February 1<sup>st</sup>, 2017 the 24th Judicial District Court denied Appellant's Application for Post-Conviction Relief.<sup>6</sup> On March 3<sup>rd</sup>, 2017, Appellant filed an Application for Supervisory Writ of Review to the Fifth Circuit Court of Appeals.<sup>7</sup> On April 4<sup>th</sup>, 2017, the Fifth Circuit Court of Appeal denied Appellant's application.<sup>8</sup> The Appellant counsel then timely filed an Application for Writ of Certiorari to the Louisiana Supreme Court.<sup>9</sup> Lack of communication by retained counsel necessitated I file pro se, albeit untimely.<sup>10</sup> Ultimately, the Louisiana Supreme Court denied Appellant's application.<sup>11</sup>

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<sup>1</sup> Exhibit 1: Original & *Pro se* Briefs. *See Volume Two.*

<sup>2</sup> Exhibit 2: Appendix I Denial of Writ. *See Volume One.*

<sup>3</sup> Exhibit 3: Writ of Certiorari. *See Volume Two.*

<sup>4</sup> Exhibit 4: Appendix H: Denial of Certiorari. *See Volume One.*

<sup>5</sup> Exhibit 5: PCR Application and Memorandum. *See Volume Two.*

<sup>6</sup> Exhibit 6: Appendix G: Denial of PCR. *See Volume One.*

<sup>7</sup> Exhibit 7: Writ to LA 5<sup>th</sup> Circuit. *See Volume Two.*

<sup>8</sup> Exhibit 8: Appendix F: Denial of Writ. *See Volume One.*

<sup>9</sup> Exhibit 9: Supervisory Writ of Review. *See Volume Two.*

<sup>10</sup> Exhibit 10: Appendix E: Denial of Writ *See Volume One.*

<sup>11</sup> Exhibit 11: Appendix D: Denial of Writ. *See Volume One.*

Appellant filed an Application and Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus with exhibits in the instant matter.<sup>12</sup> The State filed an answer and Petitioner sought an index of contents under Rule 5,<sup>13</sup> which was dismissed with reasons.<sup>14</sup> On September 6, 2019, in his report and recommendation, the Magistrate Judge denied Appellant's § 2254 petition with prejudice.<sup>15</sup> Petitioner filed objection to the Report and Recommendation on November 6, 2019. On July 22, 2020,<sup>16</sup> the United States District Court for the Eastern District of Louisiana adopted the Magistrate Judge's Report and Recommendation.<sup>17</sup> Thereafter, Appellant timely filed Notice of Appeal,<sup>18</sup> asking the Fifth Circuit Court of Appeals to issue a Certificate of Appealability.<sup>19</sup>

On April 1, 2021, the U.S. Fifth Circuit Court of Appeals denied his application for Certificate of Appealability.<sup>20</sup> Petitioner now comes before this Honorable Court seeking its discretion and imploring it to consider the reasons and grant Certiorari.

#### **STATEMENT OF THE CASE**

On February 27, 2014 Petitioner was found guilty of Attempted Aggravated Rape, La R.S. 14:27.42 and Pornography Involving Juveniles, 14:81.1, the court imposed one sentence of fifteen (15) years at hard labor for the *Attempted Aggravated Rape*. Concerning *Distribution of Pornography Involving Juveniles*, the court imposed

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<sup>12</sup> Exhibit 12: 28 §2254 Application and Petition. *See Volume Three.*

<sup>13</sup> Exhibit 13: Leave and Motion seeking Index. *See Volume Three.*

<sup>14</sup> Exhibit 14: Dismissal of Motion for Index. *See Volume Three.*

<sup>15</sup> Exhibit 15: Magistrate Report and Recommendation. *See Volume Three.*

<sup>16</sup> Exhibit 16: Appendix C: Objections to Report and Recommendations. *See Volume One.*

<sup>17</sup> Exhibit 17: Appendix B: District Court Adoption of R & R. *See Volume One.*

<sup>18</sup> Exhibit 18: Notice of Appeal. *See Volume Three.*

<sup>19</sup> Exhibit 19: Memorandum Seeking COA. *See Volume Three.*

<sup>20</sup> Exhibit 20: Appendix A: Denial of COA. *See Volume One.*

ten (10) years for count two, ten (10) years for count three and ten (10) years for count four, all to run consecutively. For count five, *Possession of Pornography Involving Juveniles*, the court imposed a five (5) year sentence and ordered it to run concurrent with the others and gave Movant credit for time served.

### **REASONS FOR GRANTING THE WRIT**

- (a)** The State of Louisiana has departed from the usual course of judicial proceedings *and* the United States Fifth Circuit Court of Appeals has accepted and sanctioned such a departure by the lower court, as to call for an exercise of this Courts supervisory power.
- (b)** The State Court and the United States Fifth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Honorable Court.

### **OVERTURE**

Respectfully, I Gary L. Workman, Petitioner, am a layman of law and do not proclaim to be a peer of this Honorable Court, nor do I come before this Honorable Court presumptuously. It is with great humility I pray you will consider the subsequent claims and persuasions.

### **CLAIMS**

The conviction was obtained in violation of the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution. The right to obtain testimony of witnesses and compel their attendance is fundamental element of due process and Petitioner was denied these substantial rights through counsel's deficient representation.

## PERSUASIONS

Both State and Federal Courts opined that I had failed to make "a substantial showing of the denial of a constitutional right."

The Fifth Circuit Court of Appeals deemed earlier claims abandoned but, all claims are subsumed in the ineffective assistance claim itself. The State's case relied on the credibility of government witnesses and my defense was dependent on the findings of a retained computer expert, D. Wesley Attaway, to challenge the credibility of these witnesses. My constitutional right to confrontation as well as my right to compel witnesses in my behalf was violated due to ineffective assistance of counsel and this ineffectiveness of counsel is the reason the State court record is insufficient for a full and fair review of the issue.

Certain exhibits and/or documents herein, which have been discovered through due diligence and, as a direct result of ineffective assistance of counsel were not preserved in the state court record or available for state court review, are now presented to support the petition:

I had recently moved from Birmingham, Alabama to New Orleans, Louisiana. I had a fiancée but, lived alone. Out of boredom, I placed ads on several adult websites and while online one evening, I was contacted via chat request by a man who hailed from New Zealand using the name, Koala. This man sent me several photos containing child pornography. Once discovering the content of the files, I deleted them and believed that was the end of it.

One of the ads I posted was titled; “Somebody’s daughter”. I said “every woman is somebody’s daughter, and the word woman was used as the qualifying term. Several people contacted me through this ad and some did misconstrue it. One of these was a man who called himself, “Ron Anderson”. He talked about his eleven-year-old daughter and his desire to have someone break her in. He sent two photos that were not deemed child pornography. I assumed this was fantasy chat, however, in case anything arose later, I saved the emails to prove I had no desire to participate.

Another ad was titled “Something Taboo”, because New Orleans is rich in voodoo and such. As I said, I was new to the area and interested in the history and culture of the city. A man contacted me on “Taboo” with the user name “Endavin” and wanted to meet in person. At first I refused, but on his fourth or fifth letter he told me he didn’t want to keep riding around drinking. I was six years sober and attending Alcoholics Anonymous (A.A.), so I was concerned that his drinking may be rooted in what he had to share. The program of A.A. tells us to reach out to others who still suffer, so I finally agreed to meet in person.

Although wary, I allowed him to my apartment. He said he was twenty-eight years old and told me about his father forcing him and his sister to begin having sex when they were ages seven and five. He also said his father forced them to have sex with him too. I told him I am in A.A., but that I was sure there was a 12-Step program for people who have suffered that kind of abuse.

A few weeks later he contacted me again and asked to speak. Not as distrustful now, I allowed him over. Why he chose to open up to me I can’t say, but he told a

disturbing story about his friend who had a five-year-old daughter and that he, the friend and the girl's eleven-year-old brother were all sexually molesting her. He also told me how he enjoyed listening to her scream while abusing her. I told him I wasn't into anything like that and he left and never wrote again.

A few weeks later a man named "Seattle-38 Hot Top Boy" contacted me. He made it pretty clear that he was into child exploitation and that he enjoyed hurting children. I tried to get more information from him and told him "I met a guy that said he was doing a five-year-old girl." "Seattle" responded by saying, "Is his name "Endavin?" I deduced that these two men knew each other and that this may be "Endavin's" abusive father. If they lived where they claimed to, these two people lived over sixty miles apart, so it wasn't happenstance that he would know about the little girl or "Endavin". When I tried to get more information, he made an ominous remark and I broke contact. He tried to re-establish communication, but I refused to respond.

Realizing there was a grave probability this was no hoax, I made a conscious decision to contact the police. Like everyone, you are asking why I didn't call police right then. I wanted to make sure I had enough reliable information before I did and to ensure the safety of my family. As I said, "Endavin" knew where I lived and could inform "Seattle". I didn't want to put my fiancée or, this child in added danger

The next day I began searching for a house away from the city. My search covered areas which I considered desirable and within driving distance from my job and my fiancée. I made a decision and on April 6, 2012, my fiancée and I drove to Picayune, Mississippi and began closing on a home. Because April 6, 2012 was Good

Friday, I spent Easter weekend at my fiancée's house, who lived fifty-miles north of New Orleans, Louisiana, using her computer to send emails concerning this business.

This investigation began on March 8, 2012 and I was arrested on April 9, 2012 by FBI Special Agent Jamie Hall and Kenner, Louisiana Police Detective Jessica Cantrell. (now Zuppardo) It was during the period of searching for a safe haven that I was contacted by FBI Special Agent Jamie Hall.

Detective Zuppardo testified at trial that a complaint came in about my ad on Craigslist. She said this complaint was not taken by her, but was relayed to her by someone else.<sup>21</sup> During preliminary examination and trial Agent Hall said this investigation began when Detective Zuppardo received a complaint about my ad.

<sup>22 23</sup> I am enclosing as exhibit all the police reports and the affidavit for the search warrant to show that this complaint was fabricated as a contingency against any constitutional violation which might arise. The reports, written on several dates, say nothing about a complaint, only that Zuppardo saw my ad and called Hall, who began an undercover investigation.<sup>24</sup>

On June 8, 2012, Jefferson Parish Sheriff's Detective Jason Rivarde re-booked me on four counts of possession of child pornography. There are two contradicting reports by Rivarde and neither mention this complaint to Zuppardo. On June 13, 2012, five days after charging me with possession of child pornography, Rivarde came to the jail to question me about emails found on my computer. One of these emails

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<sup>21</sup> Exhibit 21: Zuppardo Testimony concerning Complaint. Pg.178 -180 .....*See Volume Four.*

<sup>22</sup> Exhibit 22: Hall Preliminary Testimony Excerpt. Page 5 .....*See Volume Four.*

<sup>23</sup> Exhibit 23: Hall Trial Testimony Excerpt. Page 163.....*See Volume Four.*

<sup>24</sup> Exhibit 24: Police Reports & Search Warrant (Nine total) .....*See Volume Four.*

was found in the “Ron Anderson” file and was specifically associated with the man, “Endavin” and the five-year old girl.

Rivarde came to question me without securing my request for counsel, although Mr. Vedros knew about this illegal interrogation and the nature of the reason for the detective’s visit.<sup>25</sup> <sup>26</sup> Rivarde was an arresting officer and counsel did not subpoena him and protect my Fifth Amendment right to confrontation. He knew Rivarde had emails to support my story about the man abusing the five-year-old girl and these emails held correspondence proving I never shared photos with “Ron Anderson”, and that I never had nor never intended to exploit a child in any way.

Hall and Zuppardo testified I gave an unrecorded statement in which I admitted to sharing child pornography with others, and that I admitted I was going to the location to have sex with a twelve-year-old girl. Hall also testified that I admitted to sending a photo of my own niece getting out of the shower and that he had the name of this niece. I enclose the Report from D. Wesley Attaway<sup>27</sup> as evidence I was never sharing child pornography prior to the government intrusion and an affidavit from my sister, Karen Dixon,<sup>28</sup> to prove Hall’s testimony concerning my niece was also untruthful.

Agent Hall testified that he intentionally sent a file during our correspondence containing actual child pornography. At the preliminary hearing he was asked if the file contained pornography. He evaded the question and merely said the file wouldn’t

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<sup>25</sup> Exhibit 25: Rivarde’s Visit..... Pg.458.

*See Volume Four*

<sup>26</sup> Exhibit 26: Detective Rivarde’s Visit, Transcripts.....Pg. 465.

*See Volume Four.*

<sup>27</sup> Exhibit 27: Computer Expert D. Wesley Attaway Report.

*See Volume Four.*

<sup>28</sup> Exhibit 28: Affidavit from Sibling

*See Volume Four.*

open.<sup>29</sup> Then at trial, Assistant D.A. James Meyers illuminates the fact Agent Hall sent child pornography,<sup>30</sup> not nudes<sup>31</sup> through interstate commerce and that he sent it first. Hall said the file would not open but, to know the contents of a file, agent Hall would have to open it, either to view it or to load the illicit material for mailing. Furthermore, why would you put anything in a file if it has no function? It is no different than sending a fake bomb. Hall intended to send child pornography and under *18 USC §2252*, it is a federal violation to send child pornography by any means, including by computer. (Please note this file was sent on April 5, 2012).

Agent Hall said he had an arrest warrant based on a photo sent to him on April 5, 2012.<sup>32</sup> The record is void of any warrant for my arrest. However, the expert's report proves that a photo was sent on April 7, 2012, not April 5, 2012. The FBI was at my apartment on April 6, 2012,<sup>33</sup> the same day I was in Picayune, Mississippi closing on a home. There was no arrest warrant, because no crime had been committed, unless you count the child pornography Agent Hall sent me first.

FBI Special Agent Lawrence Robinson's testified he didn't do a real forensic examination of the hard drive, so he wasn't in a position to say whether the photos were deleted manually or by the computer itself. And, he couldn't say if the user knew if they were still on the computer or not. Agent Robinson testified that one image was in the recycle bin.<sup>34</sup> The computer expert, D. Wesley Attaway, stated in his report one

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<sup>29</sup> Exhibit 29: Preliminary Testimony concerning Fake File. Transcript Page.8 *See Volume Four.*

<sup>30</sup> Exhibit 30: Hall Admits Fake File is Child Pornography Transcript ..... Page 329 *See Volume Four.*

<sup>31</sup> Exhibit 31: D.A. Illuminates Fake File; Lines 3&4 Transcripts.....Page 385 *See Volume Four.*

<sup>32</sup> Exhibit 32: Hall Said Arrest Warrant Issued..... Transcript ..... Page 335 *See Volume Four.*

<sup>33</sup> Exhibit 33: FBI Surveillance Photos April 6, 2012. Transcript.....Page 288 *See Volume Four.*

<sup>34</sup> Exhibit 34: One Image in Recycle Bin Transcript..... Page 288 *See Volume Four.*

photo was in the recycle bin and that it was the same photo that had been mailed on April 7, 2012.

Defense counsel, George Vedros, told the jury in opening statements they would hear from an expert who would testify that these photos could still be on the computer and the user not know it.<sup>35</sup>

The U.S. District Judge, Jane Triche Milazzo, in adopting the Report and Recommendation said in doing so; the Court specifically addresses Petitioner's objection regarding his counsel's failure to subpoena an available expert witness at his trial. The Court notes that the expert report at issue agreed that the prosecution's report was "very accurate."

The computer expert, D. Wesley Attaway, found the prosecution's report very accurate and the prosecution's report showed only one photo was sent. Exculpatory evidence was available and counsel had a duty to examine the police and prosecution reports and conduct an independent investigation into the State's evidence.

*York v. Ducart*, 736 Fed. Appx. 628; 2018 U.S. App. LEXIS 14571, (U. S. 9th Cir., June 1, 2018) {736 Fed. Appx. 630} Trial counsel's failure to review the evidence obtained by law enforcement, turned over to him by the prosecution, and later located in his *own* case file, was deficient performance. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Counsel's investigation "should always include efforts to secure information in the possession of the prosecution and law enforcement authorities." *Rompilla v. Beard*, 545 U.S. 374, 387, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) (quoting 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.)).5 Inherent in "secur[ing]" that evidence is the obligation to review it—that is, to "make some effort to *learn* the information in the possession of [those] authorities." *Id.* at 387 n.6 (emphasis added).

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<sup>35</sup> Exhibit 35: Opening Statements..... Page 17

*See Volume Four.*

On the day of trial, the state charged me with three counts of distribution of child pornography by amending counts 2, 3, and 4 on the bill of information from possession of child pornography to distribution of child pornography and also amended the dates on counts 2, 3, and 4 from April 9, 2012 to April 5, 2012.<sup>36</sup>

FBI Agent Hall admitted he sent a file containing actual child pornography on April 5, 2012. The surveillance photos show that he and other FBI agents came to my apartment on April 6, 2012. If counsel had conducted an independent investigation into the prosecution's file he would have found that only one photo was ever sent from my computer and that this photo was sent on April 7, 2012, after the April 6, 2012 visit by FBI and not on April 5, 2012 as the state claimed.

If counsel had conducted a reasonable investigation, he would have learned the FBI, along with Europol, was involved in an investigation code named "Koala". *United States v Campbell*, 738 F. Supp. 2d 960, 964, (8<sup>th</sup> Cir. August 26, 2010). And, around this same era, there was an investigation by the Leon County, Florida Sheriff's Office called, "Travelling Man", in which Leon County, Florida Sheriff's Detective Melinda McBride posed as a thirteen-year old girl, "coincidentally" named, "Melissa Anderson." *U.S. V Duke*; 2013 U.S. Dist. LEXIS 11752. The coincidence of these people indiscriminately contacting Petitioner is suspect.

When counsel is tolerable to the manipulation of evidence in such a way that renders the state court record insufficient, ineffective attorneys will always prevail while indigent defendants convicted in state courts are denied the right to federal

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<sup>36</sup> Exhibit 36: Amended Bill of Information.

*See Volume Four.*

review of claims concerning ineffective assistance of counsel and other constitutional violations. The State of Louisiana denied my claims as speculative and conclusory but, I was never afforded an evidentiary hearing to develop the record.

The adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. (28 § 2254 (d)). The state court ruled on the merits of the claim and rendered their decision based on an insufficient state court record.

When the state answered my claims in state and federal court, they referred to evidence mentioned in testimony by the state as rebuttal to the defense's assertions presented during *voir dire*. The state said this information was seized property and available to the defense in open file discovery concerning 184 photos. However, this unsubstantiated testimony during *voir dire* was never quoted in the answer and I was not provided with *voir dire* when I was allowed to borrow during direct appellate review. A party seeking to introduce evidence over an objection bears the burden of showing that it is relevant. Contrary to the State's answer, the erotica photos were published to the jury<sup>37</sup> and over objection,<sup>38</sup> without going through the balancing test of La. C. Cr. P. art. 403 or Federal Rule 403 concerning relevancy of evidence. If counsel had investigated the police and prosecutors report he would have known the state intended to use this inadmissible and prejudicial evidence. There was no hearing to put me on notice concerning the use of this evidence.

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<sup>37</sup> Exhibit 37: Erotica Published to Jury.....Transcript Page 249

<sup>38</sup> Exhibit 38: Objection to Erotica Photos.....Transcript Page 255

*See Volume Four.*

*See Volume Four..*

The state said I failed to offer any affidavit from my computer expert to warrant an evidentiary hearing. The computer expert, hired by the indigent defender board, submitted a report to counsel and in this report the expert said he found the prosecution's report very accurate. Either counsel disobeyed the rules of discovery or, the state has retracted this from the state court record. The Magistrate conceded in his Report and Recommendation that discovery had been satisfied, however, I obtained a copy of this expert's report just prior to filing my federal habeas petition.

Under requirements of Rules Governing Section 2254 Cases in United States District Courts 1,5,11 Federal Rule of Civil Procedure 5(a), 10(c), 81(a) (2). The State is required to serve its answer, including Exhibits, on the Petitioner. The state of Louisiana failed to follow the rule(s) and I did seek an index of all exhibits and transcripts used as rebuttal by the state in their answer, however, the U. S. Eastern District Court of Louisiana denied my request.<sup>39</sup>

This Honorable Court ruled in *Cullen v. Pinholster*, 563 U.S. 170, 200, 131 S. Ct. 1388, 1409-10, 179 L. Ed. 2d 557 (2011), Review of state prisoner's federal habeas corpus claim under 28 U.S.C.S. 2254(d)(1) held to be limited to record that had been before state court that adjudicated claim on merits.

I was not provided an index of contents of the relevant transcripts as required under Rule 5 Governing Section 2254 Cases and the state's use part of the record while withholding it from me tipped the Scales in the state's favor by not allowing me to rebut the allegations. This denied me the right to a full and fair judicial review.

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<sup>39</sup> See Volume Three; Exhibits 13 & 14.

I submitted a motion to replace counsel due to Mr. Vedros' indifference to my requests for an investigator and computer expert.<sup>40</sup> Lampooning the role of advocate, Mr. Vedros informed the court that a computer expert had been retained. The motion to replace counsel was denied and Vedros was basically given unrestrained apathy. After this hearing, I began writing the Louisiana Disciplinary Counsel<sup>41</sup> and the Indigent Defender's Board, documenting events.<sup>42</sup>

If the jury had heard testimony that only one photo had been sent, they would have discovered that the government witnesses had been untruthful. This testimony, contrary to the evidence, would have raised an actual and substantial doubt concerning all the State's evidence and testimony. Instead, counsel asked for a jury instruction of entrapment.

I was prejudiced by trial counsel's failure to review the material in the prosecution's report and, in turn, to introduce the evidence at trial. Had counsel subpoenaed the expert to testify and introduce this exculpatory evidence, it would have altered the entire evidentiary picture before the jury, resulting in "a reasonable probability that . . . at least one juror would have harbored a reasonable doubt. *Buck v. Davis*, 137 S. Ct. 759, 776, 197 L. Ed. 2d 1 (2017).

In *Taylor v. Vannoy*, 2018 U.S. LEXIS 4709 (U.S., Oct. 1, 2018), The U. S. District Court in the Eastern District of Louisiana, granted a Certificate of Appealability (COA) on a single issue - whether Taylor's constitutional right to

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<sup>40</sup> Exhibit 39: Hearing on Motion to Replace Counsel

*See Volume Four.*

<sup>41</sup> Exhibit 40: Letters to Disciplinary Counsel.

*See Volume Four.*

<sup>42</sup> Exhibit 41: Letters to Indigent Board Director.

*See Volume Four.*

compulsory process to call a witness was violated. I was deprived the same fundamental right, however, the U. S. District Court in the Eastern District of Louisiana denied a COA although I presented the same issue.

The record is barren as to the reasons for the denial of compulsory process. The cause is immaterial. It is the resulting failure to compel the expert, Mr. Attaway, to testify, which is unconstitutional. The right to compulsory process is "fundamental and essential to a fair trial," *Washington v Texas*, 388 U. S. 14 at 17, 87 S. Ct. 1920 at 1922; and it is a necessary correlative of due process of law: Louisiana law also guarantees this right to petitioner. La. Const. Art. 1, 9; C. of Crim. P., Art. 731.

The State published 184 images they claimed were used as rebuttal from defense statements in *voir dire*. No transcript of this *voir dire* statement has been produced to confirm the allegation. These images were never put before the court to undergo the balancing test under both state and federal rules concerning other crimes evidence. Also, the Magistrate's Report and Recommendation stated counsel failed to make a timely contemporaneous objection, however, an objection was made. It is the State that failed to make a contemporaneous objection at the *voir dire*, precluding the use of this evidence as rebuttal to any defense statements.

Petitioner was denied a full, fair review in state and Federal court when the state court reached an unreasonable decision and denied Petitioner relief based on *voir dire* evidence which was not presented in the State court record of proceedings. The Magistrate ordered the State to answer Petitioner's §2254 petition and to include transcripts of all proceedings held in state court. Petitioner sought an index of the

documents to refute the state's claims, but was denied. The Magistrate said the State did not cite any portions of the state court record, other than the opinions and orders of the state trial court. The state never produced transcripts of the *voir dire* to substantiate the claim, but the record does contain a timely contemporaneous objection by counsel to the evidence.<sup>43</sup> The State rule and balancing test concerning other crimes evidence is not independent of Federal rule. If a criminal defendant is bound to review by a federal court based on the state court record, then the state is bound by the same rule of law in reaching its conclusion in granting or denying relief.

Petitioner asserts he has met both prongs of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), where the prosecution's report held material evidence of innocence and counsel's failure to examine the evidence, file a motion to suppress this evidence and subpoena the expert witness to testify to his findings was unreasonable and I was prejudiced by his deficient performance.

### CONCLUSION

Petitioner, Gary L. Workman, prays this Honorable Court will agree that the nexus of his conviction and the incomplete state court record for review are due to ineffective assistance of counsel and appellate counsel and that these issues are debatable among reasonable jurists. He further prays a that this Honorable Court will grant Writ of Certiorari and remand this to the district court for an evidentiary hearing to expand the record to allow Petitioner a full and fair judicial review.



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Gary L. Workman

<sup>43</sup> See Exhibit 38: Objection to Erotica Photos.....Transcript Page 255

*See Volume Four.*