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IN THE
SUPREME COURT OF THE UNITED STATES

TRE' ANTHONY JAMES — PETITIONER

vs.

STATE OF LOUISIANA — RESPONDENT(S)
ON PETITION FOR A WRIT OF CERTIORARI TO
THE LOUISIANA FIRST CIRCUIT COURT OF APPEAL
PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Is it reversible error when an appellate court overturns a trial court's grant of a new trial when, first, the decision to grant or deny a motion for new trial is not reviewable; and second, the trial court's grant concerns **factual** sufficiency, which is not to be confused with **legal** sufficiency and the due process standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)?
2. Does the law-of-the-case doctrine prevent a high court from considering the correctness of an appellate courts decision?

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner, Tre'Anthony James ("James") respectfully requests that the Court grant a writ of certiorari to review the Louisiana Supreme Court's decision to allow his convictions for first and second degree rape and the resultant concurrent sentences of life and twenty years imprisonment, at hard labor and without the benefits, to stand after the trial court granted his motion for new trial under *La. C. Cr. P. art. 851(5)*.

James is the defendant and defendant-appellant in the courts below. The respondent is the State of Louisiana, the plaintiff and plaintiff-appellee in the courts below.

OPINIONS BELOW

The Louisiana Supreme Court's decision to deny James's writ application appears at Appendix B to the petition and is reported at *State v. James*, 2023-00838 (La. 2/14/24); --- So.3d ---, 2024 WL 618016. The Louisiana First Circuit Court of Appeal's opinion appears at Appendix A to the petition and is reported at *State v. James*, 2022-0938 (La. App. 1 Cir. 5/18/23); 2023 WL 3556925 (Not Reported in So. Reporter).

JURISDICTION

James invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Louisiana Supreme Court on the basis of 28 U.S.C. § 1257(a). The Louisiana Supreme Court denied James's writ application seeking review of the affirmance of his conviction and sentence on direct appeal on February 14, 2024. See Rules of the Supreme Court of the United States, Rule 10(b).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The questions presented implicates the following provisions of the United States Constitution, the Louisiana Constitution, and the Louisiana Code of Criminal Procedure:

The Fourteenth Amendment, § 1, to the United States Constitution provides:

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

Article 1, § 2 of the Louisiana Constitution provides:

Due Process of Law. No person shall be deprived of life, liberty, or property, except by due process of law.

Article 1, § 3 Louisiana Constitution provides:

Right to individual Dignity. No person shall be denied the equal protection of the laws.

La. Const. Art. V, § 10(B) provides:

Scope of Review.... In criminal cases its appellate jurisdiction extends only to questions of law.

La. C. Cr. P. art. 851 B.(1)(2)(3)(4)(5) provides:

A. The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegation it is grounded.

B. The court, on motion of the defendant, shall grant a new trial whenever any of the following occur:

(1)The verdict is contrary to the law and the evidence.

(2)The court's ruling on a written motion, or an objection made during the proceedings, shows prejudicial error.

(3)New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is

available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty.

(4) The defendant has discovered, since the verdict or judgment of guilty, a prejudicial error or defect in the proceedings that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before the verdict or judgment.

(5) The court is of the opinion that the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right.

La. C. Cr. P. art. 858 Review of ruling on motion for new trial provides:

Neither the appellate nor supervisory jurisdiction of the supreme court may be invoked to review the granting or the refusal to grant a new trial, except for error of law.

STATEMENT OF THE CASE

A. *Introduction.*

James was indicted for two counts of first degree rape. The jury returned unanimous convictions on both counts; but, on count two, the jury convicted responsively of second degree rape. R. p. 20. On October 8, 2020, the trial court granted James's motion for a new trial and denied his motion for post-verdict judgment of acquittal as moot. R. p. 161. The state filed a writ application to the First Circuit Court of Appeal. On February 18, 2021, the First Circuit granted the State's writ application and reversed the trial court's grant of a new trial and remanded the case for sentencing. Attachment C, p. 23; R. p. 182. Instead of filing an application for rehearing in the First Circuit, James's counsel filed an application for reconsideration to the Louisiana Supreme Court. On June 1, 2021, the state supreme court denied counsel's misplaced application. Attachment D, p. 24. R. p. 193. James's appointed appellate counsel did not brief the state supreme court about the First Circuit's inability, under *La. C. Cr. P. art. 858*, to review the trial court's grant of a new trial except for errors of law. On August 26, 2021, the state filed a habitual offender bill of information charging James as a second felony offender with respect to his second degree rape conviction. R. p. 184. On October 26, 2021, the trial court adjudicated James a second felony offender on count two. R. p. 31. The court sentenced James to life imprisonment at hard labor without the benefits of probation, parole, or suspension of sentence on count one, and 20-years at hard labor on count two. The court ordered the sentences to run concurrently. R. pp. 7-8. On November 21, 2022, James's appellate counsel filed a timely appeal to the First Circuit. On May 18, 2023, the First Circuit

affirmed James's convictions and sentences. Attachment A, p. 2. On June 13, 2023, James filed a timely pro se application for a writ of certiorari to the Louisiana Supreme Court. On February 14, 2024, the state supreme court denied James's writ application.

B. Facts of the Incident.

James was 17-years-old when he was arrested for unrelated charges and incarcerated in the Ascension Parish Jail. James, J.W. and Green were housed in the same dorm. According to J.W., he and James were friends initially. R. p. 419. J.W. asked James to "slap-box" with him but, when James began winning every time, J.W. asked him to stop. R. p. 420. According to J.W., the slap boxing did not stop and he claimed to be afraid of James. R. p. 421. J.W. testified that he would often share his prison food and commissary items with James when he was hungry. R. p. 420. J.W. said James's asking for things eventually turned into him demanding them. R. p. 420. James had been in the dorm for about 40-days when J.W. claimed James anally raped him on January 10, 2017. R. pp. 424-25. According to J.W., that night, he, Green and James played cards until lights out. R. p. 423. After lights out, J.W. said Green asked for his food trays for the next day. R. p. 424. J.W. said he told Green no. R. p. 424. In response, Green choked him and pinned him to the table in the dayroom area. R. p. 424. According to J.W., James then walked up and kept him pinned to the table while Green went into the cell and grabbed a razorblade. R. pp. 424-25. J.W. said they cut his jumpsuit open, adorned plastic gloves like condoms, and James, lubricated with lotion, anally raped him. R. p. 425. J.W. said he told them to stop but they did not. R. p. 426. Afterwards, J.W. went back to his cell and did not report the allege rape. R. p. 426.

J.W. said, the following night, James asked him to have sex with him. R. p. 427. J.W. said he kept telling James no until James told him he could either "give up or he can just take it every night." R. p. 427. J.W. said he decided to give in and have sex with James. R. p. 427. J.W. admitted on cross examination that he told the police James was the only person to put on a glove although he was claiming James and Green both wore gloves as condoms. R. p. 439. J.W. also changed his story when he told the sexual assault nurse that it was James, and not Green, who choked him. R. p. 463.

James's DNA was recovered from two items of evidence: the rectal swab performed on J.W.; and pubic hair located during the examination. R. p. 479. James's DNA was also recovered from the blue gloves collected. Based on J.W.'s allegations and the DNA evidence, James was arrested and charged with two counts of first degree rape. The Ascension Parish District Attorney's Office decided not to prosecute. The Louisiana Attorney General's Office reinstated the offenses against James.

REASONS FOR GRANTING THE PETITION

Under Rule 10, the Louisiana Supreme Court denied relief and contrarily decided important questions of federal law that has been settled by this Court and has decided important federal questions in a way that conflicts with this Court's relevant decisions:

- 1. [Questions 1 and 2] This Court should decide if it is permissible for an appellate court to overturn a decision to grant a motion for new trial absent a clear abuse of a trial court's considerable discretion.**

The Louisiana Supreme has acknowledged, and made decisions consistent with, the way this Court has distinguished legal and factual insufficient evidence. In *State v. Bourg*, the Louisiana Supreme Court held:

In the context of a motion for new trial pursuant [to] La. C. Cr. P. art. 851(B)(1), the term *sufficiency* is shorthand for *factual sufficiency*, which should not be confused with *legal sufficiency* of the evidence in the context of a motion for post verdict judgment of acquittal and the due process standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

State v. Bourg, 2019-00038 (La. 12/11/19); 286 So.3d 1005,1008 (citing *Hudson v. Louisiana*, 450 U.S. 40, 42-45, 101 S.Ct. 970, 972-973, 67 L.Ed.2d 30 (1981)).

The Louisiana Supreme Court further noted that:

In considering the double jeopardy implications, the United States Supreme Court described the differences between legally and factually insufficient evidence in *Hudson v. Louisiana*, 450 U.S. 40, 42-45, 101 S.Ct. 970, 972-973, 67 L.Ed.2d 30 (1981) (citations and footnotes omitted):

Our decision in [*Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 51 L.Ed.2d 1 (1978)] controls this case, for it is clear that petitioner moved for a new trial on the ground that the evidence was legally insufficient to support the verdict and that the trial judge granted petitioner's motion on that ground.

State v. Bourg, supra. Footnote 1.

The Louisiana Supreme Court also made clear that when a trial court is ruling on a motion for new trial under La. C. Cr. P. art. 851(B)(1), it is the trial court's duty to "put itself in the position of a juror." *State v. Bourg*, 286 So.3d at 1008. Cf. *Hudson v. Louisiana*, 450 U.S. at 43-44, 101 S.Ct. at 972-73. In the instant case, James's trial counsel filed an unsuccessful motion for acquittal and a successful motion for new trial. Counsel argued:

... [Y]ou were the judge for both trials for Mr. Tre'Anthony James and the subsequent codefendant's trial Mr. Kaglin Green ... and you sit in the best position to grant the Motion for a New Trial. And a strong point or the crux of our argument, one, would be prosecutorial misconduct that was definitely displayed by the Attorney General's Office; and also, secondly, a victim who seemed to recant or if not lie on the witness stand at the subsequent trial of Mr. Kaglin Green. And, thirdly, there was some evidence that was hidden from the defense attorney ... that we didn't find out until the victim was on the witness stand. I don't believe in trial by ambush when the victim lied about the number of times he had had sex with different men in jail, and the State actually told the victim that he was raped I think by Mr. Kaglin Green. None of that was disclosed to us. I mean, so, basically, Judge, it was a trial by ambush.

Appendix D, pp. 10-11.

In response to counsel's argument, the assistant attorney general said:

... [W]e first assert, as we have in our motion, that no Brady violations exist. We maintained open-file discovery throughout the entire process of the James' trial leading up to it. DNA evidence existed about any contact between James and Green. All of that was turned over. There were no objections by defense that any discovery had not been provided, and as it relates to the prosecutorial conduct, Your Honor, we've stated in our motion as well that there was no conflict of interest there. Mr. Ambeau [an assistant attorney general] was representing Mr. Westbrook in the capacity of a civil attorney, and communication with him throughout the course of the trial in reference to matters that defense brought up regarding the federal petition was the only reason that they were to communicate, and it's untenable for Mr. Battiste to think that because an AAG is a prosecutor he's also in a capacity to represent any other state agency in any other matter, and we feel that that argument is over exaggerated and meritless. And as far as the injustice that they are asserting against Mr. James, Your Honor, we feel that no injustice exists. While the trials that occurred between James and Green were similar in nature, Green was charged with something completely different. He was charged with a principal offense. James was charged with the actual rapes of the victim on two different occasions, and there is nothing in any testimony admitted by the victim in either trial that is materially inconsistent throughout both cases. There's nothing that occurred in the testimony of the Green trial that would exonerate James in any way, and the allegation that the victim made in both the Green trial and the James trial that a subsequent rape occurred by Green was consistent in both situations, and at no time did he ever indicate that any of those acts were consensual. The fact that the subsequent rape occurred by Green and the allegation took place and was brought forth during the trial was not new information, because in open-file discovery there was DNA evidence that there was Green's DNA on the gloves that were submitted. Defense chose not to pursue that. He had ample opportunity to cross-examine the victim during direct and cross-examination in the trial, and the jury clearly dismissed any allegation or any suggestion that any of the acts were consensual. Your Honor, there were four different underlying elements of first-degree rape that were presented to the jury, and the State believes, as the verdict rendered/shows, that we proved beyond a reasonable doubt that first-degree rape was committed against James, and that nothing in the trial of Green presented any new evidence or new material that would have exonerated James in any way.

Appendix D, pp. 11-13.

The trial judge, in response, took judicial notice that there were "definitely some inconsistencies" in the alleged victim's testimonies. Appendix D, p. 14. Trial counsel went on to argue:

I don't know what trial she was at, okay, but I tried the case, and I sat here the whole time, and when the victim was on the witness stand ... and I was looking at the psychiatric report, because if you don't - - because in case you forgot, this case was dismissed by the State of Louisiana, and for some reason and no one seemed to know why, the Attorney General's Office decided that they would re-indict it, and as far as prosecutorial misconduct, it was prosecutorial misconduct, because for me to make that statement as a defense, for me to put it in the pleading means I have to absolutely believe that I gained nothing out of accusing Mr. Derbes of committing prosecutorial misconduct. That's what he did. Let me refresh the Court's memory. We were in the back, and he was like (quotes are as spoken for clarification), "Well, um, you know, Mr. Ambeau is getting to the family; (repeats) Mr. Ambeau is getting to the family." And for Jarrett Ambeau to have an active civil case against the sheriff's department, and for Matthew Derbes and Jarrett Ambeau to participate about - - if my client would have got convicted, it would have definitely helped the civil case that Mr. Ambeau who sat here in court, sat here with the victim's family, communicated with Matthew Derbes; Matthew Derbes even told us that after he left that Mr. Ambeau called him. And as far as Brady material, there was a Brady violation. In the report the victim says that he only had sex with my client. He's absolutely right. Kaglin Green was only charged with principal, all right, but in the psychiatric report where the victim said he played homosexual games, whatever that may be, for weeks, before he decided he didn't want to participate in homosexual acts, he tells the psychiatrist ... that he had sex with two black males. Well, guess what? I think that's just a fluke or a typo. When he's on the stand I said, "You said to the psychiatrist that you were penetrated by two males, but that's my first time ever hearing that." And he says, "I told the Attorney General's Office that I also had sex with Kaglin Green," and he said ... "Well, he kept asking me, (repeats) he kept asking me, he kept asking me to have sex with him, and finally I did it." I said, "Well, you've got to at least make the offer, right?" "And then the Atty. Gen.'s Office [sic] told me I that I was raped." That was not disclosed to me, and if the Atty. Gen.'s [sic] Office is going to tell a victim, "You were raped" versus "you had consensual sex" and I represent the codefendant, one, that sexual act could have been a source of any damage that the victim had to his anus, all right, because supposedly my client raped the guy Monday morning. He had sex either Monday evening or Tuesday morning, whichever you believe, with Kaglin Green; that's not disclosed to me, but Kaglin Green could have been a source of any semen or anal tearing that he had. Then he turns around the very next day and he has sex with my client, so I don't know if that's information the Atty. Gen.'s [sic] Office had. That's something that should have

been disclosed to me, and I would've tried my case differently. So I don't know how that's not prosecutorial misconduct. I don't know how that wouldn't be a Brady violation if you were hiding evidence which seems to exculpate; that's the definition of Brady. You hide evidence that shows someone's innocence or that's hindering his defense. So if this would have been a woman that would have had sex with, let's say, my client, whether you believe it was consensual or not, and the very next day had sex with someone else and the State learned about it, that should have been disclosed to me. It should not have been hidden. Not Jarrett Ambeau, not Matthew Derbes, not your learned counsel before the Court has the right to tell me if a defendant - - if a victim has sex with a person in between - - as a matter fact [sic], there's a special statute for that, but you know that in the Code of Criminal Procedure that provides that that has to be disclosed, and they didn't disclose it, and I take a real big issue with that. And I'm going to say it again: One of the many things that I argued in my motion was prosecutorial misconduct, because you cannot serve two masters. There's one State of Louisiana; am I right? There's one governor, John Bel Edwards. You cannot be a prosecutor for the Atty. Gen. [sic] and give an appearance that you are assisting - - I don't care if he was acting as a civil attorney in a case against the sheriff's department. It's the same body. One is the head, one is the leg, and one is the arm.

Appendix D, pp. 14-18.

To clarify counsel's claim regarding the Brady material, the court asked if the open-file discovery contained any information about the sexual encounter between the putative victim and James's codefendant—Kaglin Green. Appendix D, p. 18. Counsel explained to the court that he did not know Green and the alleged victim had sex until the alleged victim was on the stand:

I did not discover that until the witness was on - - until the victim - - and I use that term very loosely - - was on the witness stand, and he said, "Well, I was told by the State I was raped." And I said, "Excuse me." "Well, yeah, he kept asking me to have sex with him, and finally I said yes." I said, "Well, if that's the case, men should go to jail every day. I mean, you've got to make the offer, you know." "Well, he kept asking me to have sex with him, so finally I said yes, and the Attorney General's Office told me I was raped," and that's nowhere in discovery. I knew this case like I knew the back of my hand. It's nowhere in discovery that he had consensual sex with anybody[.]

Appendix D, p. 19.

The trial court asked Assistant Attorney General Erica McLellan if she knew the sexual incident between Green and the alleged victim was actually contained in the discovery provided to the defense. AAG McLellan said her office gave everything they had. She said the discovery included DNA evidence that indicated:

... there was sexual contact between Green and the glove that was used, and the only allegation that the victim made at all regarding any sexual contact between him and Green relates to an event that happened after the two incidents that James was tried for. And the only reason he didn't report them is because he didn't understand that they were rape because there wasn't force at any point. Admission is not consent. He then - - he was in fear.

Appendix D, p. 20.

The assistant attorney general's response was not only misleading, it was false. Trial counsel did not know James had an alleged codefendant. Counsel also did not know the codefendant was charged as a principal to first degree rape. Also, according to the alleged victim, he had sex with the codefendant in between the two alleged rape incidents—not after. In response to AAG McLellan's false assertion, James's trial counsel said:

Please pay attention to the victim's testimony....the exhibit that I'm showing the victim is ... the psychiatric report, you know, when his attorney was trying to act like he was so crazy, you know, he was scared and he was in jail, this, that, and the other. And the psychiatric report says the victim is here because he was sexually assaulted by two men. He doesn't tell this to the rape nurse that Kaglin Green had sex with him. He doesn't tell this to ... anybody in the sheriff's department that Kaglin Green had sex with him. I asked him the question because it was news to me, all right. I asked him the question, I said, "Well, when did you have sex with Kaglin Green?" He said, "I had sex with him in between the two times that I had sex with your client, but I didn't know it was rape until the AG's Office told me." And that has been memorialized nowhere. The first time I ever heard that was when he was on the witness stand....I can give the Court what I got/open-file discovery; that is not in the file. That was not disclosed to me, and if you would read the transcript, Mr. Derbes said he felt that it was not related. And I don't know how he felt it wasn't related that a victim had consensual sex with someone who he's accusing was a principal in my client raping him violently in the jail. And it doesn't help his - - and it helps my client's case, because I guess

of the two guys that he was having sex with in jail he must have liked Kaglin Green better, because then when Kaglin Green's trial was second, he tries to downplay it as I guess just two guys having sex in jail. And I'm going to say this again. That was hidden from me. That was not disclosed to me. It was a trial by ambush. It was unfair. It's a miscarriage of justice. I do not like the fact that Matt Derbes was communicating with Jarrett Ambeau the way how he was when Jarrett Ambeau has a financial interest in this case. I sue people every day of my life. You sue people for money, all right. I do not like that, and that looks bad, and it's a black eye at the Attorney General's Office.

Appendix D, pp. 21-26.

After considering arguments for both sides and reading the transcripts of the victim's testimonies, the trial court granted James's motion for new trial and explained:

This Court is of the opinion that an injustice is surely done to a defendant who is found guilty of First Degree Rape, which carries a life sentence, when there are such glaring discrepancies in the victim's statements, and the defense was not notified of relevant evidence of another alleged rape by a different perpetrator before trial, which may have allowed it to form a more adequate defense. It is impossible to know whether the jury relied on the alleged fact that Green assisted James in the January 10th rape to find him guilty of First Degree Rape, but if the basis of the conviction was the jury's finding that two or more offenders participated in the act, then the conviction should be overturned based on the victim's subsequent retraction of his statements at the trial of Kaglin Green. Likewise, it is impossible to know whether the jury found James guilty of First Degree Rape based on him having a dangerous weapon (i.e., a razorblade), but if that was the basis of the verdict, then the conviction should be overturned based on the victim's admission in Green's trial that he never actually saw the razor blade. The inconsistency in the victim's statements creates sufficient doubt to cause one to question whether a just verdict was reached by the Jury for First Degree Rape. As such, the Motion for New Trial is granted as to the January 11th, 2017 incident.

Similarly, the victim's inconsistent statements regarding the January 10th, 2017 incident, along with the revelation during trial that the victim was also penetrated by another perpetrator during the relevant time period, leads this Court to believe that the ends of justice would be served if the Defendant were also granted a new trial for the January 11th, 2017 incident. As such, the Defense's Motion for New Trial as to both counts in the November 5, 2018 indictment is granted.

R. pp. 165-66; (James does not have a copy of the trial court's written judgment).

The trial judge's factual observations are similar to those of the trial judge in Tracy Hudson's case. The difference is, in James's case, the judge acted, as allowed under Louisiana law, solely as the thirteenth juror when he granted the defense's motion for new trial. See *Hudson v. Louisiana*, 450 U.S. at 44, n.5, 101 S.Ct. at 972-73. In granting the State's writ application, the First Circuit Court of Appeal erred when it reversed the trial judge's decision to grant a new trial and opined that:

There are six circumstances under which a defendant can be convicted of first degree rape. See La. R.S. 14:42(A). Even discounting the two circumstances noted in the district court's ruling, the victim's uncontroverted testimony established he resisted the act to the utmost, but his resistance was overcome by force. Thus, the defendant's conduct appears to meet at least one of the remaining circumstances for first degree rape. Furthermore, the court failed to identify any legal error regarding the jury verdict on count two. Therefore, the State's writ is granted, the ruling granting a new trial on both counts is reversed, the convictions on both counts are reinstated, and this case is remanded to the district court for sentencing on both counts.

R. p. 182; (James does not have a copy of the appellate court's judgment).

Under *La. C. Cr. P. art. 858*, and *La. Const. Art. V, § 10(B)*, the First Circuit did not possess the legal power and/or authority to reverse the trial court's decision to grant James a new trial. See *State v. Bourg*, 286 So.3d at 1010 (Crichton, Justice., concurring). Louisiana appellate courts have jurisdiction to review the standard trial courts apply when granting motions for new trials under Article 851. However, like the appellate court in *State v. Bourg*, 16-0915 (La. App. 3 Cir. 6/21/17); 223 So.3d 26, the First Circuit Court of Appeal "erred ... in finding the district court applied the wrong standard, and then used its erroneous determination to displace the district court's evaluation of credibility and the weight of the evidence." *State v. Bourg*, 286 So.3d at 1010.

Another instance, similar to the present one, arose in *State v. Miller*, 2005-1111 (La. 3/10/06); 923 So.2d 625. In *Miller*, the Louisiana Supreme Court reversed the Fifth Circuit Court of Appeal's decision to undo the trial court's decision to grant the defense's motion for new trial. Most notably, the Louisiana Supreme Court explained:

An appellate court's independent review of the evidence may lead it to disagree with a lower court's assessment ... that disagreement alone may not form the basis of setting aside a trial court's further finding on the same evidence that in any case a new trial appears warranted to serve the ends of justice because La. C. Cr. P. art. 851(5) gives the court the authority to make that call "although the defendant may not be entitled to a new trial as a matter of strict legal right." See La. C. Cr. P. art. 858 ("Neither the appellate nor supervisory jurisdiction of the supreme court may be invoked to review the granting or the refusal to grant a new trial, except for error of law."). Louisiana law thereby recognizes the unique position of a trial judge to "get the feel of the case" by observing the witnesses first hand as they testify. *State v. Talbot*, 408 So.2d 861, 885 (La. 1981)(on reh'g) (interior quotation marks and citations omitted)....The judgment provides substantial assurance, if any is needed, that the trial judge did not act arbitrarily or capriciously but exercised her authority under La. C. Cr. P. art. 851(5) for reasons firmly grounded in the record of trial and post-verdict proceedings and in the discharge of her duty to administer justice.

State v. Miller, 923 So.2d at 627.

The trial judge's appreciation of the evidence in this case, coupled with his observation that James was a victim of injustice at his trial, was not reviewable. The trial judge said James suffered an injustice when he was convicted of first degree rape and sentenced to life imprisonment in the face of: (1) glaring discrepancies in the victim's statement; (2) the State's failure to notify the defense of relevant evidence of another alleged rape by a different perpetrator before trial; (3) the inability to know if the jury convicted James of aggravated rape because they believed he and another person acted in concert in the first accusation; (4) the victim's retraction at the codefendant's trial; (5) the inability to know whether the jury convicted James because

they believed he had a dangerous weapon—especially when the victim admitted at the codefendant's trial that he never saw a weapon; and (6) the victim's inconsistent statements. See R. pp. 165-66.

In James's case, the Louisiana Supreme Court has allowed the First Circuit Court of Appeal to reverse the trial court's grant of James's motion for a new trial in error. A motion for a new trial, challenging the sufficiency of the evidence is a question of fact beyond a reviewing court's constitutional scope of review. Cf. *La. Const. Art. V, § 10(B)*; *Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970 (La. 1981); *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 1, 98 S.Ct. 2141 (1978); *State v. Bourg*, 286 So.3d 1005, *State v. Guillory*, 10-1231 (La. 10/8/10); 45 So.3d 612; *State v. Miller*, 923 So.2d 625. The First Circuit lacked jurisdiction to undo the granting of James's motion for a new trial because the trial court did not abuse its considerable discretion.

The only evidence presented to show that the sexual contact between James and J.W. was not consensual was J.W.'s testimony. The entirety of the state's case relied on J.W.'s credibility. When considering J.W.'s testimony in Green's trial, as a principal to first degree rape, and how his testimony was substantially inconsistent from his previous testimony concerning the same event, the trial court initially granted the motion for new trial based on newly discovered evidence. After James was convicted, Green went on trial for principal to the first degree rape that, allegedly, happened January 10, 2017. J.W.'s testimony was not consistent with the testimony he offered at James's trial. In James's trial, J.W. said Green left the room to retrieve the razor blade James supposedly used to cut open his jumpsuit. R. p. 425. At Green's trial, J.W. said he did not actually

see Green leave the room to get the razor blade and he did not know if a razor blade was even used. R. pp. 148,163. At James's trial, J.W. said James and Green used rubber gloves as condoms. R. p. 439. At Green's trial, however, J.W. did not mention this to the jury. R. p. 164. In fact, at Green's trial, J.W. said he did not believe Green knew James was going to rape him. R. p. 164.

Article 851, of the Louisiana Code of Criminal Procedure, provides the grounds for a new trial:

- A. The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegation it is grounded.
- B. The court, on motion of the defendant, shall grant a new trial whenever any of the following occur:
 - (1) The verdict is contrary to the law and the evidence.
 - (2) The court's ruling on a written motion, or an objection made during the proceedings, shows prejudicial error.
 - (3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty.
 - (4) The defendant has discovered, since the verdict or judgment of guilty, a prejudicial error or defect in the proceedings that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before the verdict or judgment.
 - (5) The court is of the opinion that the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right.
 - (6) The defendant is a victim of human trafficking or trafficking of children for sexual purposes and the acts for which the defendant was convicted were committed by the defendant as a direct result of being a victim of the trafficking activity.

While the trial judge did base his granting of a new trial partially on the victim's inconsistent statements, the court's ruling on the inconsistent statements created sufficient doubt about whether the jury reached a just verdict in James's case. In seeking a new trial based on newly discovered evidence, a defendant must establish four elements:

- (1) that the new evidence was discovered after trial;
- (2) that failure to discover the evidence before trial was not attributable to his lack of diligence;
- (3) that the evidence is material to the issues at trial; and
- (4) that the evidence is of such a nature that it would probably produce a different verdict in the event of a retrial.

State v. Hammons, 597 So.2d 990 (La. 1992); *State v. Knapper*, 555 So.2d 1335 (La. 1990); *State v. Prudholm*, 446 So.2d 729 (La. 1984).

In ruling on the motion, "the trial judge's duty is not to weigh the evidence as though he were a jury determining guilt or innocence, rather his duty is the narrow one of ascertaining whether there is new material fit for a new jury's judgment." *State v. Prudholm*, 446 So.2d 729, 736.

Newly discovered evidence affecting only a witness's credibility will ordinarily not support a motion for a new trial. *Mesarosh v. United States*, 352 U.S. 1, 77 S.Ct. 1, 1 L.Ed.2d 1 (1956); *State v. Cavalier*, 96-3052 (La. 10/03/97); 701 So.2d 949. However, a court has discretion to grant a new trial in cases where the witness's testimony is essentially uncorroborated and dispositive of the question of guilt or innocence and it appears that had the impeaching evidence been introduced, it is likely that the jury would have reached a different result. *United States v. Davila*, 428 F.2d 465 (9th Cir. 1970); *United States v. Davis*, 960 F.2d 820 (9th Cir.); *cert denied*, 506 U.S. 873, 113

S.Ct. 210, 121 L.Ed.2d 150 (1992); *United States v. Taglia*, 922 F.2d 413 (7th Cir. 1991); *State v. Bryan*, 398 So.2d 1019 (La. 1980) (on rehearing). In making a determination as to whether a new trial is warranted, the court may assume that the jury would have known that the witness had lied about the matter. *United States v. Stofsky*, 527 F.2d 237 (2nd Cir. 1975); *cert denied*, 429 U.S. 819, 97 S.Ct. 65, 50 L.Ed.2d 80 (1976); *State v. Cavalier*, 701 So.2d 949.

One of the most glaring inconsistencies the trial court noted in its written reasons for judgment was J.W.'s testimony at Green's trial that he did not believe Green knew James was going to rape him on the night of January 10, 2017. R. p. 164. As the trial court pointed out at James's trial, J.W. was adamant about seeing James and Green put on gloves like condoms. R. p. 425. Not only did J.W. not mention the gloves in his testimony at Green's trial, his testimony that he did not believe Green knew James was going to rape him contradicts his prior testimony. As the trial court correctly pointed out, if J.W. saw Green putting on a glove like it was a condom, he not only knew James was about to rape him, he also knew Green was about to rape him too. R. p. 164.

The trial court further pointed out that J.W.'s story changed during James's trial. After James was convicted, J.W. told another inconsistent story during Green's trial, after which, Green was acquitted by the trial court. The inconsistencies in J.W.'s testimonies are not insignificant; they go to the heart of the credibility of the only witness in James's trial who claimed the intercourse was not consensual. This newly discovered evidence is sufficiently probative of the alleged victim's credibility such that

the granting of a new trial was warranted in this case and was not reviewable, except for legal errors, by the First Circuit Court of Appeal.

CONCLUSION

James respectfully ask the Court to grant his writ of certiorari and permit briefing and argument on the issues.

Respectfully submitted,

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Date - April ____, 2024

date