

NO: _____

IN THE
SUPREME COURT OF THE UNITED STATES

GEORGE A. REESE - Petitioner;

v.

DUSHAN ZATECKY - Respondent;

PETITION FOR WRIT OF CERTIORARI

Attorney for Petitioner:

George A. Reese #862207
Pendleton Correctional Facility
4490 West Reformatory Road
Pendleton, IN 46064-9001

Petitioner / *pro se*

QUESTIONS PRESENTED

1. Whether the state court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court in violation of the 5th, 6th & 14th Amendments to the United States Constitution concerning whether the prosecutor committed misconduct when he repeatedly informed members of the jury that inadmissible evidence was being withheld from them?
2. Whether the state court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court in violation of the 5th, 6th & 14th Amendments to the United States Constitution concerning whether the State injected improper vouching testimony to bolster the creditability of the victim?
3. Whether the state court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court in violation of the 5th, 6th & 14th Amendments to the United States Constitution concerning whether the trial court abused its discretion when it held that defense counsel opened the door to uncharged conduct?
4. Whether the state court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court concerning in violation of the 5th, 6th & 14th Amendments to the United States Constitution whether Mr. Reese received ineffective assistance of counsel when she failed to object to what the Court of Appeals held to be prosecutorial misconduct that placed Mr. Reese in grave peril and had a probable persuasive affect on the jury.

LIST OF PARTIES

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

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

Opinions Below.....	1
Jurisdiction.....	2
Constitutional and Statutory Provisions Involved.....	3
Statement of the Case.....	4
Reasons for Granting the Writ.....	5
Conclusion.....	13

INDEX TO APPENDICES

Appendix A - Seventh Circuit Court of Appeals Denial

Appendix B - United States Southern District Court Denial

Appendix C - Indiana Supreme Court Order denying Transfer for Post-Conviction Appeal

Appendix D - Indiana Court of Appeals Decision affirming Post-Conviction Relief Court

Appendix E - Indiana Post-Conviction Order Denying Amended petition for Post-Conviction Relief

Appendix F - Indiana Court of Appeals Decision Affirming Direct Appeal

Appendix G - Indiana Supreme Court order denying Transfer for Affirmed Direct Appeal

TABLE OF AUTHORITIES CITED

<u>CASES:</u>	<u>PAGE NUMBER:</u>
<i>Douglas v. State</i> , 663 N.E.2d 1153 (Ind.1996)	11
<i>Hannon v. Cooper</i> , 109 F.3d 330 (7 th Cir. 1997)	6, 12
<i>R-BOC REPRESENTATIVES, INC.</i> , et al., , 2017 U.S. Dist. LEXIS 18968 (N.D.Ill. 2017)	10
<i>Strickland v. Washington</i> , 466 U.S. 668, 80 L.Ed. 674, 104 S.Ct. 2054 (1984)	11
<i>U.S. v. Meyerson</i> , 18 F.3d 153, 40 Fed. R. Evid. Serv. 601 (2 nd Cir. 1994)	7
<i>U.S. v. Small</i> , 74 F. 3d 1276 (D.C. Cir. 1996).	7
<i>United States v. Nunez</i> , 532 F.3d 635 (7 th Cir. 2008)	8, 12
<i>United States v. Corley</i> , 519 F.3d 716, 727 (7th Cir. 2008)	8, 12
<i>United States v. Serfling</i> , 504 F.3d 672, 677 (7th Cir. 2007)	8, 13
	10

<u>OTHER:</u>	<u>PAGE NUMBER:</u>
<i>ABA Standards for Criminal Justice</i> , § 3-5.8(a), § 3-5.9 (3 rd ed. 1993)	7

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is-

reported at _____; or,
 has been designated for publication but is not yet reporter; or,
 is **unpublished**.

The opinion of the United States district court appears at Appendix B to the petition and is-

reported at _____; or,
 has been designated for publication but is not yet reporter; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is-

reported at _____; or,
 has been designated for publication but is not yet reporter; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is-

reported at _____; or,
 has been designated for publication but is not yet reporter; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States court of appeals decided my case was October 30, 2018.

A copy of that decision appears at Appendix A.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States court of appeals on the following date: _____, 20____, and a copy of the order denying rehearing appears at Appendix ____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____, 20____, on _____, 20____, in Application No. __, and a copy of the order granting said extension appears at Appendix ____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____, 20____.
A copy of that decision appears at Appendix ____.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied on the following date: _____, 20____, and a copy of the order denying rehearing appears at Appendix ____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____, 20____, on _____, 20____, in Application No. __, and a copy of the order granting said extension appears at Appendix ____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment 5 Criminal actions Provisions concerning Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6 Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 14

Sec. 1. [Citizens of the United States.]

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

STATEMENT OF THE CASE

On April 20, 2012 under Cause No.: 31D01-1003-FA-187 Petitioner was convicted by jury trial and sentencing was held on May 16, 2012.

A direct appeal was filed and affirmed May 23, 2013 under Cause No.: 31A05-1206-00309, and Transfer to the Indiana Supreme Court was denied August 22, 2013 (993 N.E.2d 182).

Petition for Post-Conviction Relief was filed October 21, 2013 under Cause No.: 31D01-1310-PC-000010 and denied August 29, 2016. An appeal was affirmed February 27, 2017 under Cause No.: 31A01-1609-PC-2164 and Transfer to the Indiana Supreme Court was denied.

A Petition for Writ of Habeas Corpus was filed and denied March 27, 2018 under Cause No.: 1:17-cv-02710-JMS-TAB.

On April 12, 2018 a Motion for Certificate of Appealability was filed and denied October 30, 2018.

REASONS FOR GRANTING THE WRIT

Ground One: The state court and United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court in violation of the 5th, 6th & 14th Amendments to the United States Constitution concerning whether the prosecutor committed misconduct when he repeatedly informed members of the jury that inadmissible evidence was being withheld from them.

Reese raised this claim in State court citing fundamental error. The Fundamental Error standard is a clearly established state and federal law applied to the States and has been raised and applied to all of Reese's claims in the State courts.

Reese allegedly touched L.J.'s breast in Floyd County and took pictures of L.J. and K.J. in their underwear. (Tr. 1006-07) Prior to trial, defense counsel filed a motion in limine, seeking to prohibit the State from introducing any evidence of uncharged conduct. (Tr. 40-41) The trial court granted the motion. (tr. 41) During her cross-examination, defense counsel asked L.J. whether she "liked" George or ever liked him. (Tr. 967) L.J. answered in the negative. (Tr. 967) The State convinced the trial court that defense counsel opened the door to the inappropriate behavior in Floyd County, reasoning that the inappropriate behavior was the reason that L.J. did not like Reese. (Tr. 1004-24) Thereafter, the State elicited testimony about inappropriate behavior, but in so doing, the prosecutor repeatedly and unabashedly informed the jury that evidence was being withheld from them, implying throughout its examination of L.J. that this evidence was very damaging to Reese. (Tr. 1026) Incredibly, the prosecutor asked L.J. whether the rules of evidence were preventing her from telling the jury the entire story. (Tr.

1027) The prosecutor followed up by noting that L.J. gave some inaccurate answers, blaming her in accuracies on “the rules.” (Tr. 1028)

The prosecutor did not end with this exchange. He continued to refer to the “rules” and how they prevented the jury from learning the truth. (Tr. 1031-34, 1038) The prosecutor even informed the jury that K.J., who had already testified, was acting under these same “rules” that prevented the jury from learning the truth. (Tr. 1050-51) The prosecutor did not limit this misconduct to L.J. During Michael Devore’s testimony, the prosecutor again informed the jury about “rules” that prevented disclosure of the truth. (Tr. 1097)

Perhaps the most egregious act of misconduct was committed by the prosecutor in closing arguments. In closing, the prosecutor not only commented that L.J. was able to testify to more of the truth when the “rules” were lifted, but also asked the jury to imagine how much easier it would have been for K.J., the chief witness, to testify if the rules had not applied to her. (Tr. 1096-97) The State did not stop there, and saved what is perhaps the most egregious act of misconduct for last in its rebuttal closing. After defense urged the jury in the very last portion of her closing arguments not to trust their gut feelings but to follow the evidence (See Tr. 1825), the prosecutor immediately thereafter sarcastically opened his rebuttal with, “There we go with those rules again. Don’t trust your gut, follow the rules, cause the rules always work and they always get us the truth.” (Tr. 1826) In *Hannon v. Cooper*, 109 F.3d 330 (7th Cir. 1997) it states, “The due process clause has been interpreted to forbid prosecutors to obtain jury verdicts by means of statements that are seriously misleading or that otherwise prevent the jury from deliberating rationally about the defendant’s guilt.

These several incidents of the prosecutor informing the jury that “rules” were preventing them from getting the real story or truth should be considered outrageous acts of prosecutorial

misconduct. The prosecutor time and time again informed the jury that inadmissible evidence was being held from them. Moreover, this misconduct placed Reese in grave peril. This is fundamental error that must be corrected.

Reese states a prosecutor must confine his or her arguments to the facts in the record, reasonable inference from those facts, and matters of common public knowledge. (ABA Standards for Criminal Justice, § 3-5.8(a), § 3-5.9 (3rd ed. 1993) It is improper for a prosecutor to misstate the evidence, misrepresent the issues, mislead the jury, or argue on the basic facts outside the record. See: *U.S. v. Meyerson*, 18 F.3d 153, 40 Fed. R. Evid. Serv. 601 (2nd Cir. 1994) (Prosecutor has “a special duty to not mislead”). Whether the prosecution deliberately tried to mislead the jury or did it inadvertently ordinarily is irrelevant. *U.S. v. Small*, 74 F. 3d 1276 (D.C. Cir. 1996). In this case prosecutorial misconduct occurred and trial counsel failed to object and to request a mistrial.

Ground two: The state court and United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court in violation of the 5th, 6th & 14th Amendments to the United States Constitution concerning whether the State injected improper vouching testimony to bolster the creditability of the victim.

Reese claims the State injected improper vouching testimony to bolster the creditability of the victim which is also a prosecutorial misconduct violation. Again, Reese raised this claim as fundamental error as he did his first claim stating it is a clearly established federal doctrine applied to the States.

Throughout trial, the State elicited vouching testimony to bolster the creditability of K.J. during direct examination, Jeri Newton, the forensic interviewer, was asked if it was common for

victims, like K.J., to give several different versions of the abuse. (Tr. 710) Investigator Newton responded that inconsistent stories from a victim, like K.J., were not uncommon. (Tr. 710-11) The State introduced similar testimony through Kristina Killen, an investigator with the Floyd County Department of Child Services. (Tr. 723) Investigator Killen testified it was very rare for a child to fabricate accusations of molestation. (Tr. 726) She allowed for the possibility that a child would do so in a custody dispute or to cover up the reason for her pregnancy, two scenarios not present in the instant case. (Tr. 726-27) Detective Wibbels testified that children rarely fabricate accusations of sexual abuse, and the few that do so are involved in a custody case. (Tr. 744-45, 749-50) When asked whether any of the factors that cause children to fabricate accusations were present in this case, Wibbels stated they were not. (Tr. 750)

Finally, during the defense's case, Detective Wibbels opined that Reese was part of the horrific sexual abuse inflicted upon K.J. (Tr. 1577-78). When defense counsel asked whether Detective Wibbels believed as much because of K.J.'s accusation, Detective Wibbels did not answer the question but proceeded to vouch for K.J.'s credibility. (Tr. 1578) This is fundamental error that must be corrected.

In *United States v. Nunez*, 532 F.3d 635 (7th Cir. 2008), the court stated: In reviewing a claim for prosecutorial misconduct, we first address the alleged misconduct to determine if it was in fact improper. *United States v. Corley*, 519 F.3d 716, 727 (7th Cir. 2008). If it was improper, we next consider whether it prejudiced the defendant. *Id.*; *United States v. Serfling*, 504 F.3d 672, 677 (7th Cir. 2007). Reese request that this court apply this standard to his claims of prosecutorial misconduct in this case and find prosecutorial misconduct did in fact occur and rendered his trial unconstitutional and unfair.

Ground three: The state court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court in violation of the 5th, 6th & 14th Amendments to the United States Constitution concerning whether the trial court abused its discretion when it held that defense counsel opened the door to uncharged conduct Reese claims the trial court abused its discretion when it held that defense counsel opened the door to uncharged conduct. Again, Reese raised this claim under fundamental error as he did his first claim stating it is a clearly established federal doctrine.

During direct examination of L.J., trial counsel asked L.J. about the inconsistencies between her deposition testimony and her trial testimony. In one specific colloquy, defense counsel elicited testimony from L.J. to the effect that L.J. claimed to have seen the charged abuse in her deposition but admitted at trial she had not. (Tr. 983) Attempting to summarize this inconsistency, defense counsel asked, “[o]kay. So you’re telling this jury today that you never saw Mr. Reese do anything to your sister?” (Tr. 983) L.J. answered to the negative. (Tr. 983). The State thereafter argued that defense counsel opened the door to alleged inappropriate and uncharged conduct by Reese toward K.J. in Floyd County. (Tr. 1009-12). Defense counsel vehemently disagreed. She argued that the context of her question clearly related to whether L.J. had seen the charged sexual abuse in Harrison County. (Tr. 1010-13). The trial court determined that defense counsel had opened the door to incidents of inappropriate behavior in Floyd County. However, the trial court determined that the State could not elicit details of this behavior. (Tr. 1014) The State further asked L.J. about whether she liked Reese. (Tr. 967) The State argued that L.J. should be permitted to explain that she did not like Reese because of the fact he took pictures of her in her underwear and touched her breasts in Floyd County days after she met him.

(Tr. 1018-20). Defense counsel argued that L.J.'s testimony indicated that she did not like Reese from the moment she met him, so the subsequent inappropriate contact was irrelevant. (Tr. 1020). The trial court nevertheless determined that this that this exchange opened the door to the inappropriate behavior between L.J. and Reese. (Tr. 1022). Again, however, the trial court prohibited the State from eliciting details about the inappropriate contact. (Tr. 1022).

In R-BOC REPRESENTATIVES, INC., et al., Plaintiffs-Counterclaim Defendants, v. JOHN T. ("TOM") MINEMYER, Defendant-Counterclaim Plaintiff. JOHN T. ("TOM") MINEMYER, Plaintiff, v. R-BOC REPRESENTATIVES, INC., et al., Defendants, 2017 U.S. Dist. LEXIS 18968 (N.D.Ill. 2017), the standard for abuse of discretion is as follows:

An abuse of discretion occurs where the court's decision is clearly unreasonable, arbitrary, or fanciful, is based on an erroneous conclusion of the law, the court's findings are clearly erroneous, or the record contains no evidence upon which the court rationally could have based its decision.

Reese maintains that his claim herein meets this standard and this court must find that the State Court judge abused his discretion violating Petitioner's rights to a fair trial.

Ground four: The state court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court in violation of the 5th, 6th & 14th Amendments to the United States Constitution concerning whether Mr. Reese received ineffective assistance of counsel when she failed to object to what the Court of Appeals held to be prosecutorial misconduct that placed Mr. Reese in grave peril and had a probable persuasive affect on the jury.

Mr. Reese received ineffective assistance of counsel when she failed to object to what the Court of Appeals held to be prosecutorial misconduct that placed Mr. Reese in grave

peril and had a probable persuasive affect on the jury. Claims of ineffective assistance of counsel are analyzed under the two-part test in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed. 674, 104 S.Ct. 2054 (1984). To prevail on an ineffective assistance of claim, one must show both deficient performance and resulting prejudice. A deficient performance is a performance that falls below an objective Standard of reasonableness. See: *Strickland*, 466 U.S. at 687; *Douglas v. State*, 663 N.E.2d 1153 (Ind.1996). Prejudice exist when a defendant/Petitioner shows “there is reasonable possibility that, but for Counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”*Strickland*, 466 U.S. at 694. Trial counsel’s failure to object resulted in a fundamental miscarriage of justice.

Hereafter *Tr.* Will refer to the direct appeal record of proceedings, *R.* will refer to the instant PCR Record of proceedings, *App.* Will refer to appendix from the direct appeal and *A.* will refer to the PCR Appendix.

There were several incidents of the prosecutor informing the jury that “rules” were preventing them from getting the real story or truth should be considered outrageous acts of prosecutorial misconduct. The prosecutor time and time again informed the jury that inadmissible evidence was being held from them. Moreover, this misconduct placed Reese in grave peril. This is fundamental error that must be corrected.

During closing argument the State made reference to its witnesses being limited by the rules, insinuating there was more to the story, arguing, “Do you remember what happened to [L.J.] once we got to remove some of the rules and some of her restrictions? Did she have an easier time testifying and trying to tell you her story? Wonder how [K.J.] would have done if we’d had done the same for her.” (Tr. 1795-97, R. 54-56).

On direct appeal, based on these instances by the State, Mr. Reese's appellate counsel raised prosecutorial misconduct alleging the State was improperly insinuating there was further incriminating evidence. (R. 61), since there had been no contemporaneous objection, appellate counsel raised the issue as fundamental error.

On appeal the Indiana Court of Appeals stated, It was nonetheless improper for the State to elicit testimony and comment in closing that the "rules" prevented L.J. from testifying truthfully, to further note that K.J. was bound by the same rules, and to say that the State itself had broken several rules. The jury here could have reasonably inferred that the State implied it had additional evidence of guilt not revealed to the jury, and thus its statements constitute prosecutorial misconduct. However, the Indiana Court of Appeals denied relief holding while there was prosecutorial misconduct, fundamental error required a higher degree of prejudice that was not met. (R. 118-20).

In his amended Petition for post-Conviction Relief, Mr. Reese alleged he received ineffective assistance of trial counsel for her failure to object to the prosecutor's comments during cross-examination and closing argument and moving for a mistrial. Trial counsel had no strategy reason for not objecting to the State's comments during closing argument and admits she should have made a motion for a mistrial. (R. 121). In *Hannon v. Cooper*, 109 F.3d 330 (7th Cir. 1997) it states, "The due process clause has been interpreted to forbid prosecutors to obtain jury verdicts by means of statements that are seriously misleading or that otherwise prevent the jury from deliberating rationally about the defendant's guilt.

In *United States v. Nunez*, 532 F.3d 635 (7th Cir. 2008), the court stated: In reviewing a claim for prosecutorial misconduct, we first address the alleged misconduct to determine if it was in fact improper. *United States v. Corley*, 519 F.3d 716, 727 (7th Cir. 2008). If it was improper,

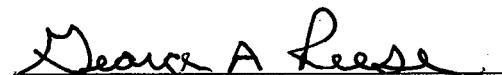
we next consider whether it prejudiced the defendant. *Id.*; *United States v. Serfling*, 504 F.3d 672, 677 (7th Cir. 2007). Reese request that this court apply this standard to his claims of prosecutorial misconduct in this case and find prosecutorial misconduct did in fact occur and counsel was ineffective by not objecting and moving for a mistrial rendered his trial unconstitutional and unfair.

CONCLUSION

The petition for a writ of certiorari should be granted because the lower courts have decided important questions of federal law that has not been, but should be, settled by this Court, or has decided important federal questions in a way that conflicts with relevant decisions of this Court.

Executed on: January 7, 2019

Respectfully submitted,


George A. Reese
Petitioner / *pro se*