No. 20-5074
4:19CV-00405-CVE-FHM
CF 2012-4542

21-7426

In The

Supreme Court of The United States

Eric Jason nolen Spears, Petitioner, ProSe

State of oklahoma, Scott crow - Respondents

Petition for Writ of Certiorari

The Tenth circuit Court of Appeals

Eric Jason nolen Spears #687109
6888 E 133rd Road FD 207
Holdenville, ok 74848
Davis Correctional Facility

QUESTION(S) PRESENTED

1. Is a state appellate court's unexplained refusal to allow a Petitioner to file a succesive Petition for Post-conviction relief on an unlitigated, meritous claim on Unconstitutional Denial of Due Process under the 14th Amendment?

2. Should a Petitioner be time-barred by statutes of limitations of AEDPA denying Due Process and equitable tolling when there is evidence of uncontrolable circumstances and the Petitioner shows Due diligence

3. If the state failed to Present sufficient evidence to disprove self-Defense is it violation of Due Process

4. Is depriving the Petitioner of objectively reasonable. competent, Professional & Effective assistance of counsel on trial and Direct appeal a violation of Due Process

5. If a court abuses its discretion by admitting unlawful and illegal evidence by illegal search & seizure of Petitioner's cell-Phone with-out a warrant a violation the 4th Amendment and denial of Due Process.

6. Does a Prosecutor commiting Prosecutorial misconduct to a level of Prejudice against Petitioner violate right to fair and impartial trial and Deny Petitioner Due Process

7. If the court makes instructional Error by confusing the jury and omitting lesser included instructions does it violate Due Process and deprive Petitioner of a fair impartial trial.

8. If a court lacks subject matter Jurisdiction to accept not-guilty due District Attorneys holding dual offices; making the court lacking subject matter and authority to sign complaint and Information in the case does it violate Due Process.

9. according to law there is a right to defend himself, so if the Petitioner claims self-defense with witnesses & evidence to Prove can Petitioner claim actual Innocence since Petitioner has right to defend himself according to law.

10. If the Petitioner makes a substantial showing of culmulative Effect of Errors denying constitutional rights to fair and impartial trial violate Due Process of law

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Eric Jason nolan Spears, Petitioner, Prose; #687109
Davis Correctional Facility FD207. 6888 E. 133rd Road, Holdenville
oklahoma 74848.

State of oklahoma. Attorney General, Scott crow

U.S. Surpreme Court of the United States. 1 1st NE
Washington D.C 20543

U.S Tenth Circuit of Appeals, Cheif Judge Timothy M. Tymkovich
Cheif Judge Holmes and BachaRach, Circuit Judges

U.S. District court for northern District of oklahoma (Tulsa)
Judge claire V. Eagen

TABLE OF CONTENTS

INDEX TO APPENDICES

Prior opinions and orders

December 2013	Jury conviction. 1st Degree murder. Tulsa County. OK CF-2012-4542
May 20 2015	Direct appeal. affirmed (unpublished) F-2014-154
June 2 2015	Rehearing Denied. Spears F-2014-154
April 5 2015	Motion for suspended sentence, Tulsa county (still Pending)
January 13. 2016	Motion for 24 month Judicial reveiw. Denied Jan. 20. 2016
March 8. 2016	Writ of habeas corpus Denied March 15 2016 by argueing it was filed in wrong court with Motion to vacate
March 21. 2016	Motion to vacate an illegal sentence. Tulsa county. OK
April 6 2016	Petition for writ of Habeas Corpus and motion to vacate illegal sentence, Payne County CJ-2016-139
May 12 2016	Petition for Post-conviction Relief filed. Tulsa county, ok
August 9. 2017	Post-conviction Denied Tulsa. County. OK
September 5. 2017	Post conviction Appeal in OCCA
September 26 2017	OCCA declined to exercise Jurisdiction over Post-conviction Appeal and dismissed it, PC-2017-910
December 18 2017	Post-conviction appeal out of time. Denied April 25 2018
November 7 2018	OCCA Affirmed the denial
July 19 2019	Petitioner filed Federal Habeas Petition, Denied July 2, 2020
April 21, 2021	Tenth Circuit Denied Certificate of Appealability

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV

united states constitution, Amendment IV

united states Constitution. Amendment V

United states Constitution, Amendment VI

oklahoma Constitution Article II §§ 7 and 20

Statement of case

In Accordance to oklahoma law and criminal Procedure the Petitioner Sought relief in everyway exhausting all the State remedies Seeking Justice. On May 20. 2015 the Direct Appeal was Denied. On Jan. 7. 2015 and march 10. 2015 the Petitioner filed for Sentence modifications; Both were Denied April 15, 2015. On June 5. 2015 the Petitioner filed for a Suspended Sentence which is still Pending On June 2. 2015 the motion for rehearing on Direct Appeal was filed; It was denied August 13. 2015. On January 13. 2016 the Petitioner filed for a 24mth judicial review Which was denied Jan. 20. 2016. On March 8. 2016 the Petitioner filed writ of Habeas Corpus in Tulsa District Court and on march 21. 2016 a motion to vacate illegal sentence. On March 15. 2016 the Tulsa County District Court denied writ of Habeas Corpus claiming Lack of Jurisdiction that the Petitioner had to file in the county in which was incarcerated at. On April 6. 2016 the Petitioner filed Writ of Habeas Corpus and motion to vacate illegal sentence case no. CJ-2016-0139 as Tulsa County District Court filed to the Petitioner but was denied for Lack of Jurisdiction claiming the opposite of Tulsa County District Court that the Petitioner had to file in the District Court the Petitioner was Convicted and Sentenced. On April 1, 2016 the Petitioner filed Application For Post-Conviction relief and motion for Extension of Time; misunderstanding A.E.D.P.A statue of limitations. On May 12, 2016 the Petitioner filed his Complete Application for Post-Conviction Relief with Brief in Support, and motion For Evidentary hearing with attached evidence. On August 9, 2017 The Tulsa County District Court misconstrued the Petitioner's Motion to vacate illegal sentence and the two Applications for Post-Conviction Relief alledly as one Complete application and denied relief instead of following Procedure and answering seperatly; calculating the tolling in states favor. On Sept. 5 2017 The Petitioner filed Post-conviction Appeal in Oklahoma Court of Appeals: Which Due to the Staff and law clerks removing the certified copy of Tulsa County District Court order from his Petition in error as the legal clerk and staff made the copies and mailed out The Appeal due to Petitioner being on lockdown. In which the OCCA declined jurisdiction over the Post-Conviction Appeal Sept. 26 2017 Case No. 2017-0910, On oct. 31 2017 the Petitioner remailed the Appeal with the certified Court order but the OCCA replied It was out of Time.

On Dec. 18, 2017 the Petitioner filed Application for Post-conviction Relief Seeking Post-conviction appeal out-of time. The TCDC denied the Application on April 25, 2018 and the OCCA affirmed the denial Nov. 7 2018. The Petitioner filed the instant federal Habeas Petition on July 19, 2019 which was denied July 2, 2020. On July 17, 2020 the Petitioner filed notice of intent to Appeal, motion for Appointment of counsel, motion to Proceed In Forma Pauperis with Affidavit, motion for Certificate of Appealability and Docketing Statment in the U.S District Court for Northern District of Ok, Attorney General and U.S Court of Appeals For The Tenth Circuit.

Under the United States Constitution The Fifth, Fourth, Sixth and Fourteenth Amendments and Article II §§ 7 & 20 of the oklahoma constitution the Petitioner will make a substantial showing that his constitutional Right to Due Process and Fair, Impartial Trial have been violated throughout his Conviction and Sentence. In Accordance to Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) and Slack v. McDaniel, 529 U.S. 473, 484 (2000). The culmulative Effect of all the violations deprived Petitioner of a Fair and impartial trial and Due Process also see Peninger v. State, 1991 OK CR 60, 811 P.2d 609, 613; chandler v. State, 1977 OK CR 324, 572 P.2d 285, 289-90 Once upon Proper review, can-not be considered harmless beyond Reasonable doubt. Cargle v Mullin 317 F.3d 1196, 1220-21, 1124-25 (10th Cir 2003) All the errors will show that the Petitioner's U.S. Constitutional rights have been violated.

---

a.) The Petitioner should not be denied Due Process by being tim-Barred by statue of limitations and Procedual Grounds to file Writ of Habeas § 2254; when § 2244(d)(1)(D) does apply to the Petitioner. The District Court erred in the Understanding of Facts. First the Petitioner is a complete layman of the law. (without education High School diploma or GED) with very little to no access to law library due to a STG label Placed on the Petitioner and frivolous lockdown during all Years at Cimarron Correctional facility. The Respondent states that the Petitioner's statutory Year ended on March, 11 2019.

The Respondent argues and claims that the Statuetory Year deadline was March 11, 2019. A Reasonable Jurist could look at the statuetory deadline and the date March 19, 2019, when the STG officer PLourd, denied the Petitioner access to the law library that the Petitioner was scheduled for, and was escorted back to the unit even though the officer knew by the librarian that the Petitioner had a deadline and was scheduled to Print off his legal work and mail it out. Had that not of happened the Petitioners § 2254 writ of Habeas would of been only 8 days late or even on time. The issue with the officer dening the Petitionr access to law library and access to the courts to Print off his writ and mail it out had been going on since January 2019 violating Petitioner's constitutional rights. As stated by the Respondent: Without Question Prisoners have a constitutional "right of access to the courts". Lewis v. Casey, 518 U.S. 343, 350 (1996). Here at Cimarron Correctional Facility all legal work is stored on Flash drive and gets Printed when its ready to mail out. Also all legal mail leaving the facility must be verified and sealed by the librarian before it gets mailed out. With these rules and the officer denying access the Petitioner demonstrates how these circumstances were beyond his control and Prevented him from timely filing a federal habeas Petition.

The Respondent states even accepting as true that the Petitioner lacked access to his legal work from April 11, 2019, to July 10, 2019, while the Petitioner was Placed in ISU. The Respondent erred on understanding the facts of how this Prison and staff violated his constitutional right to have access to the courts repeatly numerous times. With how legal work is allowed to be mailed out here at the Prison the Petitioner could not receive his legal work; but was unable to mail anything out being denied access to the courts violating his Constitutional rights causing uncontrolable circumstances. As demonstrated above, the Petitioner's Petition for Habeas Corpus § 2254 was timely showing Due diligence and external circumstances under the Provisions of 28 U.S.C § 2244(d)(1)(B). states:

(B) The date on which the impediant to filing an application created by state action in violation of constitution or laws of United States is removed, if the Applicant was Prevented from filing such action.

The Respondent did not consider all the important issues surrounding the statue tolling in reagrds to the number of motions filed by the Petitioner that qualifies for collateral review. In recent decesions the tenth circuit has assumed that a motion filed under OK. Stat. tit. 22 § 982(a) qualifies as "Collateral review for tolling pursuant to § 2244(d)(2). The respondent brings up that on June 5, 2015 the Petitioner filed a motion for a Suspended Sentence under Okla. Stat. 22 § 994 that is still pending. Since it was filed properly it should apply to toll the limitations period. Also the Respodent brings up the state writ of Habeas Corpus filed in TCDC March 8, 2016 and Application to vacate illegal sentence filed march 21 2016, but does-not understand all facts surrounding the motions. According to Tulsa district court to file writ of Habeas you must file in the county your being held in quoting Rule 10.6(c) Rules of oK. criminal Procedure Title 22, chap 18; Waldon v. Evans, 1993 OK CR 46, 921 P.2d 311; Canady v. Reynolds 1994 OK CR 54, 880 P.2d 391. So they declined jurisdiction. Then the Petitioner filed the writ of Habeas Corpus and Application to vacate illegal sentence in Payne County as per Tulsa District Court. Then Payne County declines jurisdiction saying the opposite according to 22 O.S. 2011 §§ 1080-1089; Twyman v. ok. Pardon Parole board, 1992 OK CR 53 ¶ 3, 837 P.2d 480, 481; Dutton v. city of midwest city, 2015 OK 5, ¶ 21, 353 P.3d 532, 541-542 that the court dont have jurisdiction over conviction and sentence. One of these courts by law should accepted jurisdiction and addressed the writ of Habeas Corpus but never did violating Petitioner Due Process taking away the tolling that should apply to Collateral Review. Further Tulsa District Court misconstrued the Application to vacate illegal Sentence and denied it with Post-conviction Relief further violating Petitioner's Constitutional right to Due Process. These motions were properly filled and warrant tolling to statue of limitations, pursuant to § 2244(d)(2).

The Respondent further does not understand the facts in regards to the Post-conviction Appeal. There was a clerical error with the Appeal. Due to the Petitioner's unit being on lockdown the Petitioner had to let the CCF librarian and law clerk take his Appeal to copy and mail out. Thats when the law clerk at CCF removed the certified order from TCDC because he thought it was not needed causing the OCCA to decline jurisdiction over Petitioners Appeal.

There was nothing the Petitioner Could do he didn't even know until he received the denial. UPon finding out the Petitioner tried to fix the error and resent the APPeal as shown in Attachments to RePlY Breif, but the Petitioner was informed he was out of time. Since the OCCA denied jurisdiction and dismissed the APPeal and gave notice of comPletion of Record Oct. 12 2017 it should toll his limitation Period.

The Petitioner makes an assertion of "Actual Innocence". BY asserting a tenable claim of Actual Innocence Provides an outright equitable exeception to AEDPA statue of limitations Perkins 569 U.S. at 392; see Doe v. Jones, 762 F.3d 1174, 1182 (10th Cir 2014). not only DKt#10 at 13 trial transcriPts SuPPort his claim of Actual innocence that the victim attacked the Petitioner from behind and that the Petitioner was in "fear for his life" and acted in Self-defense. The Petitioner has factual evidence and a witness from trial that will testify and write an Affidavit in the intrest of Justice That Petitioner is innocent and acted in Self-Defense from being threatened and attacked from behind. Due to Petitioner having legal and factual innocence the Petitioner's claim is credible Under§2244(d)(1)(B) and equitable tolling.

Due to the exceptional uncontrolable circumstances and foregoing reasons the Petitioner is entitled to equitable tolling and should not be denied Due Process as being time-Barred. Under Holland the Petitioner established the two elements that he has been Pursueing his rights diligently and that extraordinary circumstances stood in his way and Prevented timely filing. Being denied access to the courts and all uncontrolable circumstances shows valid claim of denial of Constitutional rights. The Petitioner has made a Substantial showing of reasonable jurists could debate whether Petition should Should have been resolved in diffrent manner and made a showing of denial of Constitutional right.

Factual Predicate renders Petitioner's §2254 Habeas Petition timely and bY state action violated Constitution Preventing Due Process. The Petitioner being a lamen of law without education (High school DiPloma or GED) lacking any Knowledge of legal exPertise relied comPletly on his counsel which Proved ineffective according to Strickland v. Washington, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed. 674 (1984.) Therefore the Petitioner would not of Known

"Vital Facts" claims to raise in Habeas Corpus Petition. Due to ineffective trial counsel and Appellate counsel mixed with no Knowledge of law Proceedings or how to understand any of it all these claims were not discoverable at or before trial or even appeal the Petitioner was completly lamen and ignorent to the law having no Knowledge or understanding at all. As the Petitioner was held in Tulsa County there was no way to have access to means to learn about Procedure of law claims for he was in maximum security unit. Then during Appeal Process he was in OK. State Penitentary Prison which had no librar'y or any access to learn anything about claims or Procedures for it was 24hr lockdown maximum security which was out of Petitioner's control. Thus the Petitioner's § 2254 Habeas is timely under § 2244(d)(1)(D).

Based on all the forgoing reasons the Petitioner beleives that he satisfys the strong Burden of "Showing Specific facts" to support his claim of extraordinary circumstances and complete Due diligence and that the Petitioner's constitutional rights have been denied making this § 2254 Petition for writ of Habeas Corpus timely and should not be Procedual Time-Barred under § 2244(d)(1)(B).

Due to the Respondent's motion to Dismiss the Petitioners § 2254 as Procedural Time-Barred: the Respondent Did-not consider any of the important issues raised or arguements Presented. The Respondent did not even address the motion for Evidentary hearing or any of the attached evidence that supported the Petitioners claims. If the Respondent understood all the facts about all the uncontrolable exceptional circumstances and veiwed the attachments the Petitioner beleives a reasonable jurist would find it debatable and find equitable tolling should apply the Time-Barred statue of limitation would of been overcome allowing the Respondent to address all the issues that he Presented violating his Constitutional rights. Equitable tolling should be applied due to meeting Barefoot v. Estelle, 463 U.S. 880, 893 (1983) also Slack v. McDaniel, 529 U.S. 473, 484 (2000).

B.) The State failed to Present Sufficient Evidence to disProve Self-defense. the Due Process clause of 5th and 14th Amends. to the U.S. Const. and Art. II § 7 of the ok. Const. Protect a criminal against a conviction "except upon Proof beyond reasonable doubt of every fact necessary to constitute the crime which which he was charged. The Respondent failed to consider all the evidence that a reasonable jurist would debate whether the state Proved beyond reasonable doubt that the Petitioner was-not acting in-self-defense. The evidence and witnesses indicated the Petitioner had reasonable grands to believe he was in great Peril of great Bodily harm. Due to the victim attacking the Petitioner from behind. All 3 of the witnesses testified at trial that the victim attacked Petitioner while the Petitioner faced his truck. Coupled with the broken Peices of wood in the area of the fight, one may reasonably infer that the victim used the wooden slat to attack the Petitioner. Even if this court finds that the state disProved self-defense claim, the evidence established that, at most, he was guilty of First degree manslaughter. The Evidence established the elements of First degree manslaughter under either heat of Passion theory. or imperfect self-defense theory. 21 O.S. 2011 § 711(2) & (3). Both elements of heat of Passion manslaughter were Present according to the evidence. adequate Provocation; a Passion or emotion such as fear, terror, anger, rage; the act occured while Passion exited before a reasonable opportunity to cool down; and connection between Provocation, Passion and homicide. The Petitioner acted under influence of fear and terror. The court recognizes that "Passion resulting from fear, fright or terror may be sufficient to reduce homicide from murder to manslaughter and such a killing may closely akin to a killing in Self defense. Wood v. State 1971 OK CR 232 ¶ 9, 486 P.2d 750, 752. Self-defense is Perfect"; an imPerfect self-defense refers to the inability to satisfy all the requirements for "Perfect" self-defense claim to justify an outright aquittal, but a imPerfect self-defense claim may mitigate murder to manslaughter. The Petitioner acted out of fear of great Bodily harm and injury to an unexPected attack from behind and hightened sense of fear due to PTSD. The Doctor from Tulsa county jail established sufficient evidence to establish self-defense. Since the state did not Prove Sufficient Evidence to disProve self-defense beyond reasonable doubt the Petitioner was denied Due Process and his constitutional rights.

C.) The Petitioner was denied "objectively Reasonable" competent, Professional and Effective Counsel in violation of Petitioner's right to a fair trial under

6th and 14th Amends. to the U.S. constitution and Act. II § 20 of the ok. Const.. The Respondent did-not consider the arguement that the Petitioner raised about he was denied his constitutional right to effective assistance of counsel. The actions and ommisions of defense trial counsel in this case clearly Prejudiced the Petitioner. As such there is a reasonable Probability that the outcome would of been diffrent had counsel Provided effective assistance of counsel. Trial counsels deficeint Performance went directly to the foundation of this case, affecting states burden of Proof and the very means by which the jury would have assesed the elements of the offense. The failure to object to instructional error, namely, the absence of manslaughter instruction and inclusion of instruction regarding when defense is unavailable. This error Permitted the interjection of improper statement of law. misinstruction constitutes error as it involves a substantial violation of Constitutional and statutory rights to trial before Properly instructed Jury. Atterberry, 1986 OK CR 186 731 P.2d at 422. Further trial counsel fail to even attempt to object to all the highly Prejudicial evidence or Prosecutorial misconduct.

Further counsel failed to investigate, call defense witnesses, impeach state witness and utilize information to Properly defend the defendant. Fisher v. Gibson, 282 F.3d 1283 (10th cir 2002) along with other federal court rulings have addressed same issues and made conclusion granting the writ under similiar cases. Counsel further did-not Properly defend the Petitioner by dening his right to testify by using his lack of knowledge of law against him by trying to make Petitioner sign a form that stated Petitioner did-not listen to counsel throughout time as his attorney; when in fact since the begining the Petitioner and counsel discussed numerous times about Petitioner testifying on his behalf telling the truth. The "Due Process law" is meant an orderly Proceeding adapted to the nature or the case, which Proceed upon notice with an opportunity to be heard with full Power to grant relief. Const. Art II § 7 Amend. 14. Dartmouth college case 4 S19, 581, 4 L.Ed 629. Had the Respondent been able to review all the facts and arguements the Respondent would see that counsel was ineffective under Strickland v. Washington, 466 U.S. 668, 688, 104 S.ct. 2039, 2044, 80 L.Ed 2d 657 (1984) and that Petitioner was Denied his right to a fair trial.

D.) The Trial court abused it's Discretion BY ADmitting Irrelevant and unlawful evidence in violation of Petitioner's rights to Due Process and a Fair Trial. The Respondent failed to consider the important arguement raised about all the unlawful Evidence. Spuehler 709 P.2d 202, as set out in Jackson, 443 U.S. 307, 99 S.ct. 2781. Even if relevant, the Probative value of evidence, if outweighed by the danger of unfair Prejudice, will be excluded see 12 O.S. 2011 § 2403.

The Petitioner Retained a Reasonable expectation of Privacy in the Phone and its Contents. to be free from unreasonable searches and that Police action in obtaining data from his cell Phone. without his consent or waiver. or with-out a search warrant violated his constitutional rights. The U.S. Supreme Court. in Riley v. California _U.S._134 S.Ct. 2473, 2494-2495, 189 L.Ed.2d 430 (2014). held that "cell Phones are not just another technological convenience. With all they contain and all they may reveal. they hold "the Privacies of life". The court reversed judgement in Riley and affirmed the Companion case of wurie. requiring that. absent exigent circumstances. Police are to obtain a warrant to search the data contents of a cell Phone. which was not issued to the Petitioner violating the 4th Amendment. A Petitioner seeking to suppress evidence without a warrant must demonstrate that the action of the Police was illegal and if through this illegality other evidence was obtained that the subsequent evidence and was the fruit of that illegality. Raskas v. state. 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). Ruiz. 664 F.3d at 841 shows a court may look to a Person's words, acts and other objective facts to determine that Person intended to retain expectation of Privacy or to abandon it: One can-not say that dropping the Phone during a fight constitutes a voluntarily relinquement of said Phone. In Wong Sun v. United States. 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1973) the Supreme Court held not only that the evidence obtained through unconstitutional Police conduct must be suppressed but also that the fruits of illeaglity obtained evidence must be suppressed.

The 4th Amendment requires that a search warrant "Particularly describes the things to be seized. Petitioner argues that the search warrant lacked Particularity because it neither listed items to be seized and the Defective Affidavit for Search warrant was invalid Search Warrant Due to no Return. See O.S. 2011 § 1226 The legislature has Provided a template for law enforcement and judges to follow which includes a space for "Judges Official Designation" which was not adhere to. In absence of abandonement of the detached and neutral magisterial role. Suppression is Proper when officers were dishonest or reckless in Preparing their affidavit. or could of not harbored an objectively reasonable belief in existence of Probable cause due to deficiency in the warrant. U.S. v. Michaelian. 803 F.2d 1042, 1047 (9th Cir 1986) There fore the Petitioner challenges the neutrality of the magistrate. The Petitioner claims an expectation of Privacy regarding message content and records from his Personal Phone account. Art. II § 30 of the Okl. Const. Forbids any unreasonable Search and Seizure.

E.) Prosecutorial misconduct Deprived the Petitioner His Right to Due Process and a fair Trial. Had the Respondent considered the arguement all the combined effects resulted in completely Prejudice toward the Petitioner which took his essential right to a fair Trial free from Prejudice.

In this case the Prosecutor committed numerous instances of Prosecutorial misconduct. From the outset the Prosecutors begining appealing to jury's emotions. The Prosecutor stated "that justice the family is looking for justice in this courtroom to come from People; judges, lawyers and jurors. Tobler, 688 P.2d at 353-354 this court found the comments by the Prosecutor to be a Plea for sympathy and held it to be "improper" even "reprehensible. The Prosecutors Appeals for sympathy continue through-out the rest of the course of the trial. The chracterization of the victim as kid dont have much and a missing Part in his freinds and family lives are akin to victim impact testimony. OK. law only Permits victims impact testimony only in Capital cases. Roy v. State 2006 OKCR 47 ¶ 36 n.45, 152 P.3d 217, 229 n45. In a non-capital murder the trial jury is charged with if is criminally Responsible for victims Death. Both Prosecutors to it even further by mistating evidence in the case & facts not in evidence. Where the Prosecutors remarks and arguments do nothing but affect and taint jury's determination and finding of guilt. these remarks and arguments constitute reversible error Marshall v State 1975 OKCR 120 ¶ 39-44, 537 P.2d 423, 430-431. The Prosecutors name calling of the accused/Good chracter of victim v. alleged Bad chracter of the Petitioner is extremely Prejudicial. The Prejudicial name calling cast doubt on Petitioner's trustworthiness and Good chracter. The Prosecutor clearly sought out to impart his Personal beliefs on the Petitioner to the Point it constituted grossly improper argument as Personal opinion /or a mistatement of the facts and completly Prejudicial.

The Prosecutor took it a step further by knowing use of false or misleading evidence to affect the outcome of the Proceedings. The states most important witness had inconsitincies from her statement, Preliminary and Trial. The Prosecutor was so impressed he told the Jury she was a disintrested Party suggesting her testimoney more credible. The recitation of the details regarding the foregoing facts, from all Sources, are wildely inconsistent. The witness was lieing in her swornstatements under Perjury and the Prosecutor admitted the Misleading evidence. The knowing of false evidence is intolerable and violation to 14th Amendment. Donelly v Dechristforo, 416 U.S 637, 646 94 S.ct 1868, 1873 40 L.Ed 2d 431 9(1974) citing Miller v. Pate, 386 U.S 1, 7, 87 S.ct 785, 788, 17 L.Ed 2d 690 (1967) The Prosecutors blatant and Pervassive Misconduct so infected the fairness of the the conviction and Sentence was violation of Due Process.

F. Instructional Error violated Petitioner right to Due Process and a fair Trial. Had the Respodent considered the importance of the argument on how Instructional errors affect a substantial right and result in Prejudice to the accused. Simpson, 876 P.2d at 694. The Trial court cofused the issue of self Defense for the jury by by Providing Irrelevant Instructions. The Trial court misinstructed the jury

Regarding the availability of self-defense. This error by the trial court gave the jury a mistaken impression that Petitioner had no right to self-defense. The trial court Provided instruction Nos 8-50, 8-51, 8-52 and 8-53 unecessarily and without tailoring them to the evidence. The Trial court's instructions included all three alternatives disPite the lack of evidence to show the Petitioner was the aggressor, Provocked the incident, or voluntarily entered mutual combat. They only served to confuse the jury. Instructions are meant to guide the jury in Proper analysis of the evidence and force the jurys consideration of evidence into Proper channels so that it reaches legally sound verdict. Kansas v. State 1991 OK CR 91, ¶ 7, 815 P.2d 1204, 1207.

The Trial court failure to Instruct on First-degree Manslaughter was instructional error due to the evidence supported lesser instructions. Jones v. State 2006 OK CR 17 ¶ 6, 134 P.3d 150, 154. For manslaughter the homicide results from influence of an uncontrolable fear or Terror conceivable as existing, but not reasonably justified by immediate circumstances Morgan 536 P.2d at 954. A Jury might conclude that self defense is "imPerfect" and while insufficeint to negate culPability it is at least sufficient to mitigate it. Any doubt as to whether the accused committed a lesser degree of homicide must be resolved in favor of instructing the jury thereof. Henna v. State, 1977 OK CR 54 ¶ 25 560 P.2d 985, 991.

The Trial Court Judge's errors were Plain and obvious. That is the errors affected the substantial right although not brought to attention of the court. Simpson 876 P.2d at 694; Palmer v. State 1944 OK CR 19, 146 P.2d 592, 596. Austina Miles v. State 1928 OK CR 350 273 P. 284 286 ("the Policy of the law is that all Persons shall have a fair and imPartial trial.") It can-not be said that a fair and imPartial trial has been had unless the jury have been ProPerly instructed as to law of the case and where the instructions do not fully Present all the material issues raised, the judgement of conviction will be set aside. This court Previously found reversible error where the trial court issued self-defense instructions on a Point of law that was correct in abstract but inaPPlicable under the facts. Easterling v. State 1954 OK CR 23 ¶ 16 267 P.2d 185, 189. Winafeild v. State 1945 OK CR 88, 160 P.2d 945, 950; Wiley v. State 1916 OK CR 128, 161 P. 61; Turnbull v. State, 1912 OK CR 429, 128 P. 743, 746.

6. The Petitioner was deprived "objectivly Reasonable" and affective APPellate counsel and because of such his Direct APPeal was adversly affected. The ResPondent failed to consider how the APPellant counsel was ineffective affected the Petitioners Due Process. Right off the APPellant counsel caused Procedual default by not raising Confrontation clause claim. Clemmons v. Delo, 124 F.3d 944 (8^{th} Cir 1997)

The Petitioner Maintains. had the Appellate cansel raised the issues brought up by Petitioner the outcome would of been diffrent. Appellent cansel failed to raise the strong issue through no fault of the Petitioner. According to Gilbert v. State 955 P.2d 727 (OKl CR 1998) Appellate cansel is ineffective if he fails to raise issues which were stronger. The issues not Raised are The Petitioner's Severe PTSD chronic condition. Shepard v. State, 847 P.2d 75, 81 (Alaska App. 1993) (appeals court found error in exclusion of PTSD evidence to rebut states claim. Failure to Raise Temporary insanity at commission of the crime in conjunction with Self-defense. The issues with the evidence not only obtained with-out a search warrant the evidence was tampered with by changing of Time stamp and not following Procedure in examing the evidence. The issue with Trial cansel violating his constitutional right to testify by actions and scare tactics. U.S.C.A Const. Amend. 5; 12 OK ST Ann § 2609 subd Rules of Professional conduct rule 1.2(a) 5 O.S. A. ch. 1 app 3-a. There exist evidence of material facts. not Previously Presented and heard. Appellate cansel failed to challenge courts subject Matter jurisdiction and failed to bring issues on Specific intent. Had These issues been raised the outcome would of been diffrent. Due to the facts and arguements as well as review it is clear the Appellate cansel was ineffective and Adversly Affected the outcome

H. The court Lacked subject matter jurisdiction to accept Petitioner's Plea of Not-Guilty Due to the District Attorney lacked Subject matter. Authority to sign the complaint & information in the case. In which deprived Petitioner Due Process that the Respondent failed to consider. Once an indictment or information is initiated against accused it must be signed & verified by a qualified D.A. If the mandatory statuetory language is not adhered to Properly. The district court is not vested with subject matter jurisdiction over the felony case. Buis v. State 792 P.2d 427 (OKl. CR 1990) Lynch v. State 909 P.2d 800 (OKCR 1995) Subject Matter Jurisdiction is defined as a court statutory or constitutional Power to adjudicate a case.

Therefore it is established law that in order for district court to have subject Matter over the instent case to accept Plea of not Guilty & sentence him to Doc the indictment in the case must be signed and verified by a duly elected DA. As elected D.A Tim Harris serves in state elected office created Pursuant to Ok. stat. tit 19 O.S. Sec 215.1 et. seq. D.A Tim Harris should have been disqualified from signing and verifying the complaint / Information because he was a dual Public office holder at the time he signed the instant case in violation of OK Const Art II Sec. 12

I. Failure to Raise Confrontation clause claim bY Appellate Counsel violated Due Process

Petitioner was denied Confrontation clause claim due to Trial counsels scare tactics. The Respondent failed to consider the important information that the Jury was unable to hear that was relevant to the case. Clark v. Arizona, 126 S.Ct. 2709, 548 U.S. 735 (U.S. Ariz 2006) Appellate counsels failure to raise Confrontation clause claim Provided "cause" for Procedural default violating Petitioners Due Process. clemmons v. Delo, 124 F 3d 944 (8th Cir) 1997).

J. The state failed to Present sufficient evidence to Prove Malice Aforethought which the Respondent failed to consider That the Prosecution is required to establish the mental element "With Malice Aforethought 21 O.S. 2011 § 701.7(A) Specific intent can-not be Presumed; it must be alleged and approved. Oglesby v. state. 1966 OK CR 34 ¶ 13, 411 P.2d 974, 976. The state failed to demonstrate that the Petitioner formed the requisite specific to Kill. There is circumstantial evidence in the record that shows the Petitioner did not intend to Kill the victim. Hemphill v United States, 402 F.2d 187, 188-191 193 (D.C. Cir 1968) conviction for Premeditated first-degree murder remanded for sentencing as second degree due to insufficient evidence of Premeditation.) The external circumstances surrounding the stabbing show the Petitioner's conduct, demeanor do not lead to conclusion he intended the victim, but the opposite when the Petitioner tried to help victim breath and get help showing there was no intent malice aforethought.

K. The Cumulative Effect of all The Errors Deprived the Petitioner Due Process and fair trial had the Respondent considered the arguments standing alone or as a whole the Propositions warrant Relief. The culmative effect deprived the Petitioner of Due Process and fair impartial trial. Peninger v. State 1991 OK CR 60 811 P.2d 609, 613; chandler v. state 1977 OK Cr 324, 572 P.2d 285, 289-90. The culmaltive effect of the errors upon Proper review, can-not be considered harmless beyond reasonable doubt. Cargle v. Mullin, 317 F.3d 1196, 1220-21, 1124-25 (10th cir 2003) The errors together deprived Petitioner of fair trial U.S. const. Amends. 5th & 14th; OK. Const. Art II § 20.

5. Relief Requested –

The Petitioner moves this Honorable Court to grant the Writ of Certiorari in the intrest of Justice. The Petitioner has made a substantial showing that jurist of reason could find those rationales debatable and Petitioner's Constitutional right to Due Process have been violated and this Honorable Court grant this Writ of Certiorari on his case, vacate Courts decision, remand case for new trial, or in alternative modify his Judgement and Sentence or grant any Relief this Honorable Court deems in intrest of Justice. .
It Is So Prayed

Respectfully Submitted,

Eric J. N. Spears

Eric J. N. Spears DOC# 687109