NO. 22-6361

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL FETHEROLF, PRO SE, PETITIONER

V

STATE OF OHIO, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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Questions for review

Question for review #One: Do the requirements of Ohio App.R.26(B) comport with due process where it advises an applicant to include "One of more assignments of error or arguments in support of assignments of error that previously were no considered on the merits in the case by an appellate court or that were considered on an incomplete record because of counsel's deficient representation." (App.R.26(B)(2)(c). When filing an assignment of error, without an argument, or an argument without an assignment of error, will not protect the right to be heard in later proceedings because to satisfy 28 USCS 2254(b)(1)(A) and O'Sullivan V Boerckel, 526 U.S.838(1999)'s exhaustion requirement a petitioner must have presented the same to the state court.

Question for review #Two: Does the Ohio Supreme Courts sanctioning the 3rd District Court of Appeals failure to consider the extraordinary circumstances alleged deliberate deception of the court and the jury by the unconstitutional, egregious and illegal acts, conduct and omissions by the County Prosecutor through false statements, false testimony, misstating expert testimony. Violate the rudimentary demands of justice, governing the actions of the state by the 14th Amendment in conflict with Darden V Wainwright. 477 U.S. 168 (1986). Berger v United States 295 U.S.28(1935). And the petitioner's appellate council's failure to raise the misconduct rise to the level of deficient representation contemplated in Evitts v Lucy 469.387 (1985), and Strickland v Washington 466 U.S. 668 (1986).

Question for review #three: Does the Ohio Supreme Courts sanctioning the 3rd District Court of Appeals decision denying petitioner's motion for delayed reconsideration for being untimely without considering the merits for extraordinary circumstances require by the Rule, violate due process and this courts' ruling in EVITTS V LUCY. 469 U.S. 387 (1985) that requires states to comport with the demands of due process when it chooses to offer a procedure for redressing grievance?

[ ] All parties appear in the caption of the cover page Fetherolf v Shoop 2022 U.S.App.Lexis 12443, 6th Cir. Court of Appeals denied Certificates of appeal-ability on 5-6-2022.

LIST OF PARTIES AND RELATED CASES

State v Fetherolf 3rd District Court of Appeals; Case No. 14-21-0011 (unreported) Dismissed Appeal from denial of motion requesting leave to file a new trial motion filed on 8-15-2022. Reconsideration filed on 9-6-2022

State v Fetherolf 167 Ohio.St.3d.1450 Case No.22-0466 filed on 7-5-2022 Re-entered on 7-22-2022.

State v Fetherolf 14-16-10 (unreported) 3RD District Court of Appeals denied motion for delayed reconsideration on March 16th, 2022.

Fetherolf v Warden 2021 U.S.Dist.Lexis 220689. U.S. District Court rendered judgement denying COA on 11-16-2021.

State v Fetherolf 164 St.3d 1448 Ohio Supreme Court declined jurisdiction on 9-28-2021.

Fetherolf v Warden CCI 2021 U.S.Dist.Lexis.182825 denied 60(b) motion on 9-24-2021.

Fetherolf v Shoop 2021 U.S. App.Lexis 22759; Sixth Circuit court of appeals. Judgement rendered July 30 2021, rehearing denied.

Fetherolf v Shoop 2021 U.S. App.Lexis 17952; Sixth Circuit court of appeals. Judgement rendered June 15, 2021. COA denied

Fetherolf v Shoop 141 Supreme Court 1711; United States Supreme Court. Judgement rendered March 22, 2021.Certiorari denied.

State Ex Rel Fetherolf v Third District Court of Appeals. 161 Ohio St.3d 1477; Judgement entered March 17 2021. Ohio Supreme court. Writ of prohibition dismissed.

Fetherolf v Warden 2020 U.S> District. Lexis.230480 U.S. District court for Southern District of Ohio; Judgement rendered December 8, 2020. Motion for relief from judgement (60(b)).

Fetherolf v Warden Chillicothe Correctional Institution. 2020 U.S. App.Lexis.35816; Sixth Circuit court of Appeals; Judgement rendered November 13, 2020. Rehearing denied.

Fetherolf v Warden Chillicothe Correctional Institution; U.S. District Court for the Southern District of Ohio; Judgement rendered October 1, 2020 denied (60(b)).

Fetherolf v Warden Chillicothe Correctional Institution; Sixth Circuit Court of Appeals; Judgement rendered September 17, 2020; denied COA.

Fetherolf v Warden Chillicothe Correctional Institution 2020 U.S. Dist. Lexis 70787; U.S. Court of Appeals Southern District of Ohio; Judgement rendered April 22, 2020; Dismissing Habeas Corpus.

State v Fetherolf 2020 Ohio Lexis 135; Ohio Supreme Court; Judgement rendered January 21, 2020; Appeal not accepted for review; Prior history; Third District Court of Appeals case No.14-19-23.

Fetherolf v Shoop 2019 U.S.Dist. Lexis. 172003; U.S. District Court for the Southern District of Ohio; Judgement rendered October 3, 2019; Magistrate order denying motions to expand the record, discovery, and council.

State v Fetherolf 151 Ohio St.3d 1529; Ohio Supreme Court; Judgement rendered February 14, 2018 Denied reconsideration.

State v Fetherolf 151 Ohio St.3d 1528; Ohio Supreme Court; Judgement rendered February 14, 2018 Denied reconsideration.

State v Fetherolf 151 Ohio St.3d 1458; Ohio Supreme Court; Judgement rendered December 6, 2017; Decline Jurisdiction.

State v Fetherolf 151 Ohio St.3d 1455; Ohio Supreme Court; Judgement rendered December 6, 2017; Decline Jurisdiction.

State v Fetherolf 2017 Ohio Lexis 1465; Ohio Supreme Court; Judgement rendered July 26, 2017; Granted delayed Appeal.

State v Fetherolf 2017-Ohio-1316, Third District Court of Appeals; Judgement rendered April 10, 2017; Affirmed (Direct Appeal).

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Appendix H: Decision of Ohio Supreme Court dismissing mandamus

Appendix I: Ohio disciplinary counsel, declining to uphold its duty

Table of Authorities

Michael Fetherolf hereby petitions this court for a writ of Certiorari to review the judgement of the Supreme Court of Ohio.

Opinion and Order

The Ohio Supreme Court's decision declining jurisdiction is reported at State v Fetherolf, 2022-Ohio-2246, and is attached as appendix A: The 3rd District Court of Appeals denying delayed reconsideration is unreported and is attached as appendix B: The Ohio Supreme Court's decision declining jurisdiction from the denial of petitioners application to reopen his direct appeal is reported at State v Fetherolf 2017 Ohio lexis 2565 and is attached as appendix C: The Ohio Supreme Court's decision denying reconsideration is reported at State v Fetherolf 151 Ohio St.3d.1529, and is attached as appendix D. The 3rd District Court of appeals decision denying petitioners application to reopen direct appeal is unreported and attached as appendix E: The 3rd District Court of appeals decision affirming petitioners conviction on direct appeal, is reported at State v Fetherolf 2017-Ohio-1316 and is attached at Appendix F:

Other Material believed to be essential to understanding this petition.
Petitioner's application to reopen direct appeal pursuant to appeal rule 26(B) is attached as appendix G. Petitioners complaint by affidavit under ORC.2935.09 and 2935.10 setting forth criminal conduct of the prosecuting attorney and appellate counsel Carrie Wood, attached as appendix H: Ohio disciplinary counsel refusing to investigate the ethical violations by the state prosecutor is attached as appendix I:

Jurisdictional Statement

Review is sought of the Supreme Court of Ohio's Decision declining jurisdiction on 7-05-2022. This court has jurisdiction pursuant to 28 USC 1257 and this petition is being filed within 90 days of the decision under review.

STATUTORY AND CONSITUTION PROVISIONS

United States Constitution:
Amendment 5, 6, and 14

Ohio Rules of Appellate procedure:
14, 26 (A) and 26 (B)

CASE AND FACTS

Petitioner was tried before a jury between March 7th and March 11th, 2016 for 1 count. ORC 2907.02(A)(1)(b): 1 count gross sexual imposition, ORC 2907.05 (D)(4); and 1 count intimidation of a victim, attorney or witness. ORC.2921.04. Petitioner was sentenced to 30 months for the intimidation, ran concurrent with the rape count which he was sentenced to 25 years to life for, and GSI Count merged for sentencing.

Petitioner was appointed counsel from the Ohio Public Defenders Office, Carrie Wood (Wood). On direct appeal Woods raised four issues, including (1) improper introduction of veracity testimony, (2) improper introduction of petitioner's prior felony conviction, and irrelevant other acts testimony, (3) failure to turn over prior conviction of its witness, and (4) prosecutor misconduct as it related to the first three errors.

The Third District Court of Appeals omitted all citation of the U.S. Constitution from the assignments of error, see State v Fetherolf 2017-Ohio 1316 at *P27.

They applied an unreasonable harmless error review, and when deciding the prosecutor misconduct claim they cited Darden v Wainwright 477 U.S. 168,106 S.ct. 2464, 911 L.Ed.2d.144 (1986). However, they relied on the standard of review from State v Braxton 102 Ohio App.3d.28.41.656.N.E. 2d 970 (8th dist.95) See Fetherolf 2017-Ohio-1316 at *P68.

Petitioner filed an application for reopening of his direct appeal pursuant to Ohio App.R.26(B), raising as error (in part) that Wood was ineffective for not raising error in total, meaning Wood only raised a small part of the issues and left out the parts that violated petitioner's substantial rights. (Appendix G).

The Third District denied the application stating that petitioner failed to satisfy Strickland v Washington, 466 U.S. 668 (1984). Because he raised issues already raised and other meritless issues. They never said which, State v Fetherolf case no. 14-16-10 (unreported).

Petitioners then sought review of the Ohio Supreme Court. They declined jurisdiction. See, State v Fetherolf 2017-Ohio-8842 (Appendix C)

Petitioner then sought relief in the federal courts through habeas corpus under 28 U.S. 2254, raising (in part) ineffective assistance of appeal counsel (IAAC), irrelevant testimony and prosecutor misconduct.

The magistrate determined the irrelevant testimony claim (one) was without merit. See Fetherolf v Warden Chillicothe Corrections Inst.2020 U.S. Dist.2.21315.at *37-48: The prosecutor misconduct did not affect the totality of the circumstances. See Fetherolf.21315 at *55-60: The magistrate never considered whether appeal counsel was ineffective for not

raising habeas claims one and five in the State Court fully. The magistrate held that "petitioners remaining ineffective assistance of appellate counsel are waived because he failed to present those same issues to the State appellate court." See Fetherolf.21315 at *80, the magistrate recommended dismissing habeas.

CONTRARY to the Magistrates decision, the judge determined in Fetherolf v Warden Chillicothe Corrections Inst 2020 U.S. Dist.L.70787.at *13 that petitioner; "Alleged IAAC based on Ms. Woods failure to argue that: the evidence was insufficient to sustain a conviction: The prosecutor had committed misconduct; and the trial court erred in allowing the state to elicit inadmissible testimony, in failing to require the state to turn over all discovery and Brady material, and in allowing Ms. Hawkins to testify." Despite that statement the judge never considered whether appellate counsel was ineffective for failing to raise claims one and five in full.

The judge divided petitioner's argument in claim one, into four parts. See. Fetherolf 70787 at *4. Then determined that only the specific arguments raised by appellate counsel was exhausted and that the "other claims have thus been presumptively defaulted since he did not raise them during "the states established appellate review process". See Fetherolf 70787 at *9-10.

The Judge ultimately determined "The remaining IAAC claims that Mr. Fetherolf now brings were not brought in his rule 26(B) motion and thus are defaulted" see Fetherolf 70787 at *13. The judge determined habeas claims, 1(a), 1(c), 2(b), 3, 4, 6, 7 and 9 as well as most of the claims, 5 and 8, see Fetherolf 70787 at *14.

The judge did not consider whether appellate counsel was ineffective for failing to raise habeas claims one and five in full. She held that only the sufficiency of the evidence claim

can be considered using the IAAC as cause. See Fetherolf 70787 at *15-16. The judge only mentions when conducting her "merits" review of claim one and five. See Fetherolf 70787 at *23-24.

The Sixth Circuit Court of Appeals determined that reasonable jurist could not debate the district court's decision on claim one. See Fetherolf v Warden Chillicothe Correctional Inst. 2020 U.S. App.L.29845 at *6-7. They noted that prosecutor misconduct claim in their merits review but only the arguments raised by the state appeal counsel. See. F.29845 at *7-9 and determined that the insufficient evidence claim was the only exhausted argument underlying the IAAC claim, based on the district court's decision. See F.29845 at *9-10. Reconsideration was denied in Fetherolf v Warden Chillicothe Correctional Inst 2020 U.S.App.L.35816. Petitioner filed a certiorari in Fetherolf v Shoop 2021 U.S. L.1546

After the Federal Habeas Courts made it very clear that exhaustion requires more than an assignment of error OR an argument, petitioner filed a motion for delayed reconsideration from the denial of his 26(B). Arguing that the Rule (26(B)) was invalid because it does not protect a defendant's right to be heard in Federal Habeas review, because it does not satisfy the exhaustion requirements. Petitioner argued this amounts extraordinary circumstances requiring delayed reconsideration. See. State v Fetherolf case no. 14-16-10 3rd. Dist (unreported). (Exhibit B). The Ohio Supreme Court appears to have decided the question on the validity of App.R.26(B) was not a constitutional question and declined review in State v Fetherolf 2022-Ohio-2246. (Appendix A). Petitioner now seeks certiorari review from this court.

Petitioner has sought redress of the injuries cause by the unethical and criminal conduct of the prosecutor and has consistently been denied due process. The Ohio disciplinary counsel neglects its duty (See Appendix I) and the State of Ohio will not prosecute their own state official who has committed misdemeanor and felony offenses in this case. (See Appendix H).

REASONS FOR GRANTING THE WRIT

QUESTIONS FOR REVIEW

Question for review #One: Do the requirements of Ohio App.R.26(B) comport with due process where it advises an applicant to include "One of more assignments of error or arguments in support of assignments of error that previously were no considered on the merits in the case by an appellate court or that were considered on an incomplete record because of counsel's deficient representation." (App.R.26(B)(2)(c). When filing an assignment of error, without an argument, or an argument without an assignment of error, will not protect the right to be heard in later proceedings because to satisfy 28 USCS 2254(b)(1)(A) and O'Sullivan V Boerckel, 526 U.S.838(1999)'s exhaustion requirement a petitioner must have presented the same to the state court.

Reason for Granting the Writ #One: App.R.26(B) requires applicant to include one of the two options: They can file an assignment of error, or they can file an argument that his counsel was deficient for not raising. However, if as here, the applicant filed an assignment of error, supported his constitutional claim with case law, but did not include

an extensive argument because App.R.26(B) advised him that it was not needed when he files in the Habeas Court which requires the same error and argument that was raised in the state court or his petition for Habeas review will be dismissed for failing to satisfy 28 USCS 2254 (b)'s exhaustion requirement. See O'Sullivan V Boerckel.

Reason for Granting the Writ #Two: App.R. 26(B) only requires an assignment of error, or an argument which is not only insufficient to satisfy ALL other rules of filing in ALL State Courts, but it also, misleads pro se petitioners, and sets them up to be ambushed when their Federal Habeas petition gets dismissed because they did not include an argument in their 26(B) application regarding the underlying claim. App.R.26(B) takes advantage of unwary applicants who have no money to hire counsel, and takes away their right to be heard and due process in later proceedings.

In the instant case after the 3rd District affirmed on direct appeal petitioner filed a 26(B) alleging that his counsel was ineffective for not raising certain assignments of error. Petitioner did not file an ASSIGNMENT OF ERROR with an argument because rule 26(B) advised him to file an assignment of error that should have been filed by his appellate counsel OR file an ARGUMENT that his counsel should have filed, in direct appeal. In STATE V LEYH 166OhioSt.3d.365. The Ohio Supreme Court discussed the rule stating:

"Appeal rule 26(B) establishes a two stage procedure to adjudicate claims of ineffective assistance of appellate counsel. At the first stage, the applicant must apply to have his appeal reopened following the procedure set out in App.R.26(B)(1) through (4). STATE V

SIMPSON, 164 Ohio St.3d,102. 2020-Ohio-6719.172.N.E.3d.97.at*12. A timely App.R.26(B) application must contain "One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by an appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation" App.R.26(B)(2)(C).id at *p.21 (intend quote omitted). If the court of appeals grants the application, then the matter proceeds to the second stage of the procedure, which "involves filing appellate briefs and supporting materials with the assistance of new counsel, in order to establish that prejudicial errors were made in the trial court and that ineffective assistance of appellate counsel in the prior appellate proceedings prevented these errors from being presented effectively to the court of appeals." See LEYH at *p22: "To put it differently, the prior appellate judgement may not be altered unless the applicant establishes at the second stage that the direct appeal was meritorious and failed because appellate counsel rendered ineffective assistance under the law prong Strickland standard" LEYH at p23.

In LEYH the Ohio Supreme Court determined that in the first stage the applicant has to make a "colorful showing" LEYH at *p.21 then he will be appointed counsel who must satisfy the two prongs of Strickland.App.R.26(B) improperly advises un-weary applicants that they do not have to include an argument with their assignment of error, or an assignment of error with their argument, even though both are required to fully consider the claim and both are needed to satisfy the exhaustion requirements for later habeas review. (see 28 U.S.C ~2254(B)). The State of Ohio has consistently differentiated between

an assignment of error and an argument of error and an argument and the need to have both for full and fair consideration.

When interpreting a statute the court is "obligated to give effect to every word in a statute and avoid a construction that would render any provision superfluous" see STATE v REED, 162 Ohio St.3d 554. 559 (2020). Also see Platt V Union P.R.Co.99 U.S. 48, 58-60 (1878). "Webster third new international dictionary defines the word "OR" as "used as a function word to indicate (1) an alternative between different or unlike things, states, or actions*** (2) choice between alternative things, states, or courses***"" Czarneck: V Jones & Laughlin Steel Corp. 58 Ohio St.2d.413.HNS (1979). App.R.26(B) clearly instructs applicants to include either an assignment of error OR argument.
Ohio App.R.12 Determination and judgement on appeal (in relevant part); (A)(1)(2) The Court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or, fails to argue the assignment of error separately in the brief as required under App.R.16(A).

Ohio App.R.16 breif of the appellant shall include (in relevant part): (A)(3) A statement of the assignment of error presented for review with reference in the record where each error is reflected. (A)(7) An argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contention, with citation to the authorities, statutes, and parts of the record on which appellant relies. The argument may be proceeded by a summary.

The States requirement that an assignment of error be included with an argument in ALL other motions for full and fair consideration is reflected in the Ohio appellate court decisions.

In STATE v BOLES, 6th dist. Lucas County, No. 6-19-1080, 2021-Ohio-363,p.32. The appellate court declined to address Boles assignment of error, stating, "While Boles second assignment of error appears to challenge the manifest weight of the evidence his brief contains no argument in support of such a claim, and therefore we will not address it."

In State v Crank, 5th Dist. Stark Co. No. 2014CA00175, 2015-Ohio-1909 at *p103-106. The appellate court overruled Cranks assignment of error stating "Crank has provided no argument in support of his contention that the trial court was wrong to impose consecutive firearm specifications."

In, in re Gallion, 4th dist.Lawrance Co. No. 06CA8, 2006-Ohio-3204, at *p25-28. Gallion raised two assignments of error, however the appellate court held that "the father has raised two assignments of error, but has only one argument"

In Ching Chang v Time Warner Cable 10th dist, Franklin co. No. 19AP-101,2019-Ohio-3465 at *p10-13. The court held that he briefs were deficient because he presented argument but did not include and assignment of error stating "this court rules on assignments of error not mere arguments." Huntington National Bank v Burda, 10th dist. No.08AP-658, 2009-Ohio-1752 p21,quoting App.R.12(A)(1)(b); Williams V Barrick, 10th

dist.No.08AP-133, 2008-Ohio-4592 *28 (holding appellate courts "rule on assignments of error only, and will not address mere arguments").

In STATE v SHOOK, 4th dist, Pike Co. No. 13CA841, 2014-Ohio-3403, *p13-17. The appeal court noted that they could have dismissed Shooks appeal because his argument did not include a separate statement of the assignment of error.

In Owen Loan Servicing, LLC v Prater, 3rd dist, 2012-Ohio-4879, *p11-12. The appellate court dismissed the appeal because the praters failed to assign any error in their briefs.

The above cases are governed by App.R.12 and 16. However, they show that the State of Ohio requires an assignment of error and an argument for full and fair consideration, in ALL appeals except under App.R.26(B). In addition, Ohio appellate courts have rejected applications under App.R.26(B) for not presenting an argument with their assignment of error:

In STATE V BOYCE 2022 Ohio App.Lexis 187
The court denied Boyce's assignment of error because he "offers no argument to establish why the trial court erred by refusing to admit" the evidence.

In STATE V WACHEE, 8th dist, Cuyahoga Co, No.110117, 2021-Ohio-4427 at *p6. The appellate court relied on STATE V HARRIS, 8th dist, Cuyahoga, No.90699, 2009-Ohio-5962 *p20, holding that "The mere recitation of an assignment of error is not sufficient to

meet an applicant's burden of proving that his counsel were deficient and that there is a reasonable probability of a different outcome.

It is also important to point out that when filing on appeal to the Ohio Supreme Court an appellant is required to file a memorandum in support of jurisdiction which must include a table of contents, which shall include numbered propositions of law arranged in order and a brief and concise argument in support of each proposition of law. (see, OH, S.Ct, Prac.R.7.02(c)(1) and (4)).

There is no reasonable explanation for why App.R.26(B) requires an assignment of error OR an argument, but the Ohio.S.ct rule 7.02 requires a proposition of law AND an argument, and direct appeal briefs require an assignment of error AND argument. Federal habeas court will find an error to be unexhausted and procedurally defaulted if an appellate files and argument that was not raised in the state court.

The exhaustion requirement is satisfied "once the federal claim has been fairly presented to the state courts" Franklin v Rose, 811 F.2d.322,325 (6th Cir 1987). To exhaust a claim a petitioner must present it "To the state courts under the same theory in which it is later presented in Federal court". Wong v Money, 142 F.3d. 313, 322. (6th. Cir 1998). See also, McMeans v brigane, 228, F.3d.674, 681 (6th Cir 2000). General allegations of the denial of rights to a "fair trial" and "due process" do not "fairly present" claims that specific constitutional rights were violated. McMeans 228 F.3d,at 681 citing Petrucell: v Coombe, 735 F.2d 684, 688-89 (2d Cir 1984),' Citing Van Buskirk v Warden Leb,Corr,Inst 2013 U.S.

Dist. Lexis.185638 at *11. "IN order to have fairly presented the substance of each of his federal constitutional claims to the State courts, the petitioner must have given the highest court in the state in which he was convicted a full and fair opportunity to rule on his claims. Manning v Alexander, 912,F.2d 878, 881 (6th Cir 1990). A petitioner fairly presents the substance of his federal constitutional claims to the state courts by (1) relying upon federal cases that use constitutional analysis, (2) relying upon state cases using a federal constitutional analysis, (3) phrasing his claim in terms of constitutional law or in terms sufficiently particular to allege the denial of a specific constitutional right, or (4) alleging facts that are obviously within the mainstream of constitutional law." Clinkscale v Carter, 375 F.3d.430, 437 (6th. Cir.2004), see, Van Buskirk at *12.

In the instant case petitioners direct appeal counsel filed assignment of error #two alleging that Pam Hawkins testimony that petitioner had her dress up like a little girl while they were sexually active violated his rights.

However, Hawkins never testified to that, Hawkins said she dressed up but she never said they were sexually active at any time, that comment was made by the prosecutor in his close, (Vol.IV.p28). Petitioners counsel also stated in the case and facts section that Teresa Warnimont testified that A.C. was at the E.R. reporting digital penetration.

However, Warnimont never made that statement in her testimony. What she said was that A.C. was in the E.R. reporting digital genital contact. (Vol.III.p.13). As such petitioners counsel falsely quoted testimony in the briefs, which made it appear that A.C.

alleged rape at the hospital even though she only alleged contact. And counsel based an assignment of error on testimony that was never made, rather the prosecutor made the statement falsely in his close. Petitioners counsel raised an assignment of error of prosecutor misconduct but it was based on the other three errors and did not include any of the false or improper comments.

In his application to reopen his direct appeal petitioner argued that his counsel was ineffective for not focusing on the acts, conduct and omissions of the county prosecutor. (Appendix G, P.9) petitioner argued in part that his counsel should have raised the following assignment of error (appendix G, P.8).

> "There were multiple instances of prosecutor misconduct; many of which were on the record and supported, including withholding discovery and brady material; failing to disclose summaries of expert testimony; eliciting inadmissible testimony; promoting jury misconduct; and making prejudiced comments."

Petitioner relied upon state case law which used a Federal Constitutional analysis to satisfy the Constitutional exhaustion requirement. More specifically petitioner cited STATE V SMITH, 14 Ohio St.3d.13 (1984). In Smith the Ohio Supreme Court discusses United States v Dorr. (C.A.5.1981) 636 F.2d.117. and Berger V United States (1935). 295 U.S. 78 (1935) when analyzing the violation of Smith's substantial rights by the State Prosecutor improper comments in closing

arguments. Petitioner in this case specifically stated that his Appeal Counsel was ineffective for not raising as an assignment of error, the Prosecutor's "Making prejudicial comments."

However, due to the EXTREME LIMITATIONS OF 10 PAGES by App.R.26(B), and the fact that the rule does not require it, petitioner did not and could not include the same extensive argument that he did in the Habeas Petition.

Guided by Ohio's App.R.26(B) raising that assignment of error should have been sufficient. However, the Federal Habeas Courts refused to consider that prosecutor misconduct claim raised by petitioner and would only acknowledge the claim raised by counsel on direct appeal, because they said the argument was not presented to the State Courts. The exact argument was not presented because App.R.26(B) does not instruct applicants to include both assignment of error or an argument.

Question for review #Two: Does the Ohio Supreme Courts sanctioning the 3rd District Court of Appeals failure to consider the extraordinary circumstances alleged deliberate deception of the court and the jury by the unconstitutional, egregious and illegal acts, conduct and omissions by the County Prosecutor through false statements, false testimony, and misstating expert testimony. Violate the rudimentary demands of justice, governing the actions of the state by the 14th Amendment in conflict with Darden V Wainwright. 477 U.S. 168 (1986). Berger v United States 295 U.S.28(1935). And the petitioner's appellate council's failure to

raise the misconduct rise to the level of deficient representation contemplated in Evitts v Lucy 469.387 (1985), and Strickland v Washington 466 U.S. 668 (1986).

Reason for granting the Writ #Three: 28 USC£2254(b)(1)(B)(ii) allows for the exhaustion requirement to be excused if the "circumstances exist that render such process ineffective to protect the rights of the applicant." App.R.26(B) is s ineffective to protect the applicants rights. However petitioner could not have known that until after the Federal Court dismissed his claims as unexhausted, even though petitioner followed the directions in App.R.26(B).

Reason for granting the Writ #Four: This court has repeatedly held that a conviction obtained through false evidence conflicts with the rudimentary demands of justice and the 14th Amendment. In Darden V Wainwright, 477 U.S. 168 (1986) that the prosecutors comments did not violate due process (in part) because the prosecutor did not manipulate or misstate the evidence, and that a prosecutors comments will be held to violate the Constitution if it so infected the trial with unfairness to make the resulting conviction a denial of due process. In this case the prosecutor's comments manipulated and misstated the evidence, which resulted in the denial of due process and a fair trial.

Reason for granting the Writ #Five: Prosecutors are immune from civil liability, they are not immune from criminal liability or reprimand by the State

disciplinary counsel. However, I this case the state has rejected petitioner's attempts at redress through these avenues, as well as avenues on appeal.

"This court has repeatedly emphasized that "the purpose of the constitutional guarantee of a right to counsel is to protect an accused form conviction resulting from his own ignorance of his legal and constitutional rights" see Roth v Gillespie County. 554 U.S. 191 *2634 (2008), citing Johnson v Zerbst. 304 U.S. 458, 465 (1938). This protection was extended to appeal through Douglas v California, 372, U.S. 353 (1963) and Evitts v Lucy 469 U.S.387 (1985).

Petitioners counsel falsely quoted the experts at trial in the facts of the case in the briefs, she filed an assignment of error based entirely on testimony that was never had. She left out half of that error and even though the prosecutor not the witness made the statement that she based her error, she never raised it in the misconduct claim. In fact she overlooked a mountain of misconduct that not only violated petitioners Civil Rights but also, ethical standards, and State, as well as Federal law. Petitioners counsel should have raised the following:

> The prosecutor committed misconduct by making improper, false, and misleading comments. By speculating and commenting on evidence not in the record, and by inviting the jury to take the place of the interested parties. Violating Appellants right to a fair trial and due process, Guaranteed under the 5th, 6th, and 14th Amendments of the United State Constitution.

When considering this error the standard that should apply to prosecutor misconduct is whether the conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process" DONELLY V DeCHRISTOFORO, 416 U.S. 637, 643,

94.S.Ct. 1868, 1871 (1974). While it may be that each specific instance of prosecutorial misconduct might not per se warrant a new trial, the misconduct, taken as a whole, and the cumulative effect of these improprieties denied petitioner a fair trial. The prejudicial statements made by the prosecution in this case constitute egregious prosecutorial misconduct and fall into several categories: (1) Improper comment regarding the character of the accused and/or prejudicial other acts evidence and argument. (2) Improper comment regarding facts not in evidence, asking the jury to speculate and assuming the role of the interested parties, speculating and making false and misleading comments.

Prosecuting Attorney Hord began his open about petitioner being on probation when the petitioner never testified:

> Tr.Vol.I.Pg.121;(HORD – In the course of being a father there was this thing called child support Michael Fetherolf unfortunately did not pay his child support, got a case out of Delaware County. Tr.Vol.I.Pg.132; (HORD) – He wasn't reporting with his supervising officer over in Delaware county. Tr.Vol.I.Pg.132; (HORD) – There's about six-seven months, they arrest him, he does his time for his none support case and then he's facing these charges.

The prosecutor elicited testimony from the states witness Pam Hawkins alleging that petitioner hit her and called her names, that he was drinking excessively, looking at underage pictures and that he has Hawkins dress up as a little girl, and he himself actually dressed up as a little girl on one occasion. Prosecutor Hord also elicited testimony that petitioner was on felony probation for an unrelated offense from FOUR witnesses, including Hawkins, Ed Worley (Probation Officer), Detective Flanagan, and Wendy Shann (Delaware County Child Support Enforcement Agency). The prosecutor made the following comments:

When Hawkins testified that she caught petitioner looking at inappropriate pictures of young girls, petitioners counsel objected. The judge overruled and instructed the jury to consider the testimony for motive opportunity, intent, preparation knowledge or identity (Volo.II.p.135). Hawkins went on to say petitioner had her dress up in a mini skirt with blue thong underwear, counsel objected again. This time the judge told the jury to consider what he already told them. (p.137).

In his closing argument the prosecutor contradicted the judge and improperly quoted Evid.R.404(B) instructing them to consider her testimony for lack of mistake, plan, design or identity (Vol.IV.p28 then again on p.29)... DESIGN is not an option to consider. The prosecutor then comments on design stating can the state design motive, other acts, dress up like a little girl, looking at child pornography, sexual gratification (Vol.IV.p.39).

The prosecutor (lied) misstated Hawkins. She never said her and petitioner was sexually active, and she never said child pornography. He further comments: child pornography.

Tr.Vol.IV.Pg.28; (HORD) – They got back and PAM TALKS ABOUT HOW SHE CAUGHT HIM ON HER TABLET LOOKING AT CHILD PORNOGRAPHY. You have instructions on other acts evidence, lack of mistake, plan, design, identity, that's all you can use it for you're going to have that instruction. BUT HE'S LOOKING AT THAT, the other thing WHICH WAS PROBABLY EVEN MORE INLIGHTENING, HE TAKES HER TO WALMART, SHE'S SHOPPING, SHE'S GETTING SOME CHIPS AND STUFF AND WHERE IS HE? HE'S OVER IN THE CHOLD SECTION AND I KNOW ANY OF US with children have probably from time to time, have been in the children's clothes section at Walmart or some other store. The bottom line is she's like what is he doing? So he goes over there and what does she tell you? She says he asked her, well, WHAT SIZE THONG WOULD YOU

WEAR? UNDERWEAR? SHE'S LIKE HUH? AND THEN HE STARTS LOOKING AT WHETHER OR NOT IF THEY WERE PLEADED SKIRTS OR SEATERS OR WHATEVER. I MEAN I'M TO REMOVED FROM WHEN MY CHILDREN WERE THAT YOUNG BUT ITS LIKE HE, BASICALLY SET HER UP WITH CLOTHES TO DRESS UP LIKE A LITTLE GIRL AND HE GOT A WIG. A BLOND WIG. AND THEY WHAT? THEY WENT BACK TO THEIR HOTEL AND HE HAD H ER DRESS UP AS A LITTLE GIRL AND THEY WERE SEXUALLY ACTIVE. AND THAT HAPPENED TWICE AND THEN SHE ALSO TOLD YOU HE ACTUALLY DID THE DRESS UP.

There are multiple issues with that statement. (1) The prosecutor was speculating about what the petitioner was doing; "he started looking at whether or not if they were pleaded skirts or sweaters or whatever". "They went back to their hotel and he had her dress up as a little girl and they were sexually active." Hawkins never testified that they were sexually active, or that petitioner was looking for a "pleaded" skirt. The prosecutor attempts to have the jury relate with him because they both have children. I would also not that Pam Hawkins is only about 5 feet 5 inches tall, and weighs about 170 pounds. There is no possible way she could wear anything out of the child's section at any store.

Reference to other unproved misconduct, such as hitting females, and calling names, looking at underage pictures or dressing up like a little girl, is universally recognized as prejudicial. Dean Wigmore's comments on evidence of other crimes states;

The Sixth Circuit court of appeals made the determination that repeat instances of improper "Bad Character evidence, is sufficiently egregious to violate the petitioners due process rights. SEE WASHINGTON V HOFBAUER, 228.F.3d. 689 (6th Cir. 2000); GUM V MITCHELL. 775 F.3d 345 (6th Cir. 2014): also see HODGE V HURLEY No.03-3166 (6th Cir. 2005).

It is submitted that the admission in to evidence of testimony alleging that petitioner was drinking excessively, hitting Hawkins and calling her names, looking at under age pictures, having her dress up as a little girl, and that he himself actually dressed up, which were unproven and which were submitted solely for the purpose of prejudicing the jury and were clearly irrelevant and which would antagonize and disgust most people was clearly prejudicial and deprived petitioner of any chance of a fair trial. It is also important to note that the prosecuting attorney also withheld the criminal record of its witness Pam Hawkins for a recent conviction for falsification. He went so far as to argue in his defense against that claim that he disclosed all relevant convictions he was aware of, (SEE STATE V FETHEROLF CASE No. 14-16-10). However, that is not true, the disclosure made by HORD said; "Criminal record; NONE"

As such the prosecution improperly instructed the Appeals Court as to the facts of the case, and the Appeals Court did not attempt to make any other findings.

The Prosecuting Attorney (HORD) made two separate comments to the jury which were in direct conflict with each other, as follows:

> TR.Vol.IV.Pg32; (HORD) – You heard and you have all kinds of evidence as to where he lived. Miss Davern who was the manager at Hillcrest, very interesting document because when she first signed in there on these documents 7, 8 and 9, he's a resident, Michael Fetherolf, her grandson but he's going to be living there. So the other evidence that you have about that which I think is quite interesting as to date is exhibit 17, September 10th of 2013, Children services or excuse me Child support enforcement agency sends the letter to Michael Fetherolf at 155 Northcrest Drive, Marysville Ohio. Until when? SOMETIME BEFORE OCTOBER 16TH, 2013, AND SOMETIME AFTER OCTOBER 2ND, 2013,. When he was speaking to detective Flanagan Michael decided to leave. (EMPHESIS ADDED).

However, the prosecuting attorney later says;

> Tr.Vol.IV.Pg.27; (HORD) – There's Pam Hawkins, Pam Hawkins doesn't have anything in this other than the fact the Michael Fetherolf was living with her and her husband, Michael's relation was also there first. Then Michael showed up and then sometime before their anniversary which was OCTOBER 16th, MICHAEL FETHEROLF WHO WAS GIVING ATTENTION TO PAM HAWKINS WHO WAS HAVING ISSUES WITH HER HUSBAN, THEY LEAVE. (EMPHESIS ADDED)

It is also important to note that the park manager who testified, also said that she had never seen the petitioner in the park, (SEE Tr.Vol.II.Pg175). Also the lease agreement the prosecutor used to show petitioner was living there was dated from 2010 which was way before allegations range of dates, furthermore, the petitioners name was only written on it by his grandmother, it was not signed by him, and this was all done while the prosecutor had in his possession a lease agreement from 2012, which DID NOT have petitioners name on it. A lie is a lie no matter what it's subject and, if it is any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. SEE NAPUE V ILLINOIS, 360 U.S. 264 (1959). CITING PEOPLE V SAVVIDE, 1 N.Y.2d 54,557,136 N.E.2d 853, 854-855; 1564 N.Y.s. 2d. 885.887. (SOME CITATION OMITTED), The prosecutor also lied to the jury about the evidence of where the petitioner was alleged to have been on or about September 22nd of 2013. The only evidence of petitioners whereabouts on or about September 22nd, 2013 was testimony from the alleged victim's mother, (Heather Cunningham) as follows;

> Tr.Vol.I.Pg.177; Q – Okay now I want to direct your attention to Friday September 20th, 2013, was there visitation started on that date?
> A – Yes
> Q – I met Michael at his friends house on Stratford road and I dropped alyssa off.
> Tr.Vol.I.Pg.178; Q – September 21st, 2013, did you do anything special that day?
> A – I can't remember if it was a text or phone call from Michael asking to drop off extra clothes for Alyssa at the residence on Stratford Road and I proceeded to do that and had returned back home.
> Q – And did you do that? I mean drop them off?

A – Yes, I dropped the extra clothes off?
Tr.Vol.I.Pg.180; Q – When you hadn't seen Alyssa at this point what were your thoughts>
A – I was worried about where she was and if everything was okay
Q – And what did you do in respect?
A – I started making phone calls trying to get ahold of Michael, I went as far as to calling the person whose house he was at that Friday and Saturday when I dropped the clothes off to Stratford Road, I sent message on face book, I tried to call his grandmother at work.
Q – And any results>
A – I finally got a call back from the--- I had ended up calling the police department and giving the information and everything and they had called the number of the male that Michael had stayed the night at over that weekend where I dropped Alyssa off and dropped clothes off. They had finally gotten a response from him after he had given them the phone number and around -----
Q – Who's they sorry?
A – The DELAWARE POLICE DEPARTMENT. I had finally gotten a call back from them saying that they had located my daughter and that I could drive over to the apartment complex on STRATFORD Road and park in the front parking lot and that they would bring my daughter out to me (EMPHESIS ADDED).

That testimony clearly says that Heather dropped A.C. off to the petitioner at an apartment complex in DELAWARE (25 miles away from the alleged crime scene), that she dropped clothes off the next day which was Saturday, and that she called the DELAWARE CITY POLICE DEPARTMENT, and they located petitioner at the apartment on Tuesday. IF SHE THOUGHT THAT THE PETITIONER WAS IN UNION COUNTY, WHY WOULD SHE CALL THE DELAWARE POLICE????.. The prosecutor, never acknowledged this or corrected the testimony, instead he participated, and lied to the jury himself, as follows;

Tr.Vol.IV.Pg.123; (HORD) – The visitation – she was going to be at Alices house trailer 155 Northcrest with Michael; Saturday, Heather, (mother) actually brought extra clothes for A.C. visitation continues and she was going to come back Sunday night, Sunday September 22nd.

Tr.Vol.IV.Pg.13 (HORD) – I know I left at Delaware at this apartment where Michael Fetherolf had gone and taken Alyssa.

Tr.Vol.IV.Pg.14 (HORD) – No answer by calling the number that was given for this place where they would be staying which turns out to be this apartment in fact it was a place that she was familiar with because she's gone there before to get Alyssa.

> Tr.Vol.IV.Pg.56 (HORD) – If you want to talk to Heather and I kind of got this idea that he was at this apartment, let's do a little thinking, if he's at this apartment on Sunday, how's the grandmother going to be taking her to school the next morning? How's that going to happen in fact you heard that Heather never went to the trailer, she didn't know where that trailer was, the only thing she knew was it was an apartment in Delaware where she dropped stuff off and I SUBMIT TO YOU A PERSON BRINGS THE STUFF OVER TO UNION COUNTY TO MARYSVILLE. (EMPHESIS ADDED).
>
> Tr.Vol.IV.Pg.10 (HORD) – One thing is clear in that situation she stayed at his grandmother's house trailer in the backroom where her dad slept, that started on Friday the 20th, the 21st Saturday, the 22nd Sunday and the 23rd when she didn't come back either she stayed there at the trailer or at some point she got over to Delaware to Michael Fetherolf's friends apartment.

Prosecutor Hord made multiple statements contradicting each other and contradicting the testimony of the witness, (Heather Cunningham) who was the only person to testify about petitioner's whereabouts on or about September 22nd 2013. Hord actually makes several statements claiming that A.C. and the petitioner were at the trailer and went to the apartment, He also flat out said they were at the trailer when the witness had said they were at the apartment. The prosecutor simply lied, See NAPUE V ILLINOIS; 360 U.S. 264 (1959).

Prosecutor Hord elicited false and misleading testimony, and failed to correct it, he chose (AGAIN) to rather involve himself, by making false and improper comments in his close that characterized the disclosure allegedly made by A.C. as being consistent over time with wide variety of people, when in fact there was no evidence to support that. There are a total of SIX people who claim A.C. gave a statement to them, FOUR of them claim the statement was made to them on September 24th, 2013, which is the date of the alleged disclosure. LINDA TENNIHILL (A.C.s grandmother); testified that A.C. told her that the petitioner stuck a finger up in me (Tr.Vol.II.Pg.43). HEATHER CUNNINGHAM (A.C;s

mother) testified that A.C. told her that petitioner touched her butterfly, and stuck a finger inside her. (Tr.Vol.I.Pg.197), Heather testified that this occurred after she had asked A.C. if she got in to trouble, and A.C. answered NO (Tr.Vol.I.Pg.177), HOWEVER, LAURA KATO (Social Worker), testified that HEATHER told her in an interview, that while going over the events of the weekend, A.C. told her she had been trouble, and that's when A.C. told her that petitioner rubbed her vagina.

Furthermore, LAURA KATO also interviewed A.C; Kato testified that A.C. told her that she was touched, but said it was "JUST THE OUTSIDE" AND A.C. HERSELF testified, in a deposition on May 18th, 2015, after being found competent, and when asked she acknowledged that she spoke to the healthcare workers, and her aunt Kara, However when the State asked her if she spoke to her mother or grandmother (HEATHER AND LINDA), she shook her head in the negative indicating NO (TWICE). KARA TENIHILL (A.C's Aunt) testified that A.C. told her that the petitioner touched her no no parts, (Tr.Vol.II.Pg.16). Kaitlyn Ruddy, (Mid Ohio Psychological Services) testified that A.C. told her that petitioner touched her privates, (Tr.Vol.II.Pg.163). KELLY RENNER, (Delaware County Job and Family Services) testified that A.C. told her petitioner touched her bad spot, (Tr.Vol. III.Pg.134). There were several healthcare professionals involved at the hospital on September 24th, however the only person who actually spoke to A.C. was LAURA KATO. Teresa Warnimonts job was to collect evidence and take photographs (Tr.Vol.III.Pg.11). Any verbal information was relayed to Warnimont from KATO (Tr.Vol.III.Pg.10 & 11). Warnimont also reported that the exam was normal (Tr.Vol.III.Pg.16). Dr. Johnathan Thacker testified that he reviewed other peoples reports (Tr.Vol.III.Pg.44-45) and based on them he determined that everything was normal.

Dr.Helen McManus testified that she gets her information from other people, and based her decision on that (Tr.Vol.II.Pg. 62). As such the only person A.C. actually spoke to was Laura Kato, however there were several false and misleading statements made by the State and or his witnesses. Teresa Warnimont testified through questioning that the information she received was CONSISTANT with the information her team members received, (Tr.Vol.III.Pg.34). When asked by the State "What have you learned about the child disclosure in these types of cases?" she answered "What they say happened is what happened" (Tr.Vol.III.Pg. 33-34).

DETECTIVE FLANNIGAN testified that the information he received from his interviews of the family is that he found A.C.'s statements were very CONSISTANT and this CONSISTANCY was spread over a wide variety of individuals that she had spoken to in a relatively short period of time, (Tr.Vol.III.Pg.94). However FLANNIGAN wrote in his investigative report that he noticed the statements from the hospital were inconsistent, so he called Heather to verify. (SEE POLICE REPORT).

The prosecuting attorney DID NOT even attempt to correct these false and misleading statements. SEE NAPUE V ILLINOIS 360 U.S. 264 (1959). He opted the make his own False and misleading comments, as follows; first the prosecutor comments in his opening statement;

> Tr.Vol.I.Pg.130; (HORD) – I will tell you in that report, in the Children's Hospital report, the child doesn't talk about putting the finger in her, but those are total strangers, this is what A.C. told them and she CONSISTANTLY tells them that her dad Michael Fetherolf was rubbing on her private parts, her vagina.

That was a completely FALSE statement. Prosecutor Hord makes further comments in his close as follows:

Tr.Vol.IV.Pg.22; (HORD) – And what did you learn from Teresa Warnimont? She told you about child disclosure, she told you about how there was CONSISTANCIES with what this child was saying based on the information that they had received.

Tr.Vol.IV.Pg.23; (HORD) – What was noted was the social workers notes and the SANE nurse's notes are all CONSISTANT. The child doesn't deviate.

Tr.Vol.IV.Pg.24; (HORD) – And you'll have an instruction about penetration, however slight, is sufficient. But the bottom line is, that's what happened. That's what she said. Both Dr. McManus and Dr. Thackery reviewed it and said it was CONSISTANT with a child abuse case and the mere fact there was no signs of trauma because you heard from both of the doctors about how they heal fast and how there is elasticity AND HERE YOUR ONLY TALKING DIGITAL and the fact that there's nothing there does not rule out that it happened and every one of them says it's CONSISTANT.

Tr.Vol.IV.Pg.57; (HORD) – The point is Heather told you what she knew because of what she was told and what had happened and it's all CONSISTANT and that's in all of the reports out of the hospital.

Tr.Vol.IV.Pg.59-60 (HORD) – You have this exhibit, State Exhibit 11, the video deposition. If you choose to see it again, arrangements can be made for that. That speaks volumes. She doesn't want to see her dad. She will not answer any questions about that (60) concerns her dad but she did say at the very end that it happened in the back room. Doesn't say bathroom. It happened in the back room which is CONSISTANT but that poor little child wasn't going to say much of anything. And then I will talk about David Ross. You know what, the sperm. All of that he didn't find. The amylase, the sperm, all of that is what? It is CONSISTANT with what Alyssa said. She never said anything about him putting her mouth on him. In fact, in the examination at the Hospital she says that, no. She never said anything about him being undressed or exposing himself or any way that his sperm, his semen are going to get from his body to hers. So, when it's not there, it is what? It is CONSISTANT with what she said. CONSISTANT. That's what all four of the people who testify from childrens Hospital tell you. This child remains CONSISTANT with all the individuals she spoke to what she said and they are total strangers to her. A child who, wow, how would you like to have this little seven to nine hour experience in your life to go through all this but that's what happened.

These extremely prejudicial, False, and misleading comments, that were meant to bolster the credibility of the alleged victims statements, even though most of the statements do not exist, and at least two of them she indicated she never spoke to those people. However the Prosecutor, stating that the statements were consistent with many people throughout;

even stating that they were total stranger, he threatens the jury, "How would you like to have this little Seven to Nine hour experience", he asks them to put themselves in the position and he flat out lies about the statements, and the people who she had spoken with while at the hospital.

The appellate court determined there was no misconduct, however the SIXTH CIRCUIT COURT of APPEALS in WASHINGTON V HOFBAUER, 228 F. 3d 689 (6th Cir 2000). The prosecutor engaged in serious misconduct when he characterized Tamera's story as having been consistent over time when there was no evidence supporting that factual assertion; This type of misconduct amounts to misrepresenting facts in evidence and can amount to substantial error because doing so "may profoundly impress a jury and may have a significant impact on the jury's deliberations." Donnelly v Dachristorforo, 416 U.S. 637.40 L.ed.2d. 431 94 S.Ct. 1868 (1974). For as similar asserting facts that were never admitted into evidence may mislead a jury in a prejudicial way. SEE BERGER V UNITED STATES. 295 U.S. 78 84.79.L.Ed. 1314, 55 S.Ct. 629 (1935).

The Prosecutor continued to enhance the credibility, by stating;

> Tr.Vol.IV.Pg.18; (HORD) – Now let's get real, we're not even talking an hour after this child is home and she's seven-and-a-half. Really? She's seven-and-a-half and this is what she said happened. She's hugged her mother, hugged her grandmother, got in the car, goes to the house. She's eating her lunch and bingo. So what. This child has formulated this plan as to what happened to her this past weekend? Really?
>
> Tr.Vol.IV.Pg.22; (HORD) – There's no time for reflection. There's no time for planning. There's no time for conspiring. That's what happened and it's with every step along with different people.

The SIXTH CIRCUIT COURT OF APPEALS in WASHINGTON V HOFBAUER, 228 F.3d. 689, (6th Cir 2000). Also determined that the State committed PLAIN misconduct when he

made statements attempting to enhance Tamara's story in the eyes of the jury; "You think a ten year old child is going to go through all of that, food everybody, talking about two instances." The instant case is almost identical to Hofbauer in the way the State bolstered the witness before the jury. In addition, the Prosecutor Bolstered A.C.'s family through the entire trial, and his close, talking about how close they were, and about how they are not cops, they are female family members who she trusts. Talks about how THEY raised her, (Tr.Vol.IV.Pg.20). Prosecutor Hord goes on to speculate about several issues, and make more false statements, and misstate expert witnesses, and suggest the jury assume the role of the interested parties in his close.

Prosecutor Hord speculates when his says. Tr.Vol.IV.Pg.21; "Kara never went any further because she flipped", That was a speculation as to why A.C. did not say anything to Kara about any type of penetration, and Hord does the same thing with the hospital staff when he says, Tr.Vol.IV.Pg.23; She doesn't talk about penetration. Now this is a total stranger. This is a child who has seen two people very close to her freak out when she talks about this activity". Hord speculates as to why the doctors did not find any physical evidence;

> Tr.Vol.IV.Pg.24; (HORD) – Both Dr. McManus and Dr.Thackery reviewed it and said it was consistent with a child abuse case and the mere fact there was no trauma because you heard from both of the doctors about how they heal fast and how there is elasticity and HERE YOUR ONLY TALKING ABOUT DIGITAL and the fact that there's a nothing there DOES NOT RULE OUT THE FACT THAT IT HAPPENED AND EVERYONE OF THEM SAY IT"S CONSISTENT. And this is what? Seven to nine hours (pg 31) think about that. Seven to nine hours this is what has been related to the people at children's Hospital.

That statement by Hord, not only speculated about why there was no evidence, but he also stated again on the consistency, and he also stated that the doctors, specifically said THIS

(IT) happened, (pg 31) ultimately tells the Jury that the doctors determined that happened and there was no evidence because the penetration was only digital.

Hord gives them the pictures of A.C. to take into deliberations and makes the following comments:

> Tr Vol.IV Pg.41; (HORD) – And then on this event, on the 24th of September, after the traumatic experience that she went through in Delaware, and I WANT YOU TO ALWAYS REMEMBER THIS IS A SEVEN AND A HALF YEAR OLD GIRL who goes home after she is retrieved by the police officer getting her from her dad, she goes home to be with her mother and that's where the whole event starts.
>
> Tr.Vol.IV.Pg.60; (HORD) – This child remained consistent with all the individuals she spoke to, to what she said and they are total stranger to her. A CHILD WHO, WOW, HOW WOULD YOU LIKE TO HAVE THIS LITTLE SEVENT TO NINE HOUR EXPERIENCE IN YOUR LIFE TO GO THROUGH.
>
> Tr.Vol.IV.Pg.10-14; (HORD) – The police are there, they won't come to the door. They won't answer. (15) I can't even fathom what a seven and a half year old is thinking.
>
> Tr.Vol. IV.Pg. 59-60; (HORD) – You have this exhibit, State's exhibit 11, the video deposition. If you choose to so it again, arrangements can be made for that. That speaks volumes. She doesn't want to see her dad. She will not answer any questions about that concerns her dad but SHE DID SAY AT THE VERY END THAT IT HAPPENED IN THE BACK ROOM. DOESN'T SAY BATHROOM, IT HAPPENED IN THE BACK ROOM.

The alleged victim NEVER SAID ANYTHING HAPPENED. Hord again speculates and this time he asked the jury to assume the position of the alleged victim, and asked them to consider what she was thinking.

Teresa Warnimonts job in this case was to do specialized exams, as well as collect evidence (SEE Tr.Vol.III.Pg.11), Warnimont concluded that the exam was normal (SEE.Tr.VOL.III.Pg.15-16), She also reported that A.C. was at the hospital because she had reported digital genital contact (Tr.Vol.III.Pg.13). Warnimont done the scopes, and

she collected evidence. She was not and is not a DNA analyst. However, she testified that as a sane nurse THEY do swabs looking for any alleged perpetrators DNA fluids. Anything that would not—that would not be the child's that WE would find on his or her body. (Tr.VOL.III.Pg.10). She talks about this further when she talks about swabbing, and looking for saliva, or other DNA where someone might have "KISSED' or "LICKED" (Tr.Vol.III.Pg.11). Warnimont is NOT a DNA examiner, she did not TEST for anything.

The report generated by David Ross returned negative findings when conducting his testing for any type of bodily fluids. Despite these facts, the record shows the prosecutor asked questions that he knows is going to elicit prejudicial answer which are not supported by the record, when he asks questions like; Do you also check for dried stains? (Tr.Vol.III.Pg.23). Further testimony was elicited through questioning and leading the witness as follows;

> Tr.Vol.III.Pg.23; A-In the absence of specific disclosure of having licked or kissed we automatically would swab the inner thigh.
> Q: And when your then talking about things like looking saliva. Q: Okay analyst.
> A: Correct
> Q: And did you do that in this instance, correct?
> A: Yes, I did the inside of her thigh.
> Q: However that type of transfer is a result of what type of contact?
> A: Some sort of contact.
> Q: By the mouth?
> A: Could be someone licked a finger and touched there, could be someone kissed there, could be lots of different---
> Q: To transfer that?
> A: To transfer that material correct.

David Ross was the BCI analyst that tested for bodily fluids, like semen, saliva or amylase (SEE Tr.Vol.III.Pg.143). All testing was negative (Tr.Vol.III.Pg.157). However, the manner in which Ross took the swabs from the underwear was misleading and the prosecutor took advantage of that and exploited it to prejudice the petitioner, he telling the jury that

evidence was found in the crotch of the underwear. David Ross testified that he used only one swab to collect from BOTH the front panel and the crotch of the underwear. (Tr.Vol.III.Pg.157-158). However, he testified that they are separate.

> Tr.Vol.III.Pg.III.Pg.154; Q: The next page of your report which it states exhibit 18, are you familiar with that item?
> A: Yes I am
> Q: And what is it?
> A: This is the photo that I generated of BCI's item number 1.7 the underwear fond picture of the underwear after you had cut them?
> A: Yes
> Q: Now on examination if we start at THE TOP of this photo, what appears to do --- WHAT PORTION OF THE UNDERWEAR WOULD BE AT THIS TOP?
> A: THAT WOULD BE THE INTERIOR OF THE FRONT PANEL THAT YOUR OBSERVING.
> Q: Then it appears on those underwear there's like a SEPARATE type of material THAT"S IN WHAT WOULD BE THE CROTCH AREA?
> A: YES
> (EMPHESIS ADDED)

The State exploited that manner of collection by misleading the jury to believe the STR was located on the crotch of the underwear.

> Tr.Vol.IV.Pg.34;(HORD) – You can take the panties out and look at them, if you want to, they're here, he made notion on it. He cut them apart, he took swabs and check ON THE RIM AT THE FRONT FOR POSSIBLE DNA. DIDN'T NOTE ANY, which is later referred to by Hailey Garofalo, but he also then took – AND I THINK THIS IS VERY IMPORTATNT – HE TOOK SWABS INSIDE THE BLUE AREA WHICH IS BASICALLY THE CROTCH AREA OF THOSE PANTIES, (EMPHESIS ADDED).

There the state not only misleads them to think the evidence was located on the crotch specifically, but he tells them that the testing for the front panel was negative.

> Tr.Vol.Pg.35; (HORD) – He did it by contact with that swab which is – you'll see --- I mean, if you want to look at it. It's a cotton end and he rubbed it over the panel, THE CROTCH PANEL OF THAT CHILD"S UNDERWEAR.

> Tr.Vol.Pg.35 (HORD) – Number two, it's in an area of which you heard the testimony that, basically almost self-(audible). You urinate, you go to the bathroom, you use the toilet paper, your cleaning, so the fact that you're not going to find something in there that's not unusual.
>
> Tr.Vol.IV.Pg.37; (HORD) – I heard talk on cross examination about that it was – could have been body fluids, sweat. Well, you're going to wipe your sweat with your child's underwear on that CROTCH. Really reasonable, are you going to spit on it?

Not only did the prosecution mislead the jury with these comments, he also speculated as to why there was no evidence found on the person, or inside the person.

Hailey Garofalo, testified:

> Tr.Vol.III.Pg.178-179; Q: What are the advantages of Y-STR testing?
> A: The advantages are being able to detect make DNA when, in other circumstances there might be excessive amount or too much female DNA, that could be masking or hiding any male contributors.
> Q: And in this instance this type of a result, would be consistent with touch transfer.
> A: In my expert opinion based on how much DNA I detected in the underwear, that's not typical of just casual touch from here's a pair of underwear I'm handling you and leaving DNA behind, I did detect close to a full profile, a significant amount of male DNA.
> Q: In order to do that or to have that what would be required?
> A:Either a body fluid or more skin cells than just say from casually touching some item.
> Q: And the fact that these swabs were taken from the rim of the underwear and the crotch area does that have bearings?
> A: It was specifically on the crotch and front panel that I detected the male DNA profile in this case.
> Q: Would that be consistent with skin transfer?
> A: It's-----
> Q: In that area?
> A: That's possible yes.

This testimony is contrary to the report that was generated by BCI, which says all testing was negative, and I would not that Garofalo testified that the DNA was put there by something other than casual touching some item. Her testimony changes when defense counsel asks her similar questions,. Which are more consistent with the report.

Tr.Vol.III.Pg.188; Q: You see there where Mr. Ross had tested for the vaginal swab and found no semen, right?
A: Correct
Q: Anal swab, no semen, correct?
A: Correct
Q: Oral swab, no semen, correct?
A: Correct
Q: Underwear, no semen, correct?
A: Correct
Q: And finally, skin swab of bilateral inner thighs, no semen?
A: Correct
Q: So would it seem to indicate that no amylase was found in the underwear sample that was provided, is that correct?
A: It doesn't look like the underwear was tested for amylase.
Q: Well, so would it be fair to say that there was no amylase found in the underwear?
A: No, it would not, if it wasn't tested for we can't testify to that.
Q: But if it was present, it would be in the report correct?
A: It should be, I didn't perform this testing though so I can't testify to that.

The prosecution further exploits the evidence in false and misleading manner making comments as follows:

> Tr.Vol.IV.Pg.33-34: (HORD) – In states exhibit 18 are the little girls panties, the front is at the top. David tells you how he did the rape kit, analysis, vaginal swabs, no semen identified no on oral swabs, no semen identified, DNA standard taken from A.C. to check for fingernail scrapings, none was examined, had hair standard, never were examined and then skin swabs, the inner thighs of A.C. that were taken by the SANE nurse Teresa Warnimont, reason being if there was any other type of activity where there would have been skin contact on her thigh, they look there to see if there is anything there, no just skin transfer but things like amylase or saliva and he even talks about that in this instance and there wasn't any noted but HE DOES TALK ABOUT THAT UNDERWEAR WHICH STATES EXHIBIT 12-BOX AND HE ALSO NOTED 12-B WHICH WERE DRYING STAINS, SALIVA STAINS. (EMPHEISIS ADDED).

The prosecution just told the jury that ROSS said there were saliva stains on the underwear, and that is FALSE, he knew it was false but he did it anyway, the following statement proves he knew it was false, only this was said to the judge:

> Tr.Vol.III.Pg.116; (JUDGE) – I understand that, what I'm saying is, was it sweat that you got the DNA from? Was it sperm that they got the DNA from or do they not know what it was that they got the DNA from?
> (HORD) – IT was not sweat, it was not spit, There's no amylase---

The prosecution made further comments as follows:

> Tr.Vol.IV.Pg.38 (HORD) – What is there is Y chromosome, what is there is consistent ACCORDING TO HAILEY with what could be transferred by hand touch and the fact this child is wearing the underwear, it's like putting it in a cup. She puts her underwear on and what else is there? The child's skin and the Y chromosome that's on it and it transfers. (EMPHESIS ADDED)

The prosecutor just told the jury that Hailey, his "Expert" said the evidence was located on the child's skin, and compared it to filling a cup while co-signing his own false statements with his "Expert" witnesses. This is at least twice the prosecutor has falsely stated the testimony of his witnesses. The prosecutor gives his own comparison of the evidence as follows.

> Tr.Vol.IV.Pg.35-36; (HORD) – One of the things that I don't like about winter is what happens to our cars. I do not like wearing a black suit when it's been nasty (36) and they have had the salt out and all of that and I get out of the car incidentally and I've got what? I've got a mark, because of what? Transfer and what did you hear from Hailey? You heard that in this instance when she had the known from Michael Fetherolf, it was a significant contribution of Y chromosomes. It was not casual touch. IT was not something that was just incidental, it had to be something that caused that to be there.

The prosecutor went on to use a black towel that he had obviously planted there the night before to compare the evidence by using the black towel to wipe up dust. (Tr.Vol.IV.Pg.61). Hord has used TWO examples, including a visual, that is not approved by the scientific community, furthermore he relied on Hailey's name to say it wasn't casual touch, even though she had already said she can never say how something got there. He goes on to say:

> Tr.Vol.IV.Pg.37; (HORD) – I heard talk on cross examination it was – could have been fluids, sweat, well you're going to wipe your sweat with your child's underwear on this crotch, really reasonable, are you going to spit on it?

This comment only served to prejudice the jury against the petitioner, by making them believe that petitioners "spit (saliva) was on the crotch of A.C.'s underwear. The reports (BCI) do not say that.

Question for review #three: Does the Ohio Supreme Courts sanctioning the 3rd District Court of Appeals decision denying petitioner's motion for delayed reconsideration for being untimely without considering the merits for extraordinary circumstances require by the Rule, violate due process and this courts' ruling in EVITTS V LUCY. 469 U.S. 387 (1985) that requires states to comport with the demands of due process when it chooses to offer a procedure for redressing grievance?

Reason for granting the Writ #Six: Ohio App.R.26(A) permits an appellant to file for delayed reconsideration upon a showing of extraordinary circumstances pursuant to Ohio App.R.14(B). State v Moore 149 Ohio St.3d.557 (2016). In this case petitioner made the proper showing. However, the 3rd District denied the motion six days after it was filed without considering the merits for extraordinary circumstances, and the Ohio Supreme Court sanctioned that by declining jurisdiction.

Reason for granting the Writ #Seven: A search of Ohio, 3rd District Court of Appeals newest – oldest will reveal that ALL cases within the past few years has

taken between 6-18 months, there is no way they complied with due process in six days, and the Ohio Supreme Court sanctioned this by declining jurisdiction.

Reason for granting the Writ #Eight: This court held in EVITTS V LUCY, 469 U.S. 387, 393 (1985) that the procedures used in deciding appeals must comport with the demands of the due process and equal protection clauses of the U.S. Constitution.

Petitioner's appeal counsel filed a prosecutor misconduct claim, unfortunately she based it on the other three assignments of error and did not raise an assignment of error based on the prejudiced comments made by the prosecutor in his closing arguments, and when petitioner filed his 26(B) application to reopen his direct appeal he argued that his counsel was ineffective for not including the prejudicial comments in the assignment of error. The 3rd District Court of Appeals denied the application under the standard applied in STRICKLAND v WASHINGTON 466 U.S. 668 (1986) because they said petitioner raised the SAME CLAIMS, as his appeal counsel (App.E).

Being under the belief that his prosecutor misconduct claims has been fairly presented because he included the assignment of error and cited state case law with Federal Constitutional analysis, petitioner proceeded with his appeals. However, when he got to the Federal Habeas Court they said petitioners remaining IAAC claims were defaulted because petitioner failed to present them to the State Court.

Petitioner proceeded all the way to the U.S. Supreme Court with the belief that his claims had been exhausted because App.R.26(B) does not require an argument with the assignment of error to be fairly presented.

After going through all levels of his appeal petitioner realized that he had ben mislead by the State Rule that advised him to file an assignment of error, or argument that was not raised because of his counsel's deficient representation, petitioner filed a delayed reconsideration.

App.Rule 26(A) permits a petitioner to file a delayed reconsideration on a showing of extraordinary circumstances under App.R.14.

Petitioner included as extraordinary circumstances, (1) The Ohio Supreme Courts recent decision in STATE v LEYH, 166 Ohio St.3d.365 (2022). Which held that the Strickland standard does not apply at the first stage of the 26(B) process: (2) The egregious amount of prosecutor misconduct and: (3) The fact that App.R.26(B) is insufficient to satisfy the Federal Habeas exhaustion requirement and is invalid.

The motion for delayed reconsideration was filed on March 10, 2022 and was denied on Wednesday March 16th, 2022 (that is six (6) days). They held that petitioner's motion was untimely and that petitioner did not raise any extraordinary circumstances. (See App.B)

The 3rd District has been taking 6-18 months or more to make a decision in ALL recent appeals. There is no way they applied due process to my motion by fairly or fully considering it in six days, and they never considered the merits of the assignments of error or the extensive argument that was now presented, that was not presented in the 26(B), per App.R.26(B), to determine the extraordinary circumstances.

There was no question that the motion for "delayed reconsideration" was untimely. The only question was the extraordinary circumstance which the 3rd District declined to consider, and simply denied the motion as untimely. The Ohio Supreme Court sanctioned that decision by declining to accept jurisdiction. (See App.A)

"The constitution does not require State to grant appeals as of right to criminal defendants seeking to review alleged trial errors. McKane v Durston.153 U.S. 684 (1894). Nonetheless, if a state has created appellate courts as "an integral part of the ...system for finally adjudicating the guilt or innocence of a defendant" Griffin v Illinois, 351 U.S. at 18, the procedures used in deciding appeals must comport with the demands of the due process and equal protection clauses of the Constitution." See Evitts V Lucy 469 U.S. 393,(1985). "In bringing an appeal of right from his conviction a criminal defendant is attempting to demonstrate that the conviction, with its consequences drastic less of liberty, is unlawful. TO prosecute the appeal, a criminal appellant must face an adversary proceeding that –like a trial – is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant – like an unrepresented defendant at trial – is unable to protect the vital interest at stake. To be sure, respondent did have nominal representation at trial when he brought this appeal, but nominal representation on an appeal as of right – like nominal representation at trial – does not suffice to render the proceeding, constitutionally adequate: A party who's counsel is unable to provide effective representation is in no better position than one who has no counsel at all. A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney." See Evitts v Lucy at *396.

In this case petitioners counsel was clearly ineffective. She created an assignment of error, alleging Hawkins testimony that she and petitioner were sexually active while she was dressed up like a little girl even though Hawkins never said that in her testimony.

That statement was made (falsely) by the prosecutor, but petitioners counsel conveniently did not include that in her misconduct claim. She falsely quoted the S.A.N.E. nurse, and she left out an ENOURMOUS amount of prosecutor misconduct where he misstated the evidence, the witness testimony and made false and prejudicial comments not supported by the record. And when petitioner sought review by the State of Ohio, he was denied any meaningful review by the 3rd District who has essentially swept his errors under the rug. The Ohio Supreme Court has sanctioned that conduct, and essentially sanctioned the prosecutor obtaining this conviction by falsifying and misrepresenting the evidence. The Ohio Supreme Court's decision to sanction the conduct of the 3rd District in this case conflicts with due process guaranteed under the 14th Amendment, and Evitts v Lucy.469 U.S.393(1985).

The rules of filing in state court should not be used to mislead appellants who rely on them to proceed under the rule to present the claims, unfortunately that is exactly what App.R.26(B)(2)(c) does when it instructs applicants to include an assignment of error OR an argument, even though an applicant must include both to protect his rights in Federal Habeas review, (28 USCS.2254(B)(1)(A). The invalid, insufficient requirements under App.R. 26)(B), the egregious prosecutor misconduct and the Ohio Supreme Court's decision in STATE v LEYH, amount to extraordinary circumstances under, App.R.14(B): Petitioner requests this court grant certiorari, appoint counsel and schedule briefing.

Respectfully Requested

12/12/23

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