Capital Case

Case No. _____

In the Supreme Court of the United States

RICKY RAY MALONE,
Petitioner,
v.
MIKE CARPENTER, Warden,
Oklahoma State Penitentiary,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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Dated this 15th day of July, 2019

Capital Case

QUESTIONS PRESENTED

1. **Where plain error review includes a built-in prejudice component, is subjecting an acknowledged plain error to a second round of harmlessness review pursuant to *Chapman v. California*, 386 U.S. 18 (1967) contrary to clearly established federal law?**

2. **Must federal courts consider the synergy amongst acknowledged errors, when such individual errors have failed to satisfy their substantive prejudice components, in assessing whether the cumulative effect of the errors results in a constitutional violation?**

LIST OF PARTIES

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

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Ricky Malone, respectfully petitions this Court and prays that a writ of certiorari issue to review the opinion rendered by the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals, Case No. 17-6027, denying relief is reported at *Malone v. Carpenter*, 911 F.3d 1022 (10th Cir. 2018) (Appendix A). The federal district court's denial of the Petition for Writ of Habeas Corpus is found at *Malone v. Royal*, Case No. CIV-13-1115-D, 2016 WL 6956646 (W.D. Okla. Nov. 28, 2016) (unpublished) (Appendix B). The Tenth Circuit's Order denying Petitioner's Petition for Rehearing dated February 14, 2019, is found at Appendix C. The state court decision of the Oklahoma Court of Criminal Appeals (OCCA) denying Mr. Malone's first direct appeal (D-2005-600) on August 31, 2007, is reported at *Malone v. State*, 168 P.3d 185 (Okla. Crim. App. 2007) (Appendix D). The state court opinion denying direct appeal D-2010-1084 from a re-sentencing bench trial can be found at *Malone v. State*, 293 P.3d 198 (Okla. Crim. App. 2013), *cert. denied*, 134 S. Ct. 172 (No. 12-10782 Oct. 7. 2013) (Appendix E). The OCCA's opinion denying Mr. Malone's Original Application for Post-Conviction Relief can be found at *Malone v. State*, No. PCD-2011-248 (Okla. Crim. App. Apr. 23, 2013) (unpublished) (Appendix F).

Petitioner's Second Application for Post-Conviction Relief was denied in *Malone v. State*, No. PCD-2014-969 (Okla. Crim. App. Jan. 30, 2015) (unpublished) (Appendix G). An agreed stipulated Order finding Mr. Malone incompetent to be executed is attached as Appendix H, *In Re: The Mental Health of Ricky Ray Malone*, Case No. MH-2016-11 (Pittsburg County Oct. 26, 2017). Of note, the Order directed Mr. Malone be housed at the Oklahoma Forensic Center in Vinita, Oklahoma, where he is undergoing treatment aimed at restoring his competency to be executed.

STATEMENT OF JURISDICTION

The Tenth Circuit Court of Appeals rendered its decision denying relief on December 20, 2018, Case No. 17-6027. Mr. Malone timely filed a petition for rehearing and rehearing *en banc* on February 4, 2019, which the Tenth Circuit denied on February 14, 2019. An extension of time to file the petition for a writ of certiorari was granted by Justice Sotomayor on May 1, 2019, extending the time to July 15, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the

> nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VIII provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV, § 1 provides:

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

Title 28, U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

This case presents the tragic circumstance of the death of an Oklahoma Highway Patrol Officer. In the early morning hours of December 26, 2003, Mr. Malone set up a methamphetamine lab on the side of a rural dirt road in Cotton County, Oklahoma. While making the drugs, Mr. Malone had taken some pain pills and passed out in the front seat of his vehicle. A passerby, a newspaper delivery driver, noticed Mr. Malone and being afraid he might need help, alerted an Oklahoma Highway Patrol Trooper. Trooper Green arrived at Mr. Malone's location at about 6:40 in the morning. Trooper Green awoke Mr. Malone, and an altercation ensued between the men. Tragically, the altercation ended with the shooting death of Trooper Green.

Mr. Malone was charged with first degree murder, and a jury found Mr. Malone guilty and imposed a death sentence. Mr. Malone's culpability for Trooper Green's death was undeniable; however, it was not certain that Mr. Malone possessed the requisite intent for first degree murder. The defense of voluntary intoxication was presented, which could have allowed the jury to properly convict Mr. Malone of second degree murder. Yet, the jury instructions on the defense were significantly flawed, and counsel engaged in a pattern of deficient performance further hampering the intoxication defense.

On direct appeal, the Oklahoma Court of Criminal Appeals (OCCA) affirmed Mr. Malone's conviction, but vacated the death sentence due to overly extensive and emotional victim impact statements and the prosecutor's second-stage closing arguments, which together were egregiously improper and unfairly prejudicial and clearly invited passion, prejudice, and arbitrariness into the jury's sentencing determination. *Malone v. State*, 168 P.3d 185 (Okla. Crim. App. 2007). The case was remanded for a new sentencing trial.

With respect to Mr. Malone's claim of erroneous jury instructions, the OCCA found:

> ***Malone's jury instructions did not, by themselves, adequately or accurately inform his jury that he should prevail on his intoxication defense if he could establish that due to methamphetamine intoxication at the time of the crime, he was unable to form the required 'malice aforethought' for first-degree murder***, *i.e.*, if the evidence established he was unable to form a deliberate intent to kill Trooper Green. ***This Court concludes that the failure of Malone's jury instructions to accurately instruct his jury in this regard constitutes plain error.*** This was the critical question in determining whether Malone could prevail on his voluntary intoxication defense, and his jury instructions, even read as a whole, fail to adequately articulate this standard.

Id. at 200-01 (emphasis added).

In Oklahoma, a finding of plain error entails a subsidiary finding of a violation of substantial rights, meaning the error affected the outcome of trial. Yet, the OCCA denied relief by concluding "although we find plain error in the

trial court's failure to properly instruct Malone's jury on his voluntary intoxication defense, we do not hesitate to conclude that this error was harmless beyond a reasonable doubt in this case." *Id*. at 203.

In addition to the erroneous jury instructions, counsel's performance was found deficient in relation to the presentation of the intoxication defense. First, counsel failed to object to the plainly erroneous jury instructions. And, second, counsel failed to adequately prepare its well-credentialed addiction specialist, a medical doctor who testified in support of the intoxication defense, by not even having this expert witness meet with Mr. Malone until the trial was well underway. This, in turn, forced a change in defense strategy mid-trial and facilitated the State's impeachment of the defense expert. Although the OCCA recognized each of these instances as deficient performance, it declined to grant guilt-stage relief. *Id*. at 220-21.

Upon the re-sentencing remand for the other issues, questions began to arise concerning Mr. Malone's competency to stand trial. The trial court twice sent Mr. Malone to the Oklahoma Forensic Center in Vinita, Oklahoma, for restoration of competency. Remarkably, defense counsel eventually stipulated Mr. Malone was competent, waived his right to a jury trial, and proceeded with a bench re-sentencing trial before the very same judge who had been exposed to the tainted evidence and prosecutorial misconduct that had forced the OCCA's

remand. This bench trial resulted in Mr. Malone again being sentenced to death.

Mr. Malone appealed to the OCCA, which affirmed the death sentence resulting from the bench re-sentencing trial in *Malone v. State*, 293 P.3d 198 (Okla. Crim. App. 2013), *cert. denied*, 134 S. Ct. 172.

Mr. Malone unsuccessfully sought state post-conviction relief. He pursued an original state post-conviction action during the pendency of his second direct appeal proceedings. The OCCA denied this application by unpublished order April 23, 2013. *See* Appx. F. A successive post-conviction application was filed November 13, 2014, but the OCCA denied relief on January 30, 2015, in an unpublished decision. *See* Appx. G.

Mr. Malone timely filed a Petition for Writ of Habeas Corpus in the Western District of Oklahoma. The federal district court denied habeas relief, discovery, and an evidentiary hearing on November 28, 2016. *See* Appx. B. The district court declined to grant a certificate of appealability (COA) as to any of the issues raised in the Habeas Petition. An appeal was timely commenced to the Tenth Circuit Court of Appeals, Case No. 17-6027.

During the pendency of his federal habeas action, Mr. Malone returned to state court to litigate his competency to be executed. Ultimately, this litigation settled. On October 26, 2017, the Pittsburg County District Court entered an

agreed stipulated Order finding Mr. Malone incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986), and the related state law standard, *Bingham v. State*, 169 P.2d 311 (Okla. Crim. App. 1946). *See* Appx. H. The state court specifically ordered that Mr. Malone may not be executed so long as he is incompetent and shall be transported to the Oklahoma Forensic Center in Vinita. *Id*. at 7. Of note, Mr. Malone is still housed at the Oklahoma Forensic Center in Vinita and is receiving treatment aimed at restoring his competency to be executed.

The court below granted COA and considered, *inter alia*, the claims forming the basis for the questions presented in this Petition for Writ of Certiorari. On December 20, 2018, the Tenth Circuit issued its opinion declining to grant habeas relief. *See* Appx. A. The thrust of the opinion was that "overwhelming evidence of Defendant's guilt" required affirmance, despite the court's acknowledgment of the errors impacting the voluntary intoxication defense. *Id*. at 1026. This opinion will be further discussed, *infra*, in relation to why certiorari should be granted.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant the Writ Because Subjecting Legal Claims, Which Already Have Satisfied a Built-in Prejudice Component, to a Second Layer of Harmless Error Analysis Is Fundamentally at Odds with Decisions of This Court.

Mr. Malone has never disputed he caused the death of Trooper Green. The only real issue in the first stage of Mr. Malone's trial was whether he had the necessary intent for first degree murder. Mr. Malone raised the defense of voluntary intoxication, and his jury was instructed as to his defense. In realty, however, the jury instructions failed in the critical respect of actually tying Mr. Malone's intoxication to the mental element for first degree murder. With correct instructions, a jury could have properly convicted Mr. Malone of second degree murder.

The jury was given a series of instructions as to the voluntary intoxication defense. O.R. 523-27 (Instruction Nos. 37-41) Unfortunately, the instructions, as given, were grossly deficient and misled the jury as to Mr. Malone's theory of defense. Most significantly, Instruction No. 38 failed to reference the requisite mental state – *malice aforethought* – for first-degree murder. Erroneously, Instruction No. 38 merely included the technical legal term "Mens Rea,"[1] which

[1] The term "Mens Rea" is included in Oklahoma's uniform jury instructions with the intention that the term be replaced with the actual mens rea applicable to the crime at issue. Here, the mens rea for murder is malice aforethought. *See* OUJI-CR 8-36.

likely meant nothing to lay jurors:

> The crime of murder in the first degree has [sic] an element the specific criminal intent of ***Mens Rea***. A person in [sic] entitled to the defense of intoxication if that person was incapable of forming the specific criminal intent because of his intoxication.

O.R. 524 (citing OUJI-CR 8-36) (emphasis added).[2] Instruction No. 40 put the abstract concept of Mr. Malone's intoxication into practice by instructing the jury:

> It is the burden of the State to prove beyond a reasonable doubt that the defendant formed the ***specific criminal intent*** of the crime of murder in the first degree. ***If you find that the State has failed to sustain that burden, by reason of the intoxication of Ricky Ray Malone then Ricky Ray Malone must be found not guilty of murder in the first degree.*** You may find Ricky Ray Malone guilty of murder in the second degree if the State has proved beyond a reasonable doubt each element of the crime of murder in the second degree.

O.R. 526 (citing OUJI-CR 8-38) (emphasis added). This instruction provided the means by which the jury could have considered and properly convicted Mr. Malone of second degree murder. Yet, Instruction No. 38 failed to correctly identify the mental state required for first degree murder, instead only referencing the technical legal term "Mens Rea." And, Instruction 40, which put the intoxication defense into practice, likewise failed by only mentioning "specific

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[2] The typographical errors were present in the actual jury instruction and were corrected subsequent to Mr. Malone's trial. *See In Re Adoption of the 2005 Revisions to the Oklahoma Uniform Jury Instructions – Criminal (Second Edition)*, 119 P.3d 753, 776-77 (Okla. Crim. App. 2005).

criminal intent"[3] instead of malice aforethought. Because the jury was not instructed as to the meaning of mens rea, *and* Instruction No. 40 did not adequately identify which specific criminal intent was to be overcome by Mr. Malone's intoxication, the jury was incapable of giving effect to his defense.[4]

A. Mr. Malone Satisfied Oklahoma's Plain Error Standard, Which Includes a Built-in Prejudice Component.

Mr. Malone presented this error on direct appeal to the OCCA. The OCCA found the voluntary intoxication instructions to constitute plain error; however, it declined to grant relief because it found the error to be harmless. Plain error review was conducted because "defense counsel did not raise an objection to the jury instructions given at Malone's trial." *Malone*, 168 P.3d at 197. With respect to its plain error analysis, the state court specifically held:

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[3] Yet another instruction added more confusion to the mix by conflating the intoxication defense with the "special state of mind known as willfully." O.R. 527, Instruction No. 41 (citing OUJI-CR 8-39). This language was confusing to the extent it may have misled jurors to believe first degree murder to be a general intent crime with a mental state of willfully. The OCCA concluded the trial court was wrong to instruct the jury in this way but found the error "not significant." *Malone*, 168 P.3d at 199 nn.62-63.

[4] On direct appeal, the OCCA was critical of the "specific criminal intent" language, which was included in Instruction No. 40 (OUJI-CR 8-38), because the language "did *not* inform Malone's jury what specific mental state was at issue." *Malone*, 168 P.3d at 199. Subsequently, OUJI-CR 8-38 was amended to insert the "Specific Intent Required By the Statute" in the instruction. *See* OUJI-CR(2d) 8-38 (2010 Supp.). However, Mr. Malone did not receive the benefit of this instruction.

> This leaves us with the problem in the current case that Malone's jury instructions did not, by themselves, adequately or accurately inform his jury that he should prevail on his intoxication defense if he could establish that due to methamphetamine intoxication at the time of the crime, he was unable to form the required "malice aforethought" for first-degree murder, *i.e.*, if the evidence established he was unable to form a deliberate intent to kill Trooper Green. **This Court concludes that the failure of Malone's jury instructions to accurately instruct his jury in this regard constitutes plain error. This was the critical question in determining whether Malone could prevail on his voluntary intoxication defense, and his jury instructions, even read as a whole, fail to adequately articulate this standard.**

Id. at 200-01 (emphasis added). This holding was significant because a finding of plain error under Oklahoma law entails, as a component, that such error resulted in a violation of substantial rights. *Hogan v. State*, 139 P.3d 907, 923 (Okla. Crim. App. 2006). Specifically, pursuant to Oklahoma law, plain error consists of: 1) an actual error (i.e., deviation from a legal rule); 2) that is plain or obvious; and 3) that affects a defendant's substantial rights (i.e., affects the outcome of the proceeding). *Id*.; *see also United States v. Olano*, 507 U.S. 725, 734-36 (1993) (discussing substantial rights and plain error review in the context of Fed. R. Crim. P. 52). Therefore, the OCCA's finding of plain error itself encompassed the finding that the erroneous instructions affected the outcome of Mr. Malone's trial, or, alternately stated, Mr. Malone was *harmed* as a result of the erroneous instructions.

Nonetheless, Mr. Malone's claim was subject to a redundant layer of harmless error review. *Malone*, 168 P.3d at 201-03. Unequivocally acknowledging the erroneous jury instructions to constitute plain error, the OCCA held:

> [A]lthough we find plain error in the trial court's failure to properly instruct Malone's jury on his voluntary intoxication defense, we do not hesitate to conclude that this error was harmless beyond a reasonable doubt in this case.

Id. at 203. This harmlessness determination is contradictory considering the state court's earlier finding that the instructions failed to accurately instruct the jury on the "critical question" of whether Mr. Malone was able to form malice aforethought due to his intoxication. *Id*. at 200-01. This second finding of harmlessness cannot be squared with the OCCA's initial finding of plain error, which included as a necessary component that Mr. Malone's substantial rights were violated, meaning that the erroneous instructions affected the outcome of trial.

B. This Court's Opinions Establish that Constitutional Errors are Only Susceptible to One Layer of Harmless Error and/or Prejudice Review.

The OCCA decision was contrary to clearly established federal law due to the state court's doubling up on harmless error review. *See Williams v. Taylor*, 529 U.S. 362, 405 (2000); 28 U.S.C. § 2254(d)(1) (holding a state court decision is "contrary to" federal law "if the state court arrives at a conclusion opposite to

that reached by [the Supreme Court] on a question of law.") This Court has taken up the issue of whether a second layer of harmless error analysis may be applied to a legal claim where the claim itself incorporates a determination of whether the error had an affect on the outcome of the proceedings. *Kyles v. Whitley*, 514 U.S. 419, 435-36 (1995). *Kyles* held that once a reviewing court has found *Bagley*[5] error then such error is not susceptible to another layer of harmless error review. *Id*. at 435. A finding that a reasonable probability exists that the result of the proceeding would have been different "necessarily entails the conclusion that the [error] must have had 'substantial and injurious effect or influence in determining the jury's verdict.'" *Id*. (internal citations omitted).

Just like the error discussed in *Kyle*s, the OCCA's plain error finding here involved a determination that Mr. Malone's substantial rights were violated, meaning the error affected the outcome of the proceedings. *See Hogan*, 139 P.3d at 923 (defining the components of plain error). And, *Kyles* made clear that in addition to the *Brady* error discussed therein, other constitutional errors, which include a built-in prejudice component cannot be subjected to a separate layer of harmless error analysis. 514 U.S. at 436 n.9 (citing *Hill v. Lockhart*, 28 F.3d 832, 839 (8th Cir. 1994)). Further, *Hill v. Lockhart*, which this Court cited with

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[5] *United States v. Bagley*, 473 U.S. 667 (1985), applied *Brady v. Maryland*, 373 U.S. 83 (1963), in the context of the prosecution withholding impeachment evidence.

approval in *Kyles*, held "it is unnecessary to add a separate layer of harmless-error analysis to an evaluation of whether a petitioner in a habeas case has presented a constitutionally significant claim for ineffective assistance of counsel." 28 F.3d at 839.

The rationale in *Kyles* and *Hill* must apply to Mr. Malone. The OCCA's finding of plain error, which included a finding of prejudice, is a more onerous finding than the reasonable probability standards applied to *Brady* or *Strickland* claims. The OCCA found constitutional error in Mr. Malone's voluntary intoxication instructions utilizing its plain error review, which included the finding of a substantial rights violation, i.e. the erroneous instructions affected the outcome of trial. This Court's refusal to permit two layers of harmless error analysis once a constitutional error, which includes a built-in prejudice component, has been found must likewise apply in Mr. Malone's circumstance. *Accord Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (applying general standards in habeas review).

C. The Writ Must Be Granted to Ensure State Courts Do Not Impose a Doubly Burdensome Showing of Harm Upon Defendants Who Have Already Established a Prejudicial Constitutional Error.

Rule 10 of this Court provides, *inter alia*, that reasons for a grant of certiorari include where "a state court or a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant

decisions of this Court." Sup. Ct. R. 10. Here, the decision below is in conflict with the clearly established rule of *Kyles v. Whitley* that two layers of harmless error review may not be applied to a constitutional error which includes a built-in prejudice component. Certiorari should be granted to reaffirm the fundamental principal that once a criminal defendant has demonstrated a prejudicial constitutional error, he need not show a second time that he was harmed as result of such error.

In the decision below, the Tenth Circuit Court of Appeals reviewed Mr. Malone's claim of instructional error pursuant to the restrictions imposed by the AEDPA. *Malone v. Carpenter*, 911 F.3d 1022, 1032 (10th Cir. 2018). The appeals court paid little attention to whether the OCCA's stacking of plain error and harmless error analyses was contrary to clearly established federal law. Instead, the appeals court determined that the OCCA's mention of "plain error" only entailed the finding "that the error is plain or obvious."[6] *Id*. (citing *Hogan*, 139 P.3d at 923). Therefore, the appeals court ultimately held, "the OCCA's statement that there was 'plain error' encompassed no determination regarding

[6] Interestingly, the State never asserted this position below. Instead, the State argued "[w]hether Oklahoma's plain error rule permits a harmless error analysis is a question of state law," which ostensibly presented no constitutional issues appropriate for federal habeas review. *See e.g., Malone v. Carpenter*, Case No. 17-6027, *Supplemental Brief of Respondent-Appellee*, at 14-15 (10th Cir. Aug. 16, 2018).

prejudice." *Id*.

As shown, *supra*, the OCCA was not equivocal in its holding of plain error, nor did that court specifically limit its finding to Mr. Malone only satisfying the plain error component that the error was plain or obvious:

> This Court concludes that the failure of Malone's jury instructions to accurately instruct his jury in this regard constitutes plain error.
>
> . . . .
>
> [A]lthough we find plain error . . . we do not hesitate to conclude that this error was harmless beyond a reasonable doubt in this case.

Malone, 168 P.3d at 201-03. The OCCA's subjecting plain error to a second layer of harmlessness review is not limited to Mr. Malone's case. In fact, two OCCA judges have taken issue with this practice:

> Under the third element of plain error, the burden is on the defendant to show that the obvious error affected substantial rights. In other words, the defendant must show that the error was prejudicial and affected the outcome of the district court proceedings. It is in this analysis that a reviewing court considers the prejudicial impact or harmlessness of the alleged error. Conducting a separate harmless error analysis after finding the existence of the three elements of plain error-as the majority does in this case-does not comport with traditional plain error review. *See United States v. Olano*, 507 U.S. 725, 734-35 (1993). For this reason, I concur in result.

Heathco v. State, No. F-2013-547, (Okla. Crim. App. Feb. 6, 2015) (Johnson & Lewis, JJ., concurring in results) (unpublished) (opinion attached hereto as Appx. I). Judges Johnson's and Lewis's concurrence in *Heathco* confirms the OCCA's finding of plain error in Mr. Malone's case was not limited to merely a

determination that the error was plain or obvious, as the circuit court found below.

Assuming certiorari is granted, a likely result would be a remand to the Tenth Circuit Court of Appeals to consider the instructional errors affecting the voluntary intoxication defense de novo and absent AEDPA constraint. Further, a grant of certiorari would compel state courts such as the OCCA to refrain from engaging in a second layer of harmless error review, which deprived Mr. Malone of relief for a constitutional error that had already been deemed prejudicial, all in contravention of this Court's clearly established law.

II. This Court Should Grant the Writ Because the Federal Courts Are Inconsistent in Considering the Synergy Amongst Acknowledged Errors When Assessing Whether the Cumulative Effect of the Errors Results in a Violation of Constitutional Rights.

A. Background.

As noted, Mr. Malone maintained throughout that he did not intentionally kill Trooper Green with malice aforethought. Rather, Mr. Malone was so intoxicated on methamphetamine and pain pills at the time of the homicide that he could not form the necessary intent for first-degree murder. Thus, the critical issue before the jury at trial was whether the homicide was the result of malice aforethought or whether Mr. Malone was so intoxicated that he was unable to form the requisite intent.

At trial, **three** acknowledged errors eliminated from the jury's consideration the question of first-degree murder versus second-degree murder. First, as discussed previously, a series of incorrect jury instructions failed to apprise Mr. Malone's jury of the contours of the intoxication defense. Critically, the instructions failed to link Mr. Malone's intoxication to malice aforethought, and instead, only informed the jurors that his intoxication had to overcome the technical legal term "Mens Rea." No further explanation or guidance was offered to allow the jury to understand this instruction. Second, Mr. Malone's own counsel stood idly by, without objecting to the erroneous intoxication instructions, giving the jurors no reason to believe the jury instructions were anything other than proper. Counsel solidified the jurors' confusion by reurging in closing arguments the erroneous instructional language:

> We're not talking alcohol; we're talking meth. Meth intoxication. Can negate the ability alone to form the mens rea for murder in the first degree of the specific intent [sic].

Tr. 1, Vol. 5 at 1251.

The effect of these two errors, which the Oklahoma court recognized impacted the "critical question" at the heart of Mr. Malone's defense, was compounded *exponentially* by a third error – further deficient performance. Specifically, trial counsel called a well-credentialed addiction expert as the centerpiece of Mr. Malone's intoxication defense. Yet, shockingly, counsel did

not have the expert meet or evaluate Mr. Malone until the middle of trial. This late meeting between expert and defendant resulted in new facts coming to light – contrary to those defense counsel had previously provided the expert. This drastic change in facts devastated the very theory counsel had laid out for the jury. As such, defense counsel was forced to modify the theory of defense in the midst of trial, allowing the State to impeach and discredit the critical addiction specialist, and otherwise undermine Malone's voluntary intoxication defense.

Because the issues of intent and intoxication were at the very core of the defense, it was imperative that the jurors be given the proper standard by which to assess Mr. Malone's guilt. And, trial counsel had no more important job than to defend against an attack on Mr. Malone's sole defense – that his actions precipitated from extreme intoxication instead of malice aforethought. Yet, counsel failed miserably by standing idly by as the defense was undercut by the jury instructions and counsel's own deficiencies.

The Oklahoma Court of Criminal Appeals recognized both that the instructions were legally inadequate and that counsel's conduct with respect to the same was deficient, but the court declined to grant relief, concluding Mr. Malone "could not have been prejudiced." *Malone v. State*, 168 P.3d 185, 198-203, 221 (Okla. Crim. App. 2007). *Cf. id*. at 201 ("This was the critical question in determining whether Malone could prevail on his voluntary intoxication

defense, and his jury instructions, even read as a whole, fail to adequately articulate this standard"). Like the other two errors, the OCCA did not hesitate to find counsel's performance deficient with respect to the expert's preparation:

> [I]t is unreasonable and deficient performance for attorneys who are defending a case in which the only plausible defense to first-degree murder involves drug use that impaired the defendant's mental processes—where the fact that the defendant killed the victim is established by overwhelming evidence—to fail to arrange a meeting between the defendant and his chosen expert until the defendant's murder trial is well underway.

Id. at 220. However, the state court found again that Mr. Malone was not prejudiced by counsel's mishandling of the expert. *Id.*

Given that all three of these acknowledged errors cut the legs out from underneath Mr. Malone's voluntary intoxication defense, the errors possessed "'an inherent synergistic effect' that . . . made them collectively more potent than the sum of their parts." *Littlejohn v. Royal*, 875 F.3d 548, 571 (10th Cir. 2017) (citing *Cargle v. Mullin*, 317 F.3d 1196, 1221 (10th Cir. 2003)). The jury was unable to properly consider the expert's testimony, as well as the other evidence at trial, that Mr. Malone lacked the specific intent for first degree murder under the erroneous jury instructions.

On federal appellate review, the Tenth Circuit expeditiously disposed of Mr. Malone's cumulative error claim. The circuit court discussed the three acknowledged errors and stated each error considered in isolation failed to merit

relief. However, the court ostensibly did not consider the synergistic effect of the combined errors on Mr. Malone's defense. The circuit court went as far as acknowledging that it has "awarded relief when the errors [have] an 'inherent synergistic effect' on the outcome"; however, there was no further discussion or analysis of the synergy amongst the errors. *Malone v. Carpenter*, 911 F.3d 1022, 1040 (10th Cir. 2018) (citing *Cargle,* 317 F.3d at 1221). Instead, the circuit court concluded only that the *Brecht* standard had not been met and that the evidence against Mr. Malone was "far too compelling."[7] *Malone*, 911 F.3d at 1040.

B. Inter- and Intra-Circuit Splits on Whether Synergistic Effect Must Be Considered.

Beyond reviewing errors in their individual capacities, this Court has made clear that it is necessary to also consider the aggregate impact of errors in a case. *Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978); *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973). *See also Kyles v. Whitley*, 514 U.S. 419, 421 (1995). A cumulative-error analysis, which itself is an extension of the harmless-error analysis, "aggregates all errors found to be harmless and analyzes whether their cumulative effect on the outcome of the trial is such that

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[7] Cumulative error was considered by the courts below; however, the OCCA failed to include the attorney errors in its analysis and the federal courts failed to account for the whole of the effect caused by these three specific errors. *See*, *e.g.*, *Malone*, 168 P.3d at 233 (failing to include deficient attorney performance in cumulative error analysis). As such, the circuit court's cumulative consideration was de novo, absent AEDPA constraint.

collectively they can no longer be determined to be harmless." *Cargle*, 317 F.3d at 1206 (quoting *United States v. Toles*, 297 F.3d 959, 972 (10th Cir. 2002)). *See also United States v. Rivera*, 900 F.2d 1462, 1470 (10th Cir. 1990). The rationale for this analysis is that denial of due process can arise from a single, prejudicial error or from the combined effect of less prejudicial errors that collectively run afoul of the fundamental fairness guarantee. *Taylor*, 436 U.S. at 487 n.15. *See also Rivera*, 900 F.2d at 1469 ("The cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error.").

To this end, the circuit courts have been called upon to review for cumulative error, with many circuits recognizing and placing heavy emphasis on the synergy and/or interplay amongst the errors in assessing their cumulative effect. *Id.* *See also Mello v. DiPaulo*, 295 F.3d 137, 151-52 (1st Cir. 2002); *Derden v. McNeel*, 978 F.2d 1453, 1454, 1456 (5th Cir. 1992) (requiring errors to "so infect[] the entire trial that the resulting conviction violates due process"); *Alvarez v. Boyd*, 225 F.3d 820, 824 & n.1 (7th Cir. 2000) (considering errors together to determine whether they so infected jury deliberations such that they denied petitioner a fundamentally fair trial); *Parle v. Runnels*, 505 F.3d 922, 928 (9th Cir. 2007) ("[W]here the combined effect of individually harmless errors renders a criminal defense 'far less persuasive than it might [otherwise] have

been,' the resulting conviction violates due process.") (citing *Chambers*, 410 U.S. at 294, 298, 302-03).

Here, the cumulative effect of the trial errors deprived Mr. Malone of his constitutional right to a fair and reliable trial. The errors' cumulative effect came from their synergy; all three errors impacted Mr. Malone's voluntary intoxication defense. This synergy is the very type of combination that should have warranted relief. *See*, *e.g.*, *Cargle*, 317 F.3d at 1206. As discussed herein, by omitting a discussion of the errors' combined synergistic effect, the Tenth Circuit is in conflict with its own precedent as well as other United States courts of appeals, not to mention with prior decisions of this Court. This Court's settling hand is necessary to maintain uniformity of the circuits' decisions.

The Tenth Circuit Court of Appeals has made clear that the "synergistic effect of errors" is grounds for relief. *See John Grant v. Trammell*, 727 F.3d 1006, 1026 (10th Cir. 2013) (discussing synergy of errors in cumulative error context); *Cargle*, 317 F.3d at 1221 (finding cumulative error due to synergistic effect of errors); *Hanson v. Sherrod*, 797 F.3d 810, 853 (10th Cir. 2015) (finding alleged errors presented "no such 'synergistic' effect"); *Donald Grant v. Royal*, 886 F.3d 874, 956 (10th Cir. 2018) (acknowledging synergistic effect "such that the errors may be 'collectively more potent than the sum of their parts'"); *Littlejohn*, 875 F.3d at 571 (finding no "particularized synergy" between alleged

errors).

The Tenth Circuit's precedent is best demonstrated in *Donald Grant*, 886 F.3d at 954-57, and *Littlejohn*, 875 F.3d at 570-71. In *Grant*, the court considered two instances of deficient attorney performance, concluding the two errors did not collectively render Grant's trial fundamentally unfair. 886 F.3d at 956. It was only *then*, after this initial determination, that the court considered whether the two errors possessed an "inherent synergistic effect," which could warrant relief. *Id.* The *Grant* court observed that the petitioner had failed to argue the two errors in question had any particularized synergy; therefore, the court declined to apply the "synergy principle of *Cargle*." *Id.*

In *Littlejohn*, the circuit court considered three errors in cumulation. 875 F.3d at 570. First, the errors, termed "three dashes of modest prejudice," were considered in the aggregate such that the errors failed to result in a "recipe" worthy of habeas relief. *Id.* *Then*, the Tenth Circuit considered whether the three errors were synergistic such that collectively the errors were "more potent than the sum of their parts." *Id.* at 571 (citing *Cargle*, 317 F.3d at 1221). While ultimately the *Littlejohn* court concluded there was no "particularized synergy" between a notice error and two other errors, the Court made clear the synergistic element of its analysis. *Id.*

Other appeals courts are in step with this practice. *See, e.g.*, *Williams v. Drake*, 146 F.3d 44, 49 (1st Cir. 1998) ("[W]e will order a new trial on the basis of cumulative error only if multiple errors synergistically achieve 'the critical mass necessary to cast a shadow upon the integrity of the verdict.'") (quoting *United States v. Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993)); *Sepulveda*, 15 F.3d at 1196 ("a column of errors may sometimes have a logarithmic effect, producing a total impact greater than the arithmetic sum of its constituent parts. . . . [T]he errors were not portentous; . . . [T]hey possessed no special symbiotic effect"); *United States v. Houston,* 481 F. App'x 188, 194 (5th Cir. 2012) ("[T]he synergistic effect of these errors as a whole severely prejudiced Houston. . . . Cumulative error analysis evaluates 'the number and gravity of the errors in the context of the case as a whole' (quoting *United States v. Valencia*, 600 F.3d 389, 429 (5th Cir. 2010)) . . . . 'The doctrine justifies reversal only in the unusual case in which synergistic or repetitive error violates the defendant's constitutional right to a fair trial'" (quoting *United States v. Delgado*, 672 F.3d 320, 344 (5th Cir. 2012))); *Alvarez v. Boyd*, 225 F.3d 820, 824 (7th Cir. 2000) ("To prevent the synergistic effect of these errors from escaping review, courts attempt to determine whether the whole is greater than the sum of its parts."); *Ybarra v. McDaniel*, 656 F.3d 984, 1001 (9th Cir. 2011) ("We have granted habeas relief under the cumulative effects doctrine when there is a 'unique

symmetry' of otherwise harmless errors, such that they amplify each other in relation to a key contested issue in the case" (quoting *Parle*, 505 F.3d at 933)).

In each of these cases, the various circuits have recognized and applied a synergistic effect analysis as part of the court's cumulative error review. However, other circuits – namely, the Second, Third, Fourth, Sixth, Eighth, Eleventh, and Twelfth Circuits – have either not recognized this crucial component or have failed to consistently apply the standard. Either way, this Court should grant the writ of certiorari to clarify that the synergistic effect of combined errors must not be bypassed by the federal courts when conducting a cumulative error analysis.

In a case such as this, the synergistic effect of recognized errors can and does have a significant impact. Clarification from this Court is needed to enforce this necessary consideration in capital cases.

CONCLUSION

It is beyond dispute that the jury instructions failed to adequately apprise Mr. Malone's jury of his voluntary intoxication defense. Yet, the OCCA applied two distinct layers of prejudice review to save the capital conviction. A grant of certiorari is necessary to ensure state courts do not ignore the prior decisions of this Court, which require reversal once prejudice has been shown to result from a constitutional violation. Apart from the erroneous instructions, two instances

of ineffective counsel also encroached upon Mr. Malone's right to present his defense. Yet, the Tenth Circuit and other circuit courts will fail to review constitutional errors – not warranting relief individually – for their combined synergistic effect. At minimum, the Constitution requires that Mr. Malone have the opportunity to present his intoxication defense to a properly instructed jury. Petitioner, Ricky Malone, respectfully prays this Court grant the petition for writ of certiorari to emphasize habeas petitioners need not show they have been doubly harmed prior to garnering relief and to make clear the standards upon which the circuit courts must review the combined effect of synergistic constitutional errors.

Respectfully submitted,

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