No. 21-6602

ORIGINAL

FILED
DEC 07 2021
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

BRANDON SHANE CHRISTIAN — PETITIONER
(Your Name)

vs.

SCOTT CROW, DIRECTOR — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

BRANDON SHANE CHRISTIAN
(Your Name)

8607 SE FLOWER MOUND ROAD
(Address)

LAWTON, OKLAHOMA 73501
(City, State, Zip Code)

(580)-351-2778
(Phone Number)

## QUESTION(S) PRESENTED

In petitioner §2254 petition, Petitioner raises this question of error?

The plea was not entered knowingly and voluntarily because the trial court failed to: (1) Ensure that a sufficient factual basis existed for the plea? (2) Advise petitioner of the proper statutory range of punishment?

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## INDEX TO APPENDICES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at *U. S. Court Of Appeals, Tenth Circuit*; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at *U.S. District Court Western District Of Oklahoma*; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is

[ ] reported at *In The Court Of Crim. Appeals State Of Oklahoma*; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the *Application For Post-Conviction Relief* court appears at Appendix E to the petition and is

[X] reported at *In The District Court Of Garvin County State Oklahoma*; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

## JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was *September 10th, 2021*.

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

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

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was *December 06, 2019*. A copy of that decision appears at Appendix ___C___.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

## *STATEMENT OF THE CASE*

***Brandon Shane Wesley Christian, Pro-Se, here in after referred to as the Petitioner, That this motion is prepared Pro-S***
***ithout the aid or assistance of a trained counsel of law and ask that this court will give any syntax structural errors and***
***berally construe to Petitioner Brandon Christian, Pro-Se Motion in accordance to Hall v. Bellmon, 935 F.2d 1106, 1110***
***0th Cir. 1991), that is now being brought before this Honorable Court in the Interest of Justice. The Tenth Circuit has***
***escribed that it is the court's responsibility in this regard, "[I]f the court can reasonably read the pleadings to state a valic***
***aim on which the defendant could prevail, it should do so despite the defendant's failure to cite proper legal authority, hi***
***nfusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading***
***quirements."Id. {emphasis added bold, underlined and quotation marks}. That the rule in Hall; as applied to prisoners is***
***nding on the courts of this State. Oklahoma Constitution Article 1,§ 1; See also Haines v. Kerner, 404 U.S. 519, 520-521,***
***2 S. Ct. 594, 596, 30 L.Ed. 2D 652 (1972). Was tried by judge on January 12th, 2015, for the crime of Aggravated Assault***
***nd Battery And Murder In The Second Degree, in Case No: CF-2013-191, in the District Court Of Garvin County, befor***
***e Honorable Trisha Misak, District Judge. The Petitioner was represented by a Attorney from Oklahoma Indigent***
***efense System Larry Monard, Honorable Judge Trisha Misak accepted a Blind Plea from the Petitioner which found hir***
***uilty of Aggravated Assault And Battery And Murder In The Second Degree and assessed a punishment of Life With***
***arole imprisonment. The trial court sentenced the Petitioner in accordance with the Blind Plea Agreement on March 30th***
***015 together with costs and fees , and with credit for time served.***

1. *Petitioner was deprived of the following rights and immunities:*

   a. ***Equal Protection of the =Laws;***
   b. ***Prohibition Against Cruel And Unusual Punishment;***
   c. ***Right To A Fair Trial;***
   d. ***Right To The Effective Assistance Of Trial Counsel;***
   e. ***Right To The Effective Assistance Of Appellate Counsel;***

***2-3. Garvin County Prosecutor having received evidence supporting that a crime committed by a mentally ill man,***
***aliciously pursued an unsupported charge of Aggravated Assault And Battery And Murder In The Second Degree agains***
***etitioner, Brandon Shane Wesley Christian, the findings made and entered by the District Court Judge, Trisha Misak,***
***ıould have been found not guilty for the Reason Of Insanity if the court's followed the Due Process Rules Of Law.***

## *(OKLAHOMA PROCEDURAL DEFAULT RULE)*

(Subsequent application)

***Title 22 Oklahoma Statutes, section 1086, provides:***

***"All grounds for relief available to an applicant under this***

***act must be raise in the original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application." 22 O.S. section, 1086.***

***(Exceptions excusing default)***

However, under **Federal Constitutional Law** as interpreted by the **United States Supreme Court** in **Ake v. Oklahoma, 470 .S. 68, the Court enunciated,** "The **Oklahoma** waiver rule does not apply to **Fundamental Error...Federal Constitutional rrors Are Fundamental...Violation** if constitutional right constitutes fundamental error...Before applying the waiver doctrin a constitutional question, the state court must rule, either explicitly or implicitly, on the merits of the constitutional uestion..." **470 U.S. @ 74-75. Also** see **Foster v. Chatman, 136 S. Ct 1737; 195 L. Ed 2d 1; 2016 U.S. LEXIS 3486.**

**The United States Supreme Court has also determined that Ineffective Assistance Of Counsel may** establish "cause" fficient to excuse procedural default, but only if the "assistance [was] so ineffective as to violate the **Federal Constitution.** ee **Thompkins v. McKune, 2010 U.S. Dist. LEXIS 134710, citing Gaines v. Workman, 326 Fed. Appx. 449, 452, (10th Cir. 009) citing Edwards v. Carpenter, 529 U.S. 446, 451 120 S. Ct. 1587, 146 L.Ed 2d 518 (2000).** The **Tenth Circuit** also set it that the "Defendant who establishes prejudice under **Strickland** also establishes prejudicial sufficient to excuse procedur efault." **U.S. v. Cook, 45 f. 3d 388, 395 (10th Cir. 1995).**

**The United States Supreme Court** has also held in **McQuiggin v. Perkins, 133 S. Ct. 1924 (2013),** that,**"Actual Innocence** proved, serves as a gateway through which state prisoner petitioning for **Federal Habeas Corpus** relief, might pass, gardless of whether impeded by procedural bar..."

***(Petitioners grounds for excusing default and resulting prejudice)***

*Petitioner asserts three grounds for establishing cause to excuse procedural defaultto be the following:*

1. ***Federal Constitutional Questions (Due Process of Law)***
2. ***Actual Innocence, and***
3. ***Ineffective Assistance of Trial Counsel.***

***PROPOSITION I***

***PROSECUTOR'S COMMITTING MISCONDUCT DEPRIVED PETITIONER OF DUE PROCESS AND EQUAL PROTECTION OF LAW***

*In **Berger v. United States, 295 U.S. 78, 88 55 S. Ct. 629, 633, 79 L. Ed. 1314, 1321 (1935)**, the **United States Supreme Court** held, that, "The primary duty of an attorney engaged in public prosecution is not to convict, **but to see that justice is done.**" Under **Oklahoma Law**, prosecutorial misconduct generally will not warrant reversal unless the cumulative effect is such as to deprive the defendant of a fair trial." See **Patton v. State, 1998 OK CR 66, 973 P.2d 270, 302.** In **Sanders v. State, 2015 OK CR 11,** the **OCCA** stated: "Relief will be granted only where the prosecutor committed misconduct that so infected the petitioner's trial that it was **Rendered Fundamentally Unfair**, such that the jury's verdicts should not be relied upon. (citing **Roy v. State, 2006 OK CR 47, 29, 152 P.3d 217,227, citing Donnelly v. DeChristoforo, 416 U.S. 637-645, 94 S. Ct. 1868, 1872, 40 L. Ed 2d 431 (1974).** Prosecutorial misconduct will be evaluated within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel. See **Mitchell v. State, 2010 OK CR 14, 97, 235 P.3d 640, 661; Cuesta-Rodriquez v. State, 2010 OK CR 23, 96, 241 P.3d 214 (Okla. Crim. App. 2010).**

*In this instant cause, **Brandon Shane Wesley Christian,** entire trial process is replete with prejudices which resulted from the malicious decision of the public prosecutor, first to pursue the prosecution and conviction of petitioner for the offense of **Aggravated Assault And Battery And Murder In The Second Degree** although the evidence overwhelmingly supported a not guilty For **Reason Of Insanity** verdict. The trial record supported by the states witness's reflects that petitioner being tried for crime he did not committed, (through no fault of his own).*

*On **July 03, 2013,** the **State Attorney** at District Arraignment the District Judge entered the charged petitioner with the crime of **Aggravated Assault And Battery And Murder In The Second Degree.** notwithstanding, all evidence supported a crime was not committed; It is clear from the record, that Prosecutor's in this instant cause, after discovering Petitioner had prior convictions, decided to pursue this case to the fullest extent of the law, and charge Petitioner with **October 28, 2013,** Prosecutor's chose to employ the use of improper and prejudicial evidence in this instant cause in an attempt to gain a conviction instead of giving the proper weight to the witnesses statements and affording Petitioner with **Due Process and Equal Protection Of The Laws** by dismissing the charges on the grounds of **Reason By Insanity** that a crime was committed. The **Oklahoma Court of Criminal Appeals** has long held, that, "it is the duty of a prosecutor to prosecute fairly and without prejudice. **Starnes v. States, 1973 OK CR 95; 507 P.2d 920; Sharkley v. State, Okl. Cr. 329 P.2d 682 (1958);** The prosecutor must use proper evidence and not improper, prejudicial evidence. **Boyd v. State, Okl. Cr., 478 P.2d 980 (1970).** In this instant matter, prosecutor not only sought to vindictively prosecute Petitioner in the face of overwhelming evidence supporting*

etitioner claim of **Reason Of Insanity** a crime was not committed; but also unlawfully elicited inadmissible and highly rejudicial testimony of other crimes and bad acts evidence, thereby willfully causing prejudice to Petitioner's trial process nd rendering the proceedings unfair and unreliable. Prosecutor's use of improper evidence in this case caused the judge to cus on extraneous matters outside of the evidence presented at the trial in this matter. The judgment and sentence in this atter must be reversed with instructions to dismiss.

**(2) Prosecutor mis-characterizing evidence.**

The record of Petitioner beckoning the deceased to settle the misunderstanding like men is consistently established. The rosecutor interpreting the above in any other manner constitutes mis-characterization of the evidence. "It is improper for a rosecutor to mis-state the evidence or the law." **U.S. v. McBride, 2014 U.S. Dist. LEXIS 178078; Stouffer v. Trammell, 73 3d 1205, 1221 (10th Cir. 2013).("It is…improper for a prosecutor to mis-state the evidence or the law...").** The above ated colloquy is clearly demonstrative of the prosecutor's overzealous intent to prosecute rather than to seek justice as quired by law. In this instance, the prosecutor committed misconduct and prejudiced the proceedings.

**(3) Prosecutor giving his personal opinion:**

During preliminary hearing in reference to the defense's theory of **the charge** State's Attorney stated to the judge, "I believe at the evidence overwhelmingly points to the fact that Petitioner By making this statement, the prosecutor expressed his ow pinion and put his own credibility at issue, thereby depriving **Petitioner Brandon Shane Wesley Christian** of his right to a ir trial.**"A prosecutor may not express his personal opinion or place his own integrity and credibility at issue." afayette v. Chrisman, 2014 U.S. Dist. LEXIS 82860; U.S. v. Jones, 468 F.3d 704, 708, (10th Cir. 2006).** Both parties are ven considerable latitude in closing argument to argue the evidence and reasonable inferences from it. **Pullen v. State, 201 K CR 18, 387 P.3d 922, 927.**

But it is improper for prosecutor to state his personal opinion. A prosecutor should refrain from expressing his opinion t e guilt or innocence of a criminal defendant. **Young v. State, 1985 OK CR 18, 695 P.2d 868 , Allen v. State, 1988 OK CR 96; 761 P.2d 902.** In the **Allen** case, the prosecutor stated that he would not prosecute an innocent person, thereby asserting s personal opinion of guilt and adding himself to the guilt/innocence determination. The Court of Appeals reversed the cas **Allen**. In this instant cause, the Prosecutor stated in closing, that he believed that the Petitioner's assertion of his theory o **ggra** was overwhelmingly overcome by the states evidence to the contrary, thereby adding himself to the **Guilt/Innocence** etermination, invading the province of the jury and depriving **Petitioner Brandon Shane Wesley Christian**, of his right to a

*ir trial.* ***(4)*** *In the* ***State of Oklahoma****, there is a common law concept known as a* ***"Duty Of Care."*** *The* ***Oklahoma Supren Court*** *has held in several cases that,"the duty of care is not a concept that arises only by statute...whenever a person is place such a position with regard to another that is obvious that if he did not use due care in his own conduct he will cause injur the other, the duty at once arises to exercise care commensurate with the situation in order to avoid such injury." See* ***homas v.Wheat, 2006 OK CIV APP 106, 143 P.3d 767; Wofford v. Eastern State Hosp., 1990 OK 77, 765 P.2d 516; Union ank of Tucson v. Griffin, 1989 OK 47, P12, 771 P.2d 219,222; Thornton v. Ford Motor Co., 2013 OK CIV APP 7, 297 P.3 13.*** *The Court in the Wheat decision elaborated further by stating, "Perhaps the most important consideration in etermining whether a duty exists is foreseeability. The general rule is that a "defendant owes a duty of care to all persons ho are foreseeability endangered by his conduct, with respect to all risks which make the conduct nreasonably dangerous.* ***Wheat @ P12.*** ***In Delbrel v. Doenge Bros. Ford, Inc., 1996 OK 36, 913 P.2d 1318, the Oklahom upreme Court*** *held: that a car repairer owed a duty of care to members of the general public because they were within the ne of persons who could foreseeable be injured by the negligent failure to repair a car." Petitioner asserts, that as stated bove, when a person has special training or skill that could put the general public at risk if he misuses his special training o kill, he has a duty of care toward members of the general public or untrained/unskilled persons to refrain from exercising th aining or skill in a manner that could cause harm to untrained or unskilled persons.*

***i) Prosecutor testified to facts not in evidence:***

*Prosecutor's may not mention facts not in evidence to support a finding of guilt.* ***U.S. v. Latimer, 511 F.2d 498, 503 (10th Cir. 975); Marks v. U.S., 260 F.2d 377, 383 (10th Cir. 1958) cert. Denied 358 U.S. 929, 79 S.Ct. 315, 3 L.Ed 2d 302 (1959).*** *In e* ***Latimer*** *decision, the* ***Tenth Circuit*** *reversed and remanded the case for a new trial when the prosecutor stated in closing at the security camera footage from the bank was not introduced into evidence because nothing could been seen, it did not lentify the defendant and all that could be seen was an* ***F. B. I.*** *agent who arrived some time following the camera becoming perational.*

***ii) Prosecutor elicited evidence of prior bad acts similar to the charge on trial;***

***(During Cross-Examination of Petitioner Brandon Shane Wesley Christian, conducted by Prosecutor (No proper defens bjection was entered contemporaneously).*** *It is abundantly clear from the record in the above referenced, that Prosecutor nowingly and willfully elicited prejudicial and inadmissible evidence of* ***prior bad acts..*** *In* ***Burks v. State, 594 P.2d 771 Okla. Cr. 1979),*** *The Court noted that in establishing* ***"other crimes"*** *guidelines, "we were responding to a problem of*

*erpetual existence in the courts of our state, where it is not uncommon to find the erroneous admission of evidence of crime ther than that for which the defendant is on trial."* ***Id at 775.*** *We then noted that one basis for the rules rested on* ***constitutional considerations of due process." Id.,*** *which applied throughout the nation. We also observed that andardization of the use of such evidence assured all defendant's equal protection of the law* ***Id at 775-76,*** *and would iminate the "recurring misuse of other crimes at trial in this state."* ***Id at 776. quoted in Cohee v. State,1997 OK CR 30; 94 2d 211.***

***The Burks*** *decision was established in* ***1979.*** *And to date, and irregardless of the* ***"other crimes"*** *guide lines, courts in the ate of* ***Oklahoma*** *continue to allow such behavior to perpetuate. Although defense counsel failed to move for a mistrial at at point, the trial court had already sustained defense's motion in* ***limine*** *to preclude prosecutorial misconduct in that anner, thereby placing the* ***State's Attorney's*** *under obligation to refrain from engaging in said behavior. Prosecutor willful ıose to violate the court's order and pursue a forbidden line of questioning, and then pretend accidental revelation of admissible and extremely prejudicial evidence. This being done in the absence of a defense objection and without any struction from the trial court, left the error uncured, and therefore unduly prejudiced* ***Petitioner Wesley Nathaniel Bankston*** *ght to a fair trial, requiring reversal and remand for a new trial.*

**') Prosecutor, during cross examination of petitioner, alluded that trial counsel coached petitioner's testimony to roduce emotions:**

*Although the Court sustained defense counsel's objection, no instruction was issued for the jury to disregard that portion c e testimony was given by the Court, leaving the error uncured and the jurors with the belief that trial counsel was coaching etitioner into showing false emotions in their presence, serving to undermine the credibility of the defense. "A prosecutor ay not personally attest to the credibility of government witnesses or attack the credibility of defense witnesses."* ***see Carleo 76 F.2d at 852; U.S. v. Martinez, 487 F.2d 973 (10th Cir. 1973). (The prosecution would commit such error if it personally tacks or vouches for the credibility of any witness.)*** *It is clear, in this instant cause, that* ***Prosecutor Cory Minor*** *launched personal attack upon defense counsel and the credibility of* ***Petitioner Brandon Shane Wesley Christian,****, testimony by sinuating that trial counsel coached petitioner into showing false emotions while testifying in the presence of the jury. rosecutor's comments as set out in the above transcript constitutes an attack upon the integrity of defense counsel. Defense ıunsel lodged and objection to the comments, which the trial court sustained. The* ***OCCA*** *has repeatedly held that reversal not required where the prosecutor's comments are fair inferences from the evidence presented.* ***See Bowie v. State, 1991 OK R 78, 816 P.2d 1143; Johnson v. State, 751 P.2d 196 (Okl. Cr. 1988); Wachoche v. State, 644 P.2d 568 (Okl. Cr.***

*982). The OCCA has also held that, "Personal attacks on defense counsel will not be condoned by this Court. "**See Evans v. State, 1985 OK CR 41; 698 P.2d 936.** In this instant matter, Prosecutor's comments regarding what he supposedly overheard defense counsel advising Petitioner as to his demeanor while testifying, in the presence of the jury, **(although the trial court sustained the defense's objection but no curative instruction was issued to the jury),** is tantamount to the prosecutions comments that warranted reversal in **Babek v. State, 587 P.2d 1375, 1379 (Okl. Cr. 1978).** Prosecutor's comments in this instant cause, misled the jury into believing that trial counsel coached Petitioner into showing emotions while testifying, and that Petitioner's emotions were contrived, therefore, Petitioner's testimony was also contrived. This violation of attorney/client confidentiality in addition to clear prosecutorial misconduct deprived petitioner of his right to a fair trial by an impartial jury and to due process of laws, requiring reversal.*

***PROPOSITIONS II***

***THE TRIAL COURT ABUSED IT'S DISCRETION THEREBY, DEPRIVING PETITIONER OF HIS RIGHTS TO A FAIR TRIAL, DUE PROCESS OF LAWS, EQUAL PROTECTION OF LAWS, AS GUARANTEED UNDER THE SIXTH AND FOURTEEN AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE 2 SECTIONS SEVEN AND TWENTY OF THE OKLAHOMA CONSTITUTION.***

*An abuse of discretion occurs where the district court clearly erred or ventured beyond the limits of permissible choice under the circumstances. **Hancock v. Am.Tel.&Co., 701 F.3d 1248, 1262 (10th Cir. 2012);** An abuse of discretion occurs when the district court's decision is arbitrary, capricious or whimsical, or results in a manifestly unreasonable judgment. **Sender v. Shifrin, (In re Shifrin), 2017 Bankr. LEXIS 3175;** An abuse of discretion occurs when the court **(1)** fails to exercise meaningful discretion, such as acting arbitrarily or not at all, **(2)** commits an error of law, such as applying an incorrect legal standard or misapplying the correct legal standard, or **(3)** relies on clearly erroneous factual findings. **Muth v. Krohn (In re Muth) 550 B.R. 869 (10th Cir. 2016); Blair v. Blair, 2016 U.S. Dist. LEXIS 190293; Queen v. TA Operating, LLC, 734 F.3d 1081, 1086 (10th Cir. 2013).***

***The following are sub-propositions of abuse of discretion by the trial court:***

***I Trial Court failed to (sua sponte) declare mistrial after repeatedly warning defense counsel about the perils of admitting former bad acts or convictions. ( this claim is incorporated into number two below)***

***I Permitting Prosecutor to violate court order sustaining defense motion in limine, re: precludeintroduction of prior convictions similar to the charged offense.***

*The standard of review for evidentiary rulings is based upon a finding of an abuse of discretion,and an appellate cour ay not reverse unless it has a definite and firm conviction that the trial court made a clear error of judgment or exceeded ɔunds of permissible choice in the circumstances. See* ***U.S. v. Talamante, 981 F.2d 1153, 1155 (10th Cir. 1992).*** *In this insta ıuse, and as set out fully above in # 7 of Petitioner's* ***First Assertion*** *of* ***Federal Constitutional Error,*** *the* ***Trial Court*** *ıstained defense motion in* ***limine*** *to preclude the Prosecution from eliciting evidence of prior bad acts similar to the one on ial. However, during Petitioner's testimony, the trial court failed to uphold it's earlier ruling, by permitting the prosecution* ***ılso without defense objection)*** *to inquire into petitioner's past behavior regarding altercations where a weapon was used. he* ***Oklahoma Court of Criminal Appeals*** *has repeatedly held that where the state does not establish facts sufficient to admi ·ior bad acts or convictions under an exception, reversal is warranted.* ***See Owens v. State, 2010 OK CR 1; 229 P.3d 1261.*** *he testimony elicited by Prosecutors regarding Petitioner's prior bad acts and convictions was unduly prejudicial to etitioner and showed what could be believed to be a pattern of violent behavior. A state court's admission of evidence of ·ior crimes, wrongs or acts will only be disturbed if the "probative value of such evidence is so greatly outweighed by the ·ejudice flowing from it's admission that the admission denied ... due process of law.* ***Hopkinson v. Shillinger****, 866* ***2d 1185, 1197 (10th Cir. 1989).*** *In this instant matter, the record clearly reflects that following the court's ruling sustaining ·fense motion in* ***limine*** *to preclude admission of prior bad acts or convictions, the trial court thereafter failed to uphold it's wn rulings and thereby permitted the prosecutor to illicit extremely prejudicial testimony from Petitioner, testimony where th ·obative value was greatly outweighed by the prejudice flowing from it's admission, thereby rendering the process unreliable ıd violating due process. Petitioner asserts that the erroneous instruction deprived him of his right to due process, to have a ·ir trial, to the effective assistance of counsel, and to equal protection of the laws, and is a clear abuse of discretion, arranting reversal.*

## *PROPOSITIONS III*

## *TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE THEREBY DEPRIVING PETITIONER OF HIS RIGHTS SECURED UNDER THE SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 2 SECTIONS SEVEN AND TWENTY OF THE OKLAHOMA CONSTITUTION.*

*The* ***Federal Constitution*** *guarantees a defendant an effective trial counsel, just as it guarantees a defendant an effective tri ɔunsel. See* ***Evitts v. Lucey,*** *469 U.S. 387, 396, 105 S.Ct. 830, 83 L. Ed. 2D 821 (1985).* *The standards for assessing claims · effective assistance of appellate counsel are set forth in* ***Strickland v. Washington****, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed2*

*74 (1984),specifically, to succeed on a claim of ineffective assistance of counsel, a convicted defendant must meet the upreme Court's test set forth in Strickland, specifically, the defendant must demonstrate: (1) counsel's performance fell elow professional standards; and (2) defense counsel's deficient performance prejudiced the defendant.*

*In this instant cause,* ***Trial Counsel*** *failed to raise numerous meritorious claims regarding ineffectiveness of* ***Trial Counsel*** *rosecutorial misconduct and abuse of discretion by the trial court, as enumerated in the sub-propositions listed below:*

***) Trial counsel failed to raise issues regarding the ineffectiveness of trial counsel as incorporated in Petitioner's ourth Proposition of Federal Constitutional Error, below.***

***) Trial counsel failed to raise issues regarding prosecutorial misconduct as set out fully in Petitioner's First roposition of Federal Constitutional Error, above.***

***) Trial counsel failed to raise issues regarding abuse of discretion by the trial court as fully set out in Petitioner's econd Proposition of Federal Constitutional Error.***

*Petitioner requests this Court to accept the arguments and authorities set out in the original Propositions as incorporated in e herein set out propositions & sub-propositions in the interests of judicial economy.*

***PROPOSITIONS IV***

***TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE TWO SECTIONS SEVEN AND TWENTY OF THE OKLAHOMA CONSTITUTION***

*The right to counsel is fundamental in criminal trials for it assures the fairness and legitimacy of our system of criminal stice based on the adversarial process.* ***Gideon v. Wainwright, 372 U.S. 335, 2344, 83 S. Ct. 792, 9 L.Ed2d 799 (1963).*** *he right to a fair trial mean precious little if the defendant is not afforded counsel for that trial.* ***U.S. v. Cronic, 466 U.S. 648 53, 104 S. Ct.2039, 80 L. Ed 2d 657 (1984).*** *The fundamental nature of this* ***Sixth Amendment*** *right counsel derives from th ct that the defendant only secures his other constitutional and procedural rights through his right to counsel.* ***Maine v. Moulton, 474 U.S. 159, 168-70, 106 S. Ct. 477, 88 L.Ed 2d 481(1985).*** *The defendant's* ***Sixth Amendment*** *right to counsel ecessarily requires counsel who will zealously represent the defendant and provide the defendant with effective legal ssistance.* ***Evitts v. Lucey, 469 U.S. 387, 395-96, 105 S. Ct. 830, 83 L.Ed 2d 821 (1985).*** *The right to counsel is the right to e effective assistance of counsel.* ***Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 2d 674 (1984).***

*To succeed on a claim of ineffective assistance of counsel, a convicted defendant must meet the* ***Supreme Court's*** *tests set*

rth in **Strickland, supra,** specifically, the defendant must demonstrate: **(1)** counsel's performance fell below professional andards; and **(2)** defense counsel's deficient performance prejudiced the defendant.

Petitioner in this instant cause puts forth the following **sub-propositions** of **ineffective assistance of counsel claims:**

- **Counsel failed to initiate any meaningful challenge to the states authority charge a crime when all evidence and witnesses statements supported petitioner being subjected to the powers of a superior causing duress as per 21 O.S. sec.'s 155,156.**
- **Counsel erroneous attempt at preparing petitioner's testimony while in the courtroom and in hearing distance of the prosecutor.**

The **attorney-client** privilege is the oldest of the privileges for confidential communications known to common law. It's urpose is to encourage full and frank communications between attorneys and theirclients and thereby promote broader publi terests in the observance of law and administration of justice. **See In re Grand Jury Proceedings, 616 F. 3d 1172 (10th Cir. 010).** The attorney-client privilege is the most fundamental of all legal relationships and any interference with or disruption f that relationship should be exercise only under extraordinary circumstances. **See U.S. v. Hurley, 728 F. Supp. 66 (D. C. 1 ir.1990).** There are actually two independent constitutional values that are jeopardized by governmental intrusion into rivate communications between defendants and their lawyers. First, the integrity of the adversary system and the fairness o ials is undermined when the prosecution surreptitiously acquires information concerning the defense strategy and evidence r **lack of it),** the defendant, or the defense counsel. Of equal concern, governmental incursions into lawyer-client ommunications threaten criminal defendant's right to the effective assistance of counsel. Only last Term the **1st Circuit** held at, the right to counsel encompasses the right to confer with one's lawyer. **See Geders v. U.S., 425 U.S. 80 (96 S. Ct. 1330, 7 L. Ed 2d 592)(1976). See also Reynolds v. Cochran, 365 U.S. 525, 531 (81 S. Ct. 723, 726, 5 L. Ed 754)(1961); Hawk v. lson, 326 U.S. 271, 278, (66 S.Ct. 116, 120 90 L. Ed 61)(1945); Avery v. Alabama, 308 U.S. 444, 446(60 S. Ct. 321, 322, 8 . Ed 377)53 S.Ct. 55, 59 77 L. Ed 158)(1932). (quoted by U.S. v. Warrant Authorizing Interception of Oral ommunications etc, 521 F. Supp. 190 (1st. Cir. D. C. 1981). Attorney-Client** communications ordinarily are privileged, and us are protected from discovery by a party opponent... By allowing confidentiality of the substance of client and lawyer scussions, the privilege is held by clients as a means of encouraging their candor in discussing their circumstances ith their chosen legal representatives. **See Upjohn Co. v. U.S., 449 U.S. 383, 66 L. Ed 2d 584, 101 S. Ct. 677 (1981).** The rivilege however, is not absolute. As stated in **Permian Corp. v. U.S. 214 U.S. App. D. C. 396, 665 F.2d 1214, 1219 (D. C. ir. 1981)(quoting U.S. v. American Telephone & Telegraph, 642 F.2d 1285, 1299 (D. C. Cir. 1980)),** "any voluntary sclosure by the holder of such a privilege is inconsistent with the confidential relationship and thus waives the privilege. **Se**

*J. Wigmore, Evidence §§ 2327-28(McNaughton rev. 1961); McCormack on Evidence § 93 (Cleary ed. 1972) (quoted in I*
*: Subpoenas Duces Tecum, 738 F.2d 1367 (D.C. Cir. 1984) and Ctr. For Pub. Integrity v. U.S. DOE, 287 F. Supp. 3D 50(1*
*. Cir. 2018).* Petitioner states that the record clearly reflects that defense counsel knowingly made a reckless attempt to
epare Petitioner testimony while sitting in the courtroom, in close proximity to the prosecutor, while speaking in a tone of
at could easily be heard by the prosecutor. This ill-conduct of defense counsel served to waive Petitioner's right to attorney
ient confidentiality without Petitioner's knowledge of what was actually occurring. This violation of Petitioner's rights
abled the prosecutor to launch a sneak attack during Petitioner's testimony in the presence of the jury. Through the action
defense counsel, Petitioner's rights to attorney-client confidentiality, right to a fair trial, and right to the effective assistanc
counsel were violated. ***This assignment of fundamental error requires reversal.***

**Counsel eliciting inadmissible and highly prejudicial information regarding petitioner's prior conviction for crime similar to the one on trial.**

*"Evidence of prior bad acts will always be prejudicial."* ***U.S. v. Patterson, 20 F.3d 809, 814 (10th Cir. 1994). District Court***
the ***Tenth Circuit*** has further held that: *"**The Court** has determined that improperly admitted prejudicial evidence deprive*
titioner of a fundamentally fair trial in violation of his right to do process and that trial counsel provided ineffective
sistance in failing to object to the prejudicial evidence..." see* ***Holland v. Patton, 2014 U.S. LEXIS 138235.*** *The admissior*
evidence is contingent upon it's relevance. ***Okla. Stat. Tit. 12 § 2401.*** *Evidence is relevant if it tends to more or less*
obable a material fact in issue. ***Kennedy v. State, 640 P.2d 971, 978 (Okla. Crim. App. 1982)***. *Even if evidence is deemed*
levant, it's probative value must outweigh it's prejudicial impact. ***Okla. Stat. Tit. 12 § 2403.*** *In this instant cause, irrelevan*
d unduly prejudicial testimony was elicited from petitioner, by trial counsel, over the trial court's own admonition and orde
staining defense **Motion in Limine** to preclude prosecutorial misconduct in said manner. Therebyviolating the guidelines th
***CCA*** *set out in* ***Burks v. State, 594 P.2d 771 (Okl. Cr. 1979)****; due process of laws, prejudicing the trial process, and*
ndering the process as unreliable, requiring reversal. Counsel's performance in this regard fell below an objective
asonableness and cannot be considered as sound trial strategy. This assignment of error constitutes ineffective assistance o
unsel and requires reversal.

*When defense counsel stated the above, he essentially joined forces with the prosecution, abandoning his duty to act as a*
yal advocate for petitioner. When a prosecutor gives his personal opinion as to any part of the evidence or testimony, it
***olates due process. See Grubb v. State, 663 P.2d 750 (Okl. Cr. 1983); Ray v. State, 510 P.2d 1395 (Okl. Cr. 1973); Trim v.***
***tate, 808 P.2d 697 (Okl.Cr. 1991), requiring reversal and remand for a new trial.*** *When defense counsel elects to bolster th*

*rosecutors case, counsel abandons his duty of loyalty to his client.* ***The Tenth Circuit*** *has held that. "Counsel's duty of loyal* *cludes... the duty to act as an adversary vis-avis the state. "An effective attorney must* play the role of an active advocate, ther than a mere friend of the court." ***Osborn, 861 F.2d at 624 (quoting Evitts v. Lucey, 469 U.S. 387, 394, 83 L.Ed 657, 1( Ct. 2039)("if the process loses it's character as a confrontation between adversaries, the constitutional guarantee is olated")*** As is the *case here in this instant cause.*

*The* ***10th Cir.*** *has held that, "****The Sixth Amendment*** *gives a defendant the right to effective assistance of counsel.* ***McMann, 97 U.S.759, 777-771 (1970); Powell, 287 U.S. 45, 57 (1932).*** *The* ***Tenth Circuit*** *has articulated the standard of competence*

*s follows:*

> ***The Sixth Amendment demands that defense counsel exercise the skill, judgment, and diligence of a reasonably competent attorney. Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir.); The Supreme Court has made clear that if counsel's incompetence is harmless error, a conviction of a criminal defendant will not be reversed. There must be some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense." U.S. v. Morrision, 449 U.S. at 365.***

*Petitioner* ***Brandon Shane Wesley Christian,*** *asserts that in this instant cause, when trial counsel attempted to persuade th ry into disregarding the law requiring them to consider petitioner prior convictions, counsel discredited himself, prejudiced e jury against petitioner and further undermined the defense. The evidence in this instant case should have weighed heavil favor of petitioner as a defense of not guilty.* ***The above complained of error cannot be attributable to harmless error, herefore, requiring reversal.***

*The fundamental nature of this* ***Sixth Amendment*** *right to counsel derives from the fact that the Petitioner* ***Brandon Shane Wesley Christian*** *only secures his other constitutional and procedural right through his right to counsel. See* ***Maine v. Moulton, 474 U.S. 159, 168-70, 106 S. Ct. 477, 88 L.Ed 2d 481 (1985).*** *The defendant's* ***Sixth Amendment*** *right to counsel ecessarily requires a counsel who will zealously represent the defendant and provide the defendant with effective legal ssistance." See* ***Evitts v. Lucey, 469 U.S. 387, 395-96, 105 S. Ct. 830, 83 L.Ed 2d 821 (1985). In Kimmelman v. Morrison 77 U.S. 365, 106 S.Ct. 2574, 91 L.Ed. 2D 305 (1986),*** the ***Supreme Court*** recognized that ineffective assistance of counsel aims may not be summarily defaulted on procedural grounds at the federal habeas level when there has not been a eaningful opportunity for full and fair litigation of petitioner's ***claims of ineffective assistance of counsel either at trial or n direct review.***

***The Supreme Court observed:***

> ***"Because collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation."***

*In a long line of cases that includes* ***Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L.Ed 158 (1932), Johnson v. Zerbst, 04 U.S. 458, 58 S. Ct.1019, 82 L.Ed 1461 (1938);*** *and* ***Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed 2d 799 963),*** *the* ***United States Supreme Court*** *has recognized that the* ***Sixth Amendment*** *right to counsel exists, and is needed, in der to protect the fundamental right to a fair trial.* ***466 U.S. 685.*** *"A fair trial is one in which evidence subject to dversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The*

*ght to counsel plays a crucial role in the adversarial system embodied in the* ***Sixth Amendment,*** *since access to counsel's ill and knowledge is necessary to accord defendant's the "ample opportunity to meet the case of the prosecution" to which ey are entitled."* ***Adams v. U.S. ex rel., McCann, 317 U.S. 296, 275-6, 63 S. Ct. 236, 240, 87 L.Ed 2d 268 (1942); owell v. Alabama, 287 U.S. at 68-69; and 466 U.S. 685.***

*An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure at the trial is fair. For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance counsel."* ***McMann v. Richardson, 397 U.S. 759, 771 n.14, 90 S.Ct. 1441, 1449 n.14, 25 L.Ed 2d 763 (1970).***

*The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive th ucible of meaningful adversarial testing.* ***Cronic, 466 U.S. at 656-7; Fisher, 282 F.3d at 1291-2.*** *When a true adversarial iminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing nvisioned by the* ***Sixth Amendment*** *has occurred. But if the process loses it's character as confrontation between adversarie e constitutional guarantee is violated.* ***Cronic, 466 U.S. at 656-7; Fisher v. Gibson, 282 F.3d 1283 (C.A. 10(okla.) 2002) @ 290, 1291.***

*The premise of an adversarial system in which the defendant has an effective advocate for his side "underlies and gives eaning to the* ***Sixth Amendment.*** *It is meant to ensure fairness in the adversarial criminal process. Unless the accused ceives effective assistance of counsel, a serious risk of injustice infects the trial itself.* ***466 U.S. 655-56, 104 S. Ct. 2039.*** *In der to make the adversarial process meaningful, counsel has a duty to investigate all reasonable lines of defense.*

*guyen, 131 F.3d at 1347; Strickland, 466 U.S. at 691.* The right to counsel guaranteed by the Constitution contemplates the ervices of an attorney devoted solely to the interests of his client. ***Osborn v. Shillinger, 861 F.2d 612, 624-25 (10th Cir. 1988)*** *uoting Von Moltke v. Gillies, 332, U.S. 708,725-26, 68 S.Ct. 316, 92 L.Ed 309 (1948).* "The duty of loyalty is violated ... hen counsel acts more for the benefit of ... the prosecution then the client he is defending. ***Id at 625*** **(quoting Cronic,** *56 U.S. at 666, 104 S. Ct. 2039); Fisher, 282 F.3d at 1291.*

## *PROPOSITION V*

## *CUMULATIVE ERROR DEPRIVED PETITIONER OF DUE PROCESS OF LAW, RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, AND EQUAL PROTECTION OF THE LAWS, A SECURED UNDER THE FEDERAL AND STATE CONSTITUTIONS.*

*Cumulative error applies when, although no single trial error examined in isolation is sufficiently prejudicial to warrant versal, the cumulative effect of multiple errors may still prejudice petitioner.* ***Mancuso v. Olivarez, 292 F.3d 939 (9th Cir. 02); Thomas v. Hubbard, 273 F.3d 1164 (9th Cir. 2001); U.S. v. Franklin-El, 555 F.3d 1115 (10th Cir. 2009); Workman v. Mullin, 342 F.3d 1100 (10th Cir. 2003)(For a petitioner in a criminal trial to demonstrate cumulative error, he must show at there were at at least two errors committed during the course of the trial and those errors so infected the ry's deliberation that they denied him a fundamentally fair trial.) U.S. v. Courtright, 632 F.3d 363 (7th Cir. 2011).*** *In nalyzing a cumulative error claim, the proper inquiry "aggregates all the errors that individually might be harmless [and erefore insufficient to require reversal], and it analyzes whether their cumulative effect on the outcome of the trial is such at collectively they can no longer be determined to be harmless." See* ***U.S. v. Wood, 207 F.3d 1222, 1237 (10th Cir. 2000).*** *he* ***Tenth Circuit Court of Appeals*** *has repeatedly held that cumulative error analysis is applicable only where there are two more actual errors.* ***Workman v. Mullin, 342 F.3d 1100, 1116 (10th Cir. 2003).***

*In the federal habeas context, the only otherwise harmless errors that can be aggregated are federal constitutional rors, and such errors will suffice to permit relief under cumulative error doctrine only when the constitutional errors mmitted in the state court trial so fatally infected the trial that they violated the trial's fundamental fairness. See* ***Mathews Workman, 577 F.3d 1175, 1195 n. 10 (10th Cir. 2009).*** *The task merely consists of aggregating all the errors that have been und to be harmless, and analyzing whether their cumulative effect on the outcome of the trial is such that collectively they n no longer be determined to be harmless. See* ***Grant v. Trammell, 727 F.3d 1006, 1025 (10th Cir. 2013)*** *quoting* ***Rivera, 00 F.2d at 1470.*** *Only if the errors so fatally infected the trial that they violated the trials fundamental fairness is reversal*

*ppropriate. Id. Quoting* ***Mathews, 577 F.3d at 1195 n. 10.*** *All defendant's needs to show is a strong likelihood that the veral errors in his case, when considered additively, prejudiced him.* ***Id at 1026.***

*Petitioner* ***Brandon Shane Wesley Christian,*** *has presented numerous instances of constitutional violations in showing the roceedings in this matter are replete with error of constitutional magnitude. In* ***United States v. Rivera, 90 F.2d 1462 (10th ir. 1990)*** *the* ***Tenth Circuit*** *held that the cumulative effect of two or more individually harmless errors has the potential to rejudice a defendant to the same extent as a single reversible error. It cannot be said that the cumulative impact of these tria rrors did not impact the trial proceedings in any way, that rendered the result of the trial proceedings as unreliable.*

***Therefore, relief is warranted in this case.***

## *REASON FOR GRANTING THE PETITION*

## *DUE PROCESS ISSUES*

*The **U.S. Supreme Court** held in **Ake v. Oklahoma, 470 U.S. 68**, that "the **Oklahoma** waiver rule does not apply to ndamental trial error. Under **Oklahoma Law**, federal constitutional errors are fundamental." **Hawkins v. State, 569 P.2d 90 (Okla. Crim. App. 1977) @493; Gaddis v. State, 447 P.2d 42, 45-46(Okla. Crim. App. 1968)**. "A violation of nstitutional rights constitutes fundamental error. **Williams v. State, 658 P.2d 499 (Okla. Crim. App. 1983)**. Petitioner **randon Shane Wesley Christian,** asserts, in his case at bar, that all errors raised herein are violations of his constitutional ghts to **(1) A fair trial; (2) the effective assistance of trial counsel; (3) the effective assistance of trial counsel; (4) the due ·ocess of laws; (5) the equal protection of laws, thus, constituting fundamental errors, rendering the Oklahoma waiver ıle inapplicable, requiring this Court to hear and adjudicate the error set forth herein.***

## *CONCLUSION*

***Wherefore,** the **Court** must **Vacate** and **Set Aside** the **Judgment And Conviction** as **22 O.S. § 1085,** which states;"If the cou nds favor of the applicant it shall **Vacate and Set Aside** the **Judgment And Sentence and Discharge or Re-sentence Him, o rant A New Trial, or Correct or Modify The Judgment And Sentence** as may appear appropriate. The court shall enter an ıpplementary orders as to Rearrangement, **Retrial, Custody, Bail, Discharge, or "Other Matters That May Be Necessary nd Proper".***

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Brandon L. W. Otto

Date: DECEMBER 08, 2021