No. 21-993

In The
Supreme Court of the United States

WILLARD ANTHONY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For A Writ Of Certiorari
To The Louisiana Fifth Circuit Court Of Appeal

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

During Anthony's trial, the trial prosecutors called the screening assistant district attorney, who presented this matter to the grand jury and refused charges against witness Nadia Lee, to the witness stand to rebut defense counsel's repeated insinuation that Nadia Lee had been given an undisclosed deal in exchange for her testimony.[1] On appeal, Petitioner alleged that the screening assistant district attorney's testimony violated his right to the presumption of innocence, the right to confrontation, and the right to a fair trial.

The questions presented in this case are:

1. Were the presumption of innocence, the right to confrontation, and/or the right to a fair trial violated when the trial court allowed the State to call the screening assistant district attorney, who was not the trial prosecutor, to the stand to rebut the allegation that Nadia Lee had been given a deal in exchange for her testimony?

2. Assuming *arguendo* the trial court erred in overruling one or more of defense trial counsel's objection(s) to parts of the screening assistant district attorney's testimony, were the alleged errors structural, or was the Louisiana Supreme Court

[1] The State disagrees with Petitioner's contention that the prosecutor testified that "he firmly believed in the credibility of the victims, the guilt of the defendant, the strength of the State's evidence (both known and unknown to the jury), and his opinions (at times incorrect) about the law applicable to the case." Pet. at (i).

QUESTIONS PRESENTED—Continued

correct in determining that the alleged errors would constitute trial error subject to harmless error review?

3. Did the Court of Appeal correctly identify the standard applicable to harmless error review and apply that standard to the instant case?

RULE 14 LIST OF PROCEEDINGS

State v. Anthony, 17-372 (La. App. 5 Cir. 02/20/19), 266 So. 3d 415 ("*Anthony I*") (Original Court of Appeal decision reversing the convictions and granting a new trial).

State v. Anthony, 19-476 (La. 06/26/19), 275 So. 3d 869 (Louisiana Supreme Court writ grant vacating and reversing the ruling below and remanding the matter for harmless error review of alleged errors).

State v. Anthony, 17-372 (La. App. 5 Cir. 12/30/20), 309 So. 3d 912 ("*Anthony II*") (Court of Appeal panel decision following remand).

State v. Anthony, 21-176 (La. 10/12/21), 325 So. 3d 1067 (denying supervisory writs without published opinion).

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JURISDICTION

The judgment of the Louisiana Supreme Court was entered on October 12, 2021.

The petition for writ of certiorari was filed on January 10, 2022. This Court has jurisdiction under 28 U.S.C. 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . to be confronted with the witnesses against him. . . ."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

Louisiana Revised Statute 14:42 (West 2015) provides in pertinent part with regard to the offense of aggravated rape as follows:

> Aggravated rape is a rape committed . . . where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:

(1) When the victim resists the act to the utmost, but whose resistance is overcome by force.

(2) When the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution.

(3) When the victim is prevented from resisting the act because the offender is armed with a dangerous weapon.

. . .

(5) When two or more offenders participated in the act.

. . .

B. For purposes of Paragraph (5), "participate" shall mean:

(1) Commit the act of rape.

(2) Physically assist in the commission of such act.

Louisiana Revised Statute 14:46.2 (West 2015) provides in pertinent part with regard to the offense of human trafficking as follows:

A. It shall be unlawful:

(1) For any person to knowingly recruit, harbor, transport, provide, solicit, obtain, or maintain the use of another person through fraud, force, or coercion to provide services or labor.

(2) For any person to knowingly benefit from activity prohibited by the provisions of this Section.

. . .

B. (2) Whoever commits the crime of human trafficking when the services include commercial sexual activity or any sexual conduct constituting a crime under the laws of this state shall be fined not more than fifteen thousand dollars and shall be imprisoned at hard labor for not more than twenty years.

. . .

C. For purposes of this Section:

(1) "Commercial sexual activity" means any sexual act performed or conducted when anything of value has been given, promised, or received by any person.

(2) "Fraud, force, or coercion" means any of the following:

(a) Causing or threatening to cause serious bodily injury;

(b) Physically restraining or threatening to physically restrain another person

. . .

Louisiana Revised Statute 14:34.1 (West 2015) provides in pertinent part with regard to second degree battery as follows:

A. Second degree battery is a battery when the offender intentionally inflicts serious

> bodily injury, however, this provisions shall not apply to a medical provider who has obtained the consent of a patient.
>
> B. For purposes of this Section, the following words shall have the following meanings:
>
> . . .
>
> (3) "Serious bodily injury" means bodily injury which involves unconsciousness, extreme physical pain or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty, or a substantial risk of death.

Louisiana Revised Statute 14:34 provides in pertinent part that aggravated battery "is a battery committed with a dangerous weapon."

Louisiana Revised Statute 14:43.1 provides in pertinent part with regard to sexual battery as follows:

> A. Sexual battery is the intentional touching of the anus or genitals of the victim by the offender, directly, or through clothing, or the touching of the anus or genitals of the offender by the victim using any instrumentality or any part of the body of the victim, directly or through clothing, when any of the following occur:
>
> (1) The offender acts without the consent of the victim.

INTRODUCTION

In the instant case, the screening assistant district attorney who presented this matter to the grand jury and who refused charges against state witnesses was called to the stand by the trial prosecutors to rebut defense counsel's repeated insinuation that Nadia Lee had been offered a deal in exchange for her testimony at Petitioner's trial on charges of aggravated rape (two counts), human trafficking, sexual battery, second degree battery, and felon with a firearm. During his direct testimony, the screening assistant district attorney explained why he refused charges against Nadia Lee, testified that it was "correct" that the grand jury indictment had no evidentiary value in the case, and explained that his personal opinion as to whether or not someone should be charged with a crime is irrelevant to a jury's determination as to whether or not someone is guilty of a crime. On appeal, Petitioner alleged that parts of the screening assistant district attorney's testimony violated his right to the presumption of innocence, the right to confrontation, and the right to a fair trial. On remand from the Louisiana Supreme Court, the Louisiana Fifth Circuit Court of Appeal found that "alleged error" with regard to the screening attorney's testimony was harmless. Anthony now petitions this Court for a writ of certiorari.

The Court should deny Anthony's petition. He identifies no novel issue of federal or state law and he alleges no splits of authorities among state or federal courts. At most, Anthony is seeking error correction, and such requests are rarely granted by this Court.

In any event, the state courts did not commit any error for this Court to correct. Rather, the Louisiana Supreme Court properly determined that the alleged errors with respect to the screening assistant district attorney's testimony were subject to harmless error analysis. On remand, the Court of Appeal properly stated the harmless error standard and did not erroneously apply it. Petitioner's claims are meritless and do not warrant this Court's review.

STATEMENT OF THE CASE

A. Summary of the Offenses[2]

C.W., the victim, testified that in April 2015, she was addicted to drugs and "not living a good lifestyle." In order to make money, she was working as a prostitute in Florida, where she first met Anthony Willard and co-defendant Pierre Braddy, at a motel in Pensacola. Anthony Willard invited her back to his room, where there were three other women who were working as prostitutes, namely Ms. Lee, Ms. Grisby and Ms. Hunt. The victim testified that while in Anthony's hotel room, he started to act "paranoid." He picked her up and as confirmed by state witness Ms. Lee, "body slammed [her]." The victim then fell asleep but

[2] The summary of the offenses was adapted from the Court of Appeal's opinion in *Anthony II*. Pet. App. D, 37-45. Additional highly relevant testimony and evidence that was presented during the trial in this matter was cited by the Court of Appeal in its harmless error analysis as is discussed in Part III. *See* Pet. App. D, 47-52.

awakened the following morning in Anthony's car not knowing how she got there. She questioned Anthony, who was driving, and he told her they were in New Orleans. The victim expressed that she wanted to go back to Pensacola, but Anthony pointed a gun at her and told her that she was "part of [his] family now."

C.W., the victim, stated that after they arrived at a hotel in New Orleans, co-defendant, Pierre Braddy, posted pictures of her and the other women online in order to get clients. The next day, they went to a hotel in Jefferson Parish. C.W. had a solo client appointment so everyone else waited in the car in the parking lot. C.W. testified that she wanted to get away, so she asked the "john" to help her escape. However, she told Anthony that she wanted to leave with the john to make more money, but he said she could not go. C.W. told Anthony that she was going to tell the client goodbye, but instead, she got in his car and told him to "just go." C.W. and the client pulled out on the highway, but Anthony pulled up next to them and pointed his gun at them. C.W. jumped out of the car and started to run, but she slipped on a flip flop shoe she was wearing and Anthony caught up with her and pulled her back into the car he was driving. C.W. testified that the "girls" started hitting her in the car. Anthony beat her with a belt in the hotel parking lot, at one point strangling her, and she lost consciousness.

When they got back to the hotel room, C.W. took a shower because she was bleeding, but Anthony came in and continued to beat her. He continued to verbally antagonize her and hit her with various objects,

including his gun. Anthony made the other girls hit her. She further testified that at the request of Anthony, who was armed with a gun, co-defendant Braddy urinated on her, put his penis in her mouth, and made her swallow the urine. After a while, Anthony directed co-defendant Braddy and the other girls to go to Walmart to buy makeup for C.W. so that despite her severe injuries from being beaten, she could continue to make money.

C.W. testified that while the other prostitutes went to the Walmart to get makeup for her, and she and Anthony were alone in the hotel room, he told her various things that would happen to her if she ever tried to run again. Then, he "forced himself" on her and also inserted his gun into her vagina.

At some point later, Detective Steven Abadie arrived in connection with his undercover investigation. Detective Abadie arranged a "date" with a prostitute at the Sun Suites Inn on Manhattan Boulevard. When he arrived at the hotel room, he encountered state witness Nadia Lee and prostitute Brittany Grisby, lying on one of the beds. He also saw the victim C.W., who "was sitting . . . on her knees and . . . she was beat." He testified that he had "never seen somebody beat like this," so he knew "there was a pimp involved." He elaborated that her entire face was swollen, with one eye completely shut and a large laceration over her left eye, and she was "black and blue from head to toe." After Detective Abadie exchanged money with state witness Nadia Lee for a date, he said the code word and the covering officers came in shortly thereafter.

Detective Abadie brought victim C.W. to the hospital due to her significant injuries. She disclosed to him how she received her injuries and all of the things that had happened to her, and based on that, he felt the need to investigate crimes other than prostitution, namely aggravated rape, human trafficking, aggravated battery, and second degree battery, and his prime suspects, based on this conversation with the victim, were Anthony and co-defendant Pierre Braddy.

State witness Nadia Lee testified that she met Anthony and Braddy in April 2015 at a hotel in Alabama, and she agreed to travel with them to Florida. She explained that she did not initially know that defendant was a pimp. However, Ms. Lee realized soon after they arrived in Florida that he was a pimp. She testified that they used Anthony's phone to set up calls. Anthony also made sure the appointments were set up and that the girls would get to and from where they were working. She stated that Anthony decided how much money she would charge for each client and "all the money had to go to" Anthony.

Ms. Lee also testified that she first met victim C.W. one night when C.W. mistakenly knocked on their hotel room door, looking for a "john," and Anthony invited her into the hotel room. Shortly thereafter, Anthony started treating C.W. very badly, "like beating her up and choke slamming her." Ms. Lee described that early the next morning, they were leaving the hotel, and she told C.W. that she could come with them or stay in the room. C.W. left with them. The group left in two cars,

drove to New Orleans, and started receiving clients at a hotel. After they were "caught" by the police at the New Orleans hotel, they relocated to the Sun Suites Inn on the Westbank of Jefferson Parish.

Ms. Lee stated that at some point, C.W. had a "date." When the date was completed, C.W. told Anthony that the date wanted to take her to a bar for some drinks, but Anthony told her no. Ms. Lee stated that C.W. walked back to the date, got in his car, and they drove off. Ms. Lee described that they chased after them until they caught up with them. Anthony rolled down his window, pointed his gun at the client's car, and told him to let C.W. out of the car. C.W. exited the car and started running away, but Anthony caught her. Ms. Lee and Ms. Grisby started hitting C.W. while she was in the car. Ms. Lee stated that in the parking lot of the hotel, Anthony started beating C.W. with his belt.

According to Ms. Lee, once they all returned to the hotel room, Anthony was angry and told the women to beat C.W. After they took turns hitting her, Anthony continued to beat C.W. with a phone receiver and threw a chair at her. Ms. Lee stated that C.W. was bleeding, and Anthony told her to lick the blood off of the floor. After this, co-defendant Braddy, at the direction of Anthony urinated in C.W.'s mouth and on her face. After all this, C.W. looked "unrecognizable" because of how swollen she was; Anthony told the other girls to go to the store to get C.W. some makeup for her face "because she was still going to work." The women left for the store with co-defendant Braddy, leaving Anthony

and C.W. in the hotel room for about thirty minutes until they returned. Thereafter, Detective Abadie and other officers arrived in connection with the undercover operation, and they were all arrested.

On cross-examination, defense counsel questioned state witness Ms. Lee about a deal she may have received from the state in exchange for her testimony and defense counsel alluded to evidence that was hidden by the state from the defense, in exchange for her testimony. While Ms. Lee denied that she received any sort of "deal" from the State in exchange for her testimony, she acknowledged that she had not been charged with any of the offenses in this matter.

Anthony testified in his own defense. He testified that C.W. came willingly with them to New Orleans in order to make more money working as a prostitute. He similarly testified that C.W., Ms. Lee, and the other women were working as prostitutes at a hotel in Jefferson Parish, but he denied being a pimp. Regarding the incident where C.W. tried to leave in a car with a client/john, Anthony testified that he did not know if she was being kidnapped by the client/john. He admitted that he pursued them and pulled a gun on them. He also testified that once C.W. got out of the client's car, she started running, but he did not know what she was running from. He testified that once they caught her, Ms. Lee and Ms. Grisby started to beat C.W. in the parking lot. Anthony denied hitting C.W. with a gun or putting a gun in C.W.'s mouth. He also denied "doing anything" with C.W. while he was alone with her in the room while the others were at Walmart, but he stated

that he did have consensual sex with C.W. one morning earlier. He also testified that C.W. had multiple opportunities to leave, could have left at any time, and was not forced or coerced into staying with them.

Dr. Mark Perlin, the Chief Executive and Scientific Officer of Cybergenetics, a company that assesses genetic data, was qualified as an expert in the field of interpretation of DNA mixtures and their matched statistics. He analyzed the DNA mixture from a swab taken from the interior of the gun recovered in this case. He was able to conclude that neither C.W., nor Anthony, nor co-defendant Braddy could be excluded as contributors. He further concluded that a match between the swab of the gun and C.W. was 1.17 million times "more probable than a coincidental match" to an unrelated Caucasian person; that the match between the firearm and defendant was 1.59 thousand times "more probable than a coincidental match to an unrelated African American person"; and that a match between the firearm and Braddy was 63.2 trillion times "more probable than a coincidental match to an unrelated African American person."

The jury also heard testimony from the screening prosecutor for this case, Assistant District Attorney Thomas Block. Mr. Block testified that he did not offer any "deals" to anyone in this case.

B. Procedural History

On October 1, 2015, Petitioner was charged in a superceding bill of indictment with two counts of

aggravated rape (counts one and two), two counts of human trafficking (counts three and four), second degree battery (count six), aggravated battery (count seven), sexual battery (count eight), and with being a felon in possession of a firearm (count ten).[3]

Trial in this matter was held on December 8-11, 2015. On December 11, 2015, Petitioner was found guilty as charged on two counts of aggravated rape (counts one and two), one counts of human trafficking (count three), second degree battery (count six), aggravated battery (count seven), sexual battery (count eight), and with being a felon in possession of a firearm (count ten).[4]

Petitioner was sentenced on December 14, 2016, to a life sentence without benefit of probation, parole, or suspension of sentence for each count of aggravated rape; to twenty years imprisonment at hard labor for human trafficking, to ten years imprisonment at hard labor for second degree battery, to ten years imprisonment at hard labor for aggravated battery, to ten years imprisonment at hard labor for sexual battery, and to twenty years imprisonment without benefit of parole, probation, or suspension of sentence for being a felon in possession of a firearm. The trial court ordered that the imposed sentences be served

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[3] A co-defendant, Pierre Braddy was also charged with aggravated rape of C.W. in count one of the indictment. In the remaining counts of the indictment, Braddy was charged with trafficking (count five) and obstruction of justice (count nine).

[4] One of the trafficking charges (count four) was dismissed by the State due to that victim's failure to appear.

concurrently. Petitioner moved to appeal his convictions and sentences, and his motion was granted on January 11, 2017.

On direct appeal to the Louisiana Fifth Circuit Court of Appeal, Petitioner alleged that he was denied his rights to a fair trial, to the presumption of innocence, and to confront the evidence against him when the prosecution was allowed to elicit testimony from the screening assistant district attorney that Petitioner claimed exceeded the scope of what was permissible. Upon review, citing State jurisprudence, the Court of Appeal concluded in *Anthony I* that it could not say that it was error to allow the screening assistant district attorney, who was not the trial prosecutor in the case, to testify "to rebut the defense implication that State witness, Nadia Lee, was given a 'deal' in exchange for her testimony." Pet. App. A, 22. However, the Court of Appeal found that the trial court erred in allowing the screening assistant district attorney to testify "beyond what was necessary" to rebut that implication and that such error was structural error, not trial error subject to harmless error analysis. *Id.* at 28-29. For this reason, in *Anthony I*, the Court of Appeal pretermitted discussion of the Petitioner's remaining assignments of error, vacated Petitioner's convictions and sentences, and remanded the matter for a new trial. Pet. App. A, 30.

The State filed an application for writ of certiorari with the Louisiana Supreme Court on March 22, 2019—which was granted in part on June 26, 2019. In its *per curiam* decision, the Louisiana Supreme Court

stated that while it "express[ed] no opinion at present on whether the testimony of the screening prosecutor contained errors . . . any such defects were not structural in nature and would instead constitute trial errors subject to a harmless error analysis." Pet. App. B, 31-32; citing *Weaver v. Massachusetts*, 582 U.S. ___, 137 S.Ct. 1899, 1907 (2017). Pet. App. B, 31. Citing *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the Louisiana Supreme Court vacated the ruling below and remanded the matter to the Court of Appeal "for a determination of whether guilty verdicts actually rendered in this trial were surely unattributable to the alleged errors in Mr. Block's testimony." Pet. App. B, 32.

On remand, in *Anthony II*, the Court of Appeal affirmed Petitioner's convictions and his sentences on all counts except count six[5] in a two-to-one decision. Pet. App. D, 34. Citing to *Chapman v. California*, 386 U.S. 18 (1967) and *Sullivan v. Louisiana*, 508 U.S. 275 (1993) the Court of Appeal found that the guilty verdicts in this case were "surely unattributable to any alleged error" in admitting the screening prosecutor's

[5] The Court of Appeal found that an illegal sentence was imposed on count six, the aggravated battery count, because the maximum sentence authorized by La. R.S. 14:34.1 at the time of the offense was eight years. Pet. App. D, 62. The Court of Appeal remanded the matter to the trial court with instructions to resentence Petitioner on count six, to notify Petitioner of the sex offender registration requirements in accordance with La. R.S. 15:540, et seq., and to make certain corrections to the sentencing minutes and the Uniform Commitment Order. Pet. App. D, 65-67. On January 31, 2022 Anthony was re-sentenced on count six to eight years imprisonment at hard labor with credit for time served.

testimony and "the testimony did not prejudice the defendant so as to warrant a reversal of these convictions." Pet. App. D, 48. Judge Wicker dissented "*in part*." Pet. App. D, 68 (emphasis added). Judge Wicker stated that she agreed with the majority in affirming Petitioner's convictions on counts six and ten because Anthony "admitted on the witness stand and concedes on appeal that he committed a second degree battery upon C.W. as charged in indictment count six, and that he was also a felon in possession of a firearm, as charged in count ten[.]" *Id.* However, Judge Wicker stated that she "could not agree that the jury's verdict as to the remaining counts was surely not attributable" to the screening assistant's testimony. *Id.*

The petitioner filed an application for writ of certiorari with the Louisiana Supreme Court on January 29, 2021—which was denied without reasons on October 12, 2021. Pet. App. E, 103.

Petitioner filed his Petition for a Writ of Certiorari in this Court on January 10, 2022, and it was docketed on January 12, 2022. Petitioner again argues that the screening assistant district attorney's testimony denied him the presumption of innocence, the right to confrontation, and the right to a fair trial. He further contends that the alleged error was structural and not subject to harmless error review. Finally, he contends that the Court of Appeal did not correctly apply the harmless error test in determining that the alleged error was harmless beyond a reasonable doubt.

REASONS FOR DENYING THE PETITION

I. Certiorari should be denied on the question of whether the presumption of innocence, the right to confrontation, and/or the right to a fair trial were violated when the trial court allowed the State to call the screening assistant district attorney (who was not the trial prosecutor) to the stand to rebut the repeated insinuation that Nadia Lee had been given a deal in exchange for her testimony.

On remand after its ruling in *Anthony I* was vacated, the Court of Appeal in *Anthony II* found that each of Petitioner's convictions was surely unattributable to "*any alleged error* in admitting Mr. Block's testimony[.]" Pet. App. D, 52 (emphasis added). Petitioner appears to argue that, in parts of the screening assistant's testimony, he vouched for the credibility of state witnesses and opined regarding Anthony's guilt in violation of the presumption of innocence, the right to confrontation, and the right to a fair trial.[6] Pet. 12-13. The State submits that certiorari should be denied on this issue.

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[6] In its opinion in *Anthony I*, the Court of Appeal originally stated "we cannot say that it was error to allow Mr. Block to testify in this matter to rebut the defense implication that a State witness, Nadia Lee, was given a deal in exchange for her testimony." Pet. App. A, 22. The petitioner does not appear to expressly argue that the screening assistant's testimony was inadmissible for such a purpose. As such, it appears that Petitioner's challenge is limited to *parts* of the screening assistant's testimony.

Of significance, Petitioner has identified no novel issue of federal or state law and he alleges no splits of authorities among state or federal courts. The State contends that the screening assistant's testimony was properly admitted to rebut defense counsel's repeated insinuation, made during his approximately 95 page cross-examination of state witness Nadia Lee, that her charges had been refused as part of an undisclosed deal in exchange for her testimony.[7] The State does not concede that it was error to admit parts of the screening assistant's testimony over the objection of defense trial counsel; however, even assuming *arguendo* that it was, such error was harmless for the reasons stated in Part III, *infra*.

In support of his contention that the admission of parts of the screening attorney's testimony violated the presumption of innocence, the right to confrontation, and the right to a fair trial, Petitioner relies upon *United States v. Young*, 470 U.S. 1, 18 (1985). In *Young*, this Court identified "[t]he concerns underlying our reactions against improper prosecutorial arguments to the jury," stating that when the prosecutor vouches for the credibility of witnesses or expresses his personal opinion regarding the guilt of the accused, it poses two dangers: 1) such comments can convey the impression that there is evidence that was not presented to the

[7] Although the screening assistant was not the trial prosecutor in this matter, it has been found to be permissible under certain circumstances for the trial prosecutor to testify at the trial of a case he is prosecuting, though the practice is frowned upon. *Riddle v. Cockrell*, 288 F.3d 713, 720 (5th Cir. 2002).

jury, but known to the prosecutor, to support the charges against the defendant and thus, it can jeopardize the defendant's right to be tried solely on the evidence presented to the jury; and 2) the prosecutor's opinion carries with it the imprimatur of the government and it may induce the jury to trust the government's judgment rather than its own view of the evidence. *U.S. v. Young*, 470 U.S. 1 (1985).

Here, Petitioner's reliance upon *Young* is misplaced as the screening assistant who testified was *not* one of the trial prosecutors in this case.[8] Instead, the screening assistant was called to the stand to testify as a witness to rebut defense counsel's insinuation that he had made an undisclosed deal with Ms. Lee to refuse her charges in exchange for her testimony. During defense counsel's lengthy cross-examination of Ms. Lee, he repeatedly questioned her "luck" in having charges against her refused by the District Attorney's Office, questioned her with respect to an armed robbery charge pending in Florida, asked her to "explain" to the jury what "arrangement" existed between her and the District Attorney's Office, and questioned her concerning the individuals she spoke with who were connected to the District Attorney's Office. R. 958-968, 977-980, 995, 998-999, and 1016-25.

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[8] During cross-examination by defense counsel, the screening assistant stated that he received the call telling him he would need to come to court to testify in this matter at 8:30 on the night before his testified, and that the last time he had looked at this case was in July of 2015 when the indictment was returned. R. 1103-04.

Given the insinuation that a deal of some kind had been made between Ms. Lee and the district attorney's office, the screening assistant was called to the stand to explain that no deals had been offered to Ms. Lee or others, and to explain his reasons for not charging them with various offenses. His testimony about how the screening process unfolded and why witnesses were not charged was both logically and legally relevant to the accusation that the state improperly refused charges against state witnesses.

Petitioner contends that the screening assistant's testimony constituted "more than 70 pages" of the trial transcript. Pet. 13. However, of those approximately seventy pages, more than 25 were taken up with arguments on defense counsel's and the trial prosecutor's objections. With regard to the testimony quoted on page 13 of the petition, the screening assistant district attorney was explaining why he refused charges against Ms. Lee—he considered that she had an affirmative defense to those charges. R. 1074-1075. To the extent that the screening assistant referenced his review of police reports and law enforcement interviews with Ms. Lee and Ms. Grisby in the first quotation on page 14 of the petition, he was simply confirming that, at the time he was screening the case, he was aware that Ms. Lee committed one or more crimes, including prostitution and battery, in Jefferson Parish. R.1074-1075. To the extent that the screening assistant suggested that he determined not to charge Ms. Lee or Ms. Grisby with second degree battery of C.W. because Anthony would have beaten them if they

had not complied with Anthony's demands, and the screening assistant linked this conclusion to his interview of C.W., it should be noted that: 1) the screening assistant was explaining his screening decision; and 2) C.W. testified at trial.

To the extent that Petitioner contends on page 17 of the petition that the screening assistant "repeatedly reminded the jury he was not an ordinary witness and possessed a higher degree of credibility," the testimony quoted in support of this assertion on pages 17-18 of the petition was not the subject of an objection. In the quotation cited on page 19 of the petition as supporting the assertion that the screening assistant "put the weight of his personal morals behind his belief that Ms. Lee was a victim who required protection" the screening assistant was simply explaining why the decision was made to take Ms. Lee to a shelter when she was released from jail after her charges were refused and that he had not made this decision to "curry some favor with her." R. 1086-87. With regard to the quoted testimony on page 20 of the petition, there was no objection to this part of the prosecutor's testimony. It should also be noted that the reference to Ms. Lee and Ms. Grisby as "victims" could have no bearing with regard to Anthony's guilt on any offense for which he was tried, as he was not tried for any offense in which they were alleged to be victims.

In the instant case, when the screening assistant testified, he affirmed on direct examination that his "personal opinion as to whether or not someone should be charged with a crime is irrelevant to a jury's

determination as to whether or not someone is guilty of a crime." R. 1064. When asked whether his opinion, like the opinions of the trial prosecutors meant nothing and "it's entirely up to the jury[,]" the screening assistant stated, "That is . . . the way it should be." R. 1064. Even when asked on cross-examination if he believed the state witnesses, the screening assistant responded that he made his decision to accept the case based on the evidence and circumstances. R. 1110. When asked on cross whether "we ought to trust Ms. Lee's testimony . . . " he responded "the jury will make the . . . the jury is the ultimate trier of fact." R. 1122-1123.

Petitioner also quotes Judge Wicker's analysis of the screening assistant's testimony concerning the grand jury process in support of his claim that the prosecutor's testimony was misleading and incorrect. Pet. at 34. Contrary to what was stated by Judge Wicker in the dissent to *Anthony II*, the screening assistant's testimony did not lead the jury to believe that a "mini trial had occurred in the grand jury proceeding, in which the rules of evidence were followed and the grand jury found the defendant guilty." Pet. at 34, Pet. App. D, 94. In fact, the screening assistant testified that: grand jury proceedings are not open to the public, neither a defense attorney nor a judge are present, hearsay is admissible, and testimony is principally presented "through law enforcement officers." R. 1065, 1070. The screening assistant also affirmed that the grand jury indictment has no evidentiary value and explained that the grand jury "is merely a group of citizens . . . who say that there is enough evidence

presented to come to court . . . it is a vehicle to get someone before you . . . as a jury." R. 1064. While Judge Wicker's asserted that the screening assistant "misinformed the jury as to the grand jury standard for indictment," the screener in fact agreed on direct examination that evidence presented to a grand jury "is well below what would be presented to a trial jury." Pet. at 34, Pet. App. D, 94, R. 1064.

Based upon the foregoing, the State of Louisiana submits that certiorari should be denied on this issue.

II. Certiorari should be denied on the question of whether, assuming *arguendo* the trial court erred in overruling one or more of defense trial counsel's objections to parts of the screening assistant district attorney's testimony, the Louisiana Supreme Court correctly found that the alleged errors were not structural errors, but were instead trial errors subject to harmless error review.

Even assuming *arguendo* the trial court erred in overruling one or more of defense trial counsel's objections to parts of the screening assistant district attorney's testimony such errors would not be structural errors, but would instead be trial errors subject to harmless error review.

At the core of the structural error doctrine is the idea that some constitutional errors damage the framework of the trial so thoroughly that no aspect of the trial is reliable. *Arizona v. Fulminante*, 499 U.S.

279 (1991). "Structural error 'affect[s] the framework within which the trial proceeds,' as distinguished from a lapse or flaw that is 'simply an error in the trial process itself.' " *McCoy v. Louisiana*, 138 S.Ct. 1500, 1511 (2018); citing *Fulminante*, supra at 279. The rationale for deeming errors structural is because unlike trial error which occur during the presentation of the case to the jury and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt, structural defects in the constitution of the trial mechanism defy analysis by harmless-error standards. *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993). Such errors "infect the entire trial process," *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and "necessarily render a trial fundamentally unfair," *Rose v. Clark*, 478 U.S. 570 (1986). With structural error "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Arizona v. Fulminante*, 499 U.S. 279, at 309-310 (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)).

Not all constitutional errors are structural and "most constitutional error can be harmless." *Neder v. United States*, 527 U.S. 1 (1999). In fact, the class of error to which bright line rules of reversal apply is

narrow. *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1909 (2017).[9]

This Court has identified at "least three broad rationales" for finding an error to be structural: (1) "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest . . . [b]ecause harm is irrelevant to the basis underlying the right,"(2) "if the effects of the error are simply too hard to measure . . . [b]ecause the government will as result, find it almost impossible to show that the error was harmless beyond a reasonable doubt," and (3) "if the error always results in fundamental unfairness . . . it therefore would be futile for the government to try to show harmlessness." *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1908 (2017).

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[9] This Court has recognized structural error in a very limited class of cases. As discussed in *Arizona v. Fulminante*, 499 U.S., at 1265, these include the fallowing constitutional violations: the "total deprivation of the right to counsel at trial" in *Gideon v. Wainwright*, 372 U.S. 335 (1963); "a judge who was not impartial" in *Tumey v. Ohio*, 273 U.S. 510 (1927); "unlawful exclusion of members of a defendant's race from a grand jury" in *Vasquez v. Hillery*, 474 U.S. 254 (1986); denial of the right to "self-representation at trial" in *McKaskle v. Wiggins*, 465 U.S. 168 (1984); denial of the "right to public trial" *Waller v. Georgia*, 467 U.S. 39 (1984). Additional constitutional violations constituting structural error include a defective reasonable doubt instruction, *Sullivan v. Louisiana*, 508 U.S. 275 (1993); denial of one's counsel of choice, *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006); error for a magistrate judge to preside over jury selection without the consent of the parties, *Gonzalez v. United States*, 553 U.S. 242, 252 (2008); and the admission by an attorney of a client's guilt over the client's objections, *McCoy v. Louisiana*, 138 S.Ct. 1500, 1505 (2018).

The screening assistant's testimony in the instant case is far removed from the cases in which this Court has found structural error. Of significance, and as is shown in Part III, *infra*, the screening assistant's testimony can be assessed quantitatively in the context of other evidence presented. This is especially true considering that the screening assistant's testimony is alleged to be error in part. As such, the Louisiana Supreme Court did not err in finding that any alleged errors in the screening assistant's testimony would be trial errors subject to harmless error review. Pet. App. D, 32. Further review of this issue is unwarranted.[10]

III. Certiorari should be denied on the question of whether the Court of Appeal correctly identified the standard applicable to harmless error review and correctly applied it.

Petitioner alleges that the Court of Appeal failed to follow *Chapman* by failing to consider the effect of the alleged errors on this trial and that the Court of Appeal instead looked to the overwhelming evidence of guilt in concluding that any error was harmless. Petitioner further contends that the Court of Appeal's analysis of harmless error conflicts with federal

[10] While Mr. Block did not testify as an expert, it should be noted that even when experts give a conclusion of law or give opinions which tell the jury what result to reach, such testimony is subject to harmless error analysis. *United States v. Oti*, 872 F. 3d 678, 691-92 (2017) (finding harmless the admission of expert testimony stating a legal conclusion that should have been left to the jury to decide).

precedent and as a result, the screening assistant's testimony was not properly reviewed in the context of this case. He further contends that the screening assistant's testimony in this case could not be harmless. Petitioner identifies no novel issue of federal or state law with regard to this issue and he alleges no splits of authorities among state or federal courts. At most, Petitioner is seeking error correction, and such requests are rarely granted by this Court.

Of significance, this Court has stressed that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Thus, "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that if there was constitutional error, it was harmless beyond a reasonable doubt." *Id*. at 681; citing *Chapman v. California*, 386 U.S. 18 (1967). In *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993), this Court stated that "the inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error."

This Court has cited the overwhelming evidence of guilt in finding error to be harmless under *Chapman*.[11] In *Neder v. United States*, 527 U.S. 1, 17 (1999) where

[11] Courts of Appeals have also cited the overwhelming evidence of guilt in finding error to be harmless under *Chapman*. *See United States v. Guzman*, 167 F. 3d 1350 (11th Cir. 1999); *Mercado v. Terhune*, 14 Fed. Appx. 938 (9th Cir. 2001); *United States v. Posey*, 663 F. 2d 37, 42 (7th Cir. 1981).

the issue was the district court's failure to instruct the jury on materiality in a criminal fraud case, the Court held that where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless. *Id.* at 17. Citing to *Chapman*, this Court concluded that the error "did not contribute to the verdict obtained." *Id.* Likewise, in *Harrington v. California*, 395 U.S. 250, 254 (1969), this Court held that the case against Harrington was so overwhelming that the *Bruton* error was harmless beyond a reasonable doubt. In *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986), this Court cited *Harrington*, and affirmed that it had applied the *Chapman* harmless-error standard in other Confrontation Clause cases such as *Harrington*.

How the error affected the verdict, which is what *Chapman* mandates in a harmless error analysis, necessitates a quantitative consideration of the impact of all the evidence received in relation to the evidence erroneously admitted. This is because a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. *Strickland v. Washington*, 466 U.S. 668 (1984). Thus, in *United States v. Hasting*, 461 U.S. 499 (1983), the Court explained that a reviewing court must consider "the trial record as a whole," when assessing harmlessness.

In *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) this Court stated, "Since *Chapman*, it has reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the *whole record*, that the constitutional error was harmless beyond a reasonable doubt." (emphasis added) (citation omitted). Consistent with these decisions, the Court of Appeal's decision in *Anthony II* reflects that it was based upon a review of the record, which is consistent with this Court's precedent to assess harmless error by looking to the basis on which "the jury *actually* rested its verdict." Pet. App. D, 47; *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

In *Anthony II*, the Court of Appeal correctly recognized that "[t]he Louisiana Supreme Court has adopted the federal test for harmless error announced in *Chapman v. California* . . . as refined by *Sullivan v. Louisiana* . . . which asks whether the guilty verdict rendered in this trial was surely unattributable to the error." Pet. App. D, 46 (citations omitted).

Turning to the merits of this case, all three judges on the panel of the Court of Appeal in *Anthony II*, including Judge Wicker, who dissented in part from the Court of Appeal's ruling, correctly concluded that Petitioner's convictions on the felon in possession of a firearm offense (count ten) and the second degree battery offense (count six) were surely unattributable to the error because Petitioner admitted on the witness stand and conceded on appeal that he committed a second degree battery upon C.W., as charged in count six, and

that he was a felon with a firearm, as charged in count ten. Pet. App. D, 47-48, 68.

As to Petitioner's convictions for aggravated rape (counts one and two), human trafficking (count three), aggravated battery (count seven) and sexual battery, the Court of Appeal correctly concluded that any error in admitting the screening prosecutor's testimony was not so prejudicial as to warrant a reversal of these convictions. Pet. App. D, 48.

As to the human trafficking conviction, the Court of Appeal noted while there was conflicting testimony concerning whether C.W. came to New Orleans voluntarily, "the undisputed testimony established that C.W. attempted to escape from the defendant." Pet. App. D, 48. The Court of Appeal stated:

> Testimony from C.W., Ms. Lee, and [Anthony] confirmed that C.W., Ms. Lee, and defendant confirmed that C.W. told defendant that the "john" wanted to take her to a bar for a drink; however, defendant told her that she could not go with the "john." When C.W. attempted to leave with the "john," defendant chased her down, threatened her at gunpoint, informing her "you ain't going home" and later beat her until she was unrecognizable. C.W. testified that she informed Sergeant Locascio that "two pimps" were involved (defendant and co-defendant) defendant forced her to sleep with "johns" in New Orleans, and defendant took any money she made from the "johns."

Pet. App. D. 48-49. The Court of Appeal also noted with respect to the trafficking charge that:

> Additional evidence at trial established that defendant's cell phone was used to post "hundreds" of solicitation ads on Backpage.com and text messages were found on his phone demonstrating communication between a pimp and his prostitute. The State introduced into evidence various incriminating letters written by defendant in jail after his arrest. During recorded telephone conversations of defendant while in jail, defendant spoke about "pimping out girls" and attempted to secure individuals to provide false testimony to ensure that Ms. Lee and C.W. "wouldn't show up for trial."

Pet. App. D, 51.

Additionally, the solicitation ads posted by Petitioner's phone, using an account under his control, included pictures of C.W., Ms. Lee, Ms. Grisby, and Ms. Hunt. R. 1563-64. Anthony admitted he posted these ads knowing that phone calls requesting prostitution dates with them would be made to his phone number. R. 1563-64. Anthony admitted to "sharing" in the money the women earned prostituting themselves. R. 1568. Petitioner admitted to being a participant in the brutal beating of C.W. during which she was struck with such force that she sustained serious bodily injury including an orbital fracture to her face and contusions all over her body. R. 1565. Petitioner also admitted throwing things at C.W. during the beating,

including a two-liter Sunkist bottle (he said "it wasn't full"), a coat hanger, and a chair (he said it did not hit her because she was under the table). R. 1566.

As to the rape offenses, the aggravated battery and sexual battery offenses, the victim testified that at Anthony's request, the co-defendant approached her and "started to pee on me."[12] R. 1393-1394. Then, he put his penis into her mouth, urinated in her mouth and she was forced to swallow the urine. *Id.* As to the second rape, the victim testified that the other individuals then left to go to Walmart and she was left alone with defendant in the hotel. She testified that Anthony "had sex with me" even though she did not want to have sex with him. R. 1396, 1491. DNA obtained from C.W.'s vaginal swab and cervical swab had a sperm fraction, from which the DNA profile of Anthony could not be excluded as a contributor. R. 677, 680, 682-683. Anthony was armed with a gun at the time of the rape, and he forced himself on her. R. 1393, 1480. She further testified that he placed his gun inside of her mouth, inside her vagina, and that he hit her with his gun. R. 1395, 1491. A Walmart receipt and video footage from Walmart confirmed the testimony that C.W. and

[12] Petitioner confirmed that he made the statement that he "wished he could piss on [C.W.]"; however, he claimed that he had been speaking "figuratively" and denied having encouraged Pierre Braddy to urinate on C.W. R. 1584-1585. Anthony testified, "I did not know [Braddy] actually put [his penis] in her mouth, but I did see him urinate on her." R. 1584. Petitioner claimed that he did not tell Braddy to urinate in C.W.'s mouth, but he admitted that he laughed about it. R. 1552.

Anthony were left alone in the hotel room at the time C.W. testified defendant raped her. Pet. App. D, 50.

DNA evidence obtained from inside the barrel of Anthony's gun which C.W. testified was used in the commission of the rape, was connected to C.W. and to Anthony in that neither could be excluded as contributors. R. 761-762, 789. Anthony further admitted to owning a gun, pointing the gun at C.W., hitting C.W. with such force that she sustained serious bodily injury, and throwing a coat hanger and a chair at C.W. R. 1565-1566, 1582-1583. Anthony admitted that the gun was in the room when he and the victim were alone together and the others were at Walmart. Rec. 1569.

The examining nurse at the hospital testified that C.W.'s medical records showed that C.W. made statements that she had been vaginally penetrated with a "penis and a gun," and that she had significant bruising to her face. R. 609, 611, 616-617, 638-639, 1168, 1171, 1175. The nurse testified that her findings were consistent with C.W.'s recitation of facts of what happened to her, which was that C.W. was "being held against her will in a hotel room and that she was beaten and assaulted by several people in the room." R. 617. C.W.'s medical records also contained a statement from C.W. that at Anthony's request, the co-defendant placed his penis inside her mouth and urinated in it. State witness Nadia Lee further corroborated C.W.'s testimony, confirming that she saw defendant beat C.W. to the point that C.W. was "unrecognizable." R. 911-955, 1032. Ms. Lee also recalled Anthony instructing the co-defendant to urinate on C.W.

Based on the foregoing the State submits that the verdicts in this matter were surely unattributable to any error in the admission of all or part of the screening assistant's testimony. As such, admission of the screening assistant's testimony was harmless beyond a reasonable doubt. The Court of Appeal correctly identified and applied the harmless error test, and this matter should not be reviewed further.

CONCLUSION

Louisiana respectfully requests that the petition for writ of certiorari should be denied.

Respectfully submitted,

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