

No. _____

18-9563

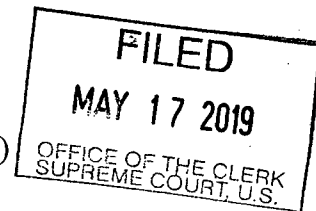
IN THE

SUPREME COURT OF THE UNITED STATES

JASON BRADY SAIN - PETITIONER

vs.

JANET DOWLING - RESPONDENT(S)



ON PETITION ON A WRIT OF CERTIORARI TO

OKLAHOMA COURT OF CRIMINAL APPEALS

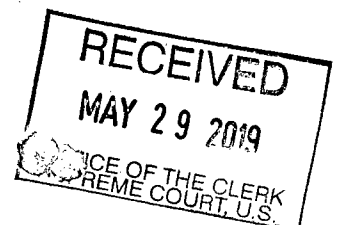
PETITION FOR WRIT OF CERTIORARI

JASON BRADY SAIN

129 CONNER ROAD

HOMINY, OK 74035

918-594-1300



QUESTION(S) PRESENTED

- 1. WAS PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL VIOLATED WHEN THE PROSECUTOR COMMITTED PLAIN AND OBVIOUS CONSTITUTIONAL ERROR IN ITS CLOSING ARGUMENTS WHEN THE PROSECUTOR GAVE THE JURY HIS PERSONAL OPINION THAT (1) PETITIONER WAS A BAD PERSON FOR CALLING CALL HIS 5-YEAR OLD SON TO TESTIFY, (2) THAT PETITIONER'S 5-YEAR-OLD SON WAS NOT A CREDIBLE WITNESS, AND (3) BELITTLED AND RIDICULED PETITIONER'S THEORY OF THE CASE?**

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:

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STATUTES AND RULES

Sixth Amendment to the U.S. Constitution
Fourteenth Amendments to the U.S. Constitution
Oklahoma Constitution Art II § 7
Oklahoma Constitution Art II § 20.

OTHER

Brief of Appellant, *Jason Brady Sain, Appellant v. The State of Oklahoma, Appellee, Case No.*
CF-2016-338

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

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **state courts**:

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

☐ reported at F-2017-1158; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

JURISDICTION

For cases from **state courts**:

The date on which the highest states court decided my case was March 28, 2019.

A copy of that decision appears at Appendix A.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION AMENDMENT SIX

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by a impartial jury of the state an 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.

UNITED STATES CONSTITUTION AMENDMENT FOURTEEN

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 any person within its jurisdiction equal protection of the laws.

OKLAHOMA CONSTITUTION ART II § 20

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by a an impartial jury of the state an district wherein the crime shall have been committed, or where uncertainty exists as to the county in which the crime was committed, the accused may be tried in any county in which the evidence indicates the crime might have been committed. Provided, that the venue may be changed to some other county of the state, on the application of the accused, in such manner as may be prescribed by law. He shall be informed of the nature and cause of the accusation against him and have a copy thereof, and be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his behalf. He shall have the right to be heard by himself and counsel; and in capital cases, at least two days before the case is called for trial, he shall be furnished with a list of witnesses that will be called in chief, to prove the allegations of the indictment or information, together with their post office addresses.

STATEMENT OF THE CASE

Petitioner was charged by information on October 5, 2016, in Grady County District Court Case Number CF-2016-338 with Count 1: Rape in the First Degree (by force and fear) in violation of Oklahoma Statute Title 21 § 1114(A) (5), Count 2: Kidnapping in violation of Oklahoma Statute Title 21 § 741, and Count 3: Domestic Abuse-Assault and Battery in violation of Oklahoma Statute Title 21 § 644(C).

Petitioner and Ms. Tammie Harris (Petitioner's common law wife), had been living together for approximately two (2) years before their son S.S. was born. After S.S.'s birth, Petitioner and Ms. Harris separated and S.S. was left in Ms. Harris's custody. However, Ms. Harris is an alcoholic and habitual drug abuser and when Petitioner informed the police that S.S. being neglected by Ms. Harris, he was given full custody of S.S. when he was approximately 7 months old.

On the evening of October 1, 2016, Petitioner invited Ms. Harris to celebrate S.S.'s fifth birthday with them. When Petitioner picked her up she was high on methamphetamine, intoxicated, and entered the car with a case of beer. S.S. was excited about his party and was talking non-stop to his parents. Although Petitioner was talking to S.S., Ms. Harris (because of her inebriated state), would not acknowledge her son and was texting non-stop on her phone. In an attempt to get Ms. Harris to speak to her son, Petitioner took her phone from her. After taking her phone, Ms. Harris became angry and a physical altercation began between her and Petitioner at that time. Petitioner stopped and exited the car, walked to the rear of the vehicle to see who Ms. Harris was texting. Ms. Harris got out of the car to talk to Petitioner and to get her phone back. When Petitioner would not give her phone back and she and Petitioner got into a verbal altercation.

Ms. Harris alleged, sometime during this altercation, Petitioner raped her on the trunk of the car; afterwards, she walked to the front of the car and sat in the front seat. Sometime later Petitioner approached her and another verbal altercation took place when he found she had been texting someone he thought she was being intimate with, and she attempted to leave in the car but Petitioner would not let her. Petitioner went to the trunk of the car and grabbed a knife, when she saw the knife, she ran into the woods and hid in a briar patch.

After Petitioner and S.S. left, Ms. Harris walked to her nephew's home and stayed there for over twenty-four (24) hours. Ms. Harris never alleged any wrongdoing by Petitioner, never contacted the police, and never requested any type of medical assistance. It was only after that she was informed that Petitioner had written about her drug and alcohol abuse on Facebook that she called her sister went to the hospital, and alleged that Petitioner had kidnapped, raped, and assaulted her.

A sexual assault nursing examination (SANE) was performed on Ms. Harris. However, because she had not attempted to report the alleged rape for over 24 hours, the SANE nurse "could not with any accuracy tell if the sexual intercourse was consensual or non-consensual." [Exhibit A Brief of Appellant, *Jason Brady Sain, Appellant v. The State of Oklahoma*, case No. F-2017-1158, pg. 4]

The only witness to the alleged offenses was Petitioner and Ms. Harris's son S.S. During trial, Petitioner called S.S. as a defense witness. In closing arguments, the prosecutor made a series of personal opinion comments that criticized Petitioner for calling his son as a witness. These comments were plain and obvious constitutional error that requires Petitioner's convictions to be vacated.

REASONS FOR GRANTING THE PETITION

ISSUE I

WAS PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL VIOLATED WHEN THE PROSECUTOR COMMITTED PLAIN AND OBVIOUS CONSTITUTIONAL ERROR IN ITS CLOSING ARGUMENTS WHEN THE PROSECUTOR GAVE THE JURY HIS PERSONAL OPINION THAT (1) PETITIONER WAS A BAD PERSON FOR CALLING CALL HIS 5-YEAR OLD SON TO TESTIFY, (2) THAT PETITIONER'S 5-YEAR-OLD SON WAS NOT A CREDIBLE WITNESS, AND (3) BY BELITTLING AND RIDICULING PETITIONER'S THEORY OF THE CASE?

The only witness to incidents occurring on October 1, 2016, was S.S. The State interviewed S.S. before defense counsel did; however, because his statements and testimony was favorable for the defense, Petitioner called him as a witness. [Exhibit A, pg. 7]

For no other apparent reasons, other than the prosecutor thought the jury may use S.S.'s testimony to acquit Petitioner on the charged offenses and the State may lose the case, in the State's closing argument, **the prosecutor went into an out of control tirade making a series of personal opinions criticizing Petitioner for calling his son as a witness.** These comments were plain and obvious and created constitutional error, to wit:

Not only was [S.S.] forced to see adult things that happened on October 1st, 2016 **but he was made to come in here into an adult environment and relive those a year later....** There's a reason that 5 year-olds are not typically drug into a courtroom in adult proceedings....he puts forth his this little 5 year-old boy, which I submit to you, ladies and gentlemen, a court of law talking about the rape of your mother by your father is not a place for children, **but the defendant – the child was called to testify....** And, he's a 5-year-old boy ladies and gentle men. This is not the place for him. [Brief, pg. 8]

Defense counsel **never** objected to the prosecutor's uncontrolled rant; therefore, the prosecutor's misconduct was reviewed as plain error. See *Norton V. State*, 43 P.3d 404, 409 (Okla. Crim. App. 2002) plain error is defined as "(1) there is an existence of an actual error, (2)

the error is plain and obvious, and (3) the error the substantial and effected the outcome of the proceedings”); also see *Rosales-Mirles v. U.S.*, 138 S.Ct. 1897, 1904-1905 (2018) (Plain error is defined as **an obvious or clear error that violates the substantial rights of the defendant**).

FIRST

The Sixth and Fourteenth Amendments and the Oklahoma Constitution Art II § 20, guarantee a criminal defendant **“In all criminal prosecutions, the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor...”**

The prosecutor’s outburst was a *personal opinion* that did **not** address the content of S.S.’s testimony, but rather **openly criticized, ridiculed, and condemned Petitioner for exercising his U.S. and Oklahoma Constitutional right to call witnesses in his favor.** [See Exhibit A, pgs. 7-16]

To **condemn** Petitioner for exercising his Constitutional right to call witnesses in his favor was to **condemn** the Sixth Amendment itself, which is contrary to foundation of our legal system. This **plain and obvious constitutional error** that violated Petitioner’s due process rights to a fair trial, requiring his conviction to be vacated.

SECOND

It is contrary to well-established federal law as set forth by the U.S. Supreme Court, in *United States v. Dinitz*, 424 U.S. 600, 603-612, 96 S.Ct. 1075, 1077-1082, 47 L.Ed.2d 267 (1976)¹, for the prosecutor to give his personal opinion to the jury:

The purpose of the opening statement is to summarize the facts the evidence will show, state the issues, *not to give personal opinions*. To make statements, which will not or cannot be supported by proof is, if it relates to significant elements of the case, professional misconduct. Moreover, it is **fundamentally unfair** to an opposing party to allow an attorney, with the standing and prestige inherent in being an officer of the court, **to present to the**

¹ Although this case pertains to an opening statement, the same logic applies to closing arguments.

jury statements not susceptible of proof but intended to influence the jury in reaching a verdict. A trial judge is under a duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop such professional misconduct.

Also see *Dupree v. State*, 514 P.2d 425, 426 (Okla. Crim. App. 1973), the Oklahoma Court of Criminal Appeals (OCCA) **reversed and remanded** the conviction when it determined that, in closing arguments, **the prosecutor went far beyond what is permissible to arouse the prejudice of the jury against defendant**, and “The argument was **highly improper** and should have been stopped by the trial judge [without objection] and the jury advised to disregard.”

In Petitioner’s case, the prosecutor gave his personal opinion to the jury multiple times:

1. **The prosecutor the prosecutor gave his personal opinion that Petitioner forced S.S. to testify in his favor:**

Not only was [S.S.] forced to see adult things that happened on October 1st, 2016 **but he was MADE to come in here into an adult environment and relive those a year later....** [Exhibit, A, pg. 8] (emphasis added)

Absolutely no evidence existed that S.S. was forced to come to trial and testify. In fact, (as noted earlier) the prosecutor interviewed S.S. with the intention of having him testify for the State. To **falsely** accuse Petitioner of forcing his son to testify was **the prosecution’s personal opinion** and were devised to persuade the jury that Petitioner was a bad parent and a bad person for forcing his son to testify. These *personal opinions* are based on nothing but “**speculation**” and **facts not in evidence** and are contrary to well-established federal law as set forth in *Bowen v. Maynard*, 799 F.2d 593, 612 (10th Cir. 1986). The prosecutor’s personal were **plain and obvious constitutional error** that violated Petitioner’s due process rights to a fair trial, requiring his conviction to be vacated in the interest of justice.

2. **The prosecutor gave his personal opinion that it was not S.S.'s place to come to trial to testify and for a second time gave his personal opinion that Petitioner forced him to testify:**

There's a reason that 5 year-olds are not typically drug into a courtroom in adult proceedings.... **but the defendant – the child was called to testify....** And, he's a 5-year-old boy ladies and gentle men. **This is not the place for him.** [Brief, pg. 8]

Again, the prosecutor condemned Petitioner in front of the jury for exercising his U.S. and Oklahoma Constitutional right to call witnesses in his favor was **plain and obvious constitutional error** that violated Petitioner's due process rights to a fair trial. [Brief, pg. 8]

Moreover, this *personal opinion* was devised solely to gain sympathy for S.S., as the prosecutor was attempting to convince the jury that Petitioner forced him to testify. In all criminal cases, state and federal, courts have continually held that it is improper for the prosecutor to elicit sympathy from the jury. See *Williams v. State*, 658 P.2d 499 (Okla. Crim. App. 1983) ("We have repeatedly held that it is improper for prosecutors to ask jurors to have sympathy for the victim")

3. **The prosecutor gave his personal opinion that S.S. was not a credible Witnesses:**

You know the defendant talked about the **arena of truth**. **This is not the 5-year-old boy's arena.** [Brief, pg. 8]

The prosecutor's statements are contrary to well-established federal law as set forth by the U.S. Supreme Court in *Dardin v. Wainwright*, 477 U.S. 168, 191, 106 S.Ct. 2464, 2476-77 (1986), where the Court held, "A lawyer **shall not**...state a personal opinion as to...the credibility of a witness."

Moreover, this Court has held that **the jury is the sole judge of the credibility of the witness.** See *Galloway v. U.S.*, 319 U.S. 372, 405, 63 S.Ct. 1077, 1095 (1943); *Santor v. Arkansas Natural Gas*, 321 U.S. 620, 629, 64 S.Ct. 724, 729 (1944); *California v. Green*, 399 U.S. 149, 198, 90 S.Ct. 130, 1956 (1970); and *Davis v. Alaska*, 415 U.S. 308, 317-18, 94 S.Ct. 1105, 1111 (1974),

The prosecutor's *personal opinion* on the credibility of a witness **jeopardizes** the defendant's right to be tried solely based on the evidence presented to the jury and is contrary to well-established federal law as set forth by the Supreme Court in *U.S. Young*, 470 U.S. 1, 18-19, 105 S.Ct. 1038, 1048(1985);

The prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment instead of resolving the facts of the case on their own.

The prosecution's *personal opinions in closing argument* were plain and obvious constitutional error that violated Petitioner's due process rights and **unfairly prejudiced Petitioner.** See *Old Chief v. U.S.*, 644 U.S. 172, 180-81, 117 S.Ct. 644, 650 (1997):

The term **unfair prejudice**, as to a criminal defendant speaks to the capacity of some concededly relevant evidence to **lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged.** Unfair prejudice within its context means an undue tendency to suggest decision on improper basis, commonly, though not necessarily, **an emotional one.** See also *U.S. v. Miles*, 207 F.3d 988, ___ 7th Cir. 2000) (**Evidence is unfairly prejudicial when it induces the jury to decide on an improper basis rather than the evidence presented**)

The unfair prejudice caused by the **prosecutor's personal opinion and attack on Petitioner affected the judgment of the jury**, requiring the conviction to be vacated. See *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 1714 (1993) (relief for trial errors

involving prosecutorial misconduct should be granted only if the error "had substantial and injurious effect or influence in determining the jury's verdict.") See also *U.S. v. Argus*, 427 U.S. 97, 103, 96 S.Ct. 2372, 2379 (1976) ("A conviction obtained through [false] evidence is **fundamentally unfair and must be set aside** if there is 'any likelihood that the false testimony could have **affected** the verdict.'")

The prosecutor's personal opinion created a **plain and obvious constitutional error** that violated Petitioner's due process rights to a fair trial, requiring his conviction to be vacated.

In fact, under the plain error standard, the Oklahoma Court of Criminal Appeals (OCCA) held:

we agree with Appellant that a series of comments in which the prosecutor pointy criticized the defense for calling appellant's young son as a witness **resulted in plain or obvious constitutional error**. [Appendix A, pgs. 3-5] (emphasis added)

However, the OCCA affirmed Petitioner's conviction with the determination:

While we condemn the prosecutor's comments in the strongest terms, we also have little difficulty in finding the error was harmless beyond a reasonable doubt. The strength of evidence supporting the convictions, the extremely violent nature of the crimes themselves, and appellant's record of prior violent and non-violent felony convictions convince us that the prosecutor's comments did not contribute unfairly to either of the convictions or sentences imposed by the jury. [Appendix A, pg. 5-6]

It is obvious by the OCCA's language that the court held that "the prosecutor's comments did not contribute unfairly to either of the convictions or sentences imposed by the jury" and affirmed Petitioner's conviction based on Petitioner's "record of prior violent and non-violent felony convictions." The OCCA's actions are contrary to the due process clause of the Fourteenth Amendment that it is fundamental principal of law that a criminal defendant should

be convicted if at all, by evidence showing guilt of the offenses charged, rather than evidence indicating guilt for other crimes.

Moreover, The OCCA's determination of facts in finding the prosecution misconduct was harmless because the strength of evidence supporting the convictions and the extremely violent nature of the crimes themselves was incorrect and unreasonable. The State produced no evidence that the rape, kidnapping, or that Petitioner threatened Ms. Harris with a knife occurred, except for Ms. Harris's testimony.

Petitioner disputed all these allegations and the evidence against Petitioner was not overwhelming; in fact, the State's case was a he said, she said case with Ms. Harris and Petitioner giving different versions of the same events.

The charged offense of assault and battery stems from Petitioner taking Ms. Harris's phone from her. Petitioner does not dispute that he took her cell phone, but took it for the sole purpose of getting her to stop texting on her phone and talk to S.S. However, Petitioner did not assault Ms. Harris until after she assaulted him. In fact, S.S. testified in trial that Ms. Harris assaulted Petitioner first when she choking him, then he hit her. [Exhibit A, pg. 7]

The only evidence the State produced to charge Petitioner with rape was Ms. Harris's testimony. The Petitioner does not dispute that he and Ms. Harris had sex, but it was consensual, not rape. After Petitioner stopped the car and walked to the rear of the vehicle with her phone to see who she was texting, Ms. Harris came to the rear of the car with him and began hugging and kissing Petitioner, which evolved into consensual sex, all of which was a plot to get her phone back before Petitioner found out who she was texting. However, when Petitioner did not give her phone back, she got angry and walked to the front of the car and sat in the front seat.

Ms. Harris said that another verbal altercation took place when Petitioner found a text from someone that she was dating. Petitioner does not dispute that another verbal altercation began, However, it because of the issue Ms. Harris said. Petitioner discovered that Ms. Harris was texting her ex-husband (who was her drug supplier) and she was setting up a time for him to come by Petitioner's home later that night to buy drugs from him during S.S. birthday party.

The only evidence the State produced to show Ms. Harris was kidnapped was her testimony. The Sate charge Petitioner kidnapping on Ms. Harris's allegation that Petitioner would not allow her to leave in the car. Petitioner does not dispute this. After he confronted Ms. Harris with the text regarding her ex-husband, and told her that her that he was not coming to his house to sell her drugs while they were celebrating S.S.'s birthday, Ms. Harris got angry and tried to start the car and leave. However, because Ms. Harris was intoxicated and high on methamphetamine, **Petitioner stopped her from driving the car with S.S. in the backseat.** This is not kidnapping, but common sense. However, because, Petitioner would not allow Ms. Harris to drive away in the car, in her inebriated state with their 5-year old son in the back seat, the State charged and convicted him of kidnapping. Had Petitioner allowed her to drive away, it very likely that Ms. Harris would have wrecked the car and possibly killed herself and S.S., and Petitioner would have been charged with a crime for not stopping her.

The State produced no evidence to show that Petitioner allegedly had a knife, except Ms. Harris's testimony. In trial, the prosecutor showed the jury a machete taken from Petitioner's trunk and announced, "This could be the knife" and then showed the jury a small broken knife taken from Petitioner's trunk and announced, "This could be the knife." However, Ms. Harris **never** identified either as the alleged knife that Petitioner was to have had.

The State's evidence was not sufficient to support the convictions; therefore, the prosecutor's comments were plain obvious constitutional error that affected the judgment of the jury in its decision to render a guilty verdict against Petitioner and/or affected its judgment in rendering excessive sentences. The prosecutor's comments require Petitioner's convictions to be vacated in the interest of justice.

CONCLUSION

Petitioner's Sixth And Fourteenth Amendment due process rights to a fair trial violated when the state committed plain error in its closing arguments when the prosecutor gave his personal opinion to the jury, saying that it was improper for Petitioner To call his 5-year old son to testify on his behalf and that Petitioner's 5-year-old son was not a credible witness. The prosecutor's comments unfairly prejudiced Petitioner and affected the judgment of the jury, requiring the court to vacate his conviction in the interest of justice.

Petitioner respectfully requests a writ of certiorari to be granted.

Respectfully submitted,

Jason Sani

Date: 5-16-19