No. 21-5567

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DAMOND DEAN — PETITIONER
(Your Name)

vs.

BOBBY LUMPKIN, DIRECTOR — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DAMOND DEAN - TDCJ NO. 2058851
(Your Name)

2661 FM 2054
(Address)

TENNESSEE COLONY, TEXAS 75884
(City, State, Zip Code)

NO PHONE
(Phone Number)

QUESTION(S) PRESENTED

Question Number One:

Counsel rendered ineffective assistance by failing to object to K.H.'s (Complainant) therapist's testimony when she told the jury "I would say most of the time, if not the majority of the time, that children come into our center, it is very rare that we see a child come in that is lying." RR5, 126. Because this Honorable Court makes it clear that "determining the weight and credibility of witness testimony belongs to the jury," should the jurists of reason consider the lower court's decision substantially debatable, for holding "Counsel cured any possible harm by eliciting from the therapist testimony that she does not conduct investigations, and does not know with certainty whether any victim including K.H. are telling the truth or a lie?" Cf. United States v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 1278 (1998).

Question Number Two:

Counsel rendered ineffective assistance by failing to investigate and present material witnesses to corroborate the Petitioner's defensive theory that no sexual assault ever took place. Because Counsel is obligated to conduct a reasonable investigation in order to present the most persuasive case that he can, should a jurist of reason consider the lower court's decision substantially debatable for generally holding: "Petitioner fails to show how any of the present evidence would have altered the outcome of the trial to demonstrate that counsel provided ineffective assistance?" See Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2054 (1984).

LIST OF PARTIES

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

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

RELATED CASES

1. Damond Dean v. Bobby Lumpkin, No. 20-10211 (5th Cir. April 12, 2021)(Unpublished Opinion).
2. Damond Dean v. Lorie Davis, No. 3:18-CV-2623-G (U.S.D.C. Northern District, March 04, 2020)(Unpublished Order adopting Magistrate's Finding of Fact and Conclusions of Law).
3. Ex Parte Damond Dean, No. WR-88,076-01 (Tex.Crim.App. June 6, 2018)(Postcard denying state habeas corpus without written order).
4. Damond Dean v. State, No. 05-16-00168-CR (Tex.App.--[5th Dist] Dallas, April 14, 2017)(Unpublished Opinion).
5. State v. Damond Dean, No. F-1575244-J (CDC #3 of Dallas County, Judgment entered on February 12, 2016).

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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

[XX] For cases from **federal courts:**

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

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

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

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

[ ] For cases from **state courts:**

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

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

The opinion of the N/A _____ court appears at Appendix N/A to the petition and is

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

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 12, 2021.

[X] No petition for rehearing was timely filed in my case.

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

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was N/A. A copy of that decision appears at Appendix N/A.

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

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI (2020):

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

United States Constitution, Amendment XIV, Sec. 1 (2020):

> Section 1. All Persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 U.S.C. Section 2253(c)(2020):

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from— (A) The final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State Court; or (B) the final order in a proceeding under section 2255. (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right. (3) The Certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Federal Rules of Evidence (2020):

> Rule 401. Test for Relevant Evidence: Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.
>
> Rule 607. Who May Impeach a Witness. Any Party, including the party that called the witness, may attack the witness's credibility.
>
> Rule 702. Testimony By Expert Witnesses. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other special-

ized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Texas Penal Code, Section 22.011(a)(2)(A), (c)(1), & (f)(2020):

(a)(2)(A) A person commits an offense of Sexual Assault if: regardless of whether the person knows the age of the child at the time of the offense, the person intentionally or knowingly causes the penetration of the anus or sexual organ of a child by any means. ... (c)(1) "Child" means a person younger than 17 of age. (f) An offense under this section is a felony of the second degree[.].

Texas Rules of Evidence (2020):

Rule 401. Test for Relevant Evidence. Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.

Rule 607. Who May Impeach a Witness. Any party, including the party that called the witness, may attack the witness's credibility.

Rule 702. Testimony By Expert Witnesses. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

STATEMENT OF THE CASE

This is an appeal from the Fifth Circuit Court of Appeals denying Petitioner's motion for certificate of appealability on April 12, 2021, by Patrick E. Higginbotham, Circuit Judge. See Appendix A. The Petitioner challenges his original judgement of conviction by jury ("Judgment"), and Sentence (Cr, 84-85; Appendix F), rendered in the Criminal District Court No. 3 of Dallas County for Sexual Assault of a child, a second degree felony, enhanced by two paragraphs due to prior final felony convictions, for which Petitioner was sentenced to 40 years in the Texas Department of Criminal Justice - Criminal Institutional Division (TDCJ-CID). RR6, 110; Texas Penal Code § 22.011(a)(2)(A), (c)(1), & (f)(2020).

On June 23, 2015, Petitioner was indicted for Sexual Assault of a child as follows: It was alleged that on or about June 20, 2013, in Dallas County, Texas, Petitioner intentionally and knowingly caused the penetration of the female sexual organ of the complaining witness (K.H.), a child younger than 17 years of age by Petitioner's sexual organ. RR3, 6-7; Cr, 8; Texas Penal Code § 22.011(a)(2)(A), (c)(1), & (f)(2020). Petitioner pleaded "not guilty" to the allegations in the indictment. RR3, 7. A trial was held before a jury, and after deliberations, the jury found Petitioner guilty as charged in the indictment. RR3-RR6; RR6, 110. Further, after hearing additional evidence during the hearing on punishment, on February 12, 2016, the trial court assessed Petitioner's sentence at 40 years in TDCJ-CID. RR6, 126; Cr, 84-85.

At trial, Desiree Teague's (Prosecution's Clinical Director and Therapist) testimony did not aid the jury with K.H.'s (Complain-

ant) therapy experience as prescribed by State and Federal Rule 702 to the Rules of Evidence; but instead, told the jury to believe K.H. because "we rarely see a child come in that is lying." RR5, 125-26. The K.H.'s Credibility was a big issue at trial, and this prejudicially erroneous concept had a substantial effect on the jury. RR6, 92-129. Counsel rendered ineffective assistance because Counsel did not object, nor did he attempt to obtain a mistrial, and the Therapist's concept compounded prejudicial harm in the Prosecution's closing argument. RR5, 76-96. The Prosecution exclaims to the jury "why would I call somebody that I know is gonna by lying on the witness stand? You see, there's something better than Damond Dean Jr. [Petitioner's son whom prosecution claims lied for Petitioner], and it's the truth [K.H.'s testimony]." [K.H.] knows that the truth will prevail and because of her therapy "she is now a teacher about her rape" experience. RR6, 93-95.

On March 4, 2020, Senior District Judge A. Joe Fish adopted the Magistrate's findings of fact and conclusions of law. Cf. Appendix B with C. Overall, the Northern District Court Debatably held on December 4, 2019, that "Petitioner fails to demonstrate or even allege prejudice. And, Petitioner's Counsel cured any possible harm by eliciting from the therapist testimony that she does not conduct investigations and does not know with certainty whether any victims, including the victim in this case, are telling the truth. Appendix C, Pgs. 14-15.

Additionally, Counsel failed to interview Cassandra Taylor, Katanya Jones, Kelvis Mims, Damond Dean Jr. (whom testified at

trial), and obtain Petitioner's work records from OTTO Environmental Systems North America, INC. As a lengthy, factually rich, and detailed presentation, in Petitioner's question Number Two, provides this Honorable Court with ripeness to hold Counsel failed to investigate, and introduce into evidence the testimony of witnesses and records (that the jury should not have been deprived of) to impeach the credibility of K.H. in their determination whether K.H. was lying and the Petitioner's testimony was truthful and accurate.

Overall, the lower courts debatably held on December 4, 2019, that "Petitoiner fails to show how any of the present evidence would have altered the outcome of the trial to demonstrate that Counsel provided ineffective assistance." Appendix c, Pgs. 11-14.

Although Petitioner provided proof by a substantial showing, the Fifth Circuit sidesteped the COA process by first deciding the merits of his appeal, and then justified its denial of Petitioner's COA based on its adjudication of the merits. In violation of Buck v. Davis [137 S.Ct. 759] the Fifth Circuit held:

> "Dean does not raise many of the claims that he raised in the district court, including claims that (1) he was actually innocent; (2) his counsel rendered ineffective assistance when he failed to (a) generally investigate and adequately prepare for trial; (b) object to the admission of various records regarding the treatment of the victim; (c) object to certain purported hearsay testimony by the victim; and (d) make an opening statement; (3) the trial court violated his due process rights when it admitted into evidence certain jailhouse telephone calls; and (4) the prosecutor engaged in misconduct when he knowingly elicited perjuried testimony. Accordingly, [Petitioner] has abandoned these claims. A COA may issue if the applicant makes a substantial showing of the denial of a constitutional right. An applicant satisfies this standard by demonstrating that reasonable jurist would find the district court's

assessment of the constitutional claims debatable or wrong." See Apendix A, Pgs. 1-2. "[Petitioner] has not met this standard." Id. Taken together, after review of this Petition, this Honorable Court should grant certiorari and order brief's on the merits.

REASONS FOR GRANTING THE PETITION

In James v. Boise, this Honorable Court declared that it has the responsibility to decide the meaning of federal and state statutes: "[O]nce the court has spoken, it is the duty of the other courts to respect that understanding of the governing rule of law." Id., 136 S.Ct. 685 (2016). The Fifth Circuit Court of Appeals, The Northern District Court, and Court of Criminal Appeals ("Lower Courts"), did not hold their respect to this Honorable Court in denying relief when Petitioner made a substantial showing that counsel rendered ineffective assistance in two critical points of error:

First, Counsel failed to object to K.H.'s therapist's testimony, when she made a credibility determination for the jury and declared "most of the time, if not majority of the time that children come into our center, it is very rare that we see a child come in that is lying." RR5, 126. And Second, Counsel failed to investigate and call: (1) Cassandra Taylor, whom brings impeaching testimony that contradicts K.H.'s reputation as a well behaved and respectful student; (2) Kelvis Mims, whom brings impeaching testimony to contradict K.H.'s "I called Kelvis to make up I'm pregnant story." And, (3) Katanga Jones, whom bring credibility to Kelvis Mim's testimony. Truly, all three witnesses provided the state courts with an affidavit to demonstrate their testimony and availability to testify in which the lower courts ignored. Therefore, this Honorable Court should grant certiorari because these two questions are flesh and blood controversies that only this Honorable Court should speak on and make its lasting effects in its positive deter-

mination to the following.

QUESTION NUMBER ONE:

Counsel rendered ineffective assistance by failing to object to K.H.'s (Complainant) therapist's testimony when she told the jury "I would say most of the time, if not the majority of the time, that children come into our center, it is very rare that we see a child come in that is lying." RR5, 126. Because this Honorable Court makes it clear that "determining the weight and credibility of witness testimony belongs to the jury," should the jurists of reason consider the lower court's decision substantially debatable, for holding "Counsel cured any possible harm by eliciting from the therapist testimony that she does not conduct investigations, and does not know with certainty whether any victim including K.H. are telling the truth or a lie?" Cf. United States v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261, 1278 (1998).

a. Prejudicially erroneous testimony by Desiree Teague, the Prosecution's Clinical Director and Therapist.

Desiree Teague's entire testimony is already highly bolstering in nature on how K.H. felt before, during, and after her outcry to her mom. RR5, 92-129. Ms. Teague testified that the sole purpose of K.H.'s treatment for the common symptom of post-traumatic and avoidance disorder. RR5, 108-112. According to Ms. Teague it is common and normal for a delayed outcry and for more details to come out as treatment continues. RR, 116-120. During cross-examination, pertaining to treatment, it could be considered to be normal if a child would come in lying. RR5, 120-121. According to Ms. Teague it does not matter whether or not a child comes in tell-

ing the truth or a lie because Ms. Teague only treats the systoms for which they come in for. RR5, 120-125. Truly, the scope of Counsel's cross examination exposed to the jury that Ms. Teague did not investigate the case, and did not interview witnesses, obtain sensory details in the outcry, nor reviewed the CPS records. Ms. Teague only provided therapy treatment for K.H.'s symptoms of post-traumatic and avoidance disorder. RR5, 119-125.

On redirect examination, Ms. Teague, then, passed judgment on K.H. credibility and truthfulness in the guise of medical opinion, and told the jury whom to believe, as the following colloquy took place:

> Q: (By Ms. Wiles, Lead Prosecutor): You were asked if a child was telling the truth or telling a lie, that would be normal?
>
> A: Uh-huh.
>
> Q: And I believe your response was you can [not] answer that with just a yes or no?
>
> A: Yes.
>
> Q: Would you like to explain what you mean by that?
>
> A: Yes. I would say most of the time, if not majority of the time that children come into our center, it is very rare that is lying.

RR5, 125-26. Counsel never objected to Ms. Teague's credibility determination. Id. Nevertheless, the following recross examination took place: Ms. Teague's goal is for K.H. to become confident based on the therapy that she received. RR5, 128. Ms. Teague does not know anything K.H. was saying true or false statements to police or CPS officials. RR5, 129.

Taken together, Ms. Teague's testimony did not aid the jury with K.H.'s therapy experience; but instead, told the jury what

the facts are, that is "we rarily see a child come in that is lying." RR5, 92-129. Counsel did not cure harm by his recross examination. RR5, 128-29. Truly, the compounding effect of Ms. Teague's erroneous credibility determinations occurred during the Prosecution's closing argument. RR5, 76-96. The Prosecutor was allowed to highly use Ms. Teague's credibility determinations as ammunition to sway the jury's verdict:

"Why would [K.H.] lie about this for three years (RR6, 78-79) ... She lied to protect her self-worth, she was at a breaking point and that breaking point came when she knew that the lie was to great to carry on." RR6, 92. ... "Why would I call somebody that I know is gonna be lying on the witness stand? You see, there is something better than Damond Dean Jr. [Whom lied for Petitioner] and it's the truth [K.H.'s testimony]." (RR6, 93). "K.H. knows that the truth will prevail" and because of her therapy "She is now a teacher about her rape" experience. (RR6, 94-95).

Again, Counsel did not object to this either. The credibility of K.H. is the critical focus of Petitioner's entire trial. Because Ms. Teague and the prosecution told the jury what the facts are, the effect of their credibility determination severely effected the jury during their five-hour-and-twenty-minute deliberation. RR6, 99-109. The jury ultimately wanted to know "how K.H. felt when she was telling her mom in the bathroom about [Petitioner] kissing her funny." RR6, 99-109. As a result, prejudicially compounding testimony occurred when the jury was told "that abused victims rarily lie about their abuse," especially for three years.

Finally, this Honorable Court should speak out and intruct the

lower courts that any competent attorney, in this situation, would have highly objected to Desiree Teague's credibility determination, then sought for an instruction or mistrial when the Prosecution ensured the jury that K.H. does not lie.

b. Jurists of Reason finds the lower courts decision substantially debatable for holding that Counsel's performance did not fall below an objective standard of reasonableness.

A doctor or therapist cannot pass judgment on the alleged victim's truthfulness in the guise of a medical opinion because it is the jury's function to decide credibility. See United States v Whitted, 11 F.3d 782, 785-86 (8th Cir. 1993)(Citing United States v. Azure, 801 F.2d 336, 339-41 (8th Cir. 1986). The Eighth Circuit held a pediatrician's testimony that an alleged child abuse victim was believable and telling the truth was not admissible under Rule 702 because the doctor put "his stamp of believability on [K.H.'s] entire story." Id. (citing Fed. R. Evid. 702). In both state and federal trials, such "evidence is improper can hardly be disputed," Snowden v. Singletary, 135 F.3d 732, 738 (11th Cir. 1998), and the reason is simple, this Honorable court has already spoken, and it is the duty of the lower courts to respect that "[d]etermining the weight and credibility of witness testimony ... belongs to the jury." United States v. Scheffer, 523 U.S. 303, 313, 118 S.Ct. 1261 (1998); accord, Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88, 11 S.Ct. 730 (1991)(The reason the issue of credibility "belong to the jury" is that jurors "are presumed to be [focalized] by their natural intelligence and their practical knowledge of men and the ways of men."). Truly, this Honorable court should reaffirm its

function and hold that Desiree Teague's testimony invaded the jury's exclusive providence to decide witness credibility when Ms. Teague told the jury that "most of the time, if not majority of the time that children come into our center, it is very rare that [K.H.] is lying. RR5, 125-26.

In this situation, reasonable jurist must conclude that counsel should have objected to Ms. Teague's credibility determinations at bar. Comparably, the Eleventh Circuit decided a similiar expert statement as that of Ms. Teague's statement: "The evidence at issue in this petition is testimony by an expert witness (Dr. Miranda) that 99.5% of children tell the truth and that the expert, in his own experience with children, had not personally encountered an instance where a child has invented a lie about abuse. These statements were elicited during the presentation of the state's case-in-chief by prosecutor's questions which were linked to the expert's interviews with a specific child who testified at trial—the only child who testified in the case who also identified by the state as the victim of the crime for which Snowden was on trial." ... therefore, "we conclude that allowing expert testimony to boost the credibility of the main witness against Snowden—considering the lack of other evidence of guilt—violated his right to due process by making his criminal trial fundamentally unfair." See Snowden v. Singletary, 135 F.3d 732, 737-39 (11th Cir. 1998).

Further, as the Seventh Circuit in United States v. Benson explained: "This is not to say that an expert witness may not give testimony that, if accepted, will lead the jury to disbelieve a witness suppose, for example, that a defendant in a suit involving

an automobile accident testified that he is traveling 15-20 miles per hour when he entered an intersection and hit plaintiff's car. An accident reconstruction expert testifies, however, to the two cars, his estimate of the point of impact, the two car's final resting positions, and other factors, that the defendant has to be traveling at least 40 miles per hour when he entered the intersection. That is useful expert testimony because it is based on specialized knowledge that is not within the average layman's ken.

If the jury accepted that testimony, it would necessarily disbelieve the defendant but that is no reason for refusing to admit the testimony. Benson, 941 F.2d 598, 604-05 (7th Cir. 1991). Similiar to Ms. Teague's testimony, Cantzler's testimony in Benson's case is different, though. [The Expert] had no reason based on any special skill or knowledge [she] possessed for believing, for example, that Meinarai was telling the truth when she testified that Benson worked for her, or that Rhodes was telling the truth when he denied any secret settlement existed between Benson and underwriters. [Expert] did not give helpful expert testimony that cast another witness' testimony in a good or bad light; instead, [the expert] told the jury whom to believe. Id. 941 F.2d at 604-05. Each of these rulings was based on the theory that the credibility of another is not an appropriate subject for expert opinion testimony. Cf. United States v. Hill, 749 F.3d 1250, 1260 (11th Cir. 2014). The Fifth circuit agreed to its sibling circuit courts that have considered this issue have uniformly agreed. Cf. United States v. Azure, 801 F.2d at 340-41 (expert testimony about credibility of alleged-child-sexual-assault victim improperly in-

vaded province of jury, which "may well have relied on [expert's] opinion and surrender[ed] their own common sence in weighing testimony."); Engsser v. Deoley, 457 F.3d 731, 736 (8th Cir. 2006)("An expert's may not opine on another witness's credibility); United States v. Gonzalez-Maldonado, 115 F.3d 9, 16 (1st Cir. 1997)("An expert's opinion that another witness is lying or telling the truth is ordinarily inadmissible pursuant to Rule 702 because the opinion exceeds the scope of the expert's specializied knowledge and therefore merely informs the jury that it should reach a particular conclusion." (quotation omitted)); United State v. Shay, 57 F.3d 126, 131 (1st Cir. 1995)(Same); United States v. Scop, 846 F.2d 135, 142 (2nd Cir. 1998)("Witness A may not offer an opinion as to relevant facts based on A's assessment of the trustworthiness or accuracy of witness B where B's credibility is an issue to be determined by the trier of fact. Were we to rule otherwise, triers of fact would be called upon to either evaluate opinion testimony in ignorance of an important foundation for that opinion or to hear testimony that is otherwise inadmissible and highly prejudicial."); Nimely v. City of New York, 414 F.3d 381, 398 (2d Cir. 2005)("[T]his court echoed by our sister circuits, has consistently held that expert opinions that constitute expertise, are inadmissible under Rule 702."); United States v. Dorsey, 45 F.3d 809, 815 (4th Cir. 1995)("[Expert] testimony can be properly excluded if it is introduced merely to cast doubt on the credibility of other eyewitnesses, since the evaluation usually within the jury's exclusive purview."); United States v. Jackson, 576 F.2d 46, 49 (5th Cir. 1978)([p]sychiatric opinions as to witness' reliability

~~in distingguishing truth from fantasy is inadmissible for impeach~~ment purposes for it invades the jury's province to make credibility determinations); United States v. Vest, 116 F.3d 1179, 1185 (7th Cir. 1997)("Credibility is not a proper subject for expert testimony, the jury does not need an expert to tell it whom to believe, and the expert's stamp of approval on a particular witness' testimony may unduly influence the jury)(citations omitted); United States v. Rivera, 43 F.3d 1291, 1295 (9th Cir. 1995)("[A]n expert witness is not permitted to testify specifically to a witness' credibility or to testify in such a manner as to improperly buttress a witness' credibility."); United States v. Samera, 643 F.2d 701, 705 (10th Cir. 1981)("[A]n expert 'may not go so far as to surpass the exclusive function of the jury to weigh the evidence and determine credibility.'")(quoting United States v. Ward, 169 F.2d 460, 464 (3rd Cir. 1948); United States v. Charley, 176 F.3d 1265, 1279 (10th Cir. 1999)("Expert testimony which does nothing but vouch for the credibility determinations, and therefore does not "assist the trier of fact" as required by Rule 702."); United States v. Beasley, 72 F.3d 1518, 1528 (11th Cir. 1996)("Absent unusual circumstances expert medical testimony concerning the truthfulness or credibility of a witness is inadmissible ... because it invades the jury's province to make credibility determinations.").

In Petitioner's case, the lower courts reasoned that Counsel cured prejudice by eliciting from the Therapist testimony that she does not conduct investigations and does not know with certainty whether any victims, including the victim in this case, are telling the truth. Appendix C, Pgs. 14-15. Axiomly, jurist of reason

holds this lower courts decision substantially debatable because the standing federal law, comparably, concludes that Counsel fell below an objective standard of reasonableness, by his failure to object to Ms. Teague's prejudicial credibility determinations at bar. Cf. 28 U.S.C. § 2253(c)(2)(West 2020); Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052 (1984). Taken together, this Honorable Court should speak out to Its inferior courts and conclude that "It is clear Ms. Teague's credibility determinations are inadmissible, and it is very clear that any compentent attorney would have objected to Ms. Teague's inadmissible statements." Therefore, certiorari must be granted.

c. Jurist of Reason finds the lower courts decision substantially debatable for holding that Petitioner fails to establish prejudice when counsel cured harm in its cross-examination.

The lower courts decision is substantially debatable for concluding "Petitioner fails to demonstrate or even allege prejudice" because "Petitioner's counsel cured any possible [prejudice] by eliciting from the therapist testimony that she does not conduct investigations and does not know with certainty whether any victims, including the victim in this case, are telling the truth." Appendix C, pgs. 14-15. Ms. Teague's goal is for K.H. to become confident based on the therapy that she received. RR5, 128. According to Ms. Teague, it is normal for victims to lie "when, in reality, they are telling the truth." RR5, 120-25.

It is very clear that Ms. Teague's testimony did not aid the jury with Complainant's therapy experience; but instead, told the jury to believe K.H. because "we rarily see a child come in that

is lying." RR5, 92-129; United States v. Scop, 841 F.2d 135, 142 (2nd Cir. 1988)(We believe that such testimony not only should be excluded as overly prejudicial but also rendered inadmissible any secondary opinion); United States v. Azure, 801 F.2d at 340-41 ("No reliable test for truthfulness exists and [Desiree Teague] was not qualified to judge the truthfulness of that party of [K.H] story line. The jury may well have relied on [her opinion] and "surrender[ed] their own common sence in weighing testimony."); United States v. Cecil, 836 F.2d 1431, 1442 (4th Cir. 1988)("The effect of reviewing such testimony, however, may be two-fold: First, it may cause juries to surrender their own common sence in weighing testimony; second, it may produce a trial within a trial on what is so natural but credibility is still an important matter.").

This Honorable Court has already spoken, in similiar situations, that it is Counsel's duty to object to Ms. Teague's line of testimony; especially, when Counsel did not cure any harm by his re-cross examination. Cf. Earls v. McGaughtry, 379 F.3d 489, 495 (7th Cir. 2004)("We have previously held that when a trial comes down to a single issue such as the credibility of a witness, deficient performance by defense counsel regarding that credibility issue may cause prejudice.")(Citation omitted); Snowden v. Singletary, 135 F.3d at 737-39 (Where "the heart of the case" is testimony by three allegedly abused children due process was violation by improper expert opinion that 99.5% of children tell the truth about sexual abuse).

Axiomly, the compounding effect of Ms. Teague's prejudcial

credibility determinations occurred during the prosecution's closing argument. RR5, 76-96. Counsel allowed the prosecution (without any attempt to object) to highly use Ms. Teague's credibility determinations as ammunition to sway the jury's verdict:

"Why would [K.H.] lie about this for three years RR6, 78-79." ... "She lied to protect her self-worth, she was at a breaking point and that breaking point came when she knew that the lie was to great to carry on." (RR6, 92). ... "Why would I call somebody that I know is gonna be lying on the witness stand? You see, there's something better than Damond Dean Jr. [whom lied for Petitioner] and it's the truth [K.H.'s testimony]." RR6, 93. "[K.H.] knows that the truth will prevail" and because of her therapy "she is now a teacher about her rape" experience. RR6, 94-96. Cf. Nichols v. American National Insurance, 154 F.3d 875, 884 (8th Cir. 1998)(prejudice is increased because of the use that was much of the testimony in closing argument); United States v. Azure, 801 F.2d at 340-41 (putting an impressively qualified expert's stamp of truthfulness on [K.H.'s] story goes to far.).

The credibility of K.H. is the critical focus of Petitioner's entire trial. K.H.'s testimony, for being an adult, was extremely generalized with a large amount of details missing out of the Police, CPS, and Medicial Reports. In other words, K.H.'s testimony is virtually weak, generalized, and highly inconsistant. There is no physical evidence of abuse, and no witness could corroborate K.H.'s events on Juneteenth's weekend in their home, along with other people in the home at the same as the alleged abuse occurred. No witness testified to any involvement of the

assault, only an outcry that "Petitioner kissed her funny," and acting out in school. Ms. Teague was virtually the only non-biased witness who appeared before the jury as an expert, and told them that "children would rarely lie." Thus, the prosecution would not put up anyone on the stand they say is not lying. Cf. Earls v. McGaughtry, 379 F.3d 489, 494-95 (7th Cir. 2004)([The Court] can think of no strategic reason why [Petitioner's] Counsel would not have objected to the vieces of questionable testimony going to this issue). Truly, because Ms. Teague and the Prosecution told the jury whom to believe, the substantial effect of their statements are seen during the jury's five-hour-and-twenty-minute deliberation. RR6, 99-109. The jury ultimately wanted to know "how the K.H. felt when she was telling her mom in the bathroom about [Petitioner] kissing her funny." RR6, 99-109. This jury note reveals that the jury believed that "children rarily lies about abuse" because they were focused on how K.H. felt during telling mom her abuse story, and not on the alleged offense at hand. RR6, 99-109. As a result, the jury was unduly swayed by Ms. Teague and the Prosecution's improper credibility determination when the jury was told: "Abused victims rarely lie about their abuse," especially for three years. Cf. United States v. Hill, 749 F.3d 1250, 1266 (10th Cir. 2014)(In light of the complete record before us, this Court should find that Petitioner "has carried his burden of showing a reasonable probability that the result of his trial would have been different without the impermissible testimony.").

Taken together, this Honorable Court should grant certiorari because any competent attorney in this situation would have highly

objected to Desiree Teague's credibility determination, and sought for an instruction from the court, then for a motion for mistrial. Therefore, this Honorable Court should speak to the lower courts and hold that Counsel rendered ineffective assistance in failing to object to Ms. Teague's testimony because the likelihood that the jury was unduly swayed by Teague's improper testimony—and would not unduly found Petitioner guilty beyond a reasonable doubt absent that testimony—is high enough to undermine this Court's confidence in the result of the trial. Hill, 749 F.3d at 1266; Earls, 379 F.3d at 496 (giving the facts and circumstances of the trial, [The Court] find[s] that the state court was unreasonable in finding that there was not a reasonable probability that, absent Counsel's errors, the outcome of the trial would have been different.); Strickland, 466 U.S. at 687-89, 104 S.Ct. 2052.

QUESTION NUMBER TWO:

Counsel rendered ineffective assistance by failing to investigate and present material witnesses to corroborate the Petitioner's defensive theory that no sexual assault ever took place. Because Counsel is obligated to conduct a reasonable investigation in order to present the most persuasive case that he can, should a jurist of reason consider the lower court's decision substantially debatable for generally holding: "Petitioner fails to show how any of the present evidence would have altered the outcome of the trial to demonstrate that counsel provided ineffective assistance?" See Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2054 (1984).

a. A proper investigation would have provided corroborating evidence to support the Petitioner's bare testimony that the alleged sexual assault did not take place.

Petitioner told Counsel to seek to interview Cassandra Taylor, Katanya Jones, Kelvis Mims, Damond Dean Jr. (Whom testified at trial, and obtain Petitioner's work records from OTTO Environmental Systems North America, Inc. Truly, the Petitioner argues that had Counsel investigated and introduced into evidence the testimony of the witnesses and records, the jury would not have been left to decide, without benefit of supporting or corroborative evidence, whether the Petitioner's testimony is truthful and accurate. Cf. Richter v. Hickman, 578 F.3d 944, 958 (9th Cir. 2009)(Leaving the jurors to believe or disbelieve defendants solely on the basis of their own testimony, without supporting evidence, where such evidence could be obtained with diligent investigation, is objectively unreasonable)(citations omitted). Therefore, this Honorable Court must grant certiorari as the Petitioner explains the substantial evidence below.

b. Reasonable Jurist finds Counsel's decision not to introduce testimonial evidence to corroborate Petitioner's testimony renders ineffective assistance of counsel.

1. Petitioner's affidavits from Cassandra Taylor, Katanya Jones, and Kelvis Mims are not speculative assertions, but relevant evidence.

The lower courts asserted that Petitioner's three witness affidavits are "speculations regarding what [Petitioner] believes his attorney would have discovered." Appendix C, Pgs. 12-13. The lower

courts decision is substantially debatable because witness affidavits are considered relevant evidence that has any tendency to make a fact more or less probable than it would be without the evidence. Fed. R. Evid. 401. The inclusion of witness affidavits the Honorable Court should declare under Rule 401 that they are not speculations; but instead, relevant evidence. Id. For example, in Kelvis Mims' affidavit, impeaches K.H.'s "can you lie for me and tell mom I am pregnant by you to cover up the rape and protect the Petitioner" story is not speculation. RR5, 93, 100-102. Instead, Mims could have brought impeaching testimony as defined by Rule 607 to attack K.H.'s credibility, in which was a major focus point during Petitioner's trial. Cf. Fed. R. Evid. 607.

In another instance, K.H. testified that Kelvis and K.H. was not sexually active because she has not seen Mims in years. Truly, Mims testified (in his affidavit) that they were sexually active in June of 2013, the year and month of the alleged rape. Cf. Mims' Affidavit; RR4, 100-102; accord, Anderson v. Johnson, 338 F.3d 382, 391 (5th Cir. 2003)("[E]ven if cross examination was effective, that is not to say it could not have been improved by prior investigation). The jury was entitled to consider this witness's testimony, and Counsel prohibited this relevant evidence from the jury's consideration due to Counsel's failure to properly investigate the factual basis of Petitioner's case. Cf. Dugas v. Coplain, 428 F.3d 317, 328-334 (1st Cir. 2005)(In an arson case, Counsel's failure to consult arson expert as part of his investigation into arson charge against [Dugas] constituted ineffective assistance). Therefore, this Honorable Court must speak out to the lower courts

and grant certiorari.

2. A Reasonable Jurist finds that Cassandra Taylor, and Kelvis Mims' affidavit present impeaching testimony that is very beneficial to Petitioner's defense.

The lower courts assert that Cassandra Taylor and Mims' affidavit are of no benefit because alot of their testimony was brought out in trial. Appendix C, Pgs. 12-14. This decision is substantially debatable because both affidavits would have brought out impeaching testimony and discredited K.H.'s credibility, in which was a huge issue and factor in debate at Petitioner's trial. Cf. Richter v. Hickman, 578 F.3d 914, 956-57 (9th Cir. 2009)(Counsel is obligated to conduct a reasonable investigation in order to present the most persuasive case that he can). At trial, the testimony of K.H. acting out at school was an isolated incident in the hallway because K.H. could not take the pressure of hiding the alleged rape story in any longer. RR4, 105-112. Cassandra Taylor could have discredited the inference that K.H. "never had a referral since in school, other than acting out in the hallway." indicating an isolated incident. Cassandra testified (in her affidavit) K.H. has disruptive behavour problems that are ongoing. In other words, K.H. has behavour issues at school, that is ongoing, and not to the contrary as K.H. told the jury. Truly, the jury was entitled to consider Cassandra Taylor's testimony at trial. Cf. Hendrick v. Calderson, 70 F.3d 1032, 1040 (9th Cir. 1995)("An attorney must provide factual support for the defense where such corroboration is available).

Further, K.H. told the jury that she called Mims to tell her

mom that they were sexually active that he got her pregnant to hide the alleged rape from K.H.'s mom, whom was also a rape victim, and to protect the Petitioner. K.H. further told the jury that they really were not sexually active because K.H. had not seen Mims in years. RR4, 100-102. To the contrary, Mims testified (in his affidavit) that they were sexually active in June of 2013. K.H. lied and previously told Mims, on another occassion, that she was pregnant with his baby; therefore, indicating that K.H. has a history about lying concerning her own pregnancy and not just a single incident to the alleged rape story from her mom, and to protect the Petitioner. This evidence also should have been presented to the jury; therefore, this Honorable Court court should speak out and grant certiorari. Then, hold that Counsel failed to uphold his duty to reasonably present corroborating evidence to the Petitioner's defensive theory. Cf. Hendricks, 70 F.3d at 1040 (failure to pursue such corroborating evidence with an adequate pretrial investigation establishes constitutionally deficient performance); Riley v. Payne, 352 F.3d 1313, 1319-20 (9th Cir. 2003)("[W]ithout any corroborating witnesses, [Petitioner's] bare testimony left him without any effective defense.")(internal quotations omitted); Hart, 174 F.3d at 1070 ("Defense Counsel failed to investigate or introduce into evidence the records that fully corroborated [the witness's] statements. Thus, the jury was left to decide, without benefit of supporting or corroborative evidence, whether [the witness's] testimony was truthful and accurate, or whether it was unreliable or offered simply in an effort to assist a former lover.); Lindstadt v. Keane, 239 F.3d 191, 203 (2d Cir. 2001)("[I]n a credi-

bility contest, testimony of neutral, disinterested witnesses is exceedingly important."); & Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 1514-15 (2000)(holding that a failure to investigate and present mitigating evidence during [guilt-innocence phase] constituted ineffective assistance even when doing so would have admitted some unfavorable evidence).

3. Jurist of Reason finds that Cassandra Taylor and Kelvis Mims were available to testify at trial, had Counsel investigated and called for them to testify.

The lower courts assert that "while Petitioner cites to the affidavits of Mims and Taylor, submitted with his State habeas application, he does not show that either Mims or Taylor were available to testify, or would have done so." Appendix C, pg. 14. This decision is substantially debatable because Petitioner did show, previously, how Mims and Taylor were available, and both would have testified at trial had counsel called them to the stand. Thus, from the face of both affdavits, proves credible evidence of availability and they were willing to testify; otherwise, they would not have provided the state court with their affidavits on behalf of the Petitioner. Further, the Petitioner also sought a live evidentiary hearing concerning Mims and Taylor affidavit in question, but the state court declined Petitioner's request. Nevertheless, Petitioner argues that no compentent attorney would have declined to interview such potentially favorable witnesses when the witnesses had been clearly identified, and were easily accessible and willing to testify and provide the jury their information at bar. Cf. Cannedy, Jr. v. Adams, 706 F.3d 1148, 1166 (9th Cir.

2013)("Counsel's failure to interview the friend and to call her as a witness could not be excused as strategic. No reasonable argument supported the state court's determination that the inmate suffered no prejudice."); Nealy v. Cabana, 764 F.2d 1173, 1179-80 (5th Cir. 1985)("The verdict against Nealy rest primarily on the testimony of Wiley Ewing, Davis's confessed killer, and is only weakly supported by other evidence. Such a verdict is more likely to have been affected by errors than one with overwhelming record support."); & Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 2458 ("[Petitioner's] lawyer is bound to make reasonable efforts to obtain and review material that Counsel knows the prosecution will probabily rely on as evidence [coming from K.H.'s testimony]"). Therefore, this Honorable Court must grant certiorari because Counsel truly deprived the jury with all facts necessary to make a just decision.

4. Jurist of Reason finds Damond Dean Jr. was available to explain Petitioner's OTTO Environmental Systems Work Records, producing an alibi that Petitioner could not have been alone with K.H.

Damond Dean, Jr. although he did testify, had Counsel properly investigated he would have also testified to the following: Mr. Dean Jr. would have revealed that a week or two after Juneteenth he was with his father to take his car to the shop to have his car brakes worked on, and Petitioner was not alone with K.H. as she protrayes. Cf. Damond Dean Jr.'s Affidvit, Exhibited in Petitioner's State Habeas; RR4, 98. While Counsel himself stated "the most devestating statement made in trial was the recording conver-

sation of [Petitioner] telling his son 'we need to get our stories straight for trial.'" See Affidavit of Nigel Redmond, Pg. 3.

Counsel is, therefore, ineffective because he had no rebuttal evidence to show the jury, due to his failure to properly investigate out the facts of this case. In ringing terms, had Counsel properly investigated Petitioner's work records, he would have known how to challenge the Prosecution's "recorded conversation" evidence. Truly, Mr. Dean Jr. would have explained that Petitioner got off work at 11:00am on the 26th, they were together to get his car brakes worked on. Taken together, this Honorable Court should speak out and grant certiorari because Counsel's errors prevented Petitioner from offering something akin to an alibi: Petitioner could not have been in the house alone with K.H. at all, much less one-hour-and-a-half as K.H. relied to the jury. Cf. Lindstadt v. Keane, 239 F.3d 191, 200-01 (2nd Cir. 2001)("Counsel's errors prevented Lindstadt from offering something akin to an alibi: Lindstadt was not living with his daughter in December 1985.); Bryant v. Scott, 28 F.3d 1411, 1418 (5th Cir. 1994)(holding that a failure to adequately investigate alibi witnesses constitutes ineffective counsel); Nealy v. Cabana, 764 F.2d 1173, 1177-78 (5th Cir. 1985) (same); Montgomery v. Peterson, 846 F.2d 407 (7th Cir. 1988)(Counsel's failure to investigate a store receipt was a serious error in professional judgment and was not related in any way to trial tactics or strategy."); & Brown v. Myers, 137 F.3d 1154, 1156-57 (9th Cir. 1998)(taking it as given that a failure to adequately investigate alibi claim or witness constitutes ineffective counsel).

c. ~~Reasonable Jurist~~ finds that there is a reasonable probability the outcome would have been different, had Counsel introduced testimonial evidence to corroborate Petitioner's defensive theory.

Taken together, there is a reasonable probability the outcome would have been different, had Counsel called Taylor and Mims to the witness stand to impeach K.H.'s testimony; and further, place in Petitioner's work records akin to an alibi Petitioner could not have been alone with K.H. In comparison to the federal authority, reasonable jurist finds the lower courts decision substantially debatable. Because Counsel render ineffective assistance where an investigation would have disclosed information bolstering his client's credibility and information "indicat[ing] that, given the layout of the home the alleged sexual assault could not have taken place, as claimed by K.H. Cf. Richter v. Hickman, 578 F.3d 944, 957 (9th Cir. 2009)(This Court has repeatedly held that a lawyer who fails adequately to investigate and introduce evidence that demonstrates his client's factual innocence, or that raised sufficient doubt as to that question to undermine confidence in the verdict."); Cannedy, Jr. v. Adams, 706 F.3d 1148, 1166 (9th Cir. 2013)(Petitioner's claim therefore meets the Strickland standard for ineffective assistance of counsel, and his petition for [Certiorari] must be granted."); Dugas v. Coplan, 428 F.3d 317, 328-34 (1st Cir. 2005)(Counsel's failure to consult arson expert as part of his investigation into arson charge against Dugas constitutes ineffective assistance); Nealy v. Cabana, 764 F.2d 1173, 1174 (5th Cir. 1985)(Because the missing evidence might have

affected the jury's appraisel of the truthfulness of the state's witness and its evaluation of the relative credibility of the conflicting witnesses, [Petitioner] has stated a claim for ineffective assistance of counsel); Lindstadt v. Keane, 239 F.3d 191 (2nd Cir. 2001)(Failure to request study relied on by Prosecution's expert, amounted to ineffective assistance); Williams v. Washington, 59 F.3d 673, 679-82 (7th Cir. 1995)(Counsel's failure to investigate was held to ineffective counsel where an investigation would have disclosed information bolstering his client's credibility and information 'indicat[ing] that, given the layout of the home... the alleged assault could not have taken place as claimed.); & Williams v. Taylor, 529 U.S. 363, 120 S.Ct. 1495, 1523 (2000)(holding that a failure to investigate and present mitigating evidence during sentencing hearing constituted ineffective assistance, even when doing so would have admitted some unfavorable evidence). Truly, because the lower courts did not hold their respect to this Honorable Court's spoken word and understanding of the rules of law, this Honorable Court should grant certiorari to hold Counsel ineffective, as being a violation of Strickland.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Damond Dean

Damond Dean - Pro se litigant.

Date: August 26th, 2021