No. 23-5259

In the Supreme Court of the United States

Ryan Lewis Hilyard,
Petitioner,

VS.

State of Wyoming et. al, & Warden Seth Norris
Wyoming Medium Correctional Institution.
Respondent,

ON WRIT OF CERTIORARI
TO THE WYOMING SUPREME COURT

AMENDED BREIF FOR PETITIONER

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ORIGINAL

Attorney for Petitioner

QUESTION(S) PRESENTED

I. DID THE WYOMING SUPREME COURT APPLY AND FOLLOW FEDERAL RULES OF EVIDENCE CORRECTLY?

II. IS THE WYOMING SUPREME COURT'S DECISION ARBITRARY, CAPRICIOUS, OR OTHERWISE NOT IN ACCORDANCE WITH FEDERAL LAW?

III. WAS MR. HILYARD DENIED HIS FOURTEENTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL . . . NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL . . . DENY TO ANY PERSON WITHIN IS JURISDICTION THE EQUAL PROTECTION OF THE LAWS?

IV. WAS APPELLANT COUNSEL INEFFECTIVE IN NOT RAISING THE QUESTION OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, AND PRESENTING THE WEAKEST ISSUE OF EVIDENCE CHALLENGES BECAUSE OF CONFLICT OF INTEREST?

PARTIES TO THE PROCEEDING

1. 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(s) is the subject of this petition is as follows:

2. Petitioner Ryan Lewis Hilyard is the appellant in the court below. Respondents are Bridget Hill, in her official capacity for the Attorney General's office for the State of Wyoming, and Warden Seth Norris in his official capacity for the Wyoming Medium Correctional Institution.

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Wyoming Attorney General et al,
State of Wyoming
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Cheyenne, WY 82002

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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543-0001

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTORITIES CITED

CASES

STATUTES

"Wyo. Stat. Ann. § 7-14-103, Claims Barred; applicability of act."

(a) A claim under this act is procedurally barred and no court has jurisdiction to decide the claim if the claim:

(i) Could have been raised but was not raised in a direct appeal from the proceeding which resulted in the petitioner's conviction;

(ii) Was not raised in the original or an amendment to the original petition under this act; or

(iii) Was decided on its merits or on procedural grounds in any previous proceeding which has become final.

(b) Notwithstanding paragraph (a) (i) of this section, a court may hear a petition if:

(i) The petitioner sets forth facts supported by affidavits or other credible evidence which was not known or reasonably available to him at the time of a direct appeal; or

(ii) The court makes a finding that the petitioner was denied constitutionally effective assistance of counsel on his direct appeal. This finding may be reviewed by the petition."....18

CONSTITUTIONAL PROVISIONS

RULES

W.R.E. Rule 601. General Rule of Competency. Every person is competent to be a witness except as otherwise provided in these rules.

Child witness competency hearing:

"A party's presentation to the court of evidence that a child witness is incompetent to testify triggers the requirement of a competency hearing, which includes consideration of whether child's memory was tainted by suggestive interview techniques." *English v. State*, 982 P.2d 139, 91 (Wyo. 1999)....36

W.R.E. Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial.

(4) Statements for purposes of medical diagnosis or treatment. — Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment....28-29

IN THE
SUPREME COURT OF THE UNITED STATES
AMENDED PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below.

I. OPINIONS BELOW

For cases from State Courts:

1.1 The Opinion of the highest state court to review the merits appear at **Appendix A** to the petition and is reported as *Hilyard v. State of Wyoming*, Cause No. S-22-0144 Decided, February 6th 2023.

1.2 The Sentence and Judgment in Case no. 22282-C, April 1st 2022, of the Seventh Judicial District Court appears as **Appendix B** to the District Court's Conviction.

II. JURISDICTION

2.1 The Wyoming Supreme Court entered its judgment on February 6, 2023. The U.S. Supreme Court Clerk sent rejection of original writ of certiorari on April 5, 2023, for page excess in violation of rule Sup. Ct. R. 33.2(b). On April 27th, 2023, Petitioner files this (Amended Writ of Certiorari) to the U.S. Supreme Court for review within the 60 day deadline pursuant to Sup. Ct. R. 14.5. Petitioner's time for filing this Writ will expire June 4, 2023. This Court has jurisdiction under 28 U.S.C. § 1257 (a) (2012).

2.2 To review the Wyoming Supreme Court's decision to see if they applied and followed Federal Laws correctly. ***Furthermore,*** Petitioner Hilyard requested his appellant counsel Elizabeth B. Lance (hereafter Ms. Lance) to file ineffective assistance of counsel on Robert E. Oldham (hereafter Mr. Oldham) Defense Counsel during trial.

2.3 The violations that occurred in Mr. Hilyard's trial and appeal are pursuant to Article 5 § 3 of the Constitution of the State of Wyoming, and violations of U.S. Const. Amends. V, VI, XIV; Wyo. Const. Art., 1, § 10, and Rule 13 of the

Wyoming Rules of Appellate Procedure (W.R.A.P.), Mr. Hilyard hereby petitions the Court to enter a [Writ of Certiorari] in this matter.

III. CONSTITUTIONAL PROVISIONS INVOLVED

3.1 U.S. Const., Amend. Federal Rules of Evidence (Art I, § 9, Cl 3; Art I, § 10, Cl 1), Ordinary rules of evidence do not violate Constitution's ex post facto prohibitions for: (1) rules of that nature are ordinarily evenhanded, in sense that such rules may benefit either state or defendant in any given case; (2) such rules, by simply permitting evidence to be admitted at trial, do not subvert presumption of innocence, as such rules do not concern whether admissible evidence is sufficient to overcome presumption; and (3) therefore, to extent that one may consider changes to such laws as "unfair" or "unjust," such changes do not implicate same kind of unfairness implicated by changes in rules setting forth sufficiency-of-the-evidence standard." *Carmell v. Texas*, 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 577, 13 Fla. L. Weekly Fed. S. 267, 2000 Cal. Daily Op. Service 3341, 2000 Colo. J. C.A.R. 2312, 2000 D.A.R. 4521 (2000).

IV. STATEMENT OF THE CASE

4.1 Mr. Hilyard moved the Wyoming Supreme Court to review his case on direct appeal and its decision was based on hearing what appellate counsel (Ms. Lance) chose to present on appeal. The issue of Evidence was unsuccessful because Evidence issues in Wyoming on appeal are rarely overturned. Convictions are often affirmed for many reasons [no] matter how much the case may have been prejudiced by the inappropriate admittance of evidence at trial, and the fact that bringing such issues will be examined alone. Ignoring the fact that the state accomplished its goal of obtaining a conviction based on the *Jury's passions* instead of the evidence presented at trial. In the case of Mr. Hilyard, the appeal was deliberately mishandled by appointed appellate counsel (Ms. Lance) in violation of Constitutional Amendments V, VI, and XIV. There was ineffective assistance of counsel that Ms. Lance overlooked although she was asked to bring it up on appeal,

not presenting the Ineffective Assistance of Counsel issue(s) with the evidence issue deprived Mr. Hilyard of a fair and impartial trial and appeal.[1]

4.2 **Factual background.** Mr. Hilyard was charged by information on November 16, 2020, on three felony counts. (R.A. p. 38). The three counts were later amended (November 10, 2021,) to two counts as follows: Count I – Aggravated Child Abuse, Count II – Child Abuse (R.A. pp. 192-98). On March 18, 2021, Mr. Hilyard entered pleas of "not guilty" to all counts. (Transcript District Court Arraignment p. 109). Trail began November 15, 2021, and the jury entered its verdict on November 18, 2021. (Transcripts Jury Trial Volume I, p.1, hereinafter Trial Tr. p.1; R.A. pp. 352-53).

* * *

4.3 At trial, the State presented testimony of Mr. Hilyard's stepson, LT. (Trial Tr. p. 534). LT testified that he remembered a day when they went to Riverton to Uncle Paul's house and KH got in trouble. (*Id.* P. 537). KH is one of Mr. Hilyard's biological children. (*Id.* P. 719). LT testified that when they got home his parents, Sarah Hilyard and Mr. Hilyard, made KH run stairs (*Id.* P. 539). LT stated he saw his mom, Sarah Hilyard, shove KH down the stairs, further stating "[m]y mom was pushing and dragging [KH] . . . [a]nd towards the end, [Mr. Hilyard] and my mom were kicking and punching [KH]." (*Id.* P. 540). LT further explained that he was told by Sarah Hilyard to stay at the top of the stairs and if KH stopped at the top of the stairs she wanted him to push him down. (*Id.* P. 541). LT stated he had mainly pushed KH down. (*Id.*). LT stated that KH passed out from being exhausted and tired, and Sarah Hilyard and Mr. Hilyard were both saying "wake up and stop faking it." (*Id.* P. 542). "They" then kicked and punched KH and when they saw he wasn't faking it they stopped. (*Id.*). They then dragged KH towards his room and splashed him with water. (*Id.*). LT stated KH wasn't waking up and LT stated

[1] The "Denial of the effective assistance of counsel to one charged with a crime violates due process." *Hawk v. Olsen*, 326 U.S. 271, 66 S.Ct 116. "The effective assistance of counsel in a state prosecution for a crime is a requirement of due process which no member of the Union may disregard." *Reece v. Georgia*, 350 U.S. 85, 76 S.Ct. 167.

he hadn't seen him since. (*Id.*). LT also testified that he was told by Mr. Hilyard to tell people coming to talk to them that KH had fallen down the stairs. (*Id.* P. 544).

4.4 Mr. Hilyard also testified at trial. (*Id.* P. 718). He testified that KH fell down the stairs at home the evening of August 2, 2020, after going to Riverton to his Brother Paul's house. (*Id.* pp. 751-60). Mr. Hilyard stated that he didn't see KH again until Thursday morning because he was working 80-90 hours per week. (*Id.* pp. 761-62).

4.5 Mr. Hilyard also explained that his wife, Sarah Hilyard, had called him at work August 6, 2020, and said KH did not wake up from a nap and she was going to the emergency room. (*Id.* p. 776).

4.6 **The Ruling that was presented for the Review:**

4.7 The State presented four additional witnesses after LT testified. (*Id.* p. 480). Tazia Morgart was the last witness for the State. (*Id.* p. 635). Ms. Morgart was in the investigation unit of the Department of Family Services (hereafter DFS). (*Id.* pp. 635-36). The State offered into evidence Exhibits 200 and 201 which were audio recordings of KLH's and LT's interview with Detective Good and Ms. Morgart conducted at the foster home around August 25, 2020. (*Id.* pp. 639-41). Mr. Hilyard, through counsel, objected to the State admitting Exhibits 200 and 201 into evidence. (*Id.* p. 641). The district court conducted an analysis under W.R.E. 801(d)(1)(B) and concluded to allow the admission of a portion of Exhibit 201, the audio recording of LT's interview. (*Id.* pp. 643-50). KLH's interview was actually given approximately one month later but was falsified on the record.

4.8 In its record of deliberation, the district court admitted it had not heard the audio recordings and therefore was not informed as to whether it contained prior consistent statements that would be outside the hearsay rule. (*Id.* p. 643). Mr. Hilyard argued that it wasn't fair to play only snippets of one interview to show a prior consistent statement. (*Id.* p. 646). Additionally, Mr. Hilyard expressed concern that by playing the select portions it would give the jury more emphasis to

what was said that would elicit a conclusion that it was true. (*Id.* pp. 646-47). The district court stated:

> "I do believe, under Wyoming Rule of Evidence 801 (d)(1)(B), that this would qualify as a prior consistent statement for LT He did testify. He was subject to cross-examination. The uncontroverted, I guess, representations to the Court are that the prior statement is consistent with his trial testimony. I'm not so much as persuaded as the –you know, the substance of the defense opening arguments as a basis for allowing this. However, particularly with LT, the cross-examination of him with regard to lying about things or telling the truth, and the cross-examination of his counselor, and the cross-examination of his foster parent do show an express and implied charge of potential fabrication or improper influence or motive on LT's part. So I will allow entry of that exhibit, LT recording 201, and allow the 14 minutes of that to be played for the ladies and gentlemen of the jury when the State wishes to do that."

4.9 (*Id.* pp. 649-50). The audio recording was played in open court for the jury. (*Id.* p. 653). During Mr. Hilyard's cross-examination of Ms. Morgart, she admitted that it was the third time LT had given a statement and that parts were inconsistent with the first statement. (*Id.* p. 655). Additionally, she admitted that parts of the played recording were inconsistent with the second statement. (*Id.*).

4.10 On December 3, 2021, after the conclusion of the trial and return of the jury's verdict of guilty at to both Counts I and II, Mr. Hilyard filed a Motion for New Trial Pursuant to *Wyoming Rules of Criminal Procedure 33(a).* (R.A., P. 395-99). On December 8, 2021, Mr. Hilyard attempted to correct some confusion regarding the initials of the children that testified and filed an *Addendum to Motion for New Trial Pursuant to Wyoming Rules of Criminal Procedure 33(a).* (R.A., p. 418-22). The district court denied both motions. (R.A., pp. 416-17, pp. 428-30).

4.11 Mr. Hilyard was sentenced at a hearing on March 10, 2022. (Tr. Sentencing pp. 1-42). At the hearing, the district court sentenced Mr. Hilyard on Count I to serve a period of incarceration of 18-20 years with credit for 113 days previously served and on Count II to serve a period of 5-10 years with credit for 113 days previously served to run consecutive to Count I. (*Id.* p. 41).

V. SUMMARY OF THE ARGUMENT

5.1 Petitioner Hilyard told Ms. Lance that Trial Counsel, Mr. Oldham, failed to put up a defense sufficient enough to meet the standards as required by Wyoming law to one who is guaranteed the right to effective counsel. The Sixth Amendment right to counsel is more than the right to have counsel present. A person who happens to be a lawyer being present at trial alongside the accused is not sufficient to satisfy the constitutional command. Neither judges nor lawyers satisfy the Constitution's guarantee of assistance to counsel by mere formal appointment. Rather, an accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. In other words, the right to counsel is the right to effective assistance of counsel.

5.2 (Mr. Oldham) failed to investigate the red flags in Mr. Hilyard's case, was Ineffective Assistance of Counsel (hereafter IAC) at trial when he failed to suppress and/or object to the statements of LT and KLH because they were obtained through unduly suggestive means, which may confuse or mislead the jury ("[f]airness of the trial is threatened by suggestive confrontation evidence, and thus, it is said, an exclusionary rule an established constitutional predicate.")[2] Mr. Oldham's overall conduct was IAC in itself as he failed to act in a professional matter pertaining to investigating and protecting his client from what Mr. Oldham himself called a "railroading by prosecution and law enforcement."

5.3 Mr. Hilyard's children, KH, KLH, and LH, are special needs children. When LT was implicated in this case [as] to have been an abuser of KH; this is when KLH was forced to corroborate LT's story. There are inconsistencies and fantastic claims within KLH's testimony that were never (impeached or objected to) by defense counsel. Mr. Oldham refused to motion for "Child witness competency hearing. - A party's presentation to the court of evidence that a child witness is incompetent to testify triggers the requirement of a competency hearing, which includes consideration of whether child's memory was tainted by suggestive interview techniques."[3]

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[2] *Manson v. Brathwaite*, 432 U.S. 98, 111 (1977).
[3] *English v. State*, 982 P.2d 139 (Wyo. 1999).

5.4 Knowing that he could be in serious trouble for hurting his stepbrother KH, [LT] told of Sarah Hilyard's direct involvement and Mr. Hilyard's alleged involvement as to wanting LT to beat KH in front of them. This story was made to look as though Mr. Hilyard wanted his own son to be beaten, this is simply not true.

5.5 Detective Terry Good of the Mills, WY Police Department and Ms. Morgart interviewed LT and KLH multiple times. "Repeated interviewing and discussions about the abuse undermine the credibility of witnesses. It can cause confusion in both adults and children. With children, it raises the additional concern of suggestibility. According to experts, children may interpret repeated interviews as demands for more or different information than they have already given."[4]

5.6 The Court may say that Mr. Oldham was not ineffective in representation because he filed standard petitions "Procedural default" for the process of this case and preservation before going to trial. On the other hand, in meeting with Mr. Hilyard about his case, Mr. Oldham did not follow through as discussed in regards to gathering expert witnesses and/or other evidence to refute the testimony that the state used during trial leaving Mr. Hilyard without an absolute defense.

5.7 During testimony, Mr. Oldham hesitated to object to the prosecutorial led testimony of KLH and LT, even after Hon. Catherine E. Wilking (hereafter Judge Wilking) had to warn ADA Jared Holbrook (hereafter Mr. Holbrook) for talking over his own witness, interrupting KLH three times (Trial Tr. p. 494). Mr. Oldham still let several leading questions come into play before finally objecting because the "Leading was over-the-top" (Trial Tr. Pp. 500-501). Mr. Oldham allowed the misconduct to continue with no further objection in either child's testimony. The doctored statements the prosecutor was free to include in the record added prejudice during the trial; [they] caused the jury to convict off of their passions. Even after Mr. Oldham's tardy objection, the illegal questioning continued, the question barely

[4] Minnesota Attorney General's report on Scott County Investigation, February 12, 1985.

different after the objection was sustained. Further leading was exclusively to prejudice the jury.

5.8 Mr. Hilyard has the right to effective assistance of trial counsel and counsel on direct appeal. ("right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error if that error . . . is sufficiently egregious and prejudicial"); *Smith v. Murray*, 477 U.S. at 535; *Kimmelman v. Morrison*, 477 U.S. 365, 383-84 & n.8 (1986); *United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984).

5.9 **Furthermore,** Mr. Hilyard asserts his involvement in this case is limited to the fact that he (***had access***) to Sarah Hilyard. This does not implicate his involvement or conduct to the child abuse as alleged. Mr. Hilyard's actions did not amount to a crime, and characterizing his conduct as a crime runs afoul of the State and Federal Constitution. The State's concise knowledge of "Criminal law cannot be lacking in definition." -- "The constitutional guarantee of equal rights under the law will not tolerate a criminal law so lacking in definition that each defendant is left to the vagaries of individual judges and juries.[5] The State may say that in Wyoming's statutes, the laws are generally applicable and are neutral in their interests that prohibit children from being abused, sexually, or physically. There is no evidence tying Mr. Hilyard to any crime(s).

5.10 Sarah Hilyard took responsibility for hurting Mr. Hilyard's child [KH]. She and her child LT, who she encouraged to beat KH, are the responsible [individuals] for causing the damage to KH. The "Ping-Pong" that was mentioned by KLH was between Sarah Hilyard and LT if anyone at all. Mr. Hilyard had no knowledge of this phrase until DFS officials said it.

5.11 Mr. Hilyard should never have been charged or convicted of these charges. If the tables were turned and he was the woman in a relationship with her child injured, the woman would have been assisted by the state, not charged.

5.12 **Men and women are equal before the law:**

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[5] *State v. Gallegos*, 384 P.2d 967, (Wyo. 1963); *Sanchez v. State*, 567 P.2d 270, (Wyo. 1977).

5.13 The equality provisions of the constitution, this section and art. IV, I, emphasize the fact that women in Wyoming are men's equals before the law. *State v. Yazzie,* 67 Wyo. 256, 218 P.2d 482, 1950 Wyo. LEXIS 13 (Wyo. 1950).

5.14 **Wyoming code § 1-12-104. Husband and wife as witnesses in civil and criminal cases:** No husband or wife shall be a witness against the other except in criminal proceedings for a crime committed by one against the other, or in a civil action or proceeding by one against the other. They may in all civil and criminal cases be witnesses for each other the same as though the marital relation did not exist.

5.15 **Privilege does not apply where child of wife wronged.** Cases in which there is a wrong against the child of the ***wife*** fall within this section's exception applicable to criminal proceedings for a crime committed by one [spouse] against the other, because the wrong affecting the ***wife*** is different from that suffered by the public in general, and it is not the policy of this state to encourage defendants to silence their spouses in child abuse or child homicide cases. *Seyle v. State*, 584 P.2d 1081, 1978 (Wyo. 1978) (emphasis added).

5.16 This is a blatant and obvious violation of Mr. Hilyard's XIV Amendment right to equal protection of the law. Wyoming statues are biased against men as they offer protection only to children of women against male violence. Wyoming trained law enforcement are taught bias and will therefore "railroad" an innocent father as they are **[programmed]** to believe any abusive act had to revolve around the man of a household. That any woman is an innocent bystander, a forced participant, or an additional victim; as Wyoming code implies.

5.17 In regards to his children, Mr. Hilyard understands that he put them in harm's way by his association with Sarah Hilyard. He asserts the marital relationship should have been ended before Sarah Hilyard and her son tried to kill KH. However, no reasonable person could have predicted this outcome happening from Sarah Hilyard's dislike of her stepchildren. Mr. Hilyard thought there were verbal arguments between his wife and children, he was not aware of the extent of the actions and feelings Sarah Hilyard had. Sarah Hilyard demonstrated hatred for

KH even while KH was undergoing emergency services. Dr. Nathan Cook of the Wyoming Medical Center in Caper, WY testified that Sarah Hilyard had to be "dismissed" to a consult room with security staff after referring to KH as "our problem child" (Trial Tr. p. 334).

VI. ARGUMENT

I. DID THE WYOMING SUPREME COURT APPLY AND FOLLOW FEDERAL RULES OF EVIDENCE CORRECTLY?

When presenting Evidence Issues on Appeal does the Wyoming Supreme Court find Wyoming Courts immune of Federal rulings on all their Issues? This came before them on appeal this issue stands out in this case, causing hesitation for any other cases that present similar evidence issues on appeal. Is it right for the Wyoming Supreme Court to state inflammatory accusations as fact without allowing the opportunity to litigate?

The question asked was:

> DID THE DISTRICT COURT ABUSE ITS DISCRETION WHEN IT ADMITTED INTO EVIDENCE LT'S OUT-OF-COURT STATEMENT IN VIOLATION OF THE RULES OF EVIDENCE?

A. Standard of Review

This Court reviews rulings on the admissibility of evidence for abuse of discretion. *Jones v. State*, 2019 WY 45, ¶ 13, 439 P.3d 753, 757 (Wyo. 2019) (citing *Marquess v. State*, 2011 WY 95, ¶ 12, 256 P.3d 506, 510 (Wyo. 2011)). In determining whether there has been an abuse of discretion, the issue is whether the district court could reasonably conclude as it did. *Id.* at ¶ 14.

B. Argument

Mr. Hilyard asserts that the audio recording of LT's prior out-of-court statement should not have been played for the jury. (Trial Tr. p. 653). "In the matter of confessions, a hybrid situation exists. It is the duty of the Court to determine from the proof, usually taken out of the presence of the jury, if they were freely and voluntarily made, etc., and admissible. If admitted, the jury is entitled to

hear and consider proof of the circumstances surrounding their ostentation, the better to determine their weight and sufficiency. The fact that the Court admits them covers them with no presumption for the jury's purpose that they are either true or were freely and voluntarily made. However, after a confession has been admitted and read to the jury the judge may change his mind and strike it out of the record. Does he strike it out of the jury's mind?" *Dennis, Maryland's Antique Constitutional Thorn*, 92 U of Pa L Rev 34, 39. See also *Bell v. State, supra* (57 Md at 120); *Vogel v. State*, (163 Md at 272). Md Const, Art 23; *Home Utilities Co. v. Revere Copper & Brass, Inc.* 209 Md 610, 122 A2d 109; *Raymond v. State*, 192 Md 602, 65 A2d 285; *County Comrs. of Anne Arundel County v. English*, 182 Md 514, 35 A2d 135, 150 ALR 842; *Oursler v. Tawes*, 178 Md 471, 13 A2d 763.

Mr. Hilyard objected to its admission at trial. (*Id.* P. 641). Mr. Hilyard's defense counsel argued that the recording was irrelevant, he did not cross-examine LT on the content of the interviews, it's unfair to just play snippets of one (out-of-court statement) to show consistency, and that the selection of the content gives more emphasis to it to show it's true. (*Id.* Pp. 641-47). Defense counsel further raised objection to the admission of LT's prior out-of-court statement when it filed a Motion for New Trial Pursuant to Wyoming Rules of Criminal Procedure 33(a) (R.A., pp. 395-98). In this motion, defense counsel outlined that the prior statement must have been made prior to the time that the alleged incentive to fabricate occurred to meet the exception to hearsay (*Id.*, p. 397). There was no evidence admitted at trial which identified when the motive to fabricate arose, thus, the statements are hearsay. (*Id.*). Further, the out-of-court statements were merely witness bolstering (*Id.* at 398). Additionally, Mr. Hilyard asserts that the admission of the prior out-of-court statements unfairly prejudiced him (*Id.* at 398).

Wyoming Rule of Evidence 801(d)(1)(B) reads in pertinent part:

> (d) Statements which are not hearsay. –A statement is not hearsay if: (1) Prior Statement by Witness.—The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is...(B) consistent with his testimony

> and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive[.]

Id. According to this Court, four requirements must be satisfied for admission of a prior consistent statement under W.R.E. 801(d)(1)(B):

> (1) The declarant must testify at trial, (2) the declarant must be subject to cross-examination concerning the prior statement; (3) the prior statement must be consistent with the declarant's trial testimony; and (4) the prior statement must be offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.
>
> *Hicks v. State*, 2021 WY 2, ¶ 13, 478 P.3d 652, 657 (Wyo.2021); *Griggs v. State*, 2016 WY 16, ¶ 98, 367 P.3d 1108, 1136 (Wyo. 2016); *Large v. State*, 2008 WY 22, ¶ 37, 177 P.3d 807, 818-19 (Wyo. 2008).

The first element of the test is satisfied as LT testified at trial (Trial Tr. Pp. 534-565). With regard to the second element, LT was subject to cross-examination. (*Id.* at 548-564). However, this element requires that the cross-examination concern the prior statement. *Hicks*, ¶ 13, 478 P.3d at 657. In this case, the admission of the prior statement occurred with another witness, Ms. Morgart of the DFS (*Id.* p. 653). At this point of the trial, LT was not available; he had testified much earlier that day and exited the courtroom (*Id.* p. 534, 565). Wherefore, LT was not subject to cross-examination concerning the content of his prior out-of-court statement.

As to the third element, the prior statement was not consistent with LT's trial testimony. At trial LT testified that his mom, Sarah Hilyard told him to push down KH (*Id.* p. 541). LT stated:

> "I was at the top, mainly watching. But then, at one point, my mom went to go clean the kitchen or do something in the kitchen; I don't exactly remember what. But she told me to stay at the top of the stairs and if KH had stopped at the top of the stairs, she wanted me to push him down. There was one point when he had stopped when I was up there. So I had mainly pushed him down. I'm pretty sure I only pushed him down two, but I didn't really want to get in trouble myself."

(*Id.*). On the audio recording LT states that "**they** told me to do it, if he's resting then I have to push him." (State's Exhibit 201) (Emphasis added). This

seems to implicate Mr. Hilyard. However, during trial LT did not implicate Mr. Hilyard in telling him to push KH (*Id.* at 541). This recording was played by the State to prejudice Mr. Hilyard and Mr. Hilyard was provided no opportunity to cross-examine LT regarding this inconsistency. At trial Ms. Morgart admits that the recording played through State's Exhibit 201, was the third time LT had given a statement and that parts of this recorded statement were inconsistent with the first statement. (Trial Tr. P. 655). Additionally, Ms. Morgart admitted that parts of the recorded statement were inconsistent with the second statement LT provided. (*Id.*). "(Granting a new trial if the evidence of false allegations was admissible under state law); *State v. Long*, 140 S.W.3d 27, 28, 31 (Mo. 2004). "(Granting a new trial when the court excluded evidence of the alleged victim's false allegations, because the witness' credibility was "the key factor in determining guilt or acquittal," and holding that the "defendant's constitutional right to present a full defense" must be honored). The Sixth Circuit, in granting a new trial has held that, when "there is no physical evidence supporting the prosecution's case, the truthfulness or lack of truthfulness {2015 U.S. Dist. LEXIS 74} of the complainant is a matter of crucial importance." *Mathis v. Berghuis*, 90 F. App'x 101, 107 (6th Cir. 2004) (unpublished) (Granting a new trial because evidence of the alleged victim's false allegations had been suppressed).

II. IS THE WYOMING SUPREME COURT'S DECISION ARBITRARY, CAPRICIOUS, OR OTHERWISE NOT IN ACCORDANCE WITH FEDERAL LAW?

Innocence:

In 1886, The Supreme Court wrote:

> "It is the birthright of every American citizen when charged with a crime, to be tried and punished according to law. The power of punishment is alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great the offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law, human

rights are secured, withdraw that protection, and they are at the mercy of wicked rulers, or the clamors of an excited people."[6]

Standard of review:

A. Admissibility Under Hearsay Rule

The State used out of court **hearsay statements**, and presented them in trial to bolster LT's inaccurate testimony that was proven to be false and misled by the DA to prove that Mr. Hilyard was guilty of Child Abuse. This violates his right to a fair and impartial trial.

> Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." W.R.E. 801(c). "Hearsay statements are generally inadmissible because they are made outside of court and, therefore, presumed to be unreliable."[7] A hearsay statement is admissible, however, if it fits a recognized exception to the hearsay rule. *Id.* We review a district court's ruling on the admissibility of evidence, including hearsay, for an abuse of discretion." *Id.*
>
> "We review a district court's ruling on the admissibility of evidence for an abuse of discretion."[8] "We afford considerable deference to a trial court's rulings on the admissibility of evidence, and we will not disturb the trial court's ruling if there is a legitimate basis for it." *Id.* "Determining whether the trial court abused its discretion involves the consideration of whether the court could reasonably conclude as it did, and whether it acted in an arbitrary and capricious manner."[9]
>
> "The district court found Mr. Linklater's testimony to be admissible under two exceptions to the hearsay rule, Rules 804(b)(3) and (b)(6), and also under the exclusion from the definition of hearsay found at Rule 801(d)(2)(D). With respect to the two exceptions under Rule 804, both required a finding that the witness was unavailable to testify in person. Because that finding is a threshold requirement of

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[6] *Ex Pate Milligan*, 71 U.S. (4 Wall.) 2, 118-19, 8 L.Ed.281 (1866). More than 100 years later, the court explained the "constitutional rights of criminal defendants are granted to the innocent and guilty alike." *Kimmelman v. Morrison*, 477 U.S. 356, 380, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).
[7] *Bruce v. State*, 2015 WY 46, ¶ 40, 346 P.3d 909, 923 (Wyo. 2015) (quoting *Moore v. State*, 2013 WY 146, ¶ 11, 313 P.3d 505, 508 (Wyo. 2013)).
[8] *Farrow v. State*, 2019 WY 30, ¶ 52, 437 P.3d 809, 823 (Wyo. 2019).
[9] *Moser v. State*, 2018 WY 12, ¶ 40, 409 P.3d 1236, 1248 (Wyo. 2018) (quoting *Triplett v. State*, 2017 WY 148, ¶ 23, 406 P.3d 1257, 1262 (Wyo. 2017)). *Matter of LDB*, 2019 WY 127, ¶ 43, 454 P.3d 908, 921 (Wyo. 2019) (quoting *Sparks v. State*, 2019 WY 50, ¶ 34, 440 P.3d 1095, 1106 (Wyo.2019)).

> Rule 804, we will begin our review there. See *Young v. HAC, LLC*, ¶ 9, 24 P.3d 1142, 1145 (Wyo. 2001) ("We will not determine if the substantive requirements of W.R.E. 804(b) were met, unless the turn to the admissibility of the testimony under the rules on which the court based its determination, and Plaintiffs' claim that the admission of Mr. Linklater's testimony violated their due process rights because they had no opportunity to cross-examine him" *Id.*

Further, on the audio recording LT states that it looked like KH had no bones. (State's Exhibit 201). However, at trial the Mr. Holbrook asks LT the leading question "[d]o you remember saying that it looked like he had no bones?" and LT responded, "uh-huh." (Trial Tr. p. 543). Mr. Holbrook later sought admission of the audio recording through State's Exhibit 201 to impermissibly bolster not only the consistent statements made by LT, but also [the prosecutor's own testimony] to the jury. (*Id.* At 543, 653). In *Jones v. State*, 2019 WY 45, 439 P.3d 753 (Wyo. 2019), this Court explained, "[c]onsequently, we have found reversible error where prior consistent statements were used 'simply to enable the parties to bolster testimony by their witnesses by piling on their prior statements.'" *Jones*, ¶¶ 15-17, 439 P.3d at 758 (quoting *Wilde v. State*, 2003 WY 93, ¶ 14, 74 P.3d 699, 708 (Wyo. 2003) (quoting *4 Christopher B. Mueller & Laird C. Kirkpatrick*, Federal Evidence § 405 (2nd ed. 1994 and Supp. 2002)).

Lastly, the fourth element requires that the prior statement must be offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. *Id.* It is unclear ***when*** the State alleges LT's motive to fabricate arose. According to the United States Supreme Court prior consistent statements are not admissible under Federal Rule of Evidence 801(d)(1)(B) to rebut an express or implied charge of recent fabrication or improper influence when made *after* the alleged improper motive arose. *Tome v. United States*, 513 U.S. 150, 156, 115 S.Ct. 696, 700 (1995). The district court found at trial that the cross-examination of LT was in regards to him lying or telling the truth. (Trial Tr. p. 649-50). Specifically, the district court found:

> However, particularly with [LT], the cross-examination of him with regard to lying about things of telling the truth, and the cross-

> examination of his counselor, and the cross-examination of his foster parent do show an express and implied charge of potential fabrication or improper influence or motive on [LT]'s part.

(*Id.*). The district court failed to make any findings as to how the cross-examinations showed potential fabrication or improper influence or motive. The district court also never indicated *when* the fabrication occurred. To that extent, the cross-examination showed that LT had the potential to fabricate however there is no analysis or indication concerning what or when the district court found he was potentially fabricating, but that it was further indicated in the cross-examination of his counselor, and the cross-examination of his foster parent. (Trial Tr. 650, R.A., p. 429). Additionally, the district court did not know the contents of the prior out-of-court statement before it was played in open court. (Trial Tr. p. 643). As such, the district court did not make an independent determination as to whether the statement was consistent. Wherefore, the prior statement was not admissible because it was hearsay. *Tome*, 513 U.S. at 156, 115 S.Ct. at 700.

It was an abuse of discretion for the district court to admit LT's prior out-of-court statement. *Jones*, ¶¶ 15-17, 439 P.3d at 758 (quoting *Wilde v. State*, 2003 WY 93, ¶ 14, 74 P.3d 699, 708 (Wyo. 2003) (quoting 4 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 405 (2nd ed. 1994 and sup. 2002). This abuse of discretion prejudiced Mr. Hilyard and denied him a fair trial. Mr. Hilyard was not implicated during LT's trial testimony of making LT push KH (Trial Tr. p. 541). It was clear that was LT's mom, Sarah Hilyard. (*Id.*). However, by playing State's Exhibit 201, the prior statement, Mr. Hilyard was implicated and was denied any opportunity to cross-examine LT regarding that statement. (*Id.* At 653). The admission of this out-of-court statement was highly prejudicial to Mr. Hilyard as Count II was child abuse against LT. The prosecutor argued that the abuse against LT was making LT participate in hurting KH and the "PTSD" he suffered as a result. (*Id.* at 819). In closing argument the prosecutor argued to the jury that "his parents" told him to help. (State's Exhibit 201; Trail Tr. at 653, 819). Without the entry of the State's Exhibit 201, the prosecutor would not have been able to argue

this to the jury. As a result, but for the admission of State's Exhibit 201, Mr. Hilyard would likely have been acquitted on Count II.

Additionally, to the extent the prior statement was consistent with LT's trail testimony it was still hearsay and was used only to bolster what LT and the prosecutor said during trial. The district court did not provide a complete analysis as to when any improper influence or motive arose. (*Id.* at 649-50). Further, the district court did not provide clear explanation of the timing or source of any recent fabrication with which to find an exception to the hearsay rule under W.R.E. 801(d)(1)(B). (*Id.*). For these reasons, Mr. Hilyard's judgment should be reversed.

III. WAS MR. HILYARD DENIED HIS FOURTEENTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL . . . NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL . . . DENY TO ANY PERSON WITHIN IS JURISDICTION THE EQUAL PROTECTION OF THE LAWS?

1. Relevant Law

a. Standing Pursuant to the Wyo. Stat. Ann. § 7-14-103:

"Wyo. Stat. Ann. § 7-14-1013, Claims Barred; Applicability of Act." (b)(ii).

This Court has Jurisdiction as Mr. Hilyard, is appealing a Wyoming conviction, with claims of Exculpatory Evidence that was withheld, Actual Innocence, New Evidence, and deliberate Ineffective Assistance of Trial and Appellate counsels.[10] Each of these has individually created due process violations in both his trial and direct appeal, warranting review.[11] Mr. Hilyard now looks to this court to correct those violations. Mr. Hilyard realizes that post-conviction is not a replacement for direct appeal,[12] however, he is also aware that according to Wyoming Law, the claim of ineffective assistance of appellate counsel opens the door to admit arguments not included in his direct appeal due to the ineffective

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[10] "Denial of the effective assistance of counsel to one charged with a crime violates due process." *Hawk v. Olsen,* 326 U.S. 271, 66 S.Ct. 116.

[11] "The effective assistance of counsel in a state prosecution for a crime is a requirement of due process which no member of the Union may disregard." *Reece v, Georgia,* 350 U.S. 85, 76 S.Ct. 167.

[12] "Post-conviction is not a substitute for an appeal and the petition will not lie where the matters alleged as error could or should have been raised in an appeal or in some other alternative matter. Relief may be granted only in extraordinary circumstances which strongly suggest a miscarriage of justice." *Harlow v. State,* 105 P.3d 1049 (Wyo. 2005).

assistance of appellate counsel. See Wyo. Stat. Ann. § 7-14-103 (b)(ii).[13] Ms. Lance had the [obligation] to present Mr. Hilyard's meritorious arguments in the direct appeal provided to Ms. Lance[14]. Ms. Lance refused to present these claims in direct appeal[15], her refusal created a procedural default of the claims[16] that can only be overcome with the argument of ineffective assistance of appellate counsel, contained herein.

b. The Right to Effective Appellate Counsel:

Standard of Review:

"Petitioner was denied his right to constitutionally effective assistance of counsel on his first appeal of right (direct appeal from conviction)."[17] ("Right to

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[13] "Wyo. Stat. Ann. § 7-14-103, Claims Barred; applicability of act."

(a) A claim under this act is procedurally barred and no court has jurisdiction to decide the claim if the claim:
  (i) Could have been raised but was not raised in a direct appeal from the proceeding which resulted in the petitioner's conviction;
  (ii) Was not raised in the original or an amendment to the original petition under this act; or
  (iii) Was decided on its merits or on procedural grounds in any previous proceeding which has become final.

(b) Notwithstanding paragraph (a) (i) of this section, a court may hear a petition if:
  (i) The petitioner sets forth facts supported by affidavits or other credible evidence which was not known or reasonably available to him at the time of a direct appeal; or
  (ii) The court makes a finding that the petitioner was denied constitutionally effective assistance of counsel on his direct appeal. This finding may be reviewed by the petition."

[14] "Wyoming Law places upon the appellate counsel, the primary responsibility for investigating and raising constitutional issues. That responsibility is not limited to raising issues that are based on the trial record, but includes issues that are traditionally within the scope of post-conviction review, such as claims of ineffective assistance of counsel or other issues that require investigation beyond the four corners of the total record." *Calene v. State*, 846 P.2d 679, 694 (Wyo. 1993). "Appellate counsel was ineffective in failing to raise arguable issues on appeal created presumption of prejudice in that defendant was essentially left without representation on appeal." *Delgado v. Lewis*, 181 F.3d 1087 (9th Cir. 1999).

[15] "Person, which confirmed that the rule of presumed prejudice in cases of actual or constructive denial of counsel applies to appellate counsel, compels the related conclusion that id a defendant tells his attorney to appeal and the lawyer fails to do so, a per se violation of the right to counsel occurs." See *Fern*, 99 F.3d at 257-58 (recognizing same). *Walker v. McCaughtry*, 72 F.Supp.2d 1025, (U.S. Dist. 1999).

[16] "Procedural default in an appeal can constitute ineffective assistance of post-trial counsel." *Calene v. State*, 846 P.2d 679, 694 (Wyo. 1993); *Harvey v. State*, 835 P.2d 1074 (Wyo. 1992); *Coleman v. Thompson*, 501 U.S. 722 (Wyo. 1991); *Star v. Lockhart*, 23 F.3d 1280 (8th Cir. 1994).

[17] *Douglas v. California*, 372 U.S. 353 (1963), *Strickland v. Washington*, 466, U.S. 668 (1984), *Evitts v. Lucey*, 469 U.S. 387 (1985), *Cutbirth v. State*, 751 P.2d 1257 (1988).

effective assistance of counsel . . . may in a particular case be violated by even an isolated error if that error . . . is sufficiently egregious and prejudicial.")[18]

"Appellate counsel's failure to challenge ineffectiveness of trial counsel ("amount[ed] to constitutionally ineffective assistance" on appeal and furnished cause for default in failing "to raise ineffectiveness of trial counsel on appeal");[19] ("Cause" existed for failure to appeal denial of post-trial motion to challenge trial counsel's effectiveness because "post-trial counsel either failed to recognize or did not adequately assist [prisoner] in pursuing this claim and thus failed to preserve it on appeal.")[20]

"Counsel's Conduct with regard to the procedurally defaulted issue was arguably incompetent but the rest of the representation was clearly so hence, the "overall fairness of the entire proceeding" was impugned."[21] Thus, Violating Mr. Hilyard's XIV Amendment Right to effective assistance of counsel. Warranting this Court to act and allow these arguments that should have been presented on direct appeal.

IV. WAS APPELLANT COUNSEL INEFFECTIVE IN NOT RAISING THE QUESTION OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, AND PRESENTING THE WEAKEST ISSUE OF EVIDENCE CHALLENGES BECAUSE OF CONFLICT OF INTEREST?

1. Relevant Law

a. Standing Pursuant to the Wyoming Rules of Appellate Procedure:

Rule 21(a) of the Wyoming Rules of Appellate Procedure (hereafter "W.R.A.P.") states that following the docketing of a direct criminal appeal, the appellant may file in the trial court a motion claiming ineffective assistance of trial counsel. W.R.A.P. 21(a). The motion shall be submitted prior to filing of appellant's initial appellate brief. *Id.*

b. The Right to Effective Counsel:

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[18] *Smith v. Murray*, 477 U.S. at 535; *Kimmelman v. Morrison*, 477 U.S. 365, 383-84 & n.8 (1986); *United States v. Cronic*, 466 U.S. 648, 657 n.20 (1984).

[19] *United States v. Conley*, 349 F.3d 837, 841 (5th Cir. 2003).

[20] *Quintero v. Bell*, 256 F.3d 409, 413-14 & n.2 (6th Cir. 2001), vac'd, 535 U.S. 1109 (2002).

[21] *Wainwright v. Sykes*, 433 U.S. at 96 (*Stevens, J., concurring*). See, e.g., *Buck v. Davis*, 137 S.Ct. 759, 767, 775 (2017).

Criminal defendants have the right to counsel as guaranteed by the VI Amendment of the United States Constitution. This right is made applicable in the State of Wyoming through the XIV Amendment, and by the Wyoming Constitution art I § 10. The United States Supreme Court has held that the right to counsel means the right to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, n.14, 90 S.Ct. 1441, 1449, n.14 (1970).

IAC claims are reviewed under the well-known standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80L.Ed.2d 674 (1984):

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was no longer functioning as the "counsel" guaranteed to the defendant by the VI Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

"When reviewing a claim for IAC, the paramount determination is whether, in light of all circumstances, trial counsel's acts or omissions were outside the wide range of professionally competent assistance."[22] Counsel is deficient when he "fail[s] to render such assistance as would have been offered by a reasonably competent attorney."[23] Furthermore, prejudice in this context "occurs when there is a reasonable probability that, absent counsel's deficient assistance, the outcome of [appellant's] trial would have been different."[24] "Therefore, two prongs exist when

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[22] *Herdt v State*, 891 P.2d. 793, 796 (Wyo. 1995); *Frias v State*, 722 P.2d. 135, 145 (Wyo.1986).
[23] *Winters v. State,* ¶ 11, 446 P.3d 191,198 (Wyo. 2019) (citing *Galbreath v. State,* 346 P.3d 16, 18 (Wyo. 2010)).
[24] *Winters v. State,* at ¶ 11, 446 P.3d at 198.

examining IAC and the failure to establish one of the two prongs dooms such a claim."[25]

2. SUMMARY OF THE ARGUMENT

There are seven (7) specific areas of IAC at issue in this matter. Each relates to conflicts of interest, non-objections, and overall conduct of defense counsel.

a. First IAC

The First (IAC) occurred when Mr. Oldham's conduct was unbecoming of a professional when he was asked to speak to KH, to gather his story. The interview was set up with KH's adoptive parents, who wanted to be present during the interview. Mr. Oldham did not state any objection to the adoptive parents' presence. The Guardian-Ad-Litem (Ms. Monroe) in the case, called Mr. Oldham to demand she be present for the interview of KH. From what Mr. Oldham said, the conversation was heated; Ms. Monroe did not comply with the investigation in a professional manner. However, instead of consenting to her presence in the interview or making any concessions to gather facts related to the case, Mr. Oldham became angry and cancelled the interview altogether; calling (Ms. Monroe) unsavory name(s). e.g. [h]e called her a "nigger, and a bitch".

This is unprofessional and constitutes misconduct. Mr. Oldham was unwilling to get the critical information needed for Mr. Hilyard's defense. KH had no opportunity to be heard. Mr. Hilyard has recently been made aware of KH sharing his recollection of an incident when Mr. Hilyard was out of town, LT beat KH and violated [Sarah Hilyard's] rule to not leave bruises on KH unless easily concealable. Sarah Hilyard called KH out of school for the week. Sarah Hilyard and her son LT were hiding abuse of KH from Mr. Hilyard as well as school/authorities. This is merely one example of what KH could have testified to had he been allowed. Mr. Oldham's discriminatory attitude towards (Ms. Monroe) shows deliberate mishandling as he failed to gather the (finding of facts) that could have been presented in court showing Mr. Hilyard's innocence. This was (IAC) at best.

b. Second IAC

[25] *Dettloff v. State*, ¶ 19, 152 P.3d 376, 382 (Wyo. 2007).

The Second IAC occurred when the initial hearing was held telephonically as Mr. Hilyard was on bond and the court claimed concern(s) because of COVID-19. Near the end of the hearing, Judge Wilking told Mr. Hilyard to get off the phone call; she needed to speak with Mr. Oldham. Mr. Hilyard heard Judge Wilking tell Mr. Oldham to "convince his client" to waive his right for a speedy trial. Moments later, Mr. Oldham called Mr. Hilyard to fulfill this order saying "it was in Mr. Hilyard's best interests as child memories, especially false ones, will fade out." He made no mention of the [repeated coaching] that Mr. Holbrook later admitted to in an off the record whispered conversation with Mr. Oldham (Trail Tr. p. 548).

Mr. Oldham's conflict of interest with the court and prosecution resulted in his advisement of his client in the best interests of the court and prosecution. He wanted Mr. Hilyard to waive his right to a "Rule 48(b) speedy trial" thus, denying Mr. Hilyard of his XIV Amendment right to due process.

c. Third IAC

The third IAC arose at the probable cause hearing; Mr. Oldham refused to argue that probable cause for arrest had [not] been made as there had been no timeline established by investigators prior to the arrest of Mr. Hilyard. This fact was established by Mr. Oldham asking Detective Good about the timeline for KH's significant injuries. Detective Good admitted he did not know. Mr. Oldham did nothing with this testimony. Turning to the Tenth Circuit authority, in *Osborn v. Shilinger*, 861 F.2d 612, 629 (10th Cir. 1998), the court determined the defense attorney had turned against his client and effectively joined the state in the effort to obtain a death sentence. Applying the reasoning in *Cronic*, the court found that by which the defendant had pled and was sentenced to death was not adversarial and therefore not reliable. Further, the court found the attorney suffered from a conflict between his client's interests and his own sympathy with the prosecution's position. The *Osborn* Court went on to find that "prejudice, (1996 U.S. Dist. LEXIS 22) whether necessary or not, is established under any applicable standard." *Id.* "Counsel's actions during trial were the same as a second prosecutor." *Jones v. Gomez*, 66 F.3d 199, 204 (9th Cir. 1995) (citation omitted), rather than that of a

defense attorney. In *Rickman*, the Sixth Circuit recounted a truly shocking deprivation of the defendant's VI Amendment right to counsel, and in so doing referred {2001 U.S. Dist. Lexis 31} to the defense attorney as a "second prosecutor." 131 F.3d at 1157. (See *Rickman v. Bell*, 131 F.3d 1150; 1997 U.S. App. LEXIS 33861; 1997 FED App. 0352P (6th Cir. 1997)).

In Mr. Hilyard's case, Mr. Oldham stopped his questioning of Detective Good and agreed there was probable cause for the arrest with no prompt. The question about timeline seemed to be a solid defensive strategy but given Mr. Oldham's lack of follow up and not even attempting to argue for his client; this only allowed Mr. Holbrook to know the investigation was incomplete at best. Mr. Holbrook then could find witnesses to bolster the theories he needed in order to support his flawed or corrupt investigators. This will be illustrated further in IAC number four.

Mr. Oldham appeared to be working to convict Mr. Hilyard rather than defend him. Defense counsel obviously held more loyalty to the prosecution's case than to his client, creating an insurmountable conflict of interest.

> "An attorney who is burdened by a conflict between his client's interests and his own sympathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants, because the interests of the state and the defendant are necessarily in opposition" *Osborn v. Shilinger*, 861 F.2d 612, 629 (10th Cir. 1989); CF. *Houchin v. Zavaras,* 107 F.3d 1465, 1471 (10th Cir. 1997).

> "Defense counsel's performance was not only ineffective, but counsel abandoned the required duty of loyalty to his client, counsel did not simply make poor strategic or tactical choices; he acted with reckless disregard for his client's best interest, and apparently with the intention to weaken his client's case." *Osborn v. Shilinger,* 861 F.2d 612 (10th Cir. 1988); *Harlow v. Murphy*, Case #05-CV-039-B (D. Wyo. February 15, 2008).

Counsel's actions added prejudice, he should have motioned for a "Rule 29 motion for acquittal" of Mr. Hilyard's case. The state did not produce any evidence of physical or mental abuse to LT or KH. The state presented misled testimony to the jury to convict Mr. Hilyard causing the trial to be unfair and impartial. Mr. Oldham, without explaining to Mr. Hilyard why he did so, waived the right to

address the court on a Rule 29 motion (Trial Tr. Pp. 672-673). Mr. Oldham as well, without explaining why to Mr. Hilyard, denied the right to poll the jury after the verdict was read (Trial Tr. P. 847). This leaves the lingering question of if this result was unanimous or not.

d. Fourth IAC

The Fourth issue showing IAC is when Mr. Oldham refused to allow Mr. Hilyard to see his discovery, (Mr. Oldham later falsely claimed Mr. Hilyard did not want to see discovery). [H]e also refused to investigate the (red flags) in this case and did not look into medical records to find members of the actual team that treated KH or to reach out to interview any of them to establish factual timelines. Mr. Oldham could have easily disputed the timeline the state obtained through the faulty testimony of Dr. Jeffrey Rhea (Dr. Rhea), who was improperly held as an expert witness. Dr. Rhea is a radiologist with no particular expertise in brain injuries (Trail Tr. Pp. 350-351).

Mr. Oldham led on that expert witnesses were being gathered to counter the state's witnesses, but, when the witness lists became due, Mr. Oldham told Mr. Hilyard that he had not provided any money to hire an expert witness to counter the state's witnesses; this is one of the "causes"[26] in showing how Counsel was (IAC). Mr. Oldham did not communicate and failed to provide due process to Mr. Hilyard's case violating his XIV Amendment right. When Mr. Oldham told Mr. Hilyard of lack of payment, it was too late to do anything to gather witnesses; Mr. Hilyard had no idea previously that witnesses had to be hired.

"When an ineffective assistance claim rests on the failure to call an expert witness, the defendant must show that one was available to testify in a manner consistent with his theory of the case." *Jones v. State,* 2017 WY 44 ¶ 16, 393 P.3d 1257, 1262 (Wyo. 2017) (citing *Griggs v. State,* 2016 WY 16, ¶ 38, 367 P.3d 1108, 1124 (Wyo. 2016)). Furthermore, in *Wall v. State*, 432 P.3d 516; (Wyo. 2019). P53

[26] Mr. Hilyard also established "cause" by demonstrating that the constitutional violations he complains of in support of his habeas motion resulted in a "fundamental miscarriage of justice;" i.e., that resulted in the conviction of a person who was actually innocent of the charged crime." See *United States v. Cervini*, 379 F.3D 987, 990-91 (10th Cir. 2004).

We have held that the failure to present expert testimony is not in itself ineffective assistance of counsel:

> "A reasonably competent attorney may use an expert witness in a variety of ways, including as a consultant in areas of specialized knowledge, for review of the facts of a case, to formulate trial strategy, to develop questions for cross examination of the State's witnesses, as an expert witness at court hearings or trial, etc. An attorney is not necessarily ineffective because he decides that an expert's assistance in trial preparation is sufficient and that the expert's testimony at trial is not necessary." See, e.g., *Rice v. State*, 292 Ga. 191, 733 S.E.2d 755, 772 (2012); *Brown v. United States*, 384 A.2d 647, 649 (D.C.Ct.App.1978) (consultation with expert for cross examination in lieu of calling expert to testify was not ineffective assistance of counsel). The task of the court in reviewing the adequacy of defense counsel's representation will be to determine whether defense counsel reasonably analyzed the options and decided on an appropriate course of action. See, e.g., [*Cooper v. State*, 2014 WY 36, 391 P.3d 914 (Wyo. 2014)], supra; *Lopez v. State*, 2004 WY 28, 86 P.3d 851 (Wyo. 2004). *Griggs*, ¶ 39, 367 P.3d at 1125.

When KH was injured, Mr. Hilyard's brother rushed to his bedside in a brain trauma center in Colorado Springs, Colorado. Mr. Hilyard himself was not allowed to. Paul Hilyard (Mr. Hilyard's brother) was told by the treating physician that it was "very unlikely" that injuries KH had suffered could have been survivable for the timeline the state used to convict on the testimony of radiologist Dr. Rhea. Terry and Annette Hilyard (Mr. Hilyard's family members who have now adopted KH) spent every weekend at KH's bedside both at the hospital in Colorado Springs then later at Denver Children's Hospital throughout KH's hospitalization with very few exceptions.

The adoptive parents were told by numerous treating physicians that KH was most likely to have sustained his brain injury three (3) to five (5) hours prior to being taken to the emergency room in Casper, WY, and that quick, precise action by the neurosurgeon in Casper had been the most critical piece in saving KH's life. The doctors thought it to be far-fetched at best to have any patient survive the timeline that was imagined or theorized by the prosecution. Doctors admitted that based in medical books, the state's timeline [*could*] be possible but realistically was not. Mr.

Oldham was given this information but he chose to do nothing with the facts. Paul Hilyard was called as a witness but was not asked about the timelines given to him by the doctor(s) he had encountered (Trial Tr. Pp. 675-691, 698-699). Mr. Oldham refused to call Terry or Annette Hilyard or to conduct any interviews with the treatment team to verify what the family had been told. He later blamed the Hilyards for "not giving him names" of treating physicians, which should have been in the discovery or that would have been prosecutorial misconduct. The sheer volume of people working on KH made recollection of individual names nearly impossible.

Through simple subpoenas, Mr. Oldham could easily have disputed the timeline given by Dr. Rhea that KH was injured over 24 hours to under 14 days prior to being taken to the E.R. Dr. Rhea was the radiologist on the case in Casper, WY. He admitted in his own words upon direct examination, "CT is not the most accurate modality for determining time frame on stuff. An MRI is a better test for determining time frame of that" (Trial Tr. Pg. 351). Then on cross examination admits he is only guessing: "That's the tricky part. I don't know the order of things. So several - - so the subdural hematoma can cause bleeding that can cause the brain to shift. And then, from the shifting, from the subdural hematoma, it can push the - - some of the arteries up against the Dura and can include those arteries that then would cause an ischemic stroke." (Trial Tr. Pg. 355).

"Or the ischemic stroke could have come first. You know, it - - so, yeah, the - - the order of events I cannot determine on that CT scan." (Trial Tr. Pg 355). Later Dr. Rhea states: "I am not familiar with the exact amount of time, but other than to say it's [*probably*] greater than 24 hours." (Trial Tr. p. 356) (Emphasis added). He as well admitted that an MRI would be a better tool for diagnosis as well as timelines but he had not followed up on KH's care to know that Denver Children's Hospital had done MRI's, he only knew that while in Casper, no MRI was performed nor has he looked at an MRI at all to ascertain the accuracy of his timeline guess (Trial Tr. Pp. 356-357). From what the family has told Mr. Hilyard,

it sounds as though there is not a single treating physician who would disagree with the timeline of three (3) to five (5) hours prior to E.R. arrival the Hilyards were told.

Dr. Emmanuel Pena, who was called as an expert witness, listed four places of employment across three states in seven years, listing several different roles inside umbrella employment. This included claiming employment in Wyoming and Florida simultaneously for a three year period. Dr. Pena claimed to have been employed with the University of Florida and with Tallahassee (FL) Child Protection team from 2014 to "this last week" which indicated November 2021. He also claimed to work for Wyoming Medical Center in Casper, WY from July 2017 to August 2020 with a role at the University of Wyoming Family Practice Center in Casper from July 2018 to August 2020 (Trial Tr. Pp. 592-593). Dr. Pena appeared to be no more than a professional witness as he admitted to taking $12,000 for services to the state as he claimed 40 hours at $300 per hour[27] (Trial Pg. 596). Dr. Pena spoke of sodium and electrolytes at such high level(s), it is unlikely any laymen would have any idea of what he was saying and potentially confused the jury. Mr. Oldham was very ill prepared to cross examine Dr. Pena as well, having not spoken to anyone with a medical background to help Mr. Hilyard's defense. Only once Mr. Oldham seemed to be gaining, when Mr. Oldham asked about the questions at the bottom of Dr. Pena's script and threw off the doctor. Mr. Oldham was obviously not supposed to have gotten a copy but was accidentally sent the script in discovery. Once again, Mr. Oldham did not make any objections or inquiries to find if Mr. Holbrook's misconduct included assisting to write the script or merely asking for a prepared script. (Trial Tr. Pp. 620-21)

Had Mr. Oldham illustrated the corruption of prosecution and witness having a script read word-for-word by Dr. Pena, called contrary witnesses, (specifically those who actually treated KH) at minimum consulted with treating professionals for assistance in cross-examination of the state's [star] witness, or even allowed the

[27] Evidence of judge's corruption in other cases was admissible to help explain to jury how illegal relationship between the judge and middle man, who was government witness, developed. *United States v. Brennan,* 798 F.2d 581, 21Fed. R. Evid. Serv. (CBC) 358 (2d Cir. 1986), habeas corpus proceeding, 685 F. Supp. 883 (E.D.N.Y. 1988).

Hilyards to share what doctors told them, the outcome of trial would have been acquittal. As it was, very little was done by Mr. Oldham to discredit Dr. Pena. Support Dr. Pena added to the state's contrived timeline was largely based on hearsay, "We do not have a CAT scan of that day (Aug. 2nd 2020), we just know he couldn't walk or speak, that clearly the brain had sustained a significant injury on the 2nd" (Trial Tr. p. 628). This statement is false; KH was walking the morning of Aug. 6th 2020.

Transition to where Mr. Hilyard was the day of KH's Assault:

Mr. Hilyard was at the Beacon Restaurant in Casper, WY for a business lunch August 6, 2020, when KH was actually injured. Mr. Oldham failed to gather evidence i.e. surveillance tapes, and failed to establish a timeline with witnesses (Jarrod Parker and Adam Willett) (Trial. Tr. Pp. 700-708, 710-715). They would have verified Mr. Hilyard being at the restaurant and not at the scene when KH was really injured. Mr. Parker attempted to without the question by indicating he and Mr. Hilyard had just gotten back from lunch when Mr. Hilyard was called home for KH's injury (Trial Tr. p. 705). However, without the factual timeline being presented, Mr. Parker and Mr. Willett were disregarded as nothing more than friends instead of factual witnesses. Mr. Hilyard asked for their testimony to assist with proving his whereabouts when his son was injured.

The state called Dr. Antonia Chiesa (Dr. Chiesa) who claimed to be employed in part with Denver Children's Hospital, where KH had spent a significant amount of time in his recovery. Dr. Chiesa had a totally inaccurate picture of KH as a patient. She stated the incorrect side of the body affected several times even while having a computer in front of her admittedly with medical records. (Trial Tr. Pp. 390, 401, 416-17). Dr. Chiesa testified about KH, urinating on himself and other **[hearsay speculation]** of day(s) prior to KH's admission to the hospital being used as diagnosing tools. (Trial Tr. Pp. 398-99, 404-05, 409-13, 417-20). This is a violation of **W.R.E. Rule 803(4)**[28] as Dr. Chiesa used statements made by law enforcement with

[28] **W.R.E. Rule 803.** Hearsay Exceptions; Availability of Declarant Immaterial.

no substantiation and statements provided by law enforcement and DFS workers without citing original sources to aid in inferring diagnoses that were not consistent with the treating team's. W.R.E. 803(4) was designed for medical professionals to use statements made by the victim/patient to aid in diagnoses. Such statements were never made by KH.

Dr. Chiesa spoke of an incontinent individual left to urinate himself; this is from speculative statements made by law enforcement about an adult diaper found in the garbage of the Hilyard residence. (Trial Tr. p. 418) It was neglected in mentioning however, that law enforcement took said used diaper to perform testing, presumably including DNA testing to find out who soiled the diaper. Mills Police Sergeant Matt Vincent was called about the diaper in question; he verified pictures of the diaper in and out of the trash can in the Hilyard residence (Trial Tr. Pp. 437-438). Sergeant Vincent also verified pictures showing a bruise cream package in and out of the same trash can (Trial Tr. Pg. 439). In cross-examination, Sergeant Vincent claimed to have found vomit in a bag and on a light fixture. He, as a specially trained evidence technician, claimed not to remember having the bag tested to discover if it was indeed vomit. He also admitted he did not scrape the light fixture to have it tested (Trial Tr. Pp. 444-445). Sergeant Vincent did not share any DNA results to find the source of the vomit and/or urine. He as well did not mention if Mr. Hilyard's fingerprints were on the discarded bruise cream package. Both prosecution and defense counsels failed to ask him any questions relating to these issues. Both counsels neglected to provide surveillance evidence showing Sarah Hilyard purchasing the bruise cream outside Mr. Hilyard's presence. Mills Police Lieutenant Jerry Rodgers perjured himself with statements in cross-examination that he had no idea what it meant to "put a subject on ice" as he had intentionally done to Mr. Hilyard on August 6, 2020, by leaving Mr. Hilyard in an

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(4) Statements for purposes of medical diagnosis or treatment. — Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

interrogation room alone for hours (Trial Tr. Pp. 383-384). This shows law enforcement had no qualms with lying and easily would have done so on any and all reports, as they had no issues lying in court although sworn and aware it is a crime.

Mr. Hilyard admits awareness of large diapers in the house but asserts his only knowledge was that they were procured in response to a bed-wetting issue suffered by LT that far predates meeting Mr. Hilyard. Mr. Hilyard had no knowledge that the bruise cream existed; the bruise cream he was made aware of was not until October of 2020, when Mills Police Department executed a second search warrant on the family home and found the product hidden in [*Sarah Hilyard's underwear drawer*,] in which Mr. Hilyard did not search himself.

There were several meetings on KH's progression held via Skype with the treatment team at Denver Children's Hospital. Mr. Hilyard and KH's adoptive parents attended them; Dr. Chiesa was not a part of any of these meetings. KH's adoptive father asked the team at the Denver Children's hospital during a follow-up appointment for KH about Dr. Chiesa. No one he spoke to admitted to knowing her. Dr. Chiesa claimed there was no evidence of "Shaken baby Syndrome" (Trial Tr. p. 414) which had been explained to the Hilyard family by the whole treatment team as the cause for visual impairments and brain injuries suffered by KH. KH's adoptive father has shared that he was first told of the diagnosis by Dr. Saiad[29] in Colorado Springs. The doctor reportedly spoke about the violent shake and slam KH had suffered. He did not; at the time believe that KH would ever see again due to damage to optical nerves. Claw marks were left on KH's shoulders and neck when he was grabbed from behind and violently shaken. It appeared KH was swung against something; this is a common occurrence in cases presenting as this one.[30]

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[29] This is merely a guess at spelling of the doctor's name. It has only been told to Mr. Hilyard verbally.

[30] {430 P.3d 745} Dr. Stephen Cina "The next portion of the head exam was whenever I see brain swelling and subdural hemorrhage I'm thinking of a closed head injury. And a closed head injury in a child is very often due to what's called the **shaken baby syndrome or shaken impact syndrome.**" "[T]here was a kind of shaking episode where the head was violently whacked against a firm surface causing a rapid acceleration and deceleration. We have evidence of the impact, we have subdural hemorrhage indicating a sheering, tearing, and we have injury to the deep structures of the brain. So

Dr. Chiesa was tasked with [undermining] the shaking. (This undermining was to make disclosure of claw marks left on KH irrelevant). The claw marks on KH's shoulders and neck were crucial as these were the physical evidence left when inflicting massive damage. The marks left by fingernails were fresh and still bleeding when KH arrived at the hospital; this clearly proves the timeline told by the radiologist, Dr. Rhea and the prosecution to be fabricated for the sole purpose of unjust conviction "guilt by association". The fact that KH had multiple surgeries to attempt to correct the damage to his eyes and optical nerves was glossed over by Dr. Chiesa simply stating the cause as "trauma" (Trial Tr. pp. 395-96). "Shaken baby syndrome" supports the knowledge of treating physicians that KH suffered injuries three (3) to five (5) hours prior to being taken to the hospital, that any more time than that would have been fatal. Upon his arrival, the treating team in Colorado Springs did not believe KH had been taken to the hospital in time, the team worried that KH would not live through the first night of hospitalization due to the injuries and the fast acting nature of brain swelling. Mr. Oldham was given pictures of KH in the hospital, taken by Paul Hilyard, clearly showing the claw marks still fresh days after KH's original admittance. Again, he chose not to use this valuable exculpatory evidence.

Mr. Oldham questioned Dr. Chiesa in regards to the side and areas of the body affected. Dr. Chiesa was clearly speaking of things she had no expertise on. Mr. Oldham did not pressure to get clear explanations from Dr. Chiesa regarding her story to explain the deficiencies suffered by KH the medical team attributed to "Shaken baby Syndrome". Mr. Oldham got Dr. Chiesa to correct the side of the body where KH had suffered damages and admit she was wrong (Trial Tr. Pp. 416-17). Had Mr. Oldham consulted with experts or the treating physicians, he would have been able to either discredit the witness fully or offer direct testimonial(s) contrary to her undermining purposes; this would have swung the result of jury's verdict in

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to me, this would be a so-called shaken impact case." *Nielsen v. Wyoming*, 430 P.3d 740; (Wyo. 2018)(emphasis added).

this case. Dr. Chiesa should not have been allowed to testify as she had no real knowledge of KH's case.[31] Any effort on Mr. Oldham's part would have incurably damaged the witness' credibility and opened up for the accurate timeline of which Mr. Hilyard could easily prove his absence from the scene. It as well would have made relevant that the physical damage left on KH's neck and shoulders that could only have come from Sarah Hilyard as she was the only member of the household with fingernails long enough and large enough to cause the damage . . . Counsel's representation prejudiced Mr. Hilyard's case for lack of due process.

e. Fifth IAC

The Fifth IAC occurred when Mr. Oldham failed to challenge the grounds of Sufficiency of the testimony. Mr. Oldham was asked repeatedly to object to LT's and KLH's testimony at trial; he did not challenge the competency of said child witnesses, and declined to "impeach" LT and KLH, the state's [star witnesses] with prior inconsistent statements. He pointed out that other statements had been made but only aided the prosecution's claim that they had told other stories because Mr. Hilyard allegedly told them to. ("habeas corpus petitioner's claim that trial counsel was ineffective in failing to object to sufficiency of evidence at habitual offender sentencing hearing and thereafter to appeal sentencing enhancement would, if established, "provide cause to excuse the procedural default of his sufficiency of the evidence claim"); *Edwards v. Carpenter*, 529 U.S. at 451 ("Although we have not identified with precision exactly what constitutes 'cause' to excuse a procedural default, we have acknowledged that in certain circumstances counsel's

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[31] *Harris v. Grizzle* 625 P.2d 747; 1981 Wyo. LEXIS 308 {625 P.2d 751} In passing, we note that even had the affidavits of Dr. McFarland and the affidavit of Virginia Rivera been timely filed, they are insufficient as a matter of law. Rule 56(e) requires that affidavits shall be made on personal knowledge and shall be based on competent evidence. Appellant's proffered affidavits are but hearsay on hearsay: Dr. McFarland's testimony was based upon what he heard from appellant's attorney who was relating narration from the appellant. Mrs. Rivera's testimony is hearsay. Furthermore, her affidavit fails to meet the Rule 56(e) requirement that it, "show affirmatively that the affiant is competent to testify to the matters stated therein." **Only an expert medical witness is competent to testify as to medical matters.** Mrs. Rivera, not being a medical expert, is incompetent to testify as to these matters. See *Keller v. Anderson,* supra. (Emphasis added).

ineffectiveness in failing to preserve the claim for review in state court will suffice.") *Murray v. Carrier*, 477 U.S. at 496.

Both LT and KLH made several contrary statements in the months leading up to the arrests of Ryan and Sarah Hilyard as well as the year leading up to Mr. Hilyard's trial. This continued in trial. LT and KLH, after being separated due to being placed in different "permanent" homes (by DFS), were unable to keep their stories in sync. LT stated that his mother, Sarah Hilyard was at the top of the stairs while Mr. Hilyard was at the bottom of the stairs when he alleged KH was injured (Trial Tr. Pp. 539-540). LT then contradicted his own statement by stating that Sarah Hilyard was the only present party when KH allegedly collapsed and that she yelled at Mr. Hilyard after failing to get KH up (Trial Tr. Pp. 562-63). KLH has a different recollection of events, stating: "I believe Sarah was at the bottom. [KH] - - I mean Ryan was at the top" (Trial Tr. Pg. 493). KLH and LT split ideas on prior acts. LT stated Mr. Hilyard pushed the children's faces into stuffed animals so nobody could hear them scream during spankings. (Trial Tr. p 546) When asked a leading question about alleged choking LT stated, he believed Mr. Hilyard picked a child up by the throat one time with no recollection of who the child was (Trial Tr. p. 546).

KLH was led to testify regarding statements LT made alleging Mr. Hilyard of shoving the children into stuffed animals and choking the children. KLH asserted only that LT had told him about the stuffed animal(s) and said he thought choking had happened a few times but maintained that KLH did not know who the victim(s) or perpetrator(s) were. (Trial Tr. Pg. 497) KLH made a fantastic claim with the statement that KH prior to allegedly falling unconscious was bleeding down both thighs from cuts on the back of his knees. (Trial Tr. p. 507) That would defy gravity, no blood was in the house, nor were there any cuts on KH. This is a sign of fabrication because the truth was not deemed enough. KLH showed further signs of his coaching, referring to Mr. Hilyard only as "Ryan" or "father", which he has never

referred to Mr. Hilyard by. This is a mental manipulation known as "disassociation"[32] used on children when attempting to manipulate.

LT was motivated out of his own fear and used his physical dominance to coerce agreement from his much smaller special needs stepbrother KLH. At a visit between the Hilyards and their children, LT told the Hilyards that he knew why the children were in foster care, that the Hilyards were too busy at KH's bedside in the hospital and asked who was taking care of the family pets. Mr. Hilyard told LT that he and Sarah Hilyard had been home with the animals. That is the night LT gave his first statement implicating Mr. Hilyard. Part of that account became state's exhibit 201. KLH's early interviews consistently stated he actually saw nothing that LT had told him what to say. It took several interviews to [coach] KLH to stop saying he had not seen anything and that his stepbrother, LT, had told him what to say. LT was also caught fabricating a story about being thrown face first into a sidewalk and the back of his head stomped by his foster parent. Mr. Oldham chose not to confront LT with this fabrication, bringing it up only when LT's foster parent and counselor were on the stand and only then because Mr. Hilyard requested Mr. Oldham to do so. (Trial Tr. pp. 576-577).

KLH changed stories regularly; this was caused by repetitive (coaching/questioning) by the Investigators, DFS, Court Appointed Special Advocates, his stepbrother LT, Ms. Monroe, school faculty, and/or any foster placements he had been put into. KLH showed this partially while testifying, saying that LT had told him what happened to KH (Trial Tr. Pg. 489).

f. Sixth IAC

The sixth IAC arose when counsel refused to object or intervene when KLH was kept in foster care for extended time so that the investigators could [have access] to coerce his story into what the state wanted it to be. KLH was denied the opportunity to spend quality time with his relatives, being denied these rights to be with extended family denied KLH his right to the Fifth Amendment, Sixth

[32] *State of Wyoming v. Hilyard*, Campbell County Circuit Court, Judge's opinion. "Dismissal for mother's attempted disassociation of the child." (Unpublished) (2014).

Amendment confrontation clause, and Eighth Amendment. Strict scrutiny would appear to be too restrictive test to address government actions that implicate children's constitutional rights. *Ramos v. Town of Vernon*, 353 F.3d 171 (2d Cir. 2003), reh'g, en banc, denied, 353 F.3d 171 (2d Cir. 2004). This was state inflicted child abuse. Mr. Oldham represented Mr. Hilyard in the family case associated with the criminal action as well as the criminal case.

KLH could not find any information on his brother and [best-friend KH], (KLH) had to watch as his stepbrother LT got to go regularly to see his maternal grandmother for unsupervised fun visits. Then watch as said stepbrother LT and their half-brother LH got taken out of foster care to be placed with their maternal grandmother. All the while, he was being routinely interrogated by all of the aforementioned individuals and told that his father and paternal family were bad people; that he needed to be with his mother's family. This was illustrated by KLH on the stand, stating that Mrs. McGlade (from school) had shown KLH his mother's obituary and led him to believe his mother was a good person although Mrs. McGlade never met KLH's mother (Trial Tr. Pp. 526-527). From KLH's "Papa Jimmy" (his maternal grandfather, regularly seen in his placement) KLH stated he "learned a lot about my mom" (Trial Tr. Pg. 527). Neither individual is aware that the accusations levied against KH's and KLH's mother were brought forward by KH with no prompt from anyone. Ashley Monroe, KLH's foster parent, admitted that in September 2020, KLH stated he had not been allowed to see his Uncle Paul since August 2, 2020, (Trial Tr. p. 582).

The youngest sibling, LH, was placed in care of his maternal grandmother along with LT as DFS falsely claimed KH and KLH would be placed together with their paternal grandparents. Several months later, KLH was placed with a cousin on his mother's side in southern Tennessee stating that is "what KLH wanted." Mr. Oldham made no objections to DFS' prior deceitful statements. The numerous variations of KLH's story made obvious that he was coaxed into statements favorable to the coaching team and away from those favorable his paternal family. Eventually, KLH did succumb to the desires of investigators et al, half-heartedly

testifying partially to what he was told. He did continue to show his coaching stating in part: "Although, what [LT] told me was that he (KH) had hit his head on the very bottom step and that - - that knocked him unconscious." (Trial Tr. Pg. 489). Later, he is led with the question of who told him KH was unconscious and he responded: "I - - it was Ryan who had said - - wait a minute. Or was it Sarah? I do not remember if it was Ryan or Sarah." (Trial Tr. Pg. 493) This draws the question of [what] KLH ever **voluntarily** said. This obvious leading of a witness and repetitive questioning to lead to a favorable response and away from the truth shows blatant disregard of justice by Mr. Holbrook and the prosecution team. Mr. Hilyard asserts that he had to implore Mr. Oldham to do the bare minimum, object, which came very late and allowed the led statements Mr. Holbrook made to stand and bolster LT's and KLH's stories.

Mr. Hilyard made repeated requests of Mr. Oldham to challenge LT and KLH as witnesses due to competency as both displayed inability to maintain a consistent story through months of questioning from all around them. Clearly, KLH and LT were assisted in their (final) stories, thus showing complete inability to maintain an independent version of facts. Mr. Oldham refused to challenge, stating "the judge will just allow them and leave it to the jury to decide their credibility."[33] He as well did not use any previously made statements to "impeach" and illustrate for the jury that the stories had changed multiple times. Mr. Oldham did the bare minimum to have the jury question LT's or KLH's credibility and/or level of coaching or coercing by prosecutors. This was another reason for Mr. Oldham to get Mr. Hilyard to waive the right for a speedy trial, to allow the state to illegally prepare the witnesses for trial. This is a cause for the results of the trial to be unfair and partial to the prosecution's stance.

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[33] **W.R.E. Rule 601**. General Rule of Competency. Every person is competent to be a witness except as otherwise provided in these rules.
Child witness competency hearing:
"A party's presentation to the court of evidence that a child witness is incompetent to testify triggers the requirement of a competency hearing, which includes consideration of whether child's memory was tainted by suggestive interview techniques." *English v. State*, 982 P.2d 139, 91 (Wyo. 1999).

g. Seventh IAC

The seventh IAC occurred at the end of his defense presentation, when Mr. Oldham chose to play a video in open court with Detective Good testifying. Mr. Oldham told Mr. Hilyard the purpose was to show that Mr. Hilyard had nothing to do with the crime and clearly no knowledge of it. It was clear Mr. Hilyard was not there, Sarah Hilyard threatened KH with forcing Mr. Hilyard's consent to sending KH to (Wyoming's boy's detention facility) in Worland, WY as she had already done so when she sent KH to Wyoming Behavioral Institute (WBI) (Trial Tr. Pp. 799-803). The showing of the video only assisted the prosecution in their strategy to change the trial from a matter of factual basis to a matter of passions and emotions. The video incited the jury's passions and sympathies for KH. The sympathies felt by the jury for KH turned them against Mr. Hilyard. This would have been true for anyone accused of these crimes. Mr. Oldham knew the prosecution needed passions/emotions of the jury over facts; he knew his client was innocent. Mr. Oldham's actions aided the state in pulling at the jury's heart strings in order to get the conviction. This was working with the prosecution completely violating Mr. Hilyard's Constitutional rights to a fair trial. No reasonably competent attorney would have thought it a valid strategic move.

In summation, trial counsel was deficient in seven unreasonable ways, each of which prejudiced Mr. Hilyard's trial in so serious a way that he was deprived of his right to a fair trial, a unanimous jury verdict, and a trial result which is reliable.

V. Appellate counsels underlying defectiveness:

As well as the instances of IAC of trial counsel, the Appellate Counsel's actions previously mentioned so stymied Mr. Hilyard's claim that his appellate counsel was ineffective serves three functions. First, "Appellate counsel's failure to conduct a reasonable investigation and present meritorious claims raises the substantive issue of whether Mr. Hilyard was deprived of his Fourteenth Amendment right to competent representation on appeal." *Calene v. State; Evitts v.*

Lucey.[34] Second, "Appellate counsel's ineffectiveness provides "cause and prejudice" for reaching the merits of the underlying constitutional claims that . . . [Mr. Hilyard] is presenting to this Court." Third, it shows a substantial denial of due process. The doctrines of procedural bar and exhaustion do not impede this court's review of these issues." *Calene v. State; Harvey v. State; Coleman v. Thompson; Star v. Lockhart.*"[35] This demonstrates that the U.S. Constitution was violated as Mr. Hilyard had constitutionally ineffective assistance of counsel throughout his case.

Mr. Hilyard asked Ms. Lance to bring fourth the following issues:

(1) Ineffective assistance of trial counsel, addressing all the above-indicated information.[36] (2) Actual Innocence, with evidence verifying that he was not the perpetrator of the accused crimes. (3) Prosecutorial misconduct, addressing the issue Ms. Lance actually presented the Court. (4) The potential testimony of KH and his adoptive parents left out due to prejudice against Ms. Monroe.

Wyoming Supreme Court Decision was over-reaching and abusing discretion:

1. The Wyoming State Supreme court used an [inconsistent hearsay] statement as fact: "LT was afraid Mr. Hilyard would hurt him if he did not lie because Mr. Hilyard picked the children up by their throats a lot and sometimes hit them with a leather belt."(Wyo. Sup. Court Dec. Pg. 2 ¶ 8).This may be based off LT's trial statements but is lacking in that LT only mentioned anything about a belt as a threat. LT as well stated, "Once, I remember him picking one of us by the throat. I don't remember which." (Trial Tr. p. 546). Conversely, KLH makes no

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[34] *Calene v. State*, 846 P.2d 679, 694 (Wyo. 1993); *Evitts v. Lucey*, 469 U.S. 387, 396-97 (Wyo. 1985).
[35] *Calene v. State*, 846 P.2d 679, 694 (Wyo. 1993); *Harvey v. State*, 835 P.2d 1074; (Wyo. 1992); *Coleman v. Thompson*, 501 U.S. 722 (Wyo. 1991); *Star v. Lockhart*, 23 F.3d 1280 (8th Cir. 1994).
[36] "The right to counsel is the right to effective counsel." *Harlow v. State,* 105 P.3d 1049 (Wyo. 2005); (on page 26); *Calene v. State,* 846 P.2d 679, 694 (Wyo. 1993); *Cutbirth v. State,* 751 P.2d 1257 (Wyo. 1988); *Evitts v. Lucey,* 469 U.S. 387, 396-396 (Wyo. 1985);*United States v. Cronic,* 466 U.S. 654; *Cuyler v. Sullivan,* 446 U.S. 335, 344 (1980); *McMannon v. Richardson,* 397 U.S. 759, 771 (1970). "Denial of the effective assistance of counsel to one charged with a crime violates due process." *Hawk v. Olsen,* 326 U.S. 271, 66 S.Ct. 116. "The effective assistance of counsel is established, then the decision to overturn the conviction goes to the prejudice prong of Strickland, but if the defendant was actively or constructively denied assistance of counsel, [as in this case] the prejudice prong of Strickland is not required to be shown and the conviction must be set aside." *Woodard v. Collins,* 892 F.2d 1027 (5th Cir. 1990).

corroboration, stating nothing about a belt and that he believed choking had happened a few times, but had no recollection of victim(s) or perpetrator(s). (Trial Tr. p. 497). The Court's statements are vastly over the top from what was said at trial and warrant new allegation(s) that Mr. Hilyard has been denied his Fifth Amendment right to face his accuser as it's unclear who is making the accusation(s).

2. Justice Boomgaarden of the Wyoming Supreme Court seems to argue Wyoming is immune to federal decisions, while asserting part of the decision on *Tome v. United States,* 513 U.S. 15,115S.Ct. 696, 130 L.Ed.2d 574 (1995) showing "prior consistent statements are not admissible under Federal Rule of Evidence 801(d)(1)(B) to rebut an express or implied charge of recent fabrication or improper influence when made after the alleged improper motive arose." Boomgaarden states: "That may be true, but the federal rule does not apply here, and *Tome* is not the law in Wyoming. As we have explained, 'the decision in *Tome* was not based on a constitutional issue and is, therefore, not binding upon this court, which is the final authority on this state's court rules'" (Wyo. Sup. Court Dec. Pg. 9 ¶ 34). This decision totally contradicts what the state is obligated to do. What is stated by the Wyoming Supreme Court's decision is a refusal to follow Federal Court rulings and governance over the law. This violates Mr. Hilyard's Constitutional Right requiring Wyoming to follow U.S. Constitutional Article IV § 1 Full Faith and Credit clause applied to judgments from other Courts.

Full faith and credit given to Florida judgment. —

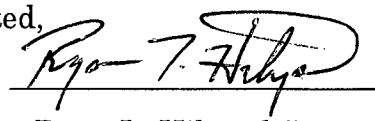
3. Because the parties would be barred from re-litigating the issue in Florida as to whether the pleadings requested the relief which had been granted to the wife and the issue which the husband asserts in the Wyoming action is exactly the same issue which he presented to the Florida courts, and the Florida district court of appeal, which was a court of competent jurisdiction, entered a final judgment on the issue, the Wyoming district court properly gave full faith and credit to the Florida judgment. *Sandstrom v. Sandstrom,* 880 P.2d 103, 1994 Wyo. LEXIS 93 (Wyo. 1994), reh'g denied, 1994 Wyo. LEXIS 102 (Wyo. Sept. 13, 1994).

VI. CONCLUSION

In conclusion, Mr. Hilyard's "trial, if allowed to stand would simply mock fundamental Constitutional guarantees of 'vital importance.'" Strickland.[37] The courts recognize that "'the right to counsel is the right to effective assistance of counsel,'" *Id.* At 686 (quoting *McMann v. Richardson,* 397 U.S. 759, 771 n.14, 25 L.Ed.2d 763, 90 S.Ct. 1441 (Wyo. 1970)), See also *Calene v. State; Duffy v. State; Engberg v. Meyer; Laing v. State,*[38] 'would be devoid of meaning were counsel like [Mr. Oldham] deemed effective." *Rickman v. Bell.* Mr. Hilyard was entitled to the effective assistance of counsel both at trial and on appeal. U.S. Const. Amends. V, VI, XIV; Wyo. Const. Art. 1, § 10. Yet, he was denied the constitutionally required effective assistance by either counsel.[39]

WHEREFORE, Mr. Hilyard prays this Court will grant his Petition for Writ of Certiorari and address the issues contained in his Petition, as he believes this would result in his conviction being overturned based upon actual innocence and ineffective assistance of both trial counsel and appellate counsel. Mr. Hilyard also prays the Court will recognize that this is not merely a case of manifest injustice, and his counsels ignored their Constitutional mandate to protect the rights of their client; they not only ignored but denied him his constitutionally mandated Rights, necessitating a reversal of his conviction, or at least a remand for a new trial.

Respectfully Submitted,



Ryan L. Hilyard #34067 Pro Se

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[37] *Strickland,* 466 U.S. at 684.

[38] *Calene v. State,* 846 P.2d 679, 694 (Wyo.1993); *Duffy v. State,* 837 P.2d 1047, (Wyo. 1992); *Engberg v. Meyer,* 820 P.2d 70 (Wyo. 1991); *Laing v. State,* 746 P.2d 1247, (Wyo.1987).

[39] "Where the state obtains a criminal conviction in a trial in which the defendant is deprived of the effective assistance of counsel, the state unconstitutionally deprives the defendant of his liberty, and the defendant is thus in custody in violation of the Federal Constitution." *Kimmelman v. Morrison* 477 U.S. 365, 106 S.Ct. 2574.