No. 19-6999

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES ALAN DYER - PETITIONER

vs.

JEORLD BRAGGS (WARDEN) - RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Charles Dyer #659682
LCC Unit 5
P.O. Box 260
Lexington, OK 73051

QUESTION PRESENTED

(1) In order to obtain relief under § 2254(d)(2), is a federal court required to review the state court's finding of facts to determine if it is "unreasonable" or can the court simply presume that the state court fact finding is correct without further review?

(a) If review is required, and the petitioner presents clear and convincing evidence rebutting the state court's finding of facts with clear and convincing evidence, must the federal court then undertake a § 2254(e)(1) review and analysis of the evidence or can it be ignored under the pretext of an impenetrable presumption that the state court determination was correct? and;

(b) What is the interplay between § 2254(d)(2) and § 2254(e)(1)?

(2) Did the 10th Circuit err in refusing to give any review of certain claims by Mr. Dyer by:

(a)Improperly merging Mr. Dyer's 3rd claim "The Trial Was Infected By False Testimony" with his 5th claim "Prosecutorial Misconduct".

(b)Erroneously ruling that Dyer did not properly exhaust his Ineffective Assistance of Trial Counsel claim in State Court.

LIST OF PARTIES

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

RELATED CASES

Dyer v. State, No. CF-2010-17, Stephens County District Court, State of Oklahoma. Judgment entered October 22, 2014 (PCR denial)

Dyer v. State, No. PC-2015-512, Oklahoma Court of Criminal Appeals. Judgment entered
November 19, 2015 (OCCA PCR denial)

Dyer v. Farris, 2018 WL 5931129 (Western District Report and Recommendation on Habeas)

Dyer v. Farris, 2018 WL5929637 (Western District Adoption of the Report and Recommendation on Habeas)

Dyer V. Farris, ___Fed.Appx___, 2019 WL 4110464 (10th. Circuit Appeal denial)

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STATUTES AND RULES

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

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

The opinion of the United States district court appears at Appendix B to the petition and is unpublished

The denial of rehearing at the 10th circuit is appears at Appendix C to the petition and is unpublished

The Report and Recommendation of the district Court appears at Appendix D to the Petition and is unpublished

The opinion of the Oklahoma Court of Appeals appears at Appendix E to the petition and is unpublished

The opinion of the Stephens County District Court for the State of Oklahoma appears at Appendix F to the petition and is unpublished

JURISDICTION

The date on which the United States Court of Appeals decided my case was August 29, 2019

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: October 7, 2019, and a copy of the order denying rehearing appears at Appendix C.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

Amendment VI (Effective Assistance of Appellate Counsel)

Amendment XIV (Due Process through incorporation)

STATUTORY PROVISIONS

28 U.S.C. §2254 (d) and (e)

STATEMENT OF THE CASE

Dyer was charged and tried 3 times in state court. The first was a hung jury, the second was a mistrial due to prosecutorial misconduct, and the third resulted in a conviction and 30 year sentence. His direct appeal to the Oklahoma Court of Criminal Appeals (OCCA) was affirmed. Mr. Dyer then filed for post-conviction relief in the Stephens Co. District Court raising the claim of ineffective assistance of appellate counsel ("IAAC") and was denied. The OCCA reversed the denial on the grounds that no finding of facts or conclusion of law had been made and the district court had failed to accept Mr. Dyer's evidence into the record. The Stephens Co. District Court once again denied relief and Mr. Dyer appealed to the OCCA which affirmed the denial of the issues now raised on procedural grounds. No evidentiary hearing on Mr. Dyer's claim was ever held in state court though he made no less than 4 requests.

On August 17, 2016 Dyer filed an application for Habeas relief to The Western District of Oklahoma, again raising the IAAC claim. Dyer requested an evidentiary hearing with his Habeas Application which was denied. The magistrate filed a report and recommendation which Dyer timely objected to arguing mainly that the magistrate had incorrectly found that the OCCA made its denial based on the merits when the OCCA stated that it was on procedural grounds. Dyer further objected to the magistrate's failure to do a facts review under 28 U.S.C. 2254 (d)(2) and (e)(1). The District court adopted the R&R on November 13, 2018. Dyer filed for an amendment of the judgment which was denied on November 28, 2018. Dyer then filed his Notice of Appeal/Request for COA which was denied on January 9, 2019. He appealed the denial of COA with the 10th Circuit and COA was granted in part and denied in part on August 29, 2019. Mr. Dyer timely filed for rehearing which was denied on October 7, 2019. It is from the denial of relief on his Habeas Petition that he now asks this Honorable Court to issue a writ of certiorari on issues that are critically important for Habeas proceedings.

SUMMARY OF THE ISSUES IN STATE COURT

The Petitioner, Mr. Dyer, was placed on trial in the state of Oklahoma. After 3 trials, he was convicted and sentenced to 30 years imprisonment for molestation of a child under 12. During the trial that resulted in the conviction, the prosecution knowingly allowed witnesses to give false testimony and defense counsel egregiously mislead Mr. Dyer about his defense. Mr. Dyer brought these claims before the state trial court in post-conviction proceedings under the claim of Ineffective Assistance of Appellate Counsel (IAAC) for failing to raise the issues on direct appeal.

The State did not respond to any of these allegations on collateral attack. The State completely ignored the prosecutorial misconduct claim and argued that ineffective assistance of trial counsel was *res judicata* because a claim with that same name was brought previously on direct appeal. The trial court gave it's pseudo-analysis of fact on these claims under IAAC with a total of 10 words; "*there was no prosecutorial misconduct*" and "*trial counsel provided effective assistance*" [1]. There was no argument made by the state on these claims and no analysis given by the trial court in order to give any indication as to why the trial court denied relief.

Mr. Dyer appealed to the OCCA with his IAAC claim arguing that neither the State nor trial court made an analysis of the merits of his claims that "Trial counsel mislead Petitioner about his defense" and "The Prosecutor allowed witnesses to lie and let perjured testimony to go uncorrected". Mr. Dyer asked the OCCA to review

[1] See *Dyer v. State* CF-2010-17 Order Of Summary Disposition filed October 22, 2014 pg 10. #26

the merits of his arguments where the lower court had failed to do so.[2] In regards to the prosecutorial misconduct, Mr. Dyer brought it to the attention of the OCCA that This Court ruled that instances of prosecutorial misconduct are presumed harmful and that the State has the burden of proving that they are harmless beyond a reasonable doubt which wasn't even attempted in this case. See *Chapman v. California*, 386 U.S. 18, 24 (1967).

The OCCA made a ruling that was dumbfounding; finding that "[The IAAC] arguments either were raised during his trial and direct appeal and are **procedurally barred** from further review under the doctrine of *res judicata*; or could have been previously raised but were not and are **waived for further review**". The OCCA recognized only 2 grounds which "could provide sufficient reason to allow grounds of relief to be the basis of his post-conviction application. The first is **Petitioner's claim that several of the exhibits he now presents in this matter constitute newly discovered evidence... The Second is his claim that his appellate counsel was ineffective for failing to find and utilize the other exhibits."**[3]

First, Petitioner never made an argument of newly discovered evidence. Second, it's completely unclear to which claims the OCCA refers to as utilizing other

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[2] Mr. Dyer's OCCA Appeal from denial of Post-Conviction relief Prosecutorial Misconduct pg 12 Trial Counsel pg 13

[3] See Dyer v. State, Order Affirming Denial of Application for PCR filed November 19, 2015 at Pgs 3-4

exhibits. Even the 10th circuit expressed its confusion as a result of this ruling and couldn't figure out which 2 sub claims the OCCA actually reviewed on the merits[4].

SUMMARY OF THE ISSUES IN FEDERAL COURT

Mr. Dyer filed for Habeas relief in the Western District of Oklahoma. In his original Habeas Petition, he argued that the State Court's decision is based on an unreasonable determination of the facts as required by § 2254(d)(2) and (e)(1) because no state court finding of fact was made in his case[5]. However, in the event that the court would conjure up some possible finding of fact that could have been opined as possible, he further provided proof to show that any possible finding would be unreasonable under the individual claims.

Dyer argued that "Trial counsel failed to fully advise Petitioner of the defense strategy when offered a 2 ½ year plea agreement by the State".[6] Dyer offered affidavits as proof of what exactly counsel had promised and further claimed that he would have taken a plea agreement if he had known that no defense would be presented. Dyer then presented proof through affidavits that a plea was on the table and that the judge would have allowed it.[7] He asserted that any decision stating that a plea wasn't offered was unreasonable and that his claims required relief if they were true.[8] With his Habeas application, he filed a Motion For Evidentiary Hearing where he alleged that he attempted to obtain an evidentiary hearing on the

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[4] 10th Circuit Order and Judgment filed August 29, 2019 Pg. 7 "It is unclear which of Mr. Dyer's fourteen IAAC claims the OCCA refers to in its order"

[5] Original Habeas Brief filed August 17, 2016 at Pg. 5 paragraph 2

[6] Original Habeas Brief filed August 17, 2016 at Pg. 26-27

[7] Mr. Dyer offered 4 affidavits total from himself and family members that stated that a plea bargain hearing was held, that the judge was present, and that Dyer would have taken a plea if he would have known counsel had lied to him. Attached as Appendix G and H to this petition

[8] Original Habeas Brief filed August 17, 2016 at Pg. 29 Sub paragraph (b)

IAC claim in state court 4 separate times and was denied each time. This federal attempt to have an evidentiary hearing was also denied, precluding him from ever obtaining information from counsel that would prove that counsel lied to him.

Dyer also argued in his Habeas Petition that the prosecutor knowingly allowed witnesses to give false testimony in convicting him. Dyer gave seventeen (17) specific instances with references to evidence to prove both that the evidence was false and that the prosecution knew or should have known it was false [9].

The Magistrate's Report and Recommendation did not state that there was no merit to the underlying Ineffective Assistance or Trial Counsel claim but stated: "Aside from claiming that he would have taken the plea, Petitioner points to no evidence that his appellate attorney could have presented to the OCCA to prove that the State actually offered Petitioner a formal plea agreement during trial, or that the court would have accepted it".[10]

In adjudicating the prosecutorial misconduct claim, the Magistrate stated that "Petitioner has failed to prove that the inconsistencies in Ms. Dyer and Ms. Taylor's testimonies constituted perjury or that the inconsistencies about which he complains were material to the question of guilt or innocence"[11].

Mr. Dyer specifically objecting to the courts failure to do a review under § 2254(d)(2) and § 2254(e)(1)[12]. He Specifically argued that **(1)** had appellate counsel presented affidavits to the OCCA and requested an evidentiary hearing in which he

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[9] Original Habeas Brief filed August 17, 2016 at Pg. 37
[10] Magistrate's Report and Recommendation Filed July 6, 2018 at Pg. 31
[11] Magistrate's Report and Recommendation Filed July 6, 2018 Prosecutorial Misconduct Pg. 40, 42-44
[12] Mr. Dyer's Objection to the Magistrate's R&R Pg.1-3

could call trial counsel, Mr. Dyer, and the prosecution, his claim would have been proved.[13] **(2)** the specific instances of false testimony were, in fact, false and any assertion to the contrary is belied by the record, requiring a review under (d)(2) or (e)(1).[14]

The District Court adopted the Report and Recommendation denying relief.

Mr. Dyer filed COA to the 10th Circuit, arguing that **(1)** The district court conducted a review under 2254(d)(1) but failed to do the independent (d)(2)-(e)(1) review required by statute[15]. **(2)** the evidence presented by Dyer during his post-conviction (IAAC) proceedings could have easily been presented to the OCCA by appellate counsel and would have been proved through evidentiary hearing at the state level[16]. **(3)** Any finding of fact that the testimony used by the prosecutor was not false is clearly belied by the record and the district court did no § 2254(d)(2)-(e)(1) review[17].

The 10th Circuit ruled that **(1)** Mr. Dyer's Ineffective Counsel Claim concerning the plea offer was never fairly presented to the state courts and was therefore unexhausted[18] **(2)** after incorrectly intermingling two separate claims, it ruled that Mr. Dyer "does not necessarily claim 'perjury' and concedes that "[t]he prosecutor

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[13] Mr. Dyer's Objection to the Magistrate's R&R Pg.32-35 (IAC);
[14] Mr. Dyer's Objection to the Magistrate's R&R pg. 42-43(Prosecutorial Misconduct)
[15] Dyer's Motion For COA at Pg. 8, 10
[16] Dyer's Motion For COA at Pg. 10
[17] Dyer's Motion For COA at Pg. 15-16
[18] 10th Circuit Order and Judgment filed August 29, 2019 Pg. 18

would have no way of knowing most of [the testimony] was false. Any *Napue* claim raised on appeal would have been unsuccessful."[19]

Mr. Dyer filed for rehearing, arguing that the 10th circuit had mistakenly intermingled two separate claims: That the 10th Circuit responded to the "False Testimony Infected the Trial" claim where Mr. Dyer conceded that the prosecution had no knowledge of most of the false testimony but failed to respond to the "Prosecutorial Misconduct" claim in which Dyer claimed that the prosecutor had full knowledge of the false testimony[20].

Petition for Rehearing was denied.

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[19] 10th Circuit Order and Judgment filed August 29, 2019 Pg. 23-24; *Napue v. Illinois, 360 U.S. at 269 (1959)*

[20] Petition Of Charles Dyer For Rehearing With Suggestion For Rehearing En BANC Pg. 4-7

REASONS FOR GRANTING THE WRIT

SPECIFIC QUESTIONS PRESENTED FOR THIS COURT

I. FIRST QUESTION

(1) In order to obtain relief under § 2254(d)(2), is a federal court required to review the state court's finding of facts to determine if it is "unreasonable" or can the court simply presume that the state court fact finding is correct without further review?

(a) If review is required, and the petitioner presents evidence in a single claim that includes evidence presented at trial and evidence that was not presented at trial that rebuts the state court's finding of facts with clear and convincing evidence, must the federal court undertake both a § 2254 (d)(2) and (e)(1) review and analysis of relevant evidence or can either be ignored under the pretext of an impenetrable presumption that the state court determination was correct? and;

(b) What is the interplay between § 2254(d)(2) and § 2254(e)(1)?

i. Overview of the State Court's Determination of Facts

In this case, there was never any state determination of facts considering the underlying IAAC claims of prosecutors knowingly allowing witnesses to give false testimony or trial counsel misleading his client. In the absence of a factual finding by the court, one would naturally look to the State's post-conviction response to this claim to help determine what the trial court based its denial on. However, a dead end is reached once again because the State of Oklahoma made absolutely no factual argument against these propositions, whatsoever. The State argued neither that the testimony allowed by the prosecution was not false, that it was harmless,

nor that trial counsel did not mislead Mr. Dyer. So, we are left with only the state court's determination that "There was no prosecutorial misconduct...Ineffective Assistance of Trial Counsel" and nothing more. This leaves Mr. Dyer with having to argue against any possible finding of fact that might be conceived by any judge on any court that he may come before in the future. Mr. Dyer has attempted to undertake this daunting task without any legal training and only a high school education.

ii. Standard of Review for § 2254(d)(2)-(e)(1)

Under § 2254(d)(2), habeas relief is warranted where the federal court determines that a state court decision is "objectively unreasonable in light of the evidence presented in the state court proceedings". *Miller-El I,* 537 U.S. at 340 (Citing § 2254(d)(2) and *Williams,* 529 U.S. at 399 (O'Connor, J. concurring)). That assessment "turns on a consideration of the totality of the evidence presented in the state court proceeding". *Lambert v. Blackwell,* 387 F.3d 210, 235 (3rd Cir.2004), Cert. Denied, 544 U.S. 1063 (2005).

This court has held that the "objectively unreasonable" standard in section § 2254(d)(2) imposes a highly deferential standard for federal review of state court habeas decisions. See *Schriro v. Landrigan,* 550 U.S. 465, 473-74 (2007); *Lockyer v. Andrade,* 538 U.S. 63, 75 (2003). But the standard is not beyond reach and is met when the reviewing court concludes from examining all the evidence that the determination of the facts falls outside the broad range of reasonable decision-making and that a different outcome is compelled. In *Miller-El II,* 545 U.S. at 265,

involving claims of jury discrimination, this Court held that a petitioner was entitled to relief under §2254(d)(2) where "[i]t is true...that at some point the significance of *Miller EL's* evidence is open to judgment calls, but when this evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but discrimination."

Under §2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct" by a federal court and "the applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

This Court has stated that sections §2254(d)(2) and §2254(e)(1) are independent and should not be conflated. In short, section §2254(d)(2) supplies a standard of review requiring a federal court to assess the reasonableness of the state court's "determination of facts" in light of all the evidence presented in the state court "determination of a factual issue." Consistent with the Court's holding in *Miller-El I*, where a habeas petitioner seeks relief "based entirely on the state record," a federal court reviews the state court's fact findings for their reasonableness under 2254 (d)(2). *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir.2004), cert. denied, 543 U.S. 1038 (2004).

If however, a habeas petitioner challenges state court factual findings based in part on evidence that is extrinsic to the state court record, §2254(e)(1)'s requirements "come into play once the state court's fact-findings survive any intrinsic challenge" under §2254(d)(2). Id. In other words, those findings are

presumed correct unless rebutted by clear and convincing evidence that was not part of the state court record (and was appropriately introduced in the federal habeas proceedings under §2254(e)(2)) See id.; see also *Lambert*, 387 F.3d at 235 ("the language of §2254(d)(2) and §2254(e)(1) implies an important distinction: §2254(d)(2)'s reasonableness determination turns on a consideration of the totality of the 'evidence presented in the state-court proceeding,' while §2254(e)(1) contemplates a challenge to the state court's individual factual determinations, including a challenge based wholly or in part on evidence outside the state trial record")[21]; 1 Hertz & Liebman, *Federal Habeas Corpus Practice and procedure* §20.2c (5th ed. 2005) (courts should consider first whether a state court's fact findings are reasonable under §2254(d)(2), and if they are, only then should they apply §2254(e)(1)'s presumption of correctness).

Although sections (d)(2) and (e)(1) are related to the extent that they both refer to a state court's factual findings, the plain language and structure of the statute demonstrate that they should not be imposed on top of each other as the federal court's have done here. And certainly (e)(1) should not be imposed where the argument is purely based on the trial record. Indeed, Congress' placement of these provisions in separate sections clearly demonstrate that they operate independently because courts must "give effect, if possible, to every clause and word of a statute."

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[21] In *Lambert*, the 3rd Circuit noted that some courts have concluded that application of (d)(2) should precede application of (e)(1), while others have found that application of (e)(1) should precede (d)(2). Id. At 236 n.19. The 3rd Circuit "adopt[ed] no rigid approach to habeas review," concluding that a federal court might apply those provisions in either order. Id. In either event, the 3rd Circuit made plain that "before the writ can be granted, petitioner must show an unreasonable determination – under (d)(2) – in light of the original state court trial." The 10th Circuit has not made any specific rulings on this that the Petitioner can find.

As discussed below, the state court's decision that there was no prosecutorial misconduct or ineffective assistance of trial/appellate counsel is objectively unreasonable based on the totality of the evidence in the state court record. A reasonable fact finder would be compelled to have ruled differently than the state court did. And the 10th circuit was in error to place the "clear and convincing" burden on Petitioner where the claim rests entirely on the trial record.

ii. § 2254(d)(2) AND (e)(1) APPLIED TO THE PROSECUTORIAL MISCONDUCT CLAIM

Concerning the Prosecutorial misconduct in this case, the Western District Court ruled that "*As discussed above, Petitioner has failed to prove that the inconsistencies in Ms. Dyer and Ms. Taylor's testimonies constituted perjury or that the inconsistencies about which he complains were material to the question of guilt or innocence*" (referring back to the finding in its order concerning Fatal Infection of the Trial with False Testimony)[22]. In that claim, the Report and Recommendation stated that "*On Post-conviction, Petitioner presented all his evidence attempting to prove the various witness' testimony constituted perjury, but the trial court rejected his allegations, finding numerous exhibits did not support his suppositions*"... "*The OCCA affirmed the final order, and this Court therefore presumes that the OCCA also found that the alleged inconsistencies in the witnesses' testimony did not amount to perjury... This Court further presumes that the court's factual findings are correct and finds that Petitioner has not presented clear and convincing evidence sufficient to rebut that presumption of correctness*" citing *Rivera v. Beck*, 122 F.App'x

[22] Magistrate's Report and Recommendation Filed July 6, 2018 at Pg. 40.

408, 409 (10th Cir. 2005) (holding petitioner had failed to rebut the presumption of correctness afforded to the state court's factual findings where he "introduced no new evidence ... that contradicts the findings").[23]

However, this is ignoring the fact that the federal court must make an independent (d)(2) review of those portions that Mr. Dyer alleges as unreasonable and only place the (e)(1) rebuttal requirement upon those claims that offer evidence not presented at trial, which also require independent review. As shown below, the Prosecutorial Misconduct claim presents 11 specific instances of the prosecutor knowingly allowing false testimony. Some rest wholly upon the trial court record while others rest on evidence outside of the record that was in the prosecutions possession. Therefore, a blanket (e)(1) requirement of new evidence on the entire claim was improper. And failure to actually do an analysis of the evidence under (e)(1) was also improper. Federal courts are required to do an independent review of each instance of prosecutorial misconduct and make a determination if it is reasonable and whether evidence outside of the record is presented to overcome the presumption of correctness; if so, whether a habeas petitioner's evidence has overcome this presumption or why it has not. Without this analysis that is required by § 2254, a habeas petitioner is denied due process.

Mr. Dyer now presents the following 11 specific instances of prosecutorial misconduct here, as presented in the Habeas Application, for review by this court and explains the relevance of a review under (d)(2) and (e)(1):

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[23] Magistrate's Report and Recommendation Filed July 6, 2018 at Pg. 32-33

FALSE STATEMENTS THAT FALL UNDER § 2254(d)(2) REVIEW

1. The defense alleged that Valerie Dyer was addicted to drugs at the time of the allegations. Valerie testified that she had "only did the drugs that one time and I told [Mr. Dyer]."(T3.111). However, Valerie previously admitted under oath to leaving H.D. at multiple residents while doing drugs (T1.33). Obviously her drug use was not isolated to a single use. The same prosecutor was present for both testimonies and obviously knew it was untrue. The defense theory was that Valerie was a drug addict that used her daughter to win a custody battle. The jury only hearing that Valerie used drugs once undermined the jury's ability to judge credibility of a state's witness.

2. Valerie testifies that upon moving back to Oklahoma in September 2008, Mr. Dyer "wouldn't call very much" and never attempted to speak to H.D. (T3.48). At a previous trial, however, when asked this exact question by this exact prosecutor, Valerie testified that Mr. Dyer called "all the time" and said nothing of his reluctance to speak to H.D. When asked "Did he talk and communicate with H.D. at this time?", she answered "Uh-huh- yes." (T2.62). This testimony was material as it mislead the jury into believing that Mr. Dyer had no emotional connection or care for his daughter and thus more likely to sexually abuse her. This testimony skewed the jury's ability to determine credibility of both a state's witness and Mr. Dyer.

3. At trial, Valerie gave testimony concerning H.D.'s demeanor, statement, and actions on the alleged disclosure date, saying that H.D. was crying when she picked her up from Mr. Dyer's home, that H.D. replied "I don't want to talk about it" numerous times when Valerie asked what was wrong, and that upon returning home, H.D.'s vagina looked red, swollen, and open (T3.72-76). Prior testimony proves this testimony false as Valerie testified that H.D. WAS NOT crying when she picked her up (Daubert Hearing at 51)(T1.46); When asked if she saw injury to H.D.'s vagina, Valerie previously stated "No, just irritation" (Daubert Hearing at 19); H.D. testified that Valerie had never inquired once about anything being wrong on the way home and she had never told her mother that she didn't want to talk about anything (T3.112). The same prosecutors were present during both trial testimonies and failed to elicit the truth. This testimony is material as it corroborated the alleged crime by showing that H.D. was emotionally distressed coming directly from Petitioner's home the day after alleged abuse. Had the jury been made aware that Valerie were giving false testimony about disclosure, there can be no doubt that they would have been less likely to believe the rest of Valerie's testimony and would not have accounted this testimony as corroboration of the crime.

4. Valerie testified to Dyer's character and his cowardess in using his wife's medical issues as an excuse to get out of deploying to war in Iraq in 2008. When asked if the reason he did not deploy was actually because of Valerie's medical problems and her seizures, she replied "No, sir"(T3.101). However, Valerie had previously testified that she was sick, having seizures, and was afraid to be alone with H.D and that it was HER that requested Mr. Dyer not deploy in order to help take care of H.D. (T2.56-57). This testimony allowed the jury to falsely believe that Mr. Dyer's character was one of a coward that would use his family to meet whatever selfish needs he desired. This increased the likelihood that they would believe that he would abuse his child for his own desires.

5. Valerie testified that she never told Charles that she would lie in court if she had to in order to keep custody of H.D. (T3.149-150). However, when asked by the same prosecution at the first trial if she stated she "would lie if [I] had to keep [H.D.]" in court proceedings, Valerie replied "Yes"(T1.38). This is material because it removed from the jury's determination Valerie's untruthfulness and willingness to lie in court to remove Mr. Dyer from her life in getting custody. This testimony stemmed from a recorded conversation prior to the crimes alleged. Valerie was unaware of this recording in which she threatened to commit "perjury" in court to win custody of H.D. if she had to.

6. The State asked forensic interviewer, Jessica Taylor, if H.D. was able to describe Mr. Dyer's "wiener" to which she replied, "Yes, she was."(T3.46). However, H.D. never describes Mr. Dyer's penis in any way. This false testimony was knowingly elicited and uncorrected by the prosecution in order to bolster their case. The jury took this false testimony into deliberation and used it as corroboration because they erroneously believed that H.D. was able to specifically describe details about Mr. Dyer's penis. The State has never attempted argued in any pleading that this testimony was true.

7. Jessica Taylor stated "[H.D.] talked about her dad would take spit from his mouth and he would rub it onto his wiener before putting it inside of her bo-bo" and then reiterated again that her father did this to H.D.(T3.48). However, H.D. never made this statement and the prosecution was well aware that there was no evidence in any manner that supported this testimony. The State has never attempted to allege that H.D. ever made this statement. The jury took this false testimony into deliberation and no doubt used it as corroboration because they erroneously thought H.D. was able to specifically describe details when these statements were false.

These instances of Prosecutorial Misconduct presented only transcripts and evidence within the record. The same prosecutor was present at all trial testimonies

and was familiar with previous testimony given. The federal court's requirement of Mr. Dyer to rebut the presumption of correctness through (e)(1) was not proper. These claims are required review under only (d)(2). Any reasonable person would undoubtedly be able to see that the testimony given at trial was contradicted by evidence within the record and that the prosecution knew or should have known that the testimony was false. Any state court finding that is contrary to this is "unreasonable".

FALSE STATEMENTS THAT FALL UNDER § 2254(e)(1) REVIEW

8. One of the most important issues to the defense was that Valerie Dyer spent days planning the abuse allegations after H.D. left Mr. Dyer's home. The State's theory was that the disclosure and report was immediately after H.D. left Mr. Dyer's home. Valerie Dyer testified that she picked up H.D. from Petitioner's home on the night disclosure was made [Jan.3, 2010](T3.72) She further testified that she reported the abuse to police "the next day"[Jan.4, 2010](T3.84). However, police reports, affidavits, and prior testimony by Deputy Seeley prove that no police report was made until Jan.8, five (5) days after leaving Mr. Dyer's home. The State made no attempt to elicit the truth from its witness on this matter and was well aware that it was fabricated as the prosecutor was in possession of the evidence presented in Attachment B of the Habeas Application. This testimony is material as it proves that any alleged disclosure could not have taken place upon leaving Mr. Dyer's home as the entire State's theory rests. Had the jury known the truth, as the first jury knew, it would have confounded them how a mother would learn of sexual abuse and then do nothing for 5 days, only to lie about it in court later.

9. The defense alleged that Valerie had coached H.D. with what to say in order to make sexual abuse allegations. Valerie Dyer testified that she hadn't discussed the sexual abuse with H.D. even once since disclosure (T3.91-92). However, the State of Oklahoma had recorded Valerie previously stating that H.D. had given "explicit" details to Valerie about the abuse and that Valerie had "interviewed" H.D. numerous times prior to trial. The state knew that this testimony was untrue as the recorded conversation was initiated by the State (recording presented as Attachment B-2) It was material as it proved that Valerie gave false testimony concerning her discussions with H.D. This mislead the jury into

believing that Valerie hadn't spoken to H.D. about the alleged crime, increasing the credibility of H.D as well as removing Valerie as a possible perpetrator of coaching H.D. if no discussions took place. This false testimony was devastating to the defense theory.

10. Defense counsel attempted to show that Valerie wanted to be in a relationship with Mr. Dyer when she found out he was with Amanda Monsalve in December 2009, showing a motive for the anger to fabricate charges. Valerie testified "I didn't want to be with him..."(T3.139). However, the State recorded Valerie previous to trial stating that she was "devastated" at learning Mr. Dyer was with Amanda and emotionally stated "I still wanted to be with you!". The State knew of this recorded statement as it had initiated the recording (recording presented as Attachment B-2). This false testimony is material as it mislead the jury into believing that Valerie would have no reason to press false charges because she wasn't angry at Mr. Dyer for leaving her and she didn't even want to be in a relationship with him.

11. Valerie Dyer used law enforcement on several occasions to unlawfully attempt to have Mr. Dyer arrested. When asked about this at trial Valerie testified that she never attempted to use law enforcement to have Mr. Dyer arrested(T.3.147-148). However, the prosecutor was aware of Valerie reporting to police numerous times that Mr. Dyer was stalking her, vandalized her car twice, hijacked her e-mail, and wrongly had him arrested on a protective order violation. To make matters worse, the state recorded Valerie admitting that she knew Dyer hadn't vandalized her car but made the police report anyway. This testimony is material as it hid Valerie's history of giving false statements to law enforcement to falsely attack Mr. Dyer. Knowing this, the jury would have certainly questioned Valerie's credibility and motive to coach H.D. All of the police reports and the recording were included as Attachments B-2(audio recording) and B-8 through 12(affidavits and police reports of attempted arrests) in the Application for Habeas Corpus.

These instances of Prosecutorial Misconduct presented recordings, affidavits, and evidence that were outside of the trial record but were presented to the state court during post-conviction application. The proper review for federal courts to make on these claims are under (e)(1). The evidence presented to the federal courts rebuts by clear and convincing evidence that the complained of testimony was false

and that the prosecution had knowledge that it was false. Only a failure to actually review the evidence presented could result in a contrary finding.

Applying the proper standards under §2254(d)(2) and (e)(1), the state court determination was an objectively unreasonable determination of the facts in light of the totality of the state court record; and anything not in the record is rebutted by clear and convincing evidence to overcome the presumption of correctness. No reasonable fact finder could conclude that the testimony presented at trial was true or that the prosecutor had no knowledge. Had this unreasonable finding of fact not been made, the results of the proceedings would have been different as there are clear *Napue* violations here.

As far as the 10th Circuit's finding that the false testimony was not material to the question of guilt or innocence; Mr. Dyer showed clearly how it was material in his pleadings. However, even if it went only to credibility, This Court ruled that false testimony that bores even "some relation" to the credibility of the prosecuting witness, and in this case to whether the alleged victim was coached, rises to the level of a *Napue* violation. See *Giles v. State of Md.*, 87 S.Ct. 793, 795, 798, 801 (1967).

iii. § 2254(d)(2) AND (e)(1) APPLIED TO THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

This claim was barred for non-exhaustion by the 10th Circuit (Argued against below). However, the Western District Court ruled that it was exhausted and: "Petitioner points to no evidence that his appellate attorney could have presented to the OCCA to prove that the State actually offered Petitioner a formal plea

agreement during trial, or that the court would have accepted it". It further found that Petitioner's affidavits of truth was not relevant to the claim. However, the affidavit stated (1). Petitioner was offered a plea deal of 2 ½ years. (2). an out of court negotiation was allowed by the judge in his chambers. (3). that the judge was present. (4). and Mr. Dyer only denied the plea because trial counsel mislead him about what defense would be presented at trial. By its very legal definition, this affidavit is relevant.

Petitioner attempted on 4 separate occasions to obtain an evidentiary hearing in State court to obtain testimony concerning this claim. He was denied and therefore the federal courts MUST accept his assertions as true. And accepting his assertions as true, appellate counsel could easily have presented affidavits from Mr. Dyer, trial counsel, the district attorney, and the trial judge to the OCCA which would state the same facts as the affidavit used in his habeas application and post-conviction proceeding. Had appellate counsel been diligent, he could have moved the state court for an evidentiary hearing in which the testimony of defense counsel, prosecuting attorneys, and the judge himself would have all shown that his allegations are true. Had the federal courts not denied his evidentiary hearing, this same evidence would have been shown in federal court.

Because Mr. Dyer presented evidence to the federal courts that was outside of the "trial record", any presumption that the state court finding of fact of no plea offer being offered or that the court would not have accepted it (though no actual finding was made) was subject to the clear and convincing rebuttal analysis under

§2254(e)(1) which he never received by the federal courts. Without a proper (e)(1) analysis, Habeas Corpus has been suspended for Mr. Dyer.

Conclusion of the First Question

The 10th Circuit court of appeals has recognized that in a § 2254 federal habeas proceeding, the State Court findings are presumed by the court to be correct unless a petitioner rebuts that presumption with clear and convincing evidence that establishes the finding of fact is clearly erroneous. AEDPA § 2254 (e)(1); See *Smith v. Aldridge*, 904 F.3d 874 (10th Cir. 2018). It also recognizes that relief can't be given unless the state court decision was based on an unreasonable determination of facts in light of the evidence presented in state court proceedings. § 2254 (d)(2); See *Bryd v. Workman*, 645 F.3d 1159, 1171 (10th Cir.2011). However, the 10th Circuit is not actually applying these statutes in any analysis and is not requiring them in the proper instances.

Without a proper review and analysis that comports with federal law, Mr. Dyer is denied due process and his right to Habeas Review has been suspended. Federal court's do not agree on the interplay between (d)(2) and (e)(1) and are failing to give proper review. In this case, no review was given due to the improper deference given to the presumption that the state court's findings are correct. With even a cursory glance at the pleadings, any reasonable person would undeniably agree that the testimony in the Prosecutorial Misconduct claim was false and that the prosecutor should have known such. Any ruling to the contrary was based on an impenetrable presumption of correctness of state facts which violates §2254. The

Ineffective Assistance of Counsel claim is identical in the court's failure to review it under (e)(1)(because evidence outside of the trial record was presented to the state and federal courts). This court should address §2254 (d)(2) and (e)(1) so that the question can be put to rest, once and for all.

II. SECOND QUESTION

(1) Did the 10th Circuit fail to give any review of Mr. Dyer's claims by:

(a) Improperly merging Mr. Dyer's 3rd claim "The Trial Was Infected By False Testimony" with his 5th claim "Prosecutorial Misconduct".

(b) Improperly finding that Dyer did not properly exhaust his Ineffective Assistance of Appellate Counsel sub claim (Ineffective Assistance of Trial Counsel) in State Court.

i. Did the 10th Circuit improperly merge Mr. Dyer's 3rd claim "The Trial Was Infected By False Testimony" with his 5th claim "Prosecutorial Misconduct".

In his Habeas Application, Mr. Dyer brought two separate and distinct claims involving false testimony. The first was Claim 3 "The Trial Was Infected By False Testimony". In this claim, Mr. Dyer argued that his trial was peppered with false testimony in which rendered his proceedings unfair. He openly admitted that the prosecution was unaware of "most" of this testimony. Ultimately, he moved away from this claim because it is apparent that the court's do not overturn convictions simply because a man is convicted on false testimony; the prosecution must know of the false testimony and fail to correct it. The false testimony and assertions that

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prosecutors did have knowledge of was placed in the independent 5th claim "Prosecutorial Misconduct".

The 10th Circuit addressed the 3rd claim "The Trial Was Infected By False Testimony" stating that "The district court denied Mr. Dyer's habeas application because it found that Mr. Dyer had not offered evidence that the challenged testimony was actually perjured, as opposed to merely internally inconsistent, or that the prosecution knew it had elicited perjured testimony"[24]. The 10th Circuit went on to state:

" In his motion for COA, Mr. Dyer backs away from the assertion that the testimony was perjured..."Rather he claims that the testimony is 'false' and that [his trial] counsel had readily available evidence to rebut it. Moreover, Mr. Dyer concedes that '[the prosecutor [at his trial] would have [had] no way of knowing [that] most of [the challenged] testimony was false'. Nevertheless, Mr. Dyer argues that he is entitled to a COA because, under §2254(d)(2), the district court should have examined the information that Mr. Dyer has collected since being convicted and decided for itself whether the prosecutor knowingly admitted perjured testimony"

The 10th Circuit laid out the requirements from *Napue* and ruled that:

"Because, in his motion for COA, Mr. Dyer "does not necessarily claim 'perjury' and concedes that 'the prosecutor would have no way of knowing most of [the testimony] was false' any *Napue* claim raised on appeal would have been unsuccessful"

The 10th Circuit completely altered Mr. Dyer's Prosecutorial Misconduct claim and took excerpts from an entirely separate claim in order to simply sweep the Prosecutorial Misconduct claim under the rug. The fact is that it is irrelevant whether Mr. Dyer uses the word "perjure" or "false" because he hasn't the legal knowledge to discern between the two and his pleadings should be liberally

[24] 10th Circuit Order and Judgment filed August 29, 2019 Pg. 23

construed. A lie is a lie and he has proven that the prosecutors allowed lies with very clear and convincing evidence. He alleged that "(1) a government witness committed (perjury) (lied) (gave false testimony) (2) the prosecution knew the testimony to be false, and (3) the testimony was material".

Mr. Dyer filed for a rehearing and made the specific argument that the circuit court had mashed two of his claims together and misapplied the facts and law to the Prosecutorial Misconduct claim.[25] Rehearing was denied.

ii. Did the 10th Circuit improperly rule that Mr. Dyer failed to exhaust his claim of Ineffective Assistance of Trial Counsel

The Western District Found that this claim had been properly exhausted and fairly presented to the state courts. However, the 10th Circuit overruled the Western District and ruled that Mr. Dyer's Ineffective Counsel Claim concerning the plea offer was never fairly presented to the state courts and was therefore unexhausted[26]. In its order, the 10th Circuit stated that:

"The entirety of Mr. Dyer's argument on this claim in the OCCA was 'that trial counsel...misled [him]about his defense.'" "This passing reference, which does not even mention a plea offer, did not 'fairly present' the claim to the OCCA"..."Nor is Dyer's bare citation to his post-conviction brief in the state district court sufficient to put the OCCA on notice of the substance of his plea offer claim."

The 10th Circuit cites *Brooks v. Archuleta*, 621 F. App'x 921, 927 n,6 (10th Cir.2015) and *Wilkinson v. Timme*, 503 F.App'x 556, 560 (10th Cir.2012), neither of which are relevant here. In *Brooks*, the Petitioner completely altered the nature of the claim between state and federal court. In *Wilkinson* the Petitioner had filed a supplemental pleading that raised new issues. Mr. Dyer did none of this.

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[25] Petition for Rehearing in the 10th Circuit at Pg. 4-7
[26] 10th Circuit Order and Judgment filed August 29, 2019 Pg. 18

This Court stated that to exhaust a claim in order to get around the §2254, a state prisoner could cite in conjunction with the claim the federal source of law on which he relied or a case deciding such a claim on federal grounds, or by simply labeling the claim "federal". See *Baldwin*, 541 U.S. at 32.

In Mr. Dyer's Brief to the OCCA, which the 10th Circuit found failure to exhaust, Mr. Dyer includes a section on the first page called "PRESERVATION OF FEDERAL HABEAS REVIEW" and alerts the OCCA that there are federal claims that were argued in his post-conviction brief and he wished to assert those standards of review here. If this were not sufficient to alert the OCCA, he then asserts Ineffective Assistance of Appellate Counsel on page 2 and cites *Strickland v. Washington* 466 U.S. 668 (1984) stating "Appellate counsel should have raised [Ineffective Assistance of Trial Counsel] and that had he done so, it is likely that the result of his direct appeal would have been different". In *Strickland*, the deprivation of a particular right specifically protected by the constitution is mentioned (Right to effective assistance of counsel). After citing 10th circuit precedent about the requirement to review the underlying merits of his IAAC claim, he argues on page 13 that trial counsel "mislead Petitioner about his defense". In order to prove that counsel mislead him, he offered an affidavit of truth; and if the court didn't believe it, he requested an evidentiary hearing to prove his claim, which the OCCA denied.

Conclusion of Second Question

The 10th Circuit failed to review viable issues because it both (1) restructured Mr. Dyer's Prosecutorial Misconduct Claim and (2) overruled the Western District

in stating that Mr. Dyer did not exhaust his IAC claim. These issues are centrally important to all Habeas Applicants. Certainly, an Applicant's claims should not be completely changed in order to deny it on incorrect facts and misapplied law. And it's important to set precedent concerning the exhaustion of Applicant's that raised issues in State court such as this. The 10th Circuit had no Supreme Court cases to cite on the exhaustion issue and had none from its own court except for Appendix cases which hold only persuasive value. And in these cases, there was no relevance to the particular facts found here. It's important for these issues to be settled for all future Habeas Applicants and for the 10th circuit's decisions contrary to law be corrected.

CONCLUSION

As Mr. Dyer argued on page 3 of his Motion for COA to the 10th circuit, he endured 12 years and over 120 combat missions with the U.S. Marine Corps defending the very constitution that is supposed to defend him from unlawful conviction and destruction of his life. Because of his *pro se* status, each level of the courts have failed to analyze his claims and give any reason as to why he is incorrect in his factual assertions or legal analysis. Instead, the first level chose not to waste its resources on him in an actual adjudication and explanation of his claims, even in the face of the State completely failing to respond to his claims. He was given a summary dismissal without evidentiary hearing. The OCCA simply affirmed the denial of relief with a confusing order that made no sense in regards to which claims it was actually addressing. The Western District Magistrate chose to

not actually review the evidence under (d)(2) or (e)(1); the Western District judge reviewed the magistrate's order and did a (d)(1) review but did no independent *de novo* review of the facts under (d)(2) or (e)(1), then summarily denied COA without any consideration at all. The 10th Circuit misconstrued claims and denied COA without doing any analysis under (d)(2) or (e)(1).

Mr. Dyer has been thwarted from receiving any review at every turn because of his *pro se* status and lack of education in the law and has argued that this was the issue from the first level of state review. Less than 6 months ago, Justice Sotomayor touched on this apathetic trend in the court system when she dissented to a denial of certiorari stating:

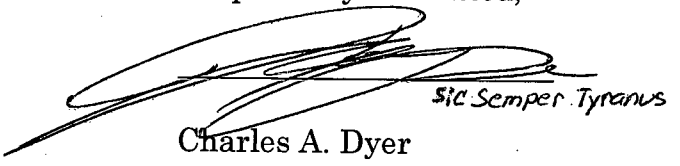
> "The federal courts handle thousands of noncapital habeas petitions each year, only a tiny fraction of which yield relief... While the volume is high, the stakes are as well. Federal judges grow accustomed to reviewing convictions with sentences measured in lifetimes, or in hundreds of months. Such spans of time are difficult to comprehend, much less to imagine spending behind bars. And any given filing - though it may feel routine to the Judge who plucks it from the top of a large stack - could be the petitioner's last, best shot at relief from an unconstitutionally imposed sentence. Sifting through the haystack of often uncounseled filings is an unglamorous but vitally important task... Unless judges take care to carry out... review with the requisite open mind, the process breaks down." *McGee v. McFadden,* 139 S.Ct. 2608 No. 18-7277 decided June 28, 2019

Then just days ago, Justice Sotomayor opined on the incident in 2008 that involved the entire 5th Circuit Court of Appeals and its secret 13 year policy of denying all *Pro se* Habeas applications without any review whatsoever; See *Schexnayder v. Vannoy,* ---S.Ct.--- 2019 WL 6689637; Due Process Denied, Supreme Court Says, New Orleans, La., Times-Picayune, Oct. 7, 2008, p.1.

The Petitioner has been unable to afford justice and asks this court to bestow at least a single chance for review on his claims by issuing a Writ of Certiorari.

The petition for writ of certiorari should be granted

Respectfully submitted,



Charles A. Dyer

Date: 12-10-19