24-5254 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

EDWARD KEITH JOHNSON – PETITIONER

vs.

TIM HOOPER, WARDEN -- RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR CERTIORARI

EDWARD KEITH JOHNSON #379494
CAMP C BEAR 4
LOUISIANA STATE PENITENTIARY
ANGOLA, LOUISIANA 70712

QUESTION(S) PRESENTED

Was Petitioner Denied the Right to Due Process violating the Fourteenth Amendments to the United States Constitution and Article 1, Section 2 of the Louisiana Constitution of 1974 when the Trial Court applied the misinterpretation of the Law to LA. R. S. 15:440.5.

Whether Petitioner Sixth and Fourteenth Amendment to the United States Constitution was Violated when Denied the Effective Assistance of Counsel at Trial and Appellate Counsel on Appeal?

Whether Petitioner's Fourteenth Amendment to the United States Constitution was violated when Prosecutor withheld Brady Material?

LIST OF PARTIES

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

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Edward Keith Johnson #379494
Camp C Bear 4
Louisiana State Prison
Angola, Louisiana 70712

Tim Hooper, Warden
Administration Building
Louisiana State Prison
Angola, Louisiana 70712

James E. Stewart Sr., District Attorney
501 Texas Street
Shreveport, Louisiana 71101

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States Court of Appeals appears at Appendix "A" to the petition and is

[X] reported at Edward Keith Johnson v. Vannoy, Warden, US Fifth Circuit Court of Appeals No. 23-30724; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished

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

[X] reported at Edward Keith Johnson v. Vannoy, Warden, USDC No. 20-356-JWD-SDJ; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished

[X] For cases from state courts:

The opinion of the highest state court to review the merits appear at Appendix "D" to the petition and is

[X] reported at Edward Keith Johnson v. State, 296 So.3d 602(Mem) (La. 5/14/20); or,
[ ] has been designated for public record; or,
[ ] is unpublished

The opinion of the Louisiana Second Circuit Court of Appeal appears at Appendix "D" to the petition and is

[X] reported at State v. Edward K. Johnson, 253 So.3d 887 (La. App 2nd Cir. 8/15/18; or,
[ ] has been designated for publication but not yet reported; or,
[ ] is unpublished

JURISDICTION

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

The date on which the United States Court of Appeals decided my case was March 20, 2024 .

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. _____.

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

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

The date on which the highest state court decided my case was May 14, 2020.
A copy of that decision appears at Appendix "A".

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. _____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the United States Constitution

Fourteenth Amendment to the United States Constitution

STATEMENT OF THE CASE

Course of Proceedings:

Johnson was charged by bill of indictment on June 18, 2015 with ___ count of aggravated rape. He entered *not guilty* pleas to both. On August 16, 2017, Johnson was found *guilty* as charged. On September 11, 2017, Johnson filed a motion for new trial and motion for post-verdict judgment of acquittal in which the trial court denied, then sentenced Johnson to life at hard labor without the possibility of probation, parole, or suspension of sentence.

Johnson timely appealed his conviction and sentence to the Second Circuit Court Of Appeal without success. He also launched a timely, yet unsuccessful collateral attack on his conviction and sentence.

On June 10, 2020, Johnson filed a timely petition for writ of habeas corpus in the Middle District of Louisiana. On September 12, 2023, United States Magistrate Judge Scott D. Johnson signed a Report and Recommendation recommending to the United States Middle District Honorable Court that Mr. Johnson's Writ of Habeas Corpus Petition should be dismissed with prejudice. Magistrate Johnson further recommended that a certificate of appealability be denied if Mr. Johnson sought appeal. The Honorable District Court denied and dismissed Johnson's habeas petition with prejudice and further ruled that a certificate of appealibility would be denied if Mr. Johnson sought to pursue an appeal. The Fifth Circuit Court of Appeal notified Mr. Johnson to file a motion and brief within Forty (40) days from October 16, 2023. Mr. Johnson respectfully requested that this Honorable Court grant him an extension of time in which to comply with the certificate of appealability requirements. On March 20, 2024 the Honorable United States Court of Appeal Fifth Circuit denied Mr. Johnson's Petition Certificate of Appealability and further denied Mr. Johnson's motion to proceed in *forma pauperis*. Petitioner Edward Kieth Johnson. now seeks Writ of Certiorari to this Honorable United States Supreme Court.

Facts of the Offense

The grand jury bill of indictment alleged a single count of Aggravated Rape in violation of Louisiana Revised Statute 14:42. Mr. Johnson entered a plea of not guilty to this charge on May 18, 2015. On July 28, 2017, counsel for Mr. Johnson made multiple motions: first, a motion to require a *Daubert*,[1] hearing of Ms. Kiersten Prochnow, a counselor who had provided counseling to A.D., the complaining witness; second, a motion to continue; third, a motion to supplemental discovery; and fourth, a motion to allow an expert witness, Dr. Shelly Visconte, to review an electronic recording of a protected witness.[2] On July 31, 2017, the district court denied the motion for a *Daubert* hearing, the motion to allow expert witness to review an electronic recording of a protected witness, and the motion for supplemental discovery. The district court denied the motion for a continuance partly on July 31, 2017 and partly on August 2, 2017.[3] Defense counsel subsequently applied to the Louisiana Second Circuit Court of Appeal for a writ for supervisory review of these denials on August 4, 2017.[4] The Second Circuit denied this writ on August 7, 2017, without assigning reasons.[5]

Mr. Johnson's trial, assigned docket number 331,421, began on August 9, 2017. The State called the following nine (9) witnesses to the stand, all of whom were questioned on direct examination by the prosecution and on cross-examination by the defense counsel: A.D., the complainant and a minor; Ms. Deborah Norgaard, the grandmother of A.D.; E.N., the minor cousin of A.D.; Ms. Alex Person, a worker at the Gingerbread House who conducted interviews of minor children related to the case; Mr. Nathaniel Veal, a development specialist with the Department of Children and Family Services; Ms. Kristen Prochnow, a mental health counselor; Dr. Jennifer Rodriguez, an expert in pediatrics specialized in child abuse; Detective Tracey Mendels, a Crime Scene Investigator for the Shreveport

1 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L. Ed.2d 469.
2 Petitioner's Exhibit 1 – July 28, 2017 Motion to Allow Expert Witness to Review Electronic Recording of Protected Witness, et seq.
3 Petitioner's Exhibit 2 – August 3, 2017 Notice of Intent to Apply for Writ of Review and Request for Return Date.
4 Petitioner's Exhibit 3 – August 4, 2017 Application by Defendant for Writ of Review.
5 Petitioner's Exhibit 4 – August 7, 2017 Second Circuit Denial of Writ.

Police Department; and Detective Michael Jones, a Youth Services Division member in the Shreveport Police Department.

On two separate occasions, Mr. Enright objected to the testimony of Ms. Prochnow on the grounds that it exceeded the scope of what a fact witness is allowed to testify.[6] Mr. Enright also objected to Ms. Prochnow's use of expert knowledge and training.[7] On all occasions, the trial court overruled his objections.

Defense counsel presented five (5) witnesses: Officer Steven Wood, From the Bossier City Police Department; Officer Jeremy Kelley, from the Shreveport Department; Ms. Krystal Ard, Mr. Johnson's niece; Mr. David Day, the father of A.D., and Mr. Edward Keith Johnson.

The jury unanimously found Mr. Johnson guilty as charged on August 16, 2017. On September 11, 2017, Mr. Johnson filed motions for new trial and post-verdict judgment of acquittal. The district court denied these motions and subsequently sentenced Mr. Johnson to life imprisonment at hard labor without benefit of probation, parole, or suspension of sentence.

Ms. Peggy Sullivan of the Louisiana Appellate Project (LAP) represented Mr. Johnson on direct appeal. In its appeal to the Louisiana Second Circuit, LAP asserted four arguments of error:

> 1.) There was insufficient evidence to support the conviction; 2.) The trial court erred in denying [defense counsel's] request to allow an expert to review A.D.'s Gingerbread House interview prior to trial; 3.) The trial court erred in allowing the State to reference other crimes evidence outside the scope of its LA. C. E. Art. 412.2 notice; and 4.) the trial court erred by denying [Mr. Johnson] the opportunity to conduct a *Daubert* hearing as to Ms. Kiersten Prochnow's testimony.[8]

On August 15, 2018, the Second Circuit denied Mr. Johnson's appeal and assigned reason.[9] LAP did not appeal to the Supreme Court of Louisiana, and Mr. Johnson's conviction therefore became final on August 30, 2018.

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6 Petitioner's Exhibit 5 – Transcript of Trial of Edward Keith Johnson, August 14, 2017, 25-26:32; 42:1-4

7 Id. at 35:9-12.

8 Petitioner's Exhibit 6 – August 15, 2018 Second Circuit Notice of Judgment at 3.

9 Petitioner's Exhibit 6 – August 15, 2018 Second Circuit Notice of Judgment.

REASONS FOR GRANTING THE PETITION

LAW AND ARGUMENT

Claim No. 1: Was Petitioner Denied the Right to Due Process violating the Fourteenth Amendment to the United States Constitution and Article 1, Section 2 of the Louisiana Constitution of 1974 when the Trial Court applied the misinterpretation of the Law to LA. R. S. 15:440.5.

There was a fundamental change in the Louisiana Provisions of La. R. S. 15:440.5 in 2014. Prior to 2014, the Law read in pertinent part: **La. R. S. 15:440.5(C)** "...If the defendant's attorney is provided a copy of the videotape statement by court order or by permission of the district attorney, **only the attorney and the defendant shall be permitted to view the tape, and no copies shall be made by any person."**

This was clearly a violation of any defendant's Constitutional Rights to Due Process and the Legislature corrected this grave prejudicial law when it amended it in 2014 to read as follows:

> This Fundamental change allowed more people to assist the accused in criminal proceedings involving sexual assault allegations. This statute further expanded the list of people who could review evidence provided by victims of sexual abuse. Attorney's regularly employ expert witnesses to testify as to their expertise in their designated fields in the defense of cases in need of them. Experts are a need in order to determine credibility of witnesses, but also to ensure that proper procedures and protocols are being followed when conducting the interviews of protected persons.

In Mr. Johnson's case, an expert witness was crucial in determining that the methods used by Interviewer, Ms. Person was leading and carried out in such a way as to illicit predetermined responses from a particularly sensitive and impressionable child such as AD. Ad has a well established history of antisocial and explosive behavior. (Vol. V., p. 880).

This conviction is based mainly on the testimony and statements given by AD and Mr. Johnson was denied his Due Process Rights to a fair trial when the Court denied his attorney the ability to have

an expert witness review the videotape in order to determine the mythology of obtaining the statements and whether the interviewer used leading questions and or any other deceitful tactics to illicit a predetermined statement.

Mr. Johnson asserts that at the very minimum a *Daubert* Hearing should have been conducted by the trial court to determine the expert's qualifications and the relevance of his potential testimony. There is no prohibition to preclude an expert from rendering general testimony about child forensic interviewing. Mr. Johnson notes that his attorney argued that an expert was fundamental to Mr. Johnson's defense and would given testimony as to how the questioning of a delicate child was ilicited through the leading questions by the interviewer. Mr. Johnson points out that in *State v. In re A.M.*[10], the Louisiana Supreme Court held that the **right to** present a **defense** does not encompass the **right to** present **expert** testimony commenting directly on the credibility of a victim's testimony. Mr. Johnson contends that the experts testimony would not contain any opinion on the credibility of the victim. La. R. S. 440.5 (C).

During preparation for trial, the State provided Mr. Johnson's defense counsel with recordings of interviews conducted at the "Gingerbread House." The persons interviewed were minors A.D., Alex, and E.N. Defense counsel requested that an expert witness be allowed to view the tapes in order to provide advice to counsel in preparation for trial and be able to give a jury more knowledge into the procedures of how these interviews are conducted, why they are conducted, the reasoning of professionally trained individuals in conducting these interviews and the proper procedures in doing so. This expert witness would have also been able to give understanding to the jury on the behavioral issues and obstacles in abstracting information from minors through the process of these interviews. [11] The trial court denied this request, on the grounds that La. R.S. 15: 440.5 restricts the viewing of such

10 State v. In re A.M., 2008-2493 (La. 11/21/08) 994 So.2d 1277.

11 Petitioner's Exhibit 1 – July 28, 2017 Motion to Allow Expert Witness to Review Electronic Recording of Protected Witness, et seq.

material to the following specific members of a defense team: "the attorney and his regularly employed staff, the defendant, the defense investigator designated to work on the case, the defense paralegal designated to work on the case, and other staff members of the attorney who are transcribing the videotaped oral statement."[12] Mr. Enright subsequently appealed the matter to the Second Circuit,[13] which denied the defense's writ without assigning reasons.[14] On direct appeal, Ms. Peggy Sullivan, on behalf of the Louisiana Appellate Project for Mr. Johnson, raised raised this issue as an assignment of error.[15] Once more, the Second Circuit denied the assignment of error, holding that a clear reading of the statute prevents expert witnesses for the defense from viewing the tapes.[16]

Defendants in Louisiana are granted the right to present a defense and the right to confront accusers under both the Louisiana And United States Constitutions.[17] The Supreme Court of the United States has long included the ability to offer the testimony of witnesses within the realm of due process:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19 (1967). At issue in the instant case is a fundamental aspect of this requirement: the right of the defendant to understand the evidence and charges laid against him. La. R.S. 15:440.5 prohibits defense counsel from hiring an expert to review the videotaped testimony made admissible in La. R.S. 15:440.1 et seq. By doing so, it prevents a defense team from adequately preparing for trial, because defense counsel will be unable to properly analyze the audio-visual recording for potential issues that may be brought up on cross. While it is true that a competent

12 La. R.S. 15:440.5(C)
13 Petitioner's Exhibit 3 – August 4, 2017 Application by Defendant for Writ of Review.
14 Petitioner's Exhibit 4 – August 7, 2017 Second Circuit Denial of Writ.
15 Petitioner's Exhibit 6 – August 15, 2015 Second Circuit Notice of Judgment at 3.
16 Petitioner's Exhibit 6 – August 15, 2015 Second Circuit Notice of Judgment at 11-13.
17 U. S. Const. Amends. VI, XIV; La. Const. Art. 1 §16.

attorney will, for example, note the issue of a forensic interviewer asking leading questions of an alleged victim and bring such issue up on cross-examination, [18] it is not reasonable to expect any criminal defense attorney to be able to review a forensic interview and detect issues that require a trained forensic psychologist to identify.

Unfortunately, the Louisiana Supreme Court has made this expectation law. In *State v. A.M., 08-2493 (La. 11/21/08), 994 So.2d 1777,* the Court ruled against a defendant who claimed the La. R.S. 15:440.5 unconstitutionally violated his right to confrontation. In its decision, the Court stated:

> Given the substantial state interest in prosecuting crimes of violence against protected persons with a minimum of additional intrusion into the lives of such protected persons, the legislature may also assume that reasonably competent counsel provided with pre-trial disclosure of the record statements made by protected persons possess the requisite tools to prepare for cross-examination as they may in any other case unaided by a psychologist or an investigator, or, for that matter, a law partner, whose contributions may, to some indeterminate degree, or may not, aid in the process.[19]

There are two significant errors in this opinion, which the Court must address and reverse. First, as mentioned *supra*, the Court expects attorneys to posses a breadth of knowledge that is unrealistic. Second, the Court significantly overestimates the scope of intrusion into the lives of persons protected under La. R.S. 15: 440.5.

The requirements for a practicing attorney in Louisiana are the passage of the bar examination and the MPRE, which gauge the ability of an applicant to the bar to understand and apply law to facts in a manner that comports with the Louisiana Rules of Professional Conduct.[20] Furthermore, unlike other post-graduate fields of work, such as medicine, the practice of law admits members from a diverse variety of educational backgrounds. It is unfeasible to expect criminal defense attorneys to possess the requisite training in both forensic science and child psychology that would allow them to

18 As Mr. Enright did at trial. Petitioner's Exhibit 5 – Transcript of Trial of Edward Keith Johnson, August 9, 2017, 97-102.

19 State v. A.M., 08-2493 (La. 11/21/08), 994 So.2d 1777, 1280.

20 Lawyers admitted *pro hac vice* have similar requirements. La. Rules of Prof'l Conduct R. 5.5.

properly review an audiovisual recording as set forth in La. R.S. 15:440.1 et seq. To deny attorneys the advice of experts in cases is to require attorneys either to know or to master a field with which they are likely only passingly familiar or cause them to render ineffective assistance of trial counsel.

More ability to confront one's accuser at trial is not sufficient to meet the requirements of due process or of the Confrontation Clause.[21]

Importantly, La. R.S. 15:440.5 does not merely prevent the defense from introducing an expert witness at trial; rather, it prohibits the defense from hiring an expert to analyze and explain issues to the defense attorney, who may then use that knowledge to inform cross-examination at trial.

This prohibition on expert analysis weakens due process and the Confrontation Clause to the point of meaninglessness. A defendant must be able to *understand* the person which is accusing him in order to meaningfully confront the accuser at trial.[22] The Louisiana Supreme Court cogently expressed this point in *State v. Lopes*, **01-1383 (La. 12/7/01), 805 So.2d 124**, wherein the Court held that:

> **LA. CONST. ART.1 §16** provides that the defendant has a right to a fair trial. This constitutional article is the source of specifics rights due a defendant in a criminal trial: such as "impartial trial," "to confront and cross-examine the witnesses against him," "to present a defense," and "to testify in his own behalf." Id. Utilizing this constitutional source provision, it is evident that the defendant's constitutional right to confront and cross-examine witnesses would be significantly impaired if he is unable to understand what these accusers say. *See United States v. Carrion*, **488 F.2d 12, 14 (1st Cir. 1973), cert. Denied, 416 U.S. 907, 40 L. Ed. 2D 112, 94 S.Ct. 1613 (1974)**; *United States ex rel. Negron v. New York*, **434 F.2d 386, 389 (2nd Cir. 1970)**; *Terry v. State*, **21 Ala. App. 100, 105 So. 386, 387 (Ala. App. 1925).** Likewise, a defendant who may choose to exercise his constitutional right to testify in his own behalf may be meaningless if a language barrier causes him to be misunderstood or he misconstrues questions posed to him because he simply does not understand the language. *See, Carrion*, **488 F.2d at 14.**[23]

La. R.S. 15:440.5 functions similarly to a statute that would prohibit the use of translators or interpreters; indeed, in the event that an alleged victim who does not speak English underwent a

21 See, e.g., *United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970)(holding that the denial of an interpreter to a defendant at trial violated due process and the right to confront accusers).

22 *See Negron, supra.*

23 State v. Lopes, 01-1383 (La. 12/7/01), 805 So.2d 124, 126.

protected interview, the reading of **R.S. 15:440.5** demanded by the Court would prevent defense counsel from hiring an interpreter to ensure the accuracy of the state's claims regarding the contents of the interview. This is beyond absurd; it is Kafkaesque. So, too, is the prohibition on defense counsel sharing recordings with expert witnesses in order to obtain expert analysis of the childhood psychology and behavior displayed in forensic interviews conducted pursuant to **R.S. 15:440.1 et seq.**

The Court's emphasis on the Legislative desire to shield alleged victims from intrusion has led it to allow a serious infringement of the rights to present a defense and to confront one's accuser. While the government interest in reducing intrusion into the private lives of children is substantial, it is insufficient to overcome the requirements of the Confrontation Clause, which has been rooted in Anglo-American law for centuries.[24]

The Confrontation Clause itself serves the valuable purpose of allowing the adversarial procedure to unveil the truth through cross-examination.[25] However, where the defense is denied the ability to meaningfully understand and prepare questions for an accuser, the power of cross-examination falters.

Even if the state interest in shielding alleged victims were so sufficient as to overwhelm the defendant's right to confrontation, La. R.S. 440.5 does not uphold the state interest in such a way as to justify the exclusion of defense experts. A defense expert trained in the fields of forensic interviewing and child psychology knows the ethical requirements involved with children who are alleging sexual

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24 For a comprehensive history of the role of the Confrontation Clause, *see generally* Richard D. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, Vol. 2003-2004, Cato Supreme Court Rev., 439(2004).

25 Professor Friedman has here provided a plethora of citations for his assertion that "The U.S. Supreme Court has repeatedly endorsed John Henry Wigmore's characterization of cross-examination as 'beyond any doubt the greatest legal engineer ever invented for the discovery of truth': 5 John Henry Wigmore, Evidence § 1367, at 32(James Chadbourn rev. 1974)(*quoted in part* in *Lily v. Virgina*, 527 U.S. 116, 123 (1999)(plurality opinion)). *See also White v. Illinois*, 502 U.S. 346, 356(1992); *Maryland v. Craig*, 497 U.S. 836, 844 (1990); *Perry v. Leeke*, 488 U.S. 272, 283 n.7(1989); *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987); *California v. Green*. 399 U.S. 149, 158 (1970); *Ford v. Wainwright*, 477 U.S. 399, 415 (1986); *Lee v. Illinois*, 476 U.S. 530, 540 (1986); *Watkins v. Sowders*, 449 U.S. 341, 348 n.4 (1981); *Robert v. Ohio*, 448 U.S. 56, 63 n.6 (1980); cf. *United States v. Salerno*, 505 U.S. 317, 328 (1992)(Stevens, J., dissenting)("Even if one does not completely agree with Wigmore's assertion... one must admit that in the Anglo-American legal system cross-examination is the principal means of undermining the credibility of the witness whose testimony is false or inaccurate.")."

violence. Such an expert's knowledge of the ethical requirements would surely surpass that of the average lawyer, who is authorized by statute to view the material in question. Any intrusion caused by the ability of the defense to use an expert to aid in the preparation for trial is therefore *de minimis*.

Notably, **La. R.S. 15:440.5** places no restrictions whatsoever upon the State's distribution of protected interview material. They have the ability to show this same video they are fighting to prohibit the defense from allowing an expert to view and hire the same expert themselves and show it to them. Where is the justice in this? Unlike the defense, the State is limited only by the "protective order of the court" required under **La. R.S. 15. 440.6** – meaning that the State may freely grant access to an expert witness or anyone not specifically named in the protective order. This gross disparity in who may access the protected material fatally undermines any claim that an expert's access to the material would present any meaningful intrusion into the life of the alleged victim. For the reasons stated above, Mr. Johnson asks that this Honorable Supreme Court of the United States address this Unconstitutional violation to his Rights and grant relief as it sees fit.

Claim No. 2: Whether Petitioner Sixth and Fourteenth Amendment to the United States Constitution was Violated when Denied the Effective Assistance of Counsel at Trial and Appellate Counsel on Appeal?

Mr. Johnson's counsel made three serious errors at trial that rendered him ineffective under the Sixth and Fourteenth Amendments to the United States Constitution and under Article 1 §13 and 16 of the Louisiana Constitution. First, Mr. Enright did not move to strike the improperly entered evidence of Ms. Alex Person's testimony on the grounds that Ms. Person impermissibly asked leading questions of A.D. during the "Gingerbread Hearing." Second, Mr. Enright failed to object to the enormous amount of inadmissible hearsay that comprised the testimony of Ms. Kiersten Prochnow, a so-called "fact witness" for the State. Third, when, under the State's direction, Ms. Prochnow impermissibly exceeded the scope of testimony permitted a fact witness and made a conclusion as to the ultimate issue of fact in

the case – namely, whether or not Mr. Johnson had raped the alleged victim – Mr. Enright failed to move for a mistrial. These three errors constitute ineffective assistance of counsel, because they not only were so severe as to deprive Mr. Johnson of counsel, but they also deprived Mr. Johnson of a trial whose result was reliable.

Ineffective assistance of counsel is governed by the familiar two-prong test set forth in *Strickland v. Washington*, **466 U.S. 668 (1984).** In *Strickland*, the United States Supreme Court held that in order to satisfy a claim of ineffective assistance of counsel,

> the defendant must [first] show that counsel's performance was deficient. This requires showing that 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[26]

A single failure to preserve an error for appeal may be sufficient to constitute ineffective assistant assistance of counsel under *Strickland*.[27]

Ms. Alex Person's Gingerbread testimony should not have been admissible. In addition to the illegality of La. R.S. 15:440.5(C), herein argued *supra*, (A)(4) of the same statute bars admission into evidence when "the statement was ... made in response to questioning calculated to lead the protected person to make a particular statement."[28] During his cross-examination of Ms. Person, Mr. Enright clearly showed that Ms. Person's questioning of A.D. was so calculated.[29]

However, Mr. Enright failed to move that the testimony be struck on these grounds. Instead, he ended his questioning by stating that he had "lost [his] train of thought... [and] ha[d] nothing further."[30]

Ms. Kiersten Prochnow's testimony also should have been excluded. Throughout her testimony, Mr. Kiersten Prochnow recounted the out-of-court statements that A.D. told her, such as her testimony

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26 *Strickland v. Washington*, 466 U.S. 667, 687-88 (1984).

27 See, *e.g.*, *Davis v. Secretary, Dept. of Corrections*, 341 F.3d 1310 (11th Cir. 2003)(holding that counsel was ineffective for failing to adequately preserve a *Batson* claim for appellate review).

28 La. R.S. 15:440.5(A)(4).

29 Petitioner's Exhibit 5 – Transcript of Trial of Edward Keith Johnson, August 9, 2017, 102-03.

30 *Id.* at 103.

regarding A.D.'s declaration when her counseling sessions involved the use of dolls.[31] These statements were hearsay, as they were, "statement[s] other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted."[32] The State improperly elicited this testimony in order to further its claim that Mr. Johnson had sexually assaulted A.D. Mr. Enright, with few exceptions, did not object to the content of Ms. Prochnow's testimony.[33]

The illegality of Ms. Prochnow's testimony culminated in her response to the State's question "the action that [A.D.] showed you regarding the dolls.... Did that mean anything to you?"[34] to which she responded, "The actions meant that Ed raped him."[35] This statement was more than merely exceeding her role as the alleged fact witness. Her given statement was a conclusion as to the ultimate issue of fact at trial – whether Mr. Johnson had raped A.D. This is a violation of Louisiana evidence law, which explicitly prohibits even an expert witness from providing an opinion as to the guilt of the accused.[36] Despite this clear illegality, Mr. Enright did not object on these grounds. Nor did Mr. Enright move for either a mistrial or jury admonishment, which are the appropriate remedies in such circumstances.[37]

Mr. Enright, despite his notable failure to object to the hearsay testimony of Ms. Prochnow, nevertheless made timely objections to a multitude of illegal actions by the State at trial, including

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31 Petitioner's Exhibit 5 – Transcript of Trial of Edward Keith Johnson, August 14, 2017, 23:3-7, 27:23-25.

32 La. C.E. Art. 801. Under La. C.E. Art 802, hearsay is inadmissible "except as otherwise provided by this Code or other legislation." Ms. Prochnow's relaying of A.D.'s out-of-court statements did not fall under any hearsay exception or exemption.

33 Mr. Enright properly objected to the State's illegal request for Ms. Prochnow to give an opinion as a fact witness. The State inaccurately responded that because the State "intend[ed] to ask the witness what those actions represented to her.... [t]hat goes to present sense impression." Petitioner's Exhibit 5 – Transcript of Trial of Edward Keith Johnson, August 14, 2017, 25:30-32; 26:1-20. In reality, present sense impression is defined by La. C.E. Art. 803(1) and is limited to "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Mr. Enright also correctly objected to Ms. Prochnow exceeding the scope of what is permissible testimony for a fact witness. Petitioner's Exhibit 5 – Transcript of Trial of Edward Keith Johnson, August 14, 2017, 35:9-24, 25:26-30.

34 Petitioner's Exhibit 5 – Transcript of Trial of Edward Keith Johnson, August 14, 2017, 25:26-30.

35 *Id.* at 25:21.

36 La. C.E. Art. 704."[I]n a criminal case, an expert witness shall not express an opinion as to the guilt or innocence of the accused."

37 La. C.Cr. P. Art. 771.

inter alia, that Ms. Prochnow's testimony had exceeded the scope of that which is permitted a fact witness.[38] However, the Louisiana Appellate Project (LAP) pursued only four assignments of error at direct appeal. These four assignments were:

> 1.) there was insufficient evidence to support the conviction; 2.) the trial court erred in denying [defense counsel's] request to allow an expert to review A.D.'s Gingerbread House interview prior to trial; 3.) the trial erred in allowing the state to reference other crimes evidence outside the scope of its LA. C.E. Art. 412.2 notice; and 4.) the trial court erred by denying [Mr. Johnson] the opportunity to conduct a *Daubert* hearing as to Kiersten Prochnow's testimony.[39]

By failing to raise the critical issue of the scope of Ms. Prochnow's testimony, LAP deprived Mr. Johnson of his right to counsel in appellate matters.

On two separate occasions, Mr. Enright objected to the testimony of Ms. Prochnow on the grounds that her testimony exceeded the scope of a fact witness.[40] Ms. Prochnow's testimony was derived exclusively from special counseling sessions with A.D. Throughout her testimony, Ms. Prochnow stated that she had elicited an enormous amount of evidence, including A.D.'s statements and trust. She acquired this evidence through her analysis of alleged symptoms of abuse and her use of specific tools. These tools and methods of analysis were derived from the expertise, technical knowledge, and training she obtained to become a trauma counselor.[41] Though Mr. Enright objected, Ms. Prochnow was allowed to give an expert opinion on the results of a psychological trauma session as a fact witness.[42]

As the testimony continued, Mr. Enright again objected to Ms. Prochnow's continued use of expert knowledge and training.[43] The prosecution had Ms. Prochnow review her own notes, which she

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38 Petitioner's Exhibit 5 – Transcript of Trial of Edward Keith Johnson, August 14, 2017, 25:30-32; 26:1-20. Under Article 701 of the Louisiana Code of Evidence, "[I]f the witness is not testifying as an expert, his testimony in the form of opinion or inference is limited to those opinions or inferences which are: (1) Rationally based on the perception of the witness; and (2) Helpful to a clear understanding of his testimony or the determination of a fact in issue."

39 Petitioner's Exhibit 5 – August 15, 2018 Second Circuit Notice of Judgment at 3.

40 Petitioner's Exhibit 5 – Transcript of Trial of Edward Keith Johnson, August 14, 2017, 35:9-24; 42:1-7.

41 *See, e.g.*, Petitioner's Exhibit 5 – Transcript of Trial of Edward Keith Johnson, August 14, 2017, 20:26-32; 21:1-9.

42 *Id.* at 35:9-24.

43 *Id.* at 42:1-7.

had written during several of her therapy sessions with A.D.[44] These notes were taken during the therapy sessions, while Ms. Prochnow employed psychological techniques to talk with A.D. and used her past experience and training to process the information presented to her. At one point during her testimony, Ms. Prochnow explained, in extensive detail, the process undertaken with A.D. During this explanation, Ms. Prochnow relayed to the jury that she and A.D.:

> Adjusted behavior chart, identified feelings where he experiences feelings in his body, so sort of building that feelings vocabulary and having him identify where he experiences anxiety or anger, and learned triggers, things that set him off or make him angry in general or make him anxious and how he's able to recognize his own-- be in tune to his body and recognize when he feels upset.[45]

Ms. Prochnow then went on to state:

> And so we learned about the cognitive triangle, which is simply how thoughts, feelings and behavior are connected, and working on how you can change certain thoughts to help you change your feelings which changes behavior. And I taught him SUDS scales, which is just an acronym for the Subjective Units of Distress Scale, which is just a way of measuring how upset an I right now from 0 to 10.[46] Ms. Prochnow's testimony, in part or in whole, could be given as an expert witness.[47]

However, the State, over repeated defense objections, repeatedly refused to characterize Ms. Prochnow as anything other than a fact witness. Accordingly, this testimony should not have been admitted at trial. Though Mr. Enright preserved this matter on appeal, LAP did not bring a claim on appeal that the testimony of Ms. Prochnow impermissibly exceeded her role as a fact witness. Instead, LAP only brought the issue of whether there needed to be a *Daubert* hearing prior Ms. Prochnow's testimony as a "fact witness." Even the Second Circuit noted in its writ denial that the writ request only involved a *Daubert* hearing prior to any witness testimony, and that the scope of Ms. Prochnow's testimony was not brought into question as an assignment of error.[48]

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44 *Id.* at 30:24-32.
45 *Id.* at 34:2-9.
46 *Id.* at 34:13-21.
47 La. C.E. Art. 701.
48 Petitioner's Exhibit 6 – August 15, 2018 Second Circuit Notice of Judgment at 18. ("Johnson makes no argument on appeal that Prochnow's testimony exceeded the scope of the state's agreement.")

Ineffective assistance of counsel extends to counsel on direct appeal through the Fourteenth Amendment.[49] The failure to bring assignment of error on direct appeal may constitute ineffective assistance of counsel when there is clear error, properly objected to, in the trial phase or no strategic decision exists to exclude assignment of error from appeal.[50]

In such cases, federal courts have held that:

> the ineffectiveness prong of *Strickland* turns on whether an objectively reasonable attorney would have presented the issue... because it had a reasonable likelihood of success. In other words, this is the rare case where both *Strickland* prongs turn on the same question, whether there is a reasonable probability that the outcome of [an] appeal would have been different had [a particular] issue raised.[51]

Therefore, each claim must be examined under its likelihood to succeed given the appropriate standard of review. The scope of a fact witness' testimony is a question of law and therefore is subject to *de novo* review. To determine whether LAP was ineffective in such a way that Mr. Johnson suffered prejudice, it must only be shown there existed "a reasonable probability that the outcome of his appeal would have been different had [an] issue been raised."[52]

The outcome of Mr. Johnson's appeal would have been significantly different had LAP extended its assignment of error to include the scope of Ms. Prochnow's testimony. As put forth *supra,* Ms. Prochnow's testimony was clearly outside the scope of what is permissible for a fact witness to present.[53] The Second Circuit made note of this in its denial of Mr. Johnson's appeal:

> Since the state agreed to present Ms. Prochnow as only a fact witness, and limited her testimony to what A.D. disclosed to her regarding the acts of sexual abuse and who committed the acts, the trial court did not err in denying Johnson's motion to conduct a *Daubert* hearing. **Mr. Johnson makes no appeal that Ms. Prochnow's testimony exceeded the scope of the state's**

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49 *See Evitts v. Lucey, 469 U.S. 387 (1985).*

50 *See e.g., United States v. Bass, 310 F.3d 321 (5th Cir. 2002); Overstreet v. Warden, 811 F.3d 1283 (11th Cir. 2016); Lynch v. Dolce, 789 F.3d 303 (2nd Cir. 2015); Sanders v. Cotton, 398 F.3d 572 (7th Cir. 2005). See also Payne v. Stansberry, 760 F.3d 10 (D.C. Cir. 2014).*

51 *Roe v. Delo, 160 F.3d 416, 419 (8th Cir. 1998). See also Payne v. Stansberry, 760 F.3d 10, 14 (D.C. Cir. 2014).*

52 *Roe,* 160 F.3d at 419.

53 La. C.E. Art. 701.

agreement.[54]

This indicates that the Second Circuit was well aware that Ms. Prochnow's testimony had impermissibly exceeded what was allowed a fact witness. However, this indication is of much less import than the clear statutory language of **La. C.E. Art. 701**, which the Second Circuit undoubtedly would have correctly interpreted ***de novo*** mandate exclusion of the vast majority of Ms. Prochnow's testimony. This exclusion, along with the appropriate exclusion of the Gingerbread House hearings pursuant to the flagrant unconstitutionality of **La. R.S. 15:440.5**, would have left only the testimony of an eight-year-old child, testimony by a Department of Child and Family Services worker that focused on the home conditions of A.D.,[55] and a coercive interrogation session as evidence for the State's prosecution of Mr. Johnson. While mere testimony by an alleged victim constitutes sufficient evidence to convict a defendant, no reasonable juror would move to convict Mr. Johnson given paucity of prosecutorial evidence weighed against the enormity of evidence offered by the defense, including the inconsistency of statements by Deborah Norgaard and the timing of A.D.'s initial allegation of abuse.[56]

The only relief possible in such a circumstance is the vacation of Mr. Johnson's conviction and the setting of a new trial wherefore, Mr. Johnson Prays this Honorable Supreme Court grant relief.

Claim No. 3: Whether Petitioner's Fourteenth Amendment to the United States Constitution was violated when Prosecutor withheld Brady Material?

There has been countless cases before this Honorable Supreme Court that has demonstrated the unfortunate but substantial role that ***Brady*** violations repeatedly play in wrongful convictions. This case is just another prime example of how the Louisiana District Attorneys undermine our justice system by violation of ***Brady***. The ***Brady*** violation that Mr. Johnson sustained shines an important light on the willingness of prosecutors to circumvent the requirements of ***Brady***. First, it confirms that

54 Petitioner's Exhibit 6 – August 15, 2018 Second Circuit Notice of Judgment at 18.
55 Petitioner's Exhibit 5 – Transcript of Trial of Edward Keith Johnson, August 10, 2017, 20-26.
56 Petitioner's Exhibit 5 – Transcript of Trial of Edward Keith Johnson, August 16, 2017, 48-50.

Louisiana prosecutors either do not understand or do not follow the commands of ***Brady*** in situations where there can be no doubt as to its applicability: fabric samples for DNA Samples, Notes of Ms. Prochnow, cell phone, laptop computer and a safe. To bring clarity to the mandate of ***Brady***, this Court should require that all documents in the possession or control of the Government that contain information about testifying witnesses, such as the notes of Ms. Prochnow in Mr. Johnson's case, should be automatically provided to defense counsel for use at trial, without filtration by Government counsel on the grounds that the information contained therein is either not exculpatory or not material.

Second, ***Brady*** violations are often discovered many years after a conviction, and in many cases after the defendant has filed unsuccessful motions to set aside the conviction. When the courts of appeal receive a petition for leave to file a successive motion to set aside a conviction under **28 U. S. C. § 2254** based on alleged ***Brady*** violations, they should be directed to require a substantive response from the Government, so that there is an evidentiary basis to seek relief in the district court. The procedure is especially important because the prosecutor alone knows why the ***Brady*** material was not produced at trial.

Third, because, as in this case, much ***Brady*** **material**, is only uncovered long after a trial is concluded, this Court should no longer require defendants to shoulder the heavy burden of proving that the wrongly withheld evidence would have altered the outcome of the trial. Prosecutors already have little enough incentive to turn over ***Brady*** **material** at trial, and if they fail to do so, the Prosecutor should be required to explain why the failure did not affect the outcome, instead of imposing that burden on the defendant, as the court below did in this case.

In violation of its ongoing prosecutorial obligation, the State failed to provide potentially exculpatory evidence to the defense. During its investigation of Mr. Johnson, the state seized multiple fabric samples for DNA testing, digital camera files, cell phone, laptop computers, and a safe.[57] Shortly

57 Petitioner's Exhibit 7 – May 27, 2015 Shreveport Police Department Narrative Supplement.

before trial, after multiple supplementary requests for evidence, the State revealed that it had never tested the fabric samples for DNA.[58] At no point did the State provide the defense with the contents of the camera, the cell phones, the laptop computers, or the safe. The State provided the defense with only selected portions of Ms. Prochnow's notes. This prevented the defense from analyzing Ms. Prochnow's notes in there entirety and adapting strategy accordingly.

The Fourteenth Amendment's requirement of due process mandates that the State provide all evidence when that evidence is material and exculpatory.[59] Whether evidence is "material" turns on whether there exists "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[60] The contents of the seized material could seriously affect the credibility of A.D., Deborah Norgaard, and, correspondingly, the probability of a different result in the proceeding. The contents of the computer, cell phones, camera, or safe might well have evidence contradicting the testimony of A.D. or Ms. Norgaard.

At present, the Caddo Parish District Attorney has declined to provide Mr. Johnson's with any of the above material, refusing to even give Mr. Johnson a price for a Copy of the D.A. Files. It is therefore impossible to determine what may constitute materially exculpatory evidence.

These undisputed facts are living proof of the conclusion drawn by then-Chief Judge Alex Kozinski, dissenting from the denial of rehearing en banc in ***United States v. Olsen, 737 F.3d 625, 626 (9th Cir. 2013):*** "There is an epidemic of ***Brady*** violations abroad in the land. Only judges can put a stop to it." The documents withheld - Ms. Prochnow's notes, laptop computer, fabric samples for DNA testing, cell phone, camera and safe – are plainly relevant in any criminal trial, especially when there is no evidence beyond the trial testimony of the prosecution's witnesses. Defendant's are not required to

58 Petitioners Exhibit 8 – August 16, 2017 Motion in Limine. It is notable that, although Mr. Enright tenaciously and properly pursued evidence in this matter, the State's obligations under ***Brady*** would exist regardless of what is or is not requested by the defense. *See* ***United States v. Agurs*, 427 U.S. 97 (1976).**

59 *Brady v. Maryland, 373 U.S. 83 (1963).*

60 *Strickler v. Greene, 527 U.S. 263, 280 (1999).*

make a specific request for ***Brady*** **material**, and this Hon. Court has held that ***Brady*** applies to impeachment as well as direct exculpatory evidence. ***United States v. Bagley,*** **473 U.S. 667, 676 (1985).** Thus, there can be no doubt that the material withheld in Mr. Johnson's case were ***Brady*** **material** that should have been turned over for trial, and little doubt that had they been available to defense counsel, the trial and almost certainly the verdict would have been very different.

CONCLUSION

Mr. Johnson's trial was irreparably damaged by the unconstitutional application of **La. R.S. 15:440.5**, by his deprivation of effective counsel at the trial and appellate levels, and by the Stat;s refusal to provide material whose disclosure was required under ***Brady v. Maryland.*** These failures deprived him of a fair trial whose result was reliable. Because a reasonable juror would not have convicted Mr. Johnson but for these errors, Mr. Johnson should receive the appropriate remedy of a new trial in which to properly present his case and have his Constitutional Rights afforded him.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: **June 19, 2024**