NO. _____

In the Supreme Court of the United States

LARRY ALAN WHITELY,

Petitioner,

v.

SHARON MCCOY, WARDEN,
JESS DUNN CORRECTIONAL FACILITY, TAFT, OKLAHOMA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Webb v. Texas prohibits the government from making gratuitous threats that preclude defense witnesses from freely and voluntarily choosing to testify. Petitioner's key defense witness, his wife, was threatened by government social workers that her children would not be returned to her if she did not believe her daughter's uncorroborated allegations of sexual abuse and support her and not petitioner. The Questions Presented are:

1. Whether the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment were violated when defense counsel elicited only part of the key defense witness's testimony due to his concern that the witness was overcome with fear by the social workers' threats.

2. Whether the Right to Trial by Jury Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment were violated when the reviewing courts assessed the credibility of a single accuser's inherently-suspect, uncorroborated allegations against the missing testimony of post-conviction defense witnesses for prejudice resulting from *Webb* and *Strickland* errors.

LIST OF RELATED PROCEEDINGS

State v. Whitely, No. 2006-CF-250, (Okla. Dist. Ct. April 2, 2007), *appeal dismissed*, No. F-2007-470, (Okla. Ct. of Cr. App. June 1, 2007), *right to appeal out of time granted*, No. PC-2007-1008, (Okla. Ct. of Cr. App. February 29, 2008), *conviction aff'd* No. F-2008-215, (Okla. Ct. of Cr. App. April 22, 2009).

Whitely v. Walkley, No. MA-2011-928 (Okla. Ct. of App. October 24, 2011).

State v. Whitely, No. 2006-CF-250 (Okla. Dist. Ct. November 7, 2012), *rev'd & rem'd*, No. PC-2012-1093, (Okla. Ct. of Cr. App. January 24, 2014), No. 2006-CF-250 (Okla. Dist. Ct. December 19, 2014), *den'd & rem'd*, No. PC-2015-49 (Okla. Ct. of Cr. App. March 27, 2015), No. 2006-CF-250 (Okla. Dist. Ct. November 24, 2015), *aff'd*, No. PC-2015-1120 (Okla. Ct. of Cr. App. April 22, 2016).

Whitely v. Walkley, No. MA-2015-873 (Okla. Ct. of App. October 21, 2015).

Whitely v. Farris, No. 16-CV-0514-HE (D. Okla. April 10, 2018), *aff'd*, No. 18-6085 (10th Cir. October 23, 2019) (rehearing and rehearing en banc denied January 16, 2020).

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The Tenth Circuit entered Judgment against Petitioner on October 23, 2019. (App.1a) The Order of the United States District Court, Western District of Oklahoma was entered on April 10, 2018. (App.52a).

JURISDICTION

A timely Petition for Rehearing and Rehearing en banc was filed. Rehearing was denied January 16, 2020. Pursuant to the Court's COVID-19 Order: 589 U.S. dated March 19, 2020, the deadline for this Petition for Certiorari is June 15, 2020. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI. In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . [and] to have compulsory process for obtaining witnesses in his favor.

U.S. Const. amend. XIV. . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . .

STATEMENT OF THE CASE

A. Factual Background

In 2006, 11 year-old K.B. slipped her friend L.W. a note stating "my dad rapes me." K.B. passed her note after her other friend N.M. shared a secret about her own family. L.W. told K.B. they needed to tell someone and K.B. replied "no, ooh, ooh." L.W. watched as K.B. "got [the note] wet underneath the faucet, and . . . threw it away so that nobody could read it."

L.W. told her mother who reported the matter to the school. On February 3, 2006, Officer Jeffrey Cox removed K.B. from her home and took her to the Mary Abbott Children's House where Tracy Koelling forensically interviewed her.

K.B. denied knowing why she was there. K.B. denied worrying about anything (except her missing cat). K.B. denied that anyone had touched her private parts or that she told anyone someone had. K.B. denied telling her friends something happened. K.B. said she felt safe with her mom and stepfather.

After her interview, K.B. was locked in a shelter with L.A.W. (K.B.'s 2 year-old half-sister and petitioner's biological daughter). Family contact was prohibited.

Cox returned two days later and interrogated K.B. after 9:30 p.m. K.B. told Cox she had inquired "when I was goin' home." Cox asked "Anything you want to tell me." K.B. replied "Nnnn." Cox suggestively said that L.W. told him K.B. "gave her a note that said something." K.B. initially replied "No" but then said "I gave her a note that says she's my best friend." Cox repeatedly asked if she told L.W. or N.M. anything. K.B. repeatedly said "No." Cox suggestively stated that L.W. and N.M. "told me some things . . . they felt it was better if you told." K.B. then said "it's true." Cox asked "What's true?" K.B. replied "I don't want to tell you" and began sobbing. K.B. did not want anyone to hear so Cox shut the door and moved his tape recorder. After much more pressing by Cox, K.B. confessed she wrote a note stating "my dad rapes me." Cox continued pressing until K.B. made anal rape allegations.

Cox returned K.B. to Koelling and advised her that K.B. made more disclosures over the weekend. Koelling conducted a second interview to elicit rape details.

Every incident K.B. alleged involved petitioner attacking her and forcing his penis into her "butthole" while she fought back. K.B. gave blow by blow accounts of kicking petitioner, making him do a "flip" and bloodying his nose. K.B. said "every time . . . I'd kick and scream and bite." K.B. said that wrestling with petitioner never made her uncomfortable but he forcefully raped her when they wrestled.

K.B. claimed the rapes did not cause pain, bleeding or soreness, except that her "feet" and "hands" were sore "from fighting back." K.B. denied lubrication was used. K.B. said something came out of petitioner's penis into her "butthole" and it felt "really cold" and his penis felt "soft and gooey" during the attacks.

Dr. Mark McKinnon performed sexual abuse exams on K.B. and L.A.W. and found no evidence of abuse. No corroborating evidence whatsoever was found.

On February 5, 2006, Cox interviewed Kelly Whitely (K.B.'s mother and petitioner's wife). Mrs. Whitely stated that K.B.'s allegations were "crap" and that K.B. has a huge imagination, watches "entirely too much TV," lied to her on a regular basis, stole money and might have made the rape allegations to get attention. Cox documented that Mrs. Whitely, "kept defending Larry, making statements such as, [']You don't know Larry['] . . . she refused to admit Larry actually committed these crimes."

On February 7, 2006, an Oklahoma Department of Human Services (DHS) social worker interviewed maternal grandmother Pat Brokaw. Mrs. Brokaw said that "none of them believe that Larry would have done such a thing" and that K.B. "had a tendency to tell stories." Mrs. Brokaw said that "she and her husband would do

whatever was necessary to have the girls placed with them." The worker replied that K.B. "needs to be in an environment where she is believed and supported."

On February 8, 2006, a social worker told Mrs. Whitely "she had an opportunity to do the right thing for her daughter's sake and tell what she knew." Mrs. Whitely replied "Kristen, if I knew anything, don't you think I would have told you by now?" Kristen documented Mrs. Whitely's statement "that what K[.B.] is telling is [']exactly['] what happened to the 12-year-old" [Nikki] petitioner's parents adopted last year.

On February 9, 2006, investigators interviewed C.L. (K.B.'s 9-year-old half-brother and Mrs. Whitely's son). C.L. visited the Whitely household on alternating weekends and thought K.B. had a good relationship with petitioner.

On March 10, 2006, Mrs. Whitely requested the children be placed with Mrs. Brokaw. A social worker advised her they would "not place victims of sexual abuse in a home where the allegations are not believed and the child is not supported." On March 14, 2006, the social workers concluded that Mrs. Whitely's disbelief meant she "does not possess the ability to protect her children."

Petitioner was charged with four counts of Rape, First Degree – Victim Under 14. Two counts were dismissed for lack of probable cause. The prosecutor amended the remaining counts to Lewd Molestation of a Minor.

The year leading up to petitioner's trial was an inquisition by social workers who continuously threatened Mrs. Whitely that she would not get her children back if she did not believe K.B. and support her and not support petitioner. Mrs. Whitely

worked diligently to meet reunification conditions imposed by DHS. The one exception was her non-compliance with their belief and support requirements.

Social workers vigilantly monitored Mrs. Whitely for evidence of her disbelief. After a May 31, 2006, children's court hearing, a social worker noted the Whitely's "hugged and kissed each other for 8 minutes, until separating and leaving in separate cars. Melissa called and advised the ADA Tate of what we had both observed."

Social workers began threatening to deny Mrs. Whitely access to services essential to meeting reunification conditions. On August 25, 2006, Mrs. Whitely called DHS to arrange a meeting with K.B.'s counselor. A social worker "discussed the case at length" with her and confronted her with the kissing incident to gauge her belief. To prevent the termination of services, Mrs. Whitely made a general statement that she had "no doubts that Larry hurt K[.B.]"

Three days later, the worker wrote:

> Mrs. Whitely made a comment that made the worker believe she still does not believe that the abuse happened. She made the comment that was something to the affect of, (the first time K[.B.] was questioned she said nothing happened, then she was questioned again by an officer alone, and then she said something happened.)

The worker also wrote that Mrs. Whitely was "frustrated" with the requirement she attend a "[g]roup for non-offending parents" and "that the six month review is coming up, and reunification of L[.A.W.] is not being requested by DHS."

At petitioner's trial, K.B. testified that he forcefully, anally raped her 60 to 100 or more times during the year prior to his arrest. Mrs. Whitely testified that she

never noticed blood on K.B.'s underwear and that K.B. watched a health video at school and played with a girl named Nikki.

Trial counsel prefaced his direct examination of Mrs. Whitely by asking, "Are you here today because we subpoenaed you and had you ordered to come here?" Mrs. Whitely replied "Yes." The prosecutor asked, "Are you here today in support of [petitioner]?" Mrs. Whitely modified her exculpatory statements to be consistent with DHS' support requirement by replying "No." Petitioner was found guilty.

Mrs. Whitely sent a pre-sentencing letter to the trial court advising:

> When I was asked about this in the beginning when I said I didn't believe it my children were taken away from me. The Department of Human Services and the District Attorney tell me that I must believe my daughter in order to ever get my children back. If they truly do not care about the truth there is nothing I can do. I am doing what is right fully knowing the consequences. It is at this point that I ask for mercy for Larry Whitely. He has devoted his life to helping others. The only threat to society that is posed is Larry not being in it to help others.

At sentencing, Mrs. Whitely stood by her letter. Petitioner was sentenced to concurrent 20-year terms of incarceration.

Petitioner filed a direct appeal. The Oklahoma Court of Criminal Appeals (OCCA) denied relief.

B. State Court Orders

Petitioner filed a post-conviction application. He raised a *Webb* claim due to the social workers and District Attorney's office threatening Mrs. Whitely. He also raised the *Webb* claim as one of several *Strickland* claims related to trial and appellate counsels' ineffective assistance. Petitioner's other *Strickland* claims were based on trial and appellate counsels' failure to investigate and present medical and forensic

interview experts and lay witnesses to contradict K.B.'s credibility. Petitioner also raised a *Napue* claim due to the prosecutor eliciting false testimony from Mrs. Whitely.

Petitioner requested discovery and a full evidentiary hearing. The trial court denied discovery but allowed petitioner to depose appellate counsel. (App.147a). The trial court granted a limited evidentiary hearing on "issues relating to ineffective assistance of appellate counsel." (App.149a). The hearing was on *Strickland*'s performance prong, specifically what appellate counsel had "in front of her" and what she "did or did not" do at the time of petitioner's direct appeal.

The trial court denied relief after finding, "it is clear that the alleged coercion had no effect on the witness." (App.145a). Petitioner appealed.

The OCCA reversed, expressing concern about Mrs. Whitely's post-conviction averment that "she never suspected and does not believe any sexual abuse occurred, and would have testified for Petitioner and against the victim if she would have felt free to do so" but that "DHS was basically forcing her to admit to the crimes, otherwise she would never get her children back." The OCCA expressed similar concern about an affidavit from her father, Gary Brokaw. (App.132a, 137a). The OCCA found "the failure to recognize and utilize such evidence would not have been insignificant in this criminal case" and admonished that "a defendant's right to the presumption of innocence prior to trial is also a bedrock principle." (App.137a).

The OCCA remanded for an explanation of why, "if the coercion had no effect on the witness . . . didn't the wife/mother testify at trial as she has averred in her affidavit." The OCCA ordered the trial court to determine whether Mrs. Whitely

and her father "were deterred by the prosecution, including DHS personnel, from feeling free to testify fully or truthfully" or "are changing their story after the fact because they no longer have anything to lose." (App.137a, 140a).

On remand, the trial court refused to "make a determination as to whether witnesses were deterred by the prosecution, including DHS personnel, from fully and truthfully testifying." The trial court claimed petitioner "had a fully and fair opportunity to present such evidence at the two day evidentiary hearing . . . Failure to do so does not provide cause for yet another bite at that proverbial apple." (App.125a).

The trial court found it "evident that appellate counsel's failure to fully investigate and develop theories related to the additional medical testimony which may have been available and may have had an effect on the trial outcome fell below an objectively reasonable standard." The trial court granted a new direct appeal on this single claim after finding it was "not clear to this court whether trial counsel's strategy fell below an objectively reasonable standard." (App.125a).

Petitioner appealed to avoid a procedural default of his entire post-conviction application. He requested a new trial on all claims. The OCCA determined that "[a] [']new['] direct appeal is not one of the remedies allowed by the [Uniform Post-Conviction Procedure] Act." The OCCA found the trial court "has already determined that Whitely was denied effective assistance of appellate counsel" and ordered the trial court to:

> . . . address Whitely's claims that form the basis of his request for relief, through whatever manner it deems proper, subject to the limitations set forth in the Act. The District Court may review the original record, and

> may allow depositions and affidavits for good cause shown . . . It may also conduct an evidentiary hearing.

(App.121-22a).

The trial court reaffirmed that "the first prong of *Strickland* had been met by appellate counsel's failure to conduct an off record review" and recognized the OCCA directed it to address, "the second prong." (App.100a, 104a). Without any supplementation, the trial court stated the record it previously found "not clear" was an "ample record to review" to assess trial counsel's representation. (App.116a, 125a).

The trial court found:

> Kelly Whitely did testify . . . In his affidavit, trial counsel states that he did not ask certain questions of Ms. Whitely because he believed her fear of DHS might consume her. This was a valid strategic reason not to ask particular questions–counsel did not know whether Ms. Whitely's testimony would assist his client. Furthermore, the affidavit of Kelly Whitely now proffered is inconsistent with other statements.

(App.109a). The trial court referenced Mrs. Whitely's "character and credibility" and stated that petitioner's post-conviction affidavits "tend[] to cast doubt on the credibility of the statement of Kelly Whitely offered long after she [']had nothing left to lose.[']" The trial court found that "nothing in the record indicates that the statements made by the prosecution or DHS were false nor that anyone indicated to Ms. Whitely that she should make false statements in court." (App.110a).

The trial court concluded that "the underlying claims for ineffective assistance of trial counsel and prosecutorial misconduct are found not to be viable claims, it is clear that Defendant cannot meet the second prong of *Strickland* as to the ineffective assistance of appellate counsel." (App.111a). Petitioner appealed.

The OCCA recognized that the trial court found "counsel committed error." (App.95a). The OCCA restated its original question of "whether or not Kelly Whitely refused to answer these questions because she was truly intimidated by D.H.S. and the prosecution or whether at this point, having nothing to lose, she has changed her story." (App.95-96a). The OCCA now determined that "[t]he real question is, had Kelly Whitely testified that she disbelieved the victim and believed her husband, would the results at Whitely's trial have been different." (App.96a).

The OCCA did not answer the questions it posed. Instead, the OCCA found that trial counsel had an "unspecified reason for limiting his questioning of Kelly Whitely." The OCCA referenced the trial court's comments on "Kelly Whitely's credibility and her character for truthfulness." The OCCA stated "[i]t is difficult to reconcile Kelly Whitely's claim that she was too intimidated to testify at trial because she feared losing her children but she was not afraid of losing them when she chose to write a letter on Whitely's behalf prior to sentencing." (App.96a) The OCCA concluded that "Whitely has failed to establish that appellate counsel's performance was deficient or objectively unreasonable and has failed to establish any resulting prejudice." (App.97a).

C. The Federal Court Orders

Petitioner filed a habeas petition, raising the *Webb*, *Strickland* and *Napue* claims. The District Court found, "the evidence as to DHS's dealings with Mrs. Whitely is the most troubling to this court." (App.55a). The District Court noted petitioner's evidence "*identifying instances of DHS personnel effectively assuming,*

in advance of trial, that petitioner was guilty of the charged crimes and suggesting that any different view by Mrs. Whitely would be viewed as a basis for removing her children from her custody." (App.55a).

The District Court stated, "the OCCA accurately noted that Mrs. Whitely testified in her husband's favor at the later sentencing hearing despite the same pressures being potentially present." The District Court concluded, "there is therefore a plausible basis for the OCCA's conclusion that appellate counsel was not constitutionally ineffective for not raising that issue." The District Court stated it, "might not have reached that conclusion if making the determination in the first instance." (App.55-56a). The District Court denied all claims and denied a Certificate of Appealability.[1]

The Tenth Circuit granted a Certificate of Appealability "on all issues" and received oral argument. (App.50a). The Tenth Circuit stated, "we do not decide whether the government's interaction with Mrs. Whitely constituted coercion, even if it did, that conduct was not especially egregious in light of the parallel child placement proceedings." (App.38-39a). The Tenth Circuit concluded that:

> whether defense counsel's response to government pressure on Mrs. Whitely rendered the governmental pressure a violation of due process-is a legal principle that falls outside the reach of *Webb*. Nothing in *Webb* indicates that Petitioner may assert a due process claim because his trial counsel

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[1] A petition for certiorari in *Farrar v. Williams* is currently pending before this Court. The Tenth Circuit ruled against Farrar's and petitioner's *Napue* claim for partially the same reason – the government did not know the false testimony presented was false. (App.31a). If *Farrar* succeeds, petitioner requests this Court grant certiorari, vacate the Tenth Circuit's order denying his *Napue* claim, and remand for reconsideration.

> refrained from asking a witness certain questions rather than asking the questions and seeking relief, if necessary, based on the witness's responses.

(App.36-37a).

Assuming *Webb* was violated by "government pressure result[ing] in false testimony," the Tenth Circuit decided the error was subject to harmless-error review under *Brecht*. (App.37a). The Tenth Circuit saw "no meaningful basis for applying *Brecht* to *Napue* claims in the § 2254 context but not to *Webb* claims in that context." (App.38a). The Tenth Circuit concluded that "we are not convinced that any prejudice from that argument resulted from Mrs. Whitely's testimony that she was not at the trial to support Petitioner." (App.39-40a).

Petitioner filed for rehearing. Rehearing was denied. (App.154a).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Webb and *Strickland* errors were made in petitioner's trial. If constitutional trial errors had not been made, substantial reasonable doubt would have been maintained. The risk of wrongful convictions was high as the only evidence of guilt was the complainant's emotionally-charged but inherently-suspect, uncorroborated allegations as the only evidence of guilt. In such cases, reversal is essential to protect the innocent and is the only remedy consistent with federal law.

I. THE *WEBB* QUESTION PRESENTED IS IMPORTANT DUE TO THE TENTH CIRCUIT'S AFFIRMANCE OF GOVERNMENT WITNESS COERCION THAT SUBSTANTIALLY INTERFERES WITH A DEFENDANT'S RIGHT TO PRESENT A DEFENSE AGAINST CHILD SEXUAL ABUSE ALLEGATIONS.

The federal Child Abuse Prevention and Treatment Act (CAPTA) provides funding for state child welfare systems. The Keeping Children and Families Safe Act of 2003

(KCFSA) amended CAPTA. The report prepared in support of H.R. 14, KCFSA, included the following excerpt:

> Subcommittee heard concerns about the number of parents being falsely accused of child abuse and neglect and the aggressiveness of child protection services personnel in their investigations of alleged child abuse. Mr. Christopher Klicka of the Home School Legal Defense Association described numerous cases of innocent families being aggressively investigated on allegations of child abuse and neglect only to have such cases later determined to be unsubstantiated or false . . . Mr. Klicka stated, "In the old days, social workers tried to prove a reported family was innocent and considered the family innocent until proven guilty. Now the system operates on the principle that a family is guilty . . . period."

The KCFSA allocated funds for "training of child protective services personnel in their legal duties . . . to protect the constitutional and statutory rights of children and families."

While utilizing CAPTA funds, the Oklahoma Department of Human Services (DHS) imposes requirements that are irreconcilable with common sense, the Compulsory Process Clause of the Sixth Amendment, and the Due Process Clause of the Fourteenth Amendment. Prior to any due process hearing, social workers repeatedly threaten parents that their children will not be returned if they do not believe a child's allegations of abuse and support them or if they support the parent accused of abuse. The main objective accomplished is the silencing of critical defense witnesses.

The DHS blatantly circumvents due process with their threats of severe consequences made to parents that may contradict their presumptions of guilt. This Court has clearly established that the "fundamental requis[i]te of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). This Court has clearly established that "[a] fundamental premise of our criminal trial

system is that the jury is the lie detector." *United States v. Scheffer*, 523 U.S. 303, 313 (1998) [citation omitted].

Support requirements, at a minimum, should be prefaced by a due process determination of guilt. Belief requirements are always absurd.

Forcing someone to believe something is not possible. A parent's false affirmation may result in the erroneous termination of parental rights and conviction of parents like petitioner who are accused but innocent. Belief requirements provide opportunities for unscrupulous parents to obtain sole placement of children by falsely affirming the other parent's guilt.

Belief requirements are arbitrary. A parent may honestly express his belief to get children back but callously expose them to more abuse. A parent may falsely express her belief to get children back but lack the competency to recognize the risk that acquaintances pose.

Petitioner's case demonstrates that the DHS and the District Attorney's conduct is evading correction in the state justice system. The trial court expressed no concern about Mrs. Whitely's pre-sentencing letter exposing the violation (*see* 6, *supra*). The coercive threats were notoriously imposed throughout the child welfare proceedings. The children's court failed to remedy them. *See Troxel v. Granville*, 530 U.S. 57, 66 (2000) ("it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.") Rather than a

proceeding over whether K.B. was sexually abused, the social workers focused the dispute on whether Mrs. Whitely believed K.B.

Rather than correct the unconstitutional threats, the prosecutor capitalized on them during cross-examination (*see* 6*, supra*). This Court has clearly established that it is the prosecutor's duty "to refrain from improper methods calculated to produce a wrongful conviction." *Berger v. United States*, 295 U.S. 78, 88 (1935).

Petitioner wrote to his appellate counsel that his wife was "supportive of me and states she knows I didn't do it." Appellate counsel reviewed the sentencing record which corroborated petitioner's advisement but, like trial counsel, did not raise the *Webb* violation. Appellate counsel testified that she "usually treat[s]-the child custody/parental rights issues as a separate matter. They are considered civil and I'm appointed only to represent the client in his criminal direct appeal."

The constitution does not provide an exception for social workers to presume guilt and coerce defense witness in child sexual abuse cases. The DHS/District Attorney's office used the Whitely children as pawns to ensure convictions. Their conduct is diametrically opposed to fundamental due process, the adversarial process, and *Webb*. The state justice system is facilitating it. This Court should grant certiorari and extinguish it before more innocent families are destroyed.

II. THE TENTH CIRCUIT'S *WEBB* OPINION IS INCONSISTENT WITH THIS COURT'S PRECEDENT BY FAILING TO PROTECT FUNDAMENTAL DUE PROCESS RIGHTS AND THE ADVERSARIAL PROCESS.

In *Webb v. Texas*, 409 U.S. 95 (1972), this Court clearly established that the Fourteenth Amendment is violated when the government "gratuitously" threatens a

defense witness in a manner that "could well have exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify." *Id.*, at 97-98.

Petitioner alleged that *Webb* was violated by the DHS' and District Attorney's conduct. The Tenth Circuit reframed petitioner's *Webb* claim as, "(1) defense counsel decided not to ask [Mrs. Whitely] certain questions because he was unsure whether [she] would answer truthfully, and (2) Mrs. Whitely did, in fact, answer certain questions untruthfully." (App.36a).

In *Webb*, this Court established no rule specific to defense counsel's conduct. The Tenth Circuit failed to apply *Webb*'s rule prohibiting the government from gratuitously threatening defense witnesses and precluding them from testifying.

This Court has clearly established that "state courts must reasonably apply the rules squarely established by this Court's holdings to the facts of each case." *White v. Woodall*, 572 U.S. 415, 427 (2014) [citation omitted]. This Court has clearly established that "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) [citation omitted]. This Court has clearly established that "certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004).

The social workers' threats were entirely gratuitous and imposed substantial duress. After sentencing, Mrs. Whitely retained Attorney Deborah Maddox in the

child welfare proceedings. Maddox averred that Mrs. Whitely "missed her daughters terribly. Her first counselor documented her grief and the fact that she was overwhelmed from losing her husband and family almost overnight."

Aside from K.B. and petitioner, Mrs. Whitely was the only other regular member of the Whitely household that could testify. Mrs. Whitely's direct testimony spanned two pages of a trial transcript exceeding 1,000 (*see* p. 5-6, *supra*). The only arguable value Mrs. Whitely's direct testimony had was her not seeing blood on K.B.'s underwear but K.B. testified the rapes never made her bleed. Mrs. Whitely avers:

> I was told by DHS that if I supported my husband in any way, shape or form, I would never get my children back . . . I would have testified for Larry and against K[.B.] if I could have. I do not believe Larry did anything to K[.B.] I never perceived Larry to be a threat to K[.B.]

Mrs. Whitely's statement is corroborated by Maddox who avers:

> DHS claimed that Kelly's belief in her husband and her disbelief in her daughter's story, rendered both children deprived. DHS explained that before her daughters could be returned to her custody, Kelly needed to believe K[.B.]'s claim of rape and, further, she could not support her husband in any way. She did not testify for Larry Whitely at his trial in an effort to remain cooperative.

The missing testimony that Mrs. Whitely would have provided is reasonable doubt. Mrs. Whitely avers that K.B:

> . . . spent the last 3 years lying to me about all kinds of things that she did. We had discipline problems with her since she was 4 or 5 . . . One time, she stole money from me . . . lied to me and blamed it on her brother C[.L.] . . . It took a few hours to get her to fess up to it, this was when she was eight.

Mrs. Whitely avers that K.B. "would do anything at all to get [her brother] in trouble." Mrs. Whitely avers that K.B. "never had a problem going to places with

[petitioner] alone," she "never suspected Larry was doing anything hurtful to K[.B.] . . . K[.B.] never hinted once there was a problem." She avers that "Larry talks to K[.B.] all the time about [']everything,[']" and "K.[B.] loves him and acts toward him like she's a [']Daddy's girl.[']"[2] She avers that K.B. "wouldn't be afraid to tell anyone something. K[.B.] can't keep a secret to save her life."

Mrs. Whitely avers that K.B.'s "friends are the type of girls who will be best friends one week and then not speak to her the next week," K.B. "would get really angry and hateful toward people who picked on her and would do anything she could to get them in trouble, even lying to their friends to start fights. K[.B.] would tell teachers that kids in her class did something that they didn't do."

Mrs. Whitely's brief testimony was itself highly suspicious. Any reasonable juror would know that she knew far more than she was saying. As she was compelled to the witness stand by the defense, the main inference is that anything more she knew was detrimental to petitioner. Any value that Mrs. Whitely's brief trial testimony provided the defense was obliterated on direct and cross (*see* 6 *supra*).[3] Mrs. Whitely's misleading non-support testimony provided corroboration

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[2] The trial court found that trial testimony was elicited "that the child did not demonstrate any fear or distrust of the defendant and that the family was a happy family unit." (App.111a). No such testimony was presented. The finding is erroneous and unreasonable. 28 U.S.C. § 2254(2).

[3] Mrs. Whitely had no reason to believe that saying "yes" to the prosecutor's "support" question would not be used to deny the return of her children. Every other statement she made in support of petitioner's innocence was used for that purpose.

for K.B.'s allegations in a trial where there was none. Rather than two to one in this credibility dispute, the government's misconduct shifted petitioner down one to two. In closing, the prosecutor argued, "You didn't hear her mom come in here and you didn't hear her mom say she was a liar. And she would be the one who would know more than anyone."[4]

The Tenth Circuit suggested that Mrs. Whitely's non-support testimony was offset by K.B.'s testimony that she did "not really" think her mom believed her. (App.39a). The jury could well have believed Mrs. Whitely's own testimony about her own position. The jury was not privy to the social workers' threats and could only speculate about why Mrs. Whitely did not support petitioner. Any reasonable juror would have noticed that the witness best-positioned to have insight into who was telling the truth provided scant assistance to the defense.

The pertinent question raised by the OCCA of why Mrs. Whitely (and her father) did not freely and fully testify in support of petitioner was never adjudicated. (App.95-96a). The focus of a *Webb* inquiry is on the government's conduct. Petitioner must only prove that the DHS' gratuitous threats may well have precluded Mrs. Whitely's free and full testimony.

After trial, Mrs. Whitely was under the additional duress of her innocent husband facing upwards of 40 years in prison. The state courts' suggestion that this

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[4] *See United States v. Viera*, 819 F.2d 498 (5th Cir. 1987) (the prosecutor's threats in this case were exacerbated by his comments before the jury on the threatened witness' failure to testify—a serious compounding of the error).

added duress would not cause a witness to set aside the duress imposed by the DHS' threats to testify is unreasonable.

When Mrs. Whitely wrote her pre-sentencing letter, her attempts to meet reunification conditions were still ongoing. Mrs. Whitely's reference to the "consequences" of writing her letter proves that she felt significant duress from the DHS' threats. After sentencing, Mrs. Whitely remained mired in endless rounds of counseling imposed by DHS. She was unable to meet reunification conditions due to her disbelief. Her parental rights were terminated.

Though Mrs. Whitely's post-conviction affidavit was signed after she permanently lost her children, it is consistent with her pre-sentencing letter, sentencing testimony, and the DHS' records. Her affidavit is also consistent with the observations of Attorneys Maddox and Smith (*see* 17 and 27, *supra*).

The social workers' coercive threats informed Mrs. Whitely that she would suffer severe consequences if she contradicted their presumption of guilt. The fact that Mrs. Whitely's children were placed outside the home the entire year before trial made the threats especially impactful. The social workers who removed the children were also the ones threatening Mrs. Whitely, formulating and monitoring reunification conditions and judging her progress.

The record proves that Mrs. Whitely supported petitioner's innocence throughout and that the social workers' continuous threats were the cause of her failure to freely and fully testify in support of petitioner. The same is true of her father. No stories were changed after there was nothing to lose. The record supports

only one answer to the question of why Mrs. Whitely and Mr. Brokaw did not freely and fully testify. That answer is government coercion.

This Court has limited habeas review to the state court record for claims adjudicated on the merits. *Cullen v. Pinholster*, 563 U.S. 170, 181-86 (2011). This Court has clearly established that when a petition "sets forth specific and detailed factual assertions that, if true, would entitle the petitioner to relief, the court must ensure the full development of the relevant facts." *Vincent v. Louisiana*, 469 U.S. 1166, 1168 (1985) [citations omitted].

The state courts prevented petitioner from further developing facts entitling him to relief. The state courts denied a full evidentiary hearing and resorted to speculation to deny petitioner's *Webb* claim and others. Regardless, the Oklahoma Post-Conviction Procedure Act allows proof in the form of affidavits. (App.155a).

The DHS' threats imposed extreme duress and were entirely gratuitous. Any finding or conclusion that the government's conduct could not well have precluded Mrs. Whitely from freely testifying at trial is wrong and unreasonable. No fair-minded jurist could find the lower courts' speculative findings and application of *Webb* reasonable. 28 U.S.C. § 2254(d)(1) and (2).

III. THE TENTH CIRCUIT'S *WEBB* OPINION IS DISCORDANT WITH OPINIONS FROM OTHER JURISDICTIONS INDICATING THAT GRATUITOUS THREATS AND THREATS REGARDING LOSS OF CHILDREN MADE TO DEFENSE WITNESSES ARE UNCONSTITUTIONAL.

1. The Tenth Circuit's opinion is discordant with other jurisdictions which consistently conclude that gratuitous threats to defense witnesses violate *Webb*. *See*, *e.g.*, *United States v. Morrison*, 535 F.2d 223 (3rd Cir. 1976) ("prosecutor in his

repeated warnings which culminated in a highly intimidating personal interview were completely unnecessary"); *Bray v. Payton*, 429 F.2d 500, 501 (4th Cir. 1970) ("prosecuting attorney directed the arrest and incarceration of [a] witness on [an] old charge"); *Viera*, at 503 (prosecutor threatened to "personally *see* to it that [witness] faced indictment for any potential mishaps on the stand"); *United States v. Thomas*, 488 F.2d 334, 336 (6th Cir. 1973) ("gratuitously admonishing [the defense witness] cannot be viewed as serving any valid purpose, even accepting the assertions of good faith"); *United States v. Jackson*, 935 F.2d 832, 847 (7th Cir. 1991) [citation omitted] (when "the substance of what the prosecutor communicates to the witness is a threat over and above what the record indicate[s] was timely, necessary, and appropriate, the inference that the prosecutor sought to coerce a witness into silence is strong"); *United States v. Smith*, 478 F.2d 976, 979 (D.C. Cir. 1973) ("prosecutor's warning . . . that he might incriminate himself and be subject to prosecution if he elected to testify . . . was calculated to transform [witness] from a willing witness to one who would refuse to testify, and that in fact was the result."); *State v. Ivy*, 300 N.W.2d 310, 314 (Iowa 1981) (witness "threatened with criminal prosecution if he didn't tell the 'truth'"); *State v. Ammons*, 305 N.W.2d 808, 810-11 (Nebraska 1981) (prosecutor threatened to revoke plea agreement if witness testified).

2. The Tenth Circuit's "not especially egregious" finding contravenes *Lynumn v. Illinois*, 372 U.S. 528 (1963) and conflicts with other jurisdictions. In a footnote, the Tenth Circuit indicated, "we need not determine if the OCCA's decision contravenes *Lynumn*." (App.36a).

In *Lynumn*, this Court considered a coerced confession claim, finding among other factors that "petitioner's oral confession was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not 'cooperate.'" This Court concluded petitioner's "will was overborne" because it was "clear that a confession made under such circumstances must be deemed not voluntary, but coerced." *Id.*, at 534.

In *State v. Gutierrez*, 333 P.3d 247, 250-51 (New Mexico 2014), the prosecution threatened a mother she would lose her son if she recanted sexual abuse allegations. The New Mexico Supreme Court reversed on other grounds but stated, "We have found no precedent in this state or elsewhere that condones going beyond merely advising a witness of direct perjury consequences to raise the specter of collateral consequences, such as losing custody of one's own child." *Id.*, at 256.

See also, *Vaughn v. Ruoff*, 253 F.3d 1124, 1130 (8th Cir. 2001) ("any reasonable social worker–indeed, any reasonable person, social worker or not-would have known that a sterilization is compelled, not voluntary, if it is consented to under the coercive threat of losing one's child, and hence unconstitutional."); *Hernandez v. Foster*, 657 F.3d 463, 483 (7th Cir. 2011) [citations omitted] ("it is difficult to overstate the cost of non-compliance-losing custody of one's child, even temporarily . . . It is one thing for parents to question a caseworker's authority to impose a safety plan when they have custody of their child; it is entirely another when the parents don't . . . in the latter, the child has already been removed-the risk is certain."); *United States v. Ivy*, 165 F.3d 397, 403-04 (6th Cir. 1998) (consent to search unconstitutionally

obtained by shackling defendant's girlfriend to table, taking child from her arms and threatening that government would take custody of child if consent was not granted); *United States v. Tingle*, 658 F.2d 1332, 1336 (9th Cir. 1981) (erroneous to "deliberately prey upon the maternal instinct and inculcate fear in a mother that she will not see her child in order to elicit cooperation"); *Raphael v. State*, 994 P.2d 1004, 1007-10 (Alaska 2000) (after a mother was incarcerated and her children removed "the trial judge conveyed the strong impression that I.W.'s release from imprisonment was conditioned not only on whether she testified, but on how she testified . . . the risk that the witness may not testify freely and truthfully is too great.")

3. The Tenth Circuit's opinion is discordant with *Taylor v. Illinois*, 484 U.S. 400 (1988). In *Taylor*, this Court considered whether a discovery sanction precluding the presentation of an untimely-disclosed defense witness violated the Compulsory Process Clause. *Id.*, at 404-05. This Court found, "that a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor" though:

> the mere invocation of that right cannot automatically and invariably outweigh countervailing public interests. The integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance.

Id., at 414-15. This Court found that the Compulsory Process Clause was not like other Sixth Amendment rights which "shield the defendant from potential prosecutorial abuses;" it was "a sword that may be used to rebut the prosecution's case." *Id.*, at 410. This Court quoted *United States v. Nixon*, 418 U.S. 683, 709 (1974), stating

that the "ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *Id.*, at 411.

In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), this Court held that specific rights protected by the Compulsory Process Clause of the Sixth Amendment include "the right to put before a jury evidence that might influence the determination of guilt." *Id.*, at 55-56. In *Ritchie*, this Court apparently adopted *Webb* as a Compulsory Process Clause case. *Id.*, at 56, f.n. 13.

In *Taylor*, this Court cited *Ritchie* to clarify that "[t]he right to offer testimony is [] grounded in the Sixth Amendment." *Id.*, at 408-09. In *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974), this Court reaffirmed that "[w]hen specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them."

Collectively, *Webb*, *Ritchie* and *Taylor* clearly establish that the Compulsory Process Clause contains a sword and shield. In *Taylor*, this Court held that swords must be used with "deliberate planning and affirmative conduct." *Id.*, at 410. Petitioner's sword was ineffective because the government violated his shield.

Unlike this Court's analysis in *Taylor,* the lower courts failed to weigh the interests involved in petitioner's case. The government's misconduct substantially caused the partial, speculative presentation of fact at petitioner's trial. The Tenth Circuit's order does not protect fundamental rights or the adversarial process.

4. The Tenth Circuit's opinion contravenes *Strickland v. Washington*, 466 U.S 668 (1984). The effective assistance of counsel is also a specific right. *Darden v.*

Wainwright, 477 U.S. 168, 182 (1986); *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). Oklahoma law requires that petitioner prove ineffective assistance of counsel to overcome the procedural bar imposed by trial and appellate counsel's failure to raise his claims. *Fox v. Ward*, 880 P.2d 383, 384 (Okl. Cr. 1994).

In *Strickland*, this Court clearly established that the purpose of the "effective assistance guarantee of the Sixth Amendment is . . . simply to ensure that criminal defendants receive a fair trial." *Id.*, at 689. This Court held that "the ultimate focus of inquiry" is whether the "the result . . . is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Id.*, at 696.

This Court has clearly established that counsel are, "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.*, at 690. This Court has clearly established that the "proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*, at 688.

This Court held that prejudice is sometimes presumed when "the prosecution is directly responsible" for "impairments" to the effective assistance of counsel because they are "easy for the government to prevent." *Id.*, at 692. This Court has "neutralize[d] the taint" when "constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation." *United States v. Morrison*, 449 U.S. 361, 364-65 (1981).

Defense counsel's post-conviction affidavit demonstrates that he was formulating strategy around the government's misconduct. He avers:

> 16. I realize also that the jury missed some critical information from my client's wife, who is also K[.B.]'s mother. Although I had reasons, at the time, for what I did and did not ask Kelly Whitely. I think it would have had a major impact on the jury if the jury had known that Kelly Whitely did not believe the allegations against my client and that K[.B.] lied on many occasions.
>
> 17. I am aware that the Department of Human Services was working hand in hand with the prosecution and that Ms. Whitely feared that offending the DHS/prosecution team would hurt her chances for custody of her children. The Department of Human Services dangled the kids in front of Kelly in an obvious attempt to influence her behavior and her testimony. My knowledge of the pressure being applied caused me not to ask some questions of Kelly Whitely. I was concerned that Ms. Whitely might be consumed by her fear of DHS.

The OCCA asserted that point 16. meant that trial counsel, "had an unspecified reason for limiting his questioning of Kelly Whitely." (App.96a). The OCCA ignored point 17. In point 17., trial counsel clearly states it was the coercion which caused him not to ask Mrs. Whitely questions. The OCCA is suggesting that an "unspecified reason" cleansed the government's threats. The government's conduct was not cleansed by trial counsel's response to it.

As the OCCA initially recognized, the relevant inquiry into defense counsels' conduct is whether Mrs. Whitely and her father were coerced. (App.137a). If so, defense counsel were deficient for failing to protect petitioner's fundamental right to present their free and voluntary testimony. Mrs. Whitely was coerced.

Petitioner's case demonstrates it cannot reasonably be presumed that defense counsel will have the insight to recognize this *Webb* violation. The risk of deficient representation is substantially increased by the bifurcated nature of it.

Trial counsel's strategy was to prove K.B. was lying. As proof, he highlighted inconsistencies in K.B.'s statements about rape. Mrs. Whitely's freely given testimony would have advised the jury not to believe K.B. (*see* 17-18, *supra*).

Trial counsel offered no reason other than government coercion for his failure to ask Mrs. Whitely certain questions. Either he was oblivious to the *Webb* violation, like appellate counsel, or he acquiesced to it (*see* 15, *supra*.).

This Court has clearly established that defense counsel's "ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is . . . unreasonable performance under *Strickland*." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014). This Court has also clearly established that defense counsel must make reasonable decisions. *Strickland*, at 690-91.

Any acquiescence to the *Webb* violation was unreasonable. Trial counsel's failure to protect petitioner's fundamental right made eliciting Mrs. Whitely's key testimony dangerous. It would be difficult to convince the trial court that any unfavorable testimony was due to coercion as opposed to Mrs. Whitely telling the truth under oath. Eliciting testimony about coercion to mitigate unfavorable testimony would prejudicially inform the jury that social workers believed K.B.

Petitioner has all along argued that trial and appellate counsel were deficient for failing to raise the *Webb* claim. The trial court received evidence and found appellate counsel deficient. (App.100a, 104a). Without justification, the OCCA's final order states that appellate counsel's performance was not deficient. The

OCCA's finding that prejudice was not established does not rehabilitate deficient performance.

Under the circumstances, petitioner should not have to prove "there is no reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105 (2011). Holding defense counsel responsible for government witness coercion does little to ensure fair trials or protect the adversarial process. Whether the error is attributable to *Webb* alone or *Webb* and *Strickland*, the trial was unreliable. No fair-minded jurist would disagree that the lowers courts' application of clearly established law in *Webb* and *Strickland* is unreasonable. 28 U.S.C. § 2254(d)(1).

5. The Tenth Circuit's findings conflict with *Webb*, *Crane*, and opinions from other jurisdictions. The Tenth Circuit observed that in *Webb*, "a defense witness refused to testify" whereas "Mrs. Whitely never refused to testify . . . she provided some exculpatory testimony" and "did, in fact, answer certain questions truthfully." The Tenth Circuit found it significant that "trial counsel refrained from asking . . . questions." (App.36-37a).

Unlike in *Webb*, self-incrimination was not an issue. Compulsory process was used to ensure Mrs. Whitely's appearance because she was unwilling to testify.

In *Webb*, this Court rejected the Texas Court of Appeals' finding that "there was no showing that the witness had been intimidated by the admonition or had refused to testify because of it" and did not limit relief to cases in which witnesses refuse to testify. *Id.*, at 97. This Court established a "circumstances" test for an obvious

reason. *Id.*, at 98. A fact-bound test would require a new rule be established each time the government employed a novel method to coerce defense witnesses.

The Tenth Circuit's application of *Webb* is in discord with this Court's clearly established principle in *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) [citation omitted], that "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." This Court clearly established *Crane*'s applicability to *Webb* violations in *Gilmore v. Taylor*, 508 U.S. 333, 343 (1993).

The Tenth Circuit's opinion conflicts with those of other jurisdictions and its own prior precedent. *See United States v. Morrison*, 535 F.2d 223, 227 (3rd Cir. 1976) ("The District Court sought to distinguish Webb on the grounds that the witness in that case had been driven from the stand by the judge's warning whereas Sally Bell testified freely to non-incriminating matters before the jury . . . We do not find these distinctions relevant to the issue of whether the actions of the prosecutor interfered with Mr. Boscia's right to have his witness give evidence in his favor."); *United States v. Thomas*, 488 F.2d 334, 336 (6th Cir. 1973) ("the government stresses that the defense counsel's failure to recall the witness or to issue a subpoena ad testificandum should be a pivotal consideration. We cannot agree. There is an obvious and considerable difference between the free and open testimony anticipated of a voluntary witness and the perhaps guarded testimony of a reluctant witness who is willing to appear only at the command of the court."); *United States v. Juan*, 704 F.3d 1137, 1139-42 (9th Cir. 2013) ("Where a witness is coerced into recanting testimony that was favorable to the defendant, the harm to

the defense involves not merely the prevention of prospective testimony that might have bolstered its case, but the retraction of testimony that did bolster its case."); *Griffin v. Davies*, 929 F.2d 550, 553 (10th Cir. 1991) ("To establish a . . . denial of the right to compulsory process . . . There must be a plausible showing that an act by the government caused the loss or erosion of testimony . . . "); *Archer v. State*, 859 A.2d 210, 355 (Maryland 2004) ("Although neither *Stanley* nor *Webb* involved a compellable witness's refusal to testify, we find that to be a difference without a distinction. Here there is no question that the witness had no legal right or privilege to refuse to testify . . . Nonetheless, he had a right to make a free and voluntary choice whether or not to testify."); *People v. Pena*, 175 N.W.2d 767 (Michigan 1970) ("The Constitutional right of a defendant to call witnesses in his defense mandates that they must be called without intimidation. The manner of testifying is often more persuasive than the testimony itself."); *Watson v. Texas*, 513 S.W.2d 577, 579 (Texas 1974) ("the witness testified, and there is neither a claim that his testimony was changed one iota because of, nor any showing that his manner of presentation of his testimony was affected by, the court's remarks.")

IV. THE PREJUDICE QUESTION IS IMPORTANT DUE TO COURTS UNCONSTITUTIONALLY ASSESSING THE IMPACT OF TRIAL ERROR ON K.B.'S CREDIBILITY AND DUE TO CONFLICT BETWEEN THE TENTH CIRCUIT AND OTHER JURISDICTIONS REGARDING *BRECHT*'S APPLICABILITY TO *WEBB* CLAIMS.

In *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993), this Court observed that "[t]he federal habeas corpus statute . . . directs simply that the court [']dispose of the matter as law and justice require,['] § 2243. The statute says nothing about the standard for harmless-error review in habeas cases." This Court established that

the *Kotteakos* harmless-error review standard applies to state habeas claims. The *Kotteakos* standard requires courts to determine whether constitutional error "had substantial and injurious effect or influence in determining the jury's verdict." *Id.*, at 637-38 [citation omitted].

This Court limited *Brecht*'s applicability to "constitutional error of the trial type." *Id.*, at 638. This Court explained that:

> trial error occurs during the presentation of the case to the jury, and is amenable to harmless-error analysis because it may . . . be quantitatively assessed in the context of other evidence presented in order to determine the effect it had on the trial. At the other end of the spectrum of constitutional errors lie structural defects in the constitution of the trial mechanism, which defy analysis harmless-error standards. The existence of such defects . . . requires automatic reversal of the conviction because they infect the entire trial process.

Id., at 629 [citations omitted].

This Court has clearly established that "[h]armless-error analysis . . . presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury." *Rose v. Clark*, 478 U.S. 570, 578 (1986). Multiple trial errors deprived petitioner of his "full opportunity to put on evidence." *Id.*, at 579.

Reviewing courts cannot assess witness credibility. *Scheffer*, at 313. The best they can do is view K.B.'s and Mrs. Whitely's testimony in "equipoise." There is "grave doubt." This Court has clearly established that when "grave doubt [exists] as to the harmlessness of an error that affects substantial rights," the error is "substantial and injurious." *O'Neal v McAninch*, 513 U.S. 432, 435, 444 (1995).

In cases like petitioner's, the result depends entirely on an assessment of K.B.'s credibility, which is directly impacted witnesses contradicting her. To determine whether *Webb* or *Strickland* trial error is substantial and injurious, a fact-finder must assess the missing witnesses' credibility and its impact on K.B.'s credibility. The jury did not assess the impact of Mrs. Whitely's critical testimony, or petitioner's critical defense experts' guiding insights or lay witness insights, on K.B.'s credibility.

This Court applied no prejudice standard in *Webb*. In *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873-74 (1982), this Court established that a Compulsory Process Clause violation "requires some showing that the evidence lost would be both material and favorable to the defense."

The best any reviewing court can do to assess prejudice from *Webb* errors in credibility dispute cases like petitioner's is assess materiality. Mrs. Whitely's missing testimony is highly material (*see* 17-19, *supra*). *See United States v. Agurs*, 427 U.S. 97, 112-13 (1976) (material evidence "creates a reasonable doubt that did not otherwise exist.") The same is true of petitioner's missing experts and lay witnesses. *Strickland* errors also rely on the materiality standard.[5] *Kyles*, at 434.

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[5] The prosecutor bolstered K.B.'s incredible allegations with testimony from Cox, McKinnon and Koelling. Trial counsel did not investigate medical or forensic interview experts and lay witnesses to support petitioner's innocence, thereby relaying the prejudicial message that no such witnesses were available. The truth is that no informed expert could support the state's case and that everyone who knew both K.B. and petitioner would undermine her credibility and support his.

McKinnon testified "I didn't take a history from this patient." The jury was not advised that McKinnon did not know what K.B.'s allegations were when he testified. McKinnon testified that studies prove physical findings are not present in "90%" of "confirmed sexual abuse cases" of children. Trial counsel "did not interview" McKinnon or obtain McKinnon's studies prior to cross-examination. Trial counsel did not consult with a medical expert. There is no study supporting the applicability of the 90% statistic to forced, anal rape of children. Dr. John Stuemky, head of the Child Protection Team at Oklahoma University Hospital, avers K.B.'s allegations:

> indicating multiple episodes of anal rape and that it was forced and against her will, and in the absence of lubricant and not hurting is also rather difficult to believe. This includes feeling ejaculate and that it was cold. If all the above occurred – forced anal rape, multiple times, without lubricant, against her will, would seem more likely that there should have been physical findings. All of the above would be of great concern.

The trial court found "it is clear that [Stuemky] believes this may be one of the 10% cases due to the allegations." (App.106a).

Stuemky avers that K.B.'s "denial of pain does not fit with her allegations of fighting back and that force was used." Stuemky avers that K.B.'s "detailed description of fighting back along with the allegations of violent forced attacks simply does not fit with ongoing child molestation by fathers/stepfathers." The Tenth Circuit unreasonably concluded this "add[ed] little to Petitioner's case" because "no one contended that K.B.'s testimony about fighting Petitioner was, in fact, true." (App.17a). K.B. unequivocally alleged nothing but forced, violent attacks while she fought back "every time." The jury was not provided the critical insight that K.B.'s story was a total mismatch to the accounts of children that have actually been sexually abused by stepfathers. Stuemky's testimony substantially undermines K.B.'s credibility. Due to trial counsel's failure to investigate, all he had was insufficient cross-examination of uninformed experts called in support of the state.

Cox's unqualified testimony and Koelling's uninformed testimony vouched for K.B. Cox testified he did not find child porn in the Whitely household because petitioner had a child to molest so he did not need the porn. Cox testified that K.B. was "hiding" "allegations" from him. Koelling testified that K.B. "didn't really . . . understand what was going on or why it was happening" when she

interviewed her, that K.B. told Cox first because of the "safety careers that both parents were involved in" and that it was not "unusual at all" that K.B. was "just skimming the surface and kind of testing how much she can tell me" in the first interview and "goes into detail during the second."

Koelling was ignorant about Cox's interrogation when she testified. Koelling learned of Cox's audio-taped interrogation from Investigator Gaynor. Koelling said she believes she was deceived and would not have re-interviewed K[.B.] if she knew what was on the tape. Koelling stated that Cox pushed and pushed which is exactly how you ruin a case. Koelling said someone needs to talk to K.B. again because she may have made up her story. Koelling clearly would not have vouched for K.B.'s victimization at trial if she knew the reason K.B. made more disclosures. Dr. Maggie Bruck, Professor and Acting Director of the Division of Child and Adolescent Psychiatry and Behavioral Sciences at Johns Hopkins University School of Medicine, avers:

> Cox should not have been allowed to interview K[.B.] He had no training in interviewing children about sexual abuse. He used a number of interrogatory techniques used by police to produce confessions from suspects . . . known to produce coerced confessions among children and adults, which are often false.

Bruck identified "interview bias" in Koelling's second interview and opined that "none of these investigators tested the hypothesis that the child had deliberately lied in her note to her peers." Gaynor provided Bruck's affidavit to Koelling and Koelling concurred with it.

The sole defense expert was Dr. Linda Ingraham. Trial counsel avers "I failed in my preparation for presenting Dr. Ingraham as a witness. I intended to show through her that the Noble police conducted an improper forensic interview of K[.B.] Instead she came prepared to testify about memory." Ingraham avers "my testimony had the potential of confusing the jury because we did not go over the answers I would give on direct examination and determine how they would relate to the case." Bruck avers "there is no issue of memory distortion. Providing the court with information about memory distortion confuses the major issues in this case." Ingraham advised the jury that child interviews are "not what I do" and "I would certainly want my interviews peer reviewed." Ingraham testified "I am not saying that Officer Cox was, quote, wrong. I'm saying that he was

This Court has also established that constitutional error impacting the right to a jury in ways "necessarily unquantifiable and indeterminate, unquestionably qualifies as structural." *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993). When "[a] reviewing court can only engage in pure speculation—its view of what a reasonable jury would have done . . . the wrong entity judge[s] the defendant guilty." *Id.*, at 281 [citation omitted]. This Court has held that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence." *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Unable to assess credibility, reviewing courts cannot quantify the impact of trial error on petitioner's verdicts.

Deprivation of "the right to a jury verdict of guilt beyond a reasonable doubt" is structural. *Sullivan*, at 281. All reviewing courts imposed structural error by usurping the jury's role in assessing credibility to determine prejudice. Petitioner

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untrained." Ingraham testified that Koelling's interviews were "very well done" and "Tracy did a fantastic job . . . She followed the protocol. She did things right. You know this is something that's important for you to know." Bruck avers Ingraham's statement that "Tracy did a fantastic job . . . clearly exposed this expert's ignorance in these areas."

L.W. testified that K.B. told "some little lies" like a lot of other kids. Petitioner's lay witnesses reveal K.B.'s history of deceptive, attention-seeking and false-accusing behavior. The lay witnesses had insights about petitioner and K.B. and why K.B. passed a false rape note. Monica Brokaw avers K.B. had a "serious lying problem" and "always had to be part of whatever was going on. It was not even enough for her to be part of it, she had to be the center of it." The lay witnesses prove petitioner is not violent and K.B. is not a child who would fail to report abuse for months. The lay witnesses fully corroborate Mrs. Whitely's missing testimony.

remains convicted in violation of the Sixth Amendment Right to Jury Trial Clause and Fourteenth Amendment Due Process Clause.

No fair-minded jurist could conclude that applying *Brecht* in a situation that results in structural error is reasonable when this Court clearly established *Brecht* is inapplicable to structural error. *Id.*, at 629-30. The reviewing courts' prejudice assessments are unconstitutional and unreasonable. 28 U.S.C. § 2254(d)(1).

The circumstances of petitioner's case, and cases like his, illustrate an essential check on prosecutorial discretion that is exercised at any cost to obtain convictions over emotionally-charged, uncorroborated allegations and which fails to respect the Fifth Amendment "beyond a reasonable doubt" standard in criminal prosecutions. *In re Winship*, 397 U.S. 358, 364 (1970). Trials in such cases must be virtually error free due to the lack of evidence supporting verdicts.

An exception to *Brecht* is available when "a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct . . . infect[s] the integrity of the proceeding." *Id.*, at 638, n. 9. The exception indicates a recognition that *Brecht* cannot always be applied.

The state's case involved coercing 11-year-old K.B. by isolating her from family and interrogating her after bedtime until she had an emotional breakdown. The investigator's coercive conduct is alarming. Perjury and false accusations is the leading cause of wrongful convictions for child sexual abuse, present in 85% of cases ending in exoneration. *See Nat'l Registry of Exonerations*, % Exonerations by Contributing Factor and Type of Crime.

K.B.'s claims were incredible but the state coerced Mrs. Whitely not to contradict her and used Cox's unqualified testimony and uninformed, erroneous expert testimony to sway the jury. Due to the DHS' and the D.A.'s misconduct, only K.B.'s testimony and Mrs. Whitely's non-support testimony directly addressed petitioner's guilt. Petitioner's trial was fundamentally unfair.

The Tenth Circuit's decision is discordant with *Kyles v. Whitley*, 514 U.S. 419, 435-36 (1995), wherein this Court held *Brecht* inapplicable to Sixth Amendment suppression claims which are reviewed under the materiality standard applied to Compulsory Process Clause claims in *Valenzuela-Bernal*. *Webb* claims, like suppression claims, involve evidence lost due to government misconduct.

The Tenth Circuit's application of *Brecht* is discordant with *Taylor v. Singletary*, 122 F.3d 1390 (11th Cir. 1997). In *Taylor*, the Eleventh Circuit cited *Kyles* and *Valenzuela-Bernal* and held that the materiality standard applied to a Compulsory Process Clause claim on collateral review. *Id.*, at 1392-95.

The Tenth Circuit cited cases from other jurisdictions applying *Brecht* to *Webb* claims. (App.37-38a). None of the cases involve courts applying *Brecht* when the only evidence of guilt is a single accuser's suspect, uncorroborated allegations.

V. PETITIONER'S CASE PRESENTS A GOOD VEHICLE FOR REVIEW AS THE REASONS UNDERLYING DEFERENCE ARE LARGELY ABSENT.

This Court held that federal review "frustrate[s] both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Brecht*, at 635. The state has no legitimate interest in punishing petitioner. There is

no convincing evidence of his guilt. The likelihood is extraordinarily low that any reasonable juror, aware of the full evidentiary picture, would convict.

Petitioner identified a serious constitutional violation precluding the reliable presentation of evidence at his trial and alleged facts and produced evidence backing up his allegations. To grant relief, the state courts would have to acknowledge the state justice system's wholesale facilitation of due process violations in criminal and children's court proceedings.

The state courts did not provide meaningful review. The state courts denied a hearing on prejudice. *See Williams v. Taylor*, 529 U.S. 420, 437 (2000) ("comity is not served by saying a prisoner has failed to develop the factual basis of a claim where he was unable to . . . in state court despite diligent effort.") The state courts repeatedly moved the target every time petitioner hit it, denied discovery needed to prove meritorious claims, made witness credibility assessments, and irrelevant conclusions of law (*see* 9, *supra*), offered a new direct appeal that would likely result in the default of all claims, suggested that petitioner chose not to produce his evidence at his hearing and made speculative findings contradicting the record.

This Court recognized that habeas relief can impose "social costs, including the expenditure of additional time and resources . . . the erosion of memory and dispersion of witnesses that . . . make obtaining convictions on retrial more difficult." *Brecht*, at 637. Granting petitioner's *Webb* claim would reduce wrongful convictions and the social costs of retrials by ensuring child sexual abuse trials are not just a presentation of the state's evidence. *McAninch* recognizes that habeas relief is

meant to protect the innocent as "unlawful custody" is "contrary to the writs most basic traditions and purposes." *Id.*, at 442.

This Court clearly established that habeas relief is a "guard against extreme malfunctions in the state criminal justice systems." *Richter*, at 103-04 [citation omitted]. The state justice system's tolerance for and failure to eliminate a policy diametrically opposed to due process and the proper functioning of the adversarial system is extreme malfunction. The lower courts' assessment of Mrs. Whitely's credibility and the impact of her missing testimony and other post-conviction witnesses' testimony on K.B.'s mere credibility is extreme malfunction.

CONCLUSION

The Oklahoma justice system deprives parents of federal constitutional rights in child sexual abuse cases. Clearly established federal law is on petitioner's side but he remains in custody in violation of it. He requests a writ of certiorari.

Respectfully submitted,

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