

No.

---

**IN THE SUPREME COURT OF THE UNITED STATES**

---

**TERRY KENT HOLCOMB, II,**

**Petitioner,**

**v.**

**RICK WHITTEN,**

**Respondent.**

---

**PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

---

**Julia L. O'Connell  
Federal Public Defender**

**Barry L. Derryberry  
(Counsel of Record)  
Assistant Federal Public Defender  
barry.derryberry@fd.org**

**Office of Federal Public Defender  
Northern District of Oklahoma  
One West Third Street, Ste. 1225  
Tulsa, OK 74103  
(918) 581-7656  
fax (918) 581-7630  
Counsel for Petitioner**

**May 3, 2021**

## **QUESTION PRESENTED FOR REVIEW**

The Petitioner claimed on appeal that he was denied the constitutional right to present defense evidence at his state court trial, entitling him to relief under 28 U.S.C. §2254. The question presented is:

Did the Tenth Circuit, on review of the denial of 28 U.S.C. §2254 petition, err in holding that evidence admitted at trial essentially established what the rejected evidence would have established, without determining that the probative facts established by the admitted and rejected evidence were essentially the same.

## **TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
PREVIOUS OPINIONS AND ORDERS.....	1
JURISDICTION .....	1
APPLICABLE LEGAL PROVISION.....	2
STATEMENT OF THE CASE.....	2
1.    State Court Proceedings .....	3
A.    Overview.....	3
B.    Facts at Jury Trial.....	3
C.    Offered Testimony of Dr. Shields.....	5
D.    State Post-Conviction Proceedings .....	6
2.    Federal Court Proceedings .....	7
A.    District Court Habeas Corpus Proceedings .....	7
B.    Tenth Circuit Appeal.....	9
REASON FOR GRANTING A WRIT .....	11
CONCLUSION .....	15

APPENDIX:

EXHIBIT 1: *United States v. Holcomb*,  
836 F. App'x 682 (10th Cir. 2020) (unpublished)

EXHIBIT 2: Opinion and Order (United States District Court)

EXHIBIT 3: Summary Opinion (Oklahoma Court of Criminal Appeals)

**TABLE OF AUTHORITIES**

<u>Cases</u>	<u>Page</u>
<i>Ball v. State</i> , 2007 OK CR 42, ¶ 15, 173 P.3d 81, 86.....	7
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973); .....	14
<i>Chapman v. California</i> , 386 U.S. 18, 24 (1967).....	14
<i>Crane v. Kentucky</i> , 476 U.S. 683, 690 (1986).....	14
<i>Day v. State</i> , 2013 OK CR 8, ¶ 11, 303 P.3d 291, 297.....	7
<i>Holmes v. South Carolina</i> , 547 U.S. 319, 330 (2006) .....	8, 14
<i>Miller-El v. Cockrell</i> , 537 U.S. 322, 336 (2003) .....	9
<i>Rock v. Arkansas</i> , 483 U.S. 44 (1987).....	14
<i>Simpson v. State</i> , 2010 OK CR 6, ¶ 9, 230 P.3d 888, 895.....	7
<i>United States v. Holcomb</i> , 836 F. App'x 682 (10th Cir. 2020) (unpublished) .....	1, 9, 10, 11, 12, 13,
<i>Washington v. Texas</i> , 388 U.S. 14, 19 (1967) .....	14

<u>Statutes</u>	<u>Page</u>
28 U.S.C. §1254(1) .....	1
28 U.S.C. §1291 .....	1
28 U.S.C. § 2253 .....	1
28 U.S.C. § 2254(d) .....	2, 8

<u>Supreme Court Rule</u>	<u>Page</u>
S. Ct. R. 10(c).....	11

## **PREVIOUS OPINIONS AND ORDERS**

In *United States v. Holcomb*, 836 F. App'x 682 (10th Cir. 2020) (unpublished), the United States Court of Appeals for the Tenth Circuit issued an Order and Judgment wherein Terry Holcomb, II, the Petitioner herein, was the Appellant. *See* Attachment 1. This Petition seeks a writ of certiorari to the Tenth Circuit Court of Appeals in regard to the Order and Judgment.

The Order and Judgment denied Mr. Holcomb's appeal of an Opinion and Order that was filed in the United States District Court for the Northern District of Oklahoma, in *Terry Holcomb v. Rick Whitten*, Case No. 16-CV-0159-TCK. *See* Attachment 2.

## **JURISDICTION**

The Tenth Circuit reviewed the Opinion and Order under the authority of 28 U.S.C. §§ 1291, 2253. On December 3, 2020, the Tenth Circuit filed the Order and Judgment now presented for review. *See* Attachment 1. Neither party filed a motion for rehearing.

Jurisdiction for a writ of certiorari lies in this Court pursuant to 28 U.S.C. §1254(1), which permits a writ of certiorari to be "granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." Mr. Holcomb was the Appellant in the case now submitted for review.

## **APPLICABLE LEGAL PROVISION**

28 U.S.C. § 2254:

- (d) 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**

### **1. State Court Proceedings**

#### **A. Overview**

In February, 2013, Mr. Holcomb was convicted in an Oklahoma state court of five counts of felony child sexual abuse after exercising his right to jury trial. He was charged by an Amended Information filed in Tulsa County, which alleged that on or about between 7/1/2010 and 2/23/2011, he sexually abused N.H., who was ten years of age, by inserting his penis in her vagina. In four of the counts the state district court imposed a sentence of five years in state prison, running consecutively to each other and Count Five. In Count Five, three years of an eight year prison term were suspended, resulting in a total prison sentence of 25 years. Mr. Holcomb was committed to the custody of the Oklahoma Department of Corrections. He is in state custody as of the filing of this petition.

#### **B. Facts at Jury Trial**

In August, 2010, Petitioner was a single parent living in Tulsa, Oklahoma, with his two minor children and his ex wife's daughter, N.H. That year, N.H. was 10 years old.

In February 2011, N.H. told two of her friends, S.E. and B.E., that she and her father "had sex." S.E. shared the news with her mother. Later that month, S.E.'s mother contacted the Department of Human Services (DHS) and N.H.'s school

counselor. The counselor, Bobbie Fields, spoke with N.H., who said that she and her dad had been having sex about once a week. N.H. confirmed an understanding that “sex” meant that “he put his privates in her privates.”

In response to a report by Fields, Tulsa Police Officer John West took N.H. to the Justice Center in Tulsa for a forensic interview. David Glanz, a forensic interviewer employed by the Child Abuse Network, conducted a video recorded interview of N.H., which was shown to the jury. The same day, Dr. Mike Baxter, a child abuse pediatrician, examined N.H. He “could not see much of the hymenal tissue” at a particular area, which could have been due to either a child not relaxing during the examination, or penetrating trauma. On February 28, 2011, N.H. returned to the Justice Center for a follow up examination. Dr. Nichole Wallace, a child abuse pediatrician, examined N.H., and “was able to do a couple of things Dr. Baxter was not.” She found “nothing abnormal.” She told the jury that in at least 90 percent of cases where children report sexual abuse, they appear normal. In the “rare” case where there is a sign of abuse, it appears on the hymen. She added that: “Even in girls of all ages who have had or who have made disclosures of some type of sexual abuse that involves penetration by a penis or an object or whatever, most of the time, that hymen tissue is normal. It's still intact. There's no tear in it. It's exactly the way it should be.” Id.. N.H. testified that she and Mr. Holcomb had sexual intercourse in his bedroom on multiple occasions.

Dr. Paul Shields testified for the defense. He was an Oklahoma-licensed marriage and family therapist, with a doctorate in counseling psychology, a master's degree in counseling, and a bachelor's degree in psychology. Beginning on April 13, 2011, he provided counseling treatment to Mr. Holcomb. Dr. Shields generally did not work with sex offenders, and in some cases would evaluate potential patients to determine whether they were sex offenders.

Mr. Holcomb testified, denying that he committed any of the charged conduct. He said that he first had sexual relations with Fay Shields when she was 17 years old, contradicting her testimony that she was 14 or 15 years old.

### C. Offered Testimony of Dr. Shields

At trial, a bench conference was held to address the prosecution's objection that Dr. Shields' testimony about testing Mr. Holcomb would invade the jury's province. Defense counsel disclosed that he intended to have the witness testify about the results of tests that he administered to Mr. Holcomb. Sustaining the objection, the trial court stated "as far as having made a determination based on any kind of testing of this gentleman's propensity to be a sex offender, that's not going to be -- that's not admissible." The court later added that its ruling prohibited evidence of "the specifics of Mr. Holcomb and this analysis and testing[.]" At another juncture, the court admonished defense counsel against "backdooring

testimony that this gentleman has an opinion that Mr. Holcomb is not a sex offender[.]”

After direct examination of Dr. Shields, defense counsel made an offer of proof that the witness would describe the process for assessing prospective patients who have sex offender issues, in order to help decide whether to keep the person as a patient and “how to deal with” the patient. Reiterating its ruling, the trial judge expressed concern “that the jury would likely be inclined to take that opinion, even though it was just a screening evaluation, as some evidence of probative evidence that the defendant did not commit the offense.”

#### **D. State Post-Conviction Proceedings**

Mr. Holcomb appealed to the Oklahoma Court of Criminal Appeals (“OCCA”). Invoking the Sixth and Fourteenth Amendments, Mr. Holcomb claimed that the trial court’s rejection of Dr. Shield’s testimony denied a meaningful opportunity to present a complete defense.

The OCCA affirmed the convictions in a Summary Opinion. (Attachment 3). It held that Mr. Holcomb was not denied the opportunity to present a complete defense. In a one-paragraph analysis, the court acknowledged the offer of proof Mr. Holcomb made at trial, that he “wanted his expert to testify that, in his opinion, Holcomb was not a sex offender.” In the OCCA’s view, the evidence “would directly invade the province of the jury by telling jurors what result to reach.” The

court explained:

Expert opinion testimony is admissible when it helps jurors understand the facts. 12 O.S. 2011, § 2702. Expert opinion may, under some circumstances, embrace an ultimate fact, but may not simply tell the jury what result to reach. *Day v. State*, 2013 OK CR 8, ¶ 11, 303 P.3d 291, 297, *r'hrg denied* 2013 OK CR 15, 316 P.3d 931; *Ball v. State*, 2007 OK CR 42, ¶ 15, 173 P.3d 81, 86. As the evidence was not admissible, the trial court's refusal to admit it did not deny Holcomb an opportunity to present a meaningful defense. *Simpson [v. State*, 2010 OK CR 6, ¶ 9, 230 P.3d 888, 895].

Mr. Holcomb filed, on February 9, 2015, a pro se Application for Post Conviction Relief and Evidentiary Hearing in state district court. In a June, 2015 order, the district court concluded that no genuine issue of material fact existed that would necessitate an evidentiary hearing. Relief was denied. Mr. Holcomb, acting pro se, appealed to the OCCA. In a four page order filed on September 30, 2015, the OCCA affirmed the denial of post-conviction relief.

## 2. Federal Court Proceedings

### A. District Court Habeas Corpus Proceedings

Mr. Holcomb timely filed a Petition for Writ of Habeas Corpus in the Northern District of Oklahoma pursuant to 28 U.S.C. §2254. The Petition submitted multiple grounds for relief and requested an evidentiary hearing. In an Opinion and Order the district court rejected the request for an evidentiary hearing and denied the petition. (Attachment 2). The court declined to issue a certificate of appealability.

The petition claimed, *inter alia*, that the state trial court erroneously refused to allow evidence that Mr. Holcomb did not fit a sex offender profile. The petition cited the Sixth and Fourteenth Amendments, and described the rulings of several applicable Supreme Court cases. In a request for an evidentiary hearing, Mr. Holcomb submitted that testimony from Dr. Shields would assist the district court in its ruling. After the State filed a response, Mr. Holcomb filed a reply brief which extensively discussed the significance of *Holmes v. South Carolina*, 547 U.S. 319 (2006). Renewing the request for an evidentiary hearing, the reply submitted that the district court would benefit from evidence developing the claim regarding testimony that his experts would have given at trial.

In an Opinion and Order, the district court denied the § 2254 petition. (Attachment 3). Regarding the disputed opinion of Dr. Shields, the court found that the OCCA adjudicated the claim on the merits. The court held that Mr. Holcomb failed to satisfy any standard in § 2254(d)(1), disqualifying him from habeas relief. An evidentiary hearing was denied on the basis that § 2254(d) barred the exhausted claim.

B. Tenth Circuit Appeal

Mr. Holcomb filed an appeal in the Tenth Circuit. On December 3, 2020, the court affirmed the district court judgment in *United States v. Holcomb*, 836 F. App'x 682 (10th Cir. 2020) (unpublished). The deciding panel granted a certificate of appealability on the basis that “[w]hether the OCCA appropriately analyzed Holcomb's complete-defense claim as it relates to Dr. Shields is a matter that ‘reasonable jurists could debate,’ and ‘deserve[s] encouragement to proceed further.’” *Id.* at 686, quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). It agreed with Mr. Holcomb's claim that the OCCA analyzed the issue in a manner contrary to clearly established federal law determined by the Supreme Court, resulting in de novo appellate review. 836 F. App'x at 687.

In its de novo review, the Tenth Circuit recited the following direct examination of Dr. Shields at trial:

Q. Now ... as part of your practice, do you generally work with sex offenders?

A. No, I do not.

Q . ... [W]hen you're dealing with this subject matter of sex offenders or sex abuse matters, where would your practice typically steer you?

A. Probably about four or five times a year, I will get a call or have a case where a sex offender is involved. Typically, I will review that, in some cases will evaluate, and typically will refer them out.

*Id.* at 687-88.

The panel noted Dr. Shields' testimony that he had received training to "identify" sex offenders on "a spectrum of ... least worst case, to worst worse [sic] case." *Id.* at 688. After describing the exchanges between the trial judge and counsel, the panel turned to the key issue: whether the trial court's reason for excluding the evidence—invasion of the jury's province—was applied in an arbitrary or disproportionate manner that violated Mr. Holcomb's right to present a complete defense. However, the court concluded that the evidence admitted at trial provided the jury with "the essence" of the rejected defense evidence. The panel explained:

Despite the state's objections, the jury still heard that Dr. Shields has training to identify sex offenders, and that he does not treat sex offenders. Moreover, defense counsel eventually asked Dr. Shields, without objection, "So, you decided to keep Mr. Holcomb as a patient, and then began a course of treatment; is that correct?" Dr. Shields answered, "That's correct." [ ] Thus, the jurors heard enough to make the connection that Dr. Shields—who held himself out as a trained expert in identifying sex offenders—did not believe that Holcomb was a sex offender. This was the essence of what counsel sought to present through his offer of proof. Holcomb has not cited a case to us in which the right to a complete defense was deemed violated when the

evidence needed to support the defense was admitted, just not in the form the defendant preferred.

*Id.* at 689.

Accordingly, the Tenth Circuit held that the trial judge “did not violate the Constitution by forbidding Dr. Shields from offering an explicit opinion about Holcomb's likelihood of being a sex offender.” *Id.*

### **REASON FOR GRANTING A WRIT**

Certiorari is appropriate when “a... United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court[.]” S. Ct. R. 10(c). The decision submitted for review is an important question of federal law that should be settled by this Court, because the Tenth Circuit erred in finding that the rejected expert opinion evidence was essentially admitted at trial. As the Petitioner herein, Mr. Holcomb seeks a ruling that the right to present a complete defense cannot be denied on the basis that the evidence was admitted in an alternate form unless the alternate form was an adequate substitute for the excluded evidence.

In the Tenth Circuit appeal, Mr. Holcomb claimed that the state trial court prohibited him from presenting opinion evidence from Dr. Shields, a licensed marriage and family therapist, based on tests administered to Mr. Holcomb, that

he did not fit a sex offender profile. As the panel noted, Dr. Shields testified that he had received training to identify sex offenders. *Holcomb*, 836 F. App'x at 688. Dr. Shields also testified, as the Tenth Circuit stated, that he did not generally work with sex offenders. *Id.* at 687. The panel also highlighted testimony that about four or five time a year Dr. Shields got a call about a sex offender, and typically would refer the potential client "out." *Id.* at 688. Dr. Shields also stated that he decided to keep Mr. Holcomb as a patient, and prescribed a course of treatment. *Id.* at 689.

The testimony described by the panel decision did not convey to the jury that Dr. Shields had evaluated Mr. Holcomb as a sex offender and determined that Mr. Holcomb did not fit a sex offender profile. Dr. Shields' trial testimony did not disclose that he administered sex offender profile tests on Mr. Holcomb, or that the results of the tests were negative for a sex offender profile. The testimony relied on by the Tenth Circuit was quite different. It established that Dr. Shields generally did not work with sex offenders and typically referred them to other treatment providers, but he treated Mr. Holcomb. This told the jury nothing about whether he administered any tests on Mr. Holcomb, and failed to convey that Mr. Holcomb tested negative for a sex offender profile. Instead, the jury received information that the doctor generally did not treat sex offenders, but he treated

Mr. Holcomb. The jury was left in the dark to surmise why Mr. Holcomb was treated—it could have been that the doctor had no reason to scrutinize Mr. Holcomb as a sex offender. Testimony that Mr. Holcomb had tested negative as a sex offender would have meant much more, demonstrating that he cleared objective standards, and that clearing those standards was certainly why Dr. Shields decided to treat him. The testimony cited by the panel lacked such objectivity and certainly. While the panel concluded that the trial testimony delivered the “essence” of the rejected evidence, this conclusion was not viable. Testimony that the doctor did not treat sex offenders had no significance as defense evidence without additional testimony that Mr. Holcomb was tested and passed the tests.

If the admitted evidence essentially established what the rejected testimony would have proved, one would expect the trial court to have reached the same conclusion as a reason for rejecting the testimony. But the trial court made no such observation, as is evident in the panel opinion’s description of the trial court’s rulings. *Id.* at 688. Nor did the OCCA or federal district court make the same observation, where the same issue was at hand—potential denial of the right to present defense evidence. The absence of any such observation in prior proceedings suggests that the Tenth Circuit’s observation is inapt, because the

prior courts could have dispensed with Mr. Holcomb's claim by holding that his proffered evidence was essentially admitted by other means.

On appeal, Mr. Holcomb asserted that the state trial court's denial of Dr. Shields' testimony deprived him of the right to present defense evidence at trial, citing cases that establish that right: *Washington v. Texas*, 388 U.S. 14, 19 (1967); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *Rock v. Arkansas*, 483 U.S. 44 (1987); and *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006). By rejecting the claim on the specious basis that the evidence was effectively admitted by other means, the Tenth Circuit arbitrarily rejected a potentially meritorious claim without truly examining the merits of the claim.

The Tenth Circuit's rejection of Mr. Holcomb's appeal erroneously applied § 2254 standards. In order to insure that § 2254 is applied effectively to protect the right to present defense evidence at trial, this Court should hold that before a court may deny § 2254 relief on the basis that prohibited defense evidence was effectively introduced at trial by alternate proof, it must be satisfied that the alternate proof established the essentially same probative facts that the offered evidence would have established if it had been admitted. If this standard had been

applied in Mr. Holcomb’s appeal, the Tenth Circuit would not have affirmed the denial of § 2254 relief.

## **CONCLUSION**

Mr. Holcomb requests this Court to grant this petition for certiorari, vacate the Tenth Circuit’s Order and Judgment, and remand to the Tenth Circuit with instructions to reconsider the appeal in light of this Court’s opinion.

Respectfully submitted,

s/Barry L. Derryberry  
Barry L. Derryberry  
Okla. Bar. Assn. No. 13099  
Assistant Federal Public Defender  
barry.derryberry@fd.org  
Counsel of Record for Petitioner

Julia L. O’Connell  
Okla. Bar Assn. No. 13882  
Federal Public Defender

Office of Federal Public Defender  
Northern District of Oklahoma  
1 West 3rd St, Ste. 1225  
Tulsa, Oklahoma 74103  
(918) 581-7656  
barry.derryberry@fd.org