ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

23-7157

No.: _____

ROY R. DIXON
Petitioner

versus

TIM HOOPER, Warden,
Louisiana State Prison
Respondent

PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES SUPREME COURT TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

From Denial of COA in the United States Fifth Circuit Court of Appeal, No. 23-30715, on appeal from Denial of Habeas Corpus Relief in the U.S.D.C., Eastern District of Louisiana, No. 2:23-CV-374.

Respectfully submitted, *pro se*, this 11th day of March, 2024.

Roy R. Dixon #723646
M.P./CBC L/L 14
LA State Prison
Angola, LA 70712

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INTERESTED PARTIES

Roy R. Dixon, *pro se* Petitioner herein, certifies that the following persons have an interest in the outcome of this cause. These representations are made in order that the Justices of this Honorable Court may evaluate possible disqualifications or recusal.

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

Paul D. Connick, Jr., District Attorney
24th Judicial District
200 Derbigny, 5th Floor
Gretna, LA 70053

Roy R. Dixon #723646
M.P.- CBC L/L 14
LA State Prison
Angola, LA 70712

There are no other parties to this action within the scope of Supreme Court Rule 29.1.

Respectfully submitted this 11th day of March, 2024.

Roy R. Dixon #723646
M.P.- CBC L/L 14
LA State Prison
Angola, LA 70712

QUESTIONS PRESENTED

1. WHETHER TRIAL COUNSEL WAS INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PROPERLY RAISE ILLEGAL SEARCH AND SEIZURE?

2. WHETHER TRIAL COUNSEL WAS INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO RAISE CHAIN OF CUSTODY ISSUE WHERE GRETNA POLICE DEPARTMENT BROKE THE CHAIN OF CUSTODY FOR THE CELL PHONE?

3. WHETHER TRIAL COUNSEL WAS INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO RAISE ISSUE OF PROSECUTORIAL MISCONDUCT AND FABRICATED EVIDENCE, AND FAILED TO CALL AN EXPERT FOR THE DEFENSE IN THIS AREA OF EXPERTISE?

4. WHETHER TRIAL COUNSEL ALLOWED TESTIMONY OF WITNESSES NOT CALLED AT TRIAL, THROUGH POLICE TESTIMONY AT TRIAL, WHICH VIOLATES *CRAWFORD V. WASHINGTON* AND CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL?

5. WHETHER TRIAL COUNSEL FAILED TO ADDRESS ISSUES CONCERNING THE CONFESSION, *MIRANDA* REQUIREMENTS, AND REASONABLE HYPOTHESES OF INNOCENCE, AND RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL?

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MAY IT PLEASE THE COURT:

NOW COMES, Roy R. Dixon, *pro se* Petitioner, suggesting to this Honorable Court that a Writ of Certiorari should issue relative to the Fifth Circuit's opinion denying a Certificate of Appealability (COA) to review the denial of his Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254, and allow his claims to proceed on appeal.

OPINIONS BELOW

The opinion of the United States Fifth Circuit in this case is unreported, and is reproduced in the appendices hereto. (Exhibit 1). The decision of the United States District Court in this case is unreported, and is reproduced in the appendices hereto. (Appendix AA).

JURISDICTION

Jurisdiction is conferred upon this Honorable Court pursuant to the United States Constitution, Article III, § 2, and 28 U.S.C. § 1254(1). Further, the United States Supreme Court has jurisdiction to review decisions of Courts of Appeals denying certificates of appealability under the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA). *Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and 28 U.S.C. § 2254, as amended by the AEDPA.

Specifically, Mr. Dixon has been denied effective assistance of counsel at trial. Further he has been denied procedural due process and access to the courts by denial of Habeas Corpus Relief and COA. The federal district court has misapplied 28 U.S.C. § 2254, which has been sanctioned by the Fifth Circuit Court of Appeal.

STATEMENT OF THE CASE

Petitioner was charged by Bill of Information, in Jefferson Parish, with one count of pornography involving juveniles (Count 1), in violation of La. R.S. 14:81.1, and two counts of sexual battery of a child under 13 (Counts 2 & 3), in violation of La. R.S. 14:43.1. (24th JDC No. 13-569). Petitioner entered pleas of not guilty to the charges.

On September 24, 2013, Petitioner's attorney filed a motion for the appointment of a sanity commission. On November 13, 2013, the court held a hearing on the competency issue. Petitioner's attorney was not present in court, so the court had him participate by way of calling him on the telephone. The parties stipulated that, were the doctors who prepared reports in connection with their examinations of Petitioner called to testify, they would testify consistently with their reports. Pursuant to the stipulation, the court accepted the physicians' reports and found Petitioner competent to proceed. No determination regarding competency at the time of the offense was made and the motion requesting the competency determination was silent as to whether a request for competency at the time of the offense, or to proceed was being sought.

On September 10, 2015, the court held a hearing on Petitioner's motion to suppress his statements. At the hearing, Petitioner's counsel indicated that the previously filed motions to suppress the evidence seized prom Petitioner's phones was not being pursued at that time[1] and that the only issue before the court concerned the suppression of statements. At the conclusion of the hearing, the court denied the motion to suppress.

On May 15, 2017, jury trial commenced. On May 16, 2017, the jury returned with verdicts of guilty as charged as to all three counts. Petitioner filed motions for new trial and post-verdict judgment

1 On July 09, 2014, and again on October 12, 2016, Petitioner filed motions to suppress the evidence. (R.pp. 74, 84). The motions sought to exclude evidence seized from Petitioner's cell phone.

of acquittal. On August 24, 2017, the trial court took up the motions for new trial and post-verdict judgment of acquittal and denied them. After Petitioner announced his readiness for sentencing, the trial court sentenced twenty-one-year-old Petitioner, Roy R. Dixon, a first offender, to twenty years at hard labor, without benefit of parole, probation, or suspension of sentence for the pornography involving a juvenile conviction, and to ninety-nine years at hard labor, without benefit of parole, probation, or suspension of sentence for each of the two sexual battery of a child under 13 convictions. (Appendix C). The court ordered that the sentences be served concurrently. The trial court informed Petitioner of his right to appeal and to file an application for post conviction relief.

Petitioner filed a motion to reconsider sentence which was denied following a hearing on October 05, 2017.

On March 19, 2018 an appeal brief was filed on Petitioner's behalf by Louisiana Appellate Project attorney Gwendolyn K. Brown. The State filed their brief on May 10, 2018.

On August 29, 2018, the 5th Circuit Court of Appeal affirmed Petitioner's convictions, and vacated his sentences and remanded the case to the trial court for re-sentencing, stating that the maximum sentence of 99 years each on counts 2 & 3 were grossly disproportionate to the offense charged for a first offender, and suggested a sentence in the range of 35-40 years; and found count 1 to be illegally lenient because the 20 years given falls below the 25-99 year sentencing range of the statute. (before Wicker, Windhorst and Edwards, JJ.) (Docket No. 2018-KA-0079). *State v. Dixon*, 254 So.3d 828 (La.App. 5 Cir. 2018).

An Application for Certiorari or Review was filed in the Louisiana Supreme Court on the remainder of the appeal issues, and was denied on April 08, 2019. (Docket No. 2018-KH-1909) *State v. Dixon*, 267 So.3d 606 (La. 2019).

The district court resentenced Petitioner on or about October 11, 2018, which was 80 years at hard labor on each of the three counts to be ran concurrently. Prentice L. White, Louisiana Appellate

Project, file an appeal on resentencing on February 04, 2019. The 5th Circuit affirmed the sentence on December 30, 2019. (before Windhorst, Liljeberg, and Marcel, JJ.) (Docket No. 2019-KA-007). *State v. Dixon*, 289 So.3d 170 (La App. 5 Cir. 2019).

An Application for Certiorari or Review was filed in the Louisiana Supreme Court on the resentencing issues on January 16, 2020, and was denied on July 17, 2020. (Docket No. 2020-KO-0143) *State v. Dixon*, 298 So.3d 176 (La. 2020).

On September 20, 2021, Petitioner filed an Application for Post Conviction Relief. (Exhibit D).[2] On March 21, 2022, the State filed a Response to Petitioner's PCR. (Exhibit B). On April 04, 2022, a Traverse to the State's Response was filed. (Exhibit C). The district court denied post conviction relief on April 25, 2022.

On May 16, 2022, Petitioner filed an Application for Supervisory Writs in the Louisiana Fifth Circuit Court of Appeal. (Appendix BB). On June 20, 2022, the Fifth Circuit Denied Writs. (No. 2022-KH-0227), (before Chehardy, Wicker, and Gravois, JJ.) (Appendix AA).

On July 11, 2022, Petitioner filed an Application for Writ of Certiorari or Review in the Louisiana Supreme Court, (Exhibit BB), which was denied on January 11, 2023. (Exhibit AA).

On January 25, 2023, Petitioner filed his petition for Writ of Habeas Corpus in the United States District Court, Eastern District of Louisiana. (Appendix JJ). On May 01, 2023, a State's Response in Opposition was filed. (Appendix FF). On May 15, 2023, a Traverse to the State's Response was filed. (Appendix GG).

A Magistrate's Report and Recommendation (R&R) was filed September 19, 2023. (Appendix HH). An Objection to the Magistrate's R&R was filed on September 22, 2023. (Appendix II). On October 02, 2023, the federal district court denied Petitioner's habeas petition and denied COA.

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2 Appendices AA through JJ are attached to Exhibit 2. Appendix JJ contains Exhibits AA through BB. Exhibit BB contains Appendices AA and BB, which contains Exhibits A through D and Appendices A through P.

(Appendix AA).

On October 06, 2023, Petitioner filed his Notice of Appeal. (Appendix BB). On October 12, 2023, Petitioner filed his Application for In Forma Pauperis. (Appendix AA). On October 16, 2023, the federal district court denied In Forma Pauperis status. (Appendix DD).

On October 19, 2023, the United States Fifth Circuit Court of Appeal granted Petitioner 40 days to file for in forma pauperis and an Application for Certificate of Appealability. (Appendix EE).

On November 28, 2023, Petitioner filed his Application for COA in the United States Fifth Circuit Court of Appeal. (Exhibit 2).

On January 05, 2024, the United States Fifth Circuit Court of Appeal denied COA. (Docket No. No. 23-30715). (Exhibit 1).

The instant Application for a Writ of Certiorari timely follows. Petitioner states that he has remained in continued custody since his arrest, and is currently being held in custody in the Louisiana State Prison at Angola, Louisiana, Tim Hooper, Warden.

Further, Petitioner is a *pro se* litigant. Therefore, he asks that his efforts herein be liberally construed as he has made a good faith effort to follow form. *United States v. Kayode*, 777 F.3d 719, 741, n. 5[3] (5th Cir. 2014).

3 [FN 5] See, e.g., *McNeil v. United States*, 508 U.S. 106, 113 S.Ct. 1980, 124 L.Ed.2d 21 (1993) (acknowledging that the Supreme Court has "insisted that the pleadings prepared by prisoners who do not have access to counsel be liberally construed") (citing *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), and *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). See also *Hernandez v. Thaler*, 630 F.3d 420, 426 (5th Cir. 2011) ("The filings of a federal habeas petitioner who is proceeding *pro se* are entitled to the benefit of liberal construction."); *Johnson v. Quarterman*, 479 F.3d 358, 359 (5th Cir. 2007) (Briefs by *pro se* litigants are afforded liberal construction...."); *Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001) (reasoning that the *pro se* habeas petitioner's argument that he should not be punished for the improper setting of the return date should be construed as a request for equitable tolling, despite his failure to "explicitly raise the issue of equitable tolling").

STATEMENT OF TIMELINESS

The Louisiana Supreme Court denied review on direct appeal on July 17, 2020. (Docket No. 2020-KO-0143) *State v. Dixon*, 298 So.3d 176 (La. 2020).

On October 15, 2020, Petitioner's conviction became final for purposes of the AEDPA when the 90 day period for seeking relief in the United States Supreme Court expired. *Roberts v. Cockrell*, 319 F.3d 690 (5th Cir. 2003).

The one-year period began to run on October 16, 2020, the day after Petitioner's conviction became final. See *Flanagan v. Johnson*, 154 F.3d 196, 202 (5th Cir. 1998). Three-hundred forty (340) days elapsed until Petitioner filed his Application for Post Conviction Relief on September 20, 2021, and tolled the one-year limitation period, leaving twenty-five (25) days until expiration of the one-year period, to wit:

On September 20, 2021, Petitioner filed his original Application for Post Conviction Relief and Memorandum in Support. On April 25, 2022, the District Court denied Petitioner's Post Conviction Relief Application.

On May 16, 2022, Petitioner filed for Supervisory Writ of Review in the Fifth Circuit Court of Appeal. (Exhibit BB). On June 20, 2022, the Fifth Circuit denied Writs. (Docket No. 2022-KH-227). On July 11, 2022, Petitioner filed for Writ of Certiorari or Review in the Louisiana Supreme Court. On January 11, 2023, the Louisiana Supreme Court denied the application, "Writ application denied. See per curiam." (Docket No. 2022-KH-1174). (Exhibit AA).

On January 19, 2023, Petitioner signed for and received this notification from the Louisiana Supreme Court that he had been denied ("order denying discretionary review"). Petitioner filed on January 25, 2023, (before February 05, 2023), therefore, he filed his Petition for Habeas Corpus in the federal district court within the twenty-five (25) days left on the one-year limitation period, and is

therefore timely. *Varnado v. Cain*, [2003 U.S. Dist. Lexis 3351 (E.D.La. 2003).] citing *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000).

Petitioner's petition for writ of habeas corpus and COA was denied on October 02, 2023. Notice of Appeal was filed on October 06, 2023, and an Application for In Forma Pauperis status was filed on October 12, 2023, which was denied on October 16, 2023.

On October 19, 2023, the United States Fifth Circuit Court of Appeal granted Petitioner 40 days to file for COA, and In Forma Pauperis. An Application for COA and Motion Requesting Permission to Proceed IFP timely followed on November 28, 2023 (Exhibit 2), and was denied on January 05, 2024. (Exhibit 1). The instant Application For Certiorari timely follows.

Petitioner has been timely filed in all courts throughout the case at bar, and shows he has diligently pursued his right to Federal Habeas Corpus Review. *Howland v. Quarterman*, 507 F.3d 840 (5th Cir. 2007); *Dolan v. Dretke*, 168 Fed.Appx 10 (5th Cir. 2006); *Gordon v. Dretke*, 107 Fed. Appx. 404 (5th Cir. 2004); *Goodwin v. Dretke*, [2004 U.S. App.Lexis 13433 (5th Cir. 2004)]; *U.S. v. Wynn*, 292 F.3d 226 (5th Cir. 2002), (all citing *Phillips v. Donnelly, supra*).

STATEMENT OF THE FACTS

On January 26, 2013, the Gretna Police Department received a complaint regarding a cell phone with a pornographic video on it. According to Sergeant Lewis Alvarez, Mr. Badeaux stated that he had stolen the phone from a man named Allen Dixon with whom he had engaged in a sexual relationship after arranging a meeting on Craig's List. Following the sexual encounter, Mr. Dixon had gone to use the bathroom and, while Mr. Dixon was out of the room, Mr. Badeaux had stolen his phone. According to Sergeant Lewis Alvarez, Mr. Badeaux later identified through photographic lineup Roy Dixon, not Allen Dixon, as the man from whom he had stolen the phone.

Detective Jeffrey Laborie responded to the complaint and ultimately met with Ryan Badeaux and retrieved a cell phone. Mr. Badeaux, clearly acting as an agent of the Gretna Police Department, showed Officer Laborie a video on the phone which depicted a small female child of one to two years old who was nude with an adult male hand touching her vaginal area. Mr. Badeaux did not have the password to the phone and had to have hacked into the phone to gain unauthorized access and open the phone.

Officer Laborie testified that following his interview with Mr. Badeaux, he went to the residence of Allen Dixon where he spoke with Allen's mother. Officer Laborie reported that he explained to Ms. Dixon that he was looking for Allen and that Ms. Dixon appeared "confused." Officer Laborie explained why he was there, that he had a cell phone, and he confirmed the number on the cell phone. According to Officer Laborie, it was through this conversation that he learned the phone number belonged not to Allen Dixon, but to his brother, Roy Dixon. While Officer Laborie was still in the home, Roy Dixon rode up on his bicycle and Officer Laborie confronted him.

According to Ms. Dixon, she was at work on January 26, 2013, and while she was there she received a phone call from her mother saying that a man had called asking for money in exchange for Roy's cell phone. She explained to the police that Allen did not live there, but while they were there, Roy rode up on his bike and they immediately arrested him.

Ms. Dixon explained that she later received a phone call from Roy who told her that he had admitted to the charges against him, charges which concern her daughter (Roy's sister), because the police had threatened him, Ms. Dixon (Roy's mother), and his sister.

Officer Laborie testified that he did indeed arrest Mr. Dixon at his mother's home, and then transported Roy to the Gretna Police Department, where he placed him in a holding cell. The room was wired so that officers could eavesdrop on what was being said inside the cell; however, because the officers merely transcribed what was being spoken rather than actually recording it, they deemed it

unnecessary to post the warning that is given when recordings are being made, so no sign was posted to alert the occupants of the room that they were being monitored. Officer Laborie testified that he eavesdropped on Mr. Dixon and heard him lamenting that he was "stupid" and that he could not "believe I did that."

Sergeant Lewis Alvarez testified that he obtained a search warrant to inspect the phone, and that once the warrant was granted, he retrieved three videos from it. He described two of the videos as depicting the torso of a "toddler child" with a "black penis ejaculating on the child," and a third with a black male hand "playing with her vagina." Neither the face of the child, nor the unknown male was depicted. Sergeant Alvarez subsequently interrogated Mr. Dixon who allegedly told him about more photos on the phone. Mr. Dixon explained that the photos and videos had been created at the urging of "Brad Howard," who police later determined was actually named Brad Case, and who police learned was incarcerated for having pled guilty in April of 2013 to distribution of child pornography.

Ms. Dixon testified that she viewed these photographs and videos, and while she found them very upsetting and disturbing, the child depicted in them absolutely was not her daughter. She explained that, although the child's face was not depicted in the images, she is nevertheless very familiar with her child's body, having given birth to her and cared for her, dressed her, and bathed her since she was born and she knew that the navel, legs, feet, genitals, and skin tone of the child in the images were not those of her baby. Ms. Dixon indicated that if her son had abused her daughter, she would not be testifying in his defense, and that Roy "would not have survived if it had been mine. Y'all would not have to worry about it. I would be the one standing over there."

Ms. Dixon also testified that prior to trial, the district attorney showed her a laptop computer, and states, "They played the videos for me. They showed me all of the pictures. I immediately told the DA right then that it wasn't my baby. He turned around and stormed out of the room."

SUMMARY OF THE ARGUMENT

In this case the record clearly shows, and the police testified at trial that, contrary to the state court judge (Exhibit A) and federal Magistrate's (Appendix HH) opinions, that Roy Dixon's phone was not "found," but was admittedly stolen by Ryan Badeaux who even pointed out Mr. Dixon in a photographic lineup as the person he stole the phone from.

> On January 26, 2013, the Gretna Police Department received a complaint regarding a cell phone with a pornographic video on it. According to Sergeant Lewis Alvarez, Mr. Badeaux stated that he had stolen the phone from a man named Allen Dixon with whom he had engaged in a sexual relationship after arranging a meeting on Craig's List. Following the sexual encounter, Mr. Dixon had gone to use the bathroom and, while Mr. Dixon was out of the room, Mr. Badeaux had stolen his phone. According to Sergeant Lewis Alvarez, Mr. Badeaux later identified through photographic lineup Roy Dixon, not Allen Dixon, as the man from whom he had stolen the phone.

(Appendix JJ, Habeas Memorandum, p. 6).

Further, Mr. Badeaux did not have the password to the phone and had to have hacked into the stolen phone to gain unauthorized access and open it. Once hacked into, the data in the phone was subject to manipulation, i.e., adding content, deleting content, and altering content, before being given to the police by the thief, Ryan Badeaux. Mr. Badeaux somehow opened the locked, password protected phone and went through it with Detective Jeffery Laborie before the phone was confiscated. Therefore, Officer Laborie, along with Mr. Badeaux acting as an agent of the police, under the authority of Officer Laborie, unlawfully made a warrantless search of the cell phone.

Being stolen, the law shows that police conducted a warrantless search. If the phone were "found," that's a horse of a different color. For the courts to deliberately manipulate the record evidence from "stolen" to "found" shows judges who are not being fair and impartial, but who are acting as prosecutors. In *United States v. Perez-Melis*, 882 F.3d 161, 165 (5th Cir. 2018), the United States Fifth

Circuit Court of Appeal stated "We reiterate, however, that 'we will not hesitate to find error when a trial judge forgets that he is no longer at counsel table.' *United States v. Achobe*, 560 F.3d 259, 274 (5th Cir. 2008)." This should hold true for any judge, at all times.

"The protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system." *United States v. Columbia Broadcasting, Inc.*, 497 F.2d 107, 109 (5th Cir. 1974).

Moreover, there has never been anyone who identified the child in the videos and photos as being Petitioner's younger sibling, either before or during trial. Simply because Petitioner has a young sister, the State assumed that the child in the videos was Petitioner's sister, based on Ryan Badeaux's belief, who, again, was not at trial.

However, Ms. Cayata Dixon, Petitioner's mother, and the mother of his young sister, testified that the child in the videos is not her daughter, which she told to the DA prior to trial. Ms. Dixon also testified that prior to trial, the district attorney showed her a laptop computer, and states:

> "They played the videos for me. They showed me all of the pictures. I immediately told the DA right then that it wasn't my baby. He turned around and stormed out of the room."

(Appendix N).

On cross-examination, Detective Alvarez was asked:

> Q. And just so we are clear on these videos, and on these photos, there are no identify[ing] features, there is no face?
>
> A. No.
>
> Q. All you can see is the torso of an infant, and the hand, and at one point the genitalia of an unknown male?
>
> A. Correct.

(Appendix O).

The State has failed to refute the testimony of Ms. Dixon in any way, much less to prove who the child in the videos actually is. The State has failed to prove the identity of the male depicted in the

video, much less that it is Petitioner.

Ms. Dixon testified that she viewed these photographs and videos, and while she found them very upsetting and disturbing, the child depicted in them was absolutely not her daughter. She explained that, although the child's face was not depicted in the images, she is nevertheless very familiar with her child's body, having given birth to her and cared for her, dressed her, and bathed her since she was born, and she knew that the navel, legs, feet, genitals, and skin tone of the child in the images were not those of her baby. "I saw a baby, but it wasn't my baby." (Appendix N).

The State knew prior to trial that the identity of the victim was speculative and unproven, and even challenged by the alleged victim's own mother. They took no pictures of the alleged victim for comparison, or otherwise verified the victim's identity.

Additionally, Ryan Badeaux is the sole accuser of Mr. Dixon. Everything Ryan Badeaux did for the police, and said to the police, was used against Petitioner at trial, including pointing him out in a photographic lineup. There would be no case at all without Ryan Badeaux's theft and accusations. However, the record evidence is clear: Ryan Badeaux was not placed on the stand for confrontation or cross-examination at anytime, either before or during trial. This violates Petitioner's constitutional right to confront his accuser under the United States Constitution, Amendment 6, through Amendment 14; Louisiana Constitution, Article 1, § 16.

Therefore, the State has, through an unreasonable search, illegally seized without a warrant, pornography discovered on a hacked, stolen cell phone and brought to the police by the thief, himself, who was not charged with possession of pornography or theft. Ultimately, it proves nothing, and it should not be used against Mr. Dixon as "fruit of the poisonous tree."

The State further failed to prove the identity of either the victim or the perpetrator, yet specifically told the jury that Mr. Dixon ". . .he did it by victimizing his sister. At the end of the day, it's Roy Dixon who is guilty of producing pornography of his sister while she was under the age of 13."

(Appendix F).

The State also failed to bring the accusing witness to trial for confrontation. No matter how much evidence the State feels it has, and how much they feel Mr. Badeaux's testimony is unneeded to prove their case, the constitution requires that Mr. Dixon must have the opportunity to face Mr. Badeaux, his accuser, at trial. Mr. Badeaux was never placed "in the crucible of cross-examination." Failure to do so is structural error not amenable to harmless error review.

Mr. Dixon has presented these and other record facts and evidence which has been overlooked, discarded, or just plain ignored, and which shows that his trial was unconstitutional, and that his trial counsel rendered ineffective assistance of counsel.

ISSUES PRESENTED

1. TRIAL COUNSEL WAS INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PROPERLY RAISE ILLEGAL SEARCH AND SEIZURE.

2. TRIAL COUNSEL WAS INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO RAISE CHAIN OF CUSTODY ISSUE WHERE GRETNA POLICE DEPARTMENT BROKE THE CHAIN OF CUSTODY FOR THE CELL PHONE.

3. TRIAL COUNSEL WAS INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO RAISE ISSUE OF PROSECUTORIAL MISCONDUCT AND FABRICATED EVIDENCE, AND FAILED TO CALL AN EXPERT FOR THE DEFENSE IN THIS AREA OF EXPERTISE.

4. TRIAL COUNSEL ALLOWED TESTIMONY OF WITNESSES NOT CALLED AT TRIAL, THROUGH POLICE TESTIMONY AT TRIAL, WHICH VIOLATES *CRAWFORD V. WASHINGTON* AND CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

5. TRIAL COUNSEL FAILED TO ADDRESS ISSUES CONCERNING THE CONFESSION, *MIRANDA* REQUIREMENTS, AND REASONABLE HYPOTHESES OF INNOCENCE, AND RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL.

ARGUMENT

1. TRIAL COUNSEL WAS INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO PROPERLY RAISE ILLEGAL SEARCH AND SEIZURE.

On January 26, 2013, Ryan Badeaux stole Petitioner's cell phone. Mr. Badeaux opened the phone and went through it with Detective Jeffery Laborie before the phone was confiscated. Therefore, Officer Laborie, along with Mr. Badeaux acting as an agent of the police, under the authority of Officer Laborie, unlawfully made a warrantless search of the cell phone.

> Private party conduct does not raise Fourth Amendment concerns; only activity by government agents implicates a person's Fourth Amendment rights. *United States v. Paige*, 136 F.3d 1012, 1017 (5th Cir. 1998). For a private party search to be classified as government action, (1) the government must know of or acquiesce in the intrusive conduct, and (2) the private party must intend to assist law enforcement in conducting the search. *Id.*; *see also United States v. Blocker*, 104 F.3d 720, 725 (5th Cir. 1997).

United States v. Barth, 26 F.Supp.2d 929, 935 (W.D. Texas, 1998).

There is no plain view in this case. Mr. Badeaux opened and went through the phone and pointed out the locations of the videos to Officer Laborie, who looked through the contents of the cell phone 1) without a warrant; 2) without any exigent circumstances; or 3) without any other exception to the warrant requirement. By all accounts, Officer Laborie never attempted to confiscate the phone until after the illegal search by Mr. Badeaux and Officer Laborie was executed.

Therefore, the private party (Mr. Badeaux) clearly intended to help the police by bringing the stolen cell phone to the police station after hacking into it, and the police (Officer Laborie) knew of and acquiesced in the intrusive conduct by allowing Mr. Badeaux to scroll through the phone and point out to him the contents of the stolen cell phone. This set of facts is clearly a violation of Petitioner's Fourth

Amendment rights, and was never argued by trial counsel.

In fact, Petitioner filed motions to suppress the evidence seized from his cell phone, however, Petitioner's trial counsel told the court at a pretrial hearing that he would not pursue the previously filed motions to suppress the evidence seized from Petitioner's phones.[4] Trial counsel was not acting as an advocate for Petitioner.

According to Officer Laborie's narrative report, (Appendix K), Badeaux advised that he decided to go through Petitioner's cell phone because he was "curious." Badeaux scrolled through the cell phone and observed one file titled "SD Card." The cover photo he assumed to be Petitioner's sister. Badeaux, accompanied by Officer Laborie, viewed the first video. Detective Alvarez took a statement from Badeaux. During the statement, Badeaux answered a call from Petitioner's grandmother. Detective Alvarez told Badeaux to tell Petitioner's grandmother that he was taking Petitioner's cell phone because of the videos found on the phone.

According to Detective Alvarez's narrative report, (Appendix L), Officer Laborie stated Badeaux looked in the cell phone and located two videos. Badeaux then showed Officer Laborie the location of the videos on the cell phone, at which time Officer Laborie viewed one of the videos. Detective Alvarez asked Badeaux if Petitioner knew he had stolen the phone, and Badeaux stated that he did not tell Petitioner that he was taking his cell phone.

Ryan Badeaux stole Petitioner's cell phone, and later brought it to the police stating that there were incriminating pictures and videos on the phone. Ryan Badeaux opened the phone at the direction of Officer Laborie, and scrolled through the phone to show where these videos were located, which were then viewed by Officer Laborie.

Further, it is clearly also a warrantless search, in violation of the controlling principle of law,

4 On July 09, 2014, and again on October 12, 2016, Petitioner filed motions to suppress the evidence. (R.pp. 74, 84). The motions sought to exclude evidence seized from Petitioner's cell phone.

the United States Supreme Court has unanimously held that law enforcement cannot by any means search a person's cell phone without a search warrant:

> As the text makes clear, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). Our cases have determined that "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). Such a warrant ensures that the inferences to support a search are "drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 92 L.Ed. 436 (1948). In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement. See *Kentucky v. King*, 563 U.S. ___, ___, 131 S.Ct. 1849, 1856-1857, 179 L.Ed.2d 865 (2011).

Riley v. California, 573 U.S. 373, 381-382, 134 S.Ct. 2473, 2482, 189 L.Ed.2d 430 (2014).

Search warrants, (Appendix D), were not even sought until well after the fact of the illegal search and seizure. Mr. Badeaux had already shown the videos to Officer Laborie, and a Fourth Amendment violation had already occurred. The police can not put the cat back in the bag by belatedly seeking a search warrant.

In fact, Petitioner's coerced confession is also tainted by this Fourth Amendment violation and can not stand:

> "[E]ven if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains." *Brown v. Illinois*, 422 U.S. 590, 601-02, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). Considering temporal proximity, intervening circumstances, and purpose and flagrancy of the official actions, the Court finds for the reasons stated in its prior discussion that the taint of the prior Fourth Amendment violation had not dissipated at the

> time Defendant made his oral and recorded statements. As such, Defendant's oral and written statements should be suppressed.

United States v. Barth, 26 F.Supp.2d 929, 942 (W.D. Texas, 1998).

Mr. Badeaux admitted to stealing the phone. At some point he had to have hacked into the phone in order for him to be able to open it under Officer Laborie's direction and authority. Mr. Badeaux had to have gone through the phone previous to opening it for the police in order to locate the videos for the police.

Additionally, this illegal warrantless search was not conducted incident to any arrest, detention, or even in the presence of Petitioner. Even then, the Supreme Court holds that the constitution requires a search warrant because digital data in a cell phone cannot be used as a weapon, or be used to effectuate an escape. *Riley, supra,* at 387. As previously stated, Officer Laborie never attempted to confiscate the phone until after the illegal search by Mr. Badeaux and Officer Laborie was executed. This implicates the "fruit of the poisonous tree" doctrine.

The question naturally arises, once Mr. Badeaux hacked into the phone, could he not download pictures, videos, etc., to the phone prior to bringing it to the police? Indeed, wasn't it Ryan Badeaux who was in constructive possession of pornography? Why wasn't he arrested for it? Or at least for theft, since he admitted to stealing the phone? Petitioner contends that his trial counsel should have raised these issues.

There were unsolicited pictures sent to Petitioner's phone by Brad Case which he deleted. However, there are videos that Petitioner believes Ryan Badeaux could have easily downloaded to the phone prior to bringing it to the police. This would account for his being able to open the phone and go right to them for the police.

Moreover, there has never been anyone who identified the child in the videos as being Petitioner's younger sibling, either before or during trial. Simply because Petitioner has a young sister,

the State assumed that the child in the videos was Petitioner's sister, based on Ryan Badeaux's belief. However, Ms. Cayata Dixon, Petitioner's mother, and the mother of his young sister, testified that the child in the videos is not her daughter.

Ms. Dixon testified that she viewed these photographs and videos, and while she found them very upsetting and disturbing, the child depicted in them was absolutely not her daughter. She explained that, although the child's face was not depicted in the images, she is nevertheless very familiar with her child's body, having given birth to her and cared for her, dressed her, and bathed her since she was born, and she knew that the navel, legs, feet, genitals, and skin tone of the child in the images were not those of her baby. Ms. Dixon indicated that if her son had abused her daughter, she would not be testifying in his defense, and said "But I can promise you Roy or nobody else would have survived if it had been mine. Y'all wouldn't have to worry about it. I would be the one standing over there." (Appendix N, pp. 133-134).

On cross-examination, Detective Alvarez was asked:

Q. And just so we are clear on these videos, and on these photos, there are no identify[ing] features, there is no face?
A. No.
Q. All you can see is the torso of an infant, and the hand, and at one point the genitalia of an unknown male?
A. Correct.

(Appendix O, p. 64).

The State has failed to refute the testimony of Ms. Dixon in any way, much less to prove who the child in the videos actually is. The State has failed to prove the identity of the male depicted in the video, much less that it is Petitioner.

Therefore, the State has, through an unreasonable search, illegally seized without a warrant, pornography found on a stolen cell phone and brought to the police by the thief, himself, who was not charged with possession of pornography or theft. Ultimately, it proves nothing, and it should not be

used against Petitioner as "fruit of the poisonous tree."

Moreover, the State has the burden of proving that the evidence would have been inevitably discovered by legal means:

> . . . One of the theories courts use in addressing "fruit of the poisonous tree" issues is the inevitable discovery rule. The inevitable discovery doctrine "is in reality an extrapolation from the independent source doctrine: Because the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered." *Murray v. United States*, 487 U.S. 533, 539, 108 S.Ct. 2529, 2934, 101 L.Ed.2d 472 (1988). A functional similarity exists between the independent source and inevitable discovery doctrines because both seek to avoid excluding evidence the police "would have obtained . . . if no misconduct had taken place." *Nix v. Williams*, 467 U.S. 431, 444, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). **The State therefore bears the burden of proving by a preponderance of the evidence that "the information ultimately or inevitably would have been discovered by lawful means** ...." *Nix v. Williams*, 467 U.S. at 444, 104 S.Ct. at 2509 n. 5; *State v. Vigne*, 820 So.2d at 539.
>
> *State v. Lee*, 976 So.2d 109, 127 (La. 2008) **(emphasis added)**.

In this case, the police did not have Petitioner under investigation, or responding to a report of illegal activity, and would not have inevitably discovered what they obtained on the stolen cell phone had the cell phone not been stolen at the outset. The phone was unlawfully stolen, and the State could not have shown by a preponderance of the evidence that the information would have been discovered by lawful means.

2. TRIAL COUNSEL WAS INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO RAISE CHAIN OF CUSTODY ISSUE WHERE GRETNA POLICE DEPARTMENT BROKE THE CHAIN OF CUSTODY FOR THE CELL PHONE.

The Gretna Police Department broke the chain of custody for the cell phone. On January 28, 2013, the JPSO Crime Laboratory received the cell phone as a whole from the Gretna Police

Department. However, on February 21, 2013, the Gretna Police Department received two specimens: S#1, and S#1A; two separate, disassembled, yet independent devices. As recorded by the Outbound Evidence Transfer Receipt from the JPSO Crime Laboratory, (Appendix H), an evidence description is given that states: "one sealed paper envelope containing one Samsung Boost Mobile Phone (S#1); one PNY Micro SD8GB Card s/n 761062ZB (S#1A)." The evidence was relinquished by Alexis Rivera, and received by Chris Brosette; date and time: 2/21/13, 10:01:13 hours. (Appendix H).

Chris Brosette never signed the receipt to verify his identity. (Appendix H). Furthermore, the PNY Micro SD8GB Card was never cataloged into the chain of custody. (Appendix I). Between February 21, 2013 and May 12, 2016, the whereabouts of the PNY Micro SD8GB Card are non-existent. Yet the PNY Micro SD8GB Card was used by the prosecution against Petitioner at trial. Neither Ms. Rivera, nor Chris Brosette were present to testify that a transfer occurred between them, how many items, or the condition of said evidence, etc. There is no chain of custody whatsoever for the PNY Micro SD8GB Card used at trial. The evidence was entered on 2/21/13 without the PNY Micro SD8GB Card in the chain of custody. *State v. Priest*, 265 So.3d 993, 1001 (La.App. 5 Cir. 2019):

> Before it can be admitted at trial, demonstrative evidence must be properly identified. La. C.E. Art. 901. This identification may be visual (i.e., by testimony at the trial that the object exhibited is the one related to the case) or it may be by chain of custody (i.e., by establishing the custody of the object from the time it was seized to the time it was offered in evidence). *State v. Cosey*, 97-2020 (La. 11/28/00), 779 So.2d 675, 678, cert. denied, 533 U.S. 907, 121 S.Ct. 2252, 150 L.Ed.2d 239 (2001); *State v. Sweeney*, 443 So.2d 522, 528 (La. 1983); *State v. Brooks*, 01-864 (La.App. 5 Cir. 1/29/02), 807 So.2d 1090, 1099.

A "defect in the chain of custody goes to the weight of the evidence rather than to its admissibility." *State v. Holliday*, ___ So.3d ___, 2020 WL 500475 (La. 1/29/20), quoting *State v. Sam*, 412 So.2d 1082, 1086 (La. 1982).

However, in this case, the evidence was not identified, nor was it in a chain of custody, since

neither Ms. Rivera, nor Chris Brosette were present to testify at trial, and should not have been admitted. Further, the issue also becomes what type of manipulation to the SD8GB Card occurred in all the time it was missing before reappearing at trial? Trial counsel failed to challenge the State's case regarding this issue, which would impeach the State's case-in-chief, as well as the weight of the evidence.

3. TRIAL COUNSEL WAS INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO RAISE ISSUE OF PROSECUTORIAL MISCONDUCT AND FABRICATED EVIDENCE, AND FAILED TO CALL AN EXPERT FOR THE DEFENSE IN THIS AREA OF EXPERTISE.

In Officer Jeffrey Laborie's narrative, he states that Ryan Badeaux scrolled through the files on the cell phone and that he observed one titled "SD Card." (Appendix K). The initial search of the cell phone by Officer Laborie and Ryan Badeaux was memorialized in this narrative. However, the "SD Card" file mentioned at the outset by Officer Laborie disappears from all records and reports in the case; it is only ever mentioned by Officer Laborie in his narrative report.

Detective Stephen Villere authored the digital forensic examination with no mention of the "SD Card" file allegedly found in the cell phone by Officer Laborie in the initial search. (Appendix J). The evidence report in Detective Villere's examination states the evidence was found in a file called "Camera." By stating in his report that the evidence was found in a file called Camera," Detective Villere falsified evidence in order to substantiate the State's case, as well as to commit perjury at trial when he was under oath. The "SD Card" file was the initial source of the evidence used against Petitioner. However, the source in Detective Villere's examination report inexplicably changes from "SD Card" file to "Camera" file.

The cell phone has a camera. By the file name being changed from "SD Card" file to "Camera" file, the jury would be led to believe that the evidence was created on the cell phone, without

reasonable doubt. Due to his expertise, the jury would believe his testimony.

> So the State's case then which is the first and primary purpose of the State's case is confession really falls apart upon examination. There are real problems here. So in the end, they turn to forensic evidence. You had a witness come up here and explain a whole lot of stuff. I'm not sure how much you followed it or how much I followed it. But there are certain things that I did follow and they caused as much concern, as much concern as anything else. You heard the testimony from the police. They allegedly got ten photos and three videos. You heard the testimony from the expert witness. Those ten photos and three videos were found over two devices. We will get to the two devices. You heard them say that big elaborate code is unique, that it follows the photo or the video from device to device. You heard them say that the copies that he saw were exact and that the information allows him to come to this conclusion.
>
> Now ignoring the context of those details here that this is an area of expertise that needs to be regulated by any sort of nationally recognized body. He come forward and he says that all of this is true. But when you dig through the digital forensic examination, you realize that there is not ten unique files. There are 18 different unique codes for pictures. And if I'm going to fast, I apologize. I'm trying to speed this up. Each number I'm pointing to is unique. Each number I'm pointing to is allegedly one of the ten pictures. In the end, the testimony then becomes that somehow ten pictures actually have 18 different unique codes. Each unique code has a different date that was modified and a different date that was created, a different date that it was adjusted. I can't remember all the terms that are used here. But somehow this person is able to come to this conclusion that all of these photos were made on Mr. Dixon's phone because the file names are unique and the information can't be changed. How can they not be changed? There are ten photos with 18 different codified pieces of information. That should tell you with concern. If they can't be changed and there are only ten photos, why are there 18 different codes?

(Appendix F, pp. 168-169).

Detective Stephen Villere authored the digital forensic examination report with an improper animus. The report has dates spanning between July 01, 2012 and January 22, 2013. Several items in

his report are not found in the digital forensic examination sections of his report when put side by side: 1) "graphics and videos from HDD"; 2) "graphics and videos from Micro SD Card" (Micro Storage Device); and 3) "located on both devices" as alleged. Additionally, the report has dates and times that do not match.

These changes were made specifically to help substantiate the State's case, and even simply changing the name of a file amounts to a lie. However, it goes further than this. The whole location, times, and the alleged source of these files within the cell phone were changed from the time Officer Laborie's report was made and the time Detective Villere made his report.

Further, the prosecutor allowed false testimony to go uncorrected in violation of *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). This is especially true in light of the fact that the prosecutor knew, or should have known, the alleged source of these files within the cell phone were changed from the time Officer Laborie's report was made and the time Detective Villere made his report and testified that the evidence was never altered.

In *Napue*, *supra*, the United States Supreme Court, Mr. Chief Justice Warren, held that where an important witness for the State, in a murder prosecution of a petitioner, falsely testified that the witness had received no promise of consideration in return for his testimony, though in fact the Assistant State's Attorney had promised the witness consideration, and Assistant State's Attorney did nothing to correct the false testimony of the witness, petitioner was denied due process of law in violation of the 14th Amendment to the Federal Constitution, though jury was apprised of other grounds for believing that the witness may have had an interest in testifying against petitioner.

In this case, the prosecutor allowed Detective Villere to perpetuate these lies in his report under oath - the manufacture and manipulation of the evidence - because his testimony was the cornerstone of the State's case. This also put the stamp of a qualified expert on the case in order to impermissibly bolster the State's case against Petitioner, especially since trial counsel did not present a defense expert

to rebut the State's expert.

Trial counsel allowed the State to present expert opinion favorable to the State, and only expert opinion favorable to the State. Without rebuttal of the State's expert, the State could develop prejudicial assumptions that would ordinarily be held in check by an expert for the defense.

An expert to testify for the defense at trial would have effectively rebutted the prejudicial assumptions erroneously elicited by the State. The State's theory of the case was only that — a theory. This theory should have been subjected to rebuttal, especially through the use of expert testimony, which is Petitioner's right that was neither utilized, nor honored by his trial counsel. *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), quoting *Britt v. North Carolina,* 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971).

Where the prosecution experts were given leeway to testify, the Petitioner's expert would have been allowed to testify as well, had Petitioner's attorney called for one. See, *United States v. Riddle,* 103 F.3d 423 (5th Cir. 1997); *Pavel v. Hollins,* 261 F.3d 210 (2nd Cir. 2001). And see, *United States v. Lueben,* 812 F.2d 179 (5th Cir. 1987), where the *Lueben* Court held it to be reversible error for the trial court to disallow a defendant's rights to due process, and to offer witnesses / rebuttal evidence. Clearly, Petitioner's counsel was ineffective assistance of counsel for failing to do so.

Petitioner asserts that it cannot be a "trial strategy" to completely disregard this area of defense, especially in light of the fact that expert testimony encompassed several areas of expertise throughout the trial, such as cell technology, computer technology, digital technology, etc. A "strategic" decision is a decision "that . . . is expected . . . to yield some benefit or avoid some harm to the defense." *Moore v. Johnson,* 194 F.3d 586 (5th Cir. 1999).

Petitioner contends that the only harm avoided by his trial counsel's failure to utilize expert testimony was to the prosecution. The prosecution also received the benefit of prejudice to the Petitioner caused by his trial counsel's errors.

Under the Sixth Amendment, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Lindstadt v. Keane*, 239 F.3d 191, 200 (2nd Cir. 2001) (quoting *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

An expert was essential to the defense in order to relate the Petitioner's version of events as the more probable scenario to the jury, and to show that the data utilized by the State's expert was manipulated and/or fabricated. Viewing the evidence in light of both the State's theory versus the Petitioner's may have caused a reasonable finder of fact to believe that Petitioner's version of events was the most probable, and realistic version according to the facts and evidence. *Draughon v. Dretke*, 427 F.3d 286 (5th Cir. 2005).

In *Strickland, supra*, the Court held: "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*, 466 U.S. at 691, 104 S.Ct. 2052. Notably, although counsel's pretrial decisions can impact later trial strategy, the Court's analysis distinguished counsel's duty to investigate from counsel's strategic approaches to the trial, explaining "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.*, 466 U.S. at 690, 104 S.Ct. 2052. The Supreme Court has recently affirmed this principle, explaining in a unanimous opinion that it was not a strategic or excusable choice for counsel to turn a blind eye to the need for procuring expert testimony to rebut the prosecution's theory that the defendant shot three victims. See *Hinton v. Alabama*, 571 U.S. 263, 273, 134 S.Ct. 1081, 1088, 188 L.Ed.2d 1 (2014).

Trial counsel had many concerns regarding the State's case and relayed this to the jury. However, trial counsel failed to call an expert to the stand in order to rebut the State's expert. This is clearly ineffective assistance of counsel and requires Petitioner to be granted the requested habeas corpus relief.

4. TRIAL COUNSEL ALLOWED TESTIMONY OF WITNESSES NOT CALLED AT TRIAL, THROUGH POLICE TESTIMONY AT TRIAL, WHICH VIOLATES *CRAWFORD V. WASHINGTON* AND CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner states that his rights to confront and cross-examine his accuser, and due process was violated at trial. United States Constitution, Amendments 5, 6, and 14; Louisiana Constitution, Art. 1, §§ 2 and 16. *See Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Further, that his trial counsel rendered ineffective assistance of counsel regarding this issue.

Ryan Badeaux stole Petitioner's cell phone, and later brought it to the police stating that there were incriminating pictures and videos on the phone. Ryan Badeaux opened the phone at the direction of Officer Laborie, and scrolled through the phone to show where these videos were located, which were then viewed by Officer Laborie.

Everything Ryan Badeaux did for the police, and said to the police, was used against Petitioner at trial. There would be no case at all without Ryan Badeaux's accusations. Yet, Ryan Badeaux was not placed on the stand for confrontation or cross-examination at anytime, either before or during trial. This violates Petitioner's constitutional right to confront his accuser under the United States Constitution, Amendment 6, through Amendment 14; Louisiana Constitution, Article 1, § 16.

Further, Officer Laborie was erroneously allowed to testify for Ryan Badeaux by proxy at trial:

Q. Can you describe Ryan Badeaux?

A. White male in his early 20s.

Q. At that point in time, did Mr. Badeaux give you the cell phone?

A. Yes, ma'am.

Q. Did he show you anything on the cell phone?

A. Yes, ma'am.

Q. What did you look at?

A. He showed one video that he said he had saw.

(Appendix P, p. 8).

This is not allowed, and is reversible error under the Confrontation Clause and Supreme Court precedent. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). It further violates the mandate of *Crawford* which specifically disallowed a trial court from allowing statements by proxy, via the police, under the guise of state evidentiary rules stating:

> Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitional practices. Raleigh was, after all, perfectly free to confront those who read Cobham's confession in court."

Id. at 1364.

This controlling principle of law was reiterated by the United States Supreme Court in *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S.Ct. 2705, 2714-15, 180 L.Ed.2d 610 (2011):

> Most witnesses, after all, testify to their observations of factual conditions or events, e.g., "the light was green," "the hour was noon." Such witness may record, on the spot, what they observed. Suppose a police report recorded an objective fact – Bullcoming's counsel posited the address above the front door of a house or the read-out of a radar gun. See Brief for Petitioner 35. Could an officer other than the one who saw the number on the house or gun present the information in court – so long as that officer was equipped to testify about any technology the observing officer deployed and the police department's standard operating procedures? As our precedent makes plain, the answer is emphatically "No." See *Davis v. Washington*, 547 U.S. 813, 826, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (Confrontation Clause may not be "evaded by having a note-taking police [officer] recite the ... testimony of the declarant" (emphasis deleted)); *Melendez-Diaz*, 557 U.S., at ____, 129 S.Ct., at 2546 (Kennedy, J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second.").

See also, State v. Bolden, 103 So.3d 377, 2011-237 (La. App. 3 Cir. 10/5/11):

> The Sixth Amendment to the U.S. Constitution provides the defendant "[i]n all

criminal prosecutions . . . shall enjoy the right . . . to be confronted with the witnesses against him." The Supreme Court has identified a "core class of 'testimonial' statements" which equate to a witness who bears testimony against an accused. *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 1364,, 158 L.Ed.2d 177 (2004). Those statements include:

> "*[E]x parte* in-court testimony or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorally," . . . "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," . . . [and] "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

Id. (quoting in part *White v. Illinois*, 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992)). The court noted testimonial statements are admissible when the witness is absent from trial "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." (footnote omitted). *Id.* at 1369. Thus, the Confrontation Clause requires "not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 1370.

Further, the prosecutor reiterated these violations to the jury in closing argument.

> Mr. Bosworth throughout the course of this trial wants to just beat it over your head Brad Case, Brad Case, Brad Case, Ryan Badeaux, Ryan Badeaux, Ryan Badeaux. . . .
>
> *
>
> But what did the hard, physical evidence prove. What did the direct testimony in this evidence prove? It proved Detective Alvarez was telling the truth when he told you that the only thing he knew at that time was that Ryan Badeaux saw what he saw on that phone and that was a video.

(Appendix E, p. 177).

> That is another reason why Ryan Badeaux doesn't matter. Thank you, Mr. Badeaux for giving us this phone so that we can get to this man.

(Appendix E, p. 179).

This is clearly a Confrontation Clause issue, and not an issue as to "the weight of the evidence rather than its admissibility." *State v. Bolden, supra.* Without Ryan Badeaux's testimony at trial, a Sixth Amendment violation occurred, and no exception should have been made to the confrontation requirement.

Bullcoming v. New Mexico, 564 U.S. 647, 131 S.Ct. 2705, 2716, 180 L.Ed.2d 610 (2011) :

> More fundamentally, as this Court stressed in *Crawford*, "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." 541 U.S., at 54, 124 S.Ct. 1354. Nor is it "the role of courts to extrapolate from the words of the [Confrontation Clause] to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values." *Giles v. California*, 554 U.S. 353, 375, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008). Accordingly, the Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination.

Trial counsel failed to object to these Confrontation Clause violations, and to the admissibility at trial of the detective's reports and statements by proxy using Ryan Badeaux's out-of-court testimonial statements, and rendered ineffective assistance of counsel. Additionally, these violations are clearly presented in the record at trial, and Petitioner's appellate counsel failed to argue these issues, rendering ineffective assistance of counsel on direct appeal.

"Further, the imperative of protecting a defendant's right to effective cross-examination is even more critical where, as here, the witness is crucial to the prosecution's case." *Wilkerson v. Cain*, 233 F.3d 886, 891 (5th Cir. 2000).

As to the reliability of Mr. Badeaux's statements to police, the U.S. Supreme Court states:

> To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Crawford v. Washington, supra, at 1370.

The Supreme Court went on to say that:

> Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

Crawford v. Washington, supra, at 1371.

Trial counsel clearly understood the role played by Ryan Badeaux in this case, knew where he was, and talked to the jury about him. The same goes for Brad Case, who trial counsel knew was incarcerated for having pled guilty in April of 2013 to distribution of child pornography. (Appendix G). However, trial counsel failed to 1) interview both Ryan Badeaux and Brad Case; 2) failed to ensure both would be called at trial, and/or 3) object to out-of-court testimonial evidence of Ryan Badeaux by proxy. Trial counsel also did not interview anyone from the NOPD, the first people Ryan Badeax went to.

During closing arguments at trial, Petitioner's trial counsel told the jury:

> Now there is no question that there is child pornography on the phone that was taken from Mr. Dixon. I'm not going to sit here and insult your intelligence by saying that there is no child pornography on it. There is child pornography on it. But who had that phone? When it was turned over to NOPD - - again, we haven't heard from NOPD - - who had that phone? It was a guy named Ryan Badeaux. Have you heard from Ryan Badeaux today? Has he shown up in order to testify as to what happened in this case? That should concern you. The fact that NOPD, the people who had the initial conversation with Mr. Badeaux, aren't here, that should concern you.

> You don't hear anything until the Gretna Police Department gets involved in the case. What have we learned at that point? Mr. Badeaux is some guy Mr. Dixon met on Craig's List. Mr. Dixon is clearly a homosexual man. Mr. Badeaux stole Mr. Dixon's phone. No question. Stole it and ran off with it. And in the time he had it, what happened? We don't know. Again, Mr. Badeaux hasn't taken the stand.

(Appendix F, p. 164).

Trial counsel's failure to secure witnesses at trial amounts to ineffective assistance of counsel. *Nealy v. Cabana*, 764 F.2d 1173 (5th Cir. 1985). Further, trial counsel's failure to interview a witness known to him is ineffective assistance of counsel. *Gaines v. Hopper*, 575 F.2d 1147 (5th Cir. 1978); *Bryant v. Scott*, 28 F.3d 1411 (5th Cir. 1994).

In "the crucible of cross-examination" *Crawford*, *supra*, Ryan Badeaux and Brad Case would have been able to expound upon the facts, and answer the questions as to 1) who actually made the videos and pictures sent to Petitioner's cell phone; 2) does Mr. Badeaux and Mr. Case know each other, and were they working together to set up Petitioner; 3) did Mr. Badeaux create a file named "SD Card"; and 4) who called Petitioner's grandmother asking for money in exchange for the cell phone? (Appendix M). It was also important to find out how much Mr. Badeaux's story changed once he got on the stand. Indeed, how much did his story change from what he told NOPD to what he told the Gretna Police?

In the instant case, trial counsel allowed the State to introduce Mr. Badeaux's "testimonial" evidence at trial against Petitioner, despite the fact that Petitioner had no opportunity to cross-examine him. This, as well as the fact that the fruits of the police questioning/interrogation of Mr. Badeaux was the crux of the State's whole case; he was Petitioner's "accuser" and Petitioner had a constitutional right to confront his accuser. This shows that trial counsel's actions and inactions prejudiced Petitioner at his trial.

Trial counsel questioned the lack of information surrounding this incident, yet never

interviewed these witnesses, or otherwise investigated the matter. If found to be a set-up, as the partial facts suggest, then testimony in this regard would have further impeached the State's case-in-chief.

Mr. Badeaux's testimony is probative evidence of a contested fact, and is essential to the defense in this case. On the other hand, "The probative value of the mere fact that an out-of-court declaration was made is generally outweighed greatly by the likelihood that the jury will consider the statement for the truth of the matter asserted." *State v. Hearold*, 603 So.2d 731, 737 (La. 1992).

Therefore, the State was required to call these witnesses at trial in order to introduce the evidence. Failure to do so violated Petitioner's due process and Confrontation Clause rights. United States Constitution, Amendments 5, 6, and 14; Louisiana Constitution, Art. 1, §§ 2 and 16. *See Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004).

Brad Case, in jail for distribution of child pornography, and connected to this case from the beginning, clearly should have been interviewed and investigated by trial counsel long before the case ever went to trial, but trial counsel never did so.

Under the Sixth Amendment, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Lindstadt v. Keane*, 239 F.3d 191, 200 (2nd Cir. 2001) (quoting *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Clearly, Petitioner's constitutional rights were violated, and he was denied effective assistance of counsel, therefore, he is entitled to habeas corpus relief.

5. TRIAL COUNSEL FAILED TO ADDRESS ISSUES CONCERNING THE CONFESSION, *MIRANDA* REQUIREMENTS, AND REASONABLE HYPOTHESES OF INNOCENCE, AND RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL.

The *Miranda* Rights form signed by Petitioner on January 26, 2013, was signed with the understanding that the entire interview would be recorded. However, the video shown does not start until after Detective Alvarez threatened to arrest Petitioner's mother, and to place his sister in a foster-home, and was told by Petitioner that he would admit to whatever they wanted, as long as they leave his mother and sister alone. In short, the alleged "confession" was coerced; it was made under duress, and with promises to leave his mother and sister out of it if he cooperated. The police, especially Detective Alvarez, engaged in "sweating" Petitioner until he "broke" and told the police what they wanted to hear. Trial counsel failed to raise this issue at trial, or to voir dire the jury on the issue of coerced confessions. However, trial counsel told the jury that it should concern them that it was not recorded.

> Let's go back a little bit. What do we know about this confession? We know Mr. Dixon who based on the evidence that was presented was 20 years old at the time riding a bicycle gets arrested by a huge swarm of Gretna cops. He is dragged off to the Gretna Police headquarters in a room where no one knows nothing for hours. You know for a fact that Gretna had the capacity to record every second he was there. You would know everything that happened. There would be no question. We wouldn't be here right now. But for whatever reason, they choose not to record it. You have no idea what happened. You have been given testimony, sure, no, we didn't do anything. The other police officer wasn't there. He has no idea. The other police officer sat there and told you, I'm there in the middle of the afternoon. Police Officers are everywhere and I'm the only person who saw it. Does that make sense? That should leave you with questions. That should leave you with concerns because nobody saw anything and in a police station full of police on a camera that should have recorded and you have no idea.

(Appendix F, pp. 165-166).

Further, a conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused. *United States* v. *Smallwood*, 188 F.3d 905 (7th Cir. 1999). See also, *State* v. *Gaspard*, 746 So.2d 725, 728 (La.App. 3 Cir. 1999):

> Defendant argues that under the 'corpus delicti rule,' an accused cannot be convicted on his own uncorroborated statement. He is correct. The corpus delicti rule was reviewed by the Louisiana Supreme Court in *State* v. *Martin*, 93-285, p. 7 (La. 10/17/94); 645 So.2d 190, 195 (citations omitted).

The State presented no direct evidence at trial that Petitioner shot these pictures and videos, and no direct evidence that the identity of the child was Petitioner's younger sister, therefore, the information elicited by police in Petitioner's coerced confession is not corroborated in any way.

The Due Process test for evaluating the voluntariness of a defendant's confession requires inquiry into whether defendant's will was overborne by the circumstances surrounding the giving of the confession, and *Miranda* requirements, being constitutionally based, cannot be overruled by statute. *Dickerson* v. *United States*, 530 U.S. 428, 120 S.Ct. 2326 (2000).

The Louisiana Supreme Court has stated in *State* v. *Seward*, 509 So.2d 413, 417 (La. 1987):

> Before a defendant's confession may be introduced into evidence, the State must affirmatively show that the confession was offered freely and voluntarily and was not given under the influence of fear, duress, intimidation, menaces, threats, inducements, or promises. La.Rev.Stat.Ann. 15:451 (West 1981). This statute serves to safeguard a defendant's Fifth Amendment protection against self-incrimination. *State* v. *Coleman*, 390 So.2d 865 (La. 1980). Further, admission of a coerced confession serves to deny a defendant due process of law, in violation of the Fourteenth Amendment to the United States Constitution. *Payne* v. *Arkansas*, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958). The constitutional guarantee of due process is denied an accused when he is deprived of that "fundamental fairness essential to the very concept of justice." 356 U.S. at 567, 78 S.Ct. at 850, 2 L.Ed.2d at 981 (citations omitted).

As previously argued, Petitioner's coerced confession is also tainted by this Fourth Amendment violation and can not stand:

> "[E]ven if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains." *Brown v. Illinois*, 422 U.S. 590, 601-02, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). Considering temporal proximity, intervening circumstances, and purpose and flagrancy of the official actions, the Court finds for the reasons stated in its prior discussion that the taint of the prior Fourth Amendment violation had not dissipated at the time Defendant made his oral and recorded statements. As such, Defendant's oral and written statements should be suppressed.

United States v. Barth, 26 F.Supp.2d 929, 942 (W.D. Texas, 1998).

Additionally, as previously argued, the State assumed, and did not attempt to prove in any way, that the person depicted in the pictures and video was actually Petitioner's sibling, or that Petitioner was the person using the camera, or even the adult also depicted at times. However, there is testimony from the child's mother stating that the pictures she viewed were not depictions of her child (Petitioner's sibling). (Appendix N). This was neither refuted, nor overcome by the State.

Petitioner did receive pictures that he deleted from his cell phone. The videos on the cell phone could have been downloaded by Ryan Badeaux after he stole the cell phone, and could depict any number of children unknown to Petitioner, and could be months or years old, regardless of the time they were downloaded to Petitioner's cell phone. Because some man goes to the police and says "I stole someone's cell phone, and look what I found!" does not prove the cell phone owner placed it there. This is purely circumstantial evidence, does not prove who is depicted, who took the video, or when it was actually taken, all of which is relevant and material to the offense charged in this case.

This raises a reasonable hypothesis of innocence which the law holds must be overcome by the State. However, trial counsel failed to argue this issue at trial and was ineffective assistance of counsel.

Mr. Dixon has raised substantial issues regarding constitutional violations that makes his State conviction and sentence unconstitutional and worthy of Federal Habeas Corpus Relief. Mr. Dixon states that he has pointed to enough constitutional and procedural errors in the lower courts, and enough questionable law and facts to warrant a COA, where the issues can be decided by a panel of judges - whether Mr. Dixon has made a "substantial showing of the denial of a federal right." *Barefoot v. Estelle*, 463 US 880, 893, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983).

Therefore, Mr. Dixon avers that he has presented record evidence that makes a "substantial showing of the denial of a federal right." *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983). A "substantial showing," in order to obtain a COA, requires that Mr. Dixon "demonstrate that the issues are debatable among jurists of reason; that a court **could** resolve the question in a different manner; or that the questions are adequate to deserve encouragement to proceed further." *Barefoot, supra*, 463 U.S., at 893 n.4 (**emphasis** in original). See also, *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

Finally, Mr. Dixon contends that his Application clearly meets the requirements of the U.S. Supreme Court in order to proceed, and that these issues could be resolved in a different manner by jurist of reason. Therefore, the requested COA should be issued by this Honorable Court.

Respectfully submitted on this 11th day of March, 2024.

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