

NO. _____

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

CHARLES DYER

Plaintiff,

v.

JIM FARRIS (WARDEN)

Respondent.

Oral Argument Requested
Evidentiary Hearing Requested

**BRIEF IN SUPPORT OF PETITION
FOR WRIT OF HABEAS CORPUS**

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ATTACHMENTS

Attachment A: Reference to Hayley Dyer’s Testimony

Attachment A-1: Dimensional diagram; diagram of Charles’ home drawn by Fire investigator Judah Shepard

Attachment A-2: Transcript of forensic video interview of Hayley (The State of Oklahoma refuses to provide a copy of the interview CD)

Attachment B: Reference to Valerie Dyer’s Testimony

Attachment B-1: Recorded conversation between Charles and Valerie in July 2009. This audio CD reflects Valerie’s willingness to commit perjury to gain custody of Hayley

Attachment B-2: Recorded conversation between Charles and Valerie on June 30, 2011 recorded by District Attorney Jason Hicks

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- Attachment B-4: Myspace message from Valerie to Amanda on January 11, 2010 displaying Valerie's vengeful nature and coaching of Hayley
- Attachment B-5: Hayley's school attendance records, school calendar, and affidavit from the school administrator stating that school began on January 4th, 2010
- Attachment B-6: Child support acknowledgement signed by Valerie Dyer
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- Attachment B-8: Affidavits by Valerie and her boyfriend alleging Charles was stalking them May 24, 2010
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Attachment M: Detailed timeline of events surrounding the dates of alleged crime

Attachment N: Affidavit of Truth by Charles Dyer

JURISDICTION

Appellant invokes the jurisdiction of the United States District Court for the Western District of Oklahoma pursuant to timely file petition for a writ of *habeas corpus* under Title 28, United States Code, § 2241 and 2254. This court has jurisdiction over this habeas corpus petition because Petitioner is in the custody of the State of Oklahoma in violation of federal laws and the Constitution of the United States. (See 28, U.S.C. § 2241 (c)(3).) All claims in this petition have been exhausted in state court as required by 28 U.S.C. §2254. There are no pending appeals in either state or federal courts.

STATEMENT OF COMPLIANCE

This brief is written in Times New Roman 13 font with Perpetua 13 font footnotes and margined 1 inch on all sides in compliance with LCvR5.2 and 7.1. The page limit is exceeded and a motion for leave to exceed this limit has been filed contemporaneously with this brief.

PRELIMINARY STATEMENT

Mr. Dyer was the Defendant in the Stephens County District Court and will be referred to as "Petitioner". Respondent will be referred to as the "State" or "Prosecution". Transcript pages are referred to as Preliminary hearing (PH.), Daubert hearing April 8, 2011 (D.H.), First trial April 2011 (T1.), Second trial January 23, 2012 (T2.), and the Third trial April 16-19, 2012 (T3.) followed with the page number, i.e. (T3.45). The

evidence presented in this case is filed contemporaneously with this Petition as attachments.

STATEMENT OF THE CASE

On January 20, 2010, the State of Oklahoma filed an information charging Petitioner with a single count of child sexual abuse in violation of 21 O.S.2009, §843.5(E).

Petitioner was first tried in April 2011 before the Honorable Joe H. Enos. At this trial, Petitioner was represented by retained counsel, David W. Hammond. The state was represented by Ms. Carie Hixon and Mr. James E. Walters. After deliberating for seven hours, the jury was unable to reach a unanimous verdict and a mistrial was declared.

Petitioner's second trial began on January 23, 2012. At this proceeding, he was represented by retained counsel, Mr. Al Hoch. The state was represented by Ms. Hixon and Mr. Walters. The day after trial began, Judge Enos declared a mistrial, at the request of the defense, after it became known that the D.A.'s office had mailed juror survey forms to several venire persons selected as members of Petitioner's jury.

On April 16-19, 2012, Petitioner was again tried by jury before Judge Enos. Defense counsel and Prosecutors remained the same as the previous trial. The jury found Petitioner guilty as charged. Formal sentencing occurred on June 5, 2012. Consistent with the jury's recommendation, Petitioner was sentenced to 30 years imprisonment.

Petitioner filed a direct appeal through use of the Oklahoma Indigent Defense System, represented by Robert W. Jackson. Direct appeal was denied on October 30, 2013.

Petitioner had no access to a law library at the conclusion of the direct appeal. In order to stop the federal tolling of his Habeas Corpus, Petitioner filed a pro se Application for Post-conviction relief on April 24, 2014. Petitioner was moved to a prison with a law library where he hastily filed a supplement to his post-conviction application on April 24, 2014. Petitioner's application was summarily denied without hearing on October 22, 2014. Petitioner appealed and the OCCA reversed the denial on April 16, 2015 remanding for further proceedings. On May 6, 2015 the district court issued a summary dismissal once again. Petitioner appealed and was denied relief by the OCCA on November 19, 2015.

Petitioner has exhausted his claims in state court and now present them on to this court through *Habeas Corpus*.

STATEMENT OF FACTS

In September 2008, Charles Dyer was stationed at Camp Pendleton CA. with the U.S. Marine Corps. He and his wife, Valerie Dyer, agreed that she would move to Oklahoma while Mr. Dyer finished the last of his enlistment in an attempt to prepare for civilian life. During the first half of 2009, Valerie committed adultery, spurring numerous arguments over custody of their daughter H.D. which got so heated that Valerie had Charles arrested by his command on charges of assault but later admitting that the allegations were false. Charles filed for divorce in July 2009 on the grounds of adultery which Valerie signed. During the summer of 2009, after Charles was discharged from the Marine Corps, there were custody disputed and arguments that became so heated that law enforcement became involved. In August 2009, Petitioner left the state and moved to

California. There he began a relationship with Valerie's best friend Amanda Monsalve. In December 2009, Charles, Amanda, and her five year old daughter moved to Oklahoma at which time Charles informed Valerie who he was living with. During December 2009, there were verbal disputes which eventually led to a public confrontation between Valerie and Charles on December 20, 2009. Five days later [December 25] Valerie's computer was used to research phrases concerning termination of parental rights. Also on this day H.D. left Valerie's home to stay with Charles over Christmas break. On January 3, 2010 H.D. left Charles' home and returned to Valerie's home. H.D. resumed school from January 4-7, 2010. On January 8, 2010 Valerie filed a police report alleging sexual abuse of H.D. by Charles. Three days later [January 11] Valerie's computer was used to view pornography over an eight hour period. On the following day [January 12] H.D. was given a forensic video interview where she described acts of sexual abuse. Concurrently to this, Charles and Amanda went to the Stephens County Sheriff's Department to inquire if Valerie had filed any false charges against him as she had in the past at which time he was arrested. On January 13, 2010 H.D. was given a physical examination by Dr. Waters.

PRO SE LITIGANT ASSERTION

Petitioner hereby requests that the protections afforded to a pro-se applicant be provided, and this application/brief be viewed in a light most favorable to the Petitioner and be construed liberally, as held by the courts of *Haines v Kerner*, 92 S.Ct. 594 (1972) and *Hall v Bellmon*, 935 F.2d 1106 (1991).

SUMMARY OF THE CLAIMS

1. The OCCA failed to apply the proper standards to the Ineffectiveness of Appellate Counsel claims. In the alternative, OCCA's conclusions were objectively unreasonable in light of the evidence.
2. The OCCA improperly barred the insufficiency of the evidence claim. No review under the *Jackson* standard was made. The evidence is insufficient to sustain a conviction.
3. Trial counsel mislead the Petitioner and failed to render effective assistance.
4. The trial was infected by false testimony given by state's witnesses.
5. Improper jury instructions were given
6. The Prosecution misstated material facts, improperly expressed personal beliefs, and knowingly allowed its witnesses to lie without correcting them.
7. The court allowed improper hearsay testimony concerning the disclosure and the forensic video.
8. The court abused its discretion when it failed to sustain the demurrer
9. Improper character evidence rendered the trial fundamentally unfair.

Ground One
INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Petitioner's appellate counsel failed to argue meritorious claims during the Direct Appeal, thus violating Petitioner's right to effective assistance of counsel guaranteed by Amendments 6 and 14 to the U.S. Constitution. See *Smith v. Robbins*, 528 U.S. 259 (2000)

ARGUMENT AND AUTHORITY

1. The State courts refused to hear Petitioner's post-conviction arguments, but had they been raised adequately on direct appeal, there is no doubt that the OCCA would have given relief on the facts that there is insufficient evidence according to state law to sustain the conviction; that the prosecutor intentionally made the trial fundamentally unfair; that the court's numerous errors, failure to force the state to elect a crime, and admissions of improper evidence rendered the proceedings unfair; and that trial counsel's deficient performance denied Petitioner's right to competent counsel.

2. Petitioner contends that appellate counsel did not adequately argue ineffective assistance of trial counsel and that Petitioner's post-conviction argument on this issue has wholly different aspects than that brought on direct appeal. Petitioner contends that the "TRIAL COURT ERRED WHEN IT REFUSED TO PERMIT DR.RAY HAND TO TESTIFY FOR THE DEFENSE" argument raised by appellate counsel was not an issue that was even preserved for appellate review and was denied on this ground by the OCCA without review. Any competent attorney could see that trial counsel made no motion or attempt to use this testimony. If any of Petitioner's claims presented to this court have merit, it cannot be said that a claim presented by appellate counsel, which didn't even warrant a review on the merits by the OCCA, was more meritorious than that

presented. The claims of insufficient evidence, failure to elect a crime, prosecutorial misconduct, and false testimony infecting the trial are plainly obvious federal constitutional issues central to the case that no reasonable counsel would ignore and is compounded by the fact that Petitioner brought these claims to the attention of appellate counsel prior to his filing of the direct appeal. The fact that counsel would raise an issue that's not even reviewable, when there are meritorious claims present is clearly deficient. Petitioner was prejudiced by counsel's failure to raise the claims in this brief as the outcome of the direct appeal proceedings would have been different had they been argued to the OCCA on direct appeal.

Request that all sub claims be reviewed *De Novo*

1. Though the district court claims that it reviewed the merits of Petitioner's claims in its order¹, the presumption that the court actually did so is not difficult to overcome. Petitioner presents the following as proof against the district court's claim and argues that these findings are objectively unreasonable findings of fact in light of the evidence:

(a) The brief state court orders are conclusory in nature and silent as to Petitioner's specific factual assertions supporting any of his claims.

(b) The district court erroneously ruled that the "Insufficient Evidence" claim was previously argued on direct appeal² and was therefore barred from review by *res judicata*

¹ See *Dyer v State* CF-2010-17 Order Of Summary Disposition

² See *Dyer v State* CF-2010-17 Order Of Summary Disposition filed October 22, 2014 Pg.6 paragraph 10 and footnote 22.

and could not be a basis for relief³. The OCCA additionally asserted that it scrutinized the evidence on direct appeal in which Petitioner failed to show that the jury's decision was not supported by "substantial evidence"⁴. This is an unreasonable determination of the facts and an incorrect conclusory statement as the court did not review his insufficiency argument on direct appeal and there is absolutely no evidence of guilt beyond the contradictory and inconsistent testimony of the alleged victim.

(c) The State of Oklahoma is required by law to show that instances of prosecutorial misconduct are harmless beyond a reasonable doubt (See *Chapman v California*, 386 U.S. 18, 24 (1967), which Petitioner brought to the attention of the court⁵. However, the State never denied that it made acts of prosecutorial misconduct nor that these acts were harmless. The court, however, arbitrarily ruled against Petitioner in violation of the law.

(d) The Court ruled that the claim of Ineffective assistance of trial counsel was barred by *res judicata* due to it being brought on direct appeal⁶. However, this ruling was an unreasonable determination of facts because this argument was presented on direct appeal in name only. The arguments asserted in the collateral attack were wholly different than was argued on direct appeal. Petitioner argued in his Post-conviction appeal that this claim does not fall within the elements required for *res judicata*.

³ See *Dyer v State* CF-2010-17 Order Of Summary Disposition filed October 22, 2014 Pg.6 paragraph 12 and 13 as well as foot note 22 and 26; Pg.10 footnote 51.

⁴ *Dyer v State*, supra (Okl.Cr.November 19, 2015) Order Affirming Denial of Relief Pg. 5

⁵ See Petitioners original Post conviction Brief in Support at Pg. IV 19

⁶ See *Dyer v State* CF-2010-17 Order Of Summary Disposition filed October 22, 2014 Pg.6 paragraph 12 and 13 as well as foot note 22 and 26.

(e) The district court ruled in its conclusion of law #14 that Petitioner did not support his Application for Post-Conviction Relief with argument or citation and therefore waived his claims. However, the Petitioner presented the state district court with 156 pages of argument and nearly 100 citations to case law and statutes in contradiction to this ridiculous finding.

(f) The district court ruled in its conclusion of law #18 Pg.8 that:

“The fact that appellate counsel fails to recognize or raise a claim, regardless of merit, is insufficient alone to establish a claim of ineffective assistance of counsel”. (emphasis added)

This is in contradiction to the decision of the 10th circuit in Milton v. Miller, 744 F.3d 660, 669 (10th.Cir.2014) in which that court rebuked the Oklahoma court system for using this exact language as a truncation that enables Oklahoma courts in rejecting appellate ineffectiveness allegations even if there is merit to the underlying claims.

(g) In # 24, the court ruled:

“If the State can show that a claim now asserted...would have been properly rejected on direct appeal, then the postconviction applicant will be unable to show prejudice, and the asertion of ineffective appellate assistance for failing to raise that claim should be rejected accordingly”

Then in # 25 ruled that :

“The State in its response to Petitioner’s...application for Post-Conviction relief does an excellent job of analyzing in great detail each of the claims Petitioner asserts appellate counsel was ineffective for failing to raise on appeal, and, shows and demonstrated that each of these claims if raised on appeal would have failed, and, according, are meritless” (emphasis added)

This ruling is significant because the State of Oklahoma didn’t even make an attempt to respond to the merits of the prosecutorial misconduct argument, made no attempt at

report to the court as to why appellate counsel failed to argue certain claims, but only requires that said claims have merit in order to give relief upon.

4. In the alternative, should this court rule that the merits were reviewed by the state court, Petitioner will argue under each sub claim or the application as to whether the results of the proceedings were due to a decision that was contrary to, or involved an unreasonable application of clearly established law; or an unreasonable determination of the facts as required by 28 U.S. §2254(d).

I. INSUFFICIENT EVIDENCE (IAAC Sub Claim)

Petitioner's appellate counsel was insufficient in not arguing the sufficiency of the evidence against state law, thus violating Petitioner's right to effective counsel on his first appeal of right guaranteed by Amendment 6 and 14 of the U.S. Constitution. See *Smith v Robbins*, supra. Additionally, Petitioner's conviction was obtained as the result of evidence that is insufficient to persuade a properly instructed, reasonable jury of his guilt beyond a reasonable doubt as guaranteed by Amendment 5 and 14 of the U.S. Constitution. See *Jackson v. Virginia*, 443 U.S. 307 (1979)

ARGUMENT AND AUTHORITY

1. The elements of the crime that the Petitioner was convicted of are: First, a person responsible for the child's health, safety or welfare; Second, willfully/maliciously engaged in; Third, sexual abuse of said child between July 2009 to January 03, 2010. Petitioner concedes that he is the parent of H.D. but denies the sexual abuse as charged. Petitioner contends that the evidence relied upon to find him guilty is, in fact, insufficient to sustain the verdict. Petitioner was placed on trial three (3) times for this crime, two of which went to the jury for determination of guilt. From the first to third trial, the State's testimony grew increasingly improbable and perjured in an attempt to gain a conviction

at any cost. The evidence presented by the state is perjured, inconsistent, contradictory, improbable, and completely uncorroborated by physical evidence.

2. The Due Process Clause protects an accused against conviction “*except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime which he is charged.*” *In re Winship*, 397 U.S. 358, 364 (1970). Here, the State satisfied the elements of the crime only through the statements of 7 year old H.D. whose accounts were so contradictory, uncertain, and improbable as to be unbelievable. H.D. altered both minor and major details of her stories and at times even denied her own previous claims. H.D.’s allegations varied so dramatically as to alternately raise and dismiss the entire case. Due process must require more. Even if viewed in the light most favorable to the State, H.D.’s claims alone were too unbelievable to establish Mr. Dyer’s guilt beyond a reasonable doubt.

3. Had appellate counsel raised this clearly meritorious insufficiency claim on direct appeal and had the OCCA applied the state law standards to this claim, Petitioner would have been entitled to the reversal of his conviction. Because appellate counsel did not do so, Petitioner was deprived of effective assistance of appellate counsel. Additionally, had the OCCA applied the *Jackson* standard, it could not have sustained the jury’s verdict.

4. Petitioner contends that trial counsel was ineffective for failing to present the DNA and computer forensic reports to the jury as they are both strong evidence of innocence. Any rational fact finder attempting to search for the truth would certainly want to know this information. Having a jury make a decision on this case in its absence is a miscarriage of justice.

5. Had trial counsel presented the Forensic DNA and computer report evidence along with effectively piecing together the timeline of events to the jury, with proper jury instruction, there can be no doubt that it would have placed far more than a reasonable doubt in the jury's mind. With the evidence presented in this claim, no jury could reasonably find the Petitioner guilty of the charged crime. The fact that the evidence was not effectively presented to the jury rendered Petitioner's entire trial proceeding fundamentally unfair.

PREJUDICE

1. Petitioner contends that had appellate counsel argued Oklahoma laws to the OCCA, on direct appeal, and had the OCCA followed state law standards, that the Petitioner's conviction would have been reversed. Petitioner contends that under Oklahoma law, a defendant cannot be convicted of rape without corroboration of the crime when the testimony of the prosecutrix is contradictory, unclear, improbable, or inconsistent⁷, when there are indications that the prosecution is maliciously conspired⁸, or when the defendant denies the allegations against him and his testimony is corroborated⁹.
2. This case certainly is one that would require corroboration sufficient enough to sustain the verdict as it falls into all three of these categories. However, there is no evidence presented by the state that is corroborative. H.D.'s testimony is unbelievable and contradicts both herself and Valerie. The testimony of Valerie is perjured and contradicted by that of H.D.; the testimony of Dr. Waters can't be considered

⁷ Ray v State, 762 P.2d 274 (Okl. Cr. 1988)

⁸ Johnson v State, 182 P.2d 777 (Okl. Cr. 1947)

⁹ Cooper v State, 568 P.2d 1300 (Okl. Cr. 1977)

corroborative because it is of no aid in determining when an injury may have occurred, if injury was due to a sex act or some accident, or that Petitioner was the author of such a condition¹⁰; and finally, the Petitioner testified that he had no opportunity to commit the crime and was corroborated, but even if he had opportunity, that can't be considered corroborative either¹¹.

3. Beyond the state law aspect, had counsel argued federal law and had the OCCA made a determination on the sufficiency of the evidence under *Jackson*, supra, the court would have reversed the conviction.

RELIEF CAN BE GRANTED IN ACCORDANCE WITH 28 U.S. §2254(d)

1. The state court's decision was contrary to, or involved an unreasonable application of clearly established federal law in *Jackson* which states "*after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt*". Petitioner asserts this to wit:

(a) In the state district court's summary denial of post-conviction relief conclusion # 26, the court states only that "the verdict is supported by the evidence" but there is no indication that it applied the *Jackson* standard, nor does the court even hint toward what evidence it relies on to make this determination.

(b) The state district court does not issue a reasoned decision denying this claim and the determination is devoid of record to support its ruling. In the OCCA's affirmation of this denial, the OCCA gives no indication that it applied the *Jackson* standard or any

¹⁰ DeArmond v State, 285 P.2d 236 (Okla. Cr. 1955) (Medical exam cannot be corroboration where it does not definitively show sexual abuse occurred or that defendant is the perpetrator of abuse)

¹¹ Foster v State, 308 P.2d 66 (Okla. Cr. 1957) (Opportunity cannot be considered corroboration)

standard resembling it, but only states that Petitioner's jury convicted him and that he has not proved that the decision was not supported by "substantial evidence", citing the state case of *Johnson v. State*, 182 P.2d 777,781 (1947). However, *Johnson* gives no governing principle concerning general sufficiency of evidence as outlined in *Jackson*, was made 30 years prior to *Jackson*, and only pertains to the needs of corroboration in a rape case.

(c) Neither the OCCA nor the district court applied the standards set forth in *Jackson* nor any standard that is equivalent.

2. Additionally, the state court's decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings to wit:

(a) The state district court erroneously ruled that this claim was brought forward on direct appeal and was therefore waived under *res judicata*¹². The OCCA also mirrored this erroneous ruling by stating "*During his appeal proceedings, the evidence...was scrutinized and Petitioner's Judgment and Sentence was affirmed*"¹³. However, the Petitioner made no attack against the sufficiency of the evidence at the direct appeal and no review under the *Jackson* standard was requested or made.

(b) The OCCA posited that the evidence of guilt was "substantial" (See footnote 28 below). The court however, did not buttress this conclusory statement with any specific findings, and they are belied by the record. The evidence presented at the first trial was so

¹² See *Dyer v. State*, CF-2010-17 (District court's Order Of Summary Disposition filed Oct. 22, 2014) Pg.6 conclusions 10, 12-13, 26.

¹³ See *Dyer v. State* No. PC-2015-512 (OCCA Order Affirming Denial of Post Conviction Relief) Pg.5.

underwhelming that the jurors were unable to even reach a decision. The evidence presented by the State at the third trial was for the most part the same (though more embellished and perjured in an attempt to plug holes in the state's case), and the main difference was only the defense's complete failure to present readily available evidence of innocence and evidence of perjury by the State's witnesses. The state court failed to even consider this fact. This alone makes it unreasonable to find "substantial" evidence of guilt when the record clearly shows that there is absolutely no evidence beyond the unreliable testimony of 7 year old H.D. in which to satisfy the elements of the crime.

(c) The state court's ruling was clearly unreasonable by sustaining the conviction due to the facts that, with the exculpatory evidence available, coupled with the unreliable and perjured evidence presented by the state, after reviewing the merits of Petitioner's argument under *Smith v. Robbins*, 528 U.S. 259 (2000), applying the *Jackson* sufficiency standard of review, any reasonable judge would have undoubtedly ruled that after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Justice Brennan In re *Winship*, 397 U.S. 372 wrote of the importance of guilt being proven beyond a reasonable doubt. He stated "*that it is far worse to convict an innocent man than to let a guilty man go free*". In this case, evidence not presented to the jury properly has allowed an innocent man to be convicted and Petitioner asks of This Honorable Court to right this miscarriage of justice.

3. The State Court ruled that it is the sole province of the jury to decide the credibility of the witnesses with regards to the inconsistencies and perjury committed by the State's witnesses. However, it is a miscarriage of justice for the court to arbitrarily sustain a verdict under this premise when the testimony is so clearly perjured or inconsistent as in the current case. In *U.S. v. Jones*, 49 F.3d 634, the 10th Circuit stated:

"When the entirety of the testimony of the government's key witness is peppered with ... inconsistency, we cannot turn our back upon it under the premise of not invading the province of the jury. Our duty as appellate judges transcends such benign review of the evidence."

II. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL (IAAC Sub Claim)

Petitioner failed to receive the effective assistance of trial counsel guaranteed by Amendments 6 and 14 to the U.S. Constitution. See *Strickland v. Washington*, 466 U.S. 668 (1984).

ARGUMENT AND AUTHORITY

1. Petitioner contends that his trial counsel was ineffective by not objecting to inflammatory hearsay and improper statements by the State, failed to present critically exculpatory evidence, failed to consult a medical expert, mislead Petitioner about the evidence that would be presented, allowed jurors to sleep during trial, and failed to request proper jury instructions. Petitioner alleges that counsel hijacked his trial and did not allow him to have any part in his defense as the law demands. Counsel in this case completely failed to investigate the facts, prior testimony of witnesses, or the law specific to the crime charged.

2. Counsel's failure to conduct the investigation necessary prevented counsel from determining before trial what evidence should be offered, how to effectively cross-examine and rebut the prosecution's expert witnesses, and how to show malicious prosecution and inconsistencies in Valerie and H.D.'s testimony.

3. Petitioner argues that counsel's performance was clearly deficient and that in evaluating counsel's performance, the supreme court has long referred to the ABA

standards for criminal justice as “guides to determining what is reasonable” *Rompilla v. Beard*, 545 U.S. 374, 387 (2005). In the instant case, Counsel violated several rules of professional conduct.

4. Petitioner contends that counsel’s failure to invoke the procedural and substantive safeguards of the justice system (See sections A,B,E,H and I of this claim), caused injustice to infect his trial, See *Cuyler v. Sullivan*, 446 U.S. 343 (1980). Petitioner’s liberty depended on counsel’s ability to present the case in the face of “the intricacies” of the law and the advocacy of the public prosecutor, See *U.S. v. Ash*, 413 U.S. 300, 309 (1973). Petitioner contends that defense counsel gave only nominal representation which does not suffice as Constitutionally adequate representation and violated Petitioner’s right to present a full defense, See *Holmes v. South Carolina*, 547 U.S. 319 (2006). Had counsel utilized the procedural safeguards by objecting to improper and inflammatory statements and hearsay, presented the computer evidence to its full extent, presented an expert witness to refute Dr. Waters, impeached Valerie and H.D. with readily available evidence, called Dr. Ray Hand as an expert witness, and been familiar enough with the case to present it fully and properly to the jury, it would have put the whole case in such a different light as to undermine the confidence in the verdict.

A. (FACT 1) Defense counsel failed to object to inflammatory, perjured hearsay.

1. Counsel’s performance was deficient as no reasonable attorney would allow this hearsay without objection as it had no bearing on the facts of the case and was solely calculated to inflame the passions and prejudice of the jury. Defense had readily available information proving that it was perjured and unreliable. Petitioner contends that he has a right to have counsel that is able to invoke the safeguards of the justice system by objecting to inadmissible testimony See *Cuyler*, supra. No cure was requested and no preservation for appellate review was retained. Petitioner was prejudiced as there’s no

doubt that the jury took this false testimony and perception of Petitioner as a cruel, controlling, violent, and negligent husband into deliberation with them.

2. This conduct violated ABA rule 1.1 (Competence) in that counsel did not prepare reasonably for cross examination concerning Valerie's testimony.

B. (FACT 2) Defense counsel failed to object to numerous improper statements made by the State during closing arguments.

1. The prosecutors wrongfully put their personal reputations behind the testimony of their witnesses, the absolute guilt of the Petitioner, and the non-credibility of defense witnesses. The Supreme Court has recognized in *Berger v. U.S.*, 295 U.S. 78 (1935) that:

"Improper suggestions, insinuations, and especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

2. The prosecutor's tactics and statements amounted to unfair and prejudicial misconduct plainly meriting an objection and curative instruction, if not a motion for mistrial, yet counsel sat silently. No objection was lodged by the defense to any of these improper statements by the State, allowing them to be improperly considered during deliberation. There is no evidence that counsel made an intelligent, tactical decision not to object and the State has offered none. Instead, counsel only reinforced perjured evidence by allowing it to be repeated, allowed the prosecutor to misstate facts, and allowed the state to place the burden of proof on the defense rather than objecting and moving for mistrial or curative instruction.

3. This conduct violated ABA Rule 1.1 (Competence) in that counsel fell short of the knowledge and skill needed to defend the Petitioner from misconduct of the adverse

party; Rule 1.3 (Diligence) in that counsel's inaction fell far from the "zeal in advocacy" as required by a reasonable attorney.

C. (FACT 3) Defense counsel failed to present witnesses and evidence vital to place doubt in the State's case

1. On Direct Appeal, the OCCA denied relief on this ground, stating that "*Dyer fails to show prejudice from counsel's strategic decision not to call certain witnesses, and he cannot [show that there is a reasonable probability that presenting the omitted evidence would have resulted in a different outcome of the proceedings]*". However, there is no evidence that this was a strategic decision and the state court refused to hold an evidentiary hearing to decide this fact at three stages of appeals. Further, it is more than a reasonable probability that this evidence would have resulted in the jury not finding the Petitioner guilty; a large portion of this evidence was presented at the first trial which did not result in a guilty verdict. This ruling was made due to an unreasonable determination of the facts before the state court. The state court's finding cannot be reasonably justified under *Strickland* as the factual determination that counsel adequately performed is plainly controverted by the evidence. Federal courts have held that an attorney's failure to present available exculpatory evidence is ordinarily deficient, unless some cogent tactical or other consideration justified it. Neither the state nor the state court in this case offers even a scintilla of a suggestion about what the strategy might have been in not calling most of these witnesses or presenting this evidence. Additionally, in regards to an expert witness; when a case hinges all but on whom to believe, an expert's interpretation of relevant physical evidence (or lack of it) is the sort of neutral disinterested testimony that

may well tip the scales and sway the fact-finder. It should be obvious that trial counsel should consider physical evidence as his focal point (See *Pavel v. Hollins*, 261 F.3d 210 (2nd Cir.2001)). The evidence of these witnesses would have been more convincing than testimony from family and would have made the innocence claim considerably more compelling than simple denial of guilt.

(a) *Pavel* is on point with this case as it concerned a Petitioner that had been convicted of sexually abusing his children, the evidence was extremely weak against him, and there was evidence of malicious prosecution by his wife. In that case, the court ruled that his counsel was deficient because he failed to investigate and develop the defense. Much like *Pavel*, the defense theory in the instant case was that Petitioner was not guilty and that H.D. accused Petitioner of abuse because she was manipulated into doing so by her mother, who wanted to prevent Petitioner from gaining custody of H.D. and was vengeful that Petitioner had started a relationship with her best friend.

(b) If the fact finder were to accept this defense, they would have to accept as true an extraordinarily unflattering portrait of Valerie Dyer. Counsel had at his disposal, numerous ways of doing this. First, he could have impeached almost everything that Valerie testified to as perjured (See Attachment B). He could have called Deputy Seeley and introduced police reports to refute the day of Valerie reporting the abuse and subsequently the day she allegedly learned of abuse. He could have called Mr. Dutton or agent Raines to introduce computer evidence that Valerie researched sexual abuse before learning of the alleged abuse and downloaded pornography the night prior to H.D. describing said pornography to the forensic interviewer. He could have called Officer

Fletcher, Deputy Lemons, and presented documents that prove Valerie used law enforcement to have Petitioner wrongfully harassed and arrested in contradiction to her testimony. He could have called Officer Corchoran to show that Valerie and Petitioner had public disputes because Valerie refused visitation between H.D. and Petitioner. He could have called the School custodian and presented attendance records to prove Valerie's versions of events were impossible. As these witnesses had all testified previously, except officers Fletcher and Corchoran, there was no chance for surprise and all testimony was exculpatory without harm to the defense. However, counsel never investigated prior testimony of the witnesses or the physical evidence available to him. Counsel's conduct was result of either inattention or negligence, rather than reasoned judgment.

(c) Further, counsel completely neglected to show the inconsistencies to the jury concerning H.D.'s prior testimony. Had he done so, the jury would have been made aware that H.D.'s testimony was contradictory to not only herself and Valerie but that she had previously testified that no abuse occurred as the state charged (T1.16).

(d) Because these contradictions concerning the testimony of Valerie and H.D. were not introduced into evidence the jury never had an opportunity to assess the conflicting testimony or to properly weigh the Petitioner's credibility against that of the State's witnesses.

(e) Additionally, Petitioner argues that counsel's performance was deficient to the extent that he did not call a medical expert to testify to the significance of the physical evidence presented by the state. This decision was not that of a strategic choice after

thorough investigation but rather an unreasonable decision after failing to do any investigation on the matter. As in *paveI*, counsel's decision not to call a medical expert was deficient because it was not based on pre-trial consultation with such an expert. In this case, the only witnesses to the alleged abuse was H.D. and Petitioner, and there was no substantial circumstantial evidence of abuse. In *Lindstadt*, 239 F.3d at 201, the court cited Beth A. Townsend, *Defending the "Indefensible": A Primer to Defending Allegations of Child Abuse*, 45 *A.F.L.REV.* 261, 270 (1998), stating: "It is difficult to imagine a child abuse case...where the defense would not be aided by the assistance of an expert.". See also, *U.S. v. Tornowski*, 29 M.J. 578, 580 (1989) ("There is little question that child sexual abuse cases often present a fertile, indeed, necessary, area for expert assistance"). It should have been clear that it was critical for the defense to call a sexual abuse expert that would testify in accordance to the information within the sexual abuse articles that were readily available to counsel. However, counsel made no attempt whatsoever at consulting with a sexual abuse physician, let alone call one as a witness.

2. This conduct violated ABA Rule 1.2 (Scope of representation) in that counsel did not abide by his client's decisions regarding representation and forcefully asserted ultimate authority over the case; Rule 1.4 (Communication) in that counsel hijacked his client's ultimate authority in determining the purpose of representation, did not promptly inform his client of trial decisions, did not consult with his client about the means by which the objectives would be accomplished, did not explain his decisions to his client so that informed decisions could be made, and blatantly lied to his client about trial strategy.

Federal courts have ruled that a defendant has a right to be involved in the decision process that will affect his life, See *Holmes v. South Carolina*, Supra.

D. (FACT 4) Defense counsel failed to file a motion to use testimony of Dr. Ray Hand

1. Dr. Hand would have presented critical aspects of the interview as seen from the defense and contradicted the perjured statements of Jessica Taylor. Presenting this testimony was a part of Petitioner's right to present a full defense as provided by law *Crane v. Kentucky*, 476 U.S. 683 (1986). Dr. Hand's testimony was admissible and he qualifies as an "expert witness" as defined by the OCCA in *Webster v. State*, 252 P.3d 259 (Okla.Cr.2011).

2. Trial counsel was deficient in that he did not refile the motion with the court. Any competent attorney would preserve this clear issue by doing so. However, as is the theme with this attorney, he failed to do so from inattention or negligence. By not submitting a motion to use Dr. Hand's testimony, the trial court's previous denial of the submission of this evidence was not preserved for appellate review in state court and was denied on direct appeal by the OCCA without review. Had it been preserved, Petitioner's direct appeal would likely have had a different outcome as the trial court's decision was contrary to that of the OCCA in previous cases¹⁴.

3. This conduct violated ABA Rule 1.1 (Competence) in that counsel failed to practice thoroughness and preparation; Rule 1.3 (Diligence) in that even the most minor diligence would require a simple reassertion of a previously argued issue to preserve it.

¹⁴ See *Dyer v State No. CF-2010-17* Brief of Appellant (Direct appeal Pg.34)

E. (FACT 5) Defense counsel failed to object to improper attacks against Petitioner's character.

1. Any competent attorney would recognize that a sexual abuse case without corroborating physical evidence would devolve into a credibility contest. They would recognize how critical it would be to both protect the defendant's character by objecting to inadmissible testimony and show that said testimony is perjured when it was offered if he had access to proof of perjury like current counsel did. However, counsel made no attempt to review Valerie's prior testimony or speak with Petitioner prior to trial concerning it in order to poke holes in the state's case.

2. Petitioner contends that counsel should have known that the State is barred by federal law from attacking the Petitioner's character, in order to establish probability of guilt. The Supreme Court has ruled that evidence of "evil character" weighs too much with the jury and causes them to pre-judge a defendant so that he is denied a fair opportunity to defend against a particular charge *Michelson v U.S.*, 335 U.S. 469 (1948). Ninth (9th) Circuit judge, Honorable Judge Alex Kozinski, wrote about psychological research showing that "*whoever makes the first assertion about something has a large advantage over everyone who denies it later*" and "*Later introduced evidence, even if pointing in the opposite direction, may not be capable of fundamentally altering that picture and may, in fact, reinforce it.*" 44 *Geo.L.J. Ann. Rev. Crim. Proc* (2015). Counsel should have recognized that this testimony would degrade all further testimony given by Petitioner. This testimony did not prove motive, propensity, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or to impeach. Additionally,

many of the actions that Valerie testified to happened nearly ten (10) years prior to the alleged crimes and before H.D. were even born.

3. It can't be said that failure to object was part of strategy as counsel had objected to it at the previous trial, stating that it was inadmissible and proved only that Petitioner was worthy of punishment. Counsel allowed Petitioner to be painted in a horribly violent and reprehensible light. It had no direct bearing on whether or not Petitioner molested H.D. and held no relevancy concerning reasons Valerie was angry at Petitioner or actions leading to the charges, as the testimony is proven false, yet the jury took it into deliberation with them and no doubt allowed it to degrade Petitioner's credibility when deciding who to believe.

4. This conduct violated ABA Rule 1.1 (Competence) in that counsel did not prepare reasonably for cross examination and impeachment of Valerie's testimony; Rule 1.3 (Diligence) in that counsel simply failed to object because he felt he would be overruled and did not preserve the issue for appellate review.

F. (Fact 6) Defense counsel failed to investigate prior testimony of witnesses in order to impeach them, failed to investigate critical evidence, and refused to ask questions presented to him by the Petitioner.

1. By not reviewing the prior testimony of Valerie Dyer and H.D., counsel sacrificed an opportunity to weaken the State's main witness's testimony. The court stated in McCall v. O'grady, 908 F.2d 170 (CA 7 1990):

"defense counsel has not represented the defendant to the satisfaction of the Sixth Amendment when counsel fails to pursue an impeaching cross-examination or present additional evidence that would in all reasonable probability cast a reasonable doubt on the testimony of the government's main...witness"

2. Any competent attorney could see that this was a credibility contest as the state had no physical evidence to present. Competent counsel would further agree that it would be critical to place doubt in the State's version of events by poking holes in the testimony, showing Valerie as committing numerous counts of perjury (See Attachment B), acting completely unreasonably, and stress that Petitioner was unable to discover possible exculpatory medical evidence due to the State's negligence. No reasonable attorney would refuse to review questions formulated by someone that was present at every hearing when counsel had attended none. No reasonable attorney would neglect reviewing prior testimony of witnesses, knowing that the credibility of the state's key witnesses were all that the case hinged on when the defendant had informed him of numerous inconsistencies and perjury. Counsel's conduct in failing to adequately prepare for cross-examination was deficient and not justified by trial strategy. To the contrary, it is obvious that during his direct and cross-examinations, counsel had no idea that he might elicit information that could be useful to the defense strategy. Furthermore, he made no attempt whatsoever to draw the jury's attention to the gaps in the State's evidence and show malicious prosecution. Trial counsel has wide latitude in deciding trial strategy. However, counsel blatantly misled his client in this case by agreeing to ask lines of questions and bring to the jury's attention certain evidence which counsel later flat out refused to do because he didn't understand the evidence and perjury involved. Counsel's negligent actions allowed the state's witnesses to be seen as credible by the jury when he could have easily shown they were perjured and unreasonable.

3. This conduct violated ABA Rule 1.1 (Competence) in that counsel did not prepare reasonably for cross examination concerning Dr. Waters or defense witnesses; Rule 1.3 (Diligence) in that counsel did not act with zeal in bringing facts to light but rather a lackadaisical attitude in which it was seemingly an inconvenience to him to prove perjury and negligence of the state; Rule 1.4 (Communication) as counsel misled his client about representation and what questions would be asked and strategy taken.

G. (FACT 7) Defense counsel was made aware of sleeping jurors and made minimal effort to resolve the issue

1. Competent counsel would recognize that a jury cannot make an informed decision if they don't hear the testimony or see the evidence. Counsel could reasonably request a recess when he saw jury members asleep, request the court to address the issue, or request a mistrial if it persisted. It was unreasonable that counsel would refuse to inform the court and would be angered by a defendant's concern of the issue. The fact that several jurors were asleep during testimony of multiple witnesses, and defense counsel did not inform the court was deficient and prejudiced Petitioner as it allowed jury members to miss critical points of testimony that they had no way to review during deliberation. This violated Petitioner's right to a fair trial as his life hung in the balance of these jurors.

2. This conduct violated ABA rule 1.1 (Competence) in that counsel should clearly know that having jury members sleep during critical testimony is an injustice to a defendant; Rule 1.3 (Diligence) as counsel wished to allow the jury to sleep rather than

inconvenience himself with alerting it to the court, only alerting the court when Petitioner threatened to cause him even greater inconvenience.

H. (FACT 8) Defense counsel failed to request proper jury instructions

1. Due to H.D.'s testimony being inconsistent, contradictory, improbable, and unclear; the defense testimony being corroborated; and evidence of malicious prosecution¹⁵; trial counsel should have requested that the jury be instructed on the need for corroboration. Trial counsel did not take adequate steps to become familiar with case law regarding rape cases. Because of this, Petitioner was convicted on uncorroborated testimony when corroboration is required by law¹⁶. Defense counsel further failed to request that an instruction be added that elected a crime on which to base a conviction¹⁷.

2. Any competent counsel would utilize the safeguards provided for by law and request these instructions. Counsel's conduct was not strategy because he was unaware of the laws concerning rape cases due to incomplete investigation of the law. Counsel failed to achieve a rudimentary understanding of well-settled laws of Oklahoma concerning rape. There is no plausible justification for failing to request instruction as counsel had nothing to lose and failed to use the law to strike at the heart of the state's case. Had

¹⁵ For details of H.D.'s testimony and the need for corroboration See Attachment A, the "Insufficient Evidence" claim Pgs.6-12 of this brief, and Pgs.4-7 of the Petition for Habeas Corpus ; For corroboration of defense See Petition for Habeas Corpus at Pgs.7-9; For proof of malicious prosecution See Attachment B

¹⁶ See *Ray v. State*, 762 P.2d 274 (Okl.Cr.1988)(Corroboration is required if the testimony of the Prosecutrix is contradictory, unclear, improbable, or inconsistent); See *Johnson v. State*, 182 P.2d 777 (Okl.Cr.1947)(Corroboration is required when there are indications of maliciously conspired prosecution); See *Cooper v. State*, 568 P.2d 1300 (Okl.Cr.1977) (Corroboration is required when the defendant denies the allegations against him and his testimony is corroborated)

¹⁷ See IAAC Sub Claim IV "Failure to Elect a Crime" Pgs.28-29 of the Petition for Habeas Corpus

counsel investigated the law and requested instruction, it is very likely that Petitioner would not have been found guilty because no corroboration existed as required by law, and the jury may not have agreed on a specific crime upon which to convict; the state's case was weak and the jury of the first trial could not agree on guilt. Trial counsel was remiss in not requesting these instructions and his failure was highly prejudicial to the extent that the fundamental fairness of the proceeding and the conviction was undermined. Had the jury been properly instructed, there is a very strong probability that the result of the trial would have been different.

3. This conduct violated ABA rule 1.1 (Competence) in that counsel did not have the knowledge and skill required to defend against a sexual abuse case and was not thorough in his research or investigation of this case.

I. (FACT 9) Defense counsel failed to present readily available evidence to overcome the State's motion in limine

1. The court ruled that no information concerning Valerie's uncle, James Hekia being a registered sex offender could be presented to the jury. The court stated that in order for the evidence to be presented, evidence must be presented of:

"acts or circumstances that tend to point to the victim's great uncle, James Hekia, other than mere circumstance that James Hekia has a felony conviction of indecent exposure, and failure to register as a sex offender" (See Attachment L)

2. Counsel could have overcome this motion as explained under Ineffective Assistance of Trial Counsel Fact 9 of the Application for Writ of Habeas Corpus. The fact that this evidence wasn't presented to the court and jury is negligent of Defense counsel as any reasonable attorney would have investigated the facts and recognize that

this evidence is compelling and would prove a direct link between H.D's disclosure and James Hekia. This evidence would likely have overcome the motion. This robbed Petitioner of his Constitutional right to present a full defense. There is no reasonable trial strategy involved in this decision. Rather, it is a product of counsel's failure to become familiar with and investigate the case as he did not link this evidence together.

3. This conduct violated ABA rule 1.1 (Competence) in that counsel did not investigate the facts of the case and did not know of evidence to overcome this motion.

J. (FACT 10) Trial counsel failed to fully advise Petitioner of the defense strategy when offered a 2 ½ year plea agreement by the State.

1. Petitioner contends that Defense counsel's complete disregard of Petitioner's trial strategy, while placating the Petitioner into believing it would be followed, was an unlawful hijacking of the case. This conduct violated ABA Rule 1.4 (Communication) to keep his client informed, abide by the client's decisions concerning objectives of representation, promptly inform the client of any decision to which the client's informed consent is required, reasonably consult with the client about the means by which the client's objectives are to be accomplished, and to explain matters necessary to permit the client to make informed decisions regarding representation. The Supreme Court has ruled that a defendant has a right to be involved in the decision process that will affect his life *Holmes v. South Carolina*, 547 U.S. 319 (2006)

2. In the face of this exculpatory evidence and testimony, it was reasonable for Petitioner to believe that he would not be found guilty as he wasn't found guilty in the previous trial in which some of this exculpatory evidence wasn't even available yet. Had

Petitioner known that counsel was going to alter the agreed upon strategy, he would have taken the plea agreement¹⁸. Trial counsel's performance in misleading Petitioner was clearly deficient as no reasonable counsel would lie to a client about trial strategy. The Supreme Court held in *Lafler v. Cooper*, 132 S.Ct. 1376 (2012) at pages 1383-1388 that:

"Where counsel's ineffective advice led to an offer's rejection, and where the prejudice alleged is having to stand trial, a defendant must show that but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the actual judgment and sentence imposed"

3. Petitioner presented an affidavit to the State courts confirming that he would have taken the plea agreement had counsel been truthful about trial strategy (See Attachment N). In said affidavit, Petitioner stated that the trial judge was present during the plea negotiations. As the judge was present during the negotiations and he had no adverse comments or response to the offer, there is a reasonable probability that the plea offer would have been accepted by the court. The offer's terms would have been less severe as Petitioner was convicted to serve twelve times, thirty (30) years, the amount of prison time he would have served had he known that counsel was misleading him and taken the two (2) and one-half (½) year plea to lewd acts with a minor.

4. The State Court's decision on this matter was contrary to or involved an unreasonable application to the Supreme Court decision in *Lafler id.*

K. Cumulative effect of counsel's deficient actions.

¹⁸ See Attachment N for the affidavit of truth by Petitioner stating that he would have taken the lesser charge and plea agreement had he known that counsel was misleading him about representation.

(a) The state court erroneously ruled that this claim was brought forward on direct appeal and was therefore waived under *res judicata*²¹. Petitioner contends that this claim was raised on direct appeal in name only. This claim is not the same as raised by Appellate counsel and Petitioner contends that counsel raised this claim inadequately. Petitioner contends that the elements of *res judicata* are not met as he was not afforded a full and fair opportunity to litigate this claim due to Appellate Counsel's failure to argue it sufficiently see *Plotner v. AT&T Corp*, 224 F.3d 1161 (10th.Cir.2000).

(b) The State Court's decision is based on an unreasonable determination of the facts in that the claims made by Petitioner, if true, prove that trial counsel was clearly deficient and that it prejudiced Petitioner. The fact that no hearing was held for this claim is unreasonable and shows that the fact finding process itself in this case is inadequate. The State Court made a clearly arbitrary and capricious ruling against Petitioner on this claim in favor for the state, regardless of facts presented.

III. THE TRIAL WAS INFECTED BY FALSE TESTIMONY (IAAC Sub Claim)

Petitioner's trial was so infected by false testimony as to render the verdict completely unreliable. This is a violation of Amendments 5 and 14 of the U.S. Constitution. See *Napue v. Illinois*, 360 U.S. 269 (1959).

1. The false testimony given by the State's witnesses is vast and encompassing. Every subject covered by the State's witnesses involving material facts, character and credibility, hearsay, custody issues, motive to fabricate charges, and witness threats and

²¹ See *Dyer v. State*, CF-2010-17 (District court's Order Of Summary Disposition filed Oct. 22, 2014) Pg.6 conclusions 10, 12-13, 26.

propensity to commit perjury is infected with testimony that has been proven false. Petitioner contends that had these perjured statements not been given or had the truth been elicited, it would have placed the case in such a different light as to undermine the confidence in the guilty verdict.

2. Petitioner contends that it's a miscarriage of justice for a man to have his freedom stripped by a trial so infected with false testimony. There can be no confidence in the outcome of a trial of this nature. The Supreme Court has held that trying a man in evidence and facts, devoid of false prejudicial testimony is implicit in any concept of ordered liberty, See *Napue*, Supra. The court stated in *Sanders v. Sullivan*, 900 F.2d 601, 607 (2nd.Cir.1990) that: "*Few rules are more central to an accurate determination of innocence or guilt than the requirement...that one should not be convicted on false testimony*". A rational fact finder, genuinely searching for the truth in this case would most assuredly want to know that Valerie had testified falsely and shown the propensity to falsely accuse Petitioner of crimes. The perjury in this case impeded the jury's ability to judge the evidence fairly and so infected the trial as to make it fundamentally unfair, and therefore, denied Petitioner of due process.

3. Had Appellate counsel raised this clearly meritorious claim on direct appeal and had the OCCA applied proper state and federal standards, Petitioner would have been entitled to a new trial. Because appellate counsel failed to do so, Petitioner was deprived of effective assistance of appellate counsel.

RELIEF CAN BE GRANTED IN ACCORDANCE WITH 28 U.S. § 2254(d)

1. The state court's decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings as it made no determination of the facts, whatsoever. The State never denied that its witnesses committed perjury nor that it caused an unfair trial. The record proves that the State's witnesses committed perjury and it's clear that this perjury was material to the jury's determination of guilt. This claim, if true, would require relief as the fundamental unfairness of the proceedings goes directly to heart of the case.

IV. FAILURE TO ELECT A CRIME (IAAC Sub Claim)

Petitioner was convicted in the absence of jury instruction that ensured a unanimous verdict as guaranteed by Amendment 5 and 14 of the U.S. Constitution. See *Estelle v. McGuire*, 112 S.Ct. 475 307 (1991)

ARGUMENT AND AUTHORITY

A. (FACTS 1&2). The jury was given instruction to convict Petitioner if they believed the Petitioner had raped H.D. between July 2009 to January 3, 2010. Federal law states that a general unanimity instruction may not suffice where there is a genuine possibility of juror confusion or that conviction may result from different jurors concluding that the defendant committed different acts. In a case such as this one, where it is a complex case and there are allegations of multiple crimes, the law demands that a conviction must be based on one sole act of intercourse, not any possible act over a six (6) month period. Though trial counsel fails to request a limiting instruction, the court is

required on its own to require the state to elect which offense to rely upon for conviction, which it did not do in the current case, rendering the trial unfair.

B. **(FACT 3)** Petitioner argues that rape is not a continuous offense and, while other acts of intercourse may be proven for the purpose of corroboration, a conviction must be based solely on one act of intercourse *Crawford V. State*, 688 P.2d 347 (Okl.Cr.1984). Additionally, even though trial counsel fails to request a limiting instruction, the court is required on its own to require the State to elect which offense to rely upon for conviction *Beasley v. State*, 94 Okl.Cr. 353, 236 P.2d 264 (1951). In the instant case, there is no way to be certain that the jury agreed on a single offense. Some may have believed that the acts occurred during the Christmas break while not believing anything happened during the summer; other jurors may have believed that acts occurred during the summer and not Christmas break. In *King v White*, 839 F.Supp 718 that court stated:

The Constitutional rights of a defendant are violated when the “*conviction may result from different jurors concluding that the defendant committed different acts*” (Citing *Jeffries v. Blodgett*)

The 10th Circuit has generally adopted this decision, as have many other district courts. Oklahoma has adopted an exception to this rule **(FACT 4)** that states:

“*When a child of tender years is under exclusive domination of one parent for a definite and certain period of time and submits to several acts at that parent’s demand, the separate acts of abuse become one transaction within the meaning of the rule governing the requirement that the state elect which offense it will prosecute*” *Gilson v. State*, 8 P.3d 883 (Okl.Cr.2000)

In its response to the Post-conviction application²², the State argued that this rule applies to the instant case. However, **this assertion is based on an unreasonable determination of the facts** as explained under **(Fact 5)** of the Application for Writ of Habeas Corpus Pgs.28-29 .Had Appellate counsel raised this clearly meritorious claim on direct appeal and the OCCA had applied proper state law standards, Petitioner would have been entitled to a new trial. Because appellate counsel failed to do so, Petitioner was deprived of effective assistance of appellate counsel.

RELIEF CAN BE GRANTED IN ACCORDANCE WITH 28 U.S. §2254(d)

1. The state court's decision was contrary to, or involved an unreasonable application of clearly established federal law in *Estelle* id, in that the jury instruction did not ensure a unanimous verdict. The State court's decision on this matter does not reflect that it's decision was based on any standard which is similar to that of *Estelle*. In fact, to deny relief on this ground, in light of the facts, the court would have to make a decision contrary to that of *Estelle*.

2. Assuming *arguendo* that the court actually made a decision on the merits and actually applied the standard set forth in *Estelle*, the decision was based on an unreasonable determination of the facts. In order to decide in the State's favor, the court must find that H.D. were in the sole custody and care of Petitioner during the alleged crimes (July 2009 – January 2010). The record proves absolutely and definitively that

²² See Dyer v State No.CF-2010-17 State's Response to Petitioner's motion to Amend/Supplement Pleadings Pgs.11-13 filed Oct. 14, 2014.

Petitioner had no contact with H.D. for a 6 month period, during this timeframe and that any decision to the contrary is unreasonable.

V. PROSECUTORIAL MISCONDUCT (Sub Claim)

Petitioner's conviction was obtained as a result of prosecutorial misconduct. This violated Petitioner's right to a fair trial and due process as guaranteed by Amendment 5 and 14 of the U.S. Constitution. See *Darden v. Wainwright*, 477 U.S. 168 (1986)

ARGUMENT AND AUTHORITY

In this case, the State of Oklahoma committed numerous acts of misconduct during the trial, including four (4) misstatements of material fact, seven (7) statements of personal belief, and allowed witnesses to commit perjury on seventeen (17) separate occasions. The Supreme Court has stated that the prosecution is not at liberty to strike foul blows as in this case; when a State uses perjured testimony to convict a man, it is a particularly reprehensible miscarriage of justice; and that a prosecutor is a minister of justice, not a one sided advocate. In *Titus v Robert*, 951 F.2d 1011 (9th.Cir.1991), that Court recognized that "*The force of a prosecutor's argument can enhance immeasurably the impact of false or inadmissible evidence.*". Petitioner contends that prosecutorial misconduct carries with it the presumption that the errors are harmful and the burden to prove beyond a reasonable doubt that they are harmless is placed upon the State, See *U.S. v. Pulido-Jacobo*, 377 F.3d 1124 (10th.Cir.2004). The Prosecution in this case: (A) mislead the jury about Valerie's motive to fabricate charges against Petitioner, her committing adultery, Petitioner's dedication to his family, and H.D.'s opportunity to name other suspects; (B) stated as uncontroverted fact that the Petitioner and his

witnesses were lying, that H.D. was telling the absolute truth, that H.D. was sexually abused, and that the Petitioner was the abuser; (C) allowed witnesses to lie about the events surrounding disclosure, Valerie's drug use, her willingness to lie and use law enforcement as a weapon against Petitioner, and mask Valerie's motive to fabricate charges. The State of Oklahoma cannot prove that these numerous and highly prejudicial statements were not harmful and had no effect on the jury's determination of credibility and guilt beyond a reasonable doubt. There can be no doubt that had these errors not been allowed, the outcome of the trial would have been different. These acts of misconduct went directly to the credibility of witnesses and concerned issues of material fact that no doubt infected the entire trial process as to impede the jury's ability to judge the evidence fairly.

A. (FACT 1) The Prosecutor's misstatements of material facts were used to obtain Petitioner's conviction, violating his right to a fair trial and due process. See *Berger v. U.S.*, 295 U.S. 78 (1935)

1. The Prosecutor's argument is likely to have a significant persuasive force with the jury and they, no doubt, gave special weight to the State's arguments. The U.S. Supreme Court in *Berger v. U.S.*, supra, stated that "*While [the Prosecutor] may strike hard blows, he is not at liberty to strike foul ones...*", also stating that intentional misstatement of evidence is particularly reprehensible. The intentional misstatements made By the State go directly to the material facts of this case, persuading the jury that there were no issues of custody or visitation in question, insinuating that the defense theory of false charges is an air defense; that Valerie was truthful, did not commit adultery, and did not use drugs; that H.D. was given opportunity by Jessica Taylor to point out an alternate perpetrator of

abuse; and that the Petitioner was an uncaring father that felt no responsibility to his family. All of this was untrue and was not supported by any other evidence than testimony that the Prosecutor knew was perjured.

B. (FACT 2) The Prosecutors improperly expressed their personal beliefs and opinions as to the truth or falsity of testimony used to obtain Petitioner's conviction, violating his right to a fair trial and due process. See *U.S. v. Young*, 470 U.S. 1 (1985)

ARGUMENT AND AUTHORITY

1. These comments are forms of unsworn, unchecked testimony that exploits the influence of the District Attorney's office and removes the State from its role as an impartial truth seeker. This testimony presented that it was **uncontroverted fact** that H.D. and Valerie were telling the truth during their testimony, that the Petitioner was lying, H.D. was definitely sexually abused, and that the Petitioner was definitely guilty, shifting the burden of proof to the Petitioner. The prosecutors wrongfully used their personal reputation and the office of the District Attorney to guarantee to the jury that their witnesses were telling the truth, that the defense witness was lying, that H.D. was definitely sexually abused, and that the Petitioner had definitely sexually abused her. The U.S. Supreme Court has long held that this very conduct is not allowed in *Berger v. U.S.*, 295 U.S. 78 (1935) stating: "*Improper suggestions, insinuations, and especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.*"(emphasis added). The prosecutor's misconduct effectively decimated the Petitioner's credibility when the credibility of Petitioner and H.D. was the only real issue. In light of the fact that the state offers no physical evidence

of guilt, this misconduct was especially egregious. This misconduct rendered the trial fundamentally unfair.

C. (FACT 3) The prosecutor knowingly used perjured testimony to obtain a conviction, the prosecution knew or should have known the testimony was false, and prejudice resulted in violation of Amendment 5 and 14 of the U.S. Constitution. See *Napue v. Illinois*, 360 U.S. 264 (1959)

ARGUMENT AND AUTHORITY

1. The U.S. Supreme Court ruled in *Napue*, supra that the prosecutor has a duty to correct false evidence when it's offered. In *U.S. v. Augers*, 427 U.S. 97 (1976) the Supreme Court stated:

"...if the prosecutor knew or should have known that testimony given at trial was perjured, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."

In *U.S. v. Bagley*, 473 U.S. 667 (1985), the Supreme Court stated that the knowing use of perjured testimony involves a "*corruption of the truth-seeking function of the trial process*". Additionally stating in *Mooney v. Holahan*, 294 U.S. 103, 112 (1935) :

"...when a conviction is obtained by the presentation of testimony known to prosecuting authorities to have been perjured, due process is violated." " ...if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance...is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."

2. The State's knowing use of perjury presented under this claim impeded the jury's ability to judge the evidence and credibility fairly. There was over thirty instances of perjury during trial but the State had the ability and duty to correct the instances

presented in this claim. Had the truth been elicited by the State, there is a reasonable likelihood that the outcome of the trial would have been different. These instances were significant and prejudicial to the defense.

RELIEF CAN BE GRANTED IN ACCORDANCE WITH 28 U.S. §2254(d)

1. The state court's decision was contrary to, or involved an unreasonable application of clearly established federal law in *Darden, Berger, Young, and Napue* in that the state court did not apply any of these federal standards in adjudicating this case. The State did not reply to the merits of this claim and neither denied that the prosecutors made the alleged comments, that they were improper, nor that they adversely affected the outcome of the trial. On the contrary, the record shows that no lawful adjudication was made, but rather the state courts made an arbitrary and capricious decision to simply deny relief without reason. The only ruling or mention of prosecutorial conduct was in the district court's 5 word denial "*there was no prosecutorial misconduct*"²³.

2. The state court's decision was undoubtedly based on an unreasonable determination of the facts as the record shows that there was, in fact, no determination made (The fact finding process itself is inadequate to satisfy due process). The record reflects that the state clearly conducted itself improperly and neither the state nor the court has suggested that these errors were harmless.

²³ See *Dyer v. State*, CF-2010-17 (District court's Order Of Summary Disposition filed Oct. 22, 2014) Pg.10 conclusions 26

VI. THE COURT ALLOWED IMPROPER HEARSAY (IAAC Sub Claim)

The trial court allowed improper hearsay in the form of testimony regarding disclosure of H.D., a video forensic interview, and testimony concerning the interview violating Petitioner's right to confrontation and due process under Amendments 6 and 14 of the U.S. Constitution. See *Crawford v. Washington*, 541 U.S. 36 (2004).

Petitioner contends that had appellate counsel argued this claim on direct appeal, and had the OCCA applied the proper state and federal standards, that the outcome of the proceedings would have been different.

A. The Court Erred in Allowing Valerie to Testify to Hearsay Statements of H.D. Concerning Disclosure

1. (FACT 1) As the record reflects during Valerie's testimony (T3.77), the court allowed this hearsay testimony because H.D. was ruled "Unavailable" as a witness under 12 O.S. 2804 (A)(1) which states:

"Unavailability as a witness...includes the situation in which the declarant... is exempt by ruling of the court on the ground of privilege from testifying concerning the subject matter or of the declarant's statement"

2. (FACT 2) However, under 12 O.S. 2803.1(A)(2)(b), a statement from a child under thirteen (13) years of age that is unavailable as defined in section 2804 "may only be admitted if there is corroborative evidence of the act." By Oklahoma common law "There must be evidence corroborating that [Petitioner] was the perpetrator of the act, not only that the act of abuse took place" See *Spotts v. State*, 790 P.2d 539 (Okl.Civ.App.1989). In the instant case, there is no corroborative evidence that a crime even occurred, let alone that Petitioner was the perpetrator of such act.

3. (FACT 4) Beyond this, had there been corroboration, "A statement may not be admitted under [12 O.S. 2803.1] unless the proponent of the statement makes known to

the adverse party...the particulars of the statement at least ten (10) days in advance”(12 O.S. 2803.1). The particulars of these statements were not made known. Petitioner was prejudiced because, if they were made known, Petitioner would have researched prior testimony to impeach Valerie through her own statements and H.D.’s interview. Specifically, Valerie testified that the first time she inquired of H.D. about what was wrong with her was at home in the bathtub and nothing of the rest of this concocted chain of events is ever mentioned (DH.10) prior to the third trial.

B. (FACT 7) The Court Erred In Allowing Out-Of-Court Video Testimony of H.D.

1. Petitioner objected to the use of the out of court video testimony before trial. On April 12, 2011 the court overruled the defense and allowed the testimony subject to availability of declarant. This objection and overruling continued to the third trial as reflected on Petitioner’s motion to dismiss the case, decided April 4, 2012 in which the court stated *“the Court’s previous rulings as to such previously presented and argued motions remain in full force and effect”*.

Petitioner contends that by allowing the video interview to be seen by the jury, his confrontation rights were violated as there was no indicia of reliability. To prove this, Petitioner will demonstrate that the district court violated the State’s own law which guarantees said reliability.

2. **(FACT 3)** Under 12 O.S. 2803.1(A)(1), the court is required to hold a hearing to determine that the time, content and totality of circumstances surrounding the taking of the statement provide sufficient indicia of reliability so as to render it inherently

trustworthy. Though the court found on April 12, 2011 that the video interview had sufficient indicia of reliability, this ruling was arbitrary and did not comport with the law. Petitioner contends that the court did not actually weigh the circumstances surrounding the video. In *F.D.W. v State*, 80 P.3d 503 (Okl.Cr.2003) the OCCA stated: “*Trial courts are required to state for the record the particular facts and circumstances supporting their findings that hearsay statements of children relating to physical or sexual abuse are reliable*”.

3. (FACT 6) The State of Oklahoma concedes that the Court made no specific findings as required by law²⁴. Had the Court made specific findings, it would have found that the statements were taken ten (10) days after the alleged disclosure, described events and details which were impossible and inconsistent with physical evidence, was taken during a heated divorce on the day subsequent to Valerie sending a vengeful message to Petitioner and his girlfriend, was taken within eighteen (18) hours of mass amounts of pornography being downloaded on Valerie’s computer, was descriptive of said pornography, that it contains conflicting and unclear testimony, and is so confusing that the even interviewer did not even understand what H.D. was alleging (T1.47-50).

4. H.D. was found to be an unavailable witness under 12 OS §2804. As such, according to 12 OS §2913(A)(2)(b), the video cannot be admitted unless there is corroboration of the crime charged. Because there is none in the current case, the video was admitted in violation of law and without a guarantee of trustworthiness or reliability.

²⁴ See *Dyer v State*, No. CF-2010-17 State’s Response To Petitioner’s Motion To Amend / Supplement Pleadings page 31 filed Oct. 14, 2014

C. (FACT 7) The Court Erred In Allowing Jessica Taylor to Testify on Hearsay Statements Regarding the Out-of-Court Video Testimony of H.D.

1. Forensic interviewer Jessica Taylor testified to hearsay statements made to her during the video interview with H.D. The Court should not have allowed this testimony as it failed to make a record of particular facts and circumstances in which it found an indicia of reliability as required by *F.D.W. v State*, supra.

2. Additionally, under 12 O.S. §2803.1(A)(2)(b), Taylor's testimony cannot be admitted unless there is corroborating evidence, which there is none. Beyond this, had there been corroboration, "*A statement may not be admitted under [12 O.S. 2803.1] unless the proponent of the statement makes known to the adverse party...the particulars of the statement at least ten (10) days in advance*"(12 O.S. 2803.1). The particulars of these statements were not made known and the defense was unable to prepare to impeach the witness based on her perjured testimony.

PREJUDICE AND CITATION

1. Petitioner contends that allowing the jury to hear the statements by Valerie Dyer improperly persuaded the jury into believing H.D. was emotionally traumatized coming directly from Petitioner's home and then disclosed abuse the evening she returned to Valerie's home, though this testimony was untrue. Improper admission of the video interview gave no definitive specifics of abuse and aided only in confusing the jury about possible abuse and dates. The improper admission of Taylor's testimony allowed the jury to take perjured and nonexistent statements into deliberation which falsely led them to believe H.D. was able to describe Petitioner's penis, ruled out any other perpetrator, and

described specific sexual acts that Petitioner did to her. In *Paxton v. Ward*, 199 F.3d 1197 (10th.Cir.1999), the court stated that when hearsay statements do not fall within firmly rooted hearsay exceptions “*they are presumptively unreliable and inadmissible for confrontation clause purposes and must be excluded, at least a showing of particularized guarantees of trustworthiness*”. In this case, the state court record does not show sufficient predicate to rationally support any determination that this evidence fits within the exception to the hearsay rule and its admission rendered the trial proceedings fundamentally unfair.

RELIEF CAN BE GRANTED IN ACCORDANCE WITH 28 U.S. §2254(d)

1. The state court’s decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. The court ruled that it had established reliability of this testimony but the record belies this conclusory statement. The record clearly shows that the procedural safeguards to ensure reliability were not followed and that the statements could in no way have a guarantee of trustworthiness based on the circumstances surrounding them and the fact that they are contradictory, inconsistent, confusing, or out-right perjured. No reasonable determination of the facts would lead to a finding that the Petitioner was not denied his right of confrontation due to the facts above.

**VII. THE DISTRICT COURT ERRED IN NOT SUSTAINING
DEFENDANT’S DEMURRER (Sub Claim)**

Petitioner’s conviction was obtained by fundamentally unfair means. This violated the guarantees of Amendment 5 and 14 of the U.S. Constitution.

ARGUMENT AND CITATION

1. The court's failure to sustain the motion was arbitrary and capricious. Petitioner asserts that the trial court has a duty to advise the jury to return a verdict of acquittal or dismiss the case when the State fails to present a prima facie case that could not be sustained by the court upon a finding of guilt. The court's arbitrary ruling allowed the prosecution to tie up loose ends in its case by presenting increasingly perjured and improbable testimony over the next two (2) trials.

2. At the April 2012 trial, the situation was similar. H.D. was found unavailable by the court (See Valerie's testimony at T3.77) and there was no corroboration of the crime. However, the court improperly allowed the video forensic interview to be played once again. At the close of the State's case, the proper evidence amounted to the testimony of H.D. which was uncertain of what she said during the video was correct and did not testify about the specifics of abuse or explain the inconsistencies in the video. The Defense put forth a demurrer to the evidence which the court, once again, denied arbitrarily. This arbitrary denial allowed the Petitioner to be found guilty and sentenced to thirty (30) years imprisonment. The court's abuse of discretion denied the Petitioner's right to due process and to be convicted on evidence beyond a reasonable doubt as guaranteed by Amendments five (5) and fourteen (14) of the U.S. Constitution.

RELIEF CAN BE GRANTED IN ACCORDANCE WITH 28 U.S. §2254(d)

1. The State court's determination that there was sufficient evidence for the trial judge to have not abused his discretion by arbitrarily overruling the defense motion to demurrer is based on an unreasonable determination of the facts in light of the evidence

presented in the state court proceedings. The properly admitted evidence does not create a prima facie case in which should be presented to a jury.

Ground Two

EVIDENCE OF EVIL CHARACTER WAS IMPROPERLY ADMITTED

Petitioner's trial was infected with irrelevant, prejudicial evidence of evil character, thus violating Petitioner's right to due process guaranteed by Amendments 14 to the U.S. Constitution. This testimony resulted in a fundamentally unfair trial proceeding.

ARGUMENT AND AUTHORITY

1. The District Court barred this claim under *res judicata*, due to the fact that it had been previously argued on Direct appeal and denied by the OCCA²⁵. However, this argument was not identical to that argued on direct appeal as appellant counsel failed to recognize that the time frames of this evidence was up to 12 years prior to the alleged crime and that evidence existed which proved these statements as perjured, making them irrelevant or their probative value severely outweighed by prejudice.

2. The State will likely argue, as it did in the direct appeal, that Petitioner intended to call witnesses to testify to Valerie's hatred toward him, issues relative to Valerie's animosity, and Petitioner's family relationship with H.D. The State argued in the direct appeal that the defense witness list proved that the defense intended to introduce this exact testimony to prove Valerie was "an angry and scorned wife and she invented the accusations against Petitioner, and coached H.D. to accuse him of sexually abusing her". This contention is ludicrous because it would require the defense to elicit perjured

²⁵ See *Dyer v. State*, CF-2010-17 (District court's Order Of Summary Disposition filed Oct. 22, 2014) Pg.6 conclusions 10, 12-13, 26.

testimony that, unlike the State, it had no intention of doing. The defense intended to offer testimony and evidence to prove that Valerie hated Charles because he threatened to gain custody of H.D., filed for divorce against her, informed her boyfriend of her cheating and drug use, and began a relationship with Amanda Monsalve. All of this testimony concerned actions between June 2009 – January 2010, roughly 6 months prior to the allegations and included absolutely nothing concerning Petitioner's bad acts toward Valerie or H.D. 2-12 years prior to the allegations and completely irrelevant from the issues of the case.

3. None of this testimony had any relevance, whatsoever, to whether or not the Petitioner committed the crime charged or any matter asserted by the state. Beyond the relevance, these supposed acts occurred up to 12 years prior to the allegations. The only acts that allegedly occurred after 2008 were Valerie's testimony that Petitioner abandoned Valerie and H.D. in OK. With \$126 (T3.47) and Petitioner never sent money to help (T3.50), which is proven false in Attachment B; Petitioner never called to speak to H.D. (T3.48, 52) which is proven false by her own testimony at (T2.61); and Valerie's testimony that H.D. was in Petitioner's way and he wanted a divorce in January 2009 (T3.51) which is proven false by Skype messages (See Attachment B Section VII). Thus, the only evidence of bad character from alleged acts after 2008, that was presented to the jury, are proven false. Valerie lied about all of these acts and her heart-felt teary eyed account of Petitioner denying her family access to H.D.'s birth, which was proven perjured during trial, is testament to both her ability and propensity to offer false testimony to prejudice Petitioner.

4. Petitioner asserts his right to be convicted only on the evidence against him and not on perjured testimony with no relevance to whether or not he raped H.D., but rather only to show that his character is in conformity with a man who would commit the crimes charged without regard to morality, right and wrong, or the suffering of others.

5. By allowing this plethora of improper testimony, the court has allowed evidence to be admitted against the accused which has no basis in truth, relevance, or avenue to defend against it. This improper evidence is not clearly proven, is not probative of any material fact that has been admitted to prove, distracts from the central issues of the trial, and very likely contributed to an improperly biased verdict. This evidence is irrelevant and very likely poisoned the minds of the jurors against Petitioner so as to produce an fair and impartial trial and unquestionably played a role in the sentence given.

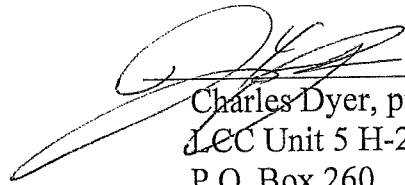
RELIEF CAN BE GRANTED IN ACCORDANCE WITH 28 U.S. §2254(d)

1. The State Court's denial of this claim is an unreasonable determination of the facts. As discussed above, Petitioner had no intention of eliciting this perjured testimony and any reference to it during questioning was in response to what had already been elicited on direct examination. To suggest that these statements were probative or relevant is not merely wrong, but is completely unreasonable and even ridiculous in light of the facts. None of this testimony was elicited to ascertain truth of any matter asserted and were perjured. This is completely contrary to the very purpose of a trial which is to find truth.

VERIFICATION AND CERTIFICATE OF SERVICE

I declare under penalty of perjury that the foregoing is true and correct and that this Supporting Brief of Petition for Writ of Habeas Corpus was placed in the prison mailing system on this 11 day of August, 2016 to the following addresses:

Court Clerk
U.S. Courthouse
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