No._____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

TIMOTHY CALHOUN v. TIM HOOPER, Warden

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

[X] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s): U.S. Western District of Louisiana; and the U.S. Fifth Circuit Court of Appeal.

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court: Mr. Laue has never proceeded to the Federal Courts prior to this pleading.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Timothy Calhoun #495713, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$0	$0	$0	$0
Self-employment (Hobby Shop)	$0	$0	$0	$0
Income from real property (such as rental income)	$0	$0	$0	$0
Interest and dividends	$0	$0	$0	$0
Gifts	$0	$0	$0	$0
Alimony	$0	$0	$0	$0
Child Support	$0	$0	$0	$0
Retirement (such as social security, pensions, annuities, insurance)	$0	$0	$0	$0
Disability (such as social security, insurance payments)	$0	$0	$0	$0
Unemployment payments	$0	$0	$0	$0
Public-assistance (such as welfare)	$0	$0	$0	$0
Other (specify): N/A	$0	$0	$0	$0
Total monthly income:	$0	$0	$0	$0

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.): **Incarcerated**

Employer	**Address**	**Dates of Employment**	**Gross monthly pay**
N/A	N/A	N/A	$0
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	**Address**	**Dates of Employment**	**Gross monthly pay**
N/A	N/A	N/A	$0
			$
			$

4. How much cash do you and your spouse have? $0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	**Type of account**	**Amount you have**	**Amount your spouse has**
N/A	N/A	$0	$0
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

[ ] Home
Value N/A

[ ] Other real estate
Value N/A

[ ] Motor Vehicle #1
Year, make & model N/A
Value N/A

[ ] Motor Vehicle #2
Year, make & model N/A
Value N/A

[ ] Other assets
Description N/A
Value N/A

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	**Amount owed to you**	**Amount owed to your spouse**
N/A	$0	$0
_____	$_____	$_____
_____	$_____	$_____

7. State the persons who rely on you or your spouse for support.

Name	**Relationship**	**Age**
N/A	N/A	

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	**Your spouse**
Rent or home-mortgage payment (included lot rented for mobile home) Are real estate taxes include? [ ] Yes [ ] No Is property insurance included? [ ] Yes [ ] No	$0	$0
Utilities (electricity, heating fuel, water, sewer, and telephone)	$0	$0
Home maintenance (repairs and upkeep)	$0	$0
Food	$0	$0
Clothing	$0	$0
Laundry and dry-cleaning	$0	$0
Medical and dental expenses	$0	$0

	You	Your spouse
Transportation (not including motor vehicle payments)	$0	$0
Recreation, entertainment, newspapers, magazines, etc.	$0	$0
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$0	$O
Life	$0	$0
Health	$0	$0
Motor Vehicle	$0	$0
Other: N/A	$0	$0
Taxes (not deducted from wages or included in mortgage payments)		
(specify): N/A	$0	$0
Installment payments		
Motor Vehicle	$0	$0
Credit card(s)	$0	$0
Department store(s)	$0	$0
Other: N/A	$0	$0
Alimony, maintenance, and support paid to others	$0	$0
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$0	$0
Other (specify): N/A	$0	$0
Total monthly expense:	$0	$0

9. Do you expect any major changes to your monthly income or expense or in your assets or liabilities during the next 12 months?

[ ] Yes[X] No If yes, describe on an attached sheet.

10. Have you paid - or will you be paying - an attorney any money for services in connection with this case, including the completion of this form? [ ] Yes[X] No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid - or will you be paying - anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

[ ] Yes [X] No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

Incarcerated. No income.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 23rd day of June, 2022

(Signature)

No.: _____ ORIGINAL

In The
Supreme Court of the United States
_____ Term, _____

TIMOTHY W. CALHOUN v. TIM HOOPER, Warden

On Petition for a Writ of Certiorari to

U. S. FIFTH CIRCUIT COURT OF APPEALS

Timothy W. Calhoun #495713
MPEY/Cypress-2
Louisiana State Penitentiary
Angola, Louisiana 70712-9818

June 23, 2022

QUESTION PRESENTED

1: Reasonable jurists would find it debatable that the evidence is sufficient to support Mr. Calhoun's convictions;

2. Reasonable jurists would agree that Mr. Calhoun was denied effective assistance of trial counsel when counsel failed to consult with, or hire, an independent Child Sexual Abuse Expert;

3. Reasonable jurists would conclude that the Assistant District Attorney committed Prosecutorial Misconduct during the Closing Argument, denying Mr. Calhoun a fair and impartial trial, in violation of the Sixth and Fourteenth Amendments to the United States Constitution; (a) Failure to ensure that the Court included "limiting" instructions concerning the State's improper remarks during Closing Argument;

4. Reasonable jurists would agree that Mr. Calhoun was denied his right to a fair and impartial trial when the State allowed perjured testimony to go uncorrected.

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
4th Judicial District Court
P.O. Box 1652
Monroe, LA 71210-1652

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. Calhoun was indicted for 19 various allegations of sexual misconduct concerning five (5) different alleged victims which supposedly occurred over an eighteen (18) year period.

Mr. Calhoun was convicted on Counts one through eight and Counts sixteen through nineteen and was sentenced on April 26, 2016. Mr. Calhoun was sentenced to serve the total of two life terms plus thirty years (Rec.pp. 1634-35).

Mr. Calhoun's Appeal was filed October 21, 2016, and Supplemented on January 5, 2017. On April 5, 2017, the Circuit Court of Appeals affirmed Mr. Calhoun's convictions and sentences. Mr. Calhoun timely filed his Application for Writs of Certiorari on April 28, 2017, which was denied on March 9, 2018 in Docket No.: 2017-KO-1029.[1]

On May 1, 2019, Mr. Calhoun filed his PCR. On August 2, 2019, Mr. Calhoun's Application for PCR was denied by the court. On August 14, 2019, Mr. Calhoun filed his Notice of Intent to the district court.

On August 23, 2019, Mr. Calhoun His Application for Supervisory Writs to the Court of Appeal, which was Granted in Part and Remanded; and, Denied in Part. The Court of Appeal ordered that this matter be remanded to the district court in order to rule on Claim No. 7 where the district court had failed to rule on the ineffective assistance of counsel Claim pertaining to counsel's failure to file a Motion to Quash Count 7 for the expiration of time limitations.

The district court determined that Mr. Calhoun's was ineffective, but subjected to the harmless error analysis, and he was denied relief in this Claim. However, Mr. Calhoun humbly requests that this Court determine that reasonable jurists would determine that counsel's ineffectiveness should not be harmless, and Grant relief in this Issue.

Mr. Calhoun timely filed his Application for Writ of Review to the Louisiana Supreme Court on October 21, 2019, and was denied by the Louisiana Supreme Court on March 16, 2021 in Docket No.

[1] This Court must note that Mr. Calhoun did not receive his Ruling from the Louisiana Supreme Court until July 19, 2018 (See: Legal Mail Receipts enclosed).

2019-KH-1822.

Mr. Calhoun filed his Petition for Habeas Corpus on June 3, 2021, which was denied on October 7, 2021. On December 17, 2021, which was denied on

On June 3, 2021, Mr. Calhoun filed his Certificate of Appealability to the U.S. Fifth Circuit Court of Appeal, which was denied on March 29, 2022. At this time, Mr. Calhoun 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 W. CALHOUN V. TIM HOOPER, Warden

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

Pro Se Petitioner, Timothy W. Calhoun 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. Calhoun 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. Calhoun 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. Calhoun's federal petition to the U.S. Eastern District of Louisiana was denied on November 4, 2019. Mr. Calhoun'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. Calhoun'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 Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE FACTS

All of the alleged victims and their families in this case were related or they were close friends or acquaintances. They lived in close proximity with each other. The allegations began with the reporting to Child Protective Services by the father of JCS of sexual abuse by Mr. Calhoun upon JCS. JCS's mother is sister-in-law to Mr. Calhoun since her half-sister was married to him at the time. JCS's father had been at odds with Mr. Calhoun. JCS's father had sent his estranged wife text messages threatening that he would receive full custody since she allowed their children to play with Tim's children. At the time in August of 2013, she was living next door to Mr. Calhoun and his wife, her sister. JSC's father labeled Mr. Calhoun as a child molester since Mr. Calhoun was arrested and charged with a sex crime involving a juvenile in 1997 in West Monroe. The family knew this even though those accusations had been dismissed.

KS, another of the accusers, was a cousin of JCS. KS's father was best friends with JCS's father. Then allegations arose from AC. She also had animosity against Mr. Calhoun. She and her father had serious disagreements with Mr. Calhoun. AC's father is Mr. Calhoun father's uncle. The brothers had bad blood between them over their inheritance. AC had a reason to implicate Mr. Calhoun in crimes. Alleged victim, RJ came forward with her allegations against Mr. Calhoun at the request of AC. RJ and AC had been good childhood friends.

CJ was called being the alleged victim of the Sexual Assault in '97. Those charges were dismissed back then and Mr. Calhoun was found not guilty of them in this trial. The jury also rendered not guilty verdicts concerning all of the allegations made by JCS. JCS's mother testified that she had very serious

doubts that Mr. Calhoun had done anything wrong.

REASONS FOR GRANTING THE WRIT

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

The Courts have erroneously denied Mr. Calhoun collateral estoppel due to the Louisiana State Penitentiary being placed on Lock-Down during the Pandemic. 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 has allowed for all Offender Counsel Substitutes and the Law Library to be locked down, effectively halting any and all legal assistance and/or access to legal materials.

At that time, all legal aid at the Louisiana State Penitentiary was 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 Offenders who have not been vaccinated are not allowed to roam around the institution (Law Library, Library, Church, work, education, or Call-Outs). The Offender Counsel Substitutes, who provide assistance in the submission of meaningful

litigation, have only recently been allowed access to the Offenders who are not vaccinated.

At the time that Mr. Calhoun had received his ruling from the Louisiana Supreme Court, the Louisiana State Penitentiary had allowed the Counsel Substitutes ***very limited*** access to their computer files in order to assist the Offenders whose cases have been assigned to them. The Offenders who are not assigned as Counsels, 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 assist the Counsels that are assigned to assist them.

Although the Offenders were allowed limited access to the Law Library, their access is limited by a "by name Call-Out" only; which is a limited number of Offenders allowed in the Law Library in order to prevent Offenders from being exposed to the Covid -19 virus. At the time that the Louisiana State Penitentiary allowed Call-Outs to the Law Library, Mr. Calhoun was being housed in Cypress-2 (which is a medical dorm). Offenders housed in the medical dorms were restricted to their dorms, and were not allowed to co-mingle with any other Offenders (which includes Inmate Ministers, Offender Counsel Substitutes, and the Library).

Although these measures may be considered extensive, it appears that the measures have most likely saved many lives at this institution, considering the fact that Covid-19 had spread through many of the prison facilities at an alarming rate. Even though Louisiana received an "F" in protection of Inmates and Offenders during the course of the Pandemic, Louisiana State Penitentiary had a relatively low number of deaths due to exposure of the virus compared to the rest of the nation (even with Offenders living in "close quarters" to each other).

When Mr. Calhoun received the March 16, 2021 Ruling from the Louisiana Supreme Court, he was still denied access to the Law Library. Immediately upon being allowed access to the Law Library, Mr. Calhoun was placed on the Call-Out for the Law Library. Mr. Calhoun fully argued this in his Objection to the Magistrate's Report and Recommendation. Mr. Calhoun 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, and should be considered collateral estoppel.

Although Mr. Calhoun was able to file his Federal Habeas Corpus Petition to the U.S. Western District, at the time that the State had filed their Response, Mr. Calhoun and the Counsels were, once again, denied access to the Law Library. In fact, Mr. Calhoun was unable to file a Traverse to the State's Response in this matter.

Simply put, Mr. Calhoun was denied access to the Law Library and the Offender Counsel Substitute who are assigned to assist other Offenders. As Mr. Calhoun is a layman of the Law, he relies solely on the assistance of Offender Counsels in order to file his pleadings.

This Court must also note that after this Honorable Court reversed Mr. Ramos' conviction and sentence in *Ramos v. Louisiana*, 140 S.Ct. 1390 (4/20/20) due to the fact that this Court had declared that a conviction which was obtained with a non-unanimous jury verdict was unconstitutional, Mr. Ramos is still at the Louisiana State Penitentiary awaiting trial even though neither party has filed for a continuance, or any other motions which would allow the State additional time in which to proceed to trial.

In Mr. Ramos' case, defense counsel has been unable to file a Motion to Quash due to time limitations expiring due to the Pandemic, and the closures that had occurred during such. Many courts have considered the fact that Offenders (especially at the Louisiana State Penitentiary) were denied access to the courts due to closures of the Law Libraries and denial of access to the Offender Counsel Substitutes. These courts have considered pleadings timely which would not have been considered such as Offenders were actually "cut off" from researching their Issues, arguing their Issues, or having the ability to discuss their case with the Offender Counsel Substitutes.

LEGAL ARGUMENT

Reasonable jurists would determine that Mr. Calhoun was denied a fair and impartial trial; and that his convictions are in violation to the United States Constitution. Reasonable jurists would also agree

that Mr. Calhoun was prejudiced by the State presenting 19 Counts on five alleged victims. Although some of the charges were mandated to be tried by a six-person jury, the State was allowed to submit *all* of the charges simultaneously.

Mr. Calhoun was also denied effective assistance of trial counsel when defense counsel failed to request that the district court make available, funding for an expert witness. As counsel was aware that the State was calling its own expert witness, there can be no trial strategy for failing to hire an expert to ensure Mr. Calhoun a fair trial. Taken as a totality, counsel's performance fell below the objective standard of reasonableness.

WHEREFORE, for the arguments in Mr. Calhoun's original State pleadings and the arguments above, Mr. Calhoun requests that this Honorable Court Grant him the necessary relief.

LAW AND ARGUMENT

1. Reasonable jurists would find it debatable that the evidence is sufficient to support Mr. Calhoun's convictions for molestation of a juvenile.

The evidence presented was insufficient to support the verdicts. The Fifth and Fourteenth Amendments to the United States Constitution provides that no person shall be "deprived of life, liberty, or property without due process of law." Implicit in the Due Process Clause is the protection of an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re: Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Jackson v. Virginia*, 443 U.S. 407, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). An accused is entitled to an appellate review of the evidence to the extent that it supports a finding of guilty beyond a reasonable doubt. *Jackson v. Virginia*, supra.

Mr. Calhoun was convicted of twelve (12) different counts involving three different alleged victims (some with non-unanimous jury verdicts[2]). The convictions were: Aggravated Rape, Sexual Battery, and Indecent Behavior With Juveniles of AC; Aggravated Rape, Sexual Battery, and Indecent Behavior

[2] At this time, Mr. Calhoun is unable to produce documentation concerning his case pursuant to LSA-R.S. 46:1844(W). He is unable to obtain the transcript; therefore, he can only cite the transcript page numbers.

With Juveniles, Cruelty to a Juvenile, and, Molestation of a Juvenile on RJ; Sexual Battery, Indecent Behavior With Juveniles, Molestation, and Cruelty to a Juvenile on KS. In total, Mr. Calhoun received two consecutive life sentences plus thirty years. The jury returned verdicts of not guilty as to the alleged sex crimes against CJ and JCS.

As stated, Mr. Calhoun was found not guilty of the charges filed concerning JCS. However, the testimony and facts involving these allegations are importance since these were the first allegations brought forward concerning all of these charges. JSC's mother and father were in a heated divorce in August of 2013 (Rec.pp. 1309, 1321). JCS's father had reason to have Mr. Calhoun implicated as abusing his daughter. It appears that her father thought he could get full custody with restricted visitation rights by alleging that JCS's mother was unfit for allowing JSC to play at the Calhoun home. JCS's mother testified as to emails from the father threatening to brand Mr. Calhoun as a child molester (Rec.p. 1321). JCS's mother testified that, "I'm telling you right now that is this were just about JCS's case and they say the emails and text messages and everything that they would have a hard time convicting Tim Calhoun" (Rec.p. 1335).

The State's case included testimony of fourteen witnesses with no rebuttal witnesses. There was no physical evidence produced by the State to prove any of the crimes alleged. There was no DNA evidence or other scientific evidence or the results of any tests submitted. The case revolved only on the allegations of the alleged victims. No medical examination was performed other than a medical exam of KS (appellate counsel erroneously presented that JCS was the only alleged victim who had undergone any type of medical examination) which was negative for signs of abuse. Mr. Calhoun was acquitted of the allegations concerning CJ and JSC.

Under the circumstances, it is requested that this Court evaluate the evidence presented at trial to determine whether it was sufficient to sustain the conviction. A thorough review of the record reveals suspicious testimony sufficient to create a reasonable doubt concerning Mr. Calhoun's guilt of sexual

misconduct. This Court must determine that the State has failed to obtain sufficient evidence concerning Mr. Calhoun's convictions for the following reasons to wit:

A conviction must be based upon proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to upholding the verdict, to find the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1079).

Mr. Calhoun acknowledges that this Court typically accords great deference to a trier of fact's decision to accept or reject the testimony of a witness in whole or in part. Where there is conflicting testimony about factual matters the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. The trier of fact is charged to make a credibility determination, and may, within the bounds of rationality, accept or reject the testimony of any witness; the reviewing court may impinge on that discretion only to the extent necessary to guarantee the fundamental Due Process of Law.

Under LSA-R.S. 14:81.2, the State was required to prove that: (1) the lewd or lascivious acts occurred, and critically; (2) that they were accomplished by Defendant's use of force, violence, duress, menace, psychological intimidation, threat of great bodily harm, or use of influence over the victim by virtue of having a position of control or supervision over her.

When the State fails to prove any of the essential element; especially the "use of influence by virtue of position of control or supervision over the juvenile," the evidence is insufficient to support a conviction for Molestation of a Juvenile, but a responsive verdict of Indecent Behavior With a Juvenile may be appropriate.

Applying the foregoing laws and standard of review, Mr. Calhoun's conviction should be reversed because the State did not present any evidence that Mr. Calhoun used force, threats, intimidation, or use of influence upon (victim) by virtue of having a position of supervision or control over a juvenile in order to influence the juvenile into allowing the lewd or lascivious act to occur – is what separates the

crime of Molestation from other sexual crimes against juveniles that do not involve the manipulation of a victim by a person with authority over that victim. In order to constitute Molestation, more is required than simply ***having*** a position of supervision or control; the offender must actually ***use*** the influence gained by that position in order to overbear the will of the victim and accomplish the act complained of.

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

According to Mr. Calhoun's memory and notes, the above noted instruction is the one that was presented to the jury during the Jury Instructions (omitting the essential elements of Molestation of a Juvenile) prior to the commencement of the deliberations. The only difference between the statute and the jury instructions was the fact that the Court substituted the words "Indecent Behavior with Juveniles" with the word "Molestation."

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

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

LeBlanc, 506 So.2d at 1199.

To illustrate, the simple fact that a person is the father (or teacher, or babysitter, or employer) of a juvenile does not transform every lewd or lascivious act into a crime of Molestation. Instead, the person must use the influence gained by virtue of such position in a manner that acts as an equally culpable substitute for the other enumerated means by which Molestation is accomplished: "force, violence, duress, menace, psychological intimidation, [or] threat of great bodily harm." LSA-R.S. 14:81.2(A). These "aggravating factors," along with the use of (and influence gained by) a position of control or supervision, are what separate "Molestation of a Juvenile" from other offenses that punish and deter lewd and lascivious acts upon juveniles by adults. To this end, it is helpful to consider cases where reviewing courts in Louisiana have determined what does, or does not, constitute sufficient evidence in the particular context of this "use of influence" element.

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

The (victim) did not testify that Mr. Calhoun coerced her into committing these acts. Though certainly abnormal, (victim) seemed to describe these acts as having simply been committed by Mr. Calhoun without any discussion beforehand about what might happen if she did not allow them to occur. She did not testify that she was afraid of the consequences of prohibiting Mr. Calhoun from

committing these acts, nor did she testify that Mr. Calhoun used his authority over her to accomplish them. Even if the Court found that Mr. Calhoun held a position of supervision over (victim), that fact alone would not even be enough to satisfy the force or influence element; Mr. Calhoun must have ***used*** his influence over her to force her into participating in these acts against her will. On this record, the State failed to prove any such conduct on the part of Mr. Calhoun.

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

2. Reasonable jurists would agree that Mr. Calhoun was denied effective assistance of trial counsel when trial counsel failed to consult with, or hire, an Independent Child Sexual Abuse Expert. *Strickland v. Washington*; Sixth Amendment to the United States Constitution.

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

The district court, it its Ruling stated:

> After review, the court denied this claim. Trial counsel's failure to hire or consult with an expert regarding sexual abuse in children *could* be considered deficient performance. However, under *Strickland*, Petitioner must show counsel's performance was deficient *and* that Petitioner was prejudiced. The court cannot say, given the evidence presented at trial, Petitioner was prejudiced, as any expert hired or consulted would not have been able to overcome the State's evidence and the testimony presented.

This Court must also note 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, as 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."

Mr. Calhoun was prejudiced by defense counsel's objectively unreasonable performance in child sex abuse case in failing to investigate the medical expert testimony, which led him to decide not to challenge what was clearly the most significant corroborative evidence in State's case, which rested solely on victim's story; had counsel investigated and discovered expert witnesses, and called them to testify, and had they been credited, there was a reasonable probability that trier of fact would have rejected entirely of alleged victim's narrative as not credible, because her assertion that Mr. Calhoun penetrated her on numerous occasions would be inconsistent with lack of any medical evidence of penetration. Sixth Amendment to the United States Constitution.

Counsel's errors impacted not only the evidence supporting pepetration and explaining victim's delay in reporting, but also resulted in counsel foregoing presentation of evidence that could have cast serious doubt on veracity of alleged victim's testimony in its entirety.

This Court may summarize that it feels that Mr. Calhoun received meaningful representation. The Court may also determine that the tactics chosen by defense counsel were reasonable and he provided zealous representation of Mr. Calhoun. Mr. Calhoun is not second guessing his failed trial strategy, and

this is not the basis to vacate the judgment of conviction.

In *Gersten v. Senkowski*, 426 F.3d 588 (2nd Cir. 2005), the Court distinguished its decision in *Lindstadt v. Keane*, 239 F.3d 191 (2nd Cir. 2001), because, unlike in *Lindstadt*, (1) this case involved only a failure to consult or call expert witness witnesses, while in *Lindstadt* involved the cumulative effect of such failure alongside other deficiencies in counsel's performance, (2) the experts in the instant case did not offer their opinions as to the ultimate question of whether abuse occurred, rendering their testimony less significant, and (3) the experts in the instant case "did not rely on any studies or texts in reaching [their] conclusions."

In *Gersten*, supra, the Court found that "[had] counsel consulted a medical expert, it is likely he would have been able to present expert testimony ... to largely rebut the conclusions of Dr. Silecchia." *Id.* This would have "cast considerable doubt on Dr. Silecchia's testimony," and supported an inference "that no sexual abuse had occurred [and] ... that no penetrating sexual activity whatsoever had taken place. *Id.*, at 104.

Second, the Court faulted defense counsel for deciding on a theory of defense without having "conducted an adequate investigation into alternative, complementary defense." Moreover, a defense backed by expert medical testimony would have been considerably more compelling than a simple denial of sexual abuse, because it would have not only rebutted the prosecution's medical evidence but would have also cast considerable doubt on all of the daughter's testimony."

Third, the Court faulted defense counsel for failing to consult with or call a psychological expert, finding the failure to be "an independent and sufficient indication of deficiency." Again, counsel's cross-examination of the prosecution's psychological expert was "pallid, showing no grasp of the scientific predicates for the testimony." This lack of grasp of the science resulted in a failure to challenge significant errors in the State's expert testimony, and thus deprived Petitioner of "another critical opportunity to damage the daughter's credibility," and such a deficiency could not be justified

by any reasonable trial strategy.

But counsel has a duty to make reasonable investigations, and a decision not to investigate will be reasonable only "to the extent that reasonable professional judgments support the limitations on investigation." In sexual abuse cases, because the centrality of medical testimony, the failure to consult with or call a medical expert is often indicative of ineffective assistance of counsel. See: ***Eze v. Senkowski***, 321 F.3d 110, 127-8 (2nd Cir. 2003); ***Pavel v. Hollins***, 261 F.3d 210, 224 (2nd Cir. 2001); ***Lindstadt***, 239 F.3d at 201 (FN1). This is particularly so where the prosecution's case, beyond the purported medical evidence of abuse, rests on the credibility of the alleged victim, as opposed to direct physical evidence such as DNA, or third party eyewitness testimony. See: ***Eze***, 321 F.3d at 128; ***Pavel***, 261 F.3d at 224.

The prosecution's case rested centrally on the alleged victim's testimony and its corroboration by the indirect physical evidence as interpreted by the medical expert. The medical expert testimony was central not only because it constituted the most extensive corroboration that any crime occurred, but because to undermine it would undermine the alleged victim's credibility and thus the entire prosecution case as to the charges.

A lesson to be learned from ***Lindstadt*** and ***Pavel*** is that when a defendant is accused of sexually abusing a child and the evidence is such that the case will turn on accepting one party's word over the other's, the need for defense counsel to, at a minimum, consult with an expert to become educated about the "vagaries of abuse indicia" is critical. The importance of consultation and pre-trial investigation is heightened where, as here, the physical evidence is less than conclusive and open to interpretation.

Defense counsel may not fail to conduct an investigation and then rely on the resulting ignorance to excuse his failure to explore a strategy that would likely have yielded exculpatory evidence. Defense counsel's lack of preparation and failure to challenge the credibility of the key prosecution witness

could not be based on a sound trial strategy, and it was an unreasonable application of *Strickland* for the Court to hold otherwise.

Here, as in *Lindstadt*, defense counsel failed to satisfy the requirement of objectively reasonable performance by failing to investigate critical prosecution evidence. Counsel was consequently unable and unprepared to challenge, either with expert testimony or an effective cross-examination, the key evidence of Petitioner's guilt and the only evidence that any crime had taken place at all. In a case where the overall body of evidence and against Petitioner was "underwhelming," as in *Lindstadt*, Petitioner was prejudiced by counsel's errors, and the Court's finding that he was not prejudiced was an unreasonable application of *Strickland*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) See: *Lindstadt*, 239 F.3d at 205.

3. Reasonable jurists would conclude that the Assistant District Attorney had committed prosecutorial misconduct during the Closing Argument of these proceedings, denying Mr. Calhoun a fair and impartial trial, in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

The prosecutor's improper remarks that, the jury needed to protect society by ensuring that Mr. Calhoun be found guilty to protect society, with the following colloquy:

> "And only you can stop it. The mother can't stop it. AD can't stop it. RJ has moved on. Only you can stop it. And if you don't stop it, ***think about the consequences of that.***" (***emphasis added***)(Rec.p. 1589).

This was the ***second*** such improper remark made during the Rebuttal of the Closing Arguments by the State. Although the trial counsel had objected to such, the trial Judge informed the parties that he would give "limiting" instructions to the jury of the improper remarks during the Jury Instructions. However, after a review of the Jury Instructions, there were no "limiting" instructions included in the Jury Instructions (and, trial counsel failed to ensure such).

The ***third*** improper remark was made when the State was finalizing its Closing Arguments to the jury, when the State informed the jury that:

"So I ask you to evaluate their testimony, and their testimony ***as the judge will instruct*** you will

be sufficient and to put a stop right here for the defendant because only by going to jail will there be a stop to that." (Rec.p. 1592)(**Emphasis added**).

It appears as though the prosecutor has improperly informed the jury that the Judge in this matter has already determined that the evidence (according to the testimony) was sufficient for a finding of guilt.

The prosecutor's remarks clearly went beyond the proper scope of Closing Argument which should be confined to "evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case." The argument before the Court is clearly that the objectionable statement was an appeal to prejudice in violation of La.C.Cr.P. Art. 774. The prosecutor in Louisiana is prohibited from making such statements partly based on the statutory prohibition of La.C.Cr.P. Art. 774, above, but also for reasons of fairness.

The National District Attorneys Association has defined the role of a public prosecutor in our system of justice:

> Each decision [the prosecutor] makes has tremendous impact on the lives of individuals involved, if not on the entire community.
>
> Prosecutors must strive diligently to raise the ethical, technical, and professional standards of all prosecutors throughout the nation. A single unprofessional, corrupt, or unscrupulous prosecutor can undo the fine work being done by the many thousands of dedicated prosecutors throughout the country. The modern prosecutor cannot simply be the defender of the status quo. He cannot be content to simply perpetuate himself in office by withdrawing from the front line battle and practicing old routines. He must be a respected voice in the community with unquestioned integrity. From that operating base he must become a respected voice in the legislative body of his jurisdiction. The prosecutor must truly represent "the people" and conduct himself in a way to make that obvious when he rises to state his views in legislative halls.

Healy & Manak, eds., THE PROSECUTOR'S DESKBOOK, 3-4 (N.D.A.A.).

As a result of this role, public prosecutors owe a higher duty to the justice system. The duties of the prosecuting attorney were well-stated in the classic opinion of Justice Sutherland many years ago. The interest of the prosecutor, he wrote:

> "... is not that he shall win a case, but that justice be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But,

while he may strike hard blows, he is not at liberty to strike foul ones."

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). Likewise, the ABA ***Standards on the Prosecution Function*** state that "the duty of the prosecutor is to seek justice, not merely to convict." Standard 3-1.1(a).

That particular petard is one upon which the State must now be hoist. "There is more at stake than just the liberty of this defendant. At stake is the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice. . . ." *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972); see also: *Edwards v. State*, 465 So.2d 1085, 1086 (Miss. 1985)("when the state fails to exercise good faith" the process becomes "unjust and we surrender the very mandate which empowers us to pass judgment").

Mr. Calhoun contends that the State's prosecutor intentionally and willfully violated his right to a fair trial and Due Process by placing jurors in a "life-like" scenario.

Surely, the courts **cannot** allow a representative of the State, or even the defense, to subjugate a trial the way that Mr. Calhoun's trial was. The Sixth and Fourteenth Amendments to the United States Constitution guarantees individuals a right to a fair and impartial trial.

Furthermore, the State completely misconstrued the evidence that was presented during the testimony of its own witnesses. It appears that the prosecutor committed this instance of misconduct due to the fact that the evidence proved that Mr. Calhoun ***did not*** have a tattoo at the time of the allegations of Counts 4 through 8 of the Indictment.

At least twice during the Closing Argument, the State intentionally misinformed the jury of the testimony of RJ. According to the prosecutor, "He never took his shirt off. She never said he took his shirt off (Rec.p. 1560). The prosecutor also stated, "He never took his shirt off. All he did was undo his pants. So whether the rabbit tattoo was there at the time is a red herring." (Rec.p. 1561); and, "The girl said he undid his pants. And that's all he did." (Rec.p. 1588).

However, after a brief review of RJ's testimony, it must be noted that RJ testified that, "Yes. One specifically that I remember only because he had his shirt off was a tattoo of the rabbit from Bambi." (Rec.p. 1272). According to RJ's testimony, Mr. Calhoun had taken his shirt off during this incident and she was able to see a tattoo of "Thumper." In this instance, the State intentionally misled the jury in order to obtain a conviction.

Mr. Calhoun notes that argument which attempts to have jurors think of themselves as crime victim, or as the guardians of civilization is prejudicial because such prosecutors' argument tends to serve no purpose but to prejudice defendant by appealing to jurors' emotions, particularly their fear and apprehension for their personal safety is in direct violation of Mr. Calhoun's right to a fair trial.

Obviously this State's prosecutor statement was made **boldly** in order to have the jurors place some form of sympathetic issues within their minds by playing upon the emotions. But this was a violation, plain and simple, of Mr. Calhoun's rights. The intent was well-noticed and the State's prosecutor should be held accountable for her willful intent.

The fact prosecutor's comments informed the jurors that they are the only ones that can stop this particular person from committing crimes, could be prejudicial, such comments were so extremely prejudicial as to have influenced jury and contributed to verdict. This Court must note that the prosecutor had informed the jury that, "*And if you don't stop it, thing about the consequences*" (*Emphasis added*). Basically, the prosecutor told the jury that, "If you don't convict Mr. Calhoun, he will re-offend."

WHEREFORE, Mr. Calhoun states that it is clear that he was denied constitutional rights guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article I § 2 and § 13 of the Louisiana Constitution of 1974. This Honorable Court should grant this claim as it has merit, by reversing the conviction and sentence with the granting of a new trial.

3(a) Failure to ensure that the Court included "limiting" instructions concerning the State's

improper remarks during Closing Argument:

Mr. Calhoun's trial counsel was ineffective for failing to ensure that the Court included instructions concerning the State's improper remarks during Closing Argument (See also: Issue No. Three: *Prosecutorial Misconduct*).

Defense counsel objected to the improper remarks to the jury during Closing Argument (See: Rec.pp. 1589, 1592). The trial court informed the parties that he would be including "limiting" instructions during the Jury Instructions concerning these improper remarks from the State (See: Rec.p. 1592). However, after reviewing the Record, Mr. Calhoun was able to ascertain that no "limiting" instructions were given to the jury by the Court.

The prosecutor's remarks clearly went beyond the proper scope of opening and closing argument which should be confined to "evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case." The argument before the Court is clearly that the objectionable statement was an appeal to prejudice in violation of La.C.Cr.P. Art. 774. The prosecutor in Louisiana is prohibited from making such statements partly based on the statutory prohibition of La.C.Cr.P. Art. 774,

Although trial counsel properly objected to such, the Court informed the parties that it would be including instructions concerning the State's improper remarks in the Jury Instructions. According to Mr. Calhoun's memory, the Court failed to include these instructions; and, trial counsel was ineffective for failure to object, or to ensure, that these instructions had been included.

Although the Court failed to include the "limiting" instructions, this Court must also note that once a bell has been rung, it cannot be un-rung. Simply put, once the jury heard these comments, it would have been virtually impossible for them to forget that the State informed them that it was their duty to put a stop to Mr. Calhoun, and if they didn't, then they would have to ***think about the consequences of that.***" (***emphasis added***)(Rec.p. 1589).

These inflammatory remarks caused prejudice so severe that it infects the Due Process rights of Mr. Calhoun with an incurable disease. Turning jurors' minds from the bias that they must represent and putting their emotion that always has a high percentage factor in finding even an innocent man guilty. This is a distortion of facts and evidence to be used by State. A magic trick to deceive jurors from any possibility of innocence.

In this case, the intent of the State's prosecutor was more than obvious. He knew that there are laws in place which do not allow for the Prosecutor to place a juror in the a "life-like" situation. Yet, this Prosecutor had a reckless disregard for the Court Rules or the Professional Rules of Conduct, much less case law set forth by the United States Supreme Court.

Although counsel objected to this line of argument from the prosecutor, the Court had now failed to instruct the jurors to disregard these statements.

"To establish that a prosecutor's remarks are so so inflammatory as to prejudice the substantial rights of a defendant, the petitioner must demonstrate either persistent and pronounced misconduct or that the evidence was so insubstantial that (in probability) but for the remarks no conviction would have occurred." *Felde v. Blackburn*, 795 F.2d 400, 403 (5th Cir. 1986), *cert. denied*, ____U.S.____, 108 S.Ct. 210, 98 L.Ed.2d 161 (1987). Mr. Calhoun has met his burden of proof with this Claim.

Mr. Calhoun notes that argument which attempts to have jurors think of themselves as crime victim is prejudicial because such prosecutors' argument tends to serve no purpose but to prejudice defendant by appealing to jurors' emotions, particularly their fear and apprehension for their personal safety is in direct violation of the Petitioner's right to a fair trial.

Obviously this State's prosecutor statement was made **boldly** in order to have the jurors place some form of sympathetic issues within their minds by playing upon the emotions. But this was a violation, plain and simple, of the Petitioner's rights. The intent was well-noticed and the State's prosecutor should be held accountable for his willful intent.

The prosecutor's comments informed the jurors that they are the only ones that can stop this man from committing crimes This, in fact, could be considered as the prosecutor asking jurors to put themselves in victim's place could be prejudicial, such comments were so extremely prejudicial as to have influenced jury and contributed to verdict.

Numerous courts have granted relief for ineffective assistance of counsel on the basis of counsel's failure to investigate and prepare viable theories of defense. *Nealy*, supra (alibi); *Profitt*, supra (insanity); *DeLuca v. Lord*, 77 F.3d 578 (2nd Cir.1996), cert. denied, ___ U.S. ___, 117 S.Ct. 83, 136 L.Ed.2d 40 (1996) (extreme emotional disturbance); *Gray*, supra (self-defense); *Griffin v. Warden*, 970 F.2d 1355 (4th Cir. 1992)(alibi); *Harris v. Reed*, 894 F.2d 871 (7th Cir. 1990)(eyewitness); *Montgomery v. Peterson*, 846 F.2d 407 (7th Cir. 1988)(alibi).

An attorney's failure to interview a readily available witness should not be allowed to automatically defend his omissions simply by raising the shield of "trial strategy and tactics." See: *Crisp v. Duckworth*, 743 F.2d 580, 584 (7th Cir. 1984). The complete failure to investigate potentially corroborating witnesses can hardly be considered a tactical decision. See: *U.S. v. Debango*, 780 F.2d 81 (D.C. Cir. 1986). Also see: *U.S. Ex Rel. Cosey v. Wolff*, 727 F.2d 656, 658 (7th Cir. 1984), where it was error for counsel who failed to investigate even one of five potential witnesses.

In *Vella v. Estelle*, 708 F.2d 954 (5th Cir. 1983), the court stated that "In most cases a single critical error may render counsel's performance constitutionally defective." Mr. Calhoun has already pointed to several errors of counsel which rendered his trial fundamentally unfair.

In *Nero vs. Blackburn*, 597 F.2d 991 (5th Cir. 1979), the failure of defense counsel to request a mistrial when the court would have automatically granted one was enough to constitute assistance of counsel constitutionally ineffective. *Nero* was granted relief after he was able to show his attorney's error through a Petition for Writ of Habeas Corpus.

A criminal defendant will rarely know that he has not been represented competently until after trial

or appeal, usually when he consults another lawyer for post conviction/collateral attack of his conviction. See: *Evitts v. Lucey*, 105 S.Ct. 830 (1985).

4. Reasonable jurists would agree that Mr. Calhoun was denied his right to a fair and impartial trial when the State allowed perjured testimony to go uncorrected; Sixth and Fourteenth Amendments to the United States Constitution.

Mr. Calhoun properly argues that the State allowed perjured testimony to go uncorrected during the course of these proceedings. After obtaining the District Attorney's file, Mr. Calhoun was able to ascertain that the testimony of Susan Bagwell was obviously perjured due to the fact that her testimony had greatly varied from her recorded statements given to the officers investigating these allegations.

Perjured testimony of Susan Bagwell:

It is quite obvious that Susan Bagwell had some type of personal vendetta against Mr. Calhoun and his wife during the interview (See: Exhibit "__," transcribed statement of Susan Bagwell). During the interview, it appears that the statements by Ms. Bagwell were more concerning her thoughts as to Mr. and Mrs. Calhoun's personal life than it did concerning the actual allegations of inappropriate conduct by Mr. Calhoun. In fact, it appears that Ms. Bagwell was more concerned about the Calhouns allegedly taking care of their personal needs rather than the children's needs (See: Exhibit "__," in its entirety).

During the course of the trial, Ms. Bagwell testified that she had no animosity towards Mr. or Mrs. Calhoun (Rec.p. 1449). Ms. Bagwell also testified that her daughter would go next door to the Calhoun's unaccompanied to play with the Calhoun children (Rec.p. 1455). Ms. Bagwell also testified that she would never go over to the Calhouns' home to watch her children as they played; that the Calhouns did not babysit on the weekends; and that even when Timothy Calhoun was home (Rec.p. 1456).

However, during her interview with the officer, Ms. Bagwell was more concerned with her opinion of the Calhouns' neglect to their children (even admitting that she had recently called CPS on the Calhouns [this would appear that Ms. Bagwell has some animosity towards Timothy and his wife]: see

Recorded statement, Exhibit "A," pp. 6, 10, and 12), and that she was upset that CPS didn't do anything about her call (See: Recorded statement, p. 6); and that she was don't want to deal with it anymore (See: Recorded statement, p. 22).

Ms. Bagwell also informed the officers that, "And KS was not allowed to, uh, go over to IC's house to play. If they played together, it was under my supervision" (See: Recorded statement, p. 6)(It appears that Ms. Bagwell either committed perjury during her statement or her testimony). But, during the course of her testimony, she testified that she never supervised KS while she was playing at the Calhoun's house (See: Rec.pp. 1455-6).

Ms. Bagwell informed the officer that she had not only reported the Calhouns to the CPS several times, but nothing was done (See: Recorded statement, p. 7); and stated that Mr. Calhoun's daughter, IC, "has had – I has a serious skin condition and, um, she's had staph five times because her mother and father would be neglectful in bathing her, and, um, ... That's a form of neglect. She should have been on medication for depression. She been put on medication, um, for depression by Dr. Gullapalli" (See: Recorded statement, p. 6-7).

Ms. Bagwell went on to tell the officer that she has a lot of influence in that because she was taught in school things that are normal and not normal when she was questioned as to why IC was put on medication for depression (See: Recorded statement, p. 7). Ms. Bagwell also criticized the Calhouns by explaining that they were purchasing items for themselves, but neglecting the children's needs (See: Recorded statement, pp. 9, 12, and 13).

In fact, the majority of the recorded statement actually criticized Timothy Calhoun's child rearing ways instead of the allegations concerning her daughter (See: Recorded statement in its entirety).

Perjured testimony of RJ:

The State allowed testimony known to be perjured of RJ to go uncorrected during the course of the trial. The State had access to the recorded statement See: Exhibit "C") given to Detective Jo Caston on

August 29, 2013.

It appears that the State allowed RJ to testify as a "scarred" victim who had avoided Mr. Calhoun after he had allegedly raped her in a motel at the age of 11. According to the testimony during trial, RJ testified that she had *NO* further contact with Mr. Calhoun after the allegation, by stating, "I mean I didn't see him so I wasn't really afraid. There was - - there was one time that we - - I don't remember him being there though, but we all went like as a family to dinner at his house with - - his mom was there cooking dinner and sister, and I remember that incident, but I don't remember seeing him there."

However, during her interview with Det. Caston, RJ admitted that she still had contact with Mr. Calhoun after the alleged incident by stating, "Um, yes, occasionally, uh, because we would still go over to his mom's house, um, and we would have dinner and stuff like that. And they would still come i – in and out at her grandma's quite a bit."

Had the jury been properly informed that RJ still came around Mr. Calhoun after the allegation, the jury would have considered the fact that, if something had happened with Mr. Calhoun and RJ, surely she would avoid him at all costs.

"It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935). It must be noted that the State was well aware of the statement given by Susan Bagwell due to the fact that the transcript of the statement was located in the District Attorney's file concerning this case.

Petitioner must show that the state knew the testimony was going to be perjurious and "in spite of that knowledge, offered the testimony." *Avery v. Procunier*, 750 F.2d 444, 448 (5th Cir. 1985).

However, the prosecutor's actual knowledge is not required. The giving of intentional falsehoods no a crucial fact by a state law enforcement officer will satisfy the requirements for state action necessary for a constitutional claim. *Schneider v. Estelle*, 552 F.2d 593 (5th Cir. 1977). The *Schneider* Court specifically rejected the argument that perjury by a policeman is insufficient to show that the state was aware of the perjury. The court reasoned that a policeman is a state law enforcement officer and, as such, is a member of the prosecution team. Id. at 595. "If the state through its law enforcement agents suborns perjury for use at the trial," the court concluded, "a constitutional due process claim would not be defeated merely because the prosecuting attorney was not personally aware of this prosecutorial activity." *Id.* See: *Smith v. Florida*, 410 F.2d 1349 (5th Cir. 1969)(police are part of the prosecution, and they taint the trial no less than if they were the State's attorney.

The presentation of known false evidence in incompatible with the rudimentary requirements of our system of justice. *Mooney v. Holohan*, supra To gain release based upon it, a petitioner must show that the testimony was material and affected the outcome of the trial; that the government knew or should have known that the testimony was false. *United States v. Chagra*, 735 F.2d 870 (5th Cir. 1984). A conviction must be set aside if there is any reasonable possibility that the use of false testimony could have affected the trial. *United States v. Bagley*, 473 U.S. 667, 678, 105 S.Ct. 3375, 3381, 87 L.Ed.2d 481 (1985).

"(I)f the state through its law enforcement agents suborns perjury for use at the trial, a constitutional due process claim would not be defeated merely because the prosecution attorney was not personally aware of this prosecutorial activity." *Schneider v. Estelle*, 552 F.2d 593, 595 (5th Cir. 1977).

A strict standard of materiality is applied in perjury cases and a conviction obtained by the knowing use of the perjury must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397,

49 L.Ed. 2d 342 (1976).

In *Chamberlain v. Mantello*, 954 F. Supp. 400 (N.D.N.Y. 1997), relief was granted where police officers gave perjured testimony, even though the prosecutor was unaware of the misconduct. In this case, although the State may erroneously argue that they were unaware of the perjured testimony by Ms. Bagwell, the statements were, in fact, found in the District Attorney's file which had been obtained by Mr. Calhoun. Therefore, the State had knowledge during the trial that she was committing perjury during her testimony.

WHEREFORE, for the reasons above, Mr. Calhoun has shown this Honorable Court that the State knowingly presented perjured testimony to the jury during this trial; and this Court must determine that Mr. Calhoun was denied his right to a fair trial in accordance with the Fifth and Fourteenth Amendments to the United States Constitution, and remand this matter for a new trial.

CONCLUSION

As Mr. Calhoun was denied the right to a fair and impartial trial, this Court should grant the petition for Writ of Certiorari.

Respectfully submitted this 23rd day of June, 2022.

Timothy W. Calhoun #495713

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 1652, Monroe, LA 71210-1652.

Timothy W. Calhoun

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Timothy W. Calhoun — Appellant

vs.

Tim Hooper — Appellee(S)

PROOF OF SERVICE

I, Timothy W. Calhoun #495713, do swear or declare that on this date, February 17, 2020 as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceedings or that party's counsel, and on every other person required to be served, be depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and address of those served are as follows:

District Attorney's Office	Jeff Landry	Tim Hooper, Warden
Parish of Ouachita	P.O. Box 94005	General Delivery
P.O. Box 1652	Baton Rouge, LA 70804	Louisiana State Penitentiary
Monroe, LA 71210-1652		Angola, LA 70712

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 23, 2022.

(Signature)

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

March 29, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 21-30693 Calhoun v. Hooper
USDC No. 3:21-CV-1744

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

Allison Lopez

By: _____
Allison G. Lopez, Deputy Clerk
504-310-7702

Mr. Timothy Wayne Calhoun

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 29, 2022
Lyle W. Cayce
Clerk

No. 21-30693

TIMOTHY WAYNE CALHOUN,

Petitioner—Appellant,

versus

TIM HOOPER, *Warden, Louisiana State Penitentiary*,

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Western District of Louisiana
USDC No. 3:21-CV-1744

ORDER:

Timothy Wayne Calhoun, Louisiana prisoner # 495713, moves for a certificate of appealability (COA) to appeal the district court's dismissal as time barred of his 28 U.S.C. § 2254 petition challenging his convictions on several sex offenses. Calhoun asserts that he was entitled to equitable tolling of the limitations period because the Louisiana State Penitentiary was placed on limited lockdown due to the COVID-19 pandemic beginning on April 1, 2020; he was denied access to the law library and the counsel substitute assigned to him; unvaccinated offenders were not allowed to move around the prison; and counsel substitutes were only recently allowed access to unvaccinated offenders. He asserts that when he received the state court's

denial of his state habeas application in March 2021, he was housed in the medical dorm, he was not allowed access to other offenders, and counsel substitutes had very limited access to their computer files to assist offenders. Calhoun states that as soon as possible, he asked permission to go to the law library.

To obtain a COA, he must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Where, as here, the district court's denial of federal habeas relief is based on procedural grounds, this court will issue a COA "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Houser v. Dretke*, 395 F.3d 560, 561 (5th Cir. 2004). Calhoun has not made such a showing. Accordingly, Calhoun's COA motion is DENIED.

JAMES C. HO
United States Circuit Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

TIMOTHY WAYNE CALHOUN #495713	**CASE NO. 3:21-CV-01744 SEC P**
VERSUS	**JUDGE TERRY A. DOUGHTY**
DARREL VANNOY	**MAG. JUDGE KAYLA D. MCCLUSKY**

ORDER

Plaintiff filed a Motion for Issuance of Certificate of Appealability [Doc. No. 13] on November 8, 2021. The Court construed the Motion to be a Motion for Reconsideration.

While there is no motion for reconsideration *per se,* there is a motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e). The Fifth Circuit has explained that a Rule 59(e) motion "calls into question the correctness of a judgment," but "is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered," or were offered, "before the entry of judgment." *Templet v. HydroChem, Inc.*, 367 F.3d 473, 478-79 (5th Cir. 2004) (citations and internal quotation marks omitted). Calhoun disagrees with the Court's determination in this case, but the Court has previously considered and rejected Calhoun's arguments and finds no reason to alter or amend its Ruling. Accordingly,

IT IS ORDERED that Calhoun's Motion [Doc. No. 13] is **DENIED.**

MONROE, LOUISIANA, this 10th day of November 2021.

Terry A. Doughty
United States District Judge