NO. 24-6225

IN THE

SUPREME COURT OF THE UNITED STATES

DENNIS MISCHLER—PETITIONER

V.

TIM HOOPER, WARDEN—RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Mischler seeks certioari for the following issues:

I. Whether the Fifth Circuit deprived Mischler of Due Process of Law by failing to afford an evidentiary hearing on disputed facts when Mischler never received an evidentiary hearing on his post conviction relief in Louisiana state court or an evidentiary hearing on his 2254 Habeas Corpus proceeding in Federal District Court?

II. Whether Louisiana's Code of Evidence Article 412.2 deprives defendants of Due Process of Law?

III. Whether the Fifth Circuit entered a decision in conflict with its own controlling precedent under U.S. v. Moreland?

IV. Whether Mischler's counsel was deficient under the Sixth Amendment by failing to call at least four witnesses and failing to produce evidence showing crucial exculpatory evidence?

LIST OF PARTIES

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

RELATED CASES

State v. Mischler, No. 2022-01361 (La. 3/7/23), 356 So. 3d 1009 (Mem). Judgment entered on March 7, 2023.

State v. Mischler, No. 00-0521 (La. 1 Cir. 8/2/22), 2022 WL 3071555. Judgment entered on August 2, 2022.

State v. Mischler, No. 2019-01100 (La. 2/26/20), 347 So. 3d 875 (Mem). Judgment entered on February 26, 2020.

State v. Mischler, No. 2018-1352 (La. 1 Cir. 5/31/19), 393 So. 3d 873. Judgment entered May 31, 2019.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is an unpublished per curiam order, and can be found at *Mishler v. Hooper*, No. 24-30231 (5th Cir. 10/7/24), 2024 WL 4524536.

The judgment of the United States District Court for the Eastern District of Louisiana appears at Appendix B to the petition and a slip copy is published at *Mischler v. Hooper*, No. 23-990, 2024 WL 1217226 (E.D. La. Mar. 21, 2024).

The report and recommendations, adopted by the district judge, of the United States District Court for the Eastern District of Louisiana appears at Appendix C to the petition and a slip copy is published at *Mischler v. Hooper*, No. 23-990, 2024 WL 1226153 (E.D. La. Feb. 26, 2024).

JURISDICTION

The date on which the United States Court of Appeals for the Fifth Circuit decided this case was October 7, 2024. No petition for rehearing was filed in this case. The jurisdiction of this Court is invoked under 28. U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Amendment VI
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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

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

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

STATEMENT OF THE CASE

Mischler was sentenced to 55 years, 40 years of which are for pornography. At trial, the State executed a trial by exhaustion with a bevy of 412.2 witnesses that successfully provided inflammatory testimony but had little, if anything, to do with the charges for which Mischler was standing trial. In a trial where the bulk of the punishment is for pornography, the bulk of the testimony did not involve pornography. Most glaringly, Mischler consistently denied ever downloading pornography, possessing pornography, or even being home to obtain pornography as he was in and out of the hospital at all relevant times, and under the care of friends and family. His consistent assertions and evidence of others having full access to his home, and his computers should have triggered his attorney's engaging a computer forensics expert to prove the impossibility of Mischler's obtaining and possessing the pornography. It should also have triggered Ms. Yazbeck to call the offered witnesses to show the impossibility of Mischler's possession, especially since the State's trial tactic was to overwhelm.

The evidence offered by the State is also constitutionally insufficient under the Fifth Circuit's *U.S. v. Moreland* opinion as the State was unable to sufficiently single out that Mishcler obtained and possessed the pornography.

Mischler contends that the accumulation of 412.2 evidence deprived him of his due process rights to a fair trial, and present a defense.

Mischler further contends that he never received an evidentiary hearing on his

post conviction relief application in state court, or in federal court on habeas corpus.

A. Procedural History

Mischler was charged, tried, convicted and sentenced to prison in Louisiana state court for having committed the offenses of two counts of Oral Sexual Battery, one count of Molestation of a Juvenile, and 54 counts of Pornography Involving Juveniles. He was sentenced to a total of 55 years, 40 of which are for the pornography. He lost his direct appeal to the Louisiana First Circuit Court of Appeal, and the Louisiana Supreme Court. Mischler filed post conviction relief in state court raising claims of ineffective assistance of counsel (IAC) and due process violations. This petition was also dismissed and the Louisiana Supreme Court again denied discretionary review. No evidentiary hearing on Mischler's IAC or due process claims was ever held in State court.

On March 16, 2023, Mischler filed his 2254 habeas corpus petition in the Eastern District of Louisiana, again raising his IAC claim and due process claims. No evidentiary hearing on Mischler's IAC or due process claims was ever held in Federal court.

On February 26, 2024, Magistrate Judge Michael B. North issued a report recommending Mischler's petition be dismissed with prejudice. On March 21, 2024, District Judge Lance M. Africk approved and adopted the Magistrate's report dismissing Mr. Mischler's habeas corpus with prejudice. The District Court preemptively denied a certificate of appealability. No evidentiary hearings were held.

Mischler timely moved to appeal on April 2, 2024. On April 29, 2024, the United States Fifth Circuit advised Mr. Mischler to apply for a certificate of appealability by filing a motion and brief in support within 40 days of the letter, or June 8, 2024. Petitioner sought a COA with the Fifth Circuit, and was denied on October 7, 2024.

B. Relevant Facts—412.2 Evidence.

Mischler uses caution as to the term "relevant facts" because his argument before this Court is actually the irrelevance, and unconstitutional facts offered and admitted under La. C. E. art. 412.2 witnesses. With that in mind, there were four witnesses—S.L.; R.L.; G.L; and G.W.—who testified and in effect placed Mischler through a second trial for alleged incidents for which Mischler was previously found innocent. The State, under the protections of 412.2, was allowed to poison the jury with "evidence" of acts that were previously rejected.

The State also introduced 412.2 evidence of movies allegedly purchased (and certainly disputed at trial) by Mischler from a company based in Toronto called Azov Films. Even though only two of four books and one of nine videos purchased from Azov films were found in Mischler's home, none of these items of "evidence" were part of the charges made against him but were used to poison the jury by way of the "lustful disposition towards children" exception found in 412.2.

C. Relevant Facts—Sixth Amendment.

A long recitation of the facts elicited at trial can be found at *State v. Mischler*, 18-

1352 (La. App. 1 Cir. 5/31/19) 2019 WL 2334219. The facts in the Habeas Corpus regarding the Sixth Amendment Violation consisted of, among other things, statements from Scott Williams, Dianna Pervel, Edward Smith, and Robert Williams. Those facts are provided verbatim below.

Scott Williams[1] provided this statement on January 22, 2021:

> I know that throughout the year between 2008-2014 several of the State's witnesses against my godfather and uncle, Dennis Mischler, visited with him, and my parents and their grandparents (Edward and Darlene Smith), during holidays, spent weekends at his house to swim in his pool, came to barbecues and crab boils, and other gatherings during the summer. I know this for two reasons. First, because during those years everyone of those state witnesses lived in my trailer at one time or another, so I or my girlfriend, Laura Evans, would take them there and picked them up if need be. Second, because even when they did not live with me, I often saw them at his house when I went to visit him and my parents.
>
> During those years my uncle was very ill with complications from a heart attack, a pulmonary embolism, and two comas. He was often bedridden and/or unable to get around without help. He needed constant home health care and someone to take care of his property, since both my mom and dad worked, I, my brother, sister, and my sister's children (including those State witnesses), spent days, weeks, and even months at a time taking care of him and his property.
>
> During that time everyone of us, including those State witnesses, had total access to every room in my uncles home, even when my dad and mom were working and my uncle was at doctor's visits. Everyone knew where the spare key to the house was and the alarm code. We had to in case of an emergency. We were all allowed to use the televisions, computers, fix food, use the pool, use the outdoor equipment, or anything else that he had.
>
> During that time everyone of my sister's children lived with my uncle for weeks and/or months at a time. He took them in his home, fed them, clothed them, and gave them money when they were destitute. In return,

1 Appendix 4; Habeas Corpus Exhibit Scott Williams Statement (Jan. 22, 2021).

they took care of him, but they also stole money, food, jewelry, tv's, computers, cameras, and tools from him.

I was there in 2011 when he returned from the hospital after his heart attack to find they had stolen his safe containing over $35,000 in money and jewelry. He knew this was done by a family member. The detectives even said it. My dad even thought so, but he never pressed charges against them.

In 2014 he was robbed for a second time. It was for over $40,000 in money, jewelry, art, and electronic equipment. Then he was going to press charges. He told us so. It was not one month later that charges were made against him.

I know my Godfather would not commit such terrible crimes like that on any child, much less on the children he loved. I spent weekends, campouts, and summer vacations with him as a child and he never was anything but kind to all of us children, including those State's witnesses. I can only believe that greed and self-preservation played a part in his charges.

I will not hesitate to testify at anytime to these facts and the untruths that were charged against my Godfather, as well as to his goodness and kindness to every member of our family.

I have not been offered anything of value, nor threatened or intimated in any way for this statement.

Diana Pervel[2] gave this statement on January 22, 2021:

I am aware, and on occasion have seen, those members of my sister, Darlene Smith's grandchildren, who testified as State witnesses, have access to my brother, Dennis Mischler's, house throughout the years of 2008-2014 (when my brother was very ill). During those years they stayed with him for days, weeks, and/or even months at a time, while he recuperated from a heart attack, pulmonary embolism, and/or comas. Whenever they were at his home, they had access to every room in his house. They had free and complete access to his televisions, computers, food, outdoor equipment, pool, and everything else he had. They took advantage of him by borrowing money from him and living in his house when they were destitute.

2 Appendix 4; Habeas Corpus Exhibit Diana Pervel Statement (Jan. 22, 2021).

Through many conversations and visits with my brother, Dennis, and sister, Darlene, during those years, I became aware that the State's witnesses stole money, jewelry, tv's, computers, and other items from my brother, either while living or visiting him, or the numerous times he was in the hospital. They also used his compute to purchase items online without his consent.

I would have been willing to testify to this and to the untruths being told by these witnesses, and their possible motivations, had his lawyer, Rachel Yazbeck, asked me to do so. She never did.

I want to testify as to Dennis continuously forgiving them, because of his kindness and open heart, when he should have banned them from his home. I know my brother is not guilty of these crimes. Dennis is only guilty of being too nice to people he shouldn't.

I still am praying justice can be served. I will testify to these matters and other truths at an evidentiary hearing.

Edward Smith[3] provided this statement on January 20, 2021:

My wife (Darlene Smith) and I have been living with my brother-in-law (Dennis Mischler) since 2005; first in a FEMA trailer, and then in 2008 in Covington, Louisiana. My wife and I are still residing at the Covington address.

I can attest that throughout the years 2008-2014 several of the State's witnesses visited us on holidays, spent weekends at our home to swim in his pool, came to barbecues, crab boils, and other family events throughout the summers. During those years Dennis was very ill and was regularly hospitalized. He suffered with complications from a heart attack, a pulmonary embolism, and two comas. Because of these illnesses he was bedridden a great deal and required home health care assistance to help him at home and take to care of his property.

My two sons, daughter, and my daughter's children (including the State's witnesses) became his caregivers, and stayed at his house days, weekends, and weeks at a time, helping him. Whenever they were at his house they had complete access to every room in his house. Even when my wife and I

3 Attachment 1; Habeas Corpus Exhibit Edward Smith Statement (Jan. 20, 2021).

were working, and/or when Dennis visited the doctors, they were allowed those privlages. They also knew where the spare key to the house was located and the alarm code. They had to in case of an emergency. They were also allowed to use the televisions, computers, the pool, tools and outdoor equipment, and even to fix themselves food or anything else he had.

Also, during that time everyone of my grandchildren became destitute at one time or another, and stayed with us for weeks and even months at a time (including the State's witnesses). He fed them, clothed them, and gave them money. They in turn stole money, jewelry, tools, tv's, computers, food and even linen.

In 2011 I was with Dennis when he came home from the hospital, from having heart surgery, to find his safe stolen, that contained over $35,000 in money and jewelry. The detectives thought it was done by family members. I even told him I thought it was one or more of my grandchildren. But he wouldn't press charges. In 2014 he was robbed for a second time of over $40,000 in money jewelry, tv's, computers, cameras, art, food, and tools. This time he was going to press charges. However, within a month, he was arrested and charges were filed against him.
In over forty-plus years I have known Dennis. He has continuously given to his parents, siblings, his siblings's families, and other relatives and friends. Out of his kindness and generosity, he has taken more people in his home then I can remember. He has sheltered them, clothed them, fed them, and given them money, and never asked for anything in return. I know he would never do those hideous crimes he was accused of doing. I know my grandchildren were greedy for his money and property.

I would have gladly testified of these facts had his lawyer, Rachel Yazbeck, asked me, but she never did. I would gladly testify to them now, if asked.

At no time was I offered anything of value, threatened, or intimidated to make these statements.

Mr. Mischler's nephew, Robert Wilson Jr.,[4] provided a statement similar to those above. Mr. Mischler also attached an analysis of his computer performed—after trial—

4 Appendix 4; Habeas Corpus Exhibit Robert Williams Statement.

by a member of the Geek Squad on September 22, 2020.[5] That analysis provides the computer a clean bill of health, with a notation by the agent that "No hidden files found."

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED TO REMAND THIS MATTER BACK TO THE EASTERN DISTRICT TO CONDUCT AN EVIDENTIARY HEARING WITH TESTIMONY.

In *Townsend v. Sain,* 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963), this Court makes a distinct statement that "The whole history of the writ—its unique development—refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review." This, in no clearer terms, provides that the federal court does not sit as an appellate court to review state court decisions. Instead, "where an applicant for a writ alleges facts which, if proved would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew."

Turning to the *Brown v. Allen*, 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469 (1953), the *Townsend* court repeated this standard:

> Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.

5 Appendix 4; Habeas Corpus Exhibit Computer Analysis (Sep. 22, 2020).

Townsend, 372 U.S. at 312.[6]

This standard, as referenced in the footnote, presupposes that the State's adjudication of the constitutional issue can be of aid to the federal court sitting in habeas. *Townsend*, 372 U.S. 293, n. 9.

Mishcler's claim on state collateral review was on sixth amendment grounds of ineffective assistance of counsel, as well as the constitutionality of Louisiana Code of Evidence 412.2. Mischler presented four statements and computer expert report, all of which provided factual disputes necessary for the State court and Federal Court to settle. Neither court provided an evidentiary hearing. Furthermore, the disputed facts offered could not have been addressed during the jury trial and direct appeal process because the record had not yet developed until the collateral attack in state and federal courts. This matter should be remanded back to federal district court to allow for evidence and testimony to be taken at an evidentiary hearing in conformity with the law.

II. CERTIORARI SHOULD BE GRANTED TO REVIEW THE CONSTITUTIONALITY OF LOUISIANA'S 412.2 EVIDENCE BEING USED TO DEPRIVE DEFENDANT'S DUE PROCESS.

This Court's supervisory power is being requested to remedy an injustice with propensity evidence, here Louisiana Code of Evidence article 412.2 which is being used against defendants in Louisiana (and the nation) in violation of the constitutional protections of due process. The inflammatory nature of this otherwise irrelevant non-

6 *See also, Machibroda v. U.S.*, 368 U.S. 487, 82 S. Ct. 510, 7 L. Ed. 2d 473 (1962) (We think the District Court did not proceed in conformity with the provisions of 28 U.S.C. 2255, when it made findings on controverted issues of fact without notice to the petitioner and without a hearing.)

indicted "evidence" is so damaging, so often misused, and so unnecessary that it should not be received and admitted in a trial that will take away one's liberty.

This propensity evidence has gotten so out of hand and so offensive to due process, that it allows evidence of other behavior that is not even a statutory crime.[7] In Louisiana cases[8], including this case, evidence of a crime for which one was previously acquitted is allowed. In fact, paragraph A of Louisiana Code of Evidence article 412.2 was amended by 2004 Acts, No. 465, which substituted the phrase "crime, wrong, or act involving assaultive behavior or acts which indicated a lustful disposition toward children" for the words "sexual offense." In other words, the wording of the statute was changed to broaden the net to essentially allow one's entire life to be arraigned, whether or not there was any guarantee that the accused actually committed the earlier act.

The results of these awkwardly placed, and relatively new evidentiary code articles[9] is eviscerating the reasonable doubt protections offered in criminal trials. Instead, these other wrongs are offered and admitted without the stringent burden of proof required when taking one's liberty. The results of criminal trials in sex offense cases are disturbingly tilted such that it is almost impossible to be acquitted in a sex offense trial, regardless of innocence. These new evidentiary code articles allow prejudicial, irrelevant evidence to be admitted almost automatically, resulting in automatic, irreversible harm.

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7 *See, State v. Layton*, 168 So. 3d 358 (La. 2015).
8 *See, e.g., State v. Smith*, 19-607 (La. App. 5 Cir. 1/21/20), 2020 WL 356010.
9 La. C. E. arts. 412.2 (2001); 412.3 (2014); 412.4 (2016); 412.5 (2018)

This jurisprudence, for sure, makes it difficult to attack the constitutionality of an evidentiary code article, requiring almost a walk through judicial history all the way into the British common law. Defendants must prove that the admission of the evidence "violates those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency." *Dowling v. United States*, 493 U.S. 342, 353, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990); See also, *Medina v. California*, 505 U.S. 437, 446, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992) ("offends some principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.") The admission must conflict with an evidentiary principle "entrenched in the central values of our legal system" as a historical matter. *Kahler v. Kansas*, 589 U.S. 271, 279, 140 S. Ct. 1021, 206 L. Ed. 2d 312 (2020); *Montana v. Egelhoff*, 518 US 37, 47-48, 116 S. Ct. 2013, 135 L.E d. 2d 361 (1996) (plurality opinion). This showing typically requires defendants to ground the identified evidentiary principle in "eminent common-law authorities" and "early English and American judicial decisions." *Kahler*, 589 U.S. at 279, 140 S. Ct. 1021. "[T]he primary guide" is "historical practice." *Montana*, 518 at 43.

This Court has not settled this issue. See, *United States v. Harvel*, 23-5416 (6th Cir. 8/29/24), 115 F. 4th 714, 733. Louisiana Code of Evidence Rule 412.2's allowance of propensity evidence in sexual assault cases departs from a "fundamental" evidentiary "principle" within the meaning of its cases. *Medina v. California*, 505 U.S. 437, 466,

112 C. Ct. 2572 (citation omitted); cf. *Estelle v. McGuire*, 502 U.S. 62, 75 n.5, 112 S. Ct. 472, 116 L. Ed. 2d 385 (1991).

On the one hand, there is no doubt that pre-1791 authorities began to develop a disdain for the use of a defendant's other (unindicted) crimes in prosecutions. *United States v. Harvel*, 23-5416 (6th Cir. 8/29/24), 115 F. 4th 714, 733, providing much of the historic backdrop herein.[10]

For much of the 1600s, English courts regularly admitted this evidence to show a defendant's bad character. *See* John H. Langbein, The Origins of Adversary Criminal Trial 190-95 (2003); Wigmore §194, at 233 n.1. But both common-law decisions and statutory enactments started to depart from this practice at the end of that century. *Id.* As a common-law matter, judges began to reject efforts to introduce other crimes, rhetorically asking: "Are you going to arraign his whole life? Away, away, that ought not to be; that is nothing to the matter." *Id., citing*, *Harrison's Trial*, 12 How. St. Tr. 833, 864 (1692). As a statutory matter, Parliament limited the use of unindicted acts in treason cases to remedy Star Chamber abuses. *See* Treason Act 1695, 7 & 8 Will. 3 c. 3, §8; *Reed, supra*, 50 U. Cin. L. Rev. at 716-17. In an oft-quoted statement some 70 years later, a treatise suggested that this statute codified a preexisting common-law rule "of rejecting all manner of evidence in criminal prosecutions that is foreign to the point in issue[.]" Sir Michael Foster, *Crown Law* 246 (1762).

10 Mischler, in fact, would not even be privy to accessing many of these historical documents through the Westlaw Correctional database. Thus, Mischler is crediting and citing *Harvel* liberally.

On the other hand, no caselaw appears to have resolved whether this preexisting common-law prohibition reached the prosecution's use of past crimes for propensity purposes until after the founding. *Harvel*, at 734. The pre-founding authorities can be read narrowly as recognizing only an unexceptional proposition: that courts should not admit a defendant's other crimes if they are "irrelevant." (i.e., foreign) to the charged crime. Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 Harv. L. Rev. 954, 959 (1993) (emphasis added). In fact, English courts routinely admitted evidence of these other crimes when they found them relevant in some way. See id. at 960-65; Reed, supra, 50 U. Cin. L. Rev. at 718. Prosecutors, for example, often used evidence of a defendant's prior attempts to pass forged banknotes as proof of the defendant's knowledge that the banknote in question was forged. *See King v. Whiley*, 168 Eng. Rep. 589, 590 (1804).

How did courts treat a prosecutor's use of other crimes evidence to show a defendant's propensity to commit the charged crime under this framework? As far as we can tell, it was not until 1810—in an unreported English case called *Rex v. Cole*—that a court held that prosecutors could not use other crimes to show a defendant's "general disposition to commit the same kind of offense as that charged against him." Samuel March Phillips, *A Treatise on the Law of Evidence* 136 (1st Am. ed. 1816) (emphasis added). Many authorities thus treat Cole (or the Phillips treatise that discusses it) as the "source" for the modern ban on propensity evidence. David P. Leonard, *In Defense of*

the Character Evidence Prohibition, 73 Ind. L.J. 1161, 1170 (1998); *see, e.g.*, Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 Harv. L. Rev. 988, 1031 (1938); R.A. Fisher, *A Digest of Reported Cases from 1756 to 1870* 576 (1871); *Williams v. State*, 110 So. 2d 654, 659 (Fla. 1959); 1 Francis Wharton, *A Treatise on the Criminal Law of the United States* § 640, at 314-15 & n.1 (5th ed. 1861); *State v. Renton*, 15 N.H. 169, 174 (1844). If accurate, it is hard to describe Cole's holding as one of the "settled usages" that had implicitly made their way into the Due Process Clause some 19 years before in 1791. *Murray's Lessee*, 59 U.S. 272, 277, 18 How. 272 (1855).

Harvel, continues on page 734, that some courts seemed to adopt a general ban on the use of other crimes evidence along with several exceptions to this ban. *See, e.g., People v. Molineaux*, 168 N.Y. 264, 61 N.E. 286, 293-94 (1901). Other court seemed to follow the English framework by asking only whether a defendant's other crimes were relevant to the charged crime. *See, e.g., State v. Lapage*, 57 N.H. 245, 289-95 (1876); *see also Reed, supra*, 50 U. Cin. L. Rev. at 728-30; *Stone, supra*, 51 Harv. L. Rev. at 989-1004. Either way, though, American courts generally followed Cole by treating other-crimes evidence as inadmissible when used only to prove a defendant's disposition to commit the charged crime. Wigmore, supra, § 194, at 236; *see, e.g., Lapage*, 57 N.H. at 259. *Walker v. Commonwealth*, 28 Va. 574, 575-76 (1829). Critically, however, many jurisdictions soon developed a "lustful disposition" exception that allowed prosecutors to introduce a defendant's other criminal acts in sex-offense cases. *See, U.S. v Schaffer*,

851 F. 3d 166, 179 (2nd Cir. 3/15/17); *U.S. v. Castillo*, 140 F. 3d 874, 881 (10th Cir. 4/6/98); *see* generally Thomas J. Reed, Reading Gaol Revisited: Admission of Unchanged Misconduct Evidence in Sex Offender Cases, 21 Am. Crim. L. 127, 168-80 (1993).

The general belief among the circuits is that as long as the protections of a balancing test, such as La. C. E. art. 404, remain in place so that district judges retain the authority to exclude potentially devastating evidence 412.2 is constitutional.[11] In those circuits, there are limits and tests administered. In Louisiana, however, the courts consistently hold that in enacting article 412.2 of similar crimes, wrongs, or acts in a sex offense case, the legislature did not see fit to impose a restriction requiring such evidence to meet a stringent similarity requirement.[12] The purpose of 412.2 was to loosen restrictions. This loosening is an unconstitutional deprivation of due process.

III. In Refusing To Grant Mischler's COA, The Fifth Circuit Disregarded It's Own Precedent Under United States v. Moreland.

Mr. Mischler's trial attorney was Rachel Yazbeck. Ms. Yazbeck called two

11 *United States v. Mound*, 149 F. 3d 799, 801 (8th Cir. 1998); *United States v. Schaffer*, 851 F. 3d 166, 177 (2nd Cir. 2017); *United States v. Harvel*, 115 F. 4th 736; *United States v. Julian* 427 F. 3d 471, 487 (7th Cir. 2005); U.S. v. Porter, 121 F. 4th 747 (9th Cir. 2024)

12 *See, State v. Montero*, 18-397 (La. App. 5 Cir. 12/19/18), 263 So. 3d 899.; *State v. Falgout*, 15-0953 (La. App. 4 Cir. 8/24/16), 198 So. 3d 1232, *writ denied*, 220 So. 3d 756 (La. 6/16/17), habeas corpus denied 2022 WL 137053; *State v. Johnson*, 50,005 (La. App. 2 Cir. 8/12/15), 175 So. 3d 442, *writ denied*, 206 So. 3d 203 (La. 9/16/16), habeas corpus denied, 2022 WL 989344, appeal dismissed, 2022 WL 16824545, reconsideration denied 2023 WL 5363491 (Prior acts need not be identical in nature to the charged offense under evidence rule governing the use of evidence of similar crimes, wrongs, or acts in sex offense cases.); *State v. Layton*, 2014-1910 (La. 3/17/15), 168 So. 3d 358 (Rule of evidnce permitting admission of evidence of past sexually assualtive behavior by defendant in prosecutions for sex offenses did not strictly limit evidence to only sexual offenses defined by state law, but rather referred to broad range of behavior, where legislature had amended rule to allow evidence of accused's "crime, wrong, or act involving sexually assaultive behavior or acts which indicated lustful disposition toward children.) *State v. Mischler*, 18-1352 (La. App. 1 Cir. 5/31/19) (Language of statute permitting evidence of similar crimes to prove lustful disposition is broad enough to include previous allegations of misconduct, even if they did not result in final conviction.)

witnesses to testify, none of whom was a computer expert. The most severe charge in this matter, however, was the possession of child pornography that ultimately resulted in a 40 year sentence against Mr. Mischler. There were four witnesses, namely Diane Parvel, Robert Williams, Scott Williams, and Darlene Smith, who were ready, willing, and able to testify as to the access, control and use of Mr. Mischler's computers and technologies. The testimony offered for these witnesses has been attached to the postconviction relief application, habeas corpus petition, and now here. The substance of their offered testimony is laid out above in the fact section, and will not be repeated for the sake of brevity.

The gravity of the pornography charges, together with the information offered by Mischler and these witnesses, should have triggered Ms. Yazbeck to engage a computer forensics expert as possession of pornography is a technical area requiring expertise. The case law, including, *U.S. v. Moreland, infra*, is rife with specialized knowledge necessary for a jury's understanding, especially when the evidence offered is not certain as to how it was obtained.

These witnesses provide sufficient evidence to create a reasonable doubt that the pornography was committed by one of the many people living in Mr. Mischler's household, who had complete access, dominion and control over his computers and devices. These witnesses were crucial to dispel the speculation of who, how, and why there was pornography at Mr. Mischler's home. Testimony regarding Mr. Mischler's

illnesses, periods of incapacitation, and helplessness was crucial to dispel the State's speculation.

In *U.S. v. Moreland*, 665 F. 3d 137 (5th Cir. 12/14/11), Keith Moreland was convicted by a jury of knowing possession of child pornography and sentenced to 51 months in prison. At trial, United States introduced 112 digital images of alleged child pornography that a city police officer found in two home computers that Keith and his wife, Deanna, owned and kept in their house. Keith's father, George Moreland, lived with Keith and Deanna on and off in 2007 until his death January 2008 because he was terminally ill. The police obtained possession of the Moreland's two computers on September 28, 2007 because on this same day, Deanna was using one of the computers and noticed an internet address in the web brower's history containing the words "Teen Topanga." She testified that she clicked the address, and it was a pornographic website with girls who appeared underage. She found the same internet address on the second computer too.

Deanna called her husband at work and was upset, but Keith did not appear to be alarmed. *Id.* After speaking to a friend, Deanna called the police. She also packed her things and children and left the house because of an anticipated heated argument. During several months prior to September 28, 2007, the two computers had been subject to joint custody, control and use by Keith, Deanna, and George. George, who frequently slept in the living room, frequently used the computers late at night when Keith and Deanna

were asleep and during the day while Keith was at work. All three had access to and free use and control of Keith's username, password, and Yahoo! account on the computers. The police never interviewed or investigated George about his use of the computers or pornography. George died on January 2008. Keith was indicted in May 2008 with knowing possession of child pornography, and tried and convicted by a jury in 2009. *Id.*

Keith appealed his conviction, arguing that the evidence was insufficient to rationally support a jury in finding beyond a reasonable doubt that he, rather than George or another person, knowingly possessed the 112 images found on the two computers. After viewing all of the evidence in the light most favorable to the guilty verdict, the Fifth Circuit Court concluded that no reasonable jury could find beyond a reasonable doubt that Keith had knowledge that the 112 images were in the computers, or possession of the images. Because of this finding, this Court reversed the district court's judgment of conviction. *Id.*

The Fifth Circuit went through the customary standard of review regarding the deference given to a jury, etc. However, it stated that a conviction cannot stand based on a pile of inferences. After a discussion on joint custody versus constructive possession, the Fifth Circuit stated that "Where. . . a residence is jointly occupied, the mere fact that contraband is discovered at the residence will not, without more, provide evidence sufficient to support a conviction based upon constructive possession against any of the occupants." *United States v. Mergerson*, 4 F. 3d 337, 348 (5th Cir. 1993). That when the

government seeks to prove constructive possession of contraband found in a jointly occupied location, it must present additional evidence of the defendant's knowing dominion and control of the contraband, besides the mere joint occupancy of the premises. *Id.* at 349.

In other words, the government in the *Moreland* case needed to prove more than that Keith, George and Deanna had access to a computer with contraband on it. The government argued it did by its computer forensics expert, Mr. Manley, but the Fifth Circuit disagreed. The *Moreland* Court found: (1) Mr. Manley could not determine from the data in the computers where the 112 images had come from, when they entered the computers, or when they had been deleted and redesignated as slack space on the hard drive; (2) Mr. Manley could not tell from the data in the computers who (George, Keith, or Deanna or another person) was using the computers when the computers received the 112 images; or when the computers deleted the images and redesignated them as unallocated slack spaces on the computer's hard drives; (3) Mr. Manley can not tell when the computers visited websites that he suspected of containing child pornography; (4) Mr. Manely was unable to determine whether any of the 112 images found in the computer came from any of the websites that the index.dat files indicated the computers had visited; (5) Mr. Manley did not provide any testimony or evidence from which it could be reasonably inferred that Keith had ever seen the 112 images; (6) Mr. Manley provided no evidence or testimony that Keith knew the 112 images were on the

computers; (7) Mr. Manley provided no evidence or testimony that Keith had the knowledge and ability to access the 112 images or that he exercised dominion or control over them. This Court found that, because of this, the government failed to introduce sufficient evidence to establish Keith's culpability beyond a reasonable doubt even if the 112 images were child pornography.

The government, unsettled with anything less than 100% culpability however, argued that Keith's response to Deanna's questioning was circumstantially indicative of Keith's guilt. That is, because Keith did not immediately express sufficient concern over the presence of the child pornography on his computer after hearing same from his wife, and because he did not immediately come home and scold his elderly father, the government argued indicated guilt. The Fifth Circuit rejected this hollow argument as mere speculation.

Here, there was an abundance of evidence to create reasonable doubt that the possession of pornography was committed by one of the many people living in the household. Ample evidence of others having access to his computer was available but not presented to the jury to show this reasonable doubt along the lines of the *Moreland* case and other insufficient evidence of possession cases.

There were also discrepancies in dates of when pornographic media was added to the thumb drives and when the appellant was ill or in the hospital, and thereby making it impossible for him to have obtained the pornography. Evidence of the time and duration

of Mischler's hospital stays, the dates that others were living in his home and had full dominion and control over his electronic devices, computers should have been compared to the dates and times the items were purchased online. This is, without question, a severe penalty for pornography and the requisite reasonable doubt scrutiny was needed more than ever.

Trial counsel failed to investigate the computer's history, cookies, cache files to see if there were hidden files within the computer. Mr. Wayne Labit[13] always felt that something was wrong in the fact that the State's computer investigators did not even look into Miscler's files. Mr. Mischler's sister, Darlene Smith, took Mr. Mischler's computer to have it examined by an expert. After the review, the expert issued a report[14] where he confirmed there were no hidden files. One item of note is that even though the report does not specifically state that there were no illegal files on the computer, it is required that if found, they must be reported. The absence of this information is indicative of this exculpatory information.

At trial, however, there was a consistent theme throughout the testimony: Many people had access to Mr. Mischler's home. For example, Josh Snyder testified that they would routinely go over to Mr. Mischler's house. He testified that not only him but there were other kids that would hang out at Mr. Mischler's house, including all of his siblings and neighbors. R. 609.

13 Appendix 4; Habeas Corpus Exhibit Wayne Labit Statement.
14 Appendix 4; Habeas Corpus Exhibit Computer Analysis (Sep. 22, 2020).

Amber Giordano testified about everyone having access to Mr. Mischler's computer. R. 1061. Josh Snyder testified that everyone had access to Mr. Mischler's laptop. R. 632. William Giordano testified that he had access to Mr. Mischler's laptop, and that it was not password protected. R. 821.

Further investigation should have been done to locate the items that were purchased online. There were items alleged to have been purchased that were never found during the search of Mr. Mischler's house, supporting the assertion that whoever purchased the items took them.

Mischler testified that his computer had been used to purchase unauthorized items and that he lodged a complaint about it. This testimony was given to his attorney, Rachel Yazbeck, who never used these records. R. 847. Even though counsel was in possession of these records, she failed to present them to the jury. Mr. Mischler's testimony alone was not enough. The State offered as many noses as it could to bury Mr. Mischler with 412 evidence. He is already perceived as a biased witness who has something to gain by his own testimony. Mr. Mischler needed his attorney to provide the testimony of Scott Williams, Dianna Pervel, Edward Smith, and Robert Williams. He provided her these people and substance of testimony. This testimony would have provided reasonable doubt as to how the pornography was found in Mr. Mischler's home just like the *Moreland* case.

Moreland had three people in the home that could have downloaded the

pornography. Mischler had many, many more. The State was unable to directly point to Mischler being the source of the pornography. The State was unable to offer proof of where the pornography entered the computers, or when they had been deleted. The State could not tell from the data in the computers who was using the computers when the computer or devices received the pornography.

The State could not tell when Mischler's computers or devices visited websites suspected of containing child pornography. The State did not provide any testimony or evidence from which it could be reasonably inferred that Mischler had ever seen the pornography. The State provided no evidence or testimony that Mr. Mischler knew the pornography was on any of his computers or devices.

Based on its own decision in *Moreland*, it goes without question that reasonable jurists could debate whether (or for that matter, agree that) Mischler's petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further." Mischler asserted that reasonable jurists would find the district court's assessment of his Sixth and 14th Amendment claims debatable or wrong because the very court he requested an appeal from issued the exact opinion applicable to his case. The same court that penned the *Moreland* case is the same court that denied granting Mishler's appeal which was under precisely the same, and most likely better facts. The Fifth Circuit's opinion in *U.S. v. Moreland* is controlling, useful, and persuasive in finding that a reasonable jurist could disagree with

the District Court's denial of Mr. Mischler's constitutional claims. The Fifth Circuit's denial effectively enters a decision that is in direct conflict with Fifth Circuit controlling jurisprudence.

IV. MISHLER'S SIXTH AMENDMENT RIGHT TO COMPETENT COUNSEL WAS VIOLATED.

In addition to the previously provided list of witnesses offered for testimony and evidence, Chris Bellone or one of the other fifteen staffers were offered to Ms. Yazbeck to rebut the allegations of S.L., and offer testimony regarding the Mississippi proceedings. Trial came and went without Ms. Yazbeck's interviewing Mr. Bellone or calling him at trial. Mr. Bellone died shortly after trial without preserving his testimony.

Ms. Yazbeck also failed to call Donald Batiste to rebut the testimony of R.L. Mr. Batiste was the principal at the school where R.L. alleged these incidents occurred. Mr. Mishler offered this testimony and the substance of it to Ms. Yazbeck. Trial came and went without Ms. Yazbeck's interviewing Mr. Batiste or calling him at trial. Mr. Batiste also died shortly after trial without Ms. Yazbeck's preserving his testimony.

Additionally, the State offered 412 evidence of an incident in Orleans Parish in which Mr. Mischler was cleared, and charges *nolle prossed*. The findings of the Orleans Parish District Attorney, and any files associated therewith would have been helpful to the defense, was a matter or public record, yet it was not investigated, obtained or presented to the jury in Mischler's defense.

Ms. Yazbeck was ineffective for failing to investigate and call these witnesses and

utilize this evidence.[15] The decision to interview a potential witness is not a decision related to trial strategy. Rather, it is a decision related to adequate preparation for trial. *Chambers v. Armontrout*, 907 F. 2d 825, 828 (8th Cir. 1990). The 412 witnesses worked together to protect each other because they knew if they did not help convict Mr. Mischler of the pornography charges, the State would next target them. They are the ones who used Mr. Mischler's computer to download pornography, which is the reason all of the alleged pornography could not be found. Ms. Yazbeck's failure to investigate and call these witnesses and evidence caused a great injustice. These witnesses and evidence was so obviously needed to prepare his defense that Ms. Yazbeck's failure to obtain it caused a denial to a meaningful adversarial testing required by the Sixth Amendment of the Constitution. A reasonable juror would agree Mr. Mischler was denied a constitutional right based on the evidence above, and that an accumulation of Ms. Yazbeck's errors prejudiced his defense. *See, Kyles v. Whitley*, 115 S. Ct. 1555, 1567 (1995).

15 *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed 2d 674 (1984)

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: December ~~16~~ 17, 2024.

Respectfully submitted:

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