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

CHARLES ALAN DYER Petitioner, v. JIM FARRIS, Warden, Respondent.	Case No. CIV-16-941-C

PETITIONER'S TRAVERSE TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2016, I served the attached document by mail on the following:

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I. ISSUES THAT THE STATE FAILS TO CONTEST

De Novo review request

Though the state generally alleges in a round-about way through its quoting of the state court's decision that there was a review of the merits, it remains silent as to Petitioner's allegations that a *De novo* review is required. Specifically the merits review of post conviction claims was barred by the lower court simply because it was not brought up on Direct appeal; the lower court stating that relief would be denied, "**regardless of merit**" in an exact quotation that has been repeatedly rebuked by the 10th circuit[1].

[1] See Petitioner's Original Habeas Corpus Supporting Brief at Pg. 4

The state is silent regarding the fact that it never responded to numerous claims during the post-conviction proceedings, yet the state court commended them on its great job at doing so, none-the-less[2]

The State is silent in regards to the State court holding the Petitioner to a higher standard than federal law allows by denying Petitioner's Ineffective Assistance of Appellate Counsel claims due to the fact that Petitioner was unable to tell the court exactly why appellate counsel did not bring the claims up on direct appeal.[3]

Insufficient evidence Claim

The State is silent on Petitioner's assertions that this claim was erroneously barred by *res judicata* during post-conviction proceedings[4] as it was not actually argued on direct appeal as the court claimed. The State neither pointed out where it had actually been raised previously, where the court did a sufficient *Jackson* review, nor where any review on the merits had been reached.

Petitioner alleged that Oklahoma case law dictates that corroboration is necessary in certain instances to find a defendant guilty beyond a reasonable doubt. Specifically, when the defendant testifies and is corroborated and when there is evidence of malicious prosecution[5]. The State has never denied through either state court proceedings or in its response to this Habeas that both of these instances should be applied in this case. Further, the State turns a blind eye to the fact that state law clearly prohibits the medical

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[2]See Petitioner's Original Habeas Corpus Supporting Brief at Pg. 4
[3] See Petitioner's Original Habeas Corpus Supporting Brief at Pg. 5
[4] See Petitioner's Original Habeas Corpus Supporting Brief at Pg. 2-3 (Section 1(b))
[5] See Johnson v. State, 182 P.2d 777 (Okl.Cr.1947)(Malicious prosecution); Cooper v. State, 568 P.2d 1300 (Okl.Cr.1977) (Defendant is corroborated)

evidence from being considered as corroborative, and instead stubbornly attempts presents it as corroboration, regardless.

Though the state makes a general assertion that the testimony within the forensic interview is not contradictory of itself[6], it makes absolutely no attempt at argueing against Petitioner's specific allegations of contradictions. Additionally, the State makes no attempt to deny that the testimony of H.D. as a whole is inconsistent, contradictory, improbable or unclear or that it is contradictory of the testimony given by Valerie Dyer.

Ineffective Assistance of Trial Counsel

The State does not deny that the IAC claim was erroneously barred by *Res judicata* by the state court. The Court ruled that this claim was brought forward during direct appeal and therefore was barred from further review on Post-conviction. However, the 10th Circuit ruled *res judicata* in this circumstance improper in *U.S. v. Galloway*, 56 F.3d 1239, 1241-42 (10th.Cir.1995) when it stated:

"*Fact that [IAC] claim is raised and adjudicated in direct appeal will not procedurally bar an ineffectiveness claim in collateral proceeding where new instances of ineffectiveness are advanced in support of claim*"

The state neither denies the relevance of this decision nor offers any other citation in contradiction to Petitioner's assertion.

[6] See State's Response to Petition for Writ of Habeas Corpus Pg. 28

Advice of trial counsel regarding alleged plea offer

The State erroneously argues that this claim was not presented on post-conviction proceedings[7]. This assertion is factually erroneous as the record reflects that this claim was presented to all levels of state court on post-conviction application[8] . Being such, the State never argues against the merit of this claim. As the State court erroneously denied this claim on *Res judicata* and the State has NEVER denied that this claim has merit, it is clearly deemed confessed by the State of Oklahoma.

Weight and credibility left to the jury

In Petitioner's Habeas application, he asserts that it is a miscarriage of justice for this court to turn a blind eye to the inconsistencies, contradictions, and outright perjury committed by the state's witnesses on the justification that it is the sole providence of the jury to determine weight and credibility. Petitioner asserted that in *U.S. v. Jones,* 49 F.3d 634 that the 10th circuit ruled that the court has a duty not to turn its back on this type of testimony[9]. The State offered no citation or argument contesting this assertion in its response.

District Court's error in not sustaining Defendant's demurrer

Though the State argued that the Demurrer was proper for the third trial, it remains completely silent as to the demurrer at the first trial. At the first trial, there was no evidence, properly admitted, to prove even a suspicion that a crime had even been

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[7] See State's Response to Petition for Writ of Habeas Corpus Pg. 55-59

[8] See Petitioner's Original Brief in Support of Post-conviction application filed April 34, 2014 at page V19 sub proposition xi. Petitioner then presented this claim to the OCCA in his Appeal Brief filed June 1, 2015 at Pg. 13. Sub proposition 11 and requested that the court review the merits of his original brief in footnote 29.

[9] See Petitioner's Original Habeas Corpus Supporting Brief at Pg. 12

committed. However, the court erroneously allowed the forensic interview in violation of law and then denied a demurrer that it had a duty to sustain. This outright and flagrant abuse of the court's power and discretion allowed the state to retry the Petitioner when double jeopardy should have been attached and petitioner should have walked free. Instead, the State was afforded an unjust opportunity to fabricate testimony to fill holes in its case at the first trial, which it took advantage of liberally. The State of Oklahoma makes no argument against this claim.

II. GROUND ONE INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

The State conveniently sidesteps Petitioner's claim that no merits review of the IAAC sub propositions was actually done. It ignores the evidence presented by the Petitioner in hopes that this court will as well. The State offers no rebuttal to the fact that the state court's ruling was word for word identical to what the 10th circuit has consistently condemned the Oklahoma courts for ruling in the past[10].

Insufficient Evidence

The State argues that the jury believed H.D. to be credible. The jury surely believed H.D. because the State failed to present to the jury, as it is attempting to hide from this court, that H.D.'s testimony was in conflict with previous testimony and that of her mother, even to the extent that said testimony varied so dramatically as to alternatively raise and dismiss the entire case. The State cannot deny that H.D. even testified at the first trial that she wasn't abused during her stay with her father (T1.16).

[10] See Petitioner's Original Habeas Corpus Supporting Brief at Pg. 2-6

The State argues that the video interview is credible and goes into detail of what H.D. describes. However, the State stays far away from Petitioner's argument that what H.D. says coincides exactly with the pornography downloaded and viewed the night prior to her interview. And though the State throws up smoke and mirrors on this issue by arguing that a computer can be hacked and that it was downloaded on the "Charles Dyer" account, and that Valerie wasn't the one that viewed this pornography, facts prove differently. The State offers no iota of proof that Petitioner had the knowledge to hack a computer or offers even a scintilla of evidence that he did so. Further, anyone using the computer did so under the "Charles Dyer" account because it was the default account. The State offered evidence that the Petitioner had no access to the computer for over a year. Lastly, Petitioner presented evidence in his post-conviction and Habeas Applications that place Valerie at the computer during the viewing of this pornography and using the "Charles Dyer" account by her own admission.

Throughout the State's response it claims that the medical exam by Dr. Waters corroborates the charges. The State offers no other corroborative evidence. This is problematic for the State for the following reasons: (1)The state agrees that the medical examination is only "suspicious" and does not rise to a "definitive" conclusion that sexual abuse even occurred. (2)The State's admission on this issue causes its claims of corroboration to be dead on arrival as state law is clear that a "*Medical exam cannot be considered as corroborative where it does not definitively show sexual abuse occurred or that defendant is the perpetrator of abuse*" see *DeArmond v. State*, 285 P.2d 236. The State offers no citation to the contrary.

The State argued that the jury has exclusive providence of determining weight of evidence. However, it is silent on Petitioner's assertion of *U.S. v. Jones*, 49 F.3d where it clearly states that the court has a duty to review testimony such as is presented in this case.[11]

Petitioner has proven that this claim was erroneously barred by *res judicata* which the State makes no attempt to deny, allowing a *de novo* review by this court. Further, by the Sate's admission, there is no corroboration to the crime charged. The State and Petitioner are only in disagreement as to whether the evidence reviewed by this court, and not available to the jury, is sufficient to warrant the conviction.

Ineffective Assistance of Counsel

(A) The State's argument that counsel was not ineffective for failing to object to hearsay and inflammatory testimony asserts only that the testimony was properly admitted. The State ignores the evidence offered by Petitioner that these statements were perjured and that counsel had readily available evidence to prove this[12]. If this testimony is false, counsel had evidence in his possession that it was false, and he failed to offer evidence to counter this damning testimony, then he was clearly deficient. The State cannot possibly argue that this evidence didn't prejudice the Petitioner and instead simply argues that it was properly admitted.

(B) The State alleges that the prosecutors comments were proper which Petitioner argues against on pages 14-15 of this traverse.

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[11] See argument presented in Petitioner's Original Habeas Corpus Supporting Brief at Pg. 12

[12] See Petitioner's Original Habeas Application Pg. 17 Fact 1 (iii) and Evidence Attachment B.

(C) The State argues that the testimony of the witnesses, besides agent Raines, was given at the first trial and Petitioner fails to show the result of the trial would have changed had they testified at the third trial. However, the State ignores the critical fact that this very testimony **DID** result in a different outcome at the first trial as Petitioner wasn't found guilty.

The state argues that the OCCA is entitled to a presumption of correctness of its determination of facts that the record shows that not calling the witnesses was a strategic decision, the testimony was admitted through other witnesses, and it had little relevance to the issues at trial. Further stating that Petitioner failed to present "any evidence" to overcome this presumption. The Petitioner presented clear and convincing evidence, however, that the jury never knew that H.D. described surroundings that were not found in Petitioner's home but were viewed on pornography the night before; that police reports prove Valerie made no report until 5 days after H.D. left Petitioner's home; Valerie's computer was used to research child sexual abuse before the alleged crime happened and was used to view pornography the night prior to H.D.'s forensic interview; and that the pornography viewed was an exact mirror of what H.D. described. To say this evidence was presented at trial or that it had no relevance is clearly unreasonable. The computer evidence and evidence of malicious prosecution alone would place such doubt in the Jury's mind that it would clearly have resulted in a different trial outcome in light of the weak evidence presented by the State.

The State's claims of these witnesses are simply unreasonable and are utilized as a smoke screen to cloud this court's assessment. The State downplays the date of disclosure

which is so critically important to the case because it proves that Valerie's entire testimony concerning H.D.'s demeanor leaving Petitioner's home was completely fabricated maliciously to have Petitioner convicted. It shows malicious intent to research and fabricate charges and then coach H.D. into following Valerie down this road of false accusations. The argument that Valerie's claims of prior abuse being prejudicial and the reason for strategically not proffering evidence that proves the defense's case while destroying the State's case is not only unreasonable but borderline ludicrous.

Concerning the DNA evidence, the State relies on incorrect facts. The State argues that the fact that H.D.'s DNA was not found on her own panties would call into question the testimony of Monsalve that the pajamas were worn by the child for 3 days and not laundered during the alleged abuse. However, the OSBI only tested **STAINS**. H.D.'s panties were not devoid of her DNA as the State claims, but was, in fact, never tested by the OSBI for DNA because no stains were present. The significance of this can't be understated in that semen or blood would undoubtedly seep into H.D.'s panties had she been raped as the State claims and this was testified to by Dr. Waters. The State further attempts to throw a smokescreen up concerning a jail phone conversation. What the State fails to include is the context of this conversation. It was concerning the practice of Amanda and Petitioner cleaning themselves after sex with the contents of the dirty clothes hamper. Being that Petitioner and Amanda both cleaned themselves after intercourse the night before clothing was taken from the hamper, it was a valid concern. But since no incriminating DNA was found, this is a moot issue used by the State to distract the court from the issues at hand.

The State further relies on incorrect factual assumptions concerning the computer evidence. It proffers evidence that Valerie's computer "could" have been accessed remotely but makes no attempt at offering even an iota of evidence that Petitioner did so or even would know how to do so. Additionally it states that the searches and pornography were conducted on "Petitioner's, not Valerie's" account. Ignoring however that Everything done on the computer was done on the "Charles Dyer" account as it had been the default account for years. Valerie admits to sending Amanda a myspace message on January 11th, 2010 which is shown by the OSBI report to have been done on the "Charles Dyer" account. So, by its own evidence, the State proves that Valerie used the "Charles Dyer" account.

The State asserts "The Rains [OSBI Report] appears to be cumulative of the Dutton testimony, and it is unclear how its additional information would support a IAC claim". It is only unclear to anyone that would intentionally close their eyes to the truth in order to sustain their ill-gotten conviction at all cost. The Raines report clearly and overwhelmingly proves that someone viewed pornography for 8 hours on the evening prior to H.D.'s forensic interview. The pornography viewed, as well as the settings and acts contained in said pornography, is described by H.D. the following day in exact detail, right down to the color of the pillows. Further, the Raines report places Valerie at the computer within minutes of this pornographic viewing. The Dutton testimony contained absolutely NONE of this highly relevant and critical evidence.

The State quotes *Sawyer v. Whitley* in stating that "*This sort of evidence that goes to the credibility of a witness generally will not change the result of a trial.*" What the State

leaves out, however, is that when the U.S. Supreme Court stated "*This sort*", it was referring specifically to that case in which the testimony complained of would only show that the witness was drunk prior to the day of a murder and that she testified under immunity (See *Sawyer* @ page 2524). The supreme Court specifically stated that the impeachment evidence in that case "*does not relate to Petitioner's guilt or innocence of the crime*". In the case at hand, the inconsistencies and perjury of H.D. and Valerie go to the heart of guilt or innocence and whether a disclosure ever happened at all. H.D. even states that Valerie first brought up the sexual abuse, that no abuse happened as charged, and that Valerie was untruthful about questioning her on the ride home from Petitioner's home[13].

The State argues that Petitioner fails to show what helpful testimony would be elicited from a medical expert witness. However, Petitioner stated specifically that an expert would show that Dr. Water did his exam in the incorrect position and the results cannot be relied upon because they must be confirmed in the proper position. Additionally, an expert would show that an incorrectly done exam can result in false findings of abuse. Petitioner did not speculate but rather proffered exactly what an expert would say based on numerous articles written by sexual abuse experts, which Dr. Waters was clearly not. As Petitioner is an indigent Pro se inmate with no family in the State of Oklahoma, it is impossible for him to search, acquire, and hire an expert witness while he is imprisoned.

[13] See Petitioner's Original Habeas Application FACT 1 Pgs. 4-5

F. Failure to impeach Valerie Dyer and H.D.

The State argues that "Petitioner offers nothing to support his claim that their testimony was perjured other than he disagrees with their testimony". Further stating that any evidence would go to credibility and is not prejudicial, citing *Sawyer*. Once again, *Sawyer* is moot as the testimony in this case goes to guilt or innocence (See page 10 for argument against sawyer). Additionally, the State's smoke screen is attempting to hide the fact that Petitioner presents specifically 47 counts of provable perjury by Valerie (See Attachment B filed with the Habeas application) with his application, and 50 statements by H.D. that range from inconsistent, improbable, uncertain, to downright impossible (See Attachment A filed with the Habeas application).

G. Sleeping Jurors

The State claims that there is nothing in the record to support this claim. However, Petitioner presented trial notes and an affidavit of truth that show Petitioner notified his attorney several times that jurors were sleeping. Petitioner attempted to get an evidentiary hearing in which the Judge and Defense attorney would confirm Petitioner's claim. Petitioner's request was denied at the State's request. Therefore, any lack of record is the design and fault of the state alone.

H. Failure to request jury instructions

The State argues that H.D.'s statements are not contradictory as to require corroboration under state law. This is clearly belied by the record (See Attachment A "Testimony of H.D." filed with the Habeas application). Additionally, the State argues that there is corroboration in the form of a medical examination. However, as discussed

on page 2 of this traverse, by the State's own admission, this exam is not corroborative (See *DeArmond v. State*).

False Testimony

The State argues that "*Petitioner presented nothing with his post-conviction application to show the testimony of the witnesses against him was false other than his disagreement with what they said*". However, this is an erroneous assertion of bad facts. Petitioner did, in fact, point out 34 specific counts of perjury committed by Valerie in Evidence item#25 filed with the post-conviction application (See also Pg II 9 and VI 1 of Original Brief in Support of Post-Conviction Application). Additionally, Petitioner pointed out 3 specific counts of perjury by interviewer Taylor (See Pages VI 1 and IV 15-16 of the Original Brief in Support of Post-conviction Application). Petitioner admitted 16 pieces of evidence including audio recordings, bank statements, financial agreements, online chats, police reports, and affidavits.

Though the State makes the *Augers* argument concerning the prosecution's knowledge on perjured testimony, this is moot. Petitioner doesn't allege an *Augers* argument on this claim, but simply argues that the existence of this perjured testimony caused a fundamentally unfair proceeding as it defies the purpose of a trial which is to find the truth of a matter.

Failure to elect a crime

The State is completely confused on this claim. The question concerns the "Exclusive domination" caluse from *Huddleston v. State*. The State is under the impresstion that "Exclusive domination" carries beyond when a parent no longer has a child. In other

words, if a parent had a child for a month, then had no contact for 8 months at which time the child is gained again for a month, the State believes that exclusive domination covers this entire 10 month period. The State believes that this is a single instance of "Exclusive domination". However, in this example, 2 instances of "Exclusive domination" have been created. 1 at the first 30 days of the period and 1 at the last 30 days. Charges can be filed over each of the 30 day periods without having to specify which specific day abuse occurred. However, charges cannot be filed over the entire 10 month period as there was no "exclusive domination" during this period as the parent didn't have the child at all for 8 months. This case is not like *Huddleston* because *Huddleston* involved only 1 instance of "Exclusive domination". The case at hand involves 2 separate instances.

Prosecutorial Misconduct.

A. The State contends that "Nowhere in the Prosecutor's closing argument did the prosecutor vouch for Valerie or H.D." Petitioner presents numerous counts in his application but the most compelling that Petitioner can leave in this court's mind is when the D.A. stated "Hayley's not lying". If this isn't vouching, there is no such thing in the world. Concerning the "uncontroverted" fact that H.D. was sexually abused; contrary to the State's assertion, Dr. Waters never testified to this but rather only to a suspicion of abuse.

B. Knowing use of perjured testimony

The State argues "Petitioner has presented nothing, other than his obvious disagreement with the testimony of the State's witness, to support his claim that perjured testimony was used against him, much less that the prosecutors knew of any alleged

perjury". There is a reason that the State does not refer to the 17 specific instances that Petitioner presented in his Habeas application. This is because he proves with transcripts and presented evidence that this testimony is perjured and proves that each one was known or should have been known by the prosecution.

III. GROUND TWO: BAD ACTS

The State argues that "there was no evidence of ... crimes under Oklahoma law"[14]. However, the State's response, as well as the lower court's decission, on this matter is unreasonable in light of the facts. First, both claim that none of the acts complained of are crimes. However, when the State alleged that the Petitioner punched his wife in the stomach, they clearly alleged a crime in violation of 21 O.S. §647 (assualt and battery) punishable up to 5 years in prison. Second, the claim that this evidence is relevant to the case and that Petitioner was going to elicit it, can only be made if the State alleges that the defense had the intention to elicit perjured testimony that the defense knew was perjured. This is not only unreasonable but ludicrious. Lastly, this perjured testimony was so overwhelmingly harmful in light of the weak evidence presented by the State, that no curative instruction could wipe away the prejudice already caused by it.

Respectfully Submitted,

[14] See The States Response to Petition for Writ of Habeas Corpus, Pg. 81.

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