18-9632

No._____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

MAJOR HUDSON III-------PETITIONER

VS.

THE STATE OF OKLAHOMA----------RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE OKLAHOMA COURT OF CRIMINAL APPEALS STATE OF OKLAHOMA

PETITION FOR WRIT OF CERTIORARI

MAJOR HUDSON III

PROSE

JAMES CRABTREE CORRECTIONAL CENTER

216 N. MURRAY

HELENA, OK 73741

QUESTIONS PRESENTED

1. Where a procedural default is the result of ineffective assistance of counsel and where the sixth amendment requires that responsibility for the default to be imputed to the state, can the state circumvent that responsibility with laches to avoid correcting a miscarriage of justice?

2. Can a state create a liberty interest right to a fair trial, protected under the 14th amendment to instruct on lesser included offenses **with or without** a request, and deny that same right with laches? And is that abuse of discretion?

LIST OF PARTIES

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

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The highest state court denied discretionary review on February 19, 2019.

Therefore this Court has jurisdiction under 28 U.S.C. sec. 1257 (a).

RELEVANT CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

Six Amendment provides in part: ... in all criminal prosecutions, the accused shall have the assistance of counsel for his defense.

Fourteenth Amendment provides in part... nor shall any state deprive any person of life, liberty... without due process of law.

Title 21 O.S. sec. 1438 provides: Illegal entry (a) every person who under circumstances not amounting to any burglary, enters any building or part of any building, booth tent, warehouse, railroad car, vessel, or other structure or errection with intent to commit any felony, or malicious mischief, is guilty of a misdemeanor.

Title 22 O.S. sec. 916 provides: lesser included offenses: a crime that is composed of some, but not all the elements of a more serious crime and that is necessarily committed in carrying out the greater crime.

Title 21 O.S. sec. 1431: every person who breaks into and enters the dwelling house of another, which there is at the time some human being, with intent to commit some crime therein, either: 1) by forcibly bursting or breaking the wall, or an outer door, window, or shutter of a window, of such house or the lock or bolts of such door, Or the fastening of such window or shutter, or 2) by breaking in any manner, being armed with a dangerous weapon or being assisted or aided by one or more confederates then actually present... is guilty of burglary in the first degree.

STATEMENT OF THE CASE

A jury tried Mr. Hudson, in 1998, in Oklahoma County, charged with count (1) rape in the first degree 21 O.S. 1991 sec. 1111 and 1114; count (2) burglary in the first degree 21 O.S. sec. 1431; count (3) child abuse 10 O.S. sec. 7115 and count (4) threatening a witness 21 O.S. sec. 455. The jury returned a verdict of guilty on all counts and set punishment at 53 years, 20 years, 10 years, and 7 years. Trial court ordered the sentences to run consecutively.

In the district court of Oklahoma Mr. Hudson on post-conviction appeal claimed 1 appellate counsel was ineffective for not showing that trial counsel was ineffective for not requesting a lesser included offense and (2) appellate counsel was ineffective for not showing abuse of discretion by the judge, for not sua sponte instructing on a lesser included offense. The district court denied the appeal on July 3, 2018. Mr. Hudson subsequently appealed the same claims to the OCCA, claiming a substantial violation. On February 19, 2019, the court denied the attempted appeal. The court denied review, relying on laches. See order in (Appendix (A)) and brief filed in OCCA, in appendix (B)).

RULE 10. REASONS FOR GRANTING WRIT

The Oklahoma Court of Criminal Appeals has decided an important federal question with the use of (laches), in a way that conflicts with relevant decisions of this Court. Simply put the sixth amendment guarantees a right to affective counsel at trial and on direct appeal, this assistance has to be effective Strickland v. Washington. Here, counsel made an egregious error, which was obvious under well established law that denied Mr. Hudson his liberty interest under the 14th amendment. Evidence was introduced by the state that proved Mr. Hudson is actually innocence. More importantly any default made by ineffective assistance of counsel, contributing to a default

the sixth amendment itself requires that responsibility to be imputed the state. *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2646, 91 L.Ed.2d 397 (1996). In any event a failure to hear this claim would be a miscarriage of justice,. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). This so because **the state's own witness's** testimony supports Mr. Hudson's innocence claim.

ARGUMENT

1. Where a procedural default is the result of ineffective assistance of counsel and the sixth amendment requires that responsibility for the default to imputed to the state. The state cannot circumvent that responsibility with laches to avoid correcting a miscarriage of justice.

A fundamental right to effective assistance of on appeal applies as of right. *(Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985)).

In this instant case, appellate counsel made an egregious error by failing to request a lesser included offense instruction, supported by the evidence introduced at trial by both the defense and the state's own eye witness, who proves Mr. Hudson is actually innocent of first degree burglary, thus violating U.S. Const. Amends 6 and 14 rights to fair trial.

ESTABLISHED LAW (OKLAHOMA):

Kaulaity v. State, 859 P.2d 521, 523 Ok.Cr.App. 40 (1993), (holding illegal entry is a lesser included offense of burglary and overruling prior contrary cases).

Title 21 O.S. sec. 1438 (A) provides: Every person who under circumstances not amounting to any burglary, railroad car, vessel, or other structure or errection with intent to commit any felony, or malicious mischief is guilty of a misdemeanor. Dixon v. State, 545 P.2d 1262 at 1265 (1976), (failure to submit a lesser included instruction supported by the evidence violated "substantial rights"). Mr. Hudson, claimed this was a substantial violation, see (Appendix (C)

Petition in error filed in OCCA)).

SUPPORTING EVIDENCE:

See Mr. Hudson's testimony (Tr. Transcript vol. 2 page 64 lines 1-18) (by defense attorney)

1. Q And did you have an occasion to go to her apartment early

2. October 96?

3. A Yes.

4. Q What was the reason for going?

5. A I just called her up one day and asked her what was she

6. doing and did she want some company and she said, yes and I

7. came over.

8. Q Do you recall the date that was?

9. A October 5th

10. Q And about what time did you get there?

11. A Oh, between 10,10:30

12. Q And what did you do first when you got there?

13. A I knocked on the door. She answered the door. I came in.

14. and she introduced me to a lady by the name Ms. Poco and

15. just had a conversation, the three of us and her son.

16. Q What did you guys talk about?

17. A Ms. Poco showed me pictures of her grandchildren, two

18. little boys. Then pictures of how her and her husband met.

(The following testimony is by the **state's eye witness** Ms. Poco) (Tr. Transcript vol. 1 page 50 lines 15-25 and page 51 lines 1-4) (By defense attorney)

15 Q Now when the defendant arrived at the apartment, did you

16 and the defendant have any discussions?

17 A He spoke to me and said hi.

18 Q Did you show him the pictures of your family?

19 A I don't recall if I did or not. I don't recall.

20 Q Did Melissa act like she didn't want Mr. Hudson there?

21 A The only way that I can answer that is that I felt that

22 there was nothing unusual, you know.

23 Q Did she act like he was a stranger?

24 A Well she acted like she couldn't remember his name?

25 Q But did she act like-

(Tr. Transcript vol. 1 page 51 lines 1-4) (By defense attorney)

1 A But she acted like she didn't know who he was, No.

2 Q Did you ever hear her say, no, you can't come in or you

3 must leave?

4 A No, I did not.

INEFFECTIVE ASSISTANCE / STATE'S RESPONSIBILITY:

The appellate counsel in this case failed to act as an effective advocate, by omitting a dead-bang winner on appeal. An issue that is both obvious from the trial record and would have --------

----------resulted in reversal on appeal, constitutes

ineffective assistance... when counsel omits an issue under these circumstances counsel's performance is objectively unreasonable because the issue was obvious from the record, and the omission is prejudicial, because the issue warranted reversal on appeal. Hawkins v. Hannigan, 185 F.3d 1146, 1154 (10th cir 1999) id. at 395.

An accused is guaranteed assistance of counsel by both the state and federal constitutions. This assistance must be effective to satisfy the constitutional guarantee. Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.E.d 2d 674 (1984).

However in this case the jury was never made aware of the fact that a person in Oklahoma can have "consent" to enter a residence and be charged with illegal entry, which is only a misdemeanor. (Kaulaity v. State, 859 P.2d 521, 523 Okla. Cr. App. 40 (1993)); 21 O.S. sec. 1438.

Mr. Hudson was denied a fair trial. Fundamental fairness is the central concern of the writ of habeas corpus. Although a constitutional claim that may establish innocence is clearly the most compelling case for habeas review, it is by no means the only type of constitutional claim that implicates "fundamental fairness" and that compels review regardless of possible procedural defaults. See Rose v. Lundy, 455 U.S. 509, 543 -544 102, S.Ct. 1198, 1216, 71 L.Ed.2d 379 (1982) (STEVENS, J dissenting).

STRICKLAND STANDARD SATISFIED:

Prong (1) 466 U.S. at 687: Counsel failed to request a instruction that was "obvious" under current law. Title 21 O.S. sec. 1438; Title 22 O.S. sec. 916; Kaulaity v. State, 859 P.2d 521, 523 Ok. Cr. App. 40 (1993).

Prong (2) 466 U.S. at 694: Because of this failure, the jury was left with only two options, either to convict Mr. Hudson of first degree burglary or acquitting him outright. One cannot say that, with the availability or a "third" option of illegal entry could not have resulted in a finding of actual innocence of first degree burglary, and raising a reasonable doubt within all the remaining charges.

In arguendo the OCCA, alleges that these claims are barred by laches. However that reasoning fails. See, Holland v. Florida, 560 U.S. 631 130 S.Ct. 2549 177 L.Ed.2d 130 (2010) at 644 (where a state is constitutionally obliged to provide attorney **but** fails to provide an effective one, the attorney's failures that fall below the standard set forth in (Strickland)... are chargeable to the state, **not** the prisoner). See Murray v. Carrier, 447 U.S. 478, 106 S.Ct. 2646, 91 L.Ed.2d 397 (1996) .id at 488, 106 S.Ct. 2645.

Finally, since the state has the duty to provide effective assistance, but fails at that duty, then the state should bare the burden of correcting the error in the interest of justice, protecting the integrity of the judicial system. [N]ot escaping it. Berge v. U.S., 295 U.S. 78, 88 (1935); McCleskey v. Zant, 499 U.S. 467, 494 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991).

Wherefore the reasons and authorities cited herein, Mr. Hudson respectfully prays that this Honorable Court reverses this case for a new trial. In the alternative grant time served.

#2 States cannot create a liberty interest right to a fair trial, to instruct on lesser included offenses with or without a request, and through abuse of discretion deny that right with laches.

In this instant case, Mr. Hudson was deprived of a fundamentally fair trial as a result of abuse of discretion by the judge and ineffective of appellate and trial counsel. OCCA's application of

laches was a deprivation of due process, resulting in a miscarriage of justice. McCleskey v. Zant, 499 U.S. 467, 494, 495, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991).

This Court has held that in cases in which the cause and prejudice standard is inadequate to protect against fundamental miscarriages of justice, the cause and prejudice requirement "must" yield to the imperative of correcting a fundamentally unjust incarceration. Engle v. Isaac, 495 U.S. 107, 135, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

In addition laches will not be imputed to one who has been justifiably ignorant of the facts creating his or her right or cause of action and who therefore has failed to assert it quoting. See Alexander v. Philips Petroleum Co. 130 F.2d 593 (1942).

A state Conviction may be set aside in a habeas proceeding on the bases of erroneous jury instructions when the errors had the effect of rendering the trial fundamentally as to cause a denial of a fair trial. Shafer v. Stratton, 906 L.Ed.2d 402 (1902).

In the light most favorable to the state, the states own eyewitness (Joyce Poco) testimony proved Mr. Hudson is innocence of first degree burglary. But it was hidden from the jury the fact that Mr. Hudson could have been charged with illegal entry, see proposition one.

STATE CREATED EXPECTATION:

This Court has recognized that a state may create a liberty interest in it laws that are protected by the Fourteenth Amendment. (Joseph Vitek v. Larry D. Jones, 455 U.S. 480 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980).

In Atterberry v. State, 731 P.2d 420, 422 (Ok.Cr.App. (1986) (trial courts have a **duty** to instruct the jury on the salient features of the law **with or without** a request), citing Wing v. State.280 P. 2d 740 (Ok.Cr.App. 29 1955).

A legitimate claim of entitlement to a protected liberty interest is accomplished when the language place's substantive limitations on official discretion, *Kentucky Dept. of Corrections* v. *Thompson*, 490 U.S. 454, 456, 109 S.Ct. 1904 L. Ed. 2d 506 (1089). "Further by mandating the outcome to be reached upon a finding that the relative criteria have been met." id at 463, 109 S.Ct. 1904 (citations omitted).

This criteria was met when the **state's eyewitness** and Mr. Hudson, testified to the issue of consent to enter the residence. See, testimony in proposition one. Under *Atterberry*, the court has **duty** to instruct the jury on the lesser included offense of illegal entry. Title 21 O.S. sec. 1438.

Furthermore, in Kaulaity v. State, 859 P.2d 521, 523 Ok. Cr. App. 4 (1999) (dictates that illegal entry is a lesser included offense of first degree burglary). And *Dixion v State*, 545 P.2d 1262 at 1265 (19976) (this is a substantial violation); *Dawson v. State*, 647 P.2d 447, 449 Ok. Cr. App. (1982), (this is reversible error); *Robert v. State*, 29 P. 3d 583 Ok. Cr. App. (2001) at 589, "if a defendant puts on evidence that his entry into the relevant premises was authorized or consented to, or if evidence introduced by the state raises the issue, the trial court **must** instruct the jury regarding this defense".

Therefore, appellate counsel should be deemed ineffective for omitting this obvious issue of abuse of discretion. See, *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2646, 91 L.Ed.2d 397 (1996), ("where a procedural default is the result of ineffective assistance of counsel, the sixth amendment itself requires that responsibility for the default to be imputed to the state").

CONCLUSION

Finally, allowing an exception to a procedural default rule in this case enhances confidence in the CRIMINAL JUSTICE SYSTEM and the role of JUDGES, PROSECUTORS, and DEFENSE ATTORNEY'S.

Wherefore the reasons and authorities cited herein Mr. Hudson respectfully prays this Honorable Court reverses this case for a new trial. In the alternative grant time served.

Respectfully, submitted,

I declare under penalty or perjury that the forgoing is true and correct.

May / 2 / 2019

(S) Major Hudson III 28 U.S.C. sec. ~~1756~~ 28 U.S.C. § 1757

Major Hudson III
264410
216 N. Murray
Helena, Oklahoma 73741

PROSE