No. 091440

In The

Supreme Court of the United States

GLENN R. HERNANDEZ,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Court Of Appeal, Third Circuit

PETITION FOR A WRIT OF CERTIORARI

KEITH B. NORDYKE
Counsel of Record
NORDYKE & GREENFIELD, LLC
427 Mayflower Street
Baton Rouge, Louisiana 70802
Telephone: (225) 383-1601
Facsimile: (225) 383-2725
knordyke@nglawllc.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Blank Page

QUESTIONS PRESENTED FOR REVIEW

1. Did pre-indictment delay prejudice this Petitioner so substantially as to violate his Due Process rights when:
   a. There was a forty-year delay between offense and indictment,
   b. Petitioner had no opportunity to identify or preserve evidence because he had no notice of the crime during this delay, and
   c. His conviction was based primarily on the testimony of a single witness whom he could not properly confront because of the delay?
2. Does the Fourteenth Amendment to the United States Constitution prohibit the prosecution of a petitioner forty years after the crime allegedly occurred when the delay in indictment was not caused intentionally by the prosecution to impair petitioner's ability to gain a tactical advantage?
3. Was petitioner's guilt proved beyond a reasonable doubt, as required by *Jackson v. Virginia,* 443 U.S. 307 (1979) when:
   a. The only testimony about all of the elements of the crime came from the alleged victim, who relied on her memory from nearly forty years ago when she was less than ten years old,
   b. Her testimony was contradicted by other witnesses who were present at the time,
   c. Her testimony was internally inconsistent,

QUESTIONS PRESENTED FOR REVIEW – Continued

d. The alleged victim had personal motives for fabricating her story,

e. Because Petitioner was unaware of the victim's accusations for forty years after the alleged incident, he was unable to corroborate his testimony and to contradict the victim's testimony due to pre-accusatorial delay, and

f. Highly prejudicial evidence of "other crimes" was improperly admitted?

RULE 14.1(b) STATEMENT

All parties to this proceeding in the Court whose judgment is sought to be reviewed are named and listed in the caption of this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

FEDERAL

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

CASES FROM OTHER STATES

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Glenn R. Hernandez respectfully petitions for a writ of certiorari to review the opinion and judgment of the Louisiana Court of Appeal, Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeal, Third Circuit, State of Louisiana, rendered June 3, 2009 is an unpublished opinion reported at *State of Louisiana v. G.R.H.*, 2008-1549, 10 So. 3d 896 (La.App.3 Cir. 6/3/09) and 2009 WL 1545606 and is reproduced at Appendix 1-76.

The Supreme Court of Louisiana order denying review is reported at 28 So. 3d 1004 (La. 2010) and is reproduced at Appendix 77.

BASIS FOR JURISDICTION IN THIS COURT

The judgment of the Supreme Court of Louisiana sought to be reviewed was entered March 5, 2010. The petition is timely under 28 U.S.C. § 2101(d) and Supreme Court Rules 13.1 and 13.3 because it is being filed within 90 days after denial of a timely sought writ of certiorari to the Supreme Court of Louisiana. This Court has jurisdiction to review the judgment of the Supreme Court of Louisiana pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

On October 25, 2006, Petitioner G.R.H.[1] was indicted for the aggravated rape of P.B, a juvenile (La. Rev. Stat. Ann. 14:42 (1942)). The alleged rape occurred *forty years* earlier, sometime between 1966 and 1972. (R.22). G.R.H. was also indicted on two counts of molestation of a juvenile (La. Rev. Stat. Ann. 14:81.2) with separate victims, C.H. and D.H. who are P.B.'s cousins. These offenses allegedly occurred in the early 1990s.[2] The counts involving

[1] The case below (as reproduced in the appendix) referred to Glenn R. Hernandez as "G.R.H." and to various witnesses by their initials. The same convention will be used in this application.

[2] The indictment alleges that the incidents involving P.B. occurred sometime between January 1, 1966 and December 31, 1972 For C.H., the time period was January 1, 1989 through December 31, 1992. For D.H., the dates were January 1, 1991 through December 31, 1992. G.R.H. filed a Bill of Particulars to narrow the time frame but the State's response provided only the same dates as the indictment. (R.71).

C.H. and D.H. were severed and have not been pursued.

When P.B. was a child, she occasionally spent the night at the home of G.R.H. and his wife who are P.B.'s uncle and aunt. These visits occurred no less than once or twice a month. P.B. slept in the same room, and later in the same bed, with G.R.H.'s daughter Terry. When G.R.H.'s son was born, he also slept in that room. (R.1035). G.R.H. and his wife slept in a room across the hall about twenty-five feet away and they "always" kept their door open at night. (R.728-29, 767-68). G.R.H. testified that P.B. never spent the night at his house when his wife was not home. (R.1035).

According to P.B., "on every occasion" that she stayed overnight, G.R.H. came into her room and acted inappropriately with her. (R.728). She alleged that she cried, called out loudly enough to be heard in another room, hit him and told him to stop but no one apparently woke up. She also did not tell anyone about these incidents at that time. (R.734, 740, 763, 767, 772).

P.B. testified that, when she was about fifteen years old, she told her mother that G.R.H. had molested her.[3] Her mother spoke with an officer at the Lafayette Parish Sheriff's Office but was told that

---

[3] Since P.B. was born in 1962, this report would have occurred around 1977.

there was nothing they could do because so much time had passed since the alleged offense. (R.734-35, 810). From the time P.B. told her mother that G.R.H. had molested her until 2006, she never again reported these incidents to the police nor confronted Petitioner.

In 2006, P.B. testified that she visited C.H., another of the alleged victims, to see C.H.'s baby. When she saw C.H., she "saw her eyes, and I knew. Her eyes were dead. And they were vacant. And I knew the look". (R.741). D.H. (the other alleged victim) also came over during P.B.'s visit, and P.B. saw a similar look in her face and again P.B. "just knew." (R.742). P.B. decided to go to the police to report what allegedly happened between 1966-1972. C.H. and D.H. then also made allegations to the police and G.R.H. was arrested. G.R.H. testified that this was the first notice he had of any alleged improprieties with any of these women. (R.1041-42).

G.R.H. filed a Motion to Quash the indictment. (R.39). This motion argued that the time limits for filing charges had expired and that proceeding with this indictment was a denial of Due Process under the Louisiana Constitution and the Fourteenth Amendment of the United States Constitution because of pre-indictment delay. (R.39).

The State filed a Notice of Intent to Introduce Evidence of Other Crimes. (R.124). Specifically, the State sought to introduce the incidents involving C.H. and D.H. at the trial about P.B. This evidence was

alleged to be admissible under La. Code Evid. Ann. art. 404(B) for "opportunity, preparation, plan, intent, knowledge and identity" and under La. Code Evid. Ann. art. 412.2 as evidence of "lustful disposition". The defense responded with a Motion to Declare La. Code Evid. Ann. art. 412.2 unconstitutional. Among other bases, this Motion alleged that this article was a violation of the Sixth Amendment right to effective assistance of counsel, Eighth Amendment prohibition of cruel and unusual punishment, and the Fourteenth Amendment rights of Due Process and Equal Protection. He also alleged that applying La. Code Evid. Ann. art. 412.2 to offenses occurring before its enactment would be a violation of Louisiana Constitution art. I § 23 prohibiting Ex Post Facto laws.

ACTION OF THE COURTS BELOW

The Trial Court denied the Motion to Quash for pre-indictment delay. The court minutes appear at R.6. Neither written reasons for judgment nor a transcript of this ruling is in the record.

The Trial Court held a hearing on the "other crimes" issue and found this evidence to be admissible to show "lustful disposition" under La. Code Evid. Ann. art. 412.2 and to show a "common design" under La. Code Evid. Ann. art. 404(B). (R.10). The commonalities were that the approach to the women was the same in that they were relatives who were "encouraged by their parents to visit" with G.R.H.

and "at least in the case of [C.H. and D.H.] they are approached in a situation where there is no one else there to witness the events. . . ." (R.222).

Concerning the constitutional arguments, a discussion occurred between the Court and defense counsel at R.173-78. The issue was whether the Court would grant a hearing before admitting evidence under La. Code Evid. Ann. art. 412.2, given that the statute did not say that a hearing was required. The Court agreed to a hearing and thereafter did not rule on the constitutional arguments.

Trial was held on July 16 and 17, 2008. The jury found G.R.H. guilty of aggravated rape and on July 31, 2008, G.R.H. was sentenced to life in prison. (R.21).

G.R.H. appealed. The decision by the Third Circuit Court of Appeal is unreported but appears at 2009 WL 1545606, 2008-1549 (La.App.3 Cir. 6/3/09), 10 So. 3d 896. The Third Circuit affirmed the conviction and sentence, with the following rulings which are relevant to this Petition:[4]

1. The evidence was sufficient under *Jackson v. Virginia*, 443 U.S. 307 (1979) because a conviction can be upheld on

[4] See the Third Circuit Court of Appeals' opinion for the Assignments of Error which demonstrates that these issues are properly "federalized" to establish this Court's jurisdiction. (App. 3-4). Also see App. 42-45 discussing the constitutional arguments asserted on the issue of "other crimes".

the basis of the victim's testimony alone. (App. 16).

2. Concerning pre-indictment delay, the Court acknowledged that this posed a Due Process concern (App. 31-35) but declined to adopt the test from *State v. Gray,* 917 S.W.2d 668 (Tenn. 1996), as the defense proposed. The Court relied instead on *State v. Smith*, 01-1027 (La.App.1 Cir. 2/15/02); 809 So. 2d 556. The Court further found that the petitioner had not proved actual prejudice. (App. 39-40).

3. The Trial Court properly found that the "other crimes" evidence was admissible under La. Code Evid. Ann. art. 412.2. (App. 56).

4. Alternatively, the "other crimes" evidence was admissible under La. Code Evid. Ann. art. 404(B) to show common design. The commonalities were that the crimes involved family members and were committed at Petitioner's residence. (App. 54).

5. All constitutional arguments were waived during defense counsel's colloquy with the Trial Judge concerning granting a hearing. (App. 49).

Petitioner then applied to the Louisiana Supreme Court for a discretionary writ of certiorari. Petitioner made the following arguments which are pertinent to this Petition:

1. Because of the delay in bringing this indictment, his Due Process rights under the Louisiana Constitution and the Fourteenth Amendment of the United States Constitution were violated.

2. The evidence was insufficient to satisfy *Jackson v. Virginia,* 443 U.S. 307 (1979).

3. La. Code Evid. Ann. art. 412.2 is unconstitutional as applied. Petitioner's constitutional arguments were not waived. The "other crimes" evidence was improperly admitted and was used solely to prove that G.R.H. was a "bad man". G.R.H. was thus denied a fair trial in violation of the Due Process protections of the Louisiana and United States Constitutions.

4. Applying La. Code Evid. Ann. art. 412.2 to this case was a violation of the Ex Post Facto provisions of Louisiana Constitution art. I § 23 and art. I § 10, cl. 1 of the United States Constitution.

The Louisiana Supreme Court denied this writ application in an unpublished decision which appears at 2009-1494 (La. 3/5/10); 28 So. 3d 1004.

ARGUMENT FOR GRANTING THE WRIT

I. Did pre-indictment delay prejudice this Petitioner so substantially as to violate his Due Process rights when:

a. There was a forty-year delay between offense and indictment,

b. Petitioner had no opportunity to identify or preserve evidence because he had no notice of the crime during this delay, and

c. His conviction was based primarily on the testimony of a single witness whom he could not properly confront because of the delay?

In *United States v. Marion*, 404 U.S. 307 (1971) and *United States v. Lovasco,* 431 U.S. 783 (1977), this Court held that the Due Process provisions of the Fifth Amendment protect a petitioner from pre-indictment delays which prejudice his ability to obtain a fair trial. However, this Court also said:

> "In [*United States v.*] *Marion* we conceded that we could not determine in the abstract the circumstances in which pre-accusation delay would require dismissing prosecutions. . . . More than five years later, that statement remains true. Indeed, in the intervening years so few defendants have established that they were prejudiced by delay that neither this Court nor any lower court has had a sustained opportunity to consider the constitutional significance of

various reasons for delay." [citations omitted] (*Lovasco,* 431 U.S. at 796-97 (1977)).

Federal Courts of Appeals and state courts are split on how to determine whether a petitioner has proved sufficient prejudice to establish a Due Process violation. There is no consistency in what showing must be made or even in what steps a court should follow in making this determination. Some courts simply look at the evidence the petitioner presented and use their judgment.[5] Other courts have devised rules which a petitioner must prove that he has followed.[6] Regardless of the approach, the threshold for proving prejudice has become so high that it is "virtually insurmountable" (*United States v. Rogers*, 118 F.3d 466, 477, n.10 (6th Cir. 1997); *State v. Gray*, 917 S.W.2d 668, 673 (Tenn. 1996)).

In setting this high threshold, these courts have assumed that the defense had some ability to identify what evidence would have been available if there had

---

[5] See, e.g., U*nited States v. Automated Medical Laboratories, Inc.*, 770 F.2d 399 (4th Cir. 1985); *State v. Malvo*, 357 So. 2d 1084 (La. 1978).

[6] See, e.g., *Jones v. Angelone*, 94 F.3d 900, 908 (4th Cir. 1996) and *Howell v. Barker*, 904 F.2d 889, 893 (4th Cir. 1990) (noting the requirement that petitioner show not only what a witness might have said but also what steps were taken to locate the witness or obtain the evidence from other sources); *United States v. Beszborn,* 21 F.3d 62, 66 (5th Cir. 1994) (must show that evidence would have "actually aided the defense"); *Stoner v. Graddick*, 751 F.2d 1535, 1545 (11th Cir. 1985) (must show that evidence would have been admissible under state evidence law).

been no pre-indictment delay. Law enforcement at least knew that a crime had occurred. All of the evidence may not have been known immediately but at least some attention was paid contemporaneously to the time, circumstances, and identities that would later become crucial at trial.

The case at bar is different. Law enforcement did not begin investigating this case until nearly forty years had passed. There was no contemporaneous report that a crime had occurred and thus there was no police investigation. No evidence was preserved from the scene. No witnesses were identified and no statements were obtained. Although P.B. testified that around 1977 she told her mother that petitioner had "molested" her and her mother spoke to the police. (R.734, 822), this report is irrelevant to the issue of prejudice. Petitioner knew nothing of it at the time and was still not on notice to preserve evidence for his defense.

Because memories had faded, the prosecution could not narrow the time frame in which the offense allegedly occurred. The best information the petitioner was given was that the incidents occurred sometime between 1966 and 1972. (R.22). Thus, he had to prepare a defense which spanned a six-year range.

It is impossible to identify and question everyone with whom the petitioner or the victim came in contact during a six-year period. And what does the defense attorney ask these potential witnesses? The

defense cannot ask if they remember whether the victim was acting strangely because there is no date from which to start. There is no point in asking if they could give him an alibi because the date of the offense is unknown. Petitioner has an alibi with excellent corroboration for two years of this time frame – he was in the Navy stationed away from Louisiana – but it is impossible to say whether this is the crucial time frame.

At trial, credibility was the key issue because the evidence was "he said/she said". Corroborating evidence to both impeach the alleged victim and bolster the defense was critical for a fair trial. In *State v. Taylor*, 960 P.2d 773, 777 (Mont. 1998), one of the few cases finding prejudice, the Court particularly noted that when credibility is the key issue, the loss of corroborating witnesses due to delay can establish prejudice.

Similarly in *State v. Lee*, 653 S.E.2d 259 (S.C. 2007), contemporaneous records which had once existed were lost and persons with personal knowledge of the crime could not be located. The Court found that petitioner had proved sufficient prejudice because " . . . the absence of any contemporaneous evidence prejudiced Lee's ability to defend himself as he had no ability to cross-examine the State's witnesses nor obtain items of exculpatory evidence." (*Lee*, at 261).

This case presents compelling facts for this Court to provide guidance on the outer limits of what

prejudice a petitioner must prove to establish a Due Process violation. This petitioner, through no fault of his own, cannot meet the high burden which courts typically require to show prejudice. He cannot identify who the witnesses are, why they are unavailable, or what specifically they would have said, as was required in *United States v. Mills*, 280 F.3d 915 (9th Cir. 2002) [proof must be "definite and not speculative"]. Because he can construct no defense other than "I didn't do it", he cannot show that this evidence would be corroborating and exculpatory as required by *United States v. Crouch,* 84 F.3d 1497 (5th Cir. 1996) or *State v. Coleman*, 380 So. 2d 613 (La. 1980).

He cannot cobble together a defense using old records as suggested in *State v. Knickerbocker*, 880 A.2d 419 (N.H. 2005) because no records were created. He also cannot bolster his case through physical evidence or forensics. Even though P.B's testimony shows that such evidence (including soiled clothing and bedding) would have existed, it has long ago been destroyed. Unlike the petitioners in *State v. Schrader*, 518 So. 2d 1024 (La. 1988), there are no secondary sources from which this evidence can be reconstructed.

Given the incredibly high standards for proving prejudice, claims that memories have faded and evidence has disappeared are typically deemed too speculative to establish a Due Process violation and that is what the Third Circuit Court of Appeals ruled here. (App. 40). Such a conclusion is virtually

inevitable in cases like this where the delay has been so lengthy and there was no contemporaneous report of a crime. The result is that those petitioners who are most in need of Due Process protections to ensure that their trial is fair are the least likely to get those protections.

Petitioner argued to the Louisiana court that his indictment should be quashed as was done in *State v. Gray*, 917 S.W.2d 668 (Tenn. 1996). The facts of *Gray* are nearly identical to the case at bar. Gray was indicted in 1992 for a rape that occurred in 1950. The incident was not reported at the time. The victim came forward only because she was "bothered" by the memory of the incident. The petitioner's presence was known at all times and he did nothing to coerce the victim to remain silent. There was no statute of limitations to bar the prosecution.

The Tennessee Supreme Court expressly rejected *Marion* and state precedents which it interpreted as requiring "almost insurmountable" proof of prejudice delay. Instead, it required only a prima facie showing of prejudice, which was met by proof that (1) the delay was excessively long; (2) the lapse of time has diminished the victim's memory; (3) witnesses thought to be material are now unavailable; and (4) the victim could not specifically date the incident, thereby requiring Gray to account for his conduct during a six-month period forty-two years past. (*Gray*, at 673)

Petitioner asked the Louisiana courts to adopt a similar rule which would hold that this prosecution

could not proceed because the delay was excessive, there was no contemporaneous evidence, the victim's statement was not corroborated by extrinsic evidence and the prosecution was unable to determine when the crime occurred. The Third Circuit Court of Appeal refused to do so and rejected *Gray*. (App. 40-41). It followed *State v. Smith*, 01-1027 (La.App.1 Cir. 2/15/02); 809 So. 2d 556 which requires a showing of actual prejudice using the same high standards of specificity as would be required in any case of pre-indictment delay.

Petitioner asks that this Court grant his writ of certiorari and reverse the decision of the court below. He contends that under the circumstances presented here, he has been prejudiced sufficiently to demonstrate a violation of his rights under the Fourteenth Amendment to the United States Constitution. While this Court and most lower courts have refused to presume prejudice based solely on the length of the delay,[7] Petitioner asks this Court to find that when a lengthy delay is combined with a lack of contemporaneous evidence and corroboration of the victim's testimony, the petitioner has been prejudiced and denied a fair trial.

---

[7] See discussion of the rejection of presumptive prejudice in *Jones v. Angelone*, 94 F.3d 900, 906 (4th Cir. 1996) and *United States v. Lucien*, 61 F.3d 366, 370 (5th Cir. 1995).

II. Does the Fourteenth Amendment to the United States Constitution prohibit the prosecution of a petitioner forty years after the crime allegedly occurred when the delay in indictment was not caused intentionally by the prosecution to impair petitioner's ability to gain a tactical advantage?

To determine whether pre-indictment delay has violated a petitioner's Due Process rights, this Court requires that there be an inquiry into the reasons for the delay (*United States v. Lovasco,* 431 U.S. 783 (1977)). However, the Federal Courts of Appeals are split in deciding what criteria to use in making this inquiry.

Most Federal Courts of Appeals[8] limit Due Process protections to cases in which the pre-indictment delay was caused by the prosecution in order to intentionally gain a tactical advantage over the petitioner. The Fourth and Ninth Circuit expressly reject this limited view.[9] They also reject the majority's assumption that this Court's decisions in *Marion, Lovasco,*

---

[8] See, e.g., *United States v. Crouch*, 84 F.3d 1497, 1508 (5th Cir. 1996), collecting cases; *Commonwealth v. Scher*, 803 A.2d 1204 (Pa. 2002), Castille, J., concurring, collecting cases at 1233-34 and n.3.

[9] See, e.g., *Howell v. Barker*, 904 F.2d 889 (4th Cir. 1990); *United States v. Doe*, 149 F.3d 945, 948 (9th Cir. 1998); *United States v. Valentine*, 783 F.2d 1413, 1416 (9th Cir. 1986).

and *United States v. Gouveia,* 467 U.S. 180 (1984) establish binding precedent on this issue.

In the Fourth and Ninth Circuits, once a petitioner shows that he was prejudiced by the delay, the court then balances that prejudice against the government's justification for the delay. Whether the delay was tactical or not is a factor to be considered but petitioners can show a Due Process violation even in the absence of intentional conduct by the prosecution. The ultimate test is whether the government's action in prosecuting after substantial delay violates "fundamental conceptions of justice" or "the community's sense of fair play and decency" citing *Lovasco*, 431 U.S. at 790.

State courts are similarly confused when applying Fourteenth Amendment Due Process principles to state prosecutions involving pre-indictment delay. Some states[10] require a showing of intentional tactical delay. Others[11] follow the minority view of balancing prejudice against the reason for the delay, whether tactical or not.

---

[10] See, e.g., *Anderson v. Commonwealth,* 634 S.E.2d 372, 376 (Va. Ct. App. 2006); *De la Beckwith v. State,* 707 So. 2d 547, 570 (Miss. 1997); *Moore v. State*, 943 S.W.2d 127 (Tex. App. – Austin 1997).

[11] See, e.g., *Knotts v. Facemire,* 678 S.E.2d 847, 856 (W. Va. 2009); *State v. Lee,* 653 S.E.2d 259 (S.C. 2007); *People v. Boysen*, 62 Cal.Rptr.3d 350 (Cal. App. 4 Dist. 2007); *State v. Knickerbocker,* 880 A.2d 419 (N.H. 2005).

In 1988, Justice White dissenting in the denial of a writ of certiorari in *Hoo v. United States,* 484 U.S. 1035 (1988) called upon the Court to provide guidance because of the constitutional significance of this issue. More than twenty years later, that split remains.

In the case at bar, the Louisiana court rejected Petitioner's request to follow *State v. Gray*, 917 S.W. 2d 668 (Tenn. 1996) on this issue. (App. 40-41). The court in *Gray* distinguished cases of pre-indictment delay from cases of pre-accusation delay. In the former, the government was aware that a crime had been committed and actively investigated but delayed in bringing charges. In the latter, the victim remained silent for a lengthy period so no contemporaneous investigation was undertaken. Once she came forward, the government moved quickly to indict.

Gray held that, in cases of lengthy pre-accusatorial delay, a petitioner did not have to prove that the delay was done to gain a tactical advantage. The court adopted a balancing test which considered the length of the delay, the degree of prejudice and the justification for the delay. Even though the delay in *Gray* was due solely to the fact that the victim waited nearly forty years to report the crime, the court found a Due Process violation. (*Gray*, at 673)

The delay in this case, as in *Gray*, was primarily caused by P.B.'s decision not to report the crime for many years. During this time, she continued to live in

the same small town as the petitioner and continued to interact with him. There was no allegation that Petitioner threatened her into silence. She simply chose not to take any action. When she did tell her mother around 1977, her mother discussed the allegation with police but no charges were filed. Petitioner was never questioned and knew nothing of this report until his arrest.

Likewise, the two women who provided "other crimes" testimony did not come forward contemporaneously. They said that they reported their incidents to the police later in the early 1990s (R.839, 892),[12] but nothing was done until after another twelve or thirteen years had passed. During this time, Petitioner knew nothing of these accusations.

These belated reports do not take this case out of the purview of *Gray*. The State did not argue that the delay from 1977 until 2006 (or from the early 1990s to 2006 after the reports by C.H. and D.H.) was justified by some legitimate law enforcement investigation or by some valid bureaucratic reason. At best, this testimony shows that the police chose not to pursue these accusations for some unspecified reason.

---

[12] C.H. was born in 1980. She testified that the incident occurred when she was nine or ten years old (approximately 1990) and that she told her parents when she was about twelve (approximately 1992). (R.834-37). D.H. was born in 1984. She testified that the incident occurred when she was eight or nine years old (approximately 1992) and reported to the police around 1993. (R.892).

This decision by the Lafayette Parish Sheriff's Office not to pursue these accusations was equivalent to a decision by the prosecution not to indict Petitioner. Law enforcement officials are considered to be an "arm of the prosecution" or part of the "prosecution team" with respect to the investigation of a particular petitioner or crime. Their knowledge and actions are imputable to the prosecution in many contexts,[13] including for purposes of evaluating the legitimacy of a pre-indictment delay.[14]

Resurrecting these charges so many years later violates 'fundamental conceptions of justice' and 'the community's sense of fair play and decency.' Even if the decision to wait until 2006 to bring this indictment was not intentionally done to gain a tactical advantage, it had the effect of prejudicing Petitioner with no legitimate justification. The State had no new evidence and no new technology. It had no ongoing investigation to protect. Petitioner had not concealed himself or lied to misdirect the investigation. This

---

[13] See, e.g., *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) in determining what exculpatory evidence must be disclosed; *Schneider v. Estelle*, 552 F.2d 593, 595 (5th Cir. 1977) with respect to perjured testimony.

[14] In *United States v. Barket*, 530 F.2d 189 (8th Cir. 1975), a United States Attorney in Missouri indicted the petitioner in 1974 for an illegal campaign contribution that was made in 1970. In 1971, the Comptroller of Currency had reported the transaction to the Department of Justice in Washington but the latter chose not to prosecute. The Court imputed the knowledge from the Department of Justice and Comptroller to the Missouri prosecutor and dismissed the indictment because of the delay.

belated change of direction should be considered as no justification for the delay and prejudice which Petitioner has suffered.

Gray and the case at bar are different from cases like *Marion*, *Lovasco*, and *Gouveia*. They are not about Sixth Amendment speedy trial rights, which were the primary focus of *Marion* and *Gouveia*. They are also not about legitimate investigative delays as in *Lovasco*. They are about inaction – which in this case is both incredibly lengthy and unjustified – as a result of which Petitioner loses his opportunity to obtain a fair trial. Permitting trials to proceed after such a delay encourages and rewards delay on the part of both the accuser and the prosecution at the expense of Petitioner's Due Process rights.

Petitioner contends that *Marion*, *m*, and *Gouveia* do not say that a showing of tactical delay is required to make out a Due Process violation in all circumstances of pre-trial delay. Petitioner contends that the minority view from *Gray*, which adopts a balancing test in which prejudice is measured against "the community's sense of fair play and decency", is the appropriate test for a Due Process violation in this case.

In the language of Rule 10, the Louisiana court has decided an important question of federal law that has not been, but should be, settled by this Court. It has also decided an important federal question in a way that conflicts with decisions of other state courts and of United States Courts of Appeals. It has also

reached an erroneous result by allowing a prosecution to proceed in the face of no justification and substantial prejudice, with the result that Petitioner now stands convicted with a sentence of life imprisonment.

Petitioner prays that the Court grant this application for writ of certiorari and reverse this decision.

III. Was petitioner's guilt proved beyond a reasonable doubt, as required by *Jackson v. Virginia*, 443 U.S. 307 (1979) when:

a. The only testimony about all of the elements of the crime came from the alleged victim, who relied on her memory from nearly forty years ago when she was less than ten years old,

b. Her testimony was contradicted by other witnesses who were present at the time,

c. Her testimony was internally inconsistent,

d. The alleged victim had personal motives for fabricating her story,

e. Because Petitioner was unaware of the victim's accusations for forty years after the alleged incident, he was unable to corroborate his testimony and to contradict the victim's testimony due to pre-accusatorial delay, and

f. Highly prejudicial evidence of "other crimes" was improperly admitted?

The Third Circuit Court of Appeal concluded that the testimony of P.B. was sufficient to prove every element of rape beyond a reasonable doubt and to satisfy *Jackson v. Virginia,* 443 U.S. 307 (1979). (App. 16). This is an oversimplification of Louisiana law and *Jackson,* which has led to an erroneous conclusion and a violation of Petitioner's Due Process rights.

The cases cited by the Third Circuit[15] did not rely simply on the testimony of the victim. Those courts also determined whether that testimony was internally consistent and not in conflict with the physical evidence. All of those cases in fact had substantial corroboration of the victim's testimony by medical examinations, lay witness testimony and/or contemporaneous reports from the victim. By contrast, this case does not have corroboration and consistency. P.B.'s testimony is vague, inconsistent and at times incredible. Thus the *Jackson* standard was not met and this conviction cannot stand.

---

[15] *State v. Waguespack,* 06-410 (La.App.3 Cir. 9/27/06); 939 So. 2d 636; *State v. Ross,* 03-564 (La.App.3 Cir. 12/17/03); 861 So. 2d 888, *writ denied* 04-0376 (La. 6/25/04); 876 So. 2d 829; *State v. Mitchell*, 453 So. 2d 1260 (La.App.3 Cir. 1984) and *State v. H.J.L.*, 08-823 (La.App.3 Cir. 2008); 999 So. 2d 338.

A. Inconsistencies in P.B.'s testimony

P.B. was less than ten years old (perhaps as young as four) when these incidents allegedly occurred. No one questioned her at the time to elicit details of the incidents. No one heard of these events until around 1977 when she told her mother that she had been "molested" but she did not give details of what happened. (R.547, 599). She also allegedly told some friends that her uncle had "hurt her" but she did not tell them what she meant. (R.781).

P.B.'s testimony was the only direct evidence that any offense occurred and the only evidence at all on the issue of penetration. Although she testified that she was "raped" more than twenty times. (R.773), she did not testify to the details of what happened on those occasions. When asked for details, she said that he penetrated her "or attempted to." (R.734). Later she was asked, " . . . are you making an accusation that Glenn Hernandez raped you . . . ?" to which she responded, "His fingers were on my vagina. At that young age, I can't say for sure if his fingers went inside of my vagina. . . ." (R.762).

On cross-examination, she was directly asked whether Petitioner inserted his penis into her vagina, however slight, during a specific period of time. Her answer was that "I don't believe it was his penis. I believe it was his fingers." (R.763). Only once (at R.770) did she come close to stating that he actually penetrated her with his penis. But she did not know

whether there was even enough penetration to cause her to bleed. (R.770).

Determining whether any penetration occurred at all and whether it was digital or penile is critical to a proper *Jackson* analysis. If penetration was digital only, the State has not proved rape because La. Rev. Stat. Ann. 14:42 requires proof of sexual intercourse.[16] Digital penetration would have been at most sexual battery and G.R.H. must be acquitted of aggravated rape.[17] If there was no penetration at all, but only an "attempt", then G.R.H. could be convicted of no more than an "attempt" crime and must also be acquitted of aggravated rape.

P.B. was told by her mother in the 1970s that it was too late to prosecute these charges. However, the detective with whom she spoke in 2006 told her that if she alleged "rape" rather than a lesser offense, there was no time limit. (R.783-85). Thus she had

---

[16] La. Rev. Stat. Ann. 14:42 defined "aggravated rape" as a "rape" occurring under certain circumstances, including the victim being less than twelve years old. La. Rev. Stat. Ann. 14:41 defined rape as "the act of sexual intercourse with a female person not the wife of, or judicially separated from bed and board from, the offender, committed without her lawful consent. Emission is not necessary; and any sexual penetration, however slight, is sufficient to complete the crime."

[17] See *State v. Ross*, 03-564, p. 11 (La.App.3 Cir. 12/17/03); 861 So. 2d 888, 895, *writ denied* 04-0376 (La. 6/25/04); 876 So. 2d 829 (if penetration was digital and not penile, the crime of aggravated rape has not been proved).

motivation – and a very personal one – to slant her testimony on this element.

Since there was no corroboration of her testimony on the element of penile penetration (such as by a medical examination), the lower courts' decision under *Jackson* can be affirmed only if "any rational trier of fact" could have found her testimony credible and sufficient on this essential element. Petitioner contends that no trier of fact could do so.

Other portions of P.B.'s testimony bordered on the incredible. She testified that on *every* occasion that she went to G.R.H.'s house, he acted inappropriately in some way. (R.727). This would be one to two visits per month for six years. When asked specifically how many times he raped her, as opposed to committing other sexual acts, she testified that this occurred "several times." (R.731), or then "twenty times." (R.773). Yet no one heard anything and no one saw anything, even though G.R.H.'s wife was just a few feet away, with the doors open. (R.731, 767). Although P.B. said that she cried and hit him and told him to stop, her efforts were not enough to awaken the children who were sleeping in the same room (and at times in the same bed). (R.759, 763, 769, 1035).

P.B. did not testify that G.R.H. threatened her or in any way prevented her from reporting these incidents when she was a child. When she became an adult, she still waited more than twenty-five years to report to the police. But in the meantime she told "everybody she knew" about it (R.739) although

"everyone" did not include Petitioner or his wife. (R.740). "Everybody" that she told apparently did nothing about her accusations.

It was not until P.B.'s grandmother disinherited P.B.'s branch of the family to the benefit of G.R.H. and "bad blood" arose within the family. (R.946-55) that P.B. took her allegations to the police. While denying that these family matters played any role in her decision, P.B.'s explanation of her motivation is puzzling. She said that she looked into C.H.'s and D.H.'s eyes and "just knew" that they had been molested and that it was time to go to the police. Even if there was no contrary evidence, this testimony is not proof beyond a reasonable doubt.

B. Inconsistencies with other evidence

The forty-year delay hindered G.R.H. in preparing his defense but evidence did emerge – often from the State's witnesses – to contradict P.B. For example, P.B.'s mother testified that P.B. had been examined by a physician when she was a child and the physician said nothing about evidence of sexual activity. (R.795, 804, 821). Her mother saw nothing when bathing P.B. (R.819). Even after P.B. allegedly told her that she had been molested, she continued to socialize with G.R.H. (R.824).

P.B.'s testimony also differs from her mother's on several key points. For example, P.B. testified that the first family member she told of these events was her mother whom she told during an argument at

their house when P.B. was about fifteen years old. (R.776). Her mother testified that she first told her when she was seventeen years old and they were making out the guest list for her wedding. (R.810).

P.B. testified that the police told her mother that there was nothing they could do because too much time had passed since the incidents. (R.735). Her mother testified that the police told her that the evidence would be "he said/she said" and she did not want to put P.B. through an ordeal like this on the eve of her wedding. (R.811, 826).

P.B.'s testimony also differed from that of C.H. and D.H. P.B. testified that she went to the police in 2006 because of the looks she saw in her cousins' eyes while visiting with C.H. and her baby. But C.H. testified that P.B. called her from the police station on the day that P.B. made her report. After that call C.H. went to the police and gave a statement. It was after C.H. gave her statement that P.B. came to see the baby. (R.832-33, 846-47).

G.R.H.'s wife Patricia, whom P.B. acknowledged was in an adjacent room during these incidents, contradicted P.B.'s testimony. Patricia is a light sleeper who was awake frequently during the night to tend to her small children. Yet she heard no cries or hits, as P.B. testified. (R.923-26). She also bathed P.B. during her overnight visits and saw nothing suspicious. (R.819, 922). She saw nothing on the bedding or P.B.'s clothing. (R.925). She insists that she would have reported anything that might have harmed P.B.

because she is her godmother and they were very close, "like her own child." (R.941).

G.R.H. vehemently denied all of these allegations. (R.1031, 1035-36, 1065-66). For about two years between 1966-1972, he had a well-corroborated alibi because he was in the Navy, stationed in Florida and for a portion of the time he lived with his parents, not in a separate house as P.B. testified. (R.915, 1028). After that, he continued to live in the same small town with P.B. and the families continued to socialize including attending functions together. (R.764, 788, 824). G.R.H. has not been arrested for any offenses other than in this indictment. (R.1048).

These contradictions and inconsistencies further undermine P.B.'s testimony. They make it even more impossible for any rational trier of fact to find that her testimony supports this conviction beyond a reasonable doubt.

C. "Other crimes" evidence

This Court has recognized that other crimes evidence, even when properly admitted, is likely to lead the jury to base its verdict on improper factors (*Old Chief v. United States*, 519 U.S. 172 (1997)). Petitioner contends that what actually led to his conviction was not just the jury's belief in P.B. but also the highly prejudicial testimony from D.H. and C.H. What happened here was the same harm which this Court warned against in *Old Chief*:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. . . . The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.

Old Chief, 519 U.S. at 181.

The "other crimes" evidence in this case did not in fact bolster the State's case factually. It had no independent relevance. Intent, plan, opportunity and the other justifications cited in the State's Notice of Intent to Introduce Evidence of Other Crimes were not at issue. Nor does this evidence substantiate a common design, as the lower courts found, because these incidents were not actually similar.

P.B. testified that Petitioner touched her vagina with his fingers or penis, fondled her, and masturbated on her. (R.731, 734, 762). C.H. told the police that he had touched her under her shirt. (R.851) but at trial she testified that he rubbed her bottom from the outside of her clothes and touched her vagina. (R.837, 850). D.H. testified about Petitioner allegedly touching her on the outside of her shirt and under her panties. (R.884-85). D.H. and C.H. expressly denied that Petitioner ever raped or attempted to rape them and they said nothing about masturbation. (R.857,

896). C.H. also testified that Petitioner threatened her (R.837) but neither of the other witnesses mentioned any threats.

The Third Circuit Court of Appeals said that one of the commonalities in these crimes was that they occurred in Petitioner's residence. This is not true. According to C.H., the incident occurred while riding a 4-wheeler. (R.835). The incident with D.H. occurred while she was playing outside. (R.885). P.B. also testified to an incident occurring while they were driving in a truck. (R.797).

The trial court said that one of the common themes was that there were no witnesses present when these incidents occurred. (R.222). But that is also incorrect. P.B. admitted that Petitioner's wife and children were present for the incidents in the house (R.767) and his granddaughter Ashley was present for the incident in the truck. (R.797). According to D.H. and C.H., Ashley was also present during the incidents with D.H. (R.884-85) and during the 4-wheeler incident. (R.835).[18]

The other commonality cited by the Court of Appeals was that the victims were family members. However, two other family members, and a friend of a similar age, testified that Petitioner never did anything inappropriate with them (R.906, 1006-07,

---

[18] Ashley testified that she was not aware of any of the incidents reported by C.H. and D.H. (R.1014-15).

1013-15). All of them visited frequently and one of them lived with G.R.H. and his wife from about age two to nine and nothing inappropriate happened to her. (R.1013-14).

No reasonable trier of fact can find that there is a pattern here and Petitioner continues to maintain that this evidence was improperly admitted. It served only one purpose and that was the purpose that *Old Chief* considered improper – to show that Petitioner was a bad man who should be convicted of this crime regardless of the actual evidence.

Even if it was properly admitted under Louisiana law, this Court can still determine that its admission violated Due Process. "[W]hen a state court admits evidence that is 'so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.'" *Dawson v. Delaware,* 503 U.S. 159, 179 (1992) (quoting *Tennessee v. Bane*, 510 U.S. 808 (1993)). In conducting this analysis, the issue is not whether the evidence was or was not properly admitted under state law. (*Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991)).

Petitioner was placed in an impossible situation at trial. To avoid being convicted on the testimony of the victim alone, a petitioner must bring out inconsistencies in her testimony. But Petitioner was hampered in doing so by the delay in bringing these charges to light. Then he faced "other crimes" evidence (which he also could not properly confront

because of the passage of time) which served to prove not that he was guilty of the crime with P.B., but simply that he was a "bad man" with a "lustful disposition". Rather than proving each element of this crime beyond a reasonable doubt with credible evidence, the prosecution proved this case through innuendo and reputation.

These circumstances have combined here to produce an unfair trial which violated Petitioner's Due Process rights. G.R.H., therefore, prays that this Court grant this Writ Application and reverse the decision of the courts below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KEITH B. NORDYKE
Counsel of Record
NORDYKE & GREENFIELD, LLC
427 Mayflower Street
Baton Rouge, Louisiana 70802
Telephone: (225) 383-1601
Facsimile: (225) 383-2725
knordyke@nglawllc.com

Attorney for Petitioner

Blank Page