No. 21-7995

ORIGINAL



**IN THE SUPREME COURT OF THE UNITED STATES**

**JOSEPH KURZ,**

**Petitioner,**

**Versus**

**TIM HOOPER, Warden,**
**Louisiana State Penitentiary at Angola,**

**Respondent.**

**ON PETITION FOR WRIT OF CERTIORARI**
**FROM THE UNITED SATES FIFTH CIRCUIT COURT OF APPEALS**

# PETITION FOR WRIT OF CERTIORARI

Joseph Kurz #169198
Rayburn Correctional Center
27268 Hwy 21 N.
Angie, La 70426

(Pro-Se Litigant)

## QUESTIONS PRESENTED

(1) Whether the United States Fifth Circuit Court of Appeals and United States District Court for the Western District of Louisiana properly conclude that Reasonable Jurists would determine there was sufficient evidence to support Mr. Kurz's convictions?

(2) Whether the United States Fifth Circuit Court of Appeals and United States District Court for the Western District of Louisiana properly conclude that Reasonable Jurists would have determined that Mr. Kurz was convicted with the use of Ex Post Facto Law; *Stogner v. California*, 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed. 544, (2003); in violation of the Sixth and Fourteenth Amendments to the United States Constitution?

(3) Whether the United States Fifth Circuit Court of Appeals and United States District Court for the Western District of Louisiana properly conclude that Reasonable Jurists would determine that Mr. Kurz was denied Effective Assistance of Counsel?

## LIST OF PARTIES

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

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**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**PETITION FOR WRIT OF CERTIORARI**

The Petitioner, Joseph Kurz, respectfully prays that this Court issue a Writ of Certiorari to review the judgment of the United States Fifth Circuit Court of Appeals below.

## OPINIONS BELOW

The United States Court of Appeal for the Fifth Circuit denied the petitioner's request for Certificate of Appealability on April 5, 2022 under Case No. 21-30713, *Kurz v. Hooper*. It appears at *Appendix I* attached to the petition. It has been designated for publishing, but not yet reported.

The opinion of the United States Fifth Circuit Court of Appeals appears at *Appendix I* attached to petition. It has not been designated for publication.

The opinion of the United States District Court, Western District of Louisiana, appears at *Appendix H* attached to the petition. It has been designated for publication and reported at *Kurz v. Vannoy*, 2021 WL 5237248 (11/10/21).

## JURISDICTION

The date on which the United States Court of Appeals, Fifth Circuit, decided petitioner's case was April 5, 2022. No petition for rehearing was timely filed in instant case.

The jurisdiction of this Court is invoked under *28 U.S.C. §1254(1)* and *28 U.S.C. §1257(a).*

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- *28 U.S.C. § 1254(1)*
- *28 U.S.C. §1257(a).*

- ***U.S. Const., Amend. VI***
  In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

- ***U.S. Const., Amend. XIV***
  Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- ***28 U.S.C. § 2253***

  (a) In a habeas corpus proceeding . . . before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceedings is held.

  (b) There shall be no right of appeal from a final order in proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

  (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

  (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;

- (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

- (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

- ***Louisiana Constitution Article I, § 2, 13, and 16.***

**REQUEST FOR JUDICIAL NOTICE**

On April 1, 2020, the Louisiana State Penitentiary was placed on a limited lock-down due to the Covid-19 Pandemic. With this limited lock-down, the Legal Programs Department at Louisiana State Penitentiary has allowed for all Offender Counsel Substitutes and Law Libraries to be locked down, effectively halting any and all legal assistance and/or access to legal materials.

During this time, all legal aid at the Louisiana State Penitentiary is offered on a limited basis due to the fact that numerous Offenders have refused to be vaccinated, effectively disallowing any research or access to any materials needed to advance pleadings. The Offender Counsel Substitutes, who provide assistance in the submission of meaningful litigation, have only recently been allowed access to the Offenders are assigned to the "Medical Dorms."

At the time that Mr. Kurz had received his ruling from the Federal District Court, the Louisiana State Penitentiary had allowed the Counsel Substitutes very limited access to their computer files in order to assist the Offenders cases have been assigned to them. The Offenders are not assigned as Counsels (and were not designated as 'Medical Dorms'), were limited to two hours a week (if they were able to be placed on the Call-Out) in which to either work on their cases, or communicate the Counsels that are assigned to assist them.

Although the Offender Counsel Substitutes were allowed limited access (along with the Offenders in Population to the Main Prison Law Library, Mr. Kurz was assigned to a "Medical Dorm," and was not allowed access to the Law Library, nor were any other Offenders allowed access to his dorm. The only persons that were allowed access to the "Medical Dorms' was Security, Administration, and Medical Staff due to the fact that the dorms were in "Reverse Quarantine," or "Isolation." No other Offenders were allowed access to the "Medical Dorms" in

the institution in order to prevent the vulnerable Offenders from being exposed to the Covid -19 virus.

When Mr. Kurz received the March 23, 2021 Ruling from the Louisiana Supreme Court, he was still denied access to the Law Library, and the Offender Counsel Substitutes were also being denied access to the "Medical Dorms."

As Mr. Kurz is elderly, with multiple health risks, and is wheelchair bound, he was considered as part of the "vulnerable" Population in the Louisiana Department of Corrections. This Court must consider the fact the Louisiana State Penitentiary took every measure possible to ensure the health and welfare of the Offenders were susceptible to contract the Coronavirus.

Only recently has Mr. Kurz been allowed access to the Law Library due to the penitentiary restrictions concerning the Coronavirus. Mr. Kurz respectfully requests that this Honorable Court deem the time-frame of the Law Library's closing, and his denial to access to the Law Library, effectively denying him access to the courts, as collateral estoppel.

WHEREFORE, for the reasons stated in this objection in this matter, find that Mr. Kurz meets the narrow exceptions for equitable tolling, review these issues on their merits.

## STATEMENT OF THE CASE

Mr. Kurz was charged by a Grand Jury Indictment with one Count of Aggravated Rape, under *LSA-R.S. 14:42*,[1] which was alleged to have occurred between July 7, 1975 and July 6, 1977 (Rec.p. 5). Mr. Kurz was sentenced to life imprisoned without the benefit of Probation, Parole, or Suspension of Sentence. (Rec.p. 956).

Mr. Kurz timely appealed his conviction and sentence to the Louisiana Second Circuit Court of Appeal, was denied on February 28, 2018. However, the Circuit Court of Appeals amended his sentence to 50 years of incarceration at labor in Docket Number 53,829-KH.

Mr. Kurz has not been re-sentenced after the remand from the Louisiana Second Circuit Court of Appeals. Mr. Kurz should have been re-sentenced to 20 years instead of 50.

Mr. Kurz timely filed for collateral review on February 26, 2020, was denied on May 18, 2020. On September 24, 2020, Mr. Kurz timely filed for Supervisory Writs to the Court of Appeal, which was denied on November 12, 2020, On November 20, 2020, Mr. Kurz filed Writs to the Louisiana Supreme Court, which was denied on March 23, 2021, in Docket No.: 2021-KH-157.

On June 24, 2021, Mr. Kurz filed his Application for Writ of Habeas Corpus, which was denied on November 10, 2021. On October 26, 2021, Judge Elizabeth Foote Denied Mr. Kurz the right to proceed in forma pauperis.

On April 5, 2022, the United States Fifth Circuit Court of Appeals denied Mr. Kurz's request for a Certificate of Appealability in Case Number 21-30713.

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

## *A BRIEF OVERVIEW OF THE FACTS*

Mr. Kurz is the biological uncle of JSC, the alleged victim. During a police interview that was secondary to another investigation, JSC disclosed that Mr. Kurz had touched him sexually beginning at age four and that varying forms of sexual conduct continued until he was 14 years old.

JSC related that Mr. Kurz would attend family gatherings at JSC's grandmother's house, and that Mr. Kurz first touched him on his genitals at age 4 (Rec.p. 779). JSC testified that the sexual activity took place between age 4 and 14, that it occurred at different locations, and that it ranged from fondling to oral sex (Rec.p. 780).

At trial, JSC testified that the first incident of "penetration" occurred at age 11, continued through Age 14, and at least a dozen times. He claimed that he remembered the time, because he was still in elementary school, Summer Grove Elementary, and that he was an Elvis fan, so when Elvis died in 1977, it was a significant event to him (Rec.p. 783).

JSC testified that he would have been 12 years old in 1977, and that the anal penetration happened at least a year to a year and a half before that. He recalls it being very painful, but did not recall how he responded. He stated that it ended between the ages of 14 and 15 when he started dating a girl (Rec-p. 784).

JSC testified that he did not tell anyone until he was in his twenties, because he felt ashamed and scared, but that he told his parents about it when he was approximately 26 years old (Rec.p. 785). He decided to talk to the police after he learned Kurz had been accused of inappropriate sexual conduct with another young man (Rec.p. 786).

On cross-examination, JSC acknowledged that when he was approximately 18 years old,

his parents asked him if he had engaged in any sexual contact with Mr Kurz, he denied (Rec.p. 792). He also confirmed that, during his original police interview, he was asked about when the penetration first occurred and that he answered, "I was a little older. I couldn't tell you age, 10, 11, 12, or something like that." (Rec.p. 793). Later in the interview, JSC told the detective that he didn't remember how old he was when the penetration began, but then he said he was "definitely under 14" (Rec.p. 811).

Mr. Kurz was allowed to be prosecuted through the Ex Post Facto application of the Law in order to obtain a conviction. Had the Court properly applied the Law at the time of the allegations (1975 to 1977), the State would not have been allowed to legally prosecute this matter (2014-2016). La.C.Cr.P. Art. 572.

This matter stems from a 40-plus year so-called "delayed disclosure" of allegations against Mr. Kurz concerning unfounded and uncorroborated sexual abuse. What's most amazing is the fact that the State was able to present evidence of "other crimes" from other alleged victims in this matter even though *LSA-C.E. Art. 412.2* was enacted in 2001, when it was alleged that the instant sexual assaults occurred in the early to mid 1970's and the "other crimes" evidence was alleged to have occurred prior to the enactment of *412.2*. Mr. Kurz's conviction was also obtained with impeached testimony by his accuser, JSC.

Although there was no possibility of Mr. Kurz being sentenced to death for a conviction of Aggravated Rape at the time of the allegations, the State was still allowed to overcome the time limitations for institution of prosecution through the application of Ex Post Facto Law in order to prosecute after the original six-year time limitation for institution of prosecution[2] had expired.

[2] At the time of the allegation, the State had six years to institute prosecution because only a death penalty case had "no time limitation. See: *La.C.Cr.P. Arts. 571 and 572.*

Mr. Kurz was arrested in July of 2014 due to an accusation of Aggravated Rape of a Juvenile Under the Age of 12 by his 49-year-old nephew (JSC), which would have allegedly occurred prior to him turning the age of 12, for a time frame of 1975-1977.

During pre-trial the parties agreed that Louisiana's Laws at the time of the accusations would have to be utilized. It is also apparent that none of the parties fully understood the Laws during the periods of 1975-77. Defense counsel filed a Motion to Dismiss the Charges as they had proscribed by 2014, and the Court summarily dismissed the motion. *La.C.Cr.P. Art. 571* was "muted" by the United States Supreme Court in 1974, ceasing Death Penalty for crimes. The Louisiana Legislature failed to reconstruct *Art. 571* until September of 1984.

Louisiana jurisprudence during the 1975-77 period of the accusation did not allow the State to seek the Death Penalty as punishment, and the Courts made the decision to use the Lesser Included Offense of Aggravated Rape being non-capital in nature, and would sentence the accused to a 20-year term of incarceration. That jurisprudence in this case would be negated by *La.C.Cr.P. Art. 571*, which by jurisprudence, then, set non-capital crimes with a six-year prescriptive period pursuant to *La.C.Cr.P Art 572.*

Mr. Kurz's charge would have prescribed between July 7, 1981 and July 7, 1983. In 1984, Art. 571 was amended to include the wording "Death or Life Sentence." As such, the Court's use of *Art. 571* to Mr. Kurz's case would entail the use of Ex-Post Facto law, and a prohibition of *Art. I, § 10, cl. 1* to the United States Constitution; *LSA-R.S. 1:2*; Sixth and Fourteenth Amendments to the United States Constitution. Mr. Kurz should never have been arrested, tried, convicted, and sentenced by the State of Louisiana.

The trial of Mr. Kurz was an aggrieved action by the use of Ex-Post Facto Laws, as the

Court allowed the State to use the Law as it was applied in 2014-16 (the Law at the time of his trial), even though all parties had agreed that the Law at the time of the allegation would (1975-1977) be used. The Laws used during the course of Mr. Kurz's trial were used mostly through the use of Ex-Post Laws. i.e., *LSA-C.E. Art. 412.2* (which was enacted in 2001), Acts 401-405 (which were enacted in 1989), instead of the Laws that were repealed in 1988, which disallowed "other crime" evidence which was not relevant to the charge.

The State erroneously informed the jury that the defense had misrepresented the Law rebuttal to the jury during closing arguments. But, the State informed the jury that the Court were using the Law as it was in effect in 1977 (which is a misstatement by the prosecutor).

The State of Louisiana, irrelevant to *Art. 572*, has arrested, tried, convicted, and sentenced a man whom Louisiana Law protected from such action. Mr. Kurz should be immediately released and his rights and freedoms re-instated by the Court.

***APPLICABLE STANDARD OF REVIEW***

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved in an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *28 U.S. C.A. § 2254(d).*

In a habeas corpus proceeding before a district judge, the final order shall be subject to review, on appeal by the court of appeals for the circuit in which the proceeding is held *28 U.S. CA. § 2253(a)*. Unless a circuit justice or judge issues a COA, an appeal may not be taken to the

court of appeals from the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court. *28 U.S.C.A. § 2253(c)(1)(A)*. A COA may issue under § *2253(e)(1)* only if the applicant has made a substantial showing of the denial of a constitutional right. *28 U.S. C.A. § 2253(c)*

(2). *Slack v. McDaniel*, 120 S.Ct. 1595, 1603, 529 U.S. 473, 483 (2000). The COA under § *2253(c)(1)* shall indicate specific issue or issues satisfy the showing required by § *2253(c)(2)*. Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy *§ 2253(c)* is that the petitioner demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Slack*, supra, at 1604, 529 U.S., at 484.

## REASON FOR GRANTING THIS PETITION

## Issue One

***Reasonable jurists would determine there was insufficient evidence to support Mr. Kurz's convictions.***

### LAW AND ARGUMENT

In evaluating the sufficiency of the evidence to support a conviction "the relevant question if whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 99 S.Ct. 2781, 2789 (1979). The *Jackson* inquiry "does not focus on whether the trier of fact made the correct guilt or innocence determination, but rather whether it made a decision to convict or acquit." *Herrera v. Collins*, 113 S.Ct. 853, 861 (1993).

Habeas corpus relief is available with respect to a claim that was adjudicated on the merits in a state court only if the adjudication (1) resulted in a decision that was contrary to, or involved

an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. *28 U.S.C. § 2254(d).* Thus a state-court decision rejecting a sufficiency challenge is reviewed under a doubly deferential standard. It may not be overturned on federal habeas unless the decision was an objectively unreasonable application of the deferential *Jackson* standard. *Parker v. Matthews,* 132 S.Ct. 2148, 2152 (2012); *Harrell v. Cain,* 595 Fed.Appx. 439 (5th Cir. 2015).

Mr. Kurz has challenged the sufficiency of the evidence supporting his conviction for Aggravated Rape. For this reason, this Honorable Court "should preliminarily determine the sufficiency of the evidence before discussing the other issues on Appeal."

This is because "a finding of insufficient evidence to support the guilty verdict bars the retrial of a defendant based on the constitutional protection against Double Jeopardy," and renders all other issues relating to that charge moot.

Mr. Kurz shows that a reviewing Court's deference regarding credibility determinations is not absolute. When a trier of fact relies on the testimony of a single witness to establish a fundamental conclusion, that witness's testimony must be free of internal contradictions with respect to factual conclusion. On appellate review, this principle has been stated as follows: [i]n the absence of internal contradiction or irreconcilable conflict with physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support for a requisite factual conclusion.

A factual conclusion is not necessarily supported by constitutionally sufficient evidence when the conclusion is based on testimony that is internally contradictory or cannot be reconciled with physical evidence. While the trier of fact in a criminal case is afforded deference in making

credibility determinations regarding witness testimony, this deference is limited by the bounds of rationality.

JSC's account of the allegations are highly inaccurate due to the discrepancies between his statements and the actual testimony, which were so substantial that trial counsel was able to impeach him during his testimony, included the lack of physical, medical, or DNA evidence.

First and foremost, the State has failed to prove the most essential elements of the crime charged (the age of the alleged victim at the time of the offense). At the time of this allegation, *LSA-R.S. 14:42* stated, "victim was under the age of 12." During JSC's initial "Skype" interview with Det. Moore, JSC was unable to adequately determine how old he was at the time of these allegations, including stating that this when he was, "10, 11, 12, or something like that" (Rec.pp. 783, 795, 800). JSC was absolutely sure that these alleged incidents occurred prior to his attaining the age of 14, even though his testimony consisted of, "I don't remember" (when questioned about his age of the allegation). The courts cannot determine that they have met the most essential element of the offense if the alleged victim can't even remember the age at the time of the allegation.

What really calls into the question of the age of the allegation is the fact that JSC couldn't remember whether or not he had reached puberty the time (See: Rec.pp. 788-9). Every male specifically remembers when they attain puberty, because it is one of the most memorable milestones in their lives.

As the age of the alleged victim is one of the essential elements, the State has to prove that JSC was under the age of 12 at the time of these allegations. One of the most important factors that must be considered in determining the evidence of the age presented, is the fact that there was about a forty (40) year span between the time of the allegation and the time of the disclosure of

the allegations, which could reasonably be contributed to the fact that JSC could not remember due to a primary allusion of a dream induced memory.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects persons accused of a crime against conviction unless the State proves every element of the offense beyond a reasonable doubt. In re *Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970);[3] See: *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The deferential standard of review, whereby reviewing courts must affirm a conviction if, after viewing the evidence and all reasonable inferences in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, does not permit the type of fine-grained factual parsing necessary to determine that the evidence presented to the factfinder was in "equipoise," and that therefore reversal of the conviction is warranted; abrogating *United States v. Jaramillo*, 42 F.3d 920, *United States v. Ortega Reyna*, 148 F.3d 540, *United States v. Penaloza-Duarte*, 473 F.3d 575, and, *United States v. Stewart*, 145 F.3d 273. Criminal Law Key 110k1159.2(1).

Courts reviewing a conviction are empowered to consider whether the inferences drawn by a jury were rational, as opposed to being speculative or insupportable, and whether the evidence is sufficient to every element of the crime. Criminal Law Key 110k1159.2(8).

The *Jackson* standard, which has been repeatedly reaffirmed by this Honorable Supreme Court, may be difficult to apply to specific cases, but is theoretically straightforward. In contrast, the "equipoise rule" is ambiguous. At one level, whether it applies only to cases ungirded by

[3] This type of error has been recognized as patent error preventing conviction for the offense, *La.C.Cr.P. art. 920(2)*, see indicative listing at *State v. Guillot*, 200 La. 935, 9 So.2d 235, 239 (1942). Quoting: *State v. Crosby*, 338 So.2d 584, 588 (La. 1976).

circumstantial evidence, as opposed to or circumstantial evidence, is not entirely clear. Moreover, no court opinion has explained how a court determines that evidence, even viewed most favorably to the prosecution, is "in equipoise." Is it a matter of counting inferences or of determining qualitatively whether inferences equally support a theory of guilt or innocence?

*Jackson* also "unambiguously instructs that a reviewing court, 'faced with a record of historical facts that supports conflicting inferences must presume - - even if it does not affirmatively appear in the record - - that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Cavazos v. Smith,* 132 S.Ct. 2, 6, 181 L.Ed2d 311 (2011).

In any event, appellate courts are authorized to review verdicts of conviction for evidentiary "equipoise," they must do so on a cold appellate record without the benefit of the dramatic insights gained from watching the trial. The potential to usurp the jury's function in such circumstances is inescapable. *Jackson's* "deferential standard" of review, however, "does not permit the type of fine-grained parsing" necessary to determine the evidence presented to the factfinder was in "equipoise." Compare: *Coleman v. Johnson*, 132 S.Ct. 2060, 2064, 182 L.Ed,2d 978 (2012).

This case gives the Court the opportunity to give concrete substance to the rule of law that contradictory testimony, such incredible, inherently improbable or impeached testimony, is insufficient to uphold a conviction.

*Corroboration of a victim's testimony in sexual offense cases is triggered only by contradictions in the victim's trial testimony. Thus, corroboration is mandated the victim's testimony is so contradictory and in conflict with physical facts, surrounding circumstances and common experience that its validity is rendered doubtful such that corroboration of the victim's testimony is required to sustain the conviction.*

*75 CJS Rape § 94*

This Court must note jurors are not trained in Law, and therefore any situation not properly explained in lay terms will be taken out of context to the extent that a defendant is denied a fair and impartial trial. Had anyone explained, in simple terms the correct "sufficiency of the evidence standard," of the Law of the "lack of evidence," Mr. Kurz would not have been found guilty.

*"The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the State proved the essential elements of the crime beyond a reasonable doubt."*

The rule regarding circumstantial evidence is set forth in *LSA-R.S. 15:438* as follows:

*"...assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence."*

As stated by the U.S. Fifth Circuit Court of Appeals, in *Fitzpatrick v. United States*, 410 F.2d 513, 516 (1969); "But in a circumstantial evidence case the inference to be drawn from the evidence must not only be consistent with guilt but inconsistent with every reasonable hypothesis of innocence."

*LSA-R.S. 15:438.*

There is no corroborating evidence in this case. The testimony of the accusing witness in this case was clearly contradictory and greatly impeached by the defense, as shown numerous times in the record, notwithstanding the fact that the State suppressed further *Brady* impeachment evidence from the defense at trial...

Further, incredible, contradictory, or impeached testimony fails to establish a corpus delicti in the first instance, and also goes to the *Winship* standard at trial.

Because JSC's statements and testimony regarding the indispensable element of his age at the time of the offense are internally contradictory, this Court should find that his uncorroborated

testimony is insufficient, standing alone, to support Mr. Kurz's conviction for Aggravated Rape. In the absence of sufficient evidence proving the essential element related to JSC's age at the time of the offense, Mr. Kurz's conviction for Aggravated Rape should be reversed. *Jackson*, 443 U.S. 307.

JSC was adamant that these allegations had occurred prior to him turning 14 years of age due to the fact that he had started dating a girl at that time (Rec.pp- 780, 783, 795, 815-6). The second time that JSC was asked his age at the time of the allegation, he simply stated, "I wasn't sure. I was under the age of 14." Conclusive evidence cannot be ignored that the victim was not sure the offense occurred and other witness failed to corroborate the victim's testimony. JSC testified to the fact that he had forgotten about the death of Elvis during his interview with the investigators (Rec.p. 809), but made a big deal of Elvis' death during trial, testifying that the allegations had occurred approximately eighteen (18) months prior to the death of Elvis.

The State relied "heavily" on the time of the death of Elvis (See: Closing Arguments and State's Rebuttal). Although JSC testified that he was able to recall the events, because he was a "Huge" Elvis fan, and that it was about a year and a half prior to Elvis' death (Rec.pp. 783-4), JSC made no reference to such during the "Skype" interview with Detective Moore (Rec.pp. 804, 809, 812). Reasonable jurists would find that an individual would most likely remember events that had happened prior to the allegation, not after.

How can someone state that the very reason that they could remember incidents was due to a "Memorable Event" such as the death of Elvis, and fail to state such during the initial interview? JSC only remembered Elvis' death when it was discovered that, according to the "old Law' (1975-77), the alleged victim had to be under the age of 12 instead of 13.

Also, as the State relied on "memorable events" during these proceedings, one must note

that probably the most memorable event that a juvenile has is when they start growing pubic hair. In this case, JSC was unable to remember if he had any pubic hair at the time of the alleged offense (Rec.p. 788).

Had JSC been raped at such a young age, there would have been some type of evidence at the time (such as blood in his underwear, or the need for some type of medical treatment). A prime example is the fact that JSC testified that he was not sure if he had blood in his underwear after the initial encounter with Mr. Kurz (Rec-p. 791). Surely, someone would remember if there had been any blood in their underwear or not.

The testimony presented also adduced the fact that JSC had continued to visit with Mr. Kurz after experiencing "excruciating' pain from the encounter (Rec.p. 784), and that other incidents of this nature had allegedly occurred until the age of approximately 14 years of age (Rec.pp. 780, 783, 795). As JSC did not live in the same residence with Mr. Kurz (JSC lived approximately 18 miles from Mr. Kurz's home), nor was he required to be at Mr. Kurz's home, JSC testified that he continued to go to Mr. Kurz's home because "He was my uncle and I enjoyed the things we did together," and "That's the only chance I got to do that type of thing" (Rec.pp. 790, 813).

There was insufficient evidence that the allegations that JSC has placed against Mr. Kurz occurred prior to his fourteenth birthday, the evidence is greatly lacking that the State had proved beyond a reasonable doubt that this allegation occurred prior to JSC attaining the age of 12.

It could be considered strange that JSC kept this to himself for close to forty (40) years, informing his parents in 1984 that nothing had occurred between himself and Mr. Kurz (Rec.pp. 792-3). But, JSC also testified he had informed his parents in the late 80's of the alleged incidents (Rec-p. 785).

Most interestingly is the fact that JSC testified that he had not even discussed this matter in over 20 years (until he discussed such with Detective Moore). But, JSC admitted that he had discussed the alleged incidents with his mother for two (2) days prior to his interview with the detective (Rec.p. 809).

When a state fails to prove every element beyond a reasonable doubt, a due process violation occurs. *Winship*, supra The constitutional nature of the claim is far too important to leave review of a valid claim to make review discretionary by the working of a law. The United States Constitution requires more.

WHEREFORE, for the foregoing reasons, Mr. Kurz contends the State has failed to meet its heavy burden of proof of guilt beyond a reasonable doubt, and this matter should be dismissed.

## Issue Two

***Reasonable jurists would determine that Mr. Kurz was convicted with the use of Ex Post Facto Law; Stogner v. California, 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed. 544 (2003); Sixth and Fourteenth Amendments to the United States Constitution.***

### LAW AND ARGUMENT

Mr. Kurz has properly argued that the district court erred in allowing the State to prosecute this matter even after the time limitations had expired Accordingly, the Law applicable to Mr. Kurz's case is the law at the time of the offense. See: *State v. Sugasti,* 820 So.2d 518 (La. 6/2/02).

Prior to the commencement of trial, the parties agreed that the Laws were in effect in 1975 and 1976 were to be utilized. But, according to the Record, different Laws from different eras were utilized during these proceedings, as follows below:

***Ex Post Facto application of time limitations:***

*La-C.Cr.P. Art. 571* had been revised in 1984 to include crimes for which the "punishment may be life imprisonment." Prior to the amendment, since its inception in 1966, *La C.Cr.P. Art. 571* stated:

> *"There is no time limitation upon the institution of prosecution for any crime for which the death penalty may be imposed."*

At the time of the alleged incident between Mr. Kurz and his nephew, *La. C.Cr.P. Art. 571* provided that there was no time limitation on any crime "for which the death penalty may be imposed". In 1984, the Legislators changed *Art. 571* to include, "Which the punishment may be death or life imprisonment."

During the time Kurz allegedly raped the victim, *LSA-R.S. 14:42* provided mandatory death penalty, and that in 1976, the United States Supreme Court abrogated the mandatory death penalty provision of *LSA-R.S. 14:42* as cruel and unusual punishment." *Selman v. Louisiana*, 428 U.S. 906, 96 S.Ct. 3214, 49 L.Ed.2d 1212 (1976).

However, it must be noted that *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726 (U.S. 1972), this United States Supreme Court had held that, "the imposition and carrying out of death penalty in cases before courts would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."

As the death penalty had been abolished with this United States Supreme Court ruling in *Furman*, supra, Mr. Kurz's charge could no longer be considered a "capital" crime due to the fact that there could be no imposition of the death penalty in his case. Hence, in the instant case, the time limitation for institution of prosecution would be six (6) years due to the fact that this charge is no longer defined as a "Capital" offense at the time of the alleged incident. It must be noted that this was not corrected until 1984 (eight years after the allegation).

The Court of Appeals correctly acknowledged that, "after the mandatory death penalty for Aggravated Rape was held unconstitutional, *Art. 571* could not strictly apply in this case." But, the Court erroneously determined that *Art. 571* continued to apply to Aggravated Rape despite the unconstitutionality of the mandatory death penalty prescribed for that crime. Therefore, *La C.Cr.P. Art. 572* applies a 6-year prescriptive period.

The Court of Appeals has erroneously determined that the Legislature clearly manifested its intention that there be no time limit on the institution of prosecution for Aggravated Rape. This is a misapplication of statutory laws. The Legislators were "silent" as to whether the newly revised *Art. 571* was to be applied retroactively,[4] until the correction in 1984.

Accordingly, *LSA-R.S. 1:2* Revised Statutes not retroactive, simply states that, "No Section of the Revised Statutes is retroactive unless it is expressly so stated." Simply put, had the Legislators intended *La C.Cr.P. Art. 571* to be retroactive, it would have been addressed in the Statute.

Prior to 1976, the crime of Aggravated Rape had only one sentence: the death penalty. However, in *Selman v. Louisiana,* supra, the United States Supreme Court held that Louisiana's mandatory death penalty for Aggravated Rape was "Cruel and Unusual" punishment. At that time, the applicable Criminal Code Article for time limitations was *La.C.Cr.P. Art. 571*. In 1975 and 1976, *Art. 571* provided that there was no time limitation for a prosecution for any crime which may be death. All other felonies had a time limitation.

As a result, *LSA-R.S. 14:42* had no penalty. The initial concern with the appellate courts was with the penalty; until the Legislature addressed the matter. The Louisiana Supreme Court in *State v. Lee,* 340 So.2d 180 (La. 1976), held that in the absence of legislation setting a new penalty, the proper sentence would be the serious penalty for the lesser included offense. In the case of *Lee*

[4] Unlike in La.C.Cr.P. Art. 572 B(4), which states , "The Paragraph shall have retroactive application to crimes prior to June 20, 2003."

supra, it was Attempted Aggravated Rape, carrying a maximum sentence of twenty (20) years: That decision was also affirmed in *State v. Fraise*, 350 So.2d 154 (La 1977).

However, this Court must also note that due to Legislative oversight, Louisiana failed to correct the fact that Aggravated Rape was no longer considered a capital offense until it amended its statutes in 1984. Therefore, Mr. Kurz should not be exposed to the application of an Ex Post Facto Law which was enacted after his initial time limitations had expired. In the initial stages of these proceedings, the parties agreed that the Laws from 1975 and 1976 had to be applied. However, it appears that this agreement was lost in the shuffle. Could that be due to the fact that the State had lost the right to prosecute? Most likely.

It must be noted that in *State v. D.T.*, 998 So.2d 1258 (La App. 3rd Cir. 12/17/08), the Court determined that "ML's testimony clearly indicated that Defendant raped her in 1981, and that this was the only incident of rape. In 1981, Aggravated Rape was punishable by life imprisonment without the benefit of Probation, Parole, or Suspension of Sentence and subject to a six-year prescriptive period." It was determined that the prescriptive period for prosecution for the offense against ML expired in 1987 according to the Law at the time of the offense.

Mr. Kurz's prescriptive period had expired prior to the enactment of the 1984 amendment to *La C.Cr.P. Art. 571*. This Court must also determine that the prescriptive period had expired prior to the newly enacted law, deferring to *La C.Cr.P. Art. 572* (6 years).

In 1978, the Louisiana Legislature amended *LSA-R.S. 14:42* to impose a mandatory life sentence for the offense of Aggravated Rape. Then, in 1984, the Louisiana Legislature amended *La C.Cr.P. 571* to include life sentences as capital offenses, which are not subjected to time limitations for prosecution.

Now, the question would be as to the "no time limitation" of capital offenses still applied to the offense of Aggravated Rape committed BEFORE the Legislature *LSA-R.S. 14:42* to provide for mandatory life sentences.

After *Furman* and *Selman*, the only penalty prescribed by *LSA-R.S. 14:42* was no longer available and a twenty-year sentence was imposed for convictions that were upheld See: *State v. Fraise*, 350 So.2d 154 (La 1977). If the death penalty could no longer be applied to Mr. Kurz, then a fortiori the case is no longer capital and the unlimited time limits for prosecution on *La. C.Cr.P. art. 571* do not apply. *La. C.Cr.P. Art. 572* would mandate this case be dismissed as the six-year time limit for prosecution has run.

The United States Supreme Court declared the death penalty for Aggravated Rape to be unconstitutional. No legislative adjustment of procedural rules could revive the death sentence. The United States Supreme Court has recently re-affirmed its position in *Kennedy v. Louisiana*, 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008). As a result, Aggravated Rape no longer met the definition of a capital offense according to *La. C.Cr.P. Art. 571* (pre-1978).

The courts have also incorrectly argued that the legislative silence meant that Aggravated Rape remained a capital offense, not subject to prescription. This argument overlooked the official comments of *La. C.Cr.P. Art. 571*, which notes that the 1928 Louisiana Code of Criminal Procedure excepted numerous other offenses (such as Aggravated Arson, Aggravated Burglary, and Armed Robbery) from prescription.

However, *Article 571's* restriction to capital offenses automatically made those offenses subject to a prescriptive period. Likewise, the post-*Selman v. Louisiana,* supra, reduction of the sentence from the capital sentence of mandatory death to a maximum sentence of twenty (20) years meant that Aggravated Rape that occurred during that gap (time-frame), was not a capital offense. It did not, and can not meet the clear language as set forth in *La. C.Cr.P. Art. 571* at that time.

This position is also supported by this United States Supreme Court, where it held that criminal statute of limitations protects a defendant's constitutional Due Process right to a fair trial when: the basic facts may have become obscured by the passage of time; and to minimize the

danger of official punishment because of acts in the far-distant past. It also found that criminal statutes of limitation are to be liberally construed in favor of repose in favor of the defendant. *U.S. v. Marion*, 404 U.S. 307, 92 S.Ct. 45, 30 L.Ed.2d 468.

Action by the legislature after the time frame of this alleged rape has classified aggravated rape as a crime for which life imprisonment may be imposed (Acts 1977) and in 1984, the legislature amended *La. C.Cr.P. art. 571* to state that there are no time limits on prosecutions where life sentences are available. But those enactments cannot work to the prejudice of Mr. Kurz. As to Mr. Kurz, any assertion of a "new" time limit for institution of prosecution would be an Ex Post Facto application under the United States Constitution *Art. I, § 10, cl. 1.*

Indeed, any legislation attempted to retroactively revise the penalty or the time limits for prosecution are unconstitutional. See for example, *Stogner v. California*, 539 U.S. 607, 123 S.Ct. 2446 (2003) denying the State of California the ability to retroactively change the statue of limitations. *Stogner* is interesting in that California wished to prosecute crimes almost as stale as the ones at issue here. The statute that would have allowed prosecution had a safeguard that Louisiana doesn't have:

*Independent evidence that clearly and convincingly corroborates the victim's allegation.*

In the present case, JCS's testimony only detailed one possible Aggravated Rape incident that occurred in 1976, when he was eleven (11) years old. As to the rest of the alleged acts, the State failed to obtain testimony concerning such. As a result, JCS vaguely referred to what happened as "abuse" or "it". Nothing in his "sparse" testimony proves, beyond a reasonable doubt, that Mr. Kurz had committed an Aggravated Rape upon him in light of the fact that the defense greatly impeached JCS'S uncorroborated testimony.

It must be noted that *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726 (U.S. Ga. 1972), this United States Supreme Court had held that, "the imposition and carrying out of the death penalty in cases before court would constitute cruel and unusual punishment in violation of the

Eighth and Fourteenth Amendments," which in fact, abolished the Death Penalty provision in Louisiana.

The revised statute threatened the kinds of harm that, in the United States Supreme Court's view, the Ex Post Facto Clause seeks to avoid. Long ago Justice Chase pointed out that the Clause protects liberty by preventing governments from enacting statutes with "manifestly unjust and oppressive" retroactive effects. See: *Calder v. Bull*, 3 Dall. 386, 386, 391, 1 L.Ed. 648 (1798). Judge Leonard Hand later wrote that extending a limitations period after the State has assured "a man that he has become safe from its pursuit...seems to most of us unfair and dishonest." See: *Falter v. United States*, 23 F.2d 420, 426 (C.A. 2).

The Constitution's two Ex Post Facto Clause prohibit the Federal Government and the States from enacting laws with certain retroactive effects. See: *Art. I, § 9, cl. 3* (Federal Government); *Art. I, § 10, cl. I* (States). The law at issue here created a new criminal limitations period that extends the time in which prosecution is allowed. It authorized criminal prosecutions that the passage of time had previously barred. Moreover, it was enacted after prior limitations periods for Mr. Kurz's alleged offense had expired. Do these features of the law, taken together, produce the kind of retroactivity that the Constitution forbids? This United States Supreme Court concluded that it did. See: *Stogner v. California*, supra, 538 U.S., at 612.

In *Stogner v. California*, 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003), this United States Supreme Court held in pertinent part that:

> *A law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution... Such features produce the kind of retroactivity that the Constitution forbids. First, the law threatens the kinds of harm that the Clause seeks to avoid, for the Clause protects liberty by preventing governments from enacting statutes with "manifestly unjust and oppressive" retroactive effects. >Calder v. Bull, 3 Dall. 386, 391, 1 L.Ed. 648. Second, the law falls literally within the categorical descriptions of ex post facto laws that Justice Chase set*

*forth more than 200 years ago > in Calder v. Bull, which this Court has recognized as an authoritative account of the Clause's scope, > Collins v. Youngblood, 497 U.S. 37, 46, 110 S.Ct. 2715, 111 L.Ed.2d 30. It falls within the second category, Justice Chase understood to include a new law that inflicts punishments where the party was not, by law, liable for any punishment. Third, numerous legislators, courts, and commentators have long believed it well settled that the Clause forbids resurrection of a time-barred prosecution.*

Simply put, in *Stogner*, this United States Supreme Court held that the Ex Post Facto Clause applying to state governments, United States Constitution, *Art. I, § 10, cl. 1*, prohibits application of a statutory amendment that has the effect of reviving a prosecution that was barred by the previously applicable limitations period. See: 539 U.S. 607, 632-33, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003). In *Stogner*, a defendant allegedly committed child sexual abuse between 1955 and 1973, at which time the applicable limitations period under the California statute was three years. *Id*, at 609-10, 123 S.Ct. 2446. In 1993, long after the limitations period had expired as to those crimes; the California legislature amended the statutory expressly to allow prosecution of child sex abuse crimes in certain circumstances, even when the earlier statute of limitations had expired. *Id*, at 609, 123 S.Ct. 2446. In striking down the law, the Supreme Court concluded that "a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto) Clause when it is applied to revive a previously time-barred prosecution." (emphasis added) *Id.*, at 632-33, 123 S.Ct. 2446.

In such a case, the government has refused "to play by its own rules." See: *Carmell v. Texas,* 529 U.S. 513, 533, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000). It has deprived the defendant of the "fair warning." See: *Weaver v. Graham*, 450 U.S. 24, 28, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), that might have led him to preserve exculpatory evidence. F. Wharton, Criminal Pleading and Practice § 3126, p, 210 (8th ed. 1880) ("The statute [of limitations] is...an amnesty, declaring that after a certain time...the offender shall be at liberty to return to his country . . . and ... may cease to preserve the proofs of his innocence"). And a Constitution that permits such extension,

by allowing legislators to pick and choose when to act retroactively, risks both "arbitrary and potentially vindictive legislation," and erosion of the separation of powers. See: *Weaver,* supra, at 29, and n. 10, 101 S. Ct. 960. See also, *Fletcher v. Peek*, 6 Cranch 87, 137-138, 3 L.Ed. 162 (1810) (viewing the Ex Post Facto Clause as a protection against "violent acts which might grow out of the feelings of the moment").

Second, the kind of statute at issue falls literally within the categorical descriptions of ex post facto laws set forth by Justice Chase more that 200 years ago in *Calder v. Bull*, supra, a characterization that the Courts have recognized as providing an authoritative account of the scope of the Ex Post Facto Clause. See: *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1900); Carmell, supra, at 539, 120 S. Ct. 1620.

Drawing substantially on Richard Wooddeson's 18th century commentary on the nature of ex post facto laws into categories that he described in two alternate ways. See, 529 U.S., at 522-24, where he wrote:

> " I will state what laws I consider ex post facto laws, within the words and the intent of prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such. 2nd. Every law that aggravates a crime, or makes it greater that it was, committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, committed. 4th. Every law that alters the legal rules of evidence, and offers less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive." *Calder*, supra, at 390-1, 1 L.Ed. 648 (emphasis altered from original); and, (emphasis added).

*Stogner v. California*, 539 U.S., at 613.

In his alternative description, Chase traced these four categories back to Parliament's earlier abusive acts, as follows:

Category 1: "Sometimes they respected the crime, by declaring acts of Treason, were not Treason, when committed."

Category 2: "[Alt other times they inflicted punishments, where the party was not, by law, liable to any punishment."

Category 3: "[I]n other cases, they inflicted greater punishment, than the law annexed to the offence."

Category 4: "[A]t other times, they violated the rules of evidence (to supply a deficiency of legal proof) by admitting one witness, when the existing law required two; by receiving evidence without oath; or the oath of the wife against the husband; or other testimony, which the courts of justice would not admit" See: 3 Dall., at 389, 1 L.Ed 648 (emphasis altered from the original).

The fourth category, including any "law that the legal rules of evidence ..." best describes this situation due to the fact that, according to the Law, Mr. Kurz's charge was no longer considered "Capital" the time of the offense because the Death Penalty had been abolished prior the alleged commencement of this offense, including any ' 'law that aggravates a crime, or makes it greater than it was, when committed" Id., 3 Dall., at 389, 1 L.Ed. 648, describes Louisiana's statute as long as those words are understood as Justice Chase understood them. i.e., as referring to a statute that "inflict[s] punishments, where the party was not, by law, liable to any punishment." *Id.*, at 389, 1 L.Ed. 648. See also: 2 R. Wooddeson, A Systematical View of the Laws of England 638 (1792) (hereinafter Wooddeson, Systematical View) (discussing the ex post facto status of a law that affects punishment by "making therein some innovation, or creating some forfeiture or disability, not incurred in the ordinary course of law" (emphasis added).

After (but not before) the original statute of limitations had expired, a party such as Mr. Kurz was not "liable to any punishment." Louisiana's new statute therefore "aggravated" Mr. Kurz's alleged crime, or made it "greater than it was, when committed," in the sense that *La. C.Cr.P. Art. 571* only applied to charges which required the Death Penalty, which, in fact, "inflicted punishment" for past criminal conduct that (prior to the amendment of the statute) did not trigger any such liability. See also: H. Black, American Constitutional Law § 266, p. 700 (4th

Ed. 1927) (hereinafter, Black, American Constitutional Law) ("[A]n act condoned by the expiration of the statute of limitations is no longer a punishable offense").

It is consequently not surprising that New Jersey's highest court long ago recognized that Chase's alternative description of second category laws "exactly describes the operation" of the kind of statute at issue here. See also: *H Black, Constitutional Prohibitions Against Legislation Impairing the Obligation of Contracts, and Against Retroactive md Ex Post Facto Laws § 235, p. 298 (1887)* (hereinafter Black, Constitutional Prohibitions). The amendment to *La. C.Cr.P. Art. 571* certainly makes this a punishable offense which was previously an obliterated offense.

So to understand the second category (as applying where a new [or amended] law inflicts a punishment upon a person not then subject to that punishment, to any degree) explains how and why that category differs from both the first category (making criminal noncriminal behavior) and the third category (aggravating the punishment). And this understanding is consistent, in relevant part, with Chase's second category examples — examples specifically provided where the party not, by law, liable to any punishment. See: *Calder*, 3 Dall., at 389, 1 L.Ed. 648.

Even courts have upheld extensions of unexpired statutes of limitations, they have consistently distinguished situations where limitations periods have expired. Further, they have often done so by saying that extension of existing limitation periods is not ex post facto "provided," "so long as," because," or "if' the prior limitations periods have not expired; a manner of speaking that suggests a presumption that revival of time-barred criminal cases is not allowed. e.g., *United States v. Madia*, 955 F.2d 538, 540 (C.A. 8 1992)("'provided' United States v. Richardson, 512 F.2d 105, 106 (C.A 3 1975) ("provided"); *People v. Anderson*, 53 Ill.2d 437, 440, 292 N.E.2d 364, 366 (1973) ("so long as"); *United States v. Haug*, 21 F.R.D. 22, 25, (N.D. Ohio 1957) ("as long as"), aff'd, 274 F.2d 885 (C.A. 6 1960), cert. denied, 365 U.S. 811, 81 S.Ct. 688, 5 L.Ed.2d 691 (1961); *United States Y. Kurzenknabe*, 136 F.Supp. 17, 23 (D.N.J. 1955)("so long as"); *Andrews v. State*, 392 So.2d 270, 271 (Fla. App. 1980)("if") See; e.g., *Shedd,* supra, at

268 (citing *Richardson,* supra, and *Andrews*, supra, as directly supporting a conclusion that a law reviving time-barred offense is ex post facto). *Stogner v. California, supra* at 123 S.Ct., at 2453 - 2454).

To fall within federal and state constitutional prohibitions of ex post facto laws, statute in question must apply to events occurring before its enactment and it must disadvantage defendant affected by it.

***Constitutional Law K 2781.***

Mr. Kurz's conviction is a violation of the Ex Post Facto Laws due to the fact that the time limitations as set forth in *La.C.Cr.P. Arts. 571* and *572* at the time of the alleged commission of this offense had expired. According to the law at the time of the allegation, the State only had six (6) years in which to institute prosecution pursuant to *La C.Cr.P. Arts. 571* and *572* at the time of the offense (See: argument above).

WHEREFORE, this Court must find that Mr. Kurz's conviction was obtained in violation of an Ex Post Facto application of the Law; and this Court must be set aside the conviction and sentence.

***"Other crimes" evidence:***

The trial court abused its discretion by allowing Mr. Kurz to be prosecuted with the use of Ex Post Facto provisions of the law which were not in effect at the time of the alleged commission of this offense. The trial court subjected Mr. Kurz's trial to proceed with the use of "Other Crimes Evidence" (*LSA-C.E. Art. 412.2*) which would not have been permitted, had his trial been conducted between July 7, 1975 and July 6, 1977 (the years that the alleged acts occurred). This is a clear violation of *Art. I, § 10, cl. I* to the United States Constitution, *LSA-R.S. 1:2*; Sixth and Fourteenth Amendments to the United States Constitution.

Four categories of law violate the ex post facto prohibition: (1) any law that makes an action criminal that was innocent when done before the passing of the law, (2) any law that aggravates a crime or makes it greater than it was when committed; (3) any law that changes the punishment and inflicts greater punishment than the law provided the crime was committed; and (4) any law that alters the legal rules of evidence and requires less or different testimony than was required at the time the offense was committed, in order to obtain a conviction (emphasis added). See: *Constitutional Law K 2781; Constitutional Law K 2789; Constitutional Law K 2790; Constitutional Law K 2812.*

The Court must rely on the Law at the time of the offense; not the time of the proceedings. See: *State v. Sugasti,* 820 So.2d 518 (La 6/2/02). *LSA-C.E. Art. 412.2*:

Mr. Kurz was subjected to the State's Ex Post Facto use of "Other Crimes Evidence" pursuant to *LSA-C.E. Art. 412.2.*

*LSA-C.E. Art. 412.2* states in pertinent part:

*Art. 412.2.* Evidence of similar crimes, wrongs, or acts in sex offenses.
A. *When an accused is charged with a crime involving sexually assaultive behavior, or with acts that constitute a sex offense involving a victim who was under the age of seventeen at the time of the offense, evidence of the accused's commission of another crime, wrong, or act involving sexually assaultive behavior or acts which indicate a lustful disposition toward children may be admissible and may be considered for its bearing on my matter to it is relevant subject to the balancing test provided in Article 403.*

*LSA-C.E. 412.2* was added by Acts 2001, No. 1130, § 1. Amended by Acts 2004, No. 465, §1.

Therefore, the use of this Code of Evidence provision during Mr. Kurz's proceedings would be Ex Post Facto due to the fact *Art. 412.2* was not enacted until 2001, which is after this alleged offense occurred.

Accordingly, *LSA-R.S. 1:2* Revised Statutes not retroactive, simply states that, "No Section of the Revised Statutes is retroactive unless it is expressly so stated." Simply put, had the

Legislators intended *LSA-C.E. Art. 412.2* to be retroactive, it would have been addressed in the Statute.

None of the parties (excluding Mr. Kurz), have acknowledged that Ex Post Facto Laws have been applied throughout these proceedings although all parties agreed, prior to the commencement of trial, that the Law in effect in 1975 and 1976 were to be used. Also, the Courts have failed to admit that the time had on the prosecution in this case due to the Legislation's failure to "close the gap" prior to the time limitations expiring. Yet, as it stands, Mr. Kurz's pleas have fallen on deaf ears.

Has everyone forgotten how to research the earlier laws?

WHEREFORE, for the foregoing reasons, Mr. Kurz avers that his conviction was obtained with the use of "other crimes" evidence which must be considered Ex Post Facto, and his conviction and sentence must be set aside.

## Issue Three

***Reasonable jurists would determine that Mr. Kurz was denied effective assistance of counsel.***

### LAW AND ARGUMENT

Mr. Kurz contends that he was denied effective assistance of counsel during the course of these proceedings, a violation of the Sixth Amendment to the United States Constitution; thereby denying him a fair trial, a violation of the Fourteenth Amendment to the United States Constitution.

It should be noted that in one of the most well-noted cases decided by this United States Supreme Court concerning ineffective assistance of counsel was *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963), where Gideon had hand-written the Court complaining of his attorney's assistance in his case. The United States Supreme Court did not hold Mr. Gideon

to the same standards as a professional attorney at that time. Therefore, Mr. Kurz is requesting the same from this Honorable Court.

***Standard of Review:***

The Sixth Amendment guarantees those accused of crimes to have the assistance of counsel for their defense. The purpose of this Sixth Amendment right to counsel is to protect the fundamental right to a fair trial. *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932); *Johnson v. Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); *Gideon v. Wainwright,* 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed 2d 799 (1963); *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The skill and knowledge counsel is intended to afford a Defendant "ample opportunity to meet the case of the prosecution." *Strickland,* 466 U.S. at 685 (citing *Adams v. United States ex rel. McCann,* 317 U.S. 269, 275, 276, 63 S. Ct. 236, 240, 87 L.Ed 268 (1942)).

Acknowledging the extreme importance of this right, this United States Supreme Court has held: That a person happens to be a lawyer is present at trial alongside the accused ... is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, retained or appointed, who plays the role necessary to ensure the trial is fair.

*Strickland v. Washington,* 466 U.S. at 685. Thus, the Court has recognized that "the right to counsel is the right to effective assistance of counsel." *McMann v. Richardson,* 397 U. S. 759, 771 n.14, 90 S.Ct. 1441, 1449 n. 14, 25 L.Ed.2d 763, 773 (1970).

A defendant's claim of ineffective assistance of counsel is to be assessed by the two-part test of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Fuller*, 454 So.2d 119 (La 1984). The defendant must show that: (1) counsel's performance was deficient, and (2) that the deficiency prejudiced the defendant. Counsel's deficient performance

will have prejudiced the defendant if he shows that the errors were so serious as to deprive him of a fair trial. To carry his burden, the defendant "must show that there is a reasonable probability that, but counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 693, 104 S.Ct. at 2068. The defendant must make both showings to prove that counsel was so ineffective as to require reversal. *State v. Sparrow,* 612 So.2d 191, 199 (La App. 4th Cir. 1992).

"At the heart of effective representation is the independent duty to investigate and prepare." *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982) accord *Porter v. Wainwright*, 805 F.2d 930, 933 (11th Cir. 1986); *Tyler v. Kemp*, 755 F.2d 741 (11th Cir. 1985); *Douglas v. Wainwright*, 714 F.2d 1532 (11th Cir. 1983), vacated, 104 S.Ct. 3575, 82 L.Ed.2d 874 (1984), adhered to, 739 F.2d 531 (1984). As the Court held in *Wade v. Armontrout,* 798 F.2d 304 (8th Cir. 1986): Investigation is an essential component of the adversary process. "Because [the adversarial] testing process generally will not function properly unless counsel has done some investigation into the prosecution's case and into various defense strategies ... 'counsel has a duty to make reasonable investigations. ...'" *Id* at 307 (quoting Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 2589, 91 L.Ed.2d 305 (1986) (quoting Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

***Deficient Performance:***

Mr. Kurz contends he was denied effective assistance of counsel from counsel due to the following to wit:

***Independent Child Sexual Abuse Expert:***

Mr. Kurz has properly agued that his counsel was ineffective for failing to consult with and/or hire an expert during these proceedings.

This Court must already know that the State's Expert merely testified to bolster the credibility of the alleged victim in this case. The scientific community has determined that the type of testimony, as presented by the State, as "Junk Science," and is merely used to corroborate the testimony of the alleged victim's testimony. If the State's expert witness testimony over the years is reviewed, it must be noted that everyone has been sexually assaulted as a child. Their testimony concerning "consistent with" sexual abuse, could also be analyzed as "consistent with" every day living.

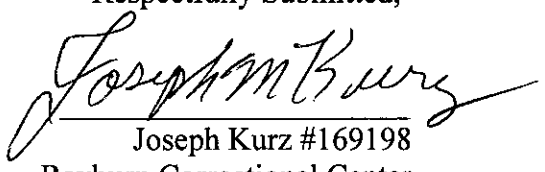
In *Gersten v. Senkowski*, 299 F.Supp.2d 84 (E.D.N.Y. 2004), the Court held that, (1) counsel's performance was constitutionally deficient for failure to consult with or call expert medical witness to rebut testimony of examining physician who stated that examination results highly suggested that the victim suffered from penetrating vaginal trauma and anal tearing; and, (2) counsel's performance was constitutionally deficient for counsel's failure to consult with or call psychological expert to rebut testimony of child psychologist."

Furthermore, in *Gersten v. Senkowski*, 426 F.3d 588 (C.A. 2 (N.Y.) 2005), the Court held that: "In child sex abuse cases in which, beyond the purported medical evidence of abuse, State's case rested on credibility of the alleged victim, opposed to direct physical evidence, it was deficient performance on counsel's part to fail to call as a witness, or even to consult in preparation for trial and cross examination of the prosecution's witnesses, any medical expert on child abuse."

## CONCLUSION

In retrospect of all presented in this matter, the petitioner states that a Writ of Certiorari should be granted in this matter.

Respectfully Submitted,



Joseph Kurz #169198
Rayburn Correctional Center
27268 Highway 21, North
Angie, Louisiana, 70426-3030