21-7869

No.: _____

ORIGINAL

Supreme Court, U.S.
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In The
Supreme Court of the United States
_____ Term, _____

Timothy Thibodeaux v. Tim Hooper, Warden

On Petition for a Writ of Certiorari to

U. S. FIFTH CIRCUIT COURT OF APPEALS

Timothy Thibodeaux #589014
MPEY/Cypress-3
Louisiana State Penitentiary
Angola, Louisiana 70712-9818

April 26, 2022

QUESTION PRESENTED

1: **Reasonable jurists would determined that Mr. Thibodeaux's conviction was obtained in violation of the Sixth and Fourteenth Amendments to the United States Constitution with the denial of his right to confront his accuser.**

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.

District Attorney's Office
17th Judicial District Court
P.O. Box 431
Thibodaux, LA 70302-0431

Attorney General's Office
P.O. Box 94005
Baton Rouge, LA 70805

Tim Hooper, Warden
Louisiana State Penitentiary
General Delivery
Angola, LA 70712

RELATED PROCEEDINGS

Mr. Thibodeaux was charged by Bill of Information with one Count of Aggravated Rape, in violation of LSA-R.S. 14:42,[1] and one Count of Aggravated Incest, a violation of LSA-R.S. 14:781. The Bill of Information alleged that both offense occurred in the Parish of Lafourche on an unspecified date.

Mr. Thibodeaux entered a plea of not guilty on September 24, 2009, and waived trial by jury on January 20, 2011. At the conclusion of trial, Mr. Thibodeaux was found guilty as charged on both Counts.

On September 12, 2011, Mr. Thibodeaux was sentenced as follows: Count 1, life imprisonment at hard labor without the benefit of Probation, Parole, or Suspension of Sentence; and Count 2, fifty (50) years at hard labor without the benefit of Probation, Parole, or Suspension of Sentence. The sentences were ordered to be served concurrently to each other.

Mr. Thibodeaux's conviction and sentence were finalized by the Louisiana Supreme Court on May 17, 2013 in Docket No.: 2012-KA-2617.

Mr. Thibodeaux then timely filed his Application for Post-Conviction Relief with Memorandum in Support on December 13, 2013, which was denied by the district court on October 22, 2015. Mr. Thibodeaux then sought Writs with the Louisiana First Circuit Court of Appeal, which was Granted on February 26, 2016, and remanded to the district court. The State then sought Writs to the Louisiana Supreme Court, which was Granted by the Supreme Court on October 27, 2017, overturning the Court of Appeal's decision.

On August 10, 2018, the Eastern District Court of Louisiana recommended that Mr. Thibodeaux's petition be stayed and the case closed for all administrative and statistical purposes, pending exhaustion of Mr. Thibodeaux's unexhausted Confrontation Clause Claim. The Court further recommended that Mr. Thibodeaux be required to move to reopen this matter within sixty (60) days finality of all State

[1]LSA-R.S. 14:42 is now entitled as First Degree Rape.

Post-Conviction review through the Louisiana Supreme Court related to the unexhausted claim "Right to Face Accuser.

On June 24, 2019, the state district court Granted Mr. Thibodeaux's Application for Post-Conviction Relief (Stand Alone Confrontation Clause Claim), ordering a new trial, reversing Mr. Thibodeaux's conviction and sentence.

On July 24, 2019, the State filed for Writs to the Louisiana First Circuit Court of Appeal. On September 17, 2019, the Court of Appeal Granted the State's Writ and overturned the district court's decision. On July 24, 2020, the Louisiana Supreme Court affirmed the Court of Appeal's ruling.

After the Louisiana Supreme Court denied relief in this matter, Mr. Thibodeaux forwarded his stand-alone confrontation claim to the U.S. Eastern District, which denied relief on September 27, 2021. On October 8, 2021, Mr. Thibodeaux filed his Notice of Appeal with the federal district court.

On November 17, 2021, Mr. Thibodeaux filed his Certificate of Appealability to the U.S. Fifth Circuit Court of Appeal, which was denied on February 28, 2022 in Docket Number 21-30641. At this time, Mr. Thibodaux is timely filing for Writs of Certiorari to this Honorable Court, and respectfully requests that this Honorable Court exercise its Supervisory Authority of Jurisdiction over the lower courts for the following reasons to wit:

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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

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

The opinion of the United States Court of Appeals 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 (but cited at 2022 WL 1101753)

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

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished (but cited at 2021 WL 4398982)

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

The opinion of the highest state court to review the merits appears at Appendix __ to the petition and is the Louisiana Supreme Court in Docket Number _____.

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

The opinion of the _____ 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 February 28, 2022.

[X] 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).

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

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

[ ] 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).

IN THE
SUPREME COURT OF THE UNITED STATES
_____ TERM, _____

No.: _____

TIMOTHY THIBODEAUX V. TIM HOOPER, Warden

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

Pro Se Petitioner, Timothy Thibodeaux respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the U.S. Fifth Circuit Court of Appeal, entered in the above entitle proceeding on February 28, 2022.

NOTICE OF PRO-SE FILING

Mr. Thibodeaux 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. Thibodeaux is a layman of the law and untrained in the ways of filings and proceedings of formal pleadings in this Court. Therefore, he should not be held to the same stringent standards as those of a trained attorney.

OPINIONS BELOW

The opinion(s) of the Louisiana First Circuit Court of Appeal was denied on October 31, 2016, and the Louisiana Supreme Court was denied on February 23, 2018. These pleadings were filed as collateral review, Supervisory Writ, and Supreme Court Supervisory Writs.

Mr. Thibodeaux's federal petition to the U.S. Eastern District of Louisiana was denied on November 4, 2019. Mr. Thibodeaux's Certificate of Appealability in the U.S. Fifth Circuit Court of Appeal was denied on February 28, 2022.

JURISDICTION

The U.S. Fifth Circuit Court of Appeal denied Mr. Thibodeaux's Request for COA on February 28, 2022. On March 19, 2020, this Court issued an order automatically extending the time to file any petition for a Writ of Certiorari to 150 days from the date of the lower court judgment, order denying

discretionary review, or order denying a timely petition for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. Amend. VI.

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "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." U.S. Const. Amend XIV, § 1.

La.C.Cr.P. Art. 930.3 provides in pertinent part: "If the Petitioner is in custody after sentence for conviction of an offense, relief shall be granted only on the following grounds: (1) The conviction was obtained in violation Constitution of the United States or the State of Louisiana."

STATEMENT OF THE FACTS

On the night of October 2, 2007, during the time of Mr. Thibodeaux's marriage to Sabrina Thibodeaux, Deputy Troy Erwin (Lafourche Parish Sheriff's Office) was dispatched at 22:12 to Mr. Thibodeaux's residence for a complaint about a possible molestation of a juvenile that came from Mrs. Thibodeaux, "who was told" by her juvenile child about the alleged sexual abuse by her father. Upon Deputy Erwin's arrival, he spoke with Mrs. Thibodeaux, who informed him of the allegations of "What CT stated to her," and that she had also confronted Mr. Thibodeaux with CT being present about what she had said. Mr. Thibodeaux denied the allegation and tried to get CT to tell the truth, but she stated that she didn't want to say it because she didn't want to get into trouble.

In 2007, charges against Mr. Thibodeaux were dropped due to lack of evidence and inconsistencies

in the statements. On October 5, 2007, Mr. Thibodeaux was a "Voice Stress Analysis Test"[2] by a Sheriff's Deputy. Mr. Thibodeaux "*clearly passed*" and **was then released the same day with no charges filed against him**. The State then used the *same evidence* from the 2007 incident to support its case against Mr. Thibodeaux.

On August 18, 2009, Mr. Thibodeaux was arrested in regards to the same allegations from 2007: One Count of Aggravated Rape, and Two Counts of Aggravated Incest. Prior to trial, the State dismissed on of the Counts of Aggravated Incest without cause. The statements from the victims were never authenticated as being competent and under oath.

On June 20, 2011, Mr. Thibodeaux was tried by Bench Trial. The victims and witnesses *were never called, nor were they made available to testify*. The State and defense never subpoenaed the victims and witnesses in order for Mr. Thibodeaux to exercise his right to confront and cross-examine the witnesses in his own behalf.

However, Mr. Thibodeaux is raising Claims of constitutional errors, and will be demonstrating in this matter how his rights were violated by the Court, the State, and even his defense counsel. Simply put, counsel's performance was ineffective. In viewing this *unjust conviction* from an independent point of view, Mr. Thibodeaux's convictions were founded upon constitutional errors; errors that infringed upon one of his most basic rights, *the right to Due Process*.

The United States Constitution protects individuals from such infringements. *In re: Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368, where the United States Supreme Court explicitly held that the Due Process Clause protects the accused against convictions except upon proof beyond a reasonable doubt of every essential element to constitute the crime with which he is charged.

Mr. Thibodeaux requests this Honorable Court to review the errors of constitutional violations that infringed upon Mr. Thibodeaux's rights, including ineffective assistance of counsel. Mr. Capasso

[2]After signing two consent forms.

represented Mr. Thibodeaux during pre-trial and trial, and it is shown that a fundamental miscarriage of justice has occurred and will go uncorrected if this Court does not correct these errors.

REASONS FOR GRANTING THE WRIT

In accordance with this Court's *Rule X, § (b) and (c)*, Mr. Thibodeaux 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.

LEGAL ARGUMENT

The United States Supreme Court decided in *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), that the defendant's right to confront and cross-examine witnesses, found in the Sixth Amendment to the United States Constitution, is a fundamental right and applicable to the states through the Fourteenth Amendment. In addition, the very same right to confrontation is found in the Louisiana Constitution, section 16 of Article I.

In order to cross-examine a witness effectively, a defendant must be afforded the opportunity to demonstrate any bias or self-interest which is attached to a witness' testimony. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 337 (1974); *State v. Senegal*, 316 So.2d 124 (La.1975).

Encompassed in the right of Confrontation is the right of the accused to impeach a witness for bias or interest. The right to expose a witness motivation in testifying is a both proper and important function of the Constitutionally protected right of cross-examination.

Failure to enter the appropriate objections into the trial court's record constitutes obvious ineffective assistance and the prejudice is inherent in that counsel allowed this information to be used to convicted his client. This evidence should have never gone before the jury without first securing his client's right to confrontation and that could only be done after a complete investigation had been done. The *Sixth Amendment* to the United States Constitution guarantees the right of an accused in a criminal prosecution " to be confronted with the witness against him." This right is secured for defendants in state as well as federal criminal proceeding under *Pointer v. Texas*, 380, U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) and the *Louisiana Constitution Art. I Sec. 16.*

Confrontation means more than being allowed to confront the witness physically; a primary interest secured by it, is the right of cross-examination. *State v. Nash*, 475 So.2d 752 (La. 1985). The three main functions of cross examination are (1) to shed light on the credibility of the direct testimony; (2) to bring out additional facts related to those solicited on direct; and (3) to bring out additional facts which tend to elucidate any issue in the case. *LSA-C.E. Art. 611 (B), State v. Harrison*, 560 So.2d 450 (La. App. 2nd Cir. 1990).

The proper protocol in accessing this claim is announced in *Crawford v. Washington*, 158 L.Ed.2d 177, 124 S.Ct.1354, where the court held that: "out-of-court statements by witness that are testimonial are barred, under the Confrontation Clause unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable by court; where testimonial statements are at issue, only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes, i.e., confrontation."

The text of the Confrontation clause reflects this focus. It applies to "witnesses" against the accused

in other words, "those who bear testimony." "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.*

An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of- court statement. *Crawford*, supra.

The United States Supreme Court has declared that reaching the truth is a fundamental goal of trial, and cross-examination is critical to the process, to prevent half truth, *Untied States, v. Nobles*, 422 U.S. 225, 241, 95 S.Ct. 2160, 2171, 45 L.Ed.2d. 141. The United State Supreme Court has further declared the denial of the right to cross-examination to the constitutional error of the first magnitude and no amount of showing of prejudice would cure it, as it makes the adversary process itself presumptively unreliable.

The United States Constitution requires the guaranteed right to "due process" of law rights. The right to cross-examine is more than a desirable rule of trial proceeding. *Chamber v. Mississippi*, 410 U.S. 284, 295, 92 S.Ct. 1046, 35 L.Ed.2d 297 (1973). It is "an essential and fundamental requirement of the kind of fair trial which is this country's constitutional goal," but when the right to confrontation is denied or significantly diminished, the "ultimate of the fact finding process" is called into question and the court must closely examine the competing interest. But this issue, in the context of entering reports into the record as evidence, and never calling their author in to testify.

The Substance of the Constitution protection is preserved to the prisoner in the advantage the defendant has once had of seeing the witness face-to-face, and of subjecting the witness to the ordeal of cross-examination this the law say's a defendant shall under no circumstance be deprived of *Mattox v United States*, 156 U.S. 237, 241-243, 15 S.Ct. 337, 339-341, 39 L.Ed 409 (1895).

Mr. Thibodeaux has a vested interest in this Honorable Court adhering to and uphold the *Equal*

Protection and Due Process Clauses of the Fourteenth Amendment, thus accused urges that he too is entitled to the reversal of his conviction. Counsel was ineffective for not making the contemporaneous objections necessary to preserve the issue. Rules of Professional Conduct, Rule 1.1(a) Competence and Rule 1.3 Diligence.

LAW AND ARGUMENT

ISSUE NO. 1

Reasonable jurists would determined that Mr. Thibodeaux's conviction was obtained in violation of the Sixth and Fourteenth Amendments to the United States Constitution with the denial of his confrontation right.

The federal district court properly found that Mr. Thibodeaux presented a meritorious "Stand Alone Confrontation Claim" in this Application for Post-Conviction Relief, and "Granted" him a new trial. After a thorough review of the Record, the district court stated that the Sixth Amendment to the United States Constitution ensures that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. See also: Louisiana Constitution of 1974, Art. I, §16; *Crawford v. Washington*, 124 S.Ct. 1354.

The record clearly reveals that neither the State, nor the defense, called, nor made available, the alleged victims to testify in connection with the introduction of video tapes from the C.A.C. during Mr. Thibodeaux's trial. LSA-R.S. 15:440(A)(8). The trial court is not required to apply the discretionary "Law of the case" doctrine. The Law of the case principle is merely a discretionary guide. In case of palpable error, or where, if the Law of the case were applied, manifest injustice would occur, the principle would not be followed. *Glenwood Hospital, Inc. v. Louisiana Hosp. Services*, 419 So.2d 1269.

The 17th Judicial District Court has now addressed the issue and agrees with the United States Eastern District Court of Louisiana; that a Stand Alone Confrontation Claim was made during collateral review. To apply the "Law of the case" doctrine here would result in manifest injustice

because, as multiple Courts have now observed, Mr. Thibodeaux's constitutional right to Confrontation was not afforded him during these proceedings (See: district court Ruling – Exhibit "A").

Mr. Thibodeaux's Stand Alone Claim "*was not inexcusably omitted*" as the State contends. It was simply not addressed by the district court during the October 22, 2015 evidentiary hearing. The district court addressed Mr. Thibodeaux's "Stand Alone Confrontation Claim" after the Federal Court stayed its proceedings and remanded this matter to the State district court, finding, "*the strongest basis that might support such relief as a Stand Alone Claim that Mr. Thibodeaux's 'Confrontation Clause was violated,*'" compounded by the admission of his counsel knew *nothing* about the Confrontation Clause in the time frame of the trial had not be exhausted. See: *Thibodeaux v. Vannoy*, 2018 WL 4376407.

Also, the United States Eastern District of Louisiana, Docket No.: 17-17701, on August 10, 2018 stated, rather than address Mr. Thibodeaux's Petition in a piecemeal fashion, recommended that, "Granting a Stay sua sponte because he has not exhausted his State Court remedies, and he asserts a 'colorable Stand Alone Confrontation Clause Claim' that has NEVER been addressed on its merits by the Louisiana Supreme Court." The seeming violation of Mr. Thibodeaux's Confrontation Clause Claim was compounded by the performance of his admittedly incompetent counsel. Thus, his claims are "not plainly meritless and should be reviewed on the merits." "Because he is proceeding Pro-Se, dismissing his case for failure to exhaust expose him to the risk of later time of a petition that has currently been submitted to this Court in a timely fashion. Under these circumstances, good cause exist to stay this Petition."

In this case, the Court of Appeal noted that the video-taped interviews of the alleged victims were the linchpin of the State's case. No other direct witness testimony or physical evidence of the crimes were presented during trial. "There is absolutely no indication that the State made the victims available at trial for cross-examination, or that there was any pre-trial evidentiary hearing concerning the video-taped interviews." The Louisiana First Circuit Court of Appeal found, sua sponte, that, "the use of the

video-taped interviews as evidence, without affording Mr. Thibodeaux an opportunity to exercise his right of cross-examination of the victims, violated his right to Confrontation." See: 201-KW-1823; Louisiana Constitution of 1974, Art. I, § 2, 13, 16, 19, 21 and 22; Louisiana Constitution of 1974, Art. V, § 2, 5, and 5(A).

The Confrontation Clause of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ..." In an obvious attempt to protect this important constitutional right, LSA-R.S. 15:440.5(A)(8) states, "the video-tape of an oral statement of the protected person made before the proceeding begins may be admissible into evidence, "*If the protected person is available to testify*." In this case, there was no discussion of the victim's availability to testify before or during the trial, and the girls were never called to the stand.

The Louisiana Supreme Court has held that when the video-tape interview of a child witness were the linchpin of the prosecution's case, the prosecution's failure to call the children to the stand was a *fatal error* on Confrontation Clause grounds.

In *State v. Carper*, 41 So.3d 605, 611-3, examined three United States Court of Appeal decisions and found that the Fifth Circuit has specifically considered the question of whether the use by the State of a recorded interview of a child alleged to be a victim of sexual abuse, "without the State calling the child as a witness, violated the defendant's right to Confrontation." The Fifth Circuit has repeatedly found that this practice is a "clear violation of the right of Confrontation." To support its finding, the Louisiana Supreme Court cited *Lowery v. Collins*, 988 F.2d 1364, and *Offer v Scott*, 72 F.3d 50.

In *Lowery*, the Fifth Circuit held: "The confrontational safeguards approbated by the Supreme Court in *Maryland v. Craig*, 497 U.S. 836, were conspicuously absent during Lowery's trial; clearly, the procedure did not 'preserve all other elements of the Confrontation right.'"

For example, the State does not here assert, and the record does not reflect that, before the interview, the competency of witness to testify was determined, or that the child was *under oath* during

the interview; or that Lowery had an opportunity for full and contemporaneous cross-examination of the child-complainant during `the interview; or that the observable demeanor of the boy gave the jury the opportunity that was sanctioned in ***Craig*** to determine the child's veracity.

The Confrontation Clause of the Sixth Amendment, the Louisiana Constitution of 1974, and La.C.Cr.P. Art. 556.1(A)(3); was violated against the defendant when "accusers' (as "witnesses" against the defendant that prosecutors ***must*** produce), were not 'available."'

The case in our jurisdiction that directly deals with this above issue and the admissibility of the video-taped testimony in ***State ex rel. L.W.***, 44 So.3d 708. In ***L.W.***, the defendant is accused of Aggravated Rape. This was actually a judge trial in Slidell, Louisiana. The prosecution introduced the child accuser's testimony "only by testimonial hearsay." The Louisiana Louisiana First Circuit Court of Appeal, in 40 So.3d 1220, argues that, to offer these tapes, "as with the tapes in the above ***Thibodaux*** trial) as an exception to the hearsay exception so as to offer the truth of the statements would, in fact, ***violate*** the Confrontation Clause of the Sixth Amendment, "if there was not opportunity for cross-examination by defendant."

In ***State v. Woods***, 402 So.2d 680, the classic case of a plea agreement in a criminal matter where the Judge advised the client of right to "confront accuser" is so elementary and so basic that it must be mentioned in ***every criminal plea***. According to La.C.Cr.P. Art. 556.1(A)(3), that right, even in a plea, is always mentioned, however slight. Mr. Woods argued that his guilty plea should have been nullified because simply informing him of his "Right to Confront Accuser" in simplistic one sentence line was not in step with the "seriousness" of the Sixth Amendment Confrontation Clause Protection right. The Appeal Court agreed with Mr. Woods and stated that the mere mention of his right under Art. 556.1(A)(3), regarding the right to an attorney, right to confront and cross-examine witnesses/accusers was, in fact, sufficient.

Mr. Thibodeaux, with all due respect to this Honorable Court, "was never uttered one word of

caution regarding his right to confront and cross-examine his accusers. Mr. Thibodeaux was never advised, even in one sentence line of his right to confront and cross-examine his accusers. If he had been advised of his rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution, the reasonable Court in determining whether that would have affected the outcome of the trial is clear that it would have."

Now, on may occasions, the State made the argument that if the witnesses are on the State's list, they are ***not available*** to the defendant simply because defendant did not include them on his list! This strikes as the heart of ***Crawford v. Washington*** and ***State ex rel. L.W.***, where prosecutors must make witnesses against defendant available, and the prosecution and the Court missed that. The Court, during an exhaustive colloquy before and during trial regarding the availability of the witnesses against the defendant, should have, at that time, ordered the State to make available, any witnesses and accusers that would testify against the defendant to be made available, to allow the defendant his rights under the Confrontation Clause.

Once this Honorable Court determines that Mr. Thibodeaux's rights to confront and cross-examine the witnesses and accusers were ***violated***, and that "there is no foundation for the introduction of the video-tapes, even though there was on objection from defense counsel, that the video-tapes be inadmissible, the Honorable Court will now conclude that the video-tapes are not, in fact, evidence, but actually hearsay, and the Court, with all due respect, remove the video-tapes from evidence, regardless of the stipulation by both parties that they be made admissible. See: La.C.Cr.P. Arts. 851(1), (4), and (5).

Also, in ***Shaw v. Collins***, 5 F.3d 128, the Fifth Circuit stated that, "The State correctly assumed that its failure to cal the victims to testify at trial violated defendant's Confrontation Clause right." The Court held that the State's error was not harmless because the video-taped testimony was the linchpin in the State's case, and the video-tape substantially and injuriously influenced the district court's finding

of guilt. The victim in ***Shaw***, like the victim in ***Lowery***, was not under oath during the video, and there was no determination of her competency to testify before trial. In Mr. Thibodeaux's case, just like in ***Lowery*** and ***Shaw***, the victims were not under oath during the video-tape statements, and there was no determination of their competency. In Mr. Thibodeaux's case, the victims were never made available and were never called to appear at any of the proceedings.

Based on the previously cited United States Fifth Circuit and Louisiana's witness availability requirement, Mr. Thibodeaux's Stand Alone Confrontation Clause Claim may serve as the basis ultimately for Federal Confrontation Clause relief. ***It is not plainly meritless.*** In fact, the Louisiana Court of Appeal has already *sua sponte* concluded that Mr. Thibodeaux's Confrontation Clause rights were violated. See: La.C.Cr.P. Art. 556.1(A)(3).

Mr. Thibodeaux brought a Claim of infringement of his Right to Confront witnesses against him on Post-Conviction, challenging the constitutionality of his conviction under ***Strickland v. Washington*** and its progeny. Mr. Thibodeaux's trial counsel was ineffective in not ensuring his client had an opportunity to face his accusers; especially when he was facing a mandatory life sentence. ***Ohio v. Roberts***, 448 U.S. 56, 100 S.Ct. 2531.

In ***State ex rel. L.W.***, that to offer taped testimony "only by testimonial hearsay" (like in this case) as an exception to the hearsay exception would clearly as day violate a Defendant to Confrontational Clause to the Sixth Amendment if there was absolutely no opportunity for cross-examination by defendant.

"The United States Supreme Court in ***Crawford*** could not have been more clear about the Confrontation Clause's meaning in regard to video-taped testimony of witnesses being admissible. The Court, in ***Crawford***, placed restraints on the admissibility or the use of prior testimonial statements, "bedrock procedural guarantee" applies to both Federal and State prosecution." ***Pointer v. Texas***, 380 U.S. 400, 13 L.Ed.2d 923.

Subsequently, viewing the errors in this case, and citing ***Crawford*** on behalf of the Writ, the Court held the admission of "testimonial statements of a witness who does not appear at trial unless the witness is unavailable to testify, and the defendant has had a prior opportunity for cross-examination." In this case, the defendant had no opportunity to cross-examine the witnesses, nor his right to confront witnesses against him face-to-face, "which is a clear violation upon Petitioner's constitutional rights."

The Confrontation Clause text does not stand alone resolve the matter, so the Louisiana Supreme Court turned to the Clause's historic background. See: ***State v. Kennedy***, 957 So.2d 757. Furthermore, enunciating his right to confront witnesses against him, he contends that the "trial court erred in admitting the video-taped interview of the children without requiring the State to call the two children as witnesses in its case-in-chief and tendering each to him for cross-examination, citing ***State v. Carper***, 41 So.3d 605.

Mr. Thibodeaux requests that that this Honorable Court to acknowledge that his constitutional claims were not fairly presented at his trial due to his counsel's failure to preserve his right in cross-examining the witnesses against him under the Fifth, Sixth and Fourteenth Amendments, which specifically invoke Due Process rights. Mr. Thibodeaux argues that defense counsel denied him the opportunity to fairly present the State Court with his constitutional challenge to the district court's limiting him in facing his accusers and cross-examining the victims in this case. "Petitioner's second point of error states that in failing to protect Petitioner's right to face his accusers, the video-taped interviews were given too much weight without proper adversarial methodology and led to an improper and unconstitutional conviction."

Mr. Thibodeaux's stand alone Claim should be liberally construed by this Court as Mr. Thibodeaux has filed such as Pro-Se, and should not be held to the same standards as a trained attorney. Also, Mr. Thibodeaux merely instructions from the previous Magistrate during the course of his habeas proceedings; as he was informed to exhaust the Confrontation Clause violation in the State courts

before proceeding with this petition.

This Court must also take into consideration of the fact that Mr. Thibodeaux had filed a "Motion to Correct Error" instead of a Second or Successive Application for Post-Conviction Relief to the district court. It must also be noted that the district court had granted him relief on the stand alone Claim, and had ordered a new trial. Accordingly, the district court understood the importance of his constitutional right to Confrontation during trial.

The Magistrate is correct when she asserted that, "While both the state trial court (via its June 24, 2019 ruling) and the state appeal court (i.e., the Louisiana First Circuit Court of Appeal via its February 26, 2016 ruing) have at separate times concluded that Thibodeaux intended to assert a standalone confrontation clause claim in its first application for post-conviction relief in 2013 and both courts have found the confrontation clause meritorious and sufficient to order a new trial ..." in the Recommendation. Furthermore, it has also been noted that when Mr. Thibodeaux returned to the state courts during the stay of these proceedings in 2018, the district court found the Claim to be meritorious.

During the course of Mr. Thibodeaux's initial collateral review, he had argued that his trial counsel was ineffective for failing to object to the Confrontation Clause violation. The argument for the right to confront his accuser was included in the ineffective assistance of counsel Claim.

Furthermore, this action by the State denied the defendant the opportunity to present a defense against the allegations of other crimes evidence. The State was basically able to say, "Mr. Thibodeaux did this to this person, but we don't have to let them testify to these allegations."

At a minimum, defense counsel should have objected to the State's use of the videos without presenting the alleged victims for testimony and cross-examination. After a review of the record, this Court would find that the introduction of the out-of-court testimonial statements by the alleged victims violated Mr. Thibodeaux's 6th and 14th Amendments to the United States Constitution and Louisiana

Constitution of 1974 Arts. 1 § 2, 13, and 16. Therefore, Mr. Thibodeaux's conviction and sentence must be reversed and remanded for a new trial.

Mr. Thibodeaux has properly argued that he was denied effective assistance of counsel during the course of these proceedings. Most importantly, Mr. Thibodeaux has argued that his counsel was ineffective for failing to object to the videotape or call and cross-examine witnesses to protect his confrontation rights.

This Court must note that it is well established federal law that a defendant is guaranteed the right to a fair and impartial trial; including the right to effective assistance of counsel. Sixth and Fourteenth Amendments to the United States Constitution.

It's quite strange that the courts have denied Mr. Thibodeaux relief concerning his Claim of ineffective assistance of counsel. Trial counsel ***admitted*** to his malpractice and his deficient performance concerning Mr. Thibodeaux's confrontation rights. Any attorney ***should be familiar*** with the defendant's right to confrontation in accordance with the United States Constitution and State and Federal Law. In fact, the Louisiana First Circuit Court of Appeal found that defense counsel's failure to object to the unavailability of the witness was deficient and prejudicial. However, the courts have erred in determining that the deficient performance denied Mr. Thibodeaux his constitutional rights to a fair and impartial trial.

The Magistrate has also stated that on April 25, 2016, the Louisiana First Circuit Court of Appeal granted in part and denied in part Mr. Thibodeaux's Writ Application. The Court found that Mr. Thibodeaux's Sixth Amendment Confrontation rights were violated when the victim's recorded statements were used without the State having made the victims available at or before trial. That Court had also found that that defense counsel's failure to object to the unavailability of the witnesses was deficient and prejudicial proving ineffective assistance of counsel under ***Strickland***. The Court reversed the trial court's denial of Mr. Thibodeaux's Application for Post-Conviction Relief, reversed his

convictions, vacated his sentences, and ordered a new trial. However, the Louisiana Supreme Court reversed the Court of Appeal's decision.

The foundation to the right to confrontation is firmly established in the Sixth Amendment to the United States Constitution, which is applicable to the states through the Fourteenth Amendment's Equal Protection Clause.

Furthermore, defense counsel should have been aware of case law concerning Mr. Thibodeaux's right to confrontation and that Mr. Thibodeaux's constitutional right to confrontation was violated in accordance to 6th and 14th Amendment to the United States Constitution and the Louisiana Constitution of 1974 Arts. 1 § 2, 13, and 16 were violated when the trial court allowed the introduction of the taped interviews of the alleged victims into evidence. The introduction of this video constitutes constitutional and prejudicial error. Subsequently, Mr. Thibodeaux was not afforded the right to confront the witnesses.

CONCLUSION

As Mr. Thibodaux was denied the right to face his accuser in this matter, and there were no provisions for his right to confrontation, this Court should grant the petition for Writ of Certiorari.

Respectfully submitted this 26th day of April, 2022.

Timothy Thibodeaux #589014

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was served by First Class United States Mail this 26th day of April, 2022 upon counsel of record for Respondent, pursuant to Rule 29 at the following address: District Attorney's Office, P.O. Box 431, Thibodaux, LA 70302-0431.

Timothy Thibodeaux

APPENDIX "A"

RULING:
U.S. 5TH CIRCUIT

United States Court of Appeals for the Fifth Circuit

No. 21-30641

United States Court of Appeals
Fifth Circuit
FILED
February 28, 2022
Lyle W. Cayce
Clerk

TIMOTHY THIBODEAUX,

Petitioner—Appellant,

versus

TIM HOOPER, *Warden, Louisiana State Penitentiary*,

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Eastern District of Louisiana
USDC No. 2:17-CV-17701

ORDER:

Timothy Thibodeaux, Louisiana prisoner # 589014, moves for a certificate of appealability (COA) to challenge the district court's denial of his 28 U.S.C. § 2254 application. Thibodaux filed the § 2254 application to attack his convictions for aggravated rape of a minor and aggravated incest of a minor, for which he was sentenced to concurrent terms of life imprisonment and 50 years of imprisonment.

In his COA filing, Thibodeaux challenges the dismissal on procedural grounds of a standalone Confrontation Clause claim. Thibodeaux also challenges the merits-based denial of relief on his claim that his trial counsel was ineffective for failing to object to the prosecution's use of videos of the

victims, where the prosecution did not call the victims as witnesses. He asserts that his counsel should have either objected to the videos of the victims or called the victims as witnesses.

Because Thibodeaux fails to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claim[] debatable or wrong" or that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling," a COA is DENIED. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

JAMES C. HO
United States Circuit Judge

APPENDIX "B"

RULING:
U.S. DISTRICT COURT

WESTLAW

2021 WL 4398982
Only the Westlaw citation is currently available.
United States District Court, E.D. Louisiana.

Timothy THIBODEAUX, Petitioner

v.

Darryl VANNOY, et al., Defendants

CIVIL ACTION NO. 17-17701
Signed 09/27/2021

Attorneys and Law Firms

Timothy Thibodeaux, Angola, LA, Pro Se.

Joseph Sidney Soignet, District Attorney's Office (Thibodaux) Parish of Lafourche, Thibodaux, LA, for Defendant Darryl Vannoy.

SECTION: "E"(2)

ORDER AND REASONS

SUSIE MORGAN, UNITED STATES DISTRICT JUDGE

***1** Before the Court is a Report and Recommendation [1] issued by Magistrate Judge Donna Currault, recommending Petitioner **Timothy Thibodeaux's** petition for Writ of Habeas Corpus [2] be dismissed with prejudice. Petitioner timely objected to the Magistrate Judge's Report and Recommendation. [3] For the reasons that follow, the Court **ADOPTS** the Report and Recommendation [4] as its own and hereby **DENIES** Petitioner's application for relief.

BACKGROUND

The underlying facts of this case and its lengthy procedural history are outlined in depth in the Magistrate Judge's Report and Recommendation and need not be repeated here. [5] However, a brief outline of the outcome of Petitioner's state-court requests for postconviction relief is useful for the resolution of this case.

On June 20, 2011, Petitioner was convicted in a bench trial of aggravated rape of his minor daughter, C.T., and aggravated incest of his second minor daughter, C.T. a/k/a A.T., in the Louisiana 17th Judicial District Court. [6] He was sentenced to life in prison for aggravated

rape and fifty years in prison for aggravated incest. [7] At trial, the State introduced audio video interviews with the child victims to prove its allegations but did not call the children to testify in person. [8] Petitioner's counsel did not object. [9] After his conviction was affirmed on appeal, Petitioner's conviction became final on August 15, 2013, when the time to file a writ of certiorari to the United States Supreme Court expired. [10]

Petitioner first filed for postconviction relief in the state court in 2013, arguing he received ineffective assistance of counsel, primarily because his counsel did not object to use of the videos at his trial in violation of the Confrontation Clause. [11] Petitioner maintains he also raised a standalone Confrontation Clause violation. [12] Ultimately, in 2017 the Louisiana Supreme Court denied Petitioner's application for postconviction relief because it found Petitioner did not demonstrate prejudice as a result of his ineffective assistance of counsel and because Petitioner did not raise a standalone Confrontation Clause claim the state courts could address. [13] Petitioner filed for postconviction relief in this Court in 2017, [14] but this Court stayed federal postconviction relief proceedings until Petitioner could exhaust his standalone Confrontation Clause claim in state court. [15]

***2** Petitioner returned to state court in 2018 to file a second application for postconviction relief asserting his standalone Confrontation Clause claim, which the Louisiana Supreme Court ultimately denied on July 24, 2020, as untimely and repetitive of his earlier application. [16] The Louisiana Supreme Court declined to consider Petitioner's application for rehearing. [17] Having exhausted his standalone Confrontation Clause claim, Petitioner moved to reopen his federal application for postconviction relief in this Court, [18] which this Court granted. [19]

STANDARD OF REVIEW

In reviewing the Magistrate Judge's Report and Recommendations, the Court must conduct a de novo review of any of the Magistrate Judge's conclusions to which a party has specifically objected. [20] As to the portions of the report that are not objected to, the Court needs only to review those portions to determine whether they are clearly erroneous or contrary to law. [21] A factual finding is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." [22] The magistrate judge's legal conclusions are contrary to law when the Magistrate Judge misapplies case law, a statute, or a procedural rule. [23]

DISCUSSION

A. Standalone Confrontation Clause Claim

Petitioner presented a standalone Confrontation Clause claim in his second application for postconviction relief in state court. He labelled this filing a "motion to correct error," but the

state courts interpreted it as a second application for postconviction relief and addressed the standalone Confrontation Clause claim. [24] Accordingly, Petitioner has now exhausted his standalone Confrontation clause claim. Even if the claim is not exhausted, this Court exercises its authority to overlook any failure to properly exhaust to consider Petitioner's claim. [25]

The Magistrate Judge found this Court is barred from reviewing Petitioner's standalone Confrontation Clause claim because the Louisiana Supreme Court denied it on independent and adequate state procedural grounds, namely as untimely and repetitive under Louisiana Code of Criminal Procedure articles 930.8 and 930.4. [26] Petitioner objects to the Magistrate Judge's finding. He argues the Louisiana Supreme Court incorrectly denied his second postconviction application as untimely and repetitive because he labelled his filing a "motion to correct error," not a second application for postconviction relief. [27] Additionally, he maintains he included his standalone Confrontation Clause claim in his first state application for postconviction relief. [28] Petitioner also argues the Louisiana Supreme Court did not give him an opportunity under Louisiana Code of Criminal procedure article 930.4(F) to explain he had not previously submitted the standalone Confrontation Clause claim in his first state application because he thought it was already included there. [29]

3 A "limit on the scope of federal habeas review is the doctrine of procedural default." [30] "If a state court clearly and expressly bases its dismissal of a prisoner's claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal, the prisoner has procedurally defaulted his federal habeas claim." [31] Procedural default bars a federal court from reviewing the merits of the defaulted claim. [32] In order for a state procedural restriction to bar a federal court's review of the merits, it must be both independent—that is, the state court must " 'clearly and expressly' state[ ] that its judgment rests on a state procedural bar" [33]—and adequate—that is, the "state rule must be 'firmly established and regularly followed.' " [34] The question of adequacy is "itself a question of federal law," but federal courts cannot review alleged errors in the application of state procedural rules because "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." [35]

On federal habeas review, the Court looks to the last reasoned opinion of the state courts to determine whether denial of relief was on the merits or based on state law procedural grounds. [36] In this case, on July 24, 2020, the Louisiana Supreme Court found Petitioner's second application untimely and repetitive under Louisiana Code of Criminal Procedure articles 930.8 and 930.4. Article 930.8 states in relevant part, "No application for post-conviction relief, including applications which seek an out-of-time appeal, shall be considered if it is filed more than two years after the judgment of conviction and sentence has become final." Article 930.4 states in relevant part, "A successive application shall be

dismissed if it raises a new or different claim that was inexcusably omitted from a prior application."

The Louisiana Supreme Court expressly cited articles 930.8 and 930.4, indicating the reasoning for its holding was independent of federal law. Moreover, the Fifth Circuit has held that invocation of article 930.8 or 930.4 is a clear expression of an independent state law basis. [37]

"A state procedural rule enjoys a presumption of adequacy when the state court expressly relies on it in deciding not to review a claim for collateral relief," and the burden is on the petitioner to prove inadequacy. [38] Petitioner has presented no evidence that articles 930.8 and 930.4 are applied irregularly, and the Fifth Circuit has previously held they are adequate grounds invoked regularly by Louisiana courts. [39] Petitioner presented his standalone Confrontation Clause claim to state courts in his second application in 2018, five years after his conviction became final and five years after he filed his first habeas application. Although he argues he presented the claim in his first 2013 application, the Louisiana Supreme Court held otherwise on review of the first application. [40] On review of the second application in 2018, the Louisiana Supreme Court held the standalone Confrontation Clause claim is procedurally barred as untimely as repetitive. [41] This holding has a foundation in the record and state law, and without a showing otherwise by Petitioner, the presumption of adequacy and the procedural bar must stand. [42] That is all adequacy requires. Petitioner's arguments that Louisiana courts erred in misconstruing his first application for postconviction relief as excluding his standalone Confrontation Clause claim, incorrectly labelling his "motion to correct error" as a second application for postconviction relief, and denying him an opportunity to explain why he had not included his standalone Confrontation Clause claim in his first application must fail, because this Court has no authority to review state-court decisions on state-law questions. [43]

***4** A petitioner may "overcome a procedural bar ... [by] show[ing] cause for the default and actual prejudice, or that a miscarriage of justice will occur if the federal court does not consider the claim." [44] Cause is " 'something external to the petitioner, something that cannot fairly be attributed to him' that impedes his efforts to comply with the [state] procedural rule." [45] An ineffective assistance of counsel claim may qualify as adequate cause for default. [46] The Magistrate Judge found Petitioner demonstrated no cause because Petitioner's ineffective assistance of counsel claim fails and because there was no evidence of other external interference. [47] In his objections, Petitioner argues the Magistrate Judge erred by finding no merit in his ineffective assistance of counsel claim. [48] The Court construes this objection as one to the Magistrate Judge's finding of no cause for the default. However, for the reasons stated below, and as the Magistrate Judge ruled, Petitioner's ineffective assistance of counsel claim fails. Petitioner points to no other external factors that prevented him from clearly raising his standalone Confrontation

v. Washington.[61] Under *Strickland*, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[62] Thus, Petitioner's argument that the burden is on the government to show harmless error is incorrect.[63] "The petitioner must 'affirmatively prove,' not just allege, prejudice."[64] As stated, Petitioner presents no proof that the child victims recanted the statements they gave on the videos, or even that their testimony would have been any different from that in the videos if they had testified in person. His argument that their testimony would have proved his innocence is mere speculation. Accordingly, the Court does not find the Louisiana Supreme Court's denial of relief contrary to or an unreasonable application of *Strickland*.

CONCLUSION

The Court finds no merit in Petitioner's objections. The Petitioner has failed to specifically object to the remaining findings of the Magistrate Judge, so the Court reviews them under a clearly erroneous or contrary to law standard. The findings are not clearly erroneous or contrary to law.

For the foregoing reasons, the Court **ADOPTS** Magistrate Judge Currault's Report and Recommendation[65] as its own and hereby **DENIES** Petitioner's application for relief.

IT IS ORDERED that the above-captioned matter be **DISMISSED WITH PREJUDICE**.

All Citations

Slip Copy, 2021 WL 4398982

Footnotes

1 R. Doc. 31.

2 R. Docs. 6, 16.

3 R. Doc. 32.

4 R. Doc. 31

5 *Id.*

6 R. Doc. 6-1 at 1-2. As the Magistrate Judge noted, pursuant to La. Rev. Stat. § 46:1844(W), Louisiana state courts identify juvenile victims and family by initials. Because the victims in this case had the same initials, the state courts and the Magistrate Judge referred to the younger victim as A.T. based on a nickname. This Court does the same.

7 *Id.*

8 R. Doc. 32 at 3.

9 *Id.*

10 *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999) ("§ 2244(d)(1)(A) ... takes into account the time for filing a certiorari petition in determining the finality of a conviction on direct review.").

11 R. Doc. 6-1 at 3, 89-116.

12 R. Doc. 32 at 3-4.

13 *Louisiana v. Thibodeaux*, No. 2016-KP-0994 (La. 10/27/17), 227 So. 3d 811; R. Doc. 6-2 at 52-55.

14 R. Docs. 1, 6.

15 R. Doc. 13.

16 *Louisiana v. Thibodeaux*, No. 2019-KP-01663 (La. 7/24/20), 299 So. 3d 58.

17 *Louisiana v. Thibodeaux*, No. 2019-KP-01663 (La. 11/24/20), 305 So. 3d 102; R. Doc. 29.

18 R. Doc. 14.

19 R. Doc. 15.

20 *See* 28 U.S.C. § 636(b)(1)(C) ("[A] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which an objection is made.").

21 *Id.* §(b)(1)(A).

22 *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

23 *Moore v. Ford Motor Co.*, 755 F.3d 802, 806 (5th Cir. 2014); *see also Ambrose-Frazier v. Herzing Inc.*, No. 15-1324, 2016 WL 890406, at *2 (E.D. La. Mar. 9, 2016) ("A legal conclusion is contrary to law when the magistrate fails to apply or misapplies relevant statutes, case law, or rules of procedure.") (internal quotation marks and citation omitted).

24 *See* R. Doc. 16-1 at 18-19, 23-24; *Thibodeaux*, No. 2019-KP-01663 (La. 7/24/20), 299 So. 3d 58.

25 28 U.S.C. § 2254(b)(2).

26 R. Doc. 31 at 14-27.

27 R. Doc. 32 at 3.

28 *Id.* at 3.

29 *Id.*

30 *Nobles v. Johnson*, 127 F.3d 409, 420 (5th Cir. 1997).

31 *Id.* (first citing *Coleman v. Thompson*, 501 U.S. 722, 731–32, (1991); the citing *Harris v. Reed*, 489 U.S. 255, 262–63, (1989); and then citing *Wainwright v. Sykes*, 433 U.S. 72, 81, (1977)).

32 *Rhoades v. Davis*, 914 F.3d 357 (5th Cir. 2019).

33 *Rhoades*, 914 F.3d at 372 (quoting *Harris v. Reed*, 489 U.S. 255, 263 (1989)).

34 *Walker v. Martin*, 562 U.S. 307, 316 (2011) (quoting *Beard v. Kindler*, 558 U.S. 53, 60-61 (2009)).

35 *Lee v. Cain*, No. 03-2626, 2004 WL 2984274, at *1 n.2 (E.D. La. Dec. 6, 2004) (quoting *Trevino v. Johnson*, 168 F.3d 173, 184 (5th Cir. 1999)) (refusing to examine alleged errors in the application of the procedural bar to applications for postconviction relief in Louisiana Code of Criminal procedure article 930.3).

36 *See Wilson v. Seller*, 138 S. Ct. 1188, 1192 (2018); *see also Salts v. Epps*, 676 F.3d 468, 479 (5th Cir. 2012) (stating courts "look to the 'last reasoned opinion,' and where a higher state court has ruled on a petitioner's motion on grounds different than those of the lower court, [courts] review the higher court's decision alone").

37 *See, e.g.*, *Glover v. Cain*, 128 F.3d 900, 902 (5th Cir. 1997); *Ardison v. Cain*, 264 F.3d 1140 (5th Cir. 2001), 2001 WL 822445, at *4-5 (unpublished); *see also Besse v. Tanner*, No. 16-2992, 2017 WL 2936311, at *8 (E.D. La. July 7, 2011).

38 *Lott v. Harget*, 80 F.3d 161, 165 (5th Cir. 1996) (citing *Sones v. Hargett*, 61 F.3d 410, 416 (5th Cir. 1995)).

39 *See, e.g.*, *Glover*, 128 F.3d at 902; *Ardison v. Cain*, 264 F.3d 1140, 2001 WL 822445, at *4-5; *see also Besse*, 2017 WL 2936311, at *8.

40 *Thibodeaux*, No. 2016-KP-0994 (La. 10/27/17), 227 So. 3d 811; R. Doc. 6-2, at 52-55.

41 *Thibodeaux*, No. 2019-KP-01663 (La. 7/24/20), 299 So. 3d 58.

42 *See, e.g.*, *Davis v. Johnson*, No. CIV. A. 4:00CV684–Y, 2001 WL 611164, at *4 & n.10 (N.D. Tex. May 30, 2001); *Johnson v. Lensing*, No. 99-0005, 1999 WL 562728, at *4 (E.D. La. July 28, 1999); *Poree v. Cain*, No. 97-1546, 1999 WL 518843, at *4 (E.D. La. July 20, 1999).

43 *See, e.g.*, *Lee*, 2004 WL 2984274, at *1 n.2; *Trevin*, 168 F.3d at 184. Regarding Petitioner's claim he received no opportunity to explain the reason for his second application to the Louisiana Supreme Court, the court noted Petitioner could attempt to "show that one of the narrow exceptions authorizing the filing of a successive application applie[d]." *Thibodeaux*, No. 2019-KP-01663, at p. 2, 299 So. 3d at 58.

44 *Gonzales v. Davis*, 924 F.3d 236, 242 (5th Cir. 2019).

45 *Matchett v. Dretke*, 380 F.3d 844, 848 (5th Cir. 2004) (quoting *Moore v. Roberts*, 83 F.3d 699, 704 (5th Cir. 1999)).

46 *Edwards v. Carpenter*, 529 U.S. 446, 450-51 (2000).

47 R. Doc. 31 at 25-26.

48 R. Doc. 32 at 11.

49 *Matchett*, 380 F.3d at 849.

50 *Murray v. Quarterman*, 243 F. App'x 51, 55 (5th Cir. 2007) (quoting *Bagwell v. Dretke*, 372 F.3d 748, 756 (5th Cir. 2004)).

51 R. Doc. 32 at 11.

52 R. Doc. 31 at 29-48.

53 *Id.*

54 R. Doc. 32 at 11.

55 *Id.* at 5-10.

56 *Id.* at 11. Petitioner does not challenge the Magistrate Judge's findings concerning his counsel's objective unreasonableness.

57 28 U.S.C. § 2254(d)(1).

58 *Strickland v. Washington*, 466 U.S. 668, 698 (1984).

59 *Young v. Stephens*, 795 F.3d 484, 489-90 (5th Cir. 2015) (quoting *Nelson v.*

Quarterman, 472 F.3d 287, 292 (5th Cir. 2006)).

60 *Brumfield v. Cain*, 576 U.S. 305, 314 (2015).

61 466 U.S. 668 (1984).

62 *Id.* at 694.

63 *Coleman v. Vannoy*, 963 F.3d 429, 434 (5th Cir. 2020) (footnote omitted) ("[T]he harmless-error doctrine differs in important ways from [ineffective assistance of counsel] prejudice. In the former, it is the state's burden to prove harmlessness beyond a reasonable doubt; in the latter, it is the defendant's burden to prove a reasonable probability that the result would have been different.").

64 *Day v. Quarterman*, 566 F.3d 527, 536 (5th Cir. 2009).

65 R. Doc. 31.

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STATE OF LOUISIANA
COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA

VERSUS

TIMOTHY THIBODEAUX

NO. 2015 KW 1823

17TH JUDICIAL DISTRICT COURT

PARISH OF LAFOURCHE

DOCKET NO. 475003

FEBRUARY 26, 2016

BEFORE: GUIDRY, HOLDRIDGE, AND CHUTZ, JJ.

INTERIM ORDER

The above numbered and entitled matter being presently before this Court,

IT IS ORDERED that the State of Louisiana, through Camille A. Morvant, II, District Attorney, or his designated assistant, file a response addressing the merits of relator's allegation that his Sixth Amendment right to confrontation was violated where the State failed to call the victims as witnesses, and relator was not afforded the opportunity to question the victims on cross-examination, on or before March 30, 2016. See **State ex rel. L.W.**, 2009-1898 (La. App. 1st Cir. 6/11/10), 40 So.3d 1220, 1226 writ denied, 2010-1642 (La. 9/3/10), 44 So.3d 708; **State v. Carper**, 45,178 (La. App. 2d Cir. 6/9/10), 41 So.3d 605, writ denied, 2010-1507 (La. 9/3/10), 44 So.3d 708. If he so elects, the Honorable John E. LeBlanc, Judge, 17th Judicial District Court, may file a *per curiam* on or before the same date, in response to this application.

IT IS FURTHER ORDERED that the office of the Clerk of Court of Lafourche Parish supplement the record with a copy of the trial transcript.

JMG
GH
WRC

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TIMOTHY THIBODEAUX	CIVIL ACTION
VERSUS	NO. 17-17701
DARRYL VANNOY ET AL.	SECTION "E"(2)

REPORT AND RECOMMENDATION FOR STAY ORDER

This matter was referred to a United States Magistrate Judge to conduct hearings, including an evidentiary hearing, if necessary, and to submit proposed findings and recommendations for disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and (C), and as applicable, Rule 8(b) of the Rules Governing Section 2254 Cases. It may be one of those rare petitions filed by a prisoner in proper person that warrants federal habeas corpus relief. However, the strongest basis that might support such relief – a standalone claim that petitioner's Confrontation Clause rights were violated, compounded by the admission of his counsel that counsel knew nothing about the Confrontation Clause at the time of trial – has not been exhausted in the state courts. Comity and the obligation of this court to defer to the preeminent position of the state courts in this circumstance mandate requiring plaintiff to exhaust his state court remedies. To preserve his federal habeas corpus rights, however, I recommend that this court STAY this case while plaintiff pursues exhaustion of review of his substantial standalone Confrontation Clause

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TIMOTHY THIBODEAUX, Petitioner	CIVIL ACTION
VERSUS	NO. 17-17701
DARRYL VANNOY, ET AL., Defendants	SECTION: "E"(2)

ORDER

Before the Court is Petitioner Timothy Thibodeaux's Petition for a Writ of Habeas Corpus.[1] This matter was referred to the United States Magistrate Judge, who issued his Report and Recommendation on August 10, 2018.[2] The period for objections ended on August 24, 2018, with no objections filed. The Court, having considered the petition, the record, the applicable law, and the magistrate judge's Report and Recommendation finds the magistrate judge's findings of fact and conclusions of law are correct. As a result, the Court hereby approves the United States Magistrate Judge's Report and Recommendation and adopts it as its opinion in this matter. Therefore,

IT IS ORDERED that Petitioner Timothy Thibodeaux's federal habeas corpus proceeding under 28 U.S.C. § 2254 be and hereby is STAYED and the case be and hereby is CLOSED for all administrative purposes pending exhaustion of his unexhausted Confrontation Clause claim in state court.

IT IS FURTHER ORDERED that Petitioner be required to move to re-open this

matter within sixty days after finality of all state post-conviction review related to the unexhausted claim.

New Orleans, Louisiana, on this 13th day of September, 2018.

Susie Morgan

SUSIE MORGAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

TIMOTHY THIBODEAUX	CIVIL ACTION
VERSUS	NO. 17-17701
WARDEN DARRYL VANNOY	SECTION "E" (2)

ORDER

Petitioner Timothy Thibodeaux's letter to the Clerk of Court (ECF No. 22) asserts that the Lafourche Parish District Attorney has not timely responded to the Court's briefing order or provided him with a copy of its answer to his supplemental petition. This Court's docket, however, reflects that the State's answer was timely filed on October 23, 2020. *See* ECF No. 21. Although the State's response indicates that a copy was mailed to Thibodeaux at his address of record (*id.* at 14), the Clerk is instructed to mail a copy of the State's answer (ECF No. 21) along with a copy of this Order to Petitioner. Accordingly,

IT IS ORDERED that the Clerk of Court mail a copy of the State's answer in opposition (ECF No. 21) with a copy of this Order to petitioner Timothy Thibodeaux.

IT IS FURTHER ORDERED that petitioner Timothy Thibodeaux may have until December 2, 2020, to file a reply to the State's answer in opposition, should he choose to do so.

New Orleans, Louisiana, this 2nd day of November, 2020.

DONNA PHILLIPS CURRAULT
UNITED STATES MAGISTRATE JUDGE

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STATE OF LOUISIANA

17TH JUDICIAL DISTRICT COURT

PARISH OF LAFOURCHE

HONORABLE JOHN E. LEBLANC

PRESIDING JUDGE, DIVISION A

STATE OF LOUISIANA

VERSUS

TIMOTHY THIBODEAUX

DOCKET NUMBER-475003

POST-CONVICTION HEARING

JUNE 24, 2019

THIBODAUX, LOUISIANA

APPEARANCES

HEATHER HENDRIX, ESQ.

Assistant District Attorney, Representing the State of Louisiana.

TERESA KING, ESQ.

Assistant Indigent Defender, Representing the defendant, Timothy Thibodeaux.

TIMOTHY THIBODEAUX,

The Defendant.

THE COURT:

This is Docket No. 475000(sic), *State of Louisiana versus Timothy Thibodeaux,* on a remand from United States Federal District Court on a Federal habeas corpus post-conviction relief. Let's make appearances, please.

MS. HENDRIX:

Heather Hendrix on behalf of the State of Louisiana.

MS. KING:

Teresa King, Your Honor, from the Public Defender's Officer here on behalf of Mr. Timothy Thibodeaux who is present in court.

THE COURT:

Okay. The State has filed previously procedural objections, which I have overruled, and now we have the, I guess, the main motion to correct sentence based on the Federal Magistrates finding in confirmation of the Louisiana Supreme Court that there was - defendant asserted a standalone Confrontation Clause issue overruling the First Circuit. So Ms. King, you can make your presentation. And I don't think this requires evidence. I think this is mostly legal argument.

MS. KING:

Yes, Your Honor. Thank you, Your Honor.

testify in connection with the introduction of the C.A.C videos in Mr. Thibodeaux's trial. We're here today because he asserts that his Confrontation Clause rights were not afforded to him during the course of the trial. There was a post-conviction relief hearing held in October of 2015 and it revealed glaring examples of ineffective assistance of counsel. Most importantly, Your Honor, David Capasso testified that he was not aware of the law regarding the Confrontation Clause and what was required of him at that time.

The question before the Court today is whether the defendant's right to confront and cross-examine his witnesses was afforded to him or not. We submit that his right to confront and cross-examine was not afforded to him during the trial. This is not a matter of blame, Your Honor, blaming the state for this, but it is a matter of whether his right was afforded to him or not. That right was not respected by his attorney and that right was not afforded to him by the state calling the witnesses either.

The First Circuit decided in 2016, Your Honor, based on a review of the record, that his right to confront and cross-examine his witnesses was violated. A

meritless. So I think there's a good record here in his case, Your Honor, that the right to confront and cross-examine the witnesses against him has been violated. Thank you, Your Honor.

THE COURT:

Ms. Hendrix?

MS. HENDRIX:

Yes, sir.

The State contends that the primary issue that is before you today is the defendant's lack of a valid excuse for omitting his standalone Confrontation claim from his previous post-conviction relief application, which ultimately resulted in a final judgment against him. Louisiana Code of Criminal Procedure Article 930.4(E) requires that a successive application for post-conviction relief shall be dismissed if it raises a new or different claim that was inexcusably omitted from a prior application.

He has yet to state why that claim was omitted, and since we argued that the law of the case doctrine should be applied to this case, when considering the binding effect of that, the doctrine refers to a policy by which the Court will not, on subsequent review, reconsider prior rulings in the same case. And we have cited the

Furthermore, he cannot amend his original PCR by adding the standalone Confrontation claim for the simple reason of the trial court's ruling of October 22, 2015, that denies the application for PCR, and it's now final by virtue of ruling of the Louisiana Supreme Court granting the State's writ application and the failure of the defendant to seek review under the United States Supreme Court thereafter.

However, alleging - if the defendant is successful in alleging that separate claim under the Confrontation Clause, it lacks merit because the statute has been ruled not unconstitutional on its face by the Louisiana Supreme Court, in 2017, in *State v Thibodeaux*, which is 227 So.3d 811. Nor has the defendant, in the current motion, alleged that the statute is unconstitutional either facially or as applied.

Subsection A-7 of Louisiana Revised Statute 15:440.5 stated a video recording of a protected person is admissible into evidence if the state satisfies eight separate criteria, all of which were satisfied in this case prior to trial, specifically subsection A-7 which requires only that the protected person is available to testify. It doesn't require that the

victims were available to testify throughout the bench trial, which they were served with subpoenas on May 26, 2001, at 8:19 A.M. via Keecia, K-e-e-c-i-a, Albert, their custodian at the time, and both remained available. So the State submits, respectfully, that we have discharged the obligation under both Louisiana Revised Statute 15:440.5 and the Confrontation Clause.

THE COURT:

Response?

MS. KING:

Your Honor, in response, the state has stated today that he omitted this claim from his original PCR, and we disagree with that, Your Honor. I think that the court's have disagreed with that as well. In his original PCR application, on December 19, 2013, he actually wrote this case involves petitioner's right to confront the witnesses against him. So I think it's very important to point that out, Your Honor. *Pro se* filings are to be construed liberally in favor of the *pro se* litigant. So while he may not have crafted it the way the state would prefer, that doesn't mean that he didn't raise it, Your Honor, so we believe that it is a standalone Confrontation claim.

that, and, Your Honor, whether they were subpoenaed or not, they were not called to testify. Mr. Capasso, the defense attorney, did not have them under subpoena. He did not call them to testify, and he came to court and he testified under oath that he failed to do several things that would have been in the clients best interest, and in this case he testified that he was not aware of the Confrontation Clause, Your Honor. So for all those reasons we maintain that Mr. Thibodeaux's Constitutional rights were violated in this case.

(An off-the-record discussion was held.)

THE COURT:

I got to take a five minute break. I lost track of where I was.

MS. HENDRIX:

Yes, sir.

MS. KING:

Your Honor, if I may, I have a copy of the First Circuit's opinion.

THE COURT:

Yeah. That would be great.

MS. KING:

Would you like for me to approach?

THE COURT:

That's good. I just need to see that for the exact language that I'm looking for. Do you have an objection?

THE COURT:

Thank you. I'm going to step off the bench and look at my notes. I'm not going to delay y'all too much.

(A recess was taken at this time.)

THE COURT:

The matter is before the Court on remand after a stay was granted by Federal Magistrate on a writ of habeas corpus regarding the issue of Mr. Thibodeaux's standalone Confrontation Clause claim, which he says may serve as a basis, ultimately, for a Federal habeas corpus relief. Mr. Thibodeaux was found guilty at a bench trial where the - his minor children were presented by videotape interviews through the Children's Advocacy Center. And they were present based on a subpoena that was issued by the state, but then released after the tapes were entered into evidence.

The state did not present the children as witnesses for cross-examination. Mr. Thibodeaux asserted in his original application for post-conviction relief that his right of confrontation had been denied in the trial process. The case went through the appeal process. Ultimately upheld by the Supreme Court. Then we came back on post-conviction relief.

counsel did not even, at the time of the trial, did not even know about his right of confrontation, the *Crawford* case, and basically tried to stipulate ineffective assistance of counsel. But at that proceeding, no evidence was presented as to what the children might have said. They weren't called as part of the evidentiary hearing and they weren't cross-examined in that case either.

The Court, this court, District Court, denied the application for post-conviction relief as it related to ineffective assistance of counsel because the defendant failed to prove the result of prejudice that was caused by the ineffective assistance of counsel. There was no showing that the children's testimony would have been different had the children been called to testify.

The First Circuit, in reviewing my reasons on post-conviction relief, and after, I guess, reading Mr. Capasso's confession, held that videotape of an oral statement of a protected person may be made before the proceeding begins, may be admissible into evidence if the protected person is available to testify. It stated that the videotape interviews of the victims were the lynchpin of the

available for cross-examination. Basically on their own motion they said the use of the videotape interviews as evidence, without affording the opportunity to exercise his right of confrontation, violated Mr. Thibodeaux's rights and reversed my post-conviction relief finding.

The Supreme Court came back, as is often the case. Supreme Court found that the First Circuit had gone beyond what a normal reviewing court does when it - the Supreme Court said the defendant did not raise a standalone Confrontation Clause claim in his application and they should not do it on their own motion, and then reversed the First Circuit, said that my original reasons for judgment on the post-conviction relief were correct.

On habeas corpus, Federal Magistrate explains that the Confrontation Clause, the purpose of it is to ensure fair trails in criminal proceedings. He, the magistrate, seemed troubled by the fact that the only evidence was the video tape interviews and that Mr. Thibodeaux, in effect, had a standalone Confrontation Clause claim to be asserted because it could be a basis for Federal relief. They stayed the proceedings, remanded back to District Court.

that originally asserted the very claim that was made by Mr. Thibodeaux, that he was denied effective assistance of counsel by not being allowed to cross-examine the children because they were not available to him, and the record, upon review, clearly shows that they were not presented as witnesses, either by the state or by him, and therefore he has a standalone claim that has merit.

It's an unusual situation to be put in, having ruled against him twice, at trial and on post-conviction relief, but I think it is clear that *Crawford* and the Confrontation Clause is something that is essential to a fair and impartial proceeding. And based on the actions of his lawyer, though possibly not as part of the post-conviction evidentiary hearing, as part of the facts of the case itself, denied him the right to confront and question and cross-examine the victims in the case.

So with that in mind, the Court will grant to Mr. Thibodeaux a new trial based on his failure to be allowed his Confrontation Clause rights. And those are my reasons. That's what my ruling is. I'll note the State's objection.

MS. HENDRIX:

The case is already stayed by the Federal magistrate anyway, but I think once this gets back to him maybe he'll un-stay it. I'll have to figure out procedurally how that works.

MS. HENDRIX:

And, Your Honor, the State, at this time, will notice its intent to seek - I'm not sure if it's a writ or appeal at this point.

THE COURT:

I think it's a writ. And you'll be going back to the entity that found it on its own motion. So I'm agreeing with the First Circuit, to the extent that that helps.

MS. KING:

Thank you very much, Your Honor.

THE COURT:

You're welcome. You want to prepare an order that I sign granting him a new trial?

MS. KING:

Yes, Your Honor.

THE COURT:

Okay. Now, you're going to remain in custody. You're going to probably - you're going back to Angola. Nothing else changes status wise until we get the trail date and procedurally what happens with the First Circuit. Okay? Tough case. It's been going

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C E R T I F I C A T E

I, Kristen Gros Morvant, Official Court Reporter, in and for the State of Louisiana, employed as an official court reporter by the 17th Judicial District Court, Parish of Lafourche, State of Louisiana, as an officer before whom this testimony was taken, do hereby certify that the above twelve (12) pages constitute a true and faithful transcript executed to the best of my ability and understanding; that this proceeding was reported by me in the Stenomask reporting method; was prepared and transcribed by me or under my personal direction and supervision; and that the transcript has been prepared in compliance with the transcript format guidelines required by statute or by rules of the board or by the Supreme Court of Louisiana; and that I have no relationship with counsel or the parties herein, nor am I otherwise interested in the outcome of this matter which was held at Thibodaux, Louisiana, on June 24, 2019, in the matter numbered and entitled:

STATE OF LOUISIANA
VERSUS NUMBER-475003
TIMOTHY THIBODEAUX

This certification is valid only for a transcript accompanied by my original signature and original imprinted seal on this page. Any copies must have a "COPY" stamp and my original imprinted seal.

In Faith Whereof, witness my signature this 5th day of August, 2019.