

APR 19 2022

OFFICE OF THE CLERK

No. \_\_\_\_\_

21-7855

IN THE  
SUPREME COURT OF THE UNITED STATES

James Wells Horsey — PETITIONER  
(Your Name)

vs.

State of Oklahoma — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Oklahoma Court of Criminal Appeals  
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

James Wells Horsey #849025  
(Your Name)

P.O. Box 514  
(Address)

Granite, Oklahoma 73547-0514  
(City, State, Zip Code)

580 480 3700  
(Phone Number)

ORIGINAL

## QUESTION

1. Under the Blockburger Test and same evidence test, can possession of juvenile pornography be considered child pornography or adult pornography since there is no separate state or federal statute for juvenile pornography in violation of the First and Eighth Amendments of the US Constitution?
2. Can courts deviate from the language of a statute by replacing wording provided specifically by their State Legislature to secure a conviction without informing the jury what the actual charge and incarcerating defendant a violation of the Due Process Clause of the Fifth Amendment of the U.S. Constitution?
3. Does a global pandemic interferes with an appellants' attorney ability to fully and properly review the original record by using the full amount of time available amounts to ineffective assistance of counsel under the Sixth and Fourth Amendment?
4. Whether or not both incarcerated retired military personnel and veterans are being denied special protections during sentencing under Title 10 of the Federal Code and the American Disability Acts in violation of Fifth and Eighth Amendment of the U.S Constitution?

## **LIST OF PARTIES**

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

[ x ] 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:

1) JOHN M. O'CONNOR, Attorney General  
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313 N.E Twenty-First Street  
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405-521-3921

2) William Rankins, Warden  
Oklahoma State Reformatory  
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580-480-3700

## **RELATED CASES**

- STATE OF OKLAHOMA v JAMES WELLS HORSEY, No. CF-2018-285  
Comanche County Courthouse Lawton Oklahoma. Judgment entered Dec. 18, 2019
- JAMES WELLS HORSEY v STATE OF OKLAHOMA, No.F-2020-3 (Okl.Cr. Nov.12, 2020) (not for publication) Oklahoma Court of Criminal Appeals. Judgment entered Nov. 12, 2020
- JAMES WELLS HORSEY v STATE OF OKLAHOMA, No. PC-2021-598 (Okl.Cr. Jan.21,2021) Oklahoma Court of Criminal Appeals. Judgment entered Jan. 21, 2022.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
  
PETITION FOR WRIT OF CERTIORARI

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

**OPINIONS BELOW**

☐ For cases from **federal courts**:

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

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

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

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

☐ For cases from **state courts**:

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

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

The opinion of the Comanche County 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,  
☒ is unpublished.

## JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was \_\_\_\_\_.

☐ No petition for rehearing was timely filed in my case.

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

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_\_.

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

☒ For cases from **state courts**:

The date on which the highest state court decided my case was Jan 21, 2022  
A copy of that decision appears at Appendix A.

☒ A timely petition for rehearing was thereafter denied on the following date: N/A, and a copy of the order denying rehearing appears at Appendix (not allowed by state law)

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_\_.

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



## STATEMENT OF JURISDICTION

Petition for Writ of Certiorari is being filed under 28 U.S.C 1257(a) for opinion filed with the Oklahoma Court of Criminal Appeals (OCCA). Jurisdiction is appropriate because the OCCA is the highest court in Oklahoma in which a decision could be had, following an appeal denying post-conviction relief. Petition has properly exhausted all state remedies for the original case CF 2018-285 through the post-conviction case PC 2021-598. Mandate was issued by the trial court to the OCCA on Jan. 24, 2022 and filed in that court on Jan 26, 2022. Petitioner is filing this request for writ within the 90 day window for Direct Collateral Review (DCR) of the judgment against the conviction and sentence and the state statute that was used. By state statute and law, Oklahoma does not allow rehearing on Post-Conviction Relief decisions<sup>1</sup>. The State of Oklahoma is a party but in accordance with 28 U.S.C § 2404(b) may apply and shall be served on the Attorney General of Oklahoma. The OCCA, pursuant to 28 U.S.C § 2403(b) should certify to the State Attorney General, the fact that the constitutionality of a state statute in this case Title 21 O.S 2011§ 1021.2 was drawn into question.

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<sup>1</sup>Title 22 Chapter 18 Section 5 Rule 5.5 (Final Order; Exhaustion of State Remedies)

## CONSTITUTIONAL AND STATUTORY PROVISION

### US CONSTITUTION

First Amendment: (To petition the Government for a redress of Grievance)

Fourth Amendment: (Supported by oath or affirmation and particularly describing the place to be searched and the persons or thing to be seized)

Fifth Amendment: (Nor shall be compelled in any criminal case to be a witness against himself, nor shall any person be subject for the same offence to be put jeopardy of life or limb, nor be deprived of life, liberty, or property, without due process of law).

Six Amendment: (And to be informed of the nature and cause of the accusation; and to have the assistance of counsel for his defense)

Eighth Amendment: (Nor cruel and unusual punishment inflicted)

Fourteenth Amendment: (equal protection under the law)

### OKLAHOMA STATUTE

Title 21 O. S 2011 § 1021.2 (Minors- Procuring for participation in Pornography)

**Any person who shall procure or cause participation of any minor under the age of 18 years in any child pornography or who knowingly possesses, procures, or manufactures or causes to be sold or distributed any child pornography shall be guilty, upon conviction, of a felony and shall be punished by imprisonment for not more than 20 years.**

## STATEMENT OF THE CASE

Petitioner, James Wells Horsey currently incarcerated at the Oklahoma State Reformatory in Granite, Oklahoma, is a 22 year retired military veteran rank (E-8, First Sergeant), a 5 time combat veteran awarded the Bronze Star and married for 34 years, with 3 adult daughters with no previous offenses or convictions. After a disagreement over money, an accusation was made by a neighbor involving her daughter on May 16, 2018 to the Lawton Police Department. The petitioner age 48, at the time, was read Miranda Rights, interviewed for over an hour by law enforcement in petitioners' front yard, search through petitioner cellphone which I consented to and saw nothing illegal nor was arrested and they left. About an hour later, law enforcement came back a second time to petitioner house saying the story had changed and they needed to take the cellphone to the patrol car to copy down the make, model and serial number of cell phone and cellphone would be given back which I consented to. Law enforcement seized petitioners' cellphone on the second visit with no Miranda Rights being read, without no search warrant, no arrest warrant and no consent to take the cellphone other than to copy information requested and left the residence. A search warrant was not secured until the following day.

On May 30, 2018, petitioner was charged with 2 counts in Comanche County Oklahoma. The indictment stated the following; Count 1: Lewd or indecent acts to a child under 12 – Title 21 O.S. 1123(A)(2) a felony, and Count 2: Possess of Juvenile Pornography under Title 21 O.S 1021.2 a felony and read as such at the initial

arraignment. On November 7, 2018 a preliminary hearing was conducted and the charges were read the same as listed above and petitioner was bound over for trial. On November 28, 2018 at the formal arraignment the charges and count were explained that the charges were the same as the preliminary hearing listed above. On August 23, 2018 an amended information sheet was submitted to the court with the only thing changed was the date of incident for Count 1 with no change to the charge for Count 2. On October 7th, 2019, a motion to suppress evidence and dismiss charges was submitted for Count 2 by the defense counsel to question the seizure of the cellphone without a search warrant and a hearing was scheduled for October 17, 2019 at 9 a.m. On the morning of October 17<sup>th</sup>, 2019 at the pretrial hearing, the trial judge admonished the defense counsel for submitting the motions late including the motion to suppress. Because of this, the defense counsel withdrew the motion to suppress over the defendant objection and the hearing was not conducted. STATE OF OKLAHOMA v JAMES WELLS HORSEY, No. CF-2018-285. On October 17<sup>th</sup> and 18<sup>th</sup> 2019, a jury trial was held but the trial judge read Count 1 the same but Count 2 was read to the jury as Possession of Child Pornography under Title 21 O.S 1021 with nothing showing in the record that the actual indictment or charge had changed. The only time it was read that way was in front of the jury. Petitioner was Acquitted of Count 1, but found guilty of Count 2 with the jury recommending a 15 year sentence. A Pre-Sentencing Investigation (PSR) was ordered on October 18, 2019 and completed on December 16, 2019. On December 18, 2019 the trial judge mentioned that was the PSR was complete but did not address any of the issues or mitigating

factors including that petitioner suffers from Post-Traumatic Stress Disorder and has a mild Traumatic Brain Injury (TBI) from his combat military service which was verified by Veteran Administration medical records in the report. Also the PSI shows on the FBI and OSBI that the petitioner was charged and convicted on Juvenile pornography. Trial Judge sentenced the petitioner according to the jury recommendation at 15 years @ 85% on Count 2, but never stated on record what Count 2 exactly was in open court. A noticed of intent to appeal and a motion for Leave to Proceed in *Forma Pauperis* was filed the same day. The Judgment and Sentence document stated the petitioner was found guilty of the following: Possession of Juvenile Pornography, a Felony under 21 O.S 1021.2 at 85% (emphasis added). The Oklahoma Court of Criminal Appeals (OCCA) granted a Certificate of Appealability (COA) on Jan 10, 2020 and petitioner was granted counsel by that court JAMES WELLS HORSEY v STATE OF OKLAHOMA, Docket No. F-2020-3. A summary opinion was issued on Nov 12, 2020 affirming the Judgment and Sentenced (emphasis added). Petitioner filed both a motion for a modification of sentence under 22 O.S 982a and a motion for a suspended sentence questioning the judgment and sentence with both being denied by the trial court without no hearing. No review of direct appeal was filed within the 90 day window in time. An application for Post-Conviction Relief under 22 O.S Section 1080 was filed along with a request for an evidentiary hearing to the trial court on May 2021 and both were denied on May 10, 2021 by the trial judge. A Notice of Intent to Appeal was filed May 18, 2021 to the OCCA and a COA was granted on June 17, 2021 and filed with a Petition-in-Error and Brief in

Support JAMES WELLS HORSEY v STATE OF OKLAHOMA, No. PC-2021-598. A Motion to Supplement the Record was also filed on July 14, 2022 for information relating to communication between petitioner and appointed counsel for ineffective assistance of appellant counsel. An opinion Affirming Denial of Application for Post-Conviction Relief was decided on Jan 21, 2022.<sup>2</sup> A Mandate and Order was returned to the OCCA and filed on Jan 26, 2022. Petitioner is requesting to grant writ and review by meeting the Apr 26, 2022 deadline and filing Pro Se. The primary focus is on the Post-Conviction Relief portion of the case *Horsey v State* PC 2021-598 (unpublished). After the trial court denied relief for CF 2018-285 and the appeal court did the same thing without addressing the merits of the issues. Both courts use the procedural bar rules to preclude the petitioner from accessing my constitutional rights.

### **REASON FOR GRANTING THE PETITION**

“Because the case comes to us on direct review of the court decision (rather than in a habeas proceeding, ADEPA’s deferential standards no longer governs.” *Madison v Alabama*<sup>3</sup>. DCR cases uses a De Novo standard and can be resolved thru the shadow docket without oral arguments or hearings. The Solicitor General have no control over DCR cases by state prisoners. A defendant charges should be consistent throughout their case and not change depending on the audience, especially in this case the jury. Individuals accused of these crimes have very limited advocacy to

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<sup>2</sup> Motion to Supplement the Record was denied by OCCA

<sup>3</sup> 139 S Ct. 718 (2019)

fight on their behalf and in some instances are the actual victims. The courts are one of the few avenues we have if political views and personal beliefs are put aside.

When interpreting a statute; the starting point is always the language of the statute itself. "Legislatures, not courts, prescribe the scope of punishment<sup>4</sup>." The legislature is the only one to define a crime and set the minimum range and the trial court is restricted to setting all sentences between/within that range. The *Ex Post Facto Clause* flatly prohibits retroactive application of penal legislature as follows:

**"1<sup>st</sup>. Every law that makes an action done before passing the law, and which was innocent when done, criminal; and punishes such action. 2<sup>nd</sup>. Every law that aggravates a crime, or makes it greater than it was, when committed. 3<sup>rd</sup>. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4<sup>th</sup>. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of commission of the offence, in order to convict the offender." *Calder v Bull*, 3 Dall., at 390, 1 L.Ed 648 (emphasis deleted).**

Possession of Juvenile Pornography may have been an old law but it not the current law, the current law is Child Pornography under 21 O.S. § 1021.2. The petitioner definitely meets the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> requirement easily and makes a strong showing for the 1<sup>st</sup> also, since there is no law. In this case, a Petition-in-Error is a requirement to proceed in a post-conviction, to challenge the conviction and sentence. Under Criminal Procedure Title 22 Chapter 18 Section 5 Rule 5.5 states:

**"Once this Court has render it decision on a post-conviction that decision shall constitute a final order and the petitioners state remedies will be deemed exhausted on all issues raised in the petition-in-error, brief and any prior appeals."**

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<sup>4</sup> 459 U.S. 359, 103 S Ct. 673, 74 L. Ed 2d 535 (1983)

The Petition-in-Error clearly and obviously states what the major issue is. The Conviction and the Judgment and Sentence are not the same it was clearly a “unit of prosecution issue”, in violation of the Double Jeopardy Clause of the Fifth Amendment of the US Constitution and even Oklahoma Constitution. This issue has been brought up from the initial arraignment up to this court primarily because the Oklahoma state courts refuse to acknowledge the problem. The Six Amendment of the U.S Constitution guarantees that the defendant would be informed of the nature and cause of the accusation, but that has been truly clear throughout this case. Most double jeopardy issues result from one act punished under multiple statutes and not multiple punishment for one act within one statute as is the case here. Petitioner was charged with possession of juvenile pornography, tried and convicted on child pornography, but sentenced for the juvenile pornography with no instruction given to the jury that juvenile pornography is a lesser or more included charge of child pornography. This clearly erroneous violation of law actually makes the petitioner innocent of any crime and currently serving an illegal sentence and has been recognized well over a century, see *Yick Wo v Hopkins*,<sup>5</sup> (finding imprisonment of the petitioners illegal because the ordinance upon which their conviction was based violated the equal protection clause of the 14<sup>th</sup> Amendment as applied). The State of Oklahoma in the original indictment could have simply charged the petitioner with child pornography but choose not to (emphasis added).

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<sup>5</sup>118 U.S.356,373-374, 6 S Ct. 1064,1073,30 L.Ed.220,227-228 (1886),



The trial judge could have simply sentence the petitioner with child pornography since that was the conviction but choose not to (emphasis added). The petitioner has already been punished for both crimes even though he was convicted of one, this is clearly a miscarriage of justice and reversible error.

In this case at *prima facie*, the state statute in question is ambiguous if applied according to the state. There is no such statute as infant pornography, teen pornography, or juvenile pornography and prosecutors can't just make up charges. The petitioner has protection against cumulative punishments. "The Blockburger Test has nothing to do with the evidence presented at trial. It is concerned solely with the statutory elements of the offenses charged<sup>6</sup>." (emphasis in original) Grady, 110 S. Ct at 2093). There are no elements specifically for juvenile pornography at either the State of Oklahoma or Federal Level that specifically addresses juvenile pornography as a crime. Specifically that possession of child pornography is punishable under 21 O.S. § 1021.2, not juvenile pornography. Most states and federal statutes addresses two type of pornography, child or adult with no room of error in between unless stated within the statute. What Oklahoma, Texas and other states are interpreting, a charge that is not a crime, placing it under a statute that is a crime in front of their juries and then sentencing defendants back on the original charge. However, The State of Louisiana does indeed have a separate statute for juvenile pornography Title 14 LSA-R.S 14:81.1 and actually defines pornography involving juveniles that

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<sup>6</sup>Grady v Corbin, 495 U.S 508,110 S Ct. 2084,2090-2091,109 L.Ed 2d 548 (1990)

Oklahoma does not. Juries are being advised on the crime that is in the statute as the actual charge when it is not the actual charge which is prejudicial to any defendant. This allowed the jury to define the crime without knowing what the original information document stated, clearly misleading the jury.

The Oklahoma Department of Corrections states that the petitioner is indeed incarcerated for Possession of Juvenile Pornography enhanced under the 85% rule for Child Pornography (emphasis added) but not incarcerated for Child Pornography. The OCCA clearly erred by affirming the conviction and sentence because under Title 21 O.S. § 13.1 (16) **child pornography OR Aggravated child pornography as defined in section 1021.2, is an 85% sentence juvenile pornography is not mentioned at all.** The State of Oklahoma judicial system along with the Department of Correction is clearly manipulating this statute and violating many defendants' statutory and constitutional rights under the First, Fifth, Six, Eighth, and Fourteenth Amendment of the U.S. Constitution. There are several definitions for juvenile including, 1) Someone who has not reached the age (usu.18) at which one should be treated as an adult by the criminal justice system<sup>7</sup>, 2) being or relating to an actor who plays a youthful part<sup>8</sup>. The only statute that mentioned anything about juvenile pornography is the Delayed Sentencing Program for Young Adults under Title 22 O.S. Ann. Ch. 16 § 996.1 referring to offenders between the age of 18 to 25 (emphasis added). Once again it refers you back to the 21 O.S. § 1021.2 statute for

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<sup>7</sup> Black Law Dictionary 11<sup>th</sup> edition 2019

<sup>8</sup> Black Law Dictionary 11<sup>th</sup> edition 2019

child pornography. Within the Oklahoma statute the word minor and child is used not juvenile. Court must imply and follow the statute as it is written and not interpret the statute according to misguided application of law. Every inmate that have been prosecuted and sentenced this way has had both their constitutional and statutory rights violated which is contributing to the high incarceration rates in Oklahoma. The State of Oklahoma makes most cases unpublished as to hide this unusual practice.

#### **i. SUFFICIENCY OF EVIDENCE**

Petitioner is also challenging the sufficiency of the evidence to support the conviction. “Sufficiency of the evidence can be considered to be a mixed question of law and facts.” *Case v Mondragon*<sup>9</sup>, Petitioner was found guilty on Count 1 and Count 2 only became an issue because of Count 1. Out of 3993 pictures extracted from the cell phone only 2 were deemed illegal. The “Vagueness Doctrine” issues fall under the Due Process of the Fifth Amendment of the US Constitution which involved the third picture. A 3<sup>rd</sup> picture was shown to the jury but it was virtual pornography and this court stated that virtual child pornography that does not involve actual minors is not illegal and may infringe on a person’s First Amendment rights. Under the statute the petitioner was convicted on there was no actual minor involved once the jury acquitted the petitioner on Count 1 and none of the two or three images involved the former alleged victim as the prosecution attempted to show and link the two charges. Procure means to obtain a sexual partner for another, esp. an unlawful partner such as a minor or a

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<sup>9</sup> 887 F.2D 1388, 1392 (10<sup>th</sup> Cir 1989) Cert. Denied U.S 1035, 110 S Ct. 1490, 108 L.Ed2d 626 (1990)

prostitute<sup>10</sup>. Possess means to have in one's actual control; to have possession of<sup>11</sup>. Petitioner could not have possibly met this because there was no victim in this case and the alleged victim was not in any illegal pictures. This statute allows for possession in basic terms. Suspected images were also legal because they involved no sexual activity at all. This court stated that were "Where the jury was instructed on the standard for reasonable doubt such additional instructions on circumstantial evidence is confusing an incorrect" *Holland v United States*<sup>12</sup>. In addition, under Federal Law Title 18 U.S.C § 2252A (d), an affirmative defense is allowed if (1) possessed less than three images of child pornography and (2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency to access any images or copy there of (A), took reasonable steps to destroy each such image; or reported the matter to a law enforcement agency and afforded that agency access to each such image. In addition under 18 U.S.C § 2251 and 2256 (11) the alleged child pornography was not produced using any actual minor or minors is not illegal. Under *United States v Dobbs*<sup>13</sup>, 2 images were insufficient to prove child pornography was knowingly. In the knowingly instruction provided to the jury, the petitioner did not have to know (knew) about the photos on his phone and still could be convicted without providing any proof the petitioner knowingly put them there. None of the photos were in the photo gallery but found somewhere in the phone data with no additional or specifics of where it was exactly found, or how it was download

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<sup>10</sup> Black Law Dictionary 11<sup>th</sup> edition 2019

<sup>11</sup> Black Law Dictionary 11<sup>th</sup> edition 2019

<sup>12</sup> 348 U.S. 121 (1954).

<sup>13</sup> 629 F.3d 1199 (10<sup>th</sup> Circuit),

intentionally or not. According to the First Amendment “Over Breath Doctrine”, a statute is facially invalid if it prohibits a substantial amount of protected speech. Circumstantial evidence though considered immoral, was legal and protected speech under the First Amendment of the US Constitution. The circumstantial evidence included Asian women with youthful appearances from a legal porn site, Olympic pictures of women gymnastics, swimming, and figure skating, and track and field events in which juveniles can compete even though they are not women but referred to as women in both local and international competitions. The same thing that was used to help convict the petitioner can be seen on television every week including the poses but consider to have an artistic value but in court was consider sexual in nature. The same can be said for juveniles that can be tried in the criminal justice system as adults even though they are considered children.

## **ii. PROSECUTION WITHHELD EVIDENCE**

The interview that was recorded by the police at petitioner house was recorded but not given to defense counsel or the petitioner. This is a clear Brady violation and was only discovered by a letter the petitioner wrote to the police department and acknowledged by the police department that the video exist. This video can also clarify how the cell phone was seized in violation of the Fifth Amendment against Self-Incrimination. Additional information and proof will be provided if writ is granted.

## **iii. EXCESSIVE SENTENCE**

The PSI report was mostly favorable to the petitioner states defendant but since the defendant doesn't think juvenile pornography is illegal and it was recommended to be incarcerated because of this belief. The State of Oklahoma has several statutes to charge a person with possession including 21- 1021.2 (Minors- Procuring for Participation in Pornography), 21-1024 (Purchase, Procurement, or Possession of Child Pornography) and 21-1040.12a (Aggravated Possession of Child Pornography). The following are examples of the difference in sentencing because this state does not use a classification matrix or sentencing matrix in the criminal justice system cases by the OCCA;

*Brown v State*<sup>14</sup>, (9 counts 6 month sentence each count) 100 images, *Hamilton v State*<sup>15</sup> (1 count 10 yrs. 15,000 fine), *Arganbright v State*<sup>16</sup> (2 counts 5 years concurrent terms) one count was a charge that actually carried a min 25 years sentence. How the state determined what statute to use was never determined and questionable especially when you have multiple statutes a person can be charged with possession under.

Title 10 U.S.C § 688 (a)(b)(1) and Title 10 U.S.C § 802 retired military members unlike other veterans may be recalled to active duty during a national crises and are consider a part of the their active component even while in a retired status and subject to military prosecution under the Uniform of Military Justice. On the military document DD-214 block 9, it clearly shows that the petitioner was transferred to the

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<sup>14</sup> 177 P.3d, 2008 OK CR3

<sup>15</sup> 387 P.3d 903, 2016 OK CR 13

<sup>16</sup> 328 P.3d 1212, 2014 OK CR 5

USAR CON GP (RET), 1 RESERVE WAY, ST LOUIS, MO 63132. According to the American Disability Act and The Veteran Administration, a veterans' medical status should be taken in consideration in criminal proceedings no matter the status. Oklahoma own law under Title 22 § 973a states:

**“When making a sentencing decision concerning a person who is a veteran, the courts may consider as a mitigating factor that the person has been diagnosed as suffering from post traumatic stress disorder resulting from his or her military service.”**

This also states that occurred as a result of events during the service of the defendant in one or more combat zones and to provide such documentation which was done in both the trial and OCCA courts but simply ignored. Veterans, especially in this case, a Senior Non-Commission Officer because of the sacrifices they make should be given special consideration for conditions suffered during combat times and the above title should have been made retroactive to cover older incarcerated veterans for resentencing purposes since the law was enacted in 2016 at the state level but still not being enforced to benefit the veteran. Additional information and proof would be added if writ is granted.

#### **iv. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL**

“The Six Amendment grants a criminal defendant personally the right to make his defense” *Faretta v California*<sup>17</sup>, Petitioner is also entitled to adequate appellate review. The issue with trial counsel withdrawing the motion to suppress and not submitting the motions on time is a major error which prejudicial to the petitioner,

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<sup>17</sup> 422 U.S. 806 (1976).

was brought up to appellant counsel in a letter written to counsel as well as in the Pro Se post-conviction relief brief of petitioner to the OCCA but was either waived or not addressed by the OCCA. The appellant counsel used only 25 days of the 60 days 41.6% of allowed time while the State used the full 60 days or 100%. Due to the COVID 19 filing of briefs were suspended by the OCCA for 60 days. Additional information and proof will be addressed and submitted if writ is granted.

### CONCLUSION

The OCCA obviously violated the 5<sup>th</sup> Amendment Due Process Clause by affirming a conviction and sentence that is contrary to law with the official judgment and sentence document by misapplying the law by the state statute, in violation of Federal Law. A motion to reverse and dismiss conviction for Count 2 would be recommended to this court or at least a new trial granted. The Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

James Wells Jr. #849025

Date: Apr 18, 2022