

21-7383  
No. \_\_\_\_\_

**ORIGINAL**

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IN THE SUPREME COURT OF THE UNITED STATES

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FRANCIS B. ARMAH,

Petitioner

v.

JANET DOWLING

Respondent.

Supreme Court, U.S.  
FILED

MAR - 7 2022

OFFICE OF THE CLERK

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

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PETITION FOR A WRIT OF CERTIORARI

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Francis B. Armah  
Prisoner # 531925  
Dick Conner Correctional Center  
129 Conner Road  
Hominy, Oklahoma 74035  
*Pro se* Litigant

March 4, 2022

### **QUESTION PRESENTED**

Whether the United States Court of Appeals for the Tenth Circuit rendered an unreasonable application of *Holland v. Florida*, 560 U.S. 631 (2010) without consideration of *Bounds v. Smith*, 430 U.S. 817 (1977), *abrogated by Lewis v. Casey*, 518 U.S. 343 (1996), when denying Petitioner Armah, a *pro se* litigant, a certificate of appealability?

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## **PETITION FOR WRIT OF CERTIORARI**

### **PARTIES TO THE PROCEEDING**

The petitioner in this case is Francis B. Armah.

The respondent in this case is Janet Dowling.

### **OPINIONS BELOW**

1. The January 20, 2022, Tenth Circuit Court of Appeals Order Denying Certificate of Appealability is unpublished and attached hereto in the Appendix as App. 1a – 6a.
2. The August 26, 2021 Northern Federal District Court of Oklahoma Opinion and Order is unpublished and attached hereto in the Appendix as App. 7a – 17a.
3. The August 21, 2020, Oklahoma Court of Criminal Appeals Order Affirming Denial of Application for Post-Conviction Relief is unpublished and attached hereto in the Appendix as App. 18a – 21a.

### **JURISDICTION**

This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS**

1. The Fourteenth Amendment to the United States Constitution provides, in relevant part: "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."
2. Title 28, Section 2254, subsection (b)(1)(A) of the United States Code provides, in pertinent part: "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 unless it appears that ... the applicant has exhausted the remedies available in the courts of the State[.]”

3. Title 28, Section 2254, subsection (c) of the United States Code provides that “[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.”

### **STATEMENT OF THE CASE**

In Case No. CF-2015-572, a Tulsa County jury convicted Petitioner of First Degree Rape, After Former Conviction of Two or More Felonies, in violation of OKLA. STAT. tit. 21, § 1114 (Count 2); Larceny from a House, After Former Conviction of Two or More Felonies, in violation of OKLA. STAT. tit. 21, § 1723 (Count 3); Forcible Sodomy, After Former Conviction of Two or More Felonies, in violation of OKLA. STAT. tit. 21, § 888 (Count 4); First Degree Rape, After Former Conviction of Two or More Felonies, in violation of OKLA. STAT. tit. 21, § 1114 (Count 5); Rape by Instrumentation, After Former Conviction of Two or More Felonies, in violation of OKLA. STAT. tit. 21, § 1114 (Count 6); and First Degree Rape, After Former Conviction of Two or More Felonies, in violation of OKLA. STAT. tit. 21, § 1114 (Count 8).

The jury fixed punishment at life without parole for Count Two; four (4) years imprisonment for Count Three; life imprisonment for Count Four; life imprisonment without parole for Count Five; twenty (20) years imprisonment for Count Six; and life imprisonment without parole for Count Eight.

The District Court Judge, Honorable William J. Musseman, sentenced Petitioner in accordance with the jury's verdicts. The Judge further ordered that Counts Two and Eight run concurrently; that the sentences for Counts Four, Five, and Six run concurrently with each other, but consecutive to Counts Two and Eight, and that Count Three runs consecutively to all other sentences.

Petitioner, represented by counsel, appealed to the Oklahoma Court of Criminal Appeals ("OCCA") in Case No. F-2016-67. On April 28, 2017, the OCCA affirmed Petitioner's Judgment and Sentence.

On March 28, 2018, Petitioner, with assistance from a prison law clerk at North Fork Correction Center ("NFCC") located in Sayre, Oklahoma, filed an "Application for Post-Conviction Relief" ("APCR") in accordance with OKLA. STAT. tit. 22, § 1080 (2011).

On July 9, 2018, the Tulsa County District Court Judge, Honorable William J. Musseman issued an order denying relief.

On July 13, 2018, Petitioner sent a letter to the Court Clerk of Tulsa County District Court requesting a certified copy of the Order Denying Post-Conviction Relief.

On July 19, 2018, Petitioner, with assistance from a prison law clerk, filed "Request for Leave to File Reply to Response to Petitioner's Application for Post-Conviction Relief" along with "Notice of Post-Conviction Appeal."

From July 19, 2018, to June 5, 2019, Petitioner submitted over thirty (30) "Request to Staff" for access to the law library so he could file papers with the assistance of a prison law clerk to the courts.



During that same period, Oklahoma prisons were subject to statewide lockdown protocols over gang and racial violence. That is, there were incidents between race groups and gangs, "Indians and Bloods"; racial conflicts between races, "Whites and Blacks" and "Hispanics and Blacks"; and amongst rival gangs "Crips and Bloods," etc...

On April 14, 2019, Petitioner was transferred from the general prison population to the Segregated Housing Unit ("SHU") for violating prison rules by possessing a cell phone.

On May 14, 2019, Petitioner was released from the SHU back to the general prison population because the prison needed the SHU beds to segregate those prisoners involved in a racial/gang conflict.

Two days later, on May 16, 2019, Petitioner was transferred back to the SHU pending transfer.

On June 5, 2019, Petitioner was transferred from NFCC at Sayre, Oklahoma to Davis Correctional Facility ("DCF") in Holdenville, Oklahoma.

On July 15, 2019, Petitioner, with assistance from a prison law clerk, filed an application for post-conviction relief seeking a recommendation for an appeal out of time.

From September 15, 2019 to October 25, 2019, the Oklahoma Department of Corrections ordered a statewide lockdown due to prison riots at multiple correctional facilities. *See* Oklahoma Department of Corrections News Release dated October 25, 2019, available at <http://www.doc.ok.gov/26>.

On September 17, 2019, Tulsa County District Court Judge, Honorable William J. Musseman issued an order denying relief.

On January 3, 2020, Petitioner, with the assistance of a prison law clerk, filed an application for post-conviction relief seeking a recommendation for an appeal out of time from the September 17, 2019 order denying relief.

On March 16, 2020, the Oklahoma Supreme Court issued FIRST EMERGENCY JOINT ORDER REGARDING the COVID-19 STATE OF DISASTER declaring “[s]ubject only to constitutional limitations, all deadlines and procedures whether prescribed by statute, rule or order in any civil, juvenile or criminal case, shall be suspended for 30 days from the date of this order. This suspension also applies to appellate rules and procedures for the Supreme Court, the Court of Criminal Appeals, and the Court of Civil Appeals.” *Id.*, 462 P.3d 704, 704 – 705 (Mem).

On March 27, 2020, the Oklahoma Supreme Court issued SECOND EMERGENCY JOINT ORDER REGARDING the COVID-19 STATE OF DISASTER declaring “[s]ubject only to constitutional limitations, all deadlines and procedures whether prescribed by statute, rule or order in any civil, juvenile or criminal case, shall be suspended through May 15, 2020. This suspension also applies to appellate rules and procedures for the Supreme Court, the Court of Criminal Appeals, and the Court of Civil Appeals.” *Id.*, 462 P.3d 262 (Mem).

On April 5, 2020, Tulsa County District Court Judge, Honorable William J. Musseman issued an order denying relief.

On April 29, 2020, the Oklahoma Supreme Court issued THIRD EMERGENCY JOINT ORDER REGARDING the COVID-19 STATE OF DISASTER declaring, in relevant part, “[i]n all cases, the period from March 16, 2020 to May 15, 2020, during which all rules and procedures, and deadlines, whether prescribed by statute, rule or order

in any civil, juvenile or criminal case were suspended, shall be treated as a tolling period. May 16<sup>th</sup> shall be the first day counted in determining the remaining time to act. The entire time permitted by statute, rule or procedure is not renewed.” 462 P.3d 703 (Mem).

In Case No. PC-2020-322, Petitioner, with the assistance of a prison law clerk, appealed this adverse ruling to the OCCA.

On August 21, 2020, the OCCA affirmed the denial of post-conviction relief seeking an appeal out of time.

On January 7, 2021, in Case No. 21-CIV-0011-JED-CDL, Petitioner, with the assistance of a prison law clerk, filed a writ of habeas corpus for a prisoner in state custody pursuant to 28 U.S.C. § 2254 in the Northern District of Oklahoma.

On April 8, 2021, Petitioner, with the assistance of a prison law clerk, filed PETITIONER’S REPLY TO THE STATE’S MOTION TO DISMISS.

On August 26, 2021, the Northern District Judge, Honorable CLAIRE V. EAGAN, dismissed Petitioner’s writ of habeas corpus as untimely. App. 7a – 17a.

In Case No. 21-5071, Petitioner, with the assistance of a prison law clerk, appealed to the Tenth Circuit Court of Appeals.

On January 22, 2022, the Tenth Circuit denied relief and issued Order Denying Certificate of Appealability. App. 1a – 6a.

### **ARGUMENT**

The Tenth Circuit Court of Appeals rendered an unreasonable application of *Holland v. Florida*, 560 U.S. 631, 130 S.Ct. 2549, 177 L.Ed.2d 130 (2010) in denying Petitioner’s belated *pro se* arguments for equitable tolling. In *Holland v. Florida*, Justice

BREYER held that “one-year statute of limitations on petitions for federal habeas relief by state prisoner is subject to equitable tolling.” *Id.*, 560 U.S., at 649.

To qualify for equitable tolling, the Court supplied a two-prong standard: “(1) that [Petitioner] has been pursuing his rights diligently; and (2) that some extraordinary circumstances stood in his way and prevented timely filing.” *Ibid.*

In adopting this standard, the Court reasoned that,

Holland does not argue that his attorney’s misconduct provides substantial ground for relief, cf. § 2254(i), nor is this a case that asks whether AEDPA’s statute of limitations should be recognized at all, cf. *Day, supra*, at 209, 126 S.Ct. 1675. Rather this case asks how equity should be applied once the statute is recognized. And given equity’s resistance to rigid rules, we cannot read *Coleman* as requiring a per se approach in this context.

*Holland*, 560 U.S., at 650 – 651. The Court did not necessarily foreclose Holland, a state prisoner’s, claims based upon “attorney misconduct” or “attorney miscalculation” under the holding of *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991), rather the Court reasoned that whether the Antiterrorism and Effective Death Penalty Act limitations period should be equitably tolled requires a fact-intensive inquiry based on the totality of the circumstances. *Holland*, 560 U.S., at 645 – 650. Justice SCALIA sufficiently clarified as such in the *Holland* dissent: “If there is any doubt that equitable tolling is unavailable under § 2241(d) to excuse attorney error, we eliminated it in *Lawrence [v. Florida]*, 549 U.S. 327, 336, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007).” *Id.*, 560 U.S., at 665. Cf. 28 U.S.C. § 2254(i) (The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.).

Nonetheless, the *Holland* Court found error where “the District Court rested its ruling not on a lack of extraordinary circumstances, but rather a lack of diligence ... [and] the diligence required for equitable tolling purposes is “reasonable diligence.” *Holland*, 560 U.S., at 653. To be sure, the Court has stated that “a pandemic” is an “extraordinary circumstance.” See *Democratic National Committee v. Wisconsin State Legislature*, 141 S.Ct. 28, 42 (Mem), 208 L.Ed.2d 247 (2020). As to “reasonable diligence,” Petitioner has been “pursuing his rights” according to the assistance provided by prison law library and prison law clerks made available through Oklahoma Department of Corrections prison policy, OP-030115 “Access to Courts/Law Library.” That is, under the circumstances of being a foreign national not fluent in the English language, Petitioner relied on the inmates supposedly “trained” upon the “law” to vindicate his “collateral rights” because, “[a]n application for a writ of habeas corpus ... shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(1)(A). See also 28 U.S.C. § 2244(d)(2) (The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section.).

In strict reliance to the assistance provided by prison law clerks for “access to courts” Petitioner sought to vindicate his “collateral rights” through the state vehicle of the Oklahoma Post-Conviction Procedures Act pursuant to OKLA. STAT. tit. 22, § 1080 *et seq.* (2011). Because an “appeal out of time” pursuant Rule 2.1(E), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011)<sup>1</sup>, is a remedy

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<sup>1</sup> Rule 2.1(E)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011) (emphasis added) provides:

available in the courts of the State, Petitioner was lead to believe by the “trained” prison law clerk that before commencing any federal action Petitioner had to “exhaust” his state court remedies under 28 U.S.C. § 2254(b)(3) & (c). This belief was “logically sound” to Petitioner’s circumstances for “absent unusual circumstances, a federal court cannot grant habeas relief unless the petitioner has exhausted all means of relief available under state law.” 28 U.S.C. § 2254(b); *O’Sullivan v. Boerckel*, 526 U.S. 838, 842 – 44, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999); *Picard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971).

In other words, the “plain text” of 28 U.S.C. § 2254(b)(1) “has exhausted the remedies available in the courts of the State” demands that Petitioner utilize the vehicle of a Oklahoma Court of Criminal Appeals “Court Rule,” *i.e.*, Rule 2.1(E), *supra*, to confer jurisdiction for appellate review of the Tulsa County District Court’s denial of Petitioner’s “Timely” March 28, 2018, Application for Post-Conviction Relief “after 243 days of his one-year limitation period had passed.” App. \_\_\_\_a. However, the “through no fault of Petitioner’s own” standard is purely arbitrary as a matter of “state law” and does not necessarily implicate a grant of “post-conviction” relief under Oklahoma Statutes title 22, section 1080. *See* footnote 1, *supra* (if the trial court recommends an

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If petitioner seeks an appeal out of time, the proper procedure is to file an Application for Post-Conviction Relief requesting an appeal out of time. The Application must be filed in the trial court where the judgment and sentence on conviction or the final order denying relief was imposed. **A petitioner’s right to appeal is dependent on the ability to prove he/she was denied an appeal through no fault of his/her own.** *See Blades v. State*, 2005 OK CR 1, 107 P.2d 607; *see also Smith v. State*, 1980 OK CR 43, 611 P.2d 276. If the trial court recommends an appeal out of time, then petitioner shall file a petition for an appeal out of time in this Court within thirty (30) days from the date the trial court’s ruling was filed with the trial court clerk. The petitioner must attach to the petition a copy of the post-conviction application for the out-of-time appeal that was filed in the trial court and a certified copy of the trial court’s ruling upon that application. This Court will consider the trial court’s recommendation and issue an order granting or denying an appeal out of time. If the trial court denies the request, then Petitioner should attach a certified copy of the order denying relief to the petition for appeal to this Court and shall otherwise comply with those procedures for perfecting a post-conviction appeal.

appeal out of time ... if the trial court denies the request). *See Orange v. Calbone*, 318 F.3d 1167, 1170 – 1171 (10<sup>th</sup> Cir. 2003) (The procedure, which can be pursued both “in a direct appeal” and “in an appeal under [Oklahoma’s] Post-conviction Procedure Act,” *id.* Rule 2.1(E)(2), is available only to those criminal defendants who can prove they were “denied an appeal through no fault of [their] own.” *Id.*).

In Petitioner’s instant case, the Tenth Circuit found Petitioner “**asserted he did not appeal the denial of his first application due to the court’s failure to send a certified copy of its order**, lockdowns in prison, limited access to the prison’s law clerk, and a stay in the segregated housing unit due to a violation of prison rules.” App. 2a (emphasis added). That is, contrary to the “extraordinary circumstance” where, in spite of Rule 5.3(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18 (2011) *clearly* providing that “[t]he court clerk shall on the same day that the order granting or denying post-conviction relief is filed in the District Court, **mail to petitioner or counsel of record for the post-conviction proceedings, a FILE-STAMPED CERTIFIED COPY OF THE ORDER of the District Court setting out findings of fact and conclusions of law granting or denying the application**” (emphasis added) and Rule 5.4(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18 (2011) *clearly* providing that “[d]ue to the statutory time constraints set out in Section 1087 of Title 22, **the judge shall monitor and ensure timely notice is provided to the parties by the clerk of the District Court**” (emphasis added) the Tenth Circuit unreasonably concluded Petitioner’s *pro se* claims could not overcome such a state impediment of the Court Clerk and District Court not following the Rules of the

Oklahoma Court of Criminal Appeals, “which will have the force of statute” 22 O.S. § 1051(b).

In recognizing the impediment, the Tenth Circuit did not disagree with the factual finding that “the state court impeded his ability to perfect a postconviction appeal from the denial of his first application for postconviction relief by failing to send him a certified copy of the order denying relief. Dkt. # 12, Resp., at 2 – 3, 6.” App. 9a. However, rather than apply “totality of the circumstances,” for Petitioner to *procedurally* invoke “one complete round of the State’s established appellate review process,” the Tenth Circuit detached the specific process into two separate, *statutory* events: Petitioner filing a “second application for postconviction relief,” “occurring after December 7, 2018, at the time the statute of limitations had run,” (App. 5a) and Petitioner’s July 13, 2018, unanswered inquiry for the court clerk to send Petitioner a “file-stamped certified copy” of the July 19, 2018 Order.

However, in stark conflict to § 2254(c), Rule 2.1(E)(1), *supra* does not necessarily implicate the requirement “if he has the right under the law of the State to raise, by any available procedure, **the question presented.**” (emphasis added). That is, a “verified” filing in accordance Rule 2.1(E)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011) cannot accurately present “the question[s] presented” in Petitioner’s March 28, 2018, “timely” verified (22 O.S. § 1081) Application for Post-Conviction Relief under the rubric of 28 U.S.C. § 2254(c); however, the statutory language of “has exhausted the remedies available in the courts of the state” under 28 U.S.C. § 2254(b)(1) is clearly implicated “[i]f the trial court denies the request, then Petitioner should attach a certified copy of the order denying relief to the petition for



appeal to this Court and shall otherwise comply with those procedures for perfecting a post-conviction appeal” in accordance with Rule 2.1(E)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011). Under this rubric grounded in “force of statute,” Petitioner truly believed he was “diligently pursuing” his federal rights by *inartfully* exhausting those “rights” through “the remedies available in the courts of the state.” 28 U.S.C. § 2254(b)(1).

Although Petitioner’s case is not grounded in “attorney error,” the same reasoning can be applied to the “fact-intensive inquiry based upon the totality of the circumstances” where Petitioner is convicted of multiple counts of First Degree Rape and sentenced to the maximum term of Life Without Parole in violation of those specific crimes and Petitioner, a layman of the law, relied on prison law clerks and prison law library officials to provide him aid as required by *Bounds v. Smith*, 430 U.S. 817, 828, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977), *abrogated by Lewis v. Casey*, 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996). The Tenth Circuit unreasonably attributed all the fault to Petitioner rather than apply the “totality of circumstance approach” under the rubric of *Holland v. Florida*, 560 U.S. 631 (2010). As a layman of the law, Petitioner’s instant case for grant of certiorari is implicated by “the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.” *Bounds v. Smith*, *supra*, 430 U.S. at 828; U.S.C.A. Const. amdt. XIV. Of course, the “actual injury” is the literal default of AEDPA’s one-year statute of limitations and that the “specific facts” supplied by Petitioner were *inartful* as to satisfy the “equitable” exception to AEDPA.

To be sure, the Oklahoma Department of Corrections, as a matter of policy<sup>2</sup>, provides that “Institution law libraries will be open a minimum of 30 hours per week.” OP-030115(VI)(A). However, “All inmates, excluding segregation housing and community corrections centers will have access to the law library at least six (6) hours a week, *if the inmate has a verifiable court deadline that is less than 90 calendar days away.*” *Ibid* (emphasis added). Nonetheless, “Inmates housed in segregated housing or a restricted unit must submit a ‘Request for Legal Research Assistance’ (DOC 030115C) to the law library. An inmate research assistant will respond to the request within two working days ... [and] Inmates with a court-imposed or other legal deadline that is less than 45 calendar days away may be allowed extra time in the law library. The law library supervisor will verify that a legal deadline exists.” OP-030115(VI)(A)(1), (2).

While at North Fork Correctional Center, Petitioner’s access to the law library consisted of an inmate law clerk assigned to a unit fulfilling the duties of a law library supervisor. Because of this, Petitioner was subject to the “whims” of another inmate due to the prison’s practice.

In *Lewis v. Casey*, this Court clarified that *Bounds* did not establish a “right to a [prison] law library or to legal assistance” but the “right that *Bounds* acknowledged was the (already well-established) right of *access to the courts.*” *Id.*, 116 S.Ct. at 2179 (emphasis in original). The Court explained further that “[b]ecause *Bounds* did not create an abstract, free-standing right to a law library or legal assistance, an inmate cannot

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<sup>2</sup> In the *Lewis v. Casey* concurrence, Justice THOMAS “agree that the Constitution affords prisoners what can be termed a right of access to the courts. [However,] [w]hether to expend state resources to facilitate prisoner lawsuits is a question of policy and one that the Constitution leaves to the discretion of the States.” *Id.*, 116 S.Ct. at 2195.

establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is sub-par in some theoretical sense." *Id.*, 116 S.Ct. at 2180.

The Tenth Circuit determined that "[Petitioner] Armah argues he is entitled to equitable tolling because he was not given a certified copy of his judgment and at various points, he had limited access to the prison law library, the inmate legal research assistant, and his legal materials. These arguments are not persuasive. Equitable tolling applies only if (1) a petitioner diligently pursues federal claims and (2) extraordinary circumstances prevent the petitioner from filing a timely petition. *Holland v. Florida*, 560 U.S. 631, 649 (2010)." App. 5a. However, the Tenth Circuit did not allow Petitioner to "go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." *Lewis, supra*, 116 S.Ct. at 2180. Under this legal framework, Petitioner "might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known." *Ibid.* Most notable is that the Northern District Court determined that "[i]n his petition, Armah does not request equitable tolling or even acknowledge that his petition was not filed within the one-year limitation period." App. 13a. In fact, the Northern District Court brings to light "[i]n the portion of the petition designated for explaining why noncompliance with the statute of limitations should not bar habeas relief, Armah wrote "N/A." Dkt. # 1, Pet., at 13." App. 13a.

Nonetheless, the Northern District Court concluded that "[w]hile Armah has provided the Court with specific facts to support his request for equitable tolling (argued for the first time in Petitioners Reply to the State's Motion to Dismiss), those facts do not

demonstrate either that Armah pursued his federal claims with reasonable diligence or that extraordinary circumstances rendered him incapable of filing a timely federal habeas petition.” App. 14a.

Under these facts, the Tenth Circuit found that “[a]s to any events occurring after December 7, 2018, at the time of the statute of limitations had run, and tolling could not apply to extend the limitations period. As to events occurring before the limitations period ran, reasonable jurists could not disagree that any circumstances preventing Armah from making a timely filing were ordinary.” App. 5a. The Tenth Circuit relied on an unpublished case based upon the persuasive value that, “[g]enerally, limited access to resources like legal assistance or legal materials are an ordinary part of prison life and do not constitute extraordinary circumstances. *See, e.g., Dill v. Workman*, 288 F.App’x 454, 457 (10<sup>th</sup> Cir. 2008) (unpublished).” App. 5a (footnote omitted). However, the Tenth Circuit did not fully consider the “totality of the circumstances” which was initially caused by “state impediment” of noncompliance with a Court Rule to “mail to petitioner or counsel of record for the post-conviction proceedings, a file-stamped certified copy of the order” pursuant to Rule 5.3(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18 (2011) and the Tulsa County District Court was equally, if not more so, complicit in this dereliction of duty in accordance with Rule 5.4(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18 (2011). Most detrimental is that Petitioner’s reliance on those court rules and “trying to obtain a copy by sending a letter dated July 13, 2018, to the court clerk requesting a certified copy, and, after failing to receive any response [and defaulting the statutory and jurisdictional requirements], [Petitioner] filed his second application for postconviction appeal [brought in accordance

with a Court Rule]” caused Petitioner actual harm when the State court did not recognize, as a *purely* factual predicate—and clear and convincing—the court clerk’s and trial court’s dereliction of duty. App. 15a. That is, filing any appeal to the Oklahoma Court of Criminal Appeals without a “FILE-STAMPED CERTIFIED COPY OF THE [District Court’s] ORDER” would have been meaningless. This Court can take judicial notice of the Oklahoma Court of Criminal Appeals general ORDER DECLINING JURISDICTION (Petitioner failed to attach to the Petition in Error a certified copy of the District Court Order being appealed, as required by Rule 5.2(C)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021). As Petitioner has provided an insufficient record for review, the Court **DECLINES** jurisdiction and **DISMISSES** this matter.). For lack of better words, the Tenth Circuit did not place any *due* emphasis on whether “the applicant has exhausted the remedies available in the courts of the State” pursuant to the statutory framework of § 2254(b)(1)(A) in light of the “specific facts” of irreparable harm through actual state impediment presented by Petitioner. *Cf. Orange v. Calbone*, 318 F.3d 1167, 1172 (10<sup>th</sup> Cir. 2003) (The level of proof a criminal defendant in Oklahoma must satisfy in order to be granted an appeal out of time is quite high. *See* Okla. Stat. Ann., tit. 22, ch. 18, App., Rule 2.1(E)(1) (indicating that a criminal defendant’s right to an “appeal out of time” is dependent upon the ability to prove he/she was denied an appeal through no fault of his/her own”).

Thus, the Tenth Circuit unreasonably concluded, against the “exhaustion doctrine,” that “even assuming that an extended lockdown or the failure to receive a certified copy of the state district court’s order impeded Armah’s ability to timely perfect an appeal or file his federal petition, reasonable jurists could not disagree that the record

demonstrates a lack of diligence.” App. 5a. To the contrary, without “A CERTIFIED COPY OF THE ORDER ATTACHED” in accordance with Rule 5.2(C)(2), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011) the Oklahoma Court of Criminal Appeals is without jurisdiction to entertain the appeal and Petitioner cannot reasonably “exhaust” his *pro se* post-conviction claims. In violation of *fundamental* due process principles the state district court *actually* denied Petitioner sufficient “notice and opportunity” under “force of statute” law to exercise his “appeal as of right,” 22 O.S. § 1051. According to Petitioner’s *layman* understanding, such a circumstance must be constitutionally “extraordinary,” or more succinctly, “a highly unusual set of facts that are not commonly associated with a particular thing or event.”<sup>3</sup> See generally *Mathews v. Eldridge*, 424 U.S. 319, 348, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (The judicial model of an evidentiary hearing is neither required, nor even the most effective, method of decision making in all circumstances. The essence of due process is the requirement that “a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it.). This Court has determined that “[b]ecause the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before these claims are presented to the federal courts, we conclude that state prisoners must give the state courts **one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process.**” *O’Sullivan v. Boerckel*, 526 U.S. at 845, 119 S.Ct. 1728 (emphasis in bold). See Oklahoma Court of Criminal Appeals Order Affirming Denial of

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<sup>3</sup> See Black’s Law Dictionary 236 (7 ed. 1999).

Application for Post-Conviction Relief, at 3 (Petitioner's state remedies are deemed exhausted on all issues in his petition in error, brief and any prior appeal.). App. 20a.

The Tenth Circuit made such a finding upon the factors that Petitioner "did not request leave to file an appeal out-of-time or file his second state application until nearly a year after the district court denied his first application. Moreover, in the two years prior to filing the instant petition, Armah filed two separate state applications for postconviction relief but did not file a federal petition, demonstrating that he had the ability to file legal claims well before filing the instant federal petition." App. 6a.

The Tenth Circuit did not consider, after finding that the state court denied Petitioner substantial notice, that his ability to file a federal petition would have been statutorily impeded by § 2254(b)(1)(A) without the due consideration "that state prisoners must give the state courts **one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process.**" *O'Sullivan v. Boerckel*, 526 U.S. at 845 (emphasis added).

### **REASON FOR GRANTING WRIT**

The Tenth Circuit Court of Appeals' Order Denying Certificate of Appealability is an unreasonable application of *Holland v. Florida*, 560 U.S. 631 (2010) without consideration of *Bounds v. Smith*, 430 U.S. 817 (1977), *abrogated by Lewis v. Casey*, 518 U.S. 343 (1996). Under the "access to courts" theory the totality of the circumstances implicating the inadequate function of the prisons law library cause Petitioner actual injury in the default of his AEDPA one-year statute of limitations to file a pleading under 28 U.S.C. § 2254. Furthermore, this injury arose from a state impediment where the Court Clerk and District Court denied Petitioner substantial notice in the "file-stamped

certified copy of the order” after Petitioner requested a copy in accordance with the Oklahoma Court Rules and the unusual circumstance of the court clerk NOT mailing that “certified copy of the order” in a timely manner thereby actually prejudicing Petitioner’s affirmative right to appeal with an incomplete record for review. Therefore, in light of the specific facts asserted by Petitioner, the Tenth Circuit rendered a contrary application of the “reasonable diligence” standard in demarcating when Petitioner’s statute of limitations had run and that no further filing—remedies available in the state court—could overcome that limitations period. However, in recognizing that such a period could be “equitably tolled” the Tenth Circuit did fully consider the “totality of the circumstances” of a prisoner subject to statewide lockdown due to racial violence and gang violence and illiterate of the English language.

### **CONCLUSION**

For the foregoing reasons, the petition for a writ of certiorari should be GRANTED.

March 4, 2022

Respectfully submitted,



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