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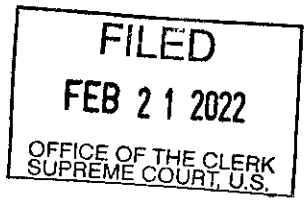


IN THE

SUPREME COURT OF THE UNITED STATES

Michael W. Kelly — PETITIONER
(Your Name)

vs.

State of Texas — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Texas Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Michael Wayne Kelly
(Your Name)

1391 FM 3328 (Beto)
(Address)

Tenn. Coloney, Tx. 75880
(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED

Did the Court of Appeals err when it held that the trial court didnot commit error in excluding evidence that deprived Petitioner of his Sixth Amendment right to confront witnesses and present his defense?

LIST OF PARTIES

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

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

RELATED CASES

State of Texas V. Michael Wayne Kelly, case no. 17-10-12451-CR,

9th judicial disrict court, Montgomery County, Texas

Michael Wayne Kelly V. State of Texas,COA. No.09-19-00197-CR,

9th Court of Appeals, Beaumont,Texas

Michael Wayne Kelly V. State of Texas, COA. No. PD-0616-21

Austin,Texas

INDEX TO APPENDICES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[ ] For cases from **federal courts:**

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

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[ ] is unpublished.

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

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[ ] is unpublished.

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

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

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[X] is unpublished.

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

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

JURISDICTION

[ ] For cases from **federal courts:**

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

[ ] No petition for rehearing was timely filed in my case.

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

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

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

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

The date on which the highest state court decided my case was July 14, 2021. A copy of that decision appears at Appendix A.

[X] A timely petition for rehearing was thereafter denied on the following date: Dec. 08, 2021, and a copy of the order denying rehearing appears at Appendix B.

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

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

TABLE OF AUTHORITIES CITED

UNITED STATES SUPREME COURT CASES

TEXAS COURT OF CRIMINAL APPEALS CASES

TEXAS COURT OF APPEALS CASES

TEXAS RULES OF APPELLATE PROCEDURE

U.S. SUPREME COURT RULES

TEXAS RULES OF EVIDENCE

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a sppedy 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 in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV: Section 1. All persons born or naturalized in the United States, and subject to the juridiction 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 proeess of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pen.§ 21.02 Continuous Sexual Abuse of Young Child or Children.

Tex.R.Evid. 412. Evidence of Previous Sexual Conduct in Criminal Cases: (a) In general. The following evidence is not admissible in a prosecution for sexual assault, or attempt to commit sexual assault or aggravated sexual assault:

(1) reputation or opinion evidence of a victim's past sexual behavior; or

(2) specific instances of a victim's past sexual behavior.

(b) Exceptions for Specific Instances. Evidence of specific instances of a victim's past sexual behavior is admissible if:

(1) the court admits the evidence in accordance with subdivisions

(c) and (d);

(2) the evidence:

(A) is necessary to rebut or explain scientific or medical evidence offered by the prosecuter;

(B) concerns past sexual behavior with the defendant and is offered by the defendant to prove consent;

(C) relates to the motive or bias;

(D) is admissible under Rule 609; or

(E) is constitutionally required to be admitted; and

(3) the probative value of the evidence outweighs the danger of unfair prejudice.

(c) Procedure for Offering Evidence. Before offering any evidence of the victim's past sexual behavior, the defendant must inform the court outside the jury's presence. The court MUST conduct an in camera hearing, recorded by a court reporter, and determine whether the proposed evidence is admissible. The defendant may not refer to any evidence ruled inadmissible without first requesting and gaining the court's approval outside the jury's presence.

(d) Record Sealed. The court must preseve the record of the in camera hearing, under seal, as part of the record.

TEXAS RULES OF APPELLATE PROCEDURE

Tex.R.App.P.44.2(a): Reversible Error in Criminal Cases.

(a) Constitutional error. If the appellate record in a criminal case reveals constitution error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punisment.

Tex.R.App.P.66.3(a): Reasons for Granting Review. While While neither controlling nor fully measuring the Court of Criminal Appeals' discretion, the following will be considered by the Court in deciding whether to grant discretionary review:

(a) whether a court of appeals' decision conflicts with another court of appeals' decision on the same issue;

(f) whether a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Court of Criminal Appeals' power of supervision.

Quote on page 14 and 15 of this Writ comes from Georgetown Law Journal volumeXI from May,1923. off theLeading Articlestitled Book Reviews and Legal Bibliography P.50-[From the book THE GREAT EXPERIMENT by the auther Thomas Dillon O'Brien, Former Associate Justice Supreme Court of Minnesota. New York, The Encyclopedia Press, 119 East 57th Street.]

STATEMENT OF THE CASE

On June 5, 2018 Michael Wayne Kelly, Petitioner, was charged by indictment with Continuous Sexaul Abuse of a Child, alleged to have been committed from on or about September 2, 2007 through April 2, 2015. (CR 31). Petitioner's case was set for trial and a jury trial commence on June 17, 2019 ((RR Vol. 2,p.1).

On June 20,2019, the jury found Petitioner guilty of Continuous Sexual Abuse of a Child as charged in the indictment.(RR Vol.5, 272:22-273:1). Following the jury,s verdict, a punishment hearing to the jury was held on June 21, 2019.(RR Vol.6,p,1,7:17-25). After the conclusion of the hearing, the jury assessed his punishment at 99 years in the Texas Department of Criminal Justice and no parole or fine.(RR Vol.6,55:2-9). The trial court certified that this wasmnot a plea bargain case and that the Petitioner had the right of appeal.(CR 136).

On June 21, 2019, a Motion for New Trial and Motion for Arrest of judgment was timely filed the same day.(CR 137). In addition, written notice of appeal was timely filed the same day(CR 139). On June 25,2019, the trial court signed an order denying the Petitioner's Motion for New Trial and Motion in Arrest of Judgment without a hearing.(CR 142).

Petitioner's Appeal brief was Timely filed to the 9th Court of Apeals in Beaumont, Tx on FEbruary 26, 2020. The 9th Court of Appeals Affirmed the judgmnet on July 14, 2021. Petitionsfor discretionary Review(P.D.R.) was timely file on September 15,2021. On October 20, 2021, Petitioner's P.D.R. was Refused. A timely Motion for Rehearing was filed on November 12, 2021. On December

08, 2021, the Court of Criminal Appeals denied Petitioner's Motion.

REASONS FOR GRANTING THE PETITION

Pursuant to the United States Supreme Courts "Rule 10 (b)": A state court of last resort 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.

ARGUMENT

Review is proper because the Court of Appeals' decision conflicts with another Texas court of appeals' decision on the same issue, Tex.R.App. P.66.3(a).

Review is proper because the Court of Appeals' has so far departed from the accepted and usual course of judical proceedings, or so far santioned such a departure by the lower courts as to call for an exercise of the United States Supreme Courts power of supervision. United States Supreme Court Rule 10(b).

The United States Supreme Court should grant this Writ and reverse the Court of Appeals' decision affirming Petitioner's conviction, set aside the Petitioner's conviction and remand the case for a new trial on guilt/innocence.

The Court of Appeals listed five reasons that trial court did not commit reversible error when it limited trial counsel's areas of cross examination during Petitioner's trial. The Court of Appeals listed five reasons that trial court didnot undermine the Petitioner's defense by limiting it trial counsel cross examination to establish motive or bias on behalf of S.K. and K.K. Court of Appeals opinion p.5-9.

A. TESTIMONY FROM OTHER WITNESSES OTHER THAN S.K. AND K.K. DOES NOT CURE THE TRIAL COURTS LIMITATION OF TRIAL COUNSELS RIGHT TO CONFRONT AND CROSS EXAMINE WITNESSES.

The Court of Appeals cited several reasons that Petitioner's defense was not undermined by the trial court's limitation of trial counsel's cross-examination to show motive and bias of S.K. and K.K. to make false allegations against Petitioner.

Of the reasons stated by the Court of Appeals that do not involve testimony from S.K. or K.K., the first was that the trial court allowed trial counsel to call a neuropsychologist that testified as to why the incidence of false claims of abuse increase against the back drop of custody disputes. Court of Appeals opinion p.6. at p.6-7 the Court of Appeals also stated that the expert testified that "disfunctional famil[ies are] destructive and use destructive methodologies to achieve their evil intentions". The Court reasoned that this was evidence to support Petitioner's claim of bias.

The jury was presented with this information through an expert and while this gives the jury an idea of how the circumstances of a child's upbringing and the contexts of custody disputes can affect the frequency of false allegation, the jury did not get to hear relevant and important information from K.K. about her prior sexual conduct (RR Vol.5,142:1-144:2) and from S.K. regarding her knowledge about her mother's previous sexual assualt allegation (RR Vol.3;242:14-243:9) and the outcry of her other sister, kayla. (RR Vol,3,81:17-82:6).

the next reason given was that trial counsel was able to establish through the mother of S.K., Stormy Winter and the mother and

of K.K., Maggie Brown, that both S.K. and K.K. were raised with dysfuntion in their homes. Court of Appeals opinion p. 7-8. Again, this testimony supported a claim of dysfuntion in the home but does notygive the jury any information from S.K. and K.K. to evaulate their credibility and their knowledge of previous sexual behavior. Trial counsel tried to show that K.K. had previously made an outcry of sexual abuse that did not involve the Petitioner ((RR Vol.7 State exhibitr51,p.4)and that S.K. knew of previous sexual assault outcries by her mother and other sister,Kayla, (RR Vol.3,81:12-82:6). Even with the testimony from Stormy and Maggie the jury is still left in the dark because the testimony from S.K..and K.K. was not allowed by the trial court.

The next reason given by the Court of Appeals is that thertrial court didnot abuse its descretion in not allowing evidence to be admitted regarding K.K. and some children. Court of Appeals opinion p.9-10. The Court of Appeals cited to Lopez V. State, 185.W.3d220, 226(Tex.Crim.App.2000) to support its reasoning that the evidence was properly excluded because the sexualacts described by K.K. were not similar to the allegations she made against Petitioner. That case involved a sexual assault charged where it was alleged that Lopez compelled the complainin witness to perform oral sex on him. Id.at221. During the trial, Lopez's counsel attempted to impeach the complaining witness with an allegation that the complaining witness had reported that his mother had thrown him against a washing machine.Id. AT 222 the case was closed and no action was taken against the mother. The Court in Lopez found that the prior allegation didnot have any probative value because it had almost no similarity to the allegation of the charged offense made by the complaining witness.
]

Id. at226.

The previous outcry made by K.K. was of a sexual nature.(RR Vol. 5,81:1-85:!). She testified that Petitioner took her bottom clothes off.(RR Vol.5,83:11-18). Next she testified that Petitioner took his shorts off and put his private in hers.(RR Vol.5,84:3-85:1). In the report made by the school counselor, Araceli Rodriguez, the outcry by K.K. includes a claim that the other children took her clothes off and put a rod in her. (RR Vol.7,States Exhibit 51,p.4). These allegations made by K.K. are significantly similar to the allegations she made againstthe Petitioner and are certianly more similar tha the example used by the Court of Appeals.

The Court of Appeals also stated that even if these encounters are relevant to show motive or bias, the trial court did not abuse its discretion because the evidence would have been unduly prejudicial. Court of Appeals opinion,p.9. Under Tex.r.Evid. 412, specific examples of the victims past sexual behavior are admissible if the evidence relates to the victim's motive or bias and the probative value of the evidence outweighs the danger of unfair prejudice. Tex. R.Evid. 412(b)(2)-(3). The evidence must also be properly admitted under Rule 412 (b)(1) and was not. Probative value refers to the inherent probative force of an item of evidence-that is, how strongly it serves to make more or less probable the existence of a fact of consequence to the litigation-coupled with the proponet's need for that item of evidence. Casey V. State,215 S.W.3d870,879(Tex.Crim. App.2007). Unfair prejudice refers to the tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. Id.

The outcry from K.K. should have been admitted because it would

have given the jury information regarding K.K.'s actual knowledge and previous history of sexual behavior when she made the outcry to her counselor. While the outcry made by K.K. is not identical to the allegation made against the Petitioner it does contain some significant similarities. This is exactly the type of information the jury needs to know about.

This is relevant to trial counsel's defensive theory because it makes a fact of consequence more or less likely than it would be without the evidence. Specifically, by being able to present information related to K.K.'s past sexual behavior this would give her the knowledge with which to make a false allegation against Petitioner of sexual abuse. This knowledge came from her expirence with the children she lived with in that household, not from Petitioner. In addition, this information is similar to her allegation against Petitioner and was relevant to the defense strategy to show that this was a false allegation due to K.K.'s motive and bias against Petitioner because she wanted to remain with her mother. Without being able to present this information to the jury, Petitioner was deprived of putting forth a vital defense theory.

B. TESTIMONY FROM S.K. AND K.K. WAS CRITICAL TO DEFENSE THEORY

The above reasons cited by the Court of Appeals do not substitute to satisfy the Petitioner's right to confront and cross-examine his accusers. The Sixth Amendment to the Constitution guarantees the right of the accused in a criminal prosecution to be confronted with the witnesses against him. Davis V. Alaska,415 U.S. 308,315(1974). Cross-examination serves three general purposes: to identify the witness with the community so that independent testimony regarding the witness's reputation for veracity may be sought, to allow facts

to be brough out tending to discredit the witness by showing that his testimony was untrue or biased. Carroll V. State,916 S.W.2d 494, 497(Tex.Crim.App.1996). The Sixth Amendment right to cross-examine a witness allows a party to attack the general credibility of that witness "or to show their possible bias, self interest, or motives in testifying. Johnson V. State, 490 S.W.3d 895,909 Tex.Crim.App.2016).

The Court of Appeals in this case, while recognizing that the Petitioner has right to confront the witnesses against him, found that this right is not unqualified and that trial court's restrictions did not prevent Petitioner from defending himself, Court of Appeals opinion p.10-11. Trial judges retain wide latitude to impose reasonable limits on cross-examination based on concerns about harassment, prejudice, confusion of the issues, the witness's saftey, or interrogation. Delaware V. Ván Arsdall,475 U.S. 673,680(1986).

While there are limitations on the cross-examination, courts have found that limitations imposed by trial court can violate the defendant's right to confront the witness against him.

In Hammer V. State,896 S.W.3d 555,557(Tex.Crim.App.2009), the defendant was charged with indecency with a child.At 566, the defendant's defense theory in this case was that complaining witness, P.H., made up a tale of sexual molestation to get out from under the heavy hand of her father.AT 567, as a part of this theory, the defendant's counsel sought to admit that P.H. was partcularly angry with the defendant when he took her to the hospital for sexual assualt examination after she had run away from him and stayed out overnight. This evidence was excluded by the trial court. Id. The Court of Criminal Appeals found that this evidence was strong to support for the defendants theory that P.H. had a motive to falsely accuse him of

molestation. At 569 the court found that the trial court abused their discretion in preventing the defendant from cross examining P.H. about this information contained in her medical records from the trip to the hospital.

In Johnson V. State,490 S.W.3d 895,897(Tex.Crim.App.2016), the defendant was convicted of two counts of aggravated sexual assault of a child and sentenced to life in prison on each count. At 908 trial defense counsel sought to cross-examine the complaining witness, H.H. about the fact that he had been sexually molesting his younger sister for years and as a result had been placed bt his parents in counseling around the time that he accused the defendant of sexual abuse. Defense counsel was not allowed to go into this on cross-examination. At911-12 the Court of Criminal Appeals found that this testimony was relevant to the issue of whether H.H. had a motive to falsely accuse the defendant of sexual assault to deflect negative attention away from him and gain sympathy from his parents. At 913 the court found that this evidence was admissible under Rule 412, and was constitutionally required to be admitted under the Confrontation Clause, and the probative value outweighed the danger of unfair prejudice.

In Hill V. State[No. 02-16-00106-CR, slip op. at 1 (Tex.App.-Fort Worth May 11,2017, petref'd)(mem. op., not designation for publication), available @ http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=6f1f7931-f72b-4c41-aed3-26732ea655a6&coa=coa02&DT=Opinion&MediaID=160c074d-929c-4605-ad9c-83a976d7cbf0), the defendant was convicted of one count of continuous sexual abuse and two counts of indecency with a child by contact. At 11 on appeal, the defendant argued that the trial court abused its discretion in excluding evidence

under Rule 412 regarding previous sexual conduct of two complaining witnesses. At 13 the defendant argued that the exclusion of these details prohibited the jury from determining if the girls made the false allegations of sexual misconduct. At 19-20 the Court of Criminal Appeals found that the evidence should have been admitted to give the jury all of the relevant evidence pertaining to the issue of whether the girls had a motive to fabricate the sexual assault allegations against the defendant. At 23 the Court of CriminalAppeals also found that this exclusion of evidence harmed the defendant.

In Fox V. State,115 S.W.3d 550,555(Tex.App.[14th Dist.]2002, pet.ref'd). the defendant was charged with aggravated sexual assault of his nine-year old stepdaughter. At the time of the outcry, the defendant had two children together with Joyce Fox, A.F. and J.F.. MS, Fox also had two daughters, E.A. and N.R. from previous relationships with two different men. N.R. was the complaining witness in this case. The defendanton several occasions during the trial tried to introduce evidence of sexual abuse allegations made by two other children, E.A. and A.F were false and were made at the instigation of Ms. Fox who allegedly wanted to ensure that she would get custody of A.F. and J.F. in her divorce from defendant. ID. at558. The trial court found that these sexual abuse allegations were inadmissible. At 562 on appeal, the Court of Criminal appeals found that this evidence was relevant and the probative value was not substantially outweighed by prejudice.

As in the cases above, the trial court in this caseerred in limiting trial counsel's presentation of his defensive theorythat S.K. and K.K.'hadamotive and bias to make false allegations against him to ensure that K.K.'s mother would have custody of her. The Court of Appeals erred in affirming the decision of the trial court due to

its finding that Petitioner may not cross-examine in every way he may choose and its concern about unqualified right to cross examination. The areas of cross examination and the evidence trial counsel sought to admit do not raise the concerns found in Van Arsdall.

At the end of the State's opening statement trial counsel made the trial court aware of its defensive theory.(RR Vol.3,6:24-7:8). During this case, trial counsel was not allowed to cross examine Stormy Winter, S.K.'s mother, in front of the jury that S.K. was aware that Stormy and another sister of S.K., Kayla, had previously been sexually assaulted.(RR Vol.3,81:12-82:6). Had this testimony been known to the jury, the jury would have seen that S.K. was lying when she denied knowing this when S.K. testified later in the trial that she was not aware of Stormy's previous sexual assault.(RR Vol.3, 242:14-243:9).

Trial counsel was not allowed to cross-examine S.K. about the allegations from the Moreno household which were similar to the abuse that K.K. told Petitioner.(RR Vol.3,250:3-24). Trial counsel was also not allowed to question S.K. regarding whether she had ever been involved in a CPS investigation.(RR Vol.3,252:11-12). The trial court also did not allow counsel to cross examine K.K. about the CPS investigation and previous outcry she had made.(RR Vol.5,142:11-24).

Trial counsel specifically and consistently argued for the admittance of this information in order to advance the defense theory that S.K. and K.K had a motive and bias to falsely accuse the Petitioner in order to favor the custody of K.K.'s mother. Trial counsel should have been allowed to cross-examine the witnesses in these areas. The Court of Criminal Appeals has held that "it is not within a trial court'sdiscretion to prohibit a defendant from engaging in 'otherwise

appropriate cross-examination designed to show a prototypical form of bias on the part of the witness!'" Johnson V. State,433 S.W.3d546,551 (Tex.Crim.App.2014)(quoting Hurd V. State,725S.W.2d249,252(Tex.Crim. App.1987). Nor, indeed, may a trial court prevent a defendant from "pursu[ing] his line of cross examination" when it can be said that "a reasonable jury might have received a significantly different impression of [the witness]'s credibility had... counsel been permitted" to do so Johnson,433 S.W.3d at 551(quoting Delaware V. Van Arsdall,475 U.S. 673,680(1986).

The concerns of the Court of Appeals that trial counsel cannot conduct unqualified cross examination are not present in this case. Trial counsel did not seek to persue limitless cross-examination on each witness in this case. Court of Appeals opinion p.11 note 20 citing to Van Arsdall regarding limitations of the trial court on cross-examination without violating the Confrontation Clause. Trial counsel was specific with the trial court as to the defensive theory he was trying to advance at trial. It was clear the motive and bias of S.K. and K.K. to falsely accuse Petitioner as it related to the custody dispute was the basis for seeking to cross-examine the witnesses in the areas listed above. In the trial court's rulingsto exclude evidence, the reasoning is based on the the trial court's belief that the evidence was not relevant and did not satisfy Rule 403.(RR Vol.2,277:22-278:1; RR Vol.3,84:24-85:3;RR Vol.250:24-251:4;RR Vol.5,142:1-144:2;RR Vol.5, 218:21-22). Any concerns regarding the possibility of confusion of the issues or unfair prejudice did not justify the exclusion of the evidence.

Although Rule 403 gives a trial judge discretion to exclude evidence that is more prejudicial than probative, in sexual assault

"He said She said" cases such as this one, where the credibility of both the complainant and the defendant is the central, dispositive issue, 403 should be used very sparingly. Johnson V. State,490 S.W.3d 895,911(Tex.Crim.App.2016). To be considered "relevant", the proffered evidence need not definitively prove the bias alleged -it need only "make the existence" of bias "more probable or less probable than it would be without the evidence". Johnson,433 S.W.3d552. In this case, the arguments made by trial counsel were relevant in that they made the existence of motive and bias more probable. Trial counsel had already established through the neuropsychologist that false allegation of sexual abuse are much more frequent in the context of a custody battle and that this is even more so when the child is raised in a dysfunctional household.

Trial counsel also established through the testimony of Stormy Winter and Maggie Brown that S.K. and K.K. grew up in dysfunctional homes. By limiting trial counsel's cross examination of S.K. and K.K. regarding his defensive theory the jury did not have all the evidence needed to make an informed judgment in this case. The jury's evaluation of the credibility of S.K. and K.K. was critical in this case. The trial court's limitation of trial counsel's cross-examination improperly prevented trial counsel from presenting his defense in violation of the Confrontation Clause and Rule 412. [J]urors [are] entitled to have the benefit of the defense theory before them so that they [can] make an informed judgment as to the weight to place on [the witness'] testimony. Johnson,490 S.W.3d at 909.

C. HARM ANALYSIS

The Court of Appeals erred in finding that the trial court did not abuse its discretion in limiting trial counsel's cross examination.

Because the Court of Appeals erred in this decision it also erred in not performing a harm analysis. An analysis of whether the trial court's error harmed the Petitioner requires this court to reverse the Court of Appeals' decision and remand this case to the trial court for a new trial on guilt/innocence.

For Constitutional error that is subject to harmless error review, a court of appeals must reverse a judgment of conviction unless the court determines beyond a reasonable doubt that the constitutional error did not contribute to the conviction. Tex.R. App.p.44.2(a). This review includes thre steps. First, it is assumed that the damaging potential of the denied cross-examination was fully realized. Shelby V. State,819 S.W.2d544,550 (Tex.Crim.App. 1991). Second and with that assumption in mind, the error is analyzed in light of several factors:(1) the importance of the witness's testimony to the State's case,(2) whether evidence of the testimony would have been cumulative,(3) the presence or absence of the evidence corroborating or contradicting the testimony on material points,(4) the extent of cross-examination that was otherwise permitted, and (5) the overall strength of the State's case.Id. at 550-51. Third, it is then determined whether the error was harmless beyond a reasonable doubt based on the results of the first two steps.Id. at 551.

In this case the testimony of S.K. and K.K were very important to the State's case. <u>There was no physical evidence and the alleged incidents occurred between 2007 and 2015.</u>(CR 31). Therefore, the defense theory in this case rested on trial counsel's ability to be able to cross-examine S.K. and K.K. on past sexual behavior to show motive and bias to make a false allegation towards Petitioner due to the custody dispute. This testimony was important because it

would have given the jury the opportunity to fully evaluate the credibility of the witnesses when confronted with motive and bias on cross-examination. This testimony would not have been cumulative because the other trial witnesses did not have the knowledge that only S.K. and K.K. had. As trial counsel stated at the beginning of trial, the inability to present this evidence would leave a big hole in their defense.(RR Vol.3,7:5).

Further, the testimony that was presented by the neuropsychologist combined with the testimony from the school counselor and the testimony from Stormy Winter would have supported the defense theory that S.K. had prior knowledge of Stormy's past sexual assault allegation and that S.K. did not testify truthfully when she answered trial counsel's questions during trial. In addition, had the testimony of the school counselor and CPS report been before the jury, the jury would have known that K.K. had past sexual coduct that was at one instance similar to the allegations made against Petitioner. lastly, the overall strength of the State's case rested on the credibility of S.K. and K.K..

Because the trial court improperly limited trial counsel's ability to cross-examine S.K. and K.K and deprived the jury of the opportunity to fully evaluate their credibility in order to make an informed judgment it cannot be determined that the error in this case was harmless beyond a reasonable doubt.

Petitioner concludes with a quote from The Great Experiment from Thomas Dillon O'brien, former Associate Justice Supreme Court of Minnesota who proclaimed " If we approve a written Constitution and further deem it wise that its provisions should not be set aside

or ignored by legislature or by any man or body of men except the people themselves in their sovereign capacity as citizens, we must approve of and have a tribunal which has power to say when legislative or executive act or act of an inferior court is contrary to fundamental law.}

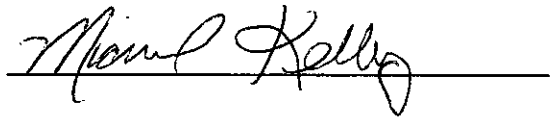
The provisions of the Constitution are law. A statue passed by a legislature is law. the Constitution is the higher law which the statue must conform. If the two conflict, there must be some tribunal with power to so declare".

Petitioner Humbly prays for a Oral Argument.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 2-28-2022