22-6437

IN THE SUPREME COURT OF THE UNITED STATES
ON PETITION FOR A WRIT OF CERTIORARI
FROM THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

ALAN SINGLETON,
Petitioner

v.

TOM WATSON, WARDEN,
Respondent.

PETITION FOR WRIT
OF CERTIORARI

Petitioner, Alan Singleton, hereby requests that the United States Supreme Court accept jurisdiction and grant certiorari after the Sixth Circuit's Ruling in *Singleton v. Watson*, 2022 U.S. App. LEXIS 18267, June 30, 2022.

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QUESTIONS PRESENTED

1. Did counsel provide ineffective assistance?
2. Did the prosecution's use of the word "uncontroverted" place the burden of proof on the defendant, thereby denying him his right to be presumed innocent until proven guilty?
3. Should the social worker's entire testimony have been denied as hearsay? Was petitioner denied his right to confront witnesses and denied a fair trial?
4. Did the admission of the child's hearsay statements violate petitioner-defendant's confrontation clause rights?
5. Did the judge improperly consult case law when finding defendant guilty? Use of case law is biased towards guilt, thereby denying defendant a fair trial.

LIST OF PARTIES

[X] 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 as follows.

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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

[X] For cases from **federal courts**:
The opinion of the United States court of appeals appears in Appendix A to the petition and is:
[] reported at _____; or,
[X] has been designated for publication but it not yet reported; or,
[] is unpublished.
The opinion of the United States district court appears at Appendix B to the petition and
[X] reported at *Singleton v. Watson 2022 U.S. App. LEXIS 18267*; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

[] For cases from **state courts**:
The opinion of the highest state court to review the merits appears at Appendix B to the petition and is:

[X] Reported at *State v. Singleton, 2016-Ohio-4696*
[] 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[] is unpublished.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 U.S. Court of Appeals decided my case was June 30, 2022.

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

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 26, 2022, and a copy of the order denying rehearing appears at Appendix C.

[] 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 State Court of Appeals decided my case was June 30, 2016.

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

[] A time petition for rehearing was denied by the State 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 _____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution Amendment Five

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution Amendment Six

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.

U.S. Constitution Amendment Fourteen

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONCISE STATEMENT OF THE CASE

Petitioner, Alan Singleton was charged under a three-count indictment with rape, gross sexual imposition and, as amended, kidnapping with a sexual motivation specification. Appellant waived his right to a jury trial, and the case proceeded to a bench trial.

Prior to the start of trial, the court conducted a competency hearing of the victim, who was four years old. The court found the victim to be incompetent. The court then conducted a hearing on the state's notice of introduction of child victim's statements and determined that the victim's previous statements were admissible under Ohio Evid.R. 807.

At trial, the victim's mother, L.B., testified that appellant came to her home unannounced on December 30, 2014, to visit with the victim, who is his child. L.B. testified that at some point during the visit, appellant told L.B. he was hungry. L.B. went to prepare food and left appellant and the victim in the third-floor bedroom where they were watching television. By the time L.B. returned to the bedroom, appellant was the only one in the room and had fallen asleep for the night.

Appellant left the next morning, which was New Year's Eve. He told L.B. that he would be back and that she should go to the liquor store. L.B. bought a bottle of Zinfandel. Appellant did not return. L.B. stated that it was "up in the air," "he don't tell the truth," and that she was contemplating what she was going to do for the night.

According to L.B., that evening the victim A.S went to her and said, "my dad do me like this" and described what appellant had done to her the previous evening. She took her fingers, put them down her panties, and made movements to demonstrate appellant's actions. The victim asked L.B., "is that bad?" L.B. testified that she was shocked. She testified she did not have a drink before the victim confided in her, but opened the bottle of Zinfandel after the disclosure. The next day, the victim repeated to L.B. what happened.

L.B. testified that she called appellant and he said, "maybe someone went too far this time * * * told her to say it was me." L.B. told appellant she was taking the victim to the emergency room.

L.B. eventually took the victim to the hospital. The sexual assault nurse examiner who examined the victim testified to her examination of the victim and to her findings, which included swelling, redness, and damaged tissue. She testified that the injuries observed were

consistent with digital touching. She also testified that "[c]hildren typically don't cause injuries like that themselves, because it is painful."

An interview of the victim took place at the Cuyahoga County Division of Children and Family Services ("CCDCFS"). Present for the interview were the victim A.S, and mother. L.B., a social worker MR .Lawrence Petrus from the Sex Abuse Intake Department of CCDCFS, and a Detective Shanika Armstead # Badge 0212 with the East Cleveland Division of Police.

The social worker testified that the detective took the lead in questioning the victim A.S during the interview. He further testified that only one person was asking the questions in order to limit the trauma to the child and to eliminate any confusion during the interview. The social worker stated that the detective was able to elicit the same information he would be looking for to aid his referral in the case.

The social worker testified that a drawing was utilized during the interview and the victim pointed to the vaginal area and stated appellant had touched her there with his finger. The social worker testified that his purpose in the interview was to determine the safety of the child and whether the child required any follow-up psychological, mental health counseling, or medical services. He further testified that in order to make this assessment, it was important to know where, and with what, the victim was touched. The social worker recommended that the victim be seen by rape crisis.

The detective testified she told the victim A.S. the purpose of the interview was "just to find out what had happened, why she had to go to the hospital." L.B., who is the victim's mother, was also interviewed. Both the social worker and the detective testified that L.B. was interviewed after the victim had been interviewed. The detective also met with appellant and obtained a sample of appellant's DNA to compare it against the sexual assault kit.

Appellant testified in his defense. He acknowledged visiting with the victim on December 30, 2014. He testified he wanted to spend time with his child. He stated that when he got to the house, he "sat on the couch, watched TV for a minute" and then said he was tired and went upstairs to bed. He claimed the victim went upstairs and played for a couple of minutes, but he told her he was tired and she left. He testified the victim returned a little later with a plate of food. He testified that a song came on the television, he was thinking of dance steps, and he "taping] her on the knee, 1-2-3, 4-5-6, 7-8" for three minutes. He claimed he gave the victim.A.S kiss on the cheek, she left, and he went to bed. He stated he left for work in the morning.

Appellant claimed that the victim was trying to convey the dance beat to L.B., but that L.B. misconstrued this and the victim probably just agreed with L.B.'s accusations. He claimed L.B. was "drunk" and was "mad" at him.

The trial court found appellant not guilty of rape, guilty of gross sexual imposition, and guilty of kidnapping with a sexual motivation specification. The court determined the latter two offenses were allied offenses, and the state elected to proceed with sentencing on the kidnapping count. The court imposed a sentence of life with the possibility of parole after 15 years of time served.

REASONS FOR GRANTING THE PETITION

Petitioner's claim boils down to the following: He can prove actual innocence and this entitles him to have his Constitutional claims heard by the Court. Petitioner does not dispute that his §2254 petition was not timely filed. So the focus must be on Petitioner's proof of actual innocence.

In denying petitioner's claim of actual innocence, the Appellate Court wrote simply:

> "Furthermore, for the reasons stated by the magistrate judge, jurists of reason would agree that Singleton has failed to make a showing of actual innocence sufficient to excuse the untimeliness of the petition. See *Perkins*, 569 U.S. at 399."

This is insufficient. Petitioner has presented a lot of evidence of actual innocence and the court merely refers back to the Magistrate's ruling, without analyzing the evidence or reviewing the record itself.

In *Souter v. Jones*, 395 F.3d 577, 580, 2005 U.S. App. LEXIS 860, *1, 2005 FED App. 0027P (6th Cir.) (6th Cir. Mich. January 18, 2005), the court wrote:

> The inmate was tried and convicted over 12 years after the victim's death. The appellate court determined that the habeas petition was time-barred under 28 U.S.C.S. § 2244, but the inmate met his burden of establishing a gateway actual innocence claim, such that he was entitled to equitable tolling and could proceed to argue the merits of his ineffective assistance of counsel and due process claims.

The same is true in the instant case. Petitioner argues that he has met his burden of establishing a gateway actual innocence claim, such that he should be entitled to equitable tolling and should be allowed to proceed to argue the merits of his ineffective assistance of counsel and due process claims.

"There is an additional safeguard against miscarriages of justice in criminal cases, and one not yet recognized in state criminal trials when many of the opinions on which the concurrence relies were written. That safeguard is the right to effective assistance of counsel, which, as this Court has indicated, may in a particular case be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial. *United States* v. *Cronic*, 466 U.S. 648, 657, 20 (1984). See also *Strickland* v. *Washington*, 466 U.S., at 693-696. The presence of such a safeguard may properly inform this Court's judgment in determining "[what] standards should govern the exercise of the habeas court's equitable discretion" with respect to procedurally defaulted claims, Reed v. Ross, 468 U.S., at 9. The ability to raise ineffective assistance claims based in whole or in part on counsel's procedural defaults substantially undercuts any predictions of unremedied manifest injustices. We therefore remain of the view that adherence to the cause and prejudice test "in the conjunctive," *Engle*, *supra*, at 134, n. 43, will not prevent federal habeas courts from ensuring the "fundamental fairness [that] is the central concern of the writ of habeas corpus." *Strickland* v. *Washington*, *supra*, at 697."

Petitioner claims that he is actually innocent and that a *de novo* look at ALL of the newly presented evidence that the state's main witness, **L.B , was suffering from multiple mental illnesses including PTSD, bipolar disorder, depression and anxiety, will show that there is simply no credible evidence at all of Petitioner's guilt. L.B mental illness is demonstrated by the fact that she was caught engaging in a sexual act with Officer Perlmuter at the time she was giving her statement of the alleged crime at the hospital.**

In *Coleman v. Thompson* 501 U.S. 722,

The Supreme Court held that in all cases in which a state prisoner had defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims was barred unless the prisoner could demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law[or demonstrated that failure to consider the claims would result in a fundamental miscarriage of justice.]

With that in mind, petitioner recapitulates the evidence of his actual innocence.

ACTUAL INNOCENCE

The magistrate wrote that the SANE nurse testified that she found evidence consistent with digital touching that was sufficient to allow a reasonable juror to conclude beyond a reasonable doubt that petitioner was the cause. The magistrate's statement is simply untrue. The nurse herself said that she was not sure beyond a reasonable doubt that petitioner did the **touching. The Sane nurse Kathy Hackett admitted that she herself may have done the touching that produced the physical evidence that was relied upon to find the petitioner guilty, saying the following on the witness stand:**

> Of course, could have been multiple things, but I can only go by what the child has disclosed. (Tr. 256)
>
> So you know, I wanted to in all fairness, you know, when I didn't initially see it, we didn't want to assume that it was just there. We – you know, those are common areas that you could cause an injury with separation and traction, but – so that's why I documented that. (Tr. 259)
>
> So when I – you know, it's often a few days later when we take the photos from the camera card and put them on a disk. I looked at those photos in more detail, and I thought I don't think we could have caused the injury, only because I didn't, in the next photo, I didn't see any active bleeding. And the toluidine blue does not adhere when there is active bleeding very well. Sometimes the edges, but it just doesn't.
>
> So, again, I documented that I really didn't see it when I looked at it initially, no initial -- no injury with initial exam. Then slight tear seen at 6:00, possibly from separation and traction with exam. (Tr. 268-269)
>
> Yeah. So, because for me to be able to look at that anatomy you have to grasp on to the labia, and kind of bring it forward out and down. So that's called separation and traction. You're opening the anatomy to be able to visualize the hymen. **And in all fairness, it could cause a little tear. (Tr. 269)**
> **So I'm very cautious not to say an injury was there prior to me I mean I have**
>
> **Never caused a tear before and in hindsight I don't think I did with this young lady but in all fairness with the exam did't initially see it when I was looking at her but then it did highlight with the dye. And so I just wanted you know I'm very honest and meticulous with my documenting like that ...Q... so at least you thought it was a possibility that you caused particular tear?**
> **A. Possible.**
> **Q. Possible?**
> **A. Yes. (tr.269)**

> **The court then is left to consider that evidence in light of the State's burden of proof here.** And certainly with respect to the testimony provided by the mother ,L.B. reporting the child's statements to her coupled with the evidence of the sexual assault nurse, the examination and the findings, the Court can find that there certainly was sexual contact of the vaginal area of the victim, A.S in this case, sufficient to support a finding of guilty on the charge of gross sexual imposition. (Tr. 380)

It should be noted that the nurse was examining the child victim on January 2, 2015. The alleged touching and rubbing of the child occurred on December 30, 2014, a difference of four days. And yet, the nurse was examining the photos for "active bleeding." The fact that the nurse was searching for active bleeding strongly suggests that the tear she was examining was not 4 days **old becaures 4-day old tears would not look fresh enough to be bleeding.** And how in the world was the nurse going to find active bleeding on an injury that we have already established was not visible to the naked eye? The nurse said the following on the witness stand:

> **"So the area is real vascular that we talked about and they can heal real quickly. And actually all her injuries were starting to heal, they were so superficial. And probably not easily identified unless we used the toluidine blue." (Tr. 260)**

Again, there is simply no way that this petitioner caused those bruises. They would have to have been four days old, which would be impossible given the nurse's description of the bruises.

The Court is simply wrong to impute certainty beyond a reasonable doubt to the SANE nurse's assertions. None of the evidence rises above the level of reasonable doubt. Therefore, Petitioner's guilt was not proved beyond a reasonable doubt, a violation of his 5th and 14th Amendment rights to due process of **law. Petitioner is right now in prison because of a tear that the SANE nurse said there is a possibility that she caused herself during the exam. So there no way that this tear is four days old; it is clearly being used to frame up this petitioner.**

Petitioner requests an evidentiary hearing where the photographs of the victim's tear can be re-examined to see if they are consistent with the tear being four days old. If this tear is inconsistent with being four days old, then it must have been self-inflicted or caused by the nurse during her exam.

Furthermore, in *State v. Singleton*, *supra*, the Appellate Court wrote "There was independent corroboration of the sexual act contained in the nurse examiner's medical report." This is not true because the nurse's report is not independent of the child's mother's allegation. The nurse admitted that she may have caused the tear which the appellate court is claiming independently corroborates the child's testimony..

CONSTITUTIONAL CLAIMS

1. DID COUNSEL PROVIDE INEFFECTIVE ASSISTANCE?

The testimony at trial pertaining to the victim's injury played a crucial role in the jury's finding of guilt, and the SANE nurse was not confident beyond a reasonable doubt that any injury had been caused by the defendant. Defense counsel should have attacked the nurse's testimony in order to make her lack of confidence crystal clear. All defense counsel said on the subject was the following:

> "And I listened to the testimony of the SANE nurse. And the only comment that I would like to make, your Honor, is that it's not as black and white as the state of Ohio would lead you to believe with respect to her testimony about the injuries. Because her first impression – and **she did not discount the possibility that she had caused the injury." (Tr. 362)**

The above statement is simply not strong enough. If defense counsel had been able to convince the Court that the SANE nurse's testimony was not certain beyond a reasonable doubt, the defendant would have been found not-guilty.

In contrast, the Prosecutor, during his closing remarks, did state clearly and forcefully that there were injuries to the victim and that those injuries were caused by the defendant:

> "The SANE nurse, in her results are uncontroverted injuries, Your Honor. You saw them. The SANE nurse testified about them. They're there. How did they get there? They got there when the defendant used his fingers to penetrate." (Tr. 352)
>
> "The testimony is backed up by the injuries." (Tr. 353)

The difference in the strengths of those two descriptions of the injuries, the first by the defense attorney, the second by the prosecutor, was the difference between a finding of guilty and a finding of not-guilty.

The prosecutor's statement is strong but inaccurate. He says the injuries are "uncontroverted". Not true. In fact, the nurse herself controverted them. She first said that there were no injuries, which she documented in her report, and then later said there were injuries, thereby controverting herself.

Defense counsel never mentioned this to the court during trial. A defense attorney is expected to represent his client's interests as clearly and forcefully as possible, and a defendant relies upon his attorney to do so. The prosecutor's representation was clear and forceful. Defense counsel's representation was flaccid and ineffectual. Had it not been so, the verdict would have been not-guilty.

In addition, defense counsel never asked any questions about the timeline of the injuries. The nurse's examination of the injuries took place on January 2nd, 2015. The injuries supposedly took place on December 30th, 2014, a difference of four days. Would injuries or bruises still be visible after so many days? We don't know because the defense attorney never asked. **Common sense tells you that bruises would not remain fresh after that long.** Defense counsel never contacted a medical expert to examine the photographs of the bruises. Defense counsel never mentioned any of this during closing arguments. Failure of defense counsel to contact a medical expert is sufficient to establish ineffective assistance of counsel.

Petitioner calls the courts attention to the *King V. Evans* 621 F. Supp 2d 850 where the court wrote:

> Considering all of the circumstances of the case, the Court concludes that the testimony of a defense medical expert could have caused the jury to reject Dr. Barnes' testimony and thus changed the outcome at trial. Accordingly, the Court finds that there is a "a reasonable probability" that "the result of the proceeding would have been different," see *Strickland*, 466 U.S. at 694, but for trial counsel's failure to consult a medical expert during his pretrial investigation and his failure to present expert testimony at trial. Petitioner has therefore established that his Sixth Amendment right to a fair trial was violated by trial counsel's ineffective representation.

King's case is extremely similar to petitioner's. The nurse found a white discharge in the victim as well as redness and swelling; at the evidentiary hearing the doctor showed that these were from a yeast infection. And, *King* was time-barred, but he was still granted his evidentiary hearing.

> The SANE nurse said on the witness stand, "Young children can have medical conditions on the genitalia area can be red and swollen can be a strep infection and can be mistaken for abuse." **The nurse noted a white discharge deep in the vaginal canal of the victim. A.S (tr.267)**
>
> **Common signs of yeast infection are:**
>
> - **Itching and irritation in the vagina**
> - **Redness, swelling, or itching of the vulva (the folds of skin outside the vagina)**
> - **A thick, white discharge that can look like cottage cheese and is usually odorless, although it might smell like bread or yeast.**

Quoting again from *King*:

> Dr. Coleman offered the following summation of the physical evidence: "the only bona fide abnormality described is the erythema (redness), something that is an inevitable accompaniment of pelvic inflammations. The very thing that this girl had at the time of the examination. Such findings are not evidence for any prior sexual contact." Id.p 13. He reiterated this conclusion at the evidentiary hearing, testifying that when physical evidence is examined for signs of sexual abuse, "all bets are off" when, as here, the complainant has a pelvic infection at the time of the examination.

The sane nurse said on the witness stand ,so the redness on inner aspects of the labia minora can be a normal variant it's—it's suspicious. It depends on what the history is.again that's where we obtain our history. So it's always suspicious. It's not confirming anything.(tr.249)

Petitioner's trial counsel should have called an expert witness, a doctor like Dr. Coleman, to opine about the implications of the white discharge. Had trial counsel done so, The Court would have realized that the redness and swelling on the victim likely did not come from the defendant. **Defendant was prejudiced by trial counsel's failure to call an expert witness.**

In *Lindstadt v. Keane* 239 F. 3d 191 and *Pavel v. Hollins* 261 F. 3d 210, the court made clear that the attorney was ineffective for not presenting expert medical testimony. In both cases, the victim testified what the accused had done, but in the instant case, the

victim did not testify at all. In both cases, the appellant was granted an evidentiary hearing. This petitioner should be granted an evidentiary hearing, just as they were. Equal protection under the law dictates that this petitioner should get the same hearing that those appellants got.

Petitioner's trial attorney's decision not to expose the doubts of the SANE nurse was so ill-chosen that it permeated the entire trial with obvious unfairness. The SANE nurse repeatedly expressed that she was not certain beyond a reasonable doubt that the defendant caused the injuries. There was no possible justification for counsel's failure to impeach the SANE nurse and expose her uncertainties and then stress these uncertainties to the judge before deliberations. Had trial counsel done so, the outcome of the trial would surely have been different.

The court wrote in *Davis* v. *Mitchel* 291 F. Supp 3d 573, 6th Cir. 2000 "A strategic decision cannot be the basis for a claim of ineffective assistance of counsel unless counsel's decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness."

In the instant case, counsel's decision was so ill-chosen that it can serve as a basis for an ineffective assistance of counsel claim.

In addition, when trial counsel makes a blatant, bad decision that costs his client the trial, then, if appellate counsel fails to raise that issue on direct appeal, appellate counsel must also be ineffective by the principal of *res ipsa loquitor*.

Another of defense counsel's decisions that was so ill-chosen that it infects the who trial with unfairness was his ineffectiveness at cross examining the victim's mother, L.B. Defendant claims that he touched his daughters leg in a perfectly acceptable way, playfully tapping out a tune on the child's knee.

When questioned by the Office David PerLmuter # Badge 0312 at the hospital, the conversation went as follows (quoting from East Cleveland Incident Number 15-00023, pg. 5):

Perlmuter: "So how does Daddy touch you when you played that game?"

A.S "On the knee" (and used her right hand to touch her knee cap). "And elbow!" (Smiling she held her right arm up and pointed her right elbow at me).

Then, a meeting was held at CDCFS (Cleveland Division of Child and Family Services). The police report from that meeting revealed that when the Detective asked the child A.S about her father touching her, the child indicated that her father would tap out music on her leg. This was significant because at trial Mr. Singleton testified that the tapping was the only physical interaction between he and his child, yet no mention was made by either part that the child A.S had told the police of the innocuous touching. Defense counsel should have impeached the CDCFS social worker about this fact as it offered insight into how the child was manipulated. This is yet another example of trial counsel's ineffectiveness.

In *Williams* v. *Washington*, 59 F.3d 673, the court found that defense counsel was ineffective because due to the attorney's failure to familiarize himself with the discovery materials, failure to interview witnesses, and failure to investigate the child's reputation for veracity. The court held that such deficiencies resulted in prejudice to petitioner.

Petitioner asked the Appellate court to supplement the record with copies of the police report. The Appellate court denied the request. For this reason, it should be submitted.

In the police report nurse Hackett also advsid that although the child mother L.B described what her child A.S. had told her regarding the incident she was unable to get any disclosure from the victim A.S . later on in the investigative Det. Armstead testfied at this point in the interview A.S. began to shut down and turned her back and refused to answer any further questions. L.B. testified that she had not had anything to drink when the victim made the statements to her. This is not true. In the police report she told the detective that she had been drinking most of the day when the victim .A.S made the statement to her and she, L.B, was not in the right state of mind to continue the Questioning at that time. L.B said that the crime took place on the third floor in the bedroom, When the detective asked the victim.A.S she said it happened in her brother Dwight's room, which is on the second floor.

L.B testified that the victim went to her and said, "my dad do me like this" and described what appellant had done to her the previous evening. In the police report, it says that the victim .A.S said, "My daddy does like this..." which sounds much less sinister.

Trial counsel never pointed out any of the lies that L.B told. He never really cross-examined her at all.

This police report would have changed the judge's perception of the witness' credibility. In *Giles v. Maryland*, 386 U.S. 66, **the Supreme Court found that this was sufficient to grant a remand:**

> The Supreme Court held that a remand was justified based on evidence before the court that was not before the lower courts. The Court found that the evidence it discovered, which consisted of two police reports that were not part of the record, might have been used by the defense at trial or in obtaining further evidence. The Court found that due to the nature of the information the reports contained, to the extent that the information would have enabled witness' credibility to be effectively attacked, resolution of the issue of victim's consent would have been affected. The Court concluded that the report, which it discovered in material that state supplied at the court's request, raised questions that sufficiently justified avoiding decision of the broad constitutional issues presented by prisoners by affording the state appeals court a chance to decide whether a further hearing should be directed.

Also, when L.B. was on the witness stand, she was demonstrating to the judge what she claimed her daughter.A.S had tried to explain to her, which was consistent with petitioner's testimony, which is in the affidavits. Then, when she got off the witness stand, she walked over to the prosecutor and she was pointing at the chair that she wanted to sit it in to hear the defendant's statement, and the prosecutor actually kicked her out of the court room. He did not want L.B to hear petitioner's statement under any circumstances, because she would then have realized that she made a terrible mistake. And that is why the prosecutor kicked her out of the courtroom. A copy of the complaint that defendant made against the prosecutor is included in Appendix K. Petitioner asked the Appellate court to look at the video court to see what the prosecutor had done. The court responded back that it was out of the Federal Court review.

When both appellate counsel and trial counsel are ineffective, this combined ineffectiveness can serve as the necessary "cause" to excuse a procedural default (*Schlup* v. *Delo*, 513 U.S. 298, 1995)

The 6th Circuit Apellate Court's judgement in the instant case conflicts with the 2nd Circuit Appellate Courts Judgment in *Lindstadt v. Keane, supra*, where the court wrote:

> **because petitioner had established (a) that trial counsel's cumulative errors, amounted to constitutional ineffectiveness, and (b) that petitioner was prejudiced by those errors. Specifically, trial counsel made no effective challenge to the only physical evidence of sexual abuse, expert testimony based on unnamed studies which were essentially unchallenged at trial, and controverted by other easily available, published studies.**

Petitioner's trial counsel was also ineffective for failing to challenge evidence presented at trial that could have been easily controverted, namely the bruises which were presented as fresh when the alleged crime had happened days four days earlier.

2. DID THE PROSECUTION'S USE OF THE WORD "UNCONTROVERTED" PLACE THE BURDEN OF PROOF ON THE DEFENDANT, THEREBY DENYING HIM HIS RIGHT TO BE PRESUMED INNOCENT UNTIL PROVEN GUILTY?

The prosecutor, during his closing remarks, stated that there were "uncontroverted injuries":

> "The SANE nurse, in her results are controverted injuries, Your Honor. You saw them. The SANE nurse testified about them. They're there. How did they get there? They got there when the defendant used his fingers to penetrate." (Tr. 352) Frist the sane nurse saids she think there possibly she cause the tear

What does it really mean to say that the injuries were "uncontroverted," It means that the defense has not proved that there weren't injuries. It doesn't mean that the prosecution proved that there were injuries. This word 'uncontroverted' makes it seem as though the injuries were proven when, in fact, it only means that they were not *disproven.* , this testimony puts the burden of proof on the defendant. It is not the defendant's job to controvert evidence. It is the prosecution's job to prove their assertions, not the defense's job to disprove them. As a result, defendant's right to be presumed innocent until *proven* guilty was violated.

3. SHOULD THE SOCIAL WORKER'S ENTIRE TESTIMONY HAVE BEEN DENIED AS HEARSAY? WAS PETITIONER DENIED HIS RIGHT TO CONFRONT WITNESSES AND DENIED A FAIR TRIAL

In the instant case, the Court ruled that Mr. Petrus', the social worker, testimony was admissible because he worked for the Department of Child and Family services:

> But at this juncture, I'm going to basically rule that it is evidence that can come in because it is part of the witness's job to certainly examine all the evidence and

make conclusions that he's required to do, required by the duty imposed on him as a member of the Department of Child and Family Services.

So the objection that I was going to sustain, I'm reversing myself on that and so the objection is overruled. And the witness can testify on that issue. (Tr. 216)

No statements were ever made by the victim.A.S to the social worker. All of this is clear in the concise **statement of the case**," above. There was a detective who questioned the victim. The social worker was present at the questioning, but did not ask any questions. **The victim spoke to the detective, not to the social worker. And the victim, in her statement to the detective, never claimed that this crime happened.**

Petitioner's right to confront the witness were violated, see *Gastone v. Brigano* 2004 U.S. Dist Lexis 30450, where the court wrote:

> **The court agreed that the admission of the alleged victim's audiotaped statements to the county children services violated petitioner's right to confront the witnesses against him. Further, the state court's decision to the contrary contravened or unreasonably applied clearly established Supreme Court precedent.**

The social worker's testimony was a foundational piece of evidence against this petitioner. The guilty verdict therefore, should have been overturned as a result.

4. DID THE ADMISSION OF THE CHILD'S HEARSAY STATEMENTS VIOLATE PETITIONER-DEFENDANT'S CONFRONTATION CLAUSE RIGHTS?

Ohio Evid. R. 807 reads, in part, as follows:

(A) An out-of-court statement made by a child who is under twelve years of age at the time of trial or hearing describing any sexual activity performed, or attempted to be performed, by, with, or on the child or describing any act or attempted act of physical harm directed against the child's person is not excluded as hearsay under Evid.R. 802 if **all of the following apply:**

(1) The court finds that the totality of the circumstances surrounding the making of the statement provides particularized guarantees of trustworthiness that make the statement at least as reliable as statements admitted pursuant to Evid.R. 803 and 804. The circumstances must establish that the child was particularly likely to be telling the truth when the statement was made and that the test of cross-examination would add little to the reliability of the statement. In making its determination of the reliability of the statement, the court shall consider all of the

> circumstances surrounding the making of the statement, including but not limited to spontaneity, the internal consistency of the statement, the mental state of the child, the child's motive or lack of motive to fabricate, the child's use of terminology unexpected of a child of similar age, the means by which the statement was elicited, and the lapse of time between the act and the statement. In making this determination, the court shall not consider whether there is independent proof of the sexual activity or attempted sexual activity, or of the act or attempted act of physical harm directed against the child's person;
>
> (2) The child's testimony is not reasonably obtainable by the proponent of the statement;
>
> (3) There is independent proof of the sexual act activity or attempted sexual activity, or of the act or attempted act of physical harm directed against the child's person;
>
> (4) At least ten days before the trial or hearing, a proponent of the statement has notified all other parties in writing of the content of the statement, the time and place at which the statement was made, the identity of the witness who is to testify about the statement, and the circumstances surrounding the statement that are claimed to indicate its trustworthiness.

In this petitioner's direct appeal, the Ohio Appellate Court claimed that the trial court satisfied all of the requirements of Evid. R. 807 before admitting the child victim's statements to her mother:

> The record in this case reflects that the trial court reviewed the totality of the circumstances surrounding the victim's statement as required under Evid. R. 807 (A) (1) and found the statement satisfied the trustworthiness element of Evid. R. 807. *State v. Singleton, Supra.*

The trial court did find that the statements satisfied the trustworthiness element of Evid R. 807, but did not find that "the test of cross-examination would add little to the reliability of the statement. Here, cross-examination was critical to defendant's case. Defendant claimed that he was merely snapping his fingers and tapping out musical tunes on the victim's leg, and never touch the victim inappropriately. And nobody ever asked the victim if defendant's claim was true. Had cross-examination been performed, the victim may well have agreed with defendant's claims. The victim was a 4-year old child and may well have not known the difference between innocuous touching and inappropriate touching. And nobody ever asked her. As such, the test of cross-examination would have added a tremendous amount to the reliability of the statement. Therefore, the trial court failed to satisfy the requirements for hearsay exceptions defined in Evid

R. 807. **For this reason, the conviction should be overturned, (see *State v. Ryan* 103 wn 2d 165, *Idaho v. Wright*, 497 U.S. 805, *re Shamblin*, 1998 Ohio App. LEXIS 4263, *Gaston v. Brigano*, 2004 U.S. Dist. LEXIS 30450)**

In *State v. Ryan*, supra, the Washington Supreme court wrote "[i]f they were incompetent when they made their statements, they would be required to be excluded as unreliable. Without their statements, there was no proof the corpus delicti." The same should apply in the instant case. How is it possible that the child was deemed not competent to testify at trial, but her statements prior to trial were reliable to be reported second-hand? This is patently unfair. In *re Shamblin*, 1998 Ohio App. LEXIS 4263 After filing its complaint, the state filed notice of its intent to use the child's hearsay statements pursuant to Ohio R. Evid. 807. The magistrate hearing the matter found the child was not competent to testify based on her refusal to answer any questions and her inability to understand the oath, but allowed the mother to testify regarding the child's statements. On appeal, the court reversed because it was improper to admit the child's hearsay statements when the child had not been found to be competent at the time she made the statement. The court found, pursuant to the existing analysis of Ohio R. Evid. 807, that although a child's out-of-court statements possessed a circumstantial probability of trustworthiness, before admitting that evidence, a court had to determine whether the child accurately received and recollected that information, as required by Ohio R. Evid. 601(A). The case had to be remanded because the evidence was clearly prejudicial to the father.

During the child victim's competency hearing, both the Court and the State of Ohio were allowed to question the child directly. But defense counsel, Mr. Gibbons, was not allowed to speak directly to the child. Mr. Gibbons had to ask the Court to transmit his questions to the child, whereas the prosecutor was allowed to ask the child directly.

Nobody ever asked the child victim A.S. if she knew the difference between appropriate and inappropriate touching. **Nobody asked the child what precisely she was trying to demonstrate to her mother.** Defense counsel's one and only change to speak directly to the victim A.S. was during the competency hearing and he did not take advantage of it. Petitioner was denied his 6th Amendment right to effective assistance of counsel.

Rule 10 of the United States Supreme Court includes the following:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual

course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

Petitioner believes that the criterion set forth above has been met. In *Idaho v. Wright, supra*, The U.S. Supreme Court wrote that

> **The Court held that under the totality of the circumstances surrounding the daughter's statements there were no special reasons for supposing that the incriminating statements were particularly trustworthy. The State failed to show that the statements possessed sufficient "particularized guarantees of trustworthiness" under the Confrontation Clause to overcome that presumption.**

This is in direct conflict with the instant case in which no court ever reviewed "particularized guarantees of trustworthiness" at all even though petitioner raised the issue multiple times. Thus, the Supreme Court should grant *certiorari.*

Pursuant to, **Tome v. United States, 513 U.S. 150, 152, 115 S. Ct. 696, 699, 130 L. Ed. 2d 574, 579, 1995 U.S. LEXIS 469, *1, 63 U.S.L.W. 4046, 40 Fed. R. Evid. Serv. (Callaghan) 1201, 95 Cal. Daily Op. Service 249, 95 Daily Journal DAR 425, 8 Fla. L. Weekly Fed. S 503 (U.S. January 10, 1995), the U.S. Supreme Court held that,**

> "Petitioner was charged with sexual child abuse of his daughter under 18 U.S.C.S. § 1153, et. seq. During trial, the court admitted certain witness statements, notwithstanding the fact that they were introduced after charges of recent fabrication had been made. Petitioner appealed the admission of these statements and the appellate court affirmed. Petitioner appealed on writ of certiorari. The question submitted to the court was whether out-of-court consistent statements made after an alleged fabrication, improper influence, or motive arose, were admissible under Fed. R. Evid. 801(d)(1)(B). Due to division of federal appellate courts, the Court accepted. The Court reversed and remanded the appellate court order because it found that Fed. R. Evid. 801(d)(1)(B) only permitted the introduction of consistent, out-of-court statements to rebut a recent fabrication, improper influence, or motive charge, when those statements were made prior to the time the charges of recent fabrication, improper influence, or motive arose."

DID THE JUDGE IMPROPERLY CONSULT CASE LAW WHEN FINDING DEFENDANT GUILTY? USE OF CASE LAW IS BIASED TOWARDS GUILT, THEREBY DENYING DEFENDANT A FAIR TRIAL.

In the habeas petition, we argued that the judge's examination of case law during deliberations was improper procedure because case law databases are inherently biased towards findings of guilt. The state argued that the judge was not biased and did not need to recuse himself, writing:

> The Due Process Clause requires a defendant be given "a fair trial in a fair tribunal" before a judge who has not actual bias against the defendant or interest in the outcome of the case. *Bracy v Gramley* 520 U.S. 899, 904-905 (1997), *Getsy* v. *Mitchell* 495 F 3d 295, 311 (6th Cir. 2007). The standard for recusal is an objective one, whether a reasonable person, knowing all the surrounding circumstances, would consider the judge to be impartial. *United States* v. *Hurst* 951 F 2d 1490, 1503 (6th Cir. 1991) Cert Denied 504 U.S. 915 (1992)
>
> Judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. To demonstrate an unconstitutional bias, judicial comments would have to show such a high degree of favoritism or antagonism as to make fair judgment impossible. *Lacky v. United States* 510 U.S. 540, 555 (1994)

The state misunderstands and mischaracterizes petitioner's argument. Petitioner did not argue that the judge was personally biased. Petitioner argued that the judge used a procedure that was biased. It is quite possible that he was entirely unaware that the procedure he was using was biased. Nevertheless, it was, as shown in the petition for Writ of Habeas Corpus. The state did not rebut this claim, focusing entirely on the bias of the judge, not the bias inherent in reviewing case law while deliberating.

Furthermore, it was clear ineffectiveness of both trial counsel and appellate counsel that this issue was never raised. If a procedure is plainly unfair to the defendant, the trial lawyer must object. The trial lawyer in the instant case was ineffective for not objecting by the principal of *res ipsa loquitor*. Likewise, the appellate attorney should have raised this issue on direct appeal. The appellate attorney was also ineffective by the same principal: *res ipsa loquitor*. Both trial counsel and appellate counsel were ineffective, and this should provide cause to excuse any procedural default. (*Murray v. Carrier*, supra)

After both the state and the defendant had finished their closing arguments, and while the court was deliberating over what verdict to return, the court did legal research and examined case law to help him reach a decision as the following excerpts from the trial transcripts demonstrate:

> The court, again, was reviewing the law because the jury instruction, and the instruction the court has to follow as well, concerning what is sexual conduct, is somewhat vague. And I think in the court's review of the case law surrounding this, the court did find appellate courts to have somewhat of the same struggle in determining what is penetration... (Tr. 382)
>
> I looked at Eighth District case that was *State of Ohio v. Blankenship*, and that was a 2001 case, the court of appeals number 77900, and we don't have the electronic cite for that case, but in any event that court did find that the defendant in that case did penetrate the victim's vaginal area... (Tr. 383)
>
> I noted another case from the Tenth District, again, that also found on behalf – found the defendant being guilty based upon, again, the contact or injury to the area of the labia and the posterior fourchette.
>
> The court in that case – I should cite that, in *State v. Gilbert*, that is Franklin County case, 04AP933. And that is reported at 2005-Ohio-5536.

Courts should not review case law while deliberating over a verdict. Such behavior is biased against the defendant. Well over 90% of appellate case law pertains to criminal defendants who were found guilty at trial. Defendants who win at trial typically have no reason to appeal, so most appeals pertain to defendants who were found guilty at trial.

By combing through and reviewing case law of guilty defendants, and systematically ignoring cases where defendants were found not-guilty, the court is tilting the playing field in favor of a guilty verdict. The court is unwittingly putting its thumb on the scales of justice in a way that is prejudicial against the defendant.

Sure enough, in both the cases that the court cited to reach its conclusions, *State v. Blankenship* and *State v. Gilbert,* the defendants were found guilty at trial. **A defendant has a right to have the court examine some cases where the defendant was found not-guilty at trial. The court did not do that here. Therefore, the court's deliberations were systematically biased towards a finding of guilt.**

Furthermore, the court should confine its deliberations to the arguments that were actually adduced by prosecutors and defense counsel. The court should be a neutral arbiter. By

researching case law during deliberations, the court is adding information to the presentation of either the prosecution or the defense, information that they themselves did not present at trial

Putting this another way, a defendant should be found guilty based upon the arguments that the State makes. When the court researches case law in order to reach his verdict, the court is injecting his own arguments into the deliberations, a place where they do not belong. And, as already demonstrated, case law is biased in favor of guilty verdicts since nearly every appeal pertains to a defendant who was found guilty at trial.

In *Shepard v. United States*, 544 U.S. 13, the Supreme Court held that the lower court's judgment must be reversed and remanded because the sentencing judge looked at information outside the record during sentencing. This is similar to the instant case, in that the judge searched through case law during deliberations, all of which is information outside the record.

United States Supreme Court Rule 10 (c) reads as follows:

> a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Petitioner believes he has met the criterion above. The question of what information a judge should be allowed to consult during deliberations in a bench trial is Constitutionally significant. It is all the more significant that the judge chose to consult case law databases that are biased toward findings of guilt.

As a result, Defendant/Petitioner did not receive a fair trial. Petitioner's 6th Amendment right to a fair trial and 4th and 14th Amendment rights to due process of law were violated. The guilty verdict must be vacated and the case remanded to count court for a new trial.

CONCLUSION

Petitioner requests a rehearing. Petitioner has demonstrated that the Federal Appellate Court's analysis of the facts of the case was perfunctory and insufficient. **At no time has any appellate court said that there is proof beyond a reasonable doubt that Mr. Singleton committed this crime.**

Petitioner is actually innocent. A *de novo* review of all the evidence will show that this is so. Petitioner's actual innocence should excuse any procedural defaults and allow him to have his claims of constitutional violations reviewed on the merits. Petitioner requests an evidentiary hearing to review all the evidence. **These bruises will prove Petitioner's innocence and they have to be addressed.**

The *Carrier* standard requires a petitioner to show that it is more likely than not that no reasonable juror would have convicted him. This petitioner has presented sufficient evidence to meet the *Carrier* standard: no reasonable juror could be confident beyond a reasonable doubt of this petitioner's guilt.

The state continually argues that my appeal should be time-barred. But the state has not presented even a shred of evidence that actually proves petitioner's guilt. **With all due respect to this honorable court, if these bruises are not addressed, the state will be getting away with framing me up, and a manifest injustice will have occurred.**

Neither the Detective Shanika Armstead# Badge 0212 or the nurse Kathy Hackett or the social worker MR. Lawrence Petrus ever said that the victim ever demonstrated with her hands that this crime happened. **There is no statement by the victim accusing this petitioner of a crime. In pavel v. Hollins (261 f. 3d 210) Dr. Kaplan testified that when a child has multiple interviews the guidelines warn that multiple interviews merely encourage the child to create a story to meet the demands of [interviewing1] adults**

The petition for a writ of certiorari should be granted. The State wants to dismiss this case because it was submitted late. And it was. But the State cannot keep an innocent man in prison if he can prove his innocence, even if he was late in his filing. Actual innocence excuses these procedural mistakes.

Respectfully submitted,

_____

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Date: _____