No. 21-7693

IN THE

SUPREME COURT OF THE UNITED STATES

KENNETH REX HEDDLESTEN-PETITIONER

Vs.

SCOTT CROW, DIRECTOR-RESPONDENT

ON PETITION FOR WRIT OF CERTORARI TO

THE UNITED STATES SUPREME COURT

FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ORIGINAL

KENNETH REX HEDDLESTEN

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QUESTION(S) PRESENTED

I. How does the Oklahoma Court of Criminal Appeals policy of reviewing plain error only prevent appellate counsel from "raising all claims of error in a single appeal," and therefore obtaining "final judgment".

II. How did the U.S. District Court-Western District of Oklahoma act in a manner Inconsistent with due process of law in denying Petitioner's Rule 60(b)(4) motion for Relief from Judgment or Order? "The judgment in question dismissed Heddlesten's of Habeas Corpus petition under 28 U.S.C. 2254 as untimely."

LIST OF PARTIES

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

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully pray 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

[] reported at_____; or

[] has been designated for publication but is not yet reported; or

[X] is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and is

[] reported at_____; 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[X] is unpublished.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 Oct. 4, 2021

[X] Petition for Rehearing was denied in my case on November 9, 2021(App. C)

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

STATEMENT OF THE CASE

On March 10, 2010 a hearing was conducted in Caddo County District Court on Petitioner's application to withdraw his pleas. The application listed 3 claims of error and was denied, AppF (Ex 1). From that denial an appeal was taken to the Oklahoma Court of Criminal Appeals and a Writ of Certiorari was filed on April 6, 2010..

On January 20, 2011, OCCA issued its Summary Opinion Denying the Writ of Certiorari. April 11, 2011 * Contested date of finality.

Petition for Writ of Habeas Corpus- filed in Western District of Oklahoma April 19, 2011 and withdrawn September 25, 2012. Ground was classified as harmless error.

42 U.S.C.S. § 1983- filed October, 2011. Decided December 20, 2012. Factual predicates were discovered thru due diligence. Conviction remained in question thru this time period. First Application for Post Conviction Relief (APCR) filed January 3, 2013- **New Factual Predicates**. O.C.C.A- Entry of judgment November 7, 2013 the date Petitioners initial claims under 1983 were adjudicated by O.C.C.A. Date of Finality under 2244(d)(1)(D)- February 6, 2014.** date of finality by exhaustion. (App F Ex. 12).

Second APCR- filed July 22, 2014- **New factual predicate** related to use of prior conviction. Denied by Caddo County on June 24, 2016. Notice of Appeal not filed in 10 days.

Third APCR (Appeal out of time)- on second APCR filed November 7, 2016- OCCA -Entry of judgment October 12, 2017. Date of Finality- January 11, 2018.

Fourth APCR- (Debra Hampton) (perfected ineffective assistance of appellate counsel claim with **new factual predicate**) filed May 14, 2018- OCCA-Entry of judgment Sept. 27, 2019.

Date of Finality-December 25, 2019*** date of finality of all constitutional issues.

Petition for Writ of Habeas Corpus filed on May 12, 2020 in the W.D. of Oklahoma. Denied on June 19th 2020.

Combined brief and C.O.A. 10th Cir. Court of Appeals. Denied on August 24, 2020.

Writ of Certiorari- Supreme Court of the United States. Denied April 19, 2021.

On June 21, 2021 Petitioner filed a Motion for Relief from Judgment or Order under Rule 60(b)(4) documenting one ground that indicated the violation of a constitutional right. *Miller-El v. Cockrell,* 537 US 322 (2003). Ground One: The term "final" under 28 U.S.C. 2244(d)(1)(A) is a term that has resulted in unfair, arbitrary, or unreasonable treatment of individuals whose constitutional claims cannot be reviewed by the Federal Courts because it (final) has been interpreted as only applicable to procedural due process. On June 28, 2021, the Honorable District Judge David L. Russell issued an Order denying the Motion stating ". . . and the instant motion presents no arguable grounds for relief under Rule 60(b)(4). He also ruled that "Because petitioner's Rule 60(b) motion alleges a defect in the habeas proceeding, the Court finds it should be treated as a "true" Rule 60(b) motion. *Spitznas v. Boone,* 464 F.3d 1213, 1215-1216 (10th Cir. 2006). (Doc. 21)

On October 8. 2021, Petitioner filed an Application for Certificate of Appealability with the United States Court of Appeals for the Tenth Circuit.

On October 4, 2021 the Honorable Circuit Judge Allison H. Eid issued an Order Denying Certificate of Appealability. "To receive a COA from the district court's substantive decision that his motion was meritless. Heddlesten must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 C (2).

On October 28, 2021, a petition for Panel Rehearing was filed and on November 9, 2021, said Petition was denied.

On Dec. 30, 2021 a motion for an extension of time was received by the United States Supreme Court. On January 7, 2022 a notice was sent from the clerk of the Supreme Court asking for corrections to the motion for extension of time. On January 19, 2022 a corrected motion was put in the United States mail with a copy sent to the Attorney General of Oklahoma. On February 2, 2022 the Motion was granted by Justice Gorsuch, extending the time to March 10, 2022.

REASONS FOR GRANTING THE PETITION

QUESTION I

On direct appeal appointed counsel from the Oklahoma Indigent Defense System attorney Robert Jackson filed the petition for Writ of Certiorari (App F Ex. 2) to Oklahoma Court of Criminal Appeals. I believed he would utilize the 3 grounds so I trusted my claims would receive final judgment. As evidenced by the OCCA Summary Opinion Denying Writ of Certiorari (App. F- Ex 3) page 2 clearly states "Petitioner fails to advance any of the grounds for withdrawal of his plea presented in district court. Instead he now argues the district court erred when it failed to advise him that he was subject to a minimum of three (3) years of post-imprisonment supervision under 22 O.S. Supp. 2009 991a(A)(1)(f). The claim was deemed harmless error in the Tenth Circuit ruling in *United States v Barry*, 895 F.2d 702, (10th Cir. 1990). "The sole issue on appeal therefore,

is whether the district courts failure to advise appellant at this plea hearing of the mandatory period of supervised release... requires us to set aside the guilty plea... We hold that it does not and affirm." The Oklahoma Court of Criminal Appeals followed this opinion and denied the Writ on January 20, 2011. Furthermore the Court stated "This claim is waived and we review only for plain error." This policy of reviewing for plain error only on direct appeal was not always OCCA's policy. The term "fundamental error" was first used by the OCCA in *Rea v State*, 3 Okl. Cr 281, 105 P 386 (1909) when the definition appeared in the syllabus 2(c). It was defined as errors "which go to the foundation of the case, or which take from a defendant a right which is essential to his defense". Since that time the definition has maintained its integrity thru other OCCA opinions. However, beginning with *Simpson v State*, 876 P2.d 690 (Okl.Cr.1994.) The Honorable Judge Gary Lumpkin stated, "As a result of the recognition of our prior jurisprudence we hold and restate the following: (1) Failure to object with specificity to errors alleged to have occurred at trial, thus giving the trial court an opportunity to cure the error during the course of the trial, waives that error for appellate review unless the error constitutes fundamental error , i.e. plain error.

(2). The concept of fundamental error is now codified in the Oklahoma Evidence Code 12 O.S. 1991 § 2104. "This Court has not previously embraced the applicability of the Oklahoma Evidence Code to this particular issue. However, we now hold the provisions of 12 O.S. 1991 § 2104(D), provide the legal basis for appellate review of allegations of error not preserved for review during the District Court proceedings by a proper objection. We further acknowledge the existing procedure for review of "plain error" for the first time on appeal." The provisions of the O.E.D. are as follows:

A. Error may not be predicated upon a ruling which admits or excluded evidence unless a substantial right of a party is affected: 1). If the ruling is one admitting evidence, a timely objection

or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context, or; 2) If the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

B. The court may add any statement which shows the character of the evidence, the objection made and the ruling thereon. It may direct the making of an offer in question and answer form.

C. In jury cases, proceeding shall be conducted to the extent practicable, so as to prevent inadmissible evidence from being presented to the jury by any means, including making statements or offers of proof or asking questions within the hearing of the jury.

D. Nothing in this section precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

Ballentine's Law Dictionary, 3rd Ed. Defines plain error as (2) error apparent – A manifest, plain, or obvious error. An error on the face of a proceeding, in the pleadings, judgment, or decree, as distinguished from an error in the evidence discoverable only upon the examination of the record. In terms of due process I contend "plain error" results from a violation of procedural due process. Due process under the 5th and 14th Amendments require that "a party must raise all claims of error in a single appeal" in order for the courts to end the litigation on the merits. Without that there is no final judgment. Further exploration reveals that in legal practice due process can be divided into two prongs. From Blacks Law Dictionary:

One. Procedural Due Process – the minimum requirement of notice and hearing guaranteed by the due process clause of the 5th and 14th Amendment.

Two. Substantive Due Process – the doctrine that the Due Process Clause of the 5th and 14th Amendment require legislation to be fair and reasonable in content and to further a legitimate governmental objective. Substantive due process is based on substantive law. Black's Law Dictionary defines this as "the part of the law that creates, defines, and regulates the rights, duties, and powers of the parties." Furthermore a substantive right is "a right that can be protected or enforced by law; a right of substance rather than form." The Sixth Amendment right to effective assistance of counsel both at trial and on appeal is such a law.

It is apparent the OCCA adopted a policy of reviewing errors related to the admission or exclusion of evidence. I submit that presenting evidence and having a hearing on the evidence falls strictly within procedural due process of providing notice and hearing, not substantive law and thus substantive due process. For the Oklahoma Court of Criminal Appeals to adopt a policy of reviewing only for plain error based on the admissibility of evidence at trial prevents appellate counsel from being able to raise all propositions of error in one appeal. Thereby denying any semblance of protecting Due Process on appeal.

Now returning to the OCCA Summary Opinion, the order stated " This claim is waived and we review only plain error." In the *United States. v Olano*, 507 US 275, 113 S.Ct. 1770, 123 L.Ed. 2d 508 (1993), the Court stated "for there to be plain error, there must be 'error' that is plain and that affects substantial rights FRCP 52(b), 18 U.S.C. If a legal rule was violated during district court proceedings and if defendant did not waive the rule, there has been "error" within meaning of "plain" error rule. The requirement of the plain error rule is that error affecting substantial rights require in most cases that errors have been prejudicial and have affected the outcome of district court proceeding." Furthermore the Court of Appeals should correct plain forfeited error affecting substantial rights if error seriously affects, fairness, integrity, or public reputation of prejudicial

proceedings." This ruling requires that substantial rights (substantive due process) be reviewed and corrected on appeal. In my case the Oklahoma Court of Criminal Appeals was made aware of at least one fundamental error that affected my substantial rights in the Brief in Support of the Petition for Writ of Certiorari filed on direct appeal. (App F Ex 4). On page 2 footnote 1 clearly documents the change in the statutes that had been raised as one of the 3 propositions of error in the Application to withdraw pleas. Eleven years later on Jan. 14, 2021, in *Markham vs Oklahoma* f 2019- 718 (2021), not for publication, the Honorable Judge Kuehn in his dissent stated "I continue to hold that 843.5(E) stands alone as a separate crime written by legislature. Thus, I construe 843.5 (E) as written and find it unconstitutional." By failing to raise this on appeal as a proposition of error, prevented OCCA from correcting an error that affected the fairness and integrity of the judicial proceedings. Furthermore, this failure prevented Appellant from obtaining final judgment. In my fourth (APCR) that change was perfected in relation to an ineffective assistance of appellate counsel for failure to raise an Ex-Post Facto violation (new factual predicate). Both state courts, the Caddo County District Court and OCCA, acknowledged the grounds, but raised a procedural bar under second and subsequent APCRs in order to avoid ruling on the merits. However, the fair presentation to OCCA effectively exhausted that ground and triggered the one year deadline. (See App. E)

QUESTION II.

In denying Heddlesten's Rule 60(b) motion, the district court relied on the 10th Circuits unpublished decision in *Weldon v. Pacheco,* 715 App'x 837, 843 (10th Cir. 2017). In *Weldon* "the Tenth Circuit reasoned that the challenged judgment was not void, within the meaning of Rule 60(b)(4), because (1) [a] federal habeas court applying a procedural bar, even in error, is not acting in the absence of jurisdiction over the habeas proceeding, and (2) there is no authority for the

notion that procedural bar rulings---or rulings on such other procedural matters as statute[s] of limitation or exhaustion, which also pretermit relief on the merits of a claim – violate due process and are "void" under Rule 60(b)(4)." It is this claim Petitioner challenges by asserting that the District Court acted in a manner inconsistent with due process of law. Addressing the conditions for relief under Rule 60 (b)(4), the Supreme Court has explained that "[a] void judgment is a legal nullity" and that "[a] judgment is not void, for example, simply because it is or may have been erroneous." *United Student Aid Funds, Inc. v. Espinosa,* 559 U.S. 260, 270, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010) (internal quotation marks omitted). *Johnson v. Spencer,* 950 F.3d 680 (10th Cir. 2017) a judgment is void "on the rare instance" that it is based on a "violation of due process that deprive a party of the notice or the opportunity to be heard." The foundation of the statement violation of due process can be found in precedent **where the issuing court acted in a manner inconsistent with due process of law.** In *Cothrum v. Hargett,* 178 Fed. Appx. 855; (10th Cir. 2006). Fed. R. Civ. P. 60(b)(4) is not a remedy for every prior judicial error. Rule 60(b)(4) provides for relief from a judgment on the ground that "the judgment is void." Fed. R. Civ. P. 60(b)(4). A judgment is void only if the court which rendered it lacked jurisdiction of the subject matter, or of the parties, or acted in a manner inconsistent with due process of law. A judgment is not void merely because it is erroneous.

Other Circuit courts have supported the statement above as follows: In *re Whitney- Forbes,* 770 F. 2d 692, (7th Cir. 1985), "even gross errors committed by court in reaching a decision do not render a court's judgment or order void, but order may be void if the issuing court acted in a manner inconsistent with due process of law." Judgment is not void simply because it is erroneous but only where court rendering it lacked jurisdiction over subject matter or parties or if it acted in manner inconsistent with due process of law. *United States v. 119.67 Acres of Land,* 663 F.2d

1328, 33 Fed. R. Serv. 2d (Callaghan) 172 (5th Cir. 1981); *Di Cesare-Engler Production, Inc. v. Mainman.Ltd.,* 81 F.R.D. 703 (W.D. Pa. 1979), disapproved, *Bally Export Corp. v. Balicar, Ltd.,* 804 F.2d 398, 6 Fed. R. Serv. 3d (Callaghan) 113 (7th Cir. 1986); Judgment is void for purposes of FRCP 60(b)(4) if court that rendered it lacked jurisdiction of subject matter, or of parties, or if it acted in manner inconsistent with due process of law; similarly, judgment may be void if court, although having jurisdiction over parties and subject matter, entered decree not within powers granted to it by law. *United States v. Indoor Cultivation Equip. from High Teck Indoor Garden Supply,* 55 F.3d 1311, 31 Fed. R. Serv. 3d (Callaghan) 832 (7th Cir. 1995); Judgment is void under FRCP 60(b)(4) if court that rendered it lacked jurisdiction of subject matter or of parties, or if it acted in manner inconsistent with due process of law *Antoine v. Atlas Turner, Inc.,* 66 F.3d 105, 1995 FED App. 0287P (6th Cir. 1995).

Unpublished decision: Where district court conditionally granted inmates writ of habeas corpus, judgment was not void under Fed. R. Civ. P. 60(b)(4) because State did not allege that either district court lacked jurisdiction of subject matter, or of parties, or that **it acted in manner inconsistent with due process of law.** *Haygood v. Quarterman,* 2008 U.S. App. LEXIS 17182 (5th Cir. Aug. 8, 2008).

In the Motion for Relief in the attached appendix Petitioner clearly challenged the use of 2244(d)(1)(A) by the Western District to deny the habeas petition as untimely based on the determination that the Petitioner's conviction was "final" on April 11, 2011. In *Weldon* "the Court dismissed the Petition as untimely" and the instant motion presents no arguable grounds for relief under Rule 60(b)(4). (Doc. 21 page2). The cause for the error in determining the date of finality was based on a violation of the Sixth Amendment Right to Effective Counsel. (Substantive due process)

In *Gonzalez v. Crosby,* 545 US 524, 162 L. Ed 2d 480, 125 SCt 2641(2005), "A district court considered a Rule 60(b) motion will often take into account a variety of factors in addition to the specific ground given for reopening the judgment. These factors include the (A) diligence of the movant, (B) the probable merit of the movant's underlying claims, (C) the opposing party's reliance interest in the finality of the judgment, (D) and other equitable considerations.

A. Diligence of the movant. The Petition for Writ of Habeas Corpus (Doc 1) filed in the Western District of Oklahoma, clearly documented the diligence of the Petitioner on page 5 (App F. Ex 5 In addition Appendix E clearly outlines the time frames and prior proceedings as evidence of the diligence which is required by 2244(d)(1)(D) In *McQuiggin v. Perkins,* 569 U.S. 383, 133 S.Ct. 1924, 185 L. Ed. 1019 (2013), "28 U.S.C.S.(d)(1)(D) is both modestly more stringent (because it requires diligence) and dramatically less stringent (because it requires no showing of innocence). Many petitions that could not pass through the actual-innocence gateway will be timely or not measured by § 2244(d)(1)(D)'s triggering provision. That provision, in short, will be hardly be rendered superfluous by recognition of the miscarriage of justice exception." (Ginsberg, J., joined by Kennedy, Breyer, Sotomayor, and Kagan, JJ.){185 L.Ed.2d 1022}.

B. The probable merit of the movant's underlying claim. In *Dulworth v. Jones,* 496 F.3d 1133, 1137-38 (10th Cir. 2007) (explaining appellate court looks to underlying habeas petition in determining whether valid-constitutional-claim prong of Slack test is satisfied in appeal from denial of Rule 60(b) motion). The Honorable Circuit Justice Eid, stated "In May 2020, Heddlesten filed a new habeas petition in the Western District of Oklahoma alleging he received (a) ineffective assistance of counsel, (b) his sentence violated the Ex Post Facto Clause, and (c) there were

constitutional problems with the conduct of both the judge and prosecutor in his case" (Doc. 491 pg.3).

The Petitioner in Ground Five of the Writ of Habeas Corpus in Case No. CV-20-438-R clearly stated that petitioner received ineffective assistance of counsel during his plea withdrawal proceeding and by appellate counsel. (App. F. Ex. 6). In the order denying the Habeas petition the Honorable District Judge David Russell stated "Furthermore, Petitioners arguments related to the alleged ineffectiveness of his counsel and counsel's failure to raise certain arguments do not support a finding of equitable tolling, **rather they are arguments in support of the merits** of his claims." (App. F. Ex. 7a). In addition the Honorable Circuit Judge Bobby R. Baldock in the order denying the C.O.A. stated "His argument regarding counsel's alleged deficient performance goes to the **merits of his habeas petition**." (App. F. Ex. 7b). Both jurists of reason acknowledged that ineffective assistance of appellate counsel was meritorious.

In citing *Murray v. Carrier,* 477 US 478, 911 L. Ed 2d 397, 106 S. Ct. 2639 (1986), we can focus on the following quote: "a failure to raise a claim on appeal reduces the finality of appellate procedures, deprives the appellate court of an opportunity to review trial error, and under cuts the state's ability to enforce its' procedural rules. As with procedural defaults at trial, these costs are imposed on the state regardless of the kind of attorney error that led to the procedural default." Now returning to, "failure to raise a claim on appeal reduces the finality of appellate proceedings . . ." Under that condition one cannot receive "final judgment" when both prongs of due process were not adjudicated on the merits. Both prongs of Due Process, procedural due process and substantive due process, must be addressed on appeal by the state's highest court for one's conviction to be "final." **First.** I think it is important to examine the word "final" as it is used in the context of the law. In researching the meaning of final as related to court proceedings there

is the "final judgment rule." Blacks' Law Dictionary defines this as "The principle that a party may appeal only from a district court's final decision that ends the litigation on the merits. Under the rule a party must raise all claims of error in a single appeal." Also the Supreme Court in *Flanagan v United States,* 465 U.S. 259, 104 S. Ct. 1051, 79 L.Ed. 2d 288 (1984) held that "Final judgment rule requires that party must ordinarily raise all claims of error in a single appeal following a judgment of merits." In cases involving the violation of the Fifth and Fourteenth Amendments Due Process Clauses, those errors "must" be raised on appeal from a districts' court's decision on the merits.

Second. When we look at the term Due Process Clause we find from Black's Law Dictionary, "The constitutional provision that prohibits the government from unfairly or arbitrarily depriving a person of life, liberty, or property." The Fifth Amendment applies to the federal government and the Fourteenth Amendment applies to the states. Due process is defined as "the conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide a case." The Fundamental Fairness Doctrine (1969)" is the rule that applies the principles of the due process to a judicial proceeding. It is Petitioner's supposition that the Western District's denial of the Habeas Petition under 2244(d)(1)(A), was a violation of "the conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights . . ." and the Court **acted in a manner inconsistent with due process of law.**

Third. 2244(d)(1)(A) did not consider cases in which a person is denied Due Process on appeal. When the court's "final decision" does not "end the litigation on the merits" there is no finality under the final judgment rule. A party must raise all claims of error in a single appeal. In

what situation is Due Process denied on appeal? When one is subjected to ineffective assistance of appellate counsel in violation of the 6th Amendment.

I discussed the failure of my Oklahoma Indigent Defense System attorney Robert Jackson to raise my claims to withdraw my plea as cause for a procedural default. Because the state was unable to "end the litigation on the merits" because appellate counsel failed to "raise all claims of error in a single appeal," there was no "final judgment". This failure could not have triggered the 90 day limitation for filing a Writ of Certiorari with the US Supreme Court nor the time for seeking such review. I want to address the term "reduces the finality of appellate proceedings." I have included in App. F. Ex. – Application to Withdraw plea. It seems to me the three grounds presented on the Application are fundamental errors in violation of substantive due process. However, because the state was unable to review those errors under the Oklahoma Evidence Code the state was unable to end the litigation on the merits and therefore there was no final judgment.

In fact I have evidence clearly showing my conviction remained in question up to an including December 20, 2012. I have included an excerpt from a civil rights complaint filed in the Western District of Oklahoma in November, 2011. The cause of Action section C, Count III, the Right to Fair Trial is clearly identified along with the supporting fact that the Petitioner had worked with the judge and officers of the court on a weekly bases for years. (App F. Ex. 8) The order from US Magistrate Judge Robert E. Bacharach dated December 8, 2011 clearly states from #4 on page 2 "In accordance with 42 U.S.C. 1997 (e)(g)(2), the Court has screened the complaint and finds the plaintiff has a reasonable opportunity to prevail on the merits." I submit this Court found the claim of right to a fair trial to be a fundamental error in violation of substantive law. After completing the investigation and special report the Honorable US District Judge Stephen P. Friot's judgment of December 20, 2012 stated "Plaintiff's official capacity claim against defendants . . . are

dismissed without prejudice." (App. F Ex. 9) These two rulings by judges from the Western District of Oklahoma support the claim that my conviction(s) were not final on April 11, 2011.

C. the opposing party's reliance interests in the finality of the judgment. In *Gonzalez v. Crosby* "When a habeas petition has been dismissed on a clearly defective procedural ground, the State can hardly claim a legitimate interest in the finality of that judgment. Indeed, the State has experienced a windfall, while the state prisoner has been deprived – contrary to congressional intent-of his valuable right to one full round federal habeas review." I submit the U.S. District Court – Western District of Oklahoma completely overlooked the explanation I had given on my Petition for Writ of Habeas Corpus as 2244(d)(1)(D), the date the factual predicate was or could have been discovered thru due diligence.(App. F Ex 10) While I acknowledge I did not expressly state 2244(d)(1)(D), but **the usual course of judicial proceedings** is for the court to review timeliness under 2244(d)(1)(B), (C) or (D). By ignoring Petitioners claims under 2244(d)(1)(D) the Western District's judgment as untimely denied the Petitioners' valuable right to one full round of federal habeas review and final judgment under the 14th Amendment due process clause. In *Gonzalez v. Crosby,* Justice Stevens, with whom Justice Souter joins, dissenting states, "Unfortunately, the Court underestimates the significance of the fact that petitioner was effectively shut out of federal court – without any adjudication of the merits of his claims – because of a procedural ruling that was later shown to be flatly mistaken. As we have stressed, "[d]ismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protection of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas,* 517 U.S. 314, 324, 134 L. Ed. 2d 440, 116 S. Ct. 1293 (1996) see also *Slack v. McDaniel,* 529 U.S. 473, 483, 146 L. Ed 2d 542, 120 S. Ct. 1595 (2000) "The writ of habeas corpus plays a vital role in protecting constitutional rights"). When a habeas corpus petition has

been dismissed on a clearly defective procedural ground, the State can hardly claim a legitimate interest in the finality of that judgment. Indeed, the State has experienced a windfall, while the state prisoner has been deprived – contrary to congressional intent – of his valuable right to one full round of federal habeas review." Therefore the Petitioner submits that the U.S. District Court Western District of Oklahoma "**acted in a manner inconsistent with due process**" by denying the Petition for Writ of Habeas Corpus as "untimely" and the judgment is void. *In Reed v Ross* 468 US 1 (1984), "This Court has never held however that finality standing alone provides sufficient reason for federal courts to compromise their protection of constitutional rights under 2254."

CONCLUSION

In *Kimmelman v. Morrison,* 477 U.S. 365, 382-383, 106 S.Ct. 2574, 2587, 91 L. Ed. 2d 305, 324, (1986). "The usual rules regarding procedural default do not apply to Sixth Amendment ineffective assistance claims, since, without effective assistance, the incarcerated person has been unconstitutionally deprived of their liberty." In my case I had both ineffective assistance of trial counsel and appellate counsel, which voided my nolo contendre pleas and prevented my convictions from being final as well. (App F Ex 6 and 11).

For the foregoing reasons I respectfully request that Certiorari be granted and the Honorable Justices of the Supreme Court review the Oklahoma Court of Criminal Appeals policy.

Respectfully submitted,

Kenneth Rex Heddlesten, Petitioner pro se

Date: March 4, 2022