No. 22-6661

IN THE SUPREME COURT OF THE UNITED STATES

Brent Allen Morris
v.
STATE OF OKLAHOMA – RESPONDENT

Supreme Court, U.S.
FILED
OCT 19 2022
OFFICE OF THE CLERK

ON PETITION FOR A WRIT OF CERTIORARI TO the Oklahoma Court of Criminal Appeals

Petitioner Brent Allen Morris is a *pro se* state prisoner at the James Crabtree Correctional Center, 216 North Murray Street, Helena, Oklahoma 73741-1017. The facility phone number is (572) 568-6000

QUESTION PRESENTED

Is Petitioner's Sixth and Fourteenth Amendment right to notice and an opportunity to defend violated when the State changed the alleged crime from "Assault and Battery with Intent to Kill" to "Assault and Battery with Means or Force Likely to Produce Death" after both the State and Defense rested?

LIST OF PROCEEDINGS

The following proceedings are directly related to this case within the meaning of this Court's Rule 14.1(b)(iii):

- *State of Oklahoma v. Brent Allen Morris*, No. CF-2016-6899 (Tulsa County, OK May 2018) (trial proceeding);
- *Morris v. State*, No. F-2018-551 (Oklahoma Court of Criminal Appeals) (direct appeal) (unpublished);
- *Morris v. State*, No. PC-2022-327 (Post-conviction appeal) (unpublished);
- *Morris v. Bridges*, No. 22-CV-0091-CVE-SH (federal habeas) (currently in protective stay and abeyance).

Constitutional Provisions

Cases

Statutes

Other Authorities

STATEMENT OF THE CASE[1]

Petitioner was charged with 'Assault and Battery with Intent to Kill.' This was the charge at arraignment, preliminary hearing, through the end of trial, and on Petitioner's Judgment and Sentence. This was the charge Petitioner's attorney was prepared to defend and defended. After both the State and Defense rested, the Trial Judge informed the State they "didn't get there with intent." At this point, the State was allowed to amend the charge to 'Assault and Battery with Force or Means Likely to Cause Death,' a charge for which Petitioner's attorney did not prepare to defend, for which Petitioner was never arraigned, for which a preliminary hearing was never held, and for which the jury was not presented during the entirety of his jury trial, but only afterward in its instructions. This is unconstitutional.

REASONS FOR GRANTING THE PETITION

Petitioner was charged with 'Assault and Battery with Intent to Kill.' This was the charge at arraignment:

(Count 1)
21 O.S. 652(C)

[1] Pursuant to S.Ct. Rule 14.1(g).

> BRENT ALLEN MORRIS, between 12/8/2016 and 12/10/2016, in Tulsa County, State of Oklahoma and within the jurisdiction of this Court, did commit the crime of ASSAULT AND BATTERY WITH INTENT TO KILL, a Felony, by unlawfully, feloniously, willfully and intentionally, without justifiable or excusable cause, commit an assault and battery upon one Charis Brianne Clopton with a weapon, to-wit: a frying pan held in the hand of said defendant and with which he did then and there repeatedly strike the said Charis Brianne Clopton in the head causing life threatening injuries, to wit: subdural hematoma.

See Criminal Information, Appendix A, Felony Information (filed December 23, 2016); the identical charge on the State's First Amended Felony Information, *see* Appendix A, Amended Felony Information (filed May 1, 2017), and; the identical charge on the State's Second Amended Felony Information, *see* Appendix A, 2nd Amended Felony Information (filed May 14, 2018).

It is the identical charge read aloud by the State and contemplated by the magistrate judge at Petitioner's preliminary hearing. *See* Appendix B, Preliminary Hearing Transcript (P.H. Tr.) at 82 (binding Petitioner over for 'Assault and Battery with Intent to Kill.'); at the beginning of trial, *see* Appendix C, Trial Transcript (Tr. II) at 234 (alleging Petitioner "did commit the crime of assault and battery with *intent* to kill, a felony, by unlawfully, feloniously, *willfully*, and *intentionally*, without justifiable or excusable cause" on the complainant); and through the end of trial until the trial court advised the State it "didn't get there with intent," *see infra*, and; on Petitioner's Judgment and Sentence. *See* Appendix D (Judgment and Sentence finding Petitioner "GUILTY by a jury & by the Court of the crime of: Count 1: ASSAULT AND BATTERY WITH INTENT TO KILL, 21 O.S. 652 C); 12/10/2016) (emphasis added).

After both the State and Defense rested, the Trial Judge informed the State it "didn't get there with intent." At this point, the State was allowed to amend the charge to 'Assault and Battery with Force or Means Likely to Cause Death,' a charge for which Petitioner was never

arraigned, for which a preliminary hearing was never held, and for which the jury was not presented during the entirety of his jury trial, but only afterward in its instructions. The Trial Judge:

> initially put in, I believe, it was [Oklahoma Uniform Jury Instruction] OUJI 4-10, which the State requested OUJI 4-7. The Court's reasoning for granting that was is that in looking at 4-7, it says it specifically applies to 652(C)), which is what the State had on its Information. I think that the confusing part of it is the State labeled it assault and battery with intent to kill, which would be [OUJI] 652) (A) if I'm reading that correctly. It makes sense to me that both sides have issues with that.

Trial Transcript at p. 1020.

Trial Counsel objected to the new jury instruction of 'Assault and Battery with Force or Means Likely to Cause Death,' because Petitioner:

> has been charged with and the jury has been advised and they'll get the case that he has been charged with assault and battery with the *intent* to kill, which indicates that the State must prove that his actions *intended* a consequence to kill. The way that the State has requested and the instruction has been changed [by the trial court] it's now assault and battery with the *intent* to kill, but we're not requiring the jury to find the element of intent. Instead they have to find the element of force likely to produce death.

Id. at p. 1021.

Trial Counsel stated it is:

> confusing to tell the jury that he's been charged with assault and battery with *intent* to kill but then take out the element that they have to prove that he *intended* to kill.

Id. at p. 1022.

To which the Trial Judge stated to Trial Counsel:

> And I don't know - - Ms. Self, I don't know that I don't - - that I disagree with you necessarily...

Id.

The Trial Judge continued, stating:

> I mean, for purposes of the record why does it say assault and battery with intent to kill?

Id. at 1022-23

To which the State answered:

> Because *that is what the language says in the statute*, Your Honor.
>
> THE COURT: In 652) (A)?
>
> THE STATE: or 652) (C) as well. If you look, it says likely to produce in any manner attempts to kill another. And it doesn't say specifically intents to kill - -
>
> THE COURT: Right. It doesn't say intent to kill. I - -
>
> THE STATE: Attempts to kill, I think - - I'm sorry.
>
> THE COURT: I don't recall a case I just read, it was 2007 case. It goes through all of this and says A is specific intent and B and C is not. So it should not be labeled intent to kill.
>
> THE COURT: So let's start with that, okay? Now the question is whether the State, when it mislabels something but files it under a different charge, that's really the issue for the Court.
>
> THE STATE: I believe the case the Court was referring to is *Goree v. State*. Does that sound - -
>
> THE COURT: Yes.

Id. at 1023.

The State and the trial court agreeing the referenced case is *Goree v. State*, 2007 OK CR 21:

> THE STATE: [T]he State agrees it does remove the specific intent from Sections B and C of Section 652). Section A is specific to shooting, which is why the State filed it under C. And when it was filed, that - - that apparently is just how the language pops up. I know it's not - -

THE COURT: I understand, but that - - that's - - anyway, that's the issue. I think the State's basically saying, look, it just happened, there's nothing we can do about it, *let's just let it go*. So I understand that.

I just hope when these things happen you go back and make some course corrections so it doesn't happen again. And this has happened before. And so some of this is, like - - sometimes the State just has to say, hey, maybe we should have done it differently.

THE STATE: I concur, Judge, we should have done it differently this time.

THE COURT: Well, [Trial Counsel] Ms. Self, you'll have - - you know, I don't know. I'm gonna go ahead and - - you know, it'll be a - - you know, potentially appeal issue if there is some sort of conviction, but I'm gonna go ahead and go with the State. And my reasoning is gonna be that it was listed under 652) (C), that 652) (C), both by wording in the statute and by *Goree* [*v. State*], does not require the specific intent.

I also will note in the language, even - - which is a little bit confusing, if you get - - but if you seem to take away the caps and what they titled it, it seems to be 652) (C) language, at least in this Court's reading of it, in that it does not require specific intent as far as the information and the language.

So I'm gonna go ahead and overrule your objection. And certainly you can - - if that becomes an issue on appeal, you have made your record. And I understand your logic. And we'll move on with that.

Id. at 1024-25.

What the record fails to reveal, however, is that the immediate week preceding Petitioner's trial, the Trial Judge presided over a jury trial in which a mistrial was declared. That trial was also argued by the same prosecutor at issue here, Tulsa County Assistant District Attorney Stefanie Jacoby. When the trial court went off the record, the judge reprimanded Ms.

Jacoby and made clear he was not going to allow (paraphrasing) "another, consecutive mistrial" because it would negatively affect his docket. *See* T.Tr. p.1027 (The Trial Judge going "[o]ff the record for a second."). This potential negative effect to his docket led the Trial Judge to agree with the State's contention, "*let's just let it go*," Trial Transcript at 1025, and these violations of the Oklahoma and United States Constitutions could simply be "you know, potentially [an] appeal issue if there is some sort of conviction." *Id.*

The record also does not consider the WestLaw Committee Notes for 'Assault and Battery by Means or Force Likely to Produce Death' which contemplate the concurring opinion of the above mentioned OCCA decision in *Goree v. State*, 2007 OK CR 21. (emphasis added). *See* OUJI-CR 4-7 Assault and Battery by Means or Force Likely to Produce Death – Elements:

> No person may be convicted of assault and battery by means or force likely to produce death unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:
>
> First, an assault and battery;
>
> Second, upon another person;
>
> Third, with force likely to produce death.

The WestLaw Committee Comments are instructive here:

> The requirement that the assault and battery was done with the intent to take a human life was removed from 21 O.S. § 652 in 1992. *See* 1992 Okla. Sess. Laws ch. 192, § 1; *Goree v. State*, 2007 OK CR 21, ¶ 35, 163 P.3d 583, 584-85. *But see Goree*, 163 P.3d at 585 (Lumpkin, J., concurring in results) (specific intent to kill, albeit not listed under 21 O.S. § 652(C), is a required element of the offense for assault and battery in attempting to kill another).

Judge Lumpkin's concurring opinion in *Goree* makes clear that under Oklahoma law, the State can (or at least, does), and has, charged and convicted defendants with the crime of 'Assault and Battery with Intent to Kill,' and in so doing requires proof beyond a reasonable doubt of the

element of intent. In those cases, intent is the generic element of the charge and 652(C) lists the alternative elements of the statute. Similarly, the use of the adverbs *willfully* and *intentionally* in each of the three Felony Information's filed by the State connotes the *mens rea* requirements of intent being proved beyond a reasonable doubt.

But in order to ensure its conviction of Petitioner, the State and Trial Judge bent the rules and the OCCA allowed them to do so by affirming his conviction. *Cf.*, *e.g.*, *Black v. State*, 21 P.3d 1047, 1056 (Okl.Crim. 2001) (Misstatement in examining magistrate's order listing crime charged and crime for which defendant was bound over as assault and battery with a dangerous weapon, rather than assault and battery with a deadly weapon, did not deny defendant due process or cause him to be convicted of greater offense than that for which he was bound over, *where record showed correct charge had been announced earlier in proceedings*. Citing U.S. Const. Amend. XIV; 21 O.S. § 652). But what the State, Trial Judge, and OCCA considered the "correct" charge had never been announced at any point because the title and substantive elements only shifted at the issuance of jury instructions.

This is unconstitutional. Listing 21 O.S. § 652(C) as the statute on each Felony Information does not cure the deleterious and prejudicial defects of the charging instruments where the substantive elements of the charged crime can change on a whim after both the State and Defense have rested. *See*, *e.g.*, *Cage v. Louisiana*, 498 U.S. 39, 41 (1990) ("In construing the instruction, we consider how reasonable jurors could have understood the charge as a whole"); *Yates v. Evatt*, 500 U.S. 391, 401 (1991) ("We think a reasonable juror would have understood the [instruction] to mean ..."). *See also Boyde v. California*, 494 U.S. 370, 379-380 (1990) (setting the "reasonable likelihood" standard "that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence") (emphasis

added); *Estelle v. McGuire*, 502 U.S. 62, 72 n.4 (reaffirming the standard set out in *Boyde*, 494 U.S.). Here, the constitutionally relevant evidence was *intent*, and the jury instruction given did not allow the jury to consider the intent required in the original and two amended Felony Informations.

The Petition for Writ of Certiorari should also be granted because the State of Oklahoma violated the Sixth and Fourteenth Amendments when it convicted Petitioner of a crime that he was never charged with, abrogating *Albrecht v. United States*, 273 U.S. 1 (1927), wherein this Court held that a person may not be punished without a sufficient association. The State of Oklahoma violated Petitioner's Sixth and Fourteenth Amendment rights to notice and an opportunity to defend when, after the State and the Defense rested, the prosecutor amended the charge from 'Assault and Battery with Intent to Kill' to 'Assault and Battery with Means or Force Likely to Produce Death.' Alternatively, if the "four corners" of the charging instrument were sufficient, then Petitioner was deprived the effective assistance of counsel in violation of the Sixth and Fourteenth Amendments.

The Sixth Amendment contains a compact statement of the rights necessary in order to present a defense:

> In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI.

This Court recognizes that these rights, and the application of them to criminal defendants in the state courts, is necessary under the Fourteenth Amendment, "[b]ecause these rights are basic to our adversary system of criminal justice, they are part of the due process of

law that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the states." *California v. Faretta*, 422 U.S. 806 (1975). But Petitioner was not afforded notice and fair opportunity to defend against the allegation for which he was convicted because the State amended the charge after the Prosecution and Defense rested. These actions by the State of Oklahoma violated clear precedent of this Court discussed above. *See also* California v. Green, 399 U.S. 149 (1930) ("In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it.").

The new crime charged was not considered a lesser included offense of the original crime charged. If it were, there would have been no need for the State to amend the information. In *Bohannan v. State*, 11 Okla.Crim. 69 (1914), the OCCA held that, after a jury had been impaneled and sworn, an information cannot be amended in matter of substance, and can be amended in matter of form only when no injury will result to the defendant. In a long line of cases which followed *Bohannon*, the OCCA upheld its previous holding. The decision of the OCCA was clearly erroneous and contrary to its own precedent, where in *Marks v. State*, 102 P.2d 955 (Okl.Crim. 1940), the OCCA reversed a conviction under similar circumstances where the State was allowed to amend the information during the defendant's trial, after the state and the defense had rested its case. On appeal the OCCA reversed Mark's conviction and held "[t]he trial court committed prejudicial error in permitting the information to be amended after both the state and the defense rested their case, so as to change the crime charged from one of larceny to conjoint robbery." *Id.*

The decision and rationale of the OCCA for denying relief in this case is erroneously premised on its finding that "Appellant was adequately apprised of the charges against him at preliminary hearing and through discovery, his due process challenge must be denied." *See*

Appendix E, Opinion of the OCCA. And although appellate counsel argued that the error violated Petitioner's Sixth Amendment right to properly defend against the charge, the OCCA blatantly ignored this argument as well, holding "[t]he record also does not show defense counsel was hampered in any way from presenting Appellant's defense due to the State's charging error." But Petitioner's trial attorney *did* present a defense that saw the State fail to meet its burden of intent beyond a reasonable doubt. That is, until the Trial Judge allowed the State to amend the charge after trial for his case-in-chief. Here, judicial fiat handed the State an ill-begotten conviction because the State could not meet its burden of intent.

And while it is true trial counsel may not have made such an argument that what the State has chosen to label as a "charging error" hampered the Defense at the trial level, on direct to the OCCA his appellate attorney did make very specific arguments as to how the error hampered and prejudiced his defense. Petitioner adopts and incorporates by reference the arguments presented by his appellate attorney on direct appeal to the OCCA. *See* Appendix F, Arguments of Appellate Counsel presented on direct appeal).

Instead of addressing these arguments presented by Petitioner's appellate counsel, the OCCA skirted around them by talking about trial counsel's failures at the trial level. The OCCA clearly violated its own precedent when it denied Petitioner relief. Further, the OCCA's conclusion that "the trial court correctly viewed the problem with Count 1 as a simple labeling error that was not fatal to the charge" was clearly erroneous because the amended charge of 'Assault and Battery with Means or Force Likely to Produce Death' did not include the "intent to kill" element. 'Intent to Kill' was the initial charge all the way through the end of trial. The initial charge and specific *mens rea* element contemplated at preliminary hearing, extensively argued by the State in its opening statement and throughout Petitioner's trial, and the same

charge defended by his Trial Counsel cannot be shown beyond a reasonable doubt to have not effected or at least confused the jury in determining its verdict.

The record establishes that a substantial portion of the Prosecution's opening statements and pattern of strategy throughout the trial was devoted to intent, disproving all illegitimate claims that the recognized problem with Count 1 was a simple labeling error. Changing the charge after the trial was concluded was prejudicial to the defense because trial counsel prepared Petitioner's defense on the completely different charge of 'Assault and Battery with Intent to Kill.'

By amending the charge from 'Assault and Battery with Intent to Kill' to 'Assault and Battery with Means or Force Likely to Produce Death,' the state broadened the charge. The Trial Judge sought to cure this by allowing the State to amend the charge, but the OCCA "has repeatedly held that the filing of a new information is the beginning of a new case, and the accused is always entitled to the statutory time in which to plead. This is a plain statutory essential, and cannot be denied when it is claimed in due time." *Trent v. State*, 91 P.2d 790, 793 (Okl.Crim. 1939) (citing *Bohannan*, 11 Okl.Cr., *supra*). *See* 22 O.S. § 491 (Time to answer indictment or information. If, on the arraignment, the defendant require it, he must be allowed until the next day, or such further time may be allowed him as the court may deem reasonable, to answer the indictment or information.).

By amending the charge from 'Assault and Battery with Intent to Kill' to 'Assault and Battery with Means or Force likely to Produce Death,' the state violated Petitioner's Sixth and Fourteenth Amendment rights and the precedent of this Court. *See Stirone v. U.S.*, 361 U.S. 212, 217-219 (1960) (held that it is always reversible error when the trial court acts to broaden a charge contained in an indictment).

These Trial Court and appellate errors require a deeper examination.

The Four Corners Doctrine Does Not Cure the State's Errors

This Court has identified "two constitutional requirements" regarding the adequacy of a charging document. *United States v. Resendiz-Ponce*, 549 U.S. 102, 108 (2007). A charging document "is sufficient if it [1] contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and [2] enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974); *see also Russell v. United States*, 369 U.S. 749, 763-764 (1962) (describing adequate notice and the ability to plead a former acquittal or conviction to bar a future prosecution for the same offense as "two of the protections which an indictment is intended to guarantee").

As evidenced above, the three (3) Felony Informations filed by the State laid out the allegation and elements of the charge that Petitioner "commit[ed] the crime of ASSAULT AND BATTERY WITH INTENT TO KILL, a Felony, *by*:

(1) unlawfully,

(2) feloniously,

(3) willfully and intentionally,

(4) without justifiable or excusable cause,

(5) commit an assault and battery,

(6) with a weapon,

(7) causing life threatening injuries.

See Appendix A.

After both The State and Petitioner rested at trial, the judge notified the parties as to the charge of 'Assault and Battery with Intent to Kill' that The State (paraphrased) "didn't get there with intent." After the Trial Judge informed The State they didn't meet their burden of proof under the charged crime, where The State made *intent* a vanguard of its argument, The State simply changed the charged count to 'Force or Means Likely to Cause Death.' *See* 21 O.S. § 652(C):

> Any person who commits any assault and battery upon another [1] by means of any deadly weapon, or [2] by such other means or force as is likely to produce death, or [3] in any manner attempts to kill another, or [4] in resisting the execution of any legal process, shall upon conviction be punished by imprisonment in the State Penitentiary not exceeding twenty (20) years.

But if The State's argument during the Direct Appeal below and the OCCA's decision that there is no procedural and substantive difference between 'Intent to Kill' and 'Force or Means Likely to Cause Death,' then (1) why would the judge inform The State they "didn't get there with intent," and (2) even find it necessary to amend the charge at all, considering (3) the judge overruled Petitioner's objection because both crimes fell under the same Oklahoma Uniform Jury Instruction (OUJI)?

This Court has recently held that "when a statute is not silent as to *mens rea* but instead 'includes a general scienter provision,' 'the presumption applies with equal or greater force' to the scope of that provision. We have accordingly held that a word *such as* 'knowingly' modifies not only the words directly following it, but also those other statutory terms that 'separate wrongful from innocent acts.' " *Ruan v. United States*, 142 S.Ct. 2370, 2377 (2022) (citing *Rehaif v. United States*, 139 S.Ct. 2191 (2019)). *Rehaif* itself corrected a long-misapplied notion in every federal circuit that *mens rea* played no part in the government's burden to convict one

accused of possessing firearms when prohibited from doing so, and continues to be a major point of confusion and contention in the federal courts.

To determine whether a defendant had sufficient notice of the charges against him, the OCCA is supposed to look to the "four corners" of the information together with all material that was made available to a defendant at preliminary hearing and through discovery to determine whether the defendant was apprised of what he must defend against at trial ***or*** subject to the possibility of being put in jeopardy a second time for the same offense. *See, e.g., Patterson v. State*, 45 P.3d 925, 931 (Okl.Crim. 2002); *Parker v. State*, 917 P.2d 980, 986 (Okl.Crim. 1996). But here, the OCCA chooses to ignore its own precedent, the Oklahoma Constitution, and the United States Constitution.

A. 21 O.S. § 652 as-applied is vague and overly broad

The doctrine of vagueness was articulated by this Court in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), in which it was stated:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc*, and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Id. at 108-109 (footnotes omitted) (emphasis added).

> "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with the sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Although the doctrine focuses both on actual notice to citizens and

> arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.' Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' "

Kolender v. Lawson, 461 U.S. 352, 357-358 (1983) (citations omitted). *See also id.* at n.7 ("Our concern for minimal guidelines finds its roots as far back as our decision in *United States v. Reese*, 92 U.S. 214, 221 (1875): 'It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.' ").

Black's defines an 'element' (13c) as "[a] constituent part of a claim that must be proved for the claim to succeed. *Burke failed to prove the element of proximate cause in prosecuting his negligence claim.*" Black's Law Dictionary (11th ed. 2019). Black's defines '*mens rea*' as "[Law Latin 'guilty mind'] (18c) The state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime - *the mens rea for theft is the intent to deprive the rightful owner of the property. Mens rea* is the second of two *essential* elements of every crime at common law, the other being the *actus reus. Ibid.* "*Mens rea* describes the state of mind or inattention that, together with its accompanying conduct, the criminal law defines as an offense." Paul H. Robinson, "Mens Rea," in *Encyclopedia of Crime & Justice* 995, 995-96 (Joshua Dressler ed., 2d ed. 2002).

The State violates due process under the Fourteenth Amendment when it is allowed to charge, arraign, preliminarily examine, bind over, and try a criminal defendant under one set of

listed elements and after being notified by the Trial Judge it "didn't get there with intent" to change the substance of the charge to gain an ill-begotten conviction.

B. 21 O.S. § 652 is a Divisible Statute

In *Taylor v. United States*, 495 U.S. 575 (1990), this Court recognized that there were going to be cases where looking at "the charging paper and jury instructions" would be necessary. *Id.* at 602. Although the *Taylor* Court stressed that this "range of cases" would be particularly "narrow," this unnamed approach would make it permissible to look at some of the underlying documents when the statute has alternative elements, or, in other words, is divisible. *Id.* One element – as here, intent – would be part of the generic offense and the alternative elements would not. *Id.* In *Taylor's* example – breaking into a house or into a car – it would be necessary for the sentencing court to look at a limited set of underlying documents, specifically the indictment or jury instructions, to see if the defendant was convicted of the elements of the charged crime. *Id.*

Normally, courts apply a categorical approach when determining whether a prior conviction qualifies as an enumerated offense for sentence enhancement purposes under the ACCA or the Federal Sentencing Guidelines, by looking to the elements of the prior offense, rather than the facts underlying that conviction.

However, a modified categorical approach applies when a defendant's prior conviction was under a criminal statute that is divisible, meaning it lists multiple, alternative *elements* of the crime. If one alternative matches an element in the generic offense that serves as a predicate for sentence enhancement but another alternative does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury

instructions, to determine which alternative of the divisible statute of conviction formed the basis of the defendant's prior conviction.

To determine whether a specific state criminal statute, written in the disjunctive (*i.e.*, using "or"), is a generic offense, this Court has created a two-step analysis: first, the sentencing court must determine if the offense is made up of a single set of "indivisible" elements, or if it has "divisible," *alternative* elements. If the statute is indivisible, the court can only use the "categorical" approach, where the court evaluates only the elements of the conviction statute to see if it is a generic offense. If the statute is divisible, the court uses the "modified categorical" approach, where it can look to a limited set of documents from the earlier conviction to determine whether the statute is a generic offense.

In *Descamps v. U.S.*, 133 S.Ct. 2276 (2013), this Court clarified that the modified categorical approach is only used in limited circumstances where it is unclear which element in a divisible statute was met to bring about the conviction. *Id.* at 2285 ("The modified approach thus has no role to play in this case. The dispute here does not concern any list of alternative elements. Rather, it involves a simple discrepancy between generic burglary and the crime established in [the statute at issue]"). Sentencing courts cannot apply the modified categorical approach when a defendant was convicted under an indivisible statute that does not contain alternative elements, but instead criminalizes a broader swath of conduct than the relevant generic offense.

The point of contention in this case is that the State grafted additional elements on the charging document, at preliminary hearing, and with a major emphasis on Petitioner's *intent* during opening statements and throughout the trial. After both Petitioner and the State rested, the Trial Judge informed The State (paraphrasing) "you didn't get there with intent." At this point,

the State moved to amend the charge to remove the element of intent. Of course, since the Trial Judge evinced the attitude of a prosecutor by informing The State they "didn't get there," the Trial Court was all-to-happy to go along with The State's request to make the amendment without declaring a mistrial and remanding the case back to the arraignment or even the preliminary hearing stage.

Importantly, the OCCA has previously held that when the State adopts a *mens rea* element it does not alter the State's ultimate burden of proving each element of a criminal statute beyond reasonable doubt. *See Drew v. State*, 771 P.2d 224, 228 (Okl.Crim. 1989) ("the adoption of the *mens rea* requirement" for a statute lacking a *mens rea* requirement "does not alter the State's ultimate burden of proving each element" of the statute "beyond a reasonable doubt") (citing *Hall v. State*, 635 P.2d 618, 621 (Okl.Crim. 1981), *cert. denied*, 455 U.S. 951, 102 S.Ct. 1455, 71 L.Ed.2d 666 (1982)) (emphasis added). But the OCCA and The State's outlook conveniently changes when a Trial Judge informs the State it "didn't get there" to prove intent beyond a reasonable doubt. *See Descamps*, 133 S.Ct. at 2289 ("The Sixth Amendment contemplates that a jury – not a sentencing court – will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense – as distinct from amplifying but legally extraneous circumstances.").

In the ACCA context, these cases resulted in confusion for federal sentencing courts. This Court, albeit in *dicta*, clarified the ambiguities in *Descamps*. *See Mathis v. U.S.*, 136 S.Ct. 2243, 2251 (2016). If the sources of state law fail to clarify whether the listed alternatives are elements or means, the sentencing court should look to the approved *Taylor/Shepard* documents for "determining whether the listed items are elements of the offense." *Id.* at 2256-57 (quoting

Rendon v. Holder, 782 F.3d 466, 473-74 (9th Cir. 2015) (Kozinski, J., dissenting from the denial of reh'g en banc) (internal quotation marks and alterations omitted)). The record would reveal what the prosecutor would have to prove beyond a reasonable doubt and what jurors could disagree on yet still find all the elements were proved. *Id.* (emphasis added). But the State of Oklahoma and OCCA would have this Court overlook its easy removal of the intent element after both sides rested. It would have this Court overlook fundamental fairness and due process concepts because what the State and the OCCA hold most dear is criminal convictions no matter the cost to our Constitution.

The Tenth Circuit holds that 21 O.S. § 652 is a divisible statute. *See, e.g., United States v. Burtons*, 696 Fed.Appx. 372 (10th Cir. 2017) (case considering 18 U.S.C. § 924(e)(2)(B)(i)'s elements clause to decide 21 O.S. § 652 (C) is divisible and that § 652 contains alternative elements, not alternative means) (unpublished);[2] *United States v. Byers*, 739 Fed.Appx. 925 (10th Cir. 2018) (similar); *United States v. Wartson*, 772 Fed.Appx. 751 (10th Cir. 2019) ("conspiracy" to shoot with intent to kill did not qualify as a predicate violent felony). Albeit in the context of the Armed Career Criminal Act (ACCA),[3] these cases and the underlying legal reasoning provide important context for Petitioner's claims.

Wartson, 772 Fed.Appx., is especially persuasive to Petitioner's claim. The federal prisoner in *Wartson* was convicted by the State of Oklahoma for a violation of 21 O.S. § 652 (A) (shooting with intent to kill), but like in Petitioner's case where the State charged him with an additional element of *intent* added to § 652(C), the state grafted an element of *conspiracy* to Wartson's criminal information and conviction. *See Wartson*, 772 Fed.Appx. at 755 & n.3

[2] All unpublished cases are cited for their persuasive value pursuant to the Federal Rules of Civil and Appellate Procedure.

[3] 18 U.S.C. § 924(e)(2)(B)(i)

(denying the Government's contention that "because Shooting with Intent to Kill obviously *involves and contemplates* the use of physical force against another human being" because "Mr. Wartson wasn't convicted of the substantive crime. Instead, he was convicted of conspiring to commit this crime.").

"Under Oklahoma law, ...

> [a]ny person who commits any assault and battery upon another [1] by means of any deadly weapon, or [2] by such other means or force as is likely to produce death, or [3] in any manner attempts to kill another, or [4] in resisting the execution of any legal process, shall upon conviction be punished by imprisonment in the State Penitentiary not exceeding twenty (20) years.

Burtons, 696 Fed.Appx. at 376 (citing Okla. Stat. Ann. tit. 21, § 652(C) (1994)).

> Here, *Burtons* concedes that 'Oklahoma provides separate jury instructions for the different methods of violating Okla. Stat. Ann. tit. 21, § 652(C) (1994)'.... For instance, OUJI-CR 4-4 lists the elements of 'Assault and Battery, Shooting with Intent to Kill'; OUJI-CR 4-6 lists the elements for 'Assault and Battery with a Deadly Weapon'; OUJI-CR 4-7 lists the elements for 'Assault and Battery by Means or Force Likely to Produce Death'; and OUJI-CR 4-9 lists the elements of 'Assault and Battery Resisting the Execution of Legal Process.'
>
> The fact that Oklahoma's jury instructions don't 'reiterat[e] all the terms of' Okla. Stat. Ann. tit. 21, § 652(C) (1994) in one instruction, but rather 'referenc[e] one alternative term to the exclusion of all others' in each of several separate instructions, indicates that Okla. Stat. Ann. tit. 21, § 652(C) (1994) 'contains a list of elements, each one of which goes toward a separate crime.' *Mathis* [*v. U.S.*], 136 S.Ct. [2243] at 2257 [(2016)]; *see also United States v. Bouziden*, No. CIV-16-516-C, 2017 WL 149988, at *2 (W.D. Okla. Jan. 13, 2017) (concluding that Oklahoma manslaughter statute is divisible based on fact that Oklahoma has three separate jury instructions, each with separate elements, for three ways of violating statute); *United States v. Hullum*, No. 11-CR-00127-DME-02, 2016 WL 7178312, at *4 n.5 (D. Colo. Dec. 9, 2016) (treating statute as divisible because Tenth Circuit pattern jury instructions don't list together the alternative methods of violating statute).
>
> Under these circumstances, we conclude that Oklahoma's jury instructions 'speak plainly,' *Mathis*, 136 S.Ct. at 2257: Okla. Stat. Ann. tit. 21, § 652(C) (1994)'s statutory alternatives are elements, not means. Thus, the

> district court didn't err in treating Okla. Stat. Ann. tit. 21, § 652(C) (1994) as divisible and applying the modified categorical approach.

See Burtons, 696 Fed.Appx at 379.

Having established that § 652 is divisible and consists of elements, not means, as suggested by The State, the Trial Judge and OCCA erred because the grafted element of "intent" only became an issue when the Trial Judge told The State (paraphrased) "you didn't get there [on intent]." This is unconstitutional.

C. The State's unconstitutional removal of intent after both sides rested offends Petitioner's right to the effective assistance of counsel

This Court set forth the test for a defense attorney's requirement of effective assistance in *Strickland v. Washington*, 466 U.S. 688 (1984). "Under *Strickland* a petitioner 'must show both that his counsel's performance 'fell below an objective standard of reasonableness' and that 'the deficient performance prejudiced the defense.' " *Grant v. Royal*, 886 F.3d 874, 903 (10th Cir. 2018) (quoting *Strickland*, 466 U.S. at 687-688).

Review of counsel's performance under the first prong of *Strickland* is a highly deferential one, under which every effort must be made to evaluate the conduct from counsel's perspective at the time. Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. A petitioner bears a heavy burden when it comes to overcoming that presumption. To be deficient, the performance must be outside the wide range of professionally competent assistance. In other words, it must have been completely unreasonable, not merely wrong. *Grant v. Royal*, 886 F.3d at 903 (citations omitted); U.S. Const. Amend. 6.

i. Counsel's Performance was Deficient

A modern lawyer's "duty to society as well as to his client involves many relevant social, economic, political, and philosophical considerations." 1 Paul Rice, Attorney-Client Privilege in the United States, § 7:4 (2021-2022 ed. 2021) (quoting *United States v. United Shoe Mach. Corp.*, 89 F.Supp. 357, 359 (D. Mass 1950)). For their clients to receive effective, high-quality advice and trial strategy, their attorney must understand the charge which must be defended, and they can do so only if the State provides sufficient notice of the elements in the Felony Information. Otherwise, a criminal defendant's Sixth Amendment right to effective assistance would place an undue burden on the defense bar when a State charges a person with a broad, divisible criminal statute containing numerous, variable elements.

If the State has their way, counsel's performance must be deficient. If a State is allowed *carte blanche* to interchange a charge under a broad and divisible statute with numerous, variable elements which does not match any of the three- (3) Felony Informations it filed against Petitioner, then counsel should be expected to prepare one's defense against each and every element within that divisible statute or, if indefensible, attempt to negotiate the best plea available for their client.

ii. The Errors Below Prejudiced Petitioner

Under the prejudice prong of *Strickland*, a petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. That reasonable probability is easy to reach here.

If the State wanted a charge that did not include intent they had two (2) other options available on the three- (3) Felony Informations it filed. Notwithstanding the fact Counts

1, 2, and 3 do not pass the *Blockburger* Test (*Blockburger v. U.S.*, 284 U.S. 299 (1932)), the Trial Judge should have immediately dismissed the unconstitutionally amended Count 1 after he informed the State it "didn't get there with intent."

Instead the Trial Judge allowed the State to completely divert from the three (3) Felony Informations and its argument throughout the trial regarding the element of intent. This is clearly prejudicial because the Trial Judge acknowledged the State failed to meet its burden of proof in Count 1.

The prejudice is further evidenced in the disparity between sentences for Count 1 (25 years) and Counts 2 and 3 (5 years per count). In Count 1 the range of punishment is "by imprisonment in the State Penitentiary not exceeding life." *See* 21 O.S. § 652(C). In Count 2 the range of punishment is "imprisonment in the custody of the Department of Corrections for not more than ten (10) years, or by imprisonment in the county jail for not more than one (1) year." *See* 21 O.S. 644(f).[4] In Count 3 the range of punishment is "imprisonment in the custody of the Department of Corrections not exceeding ten (10) years, or by imprisonment in a county jail not exceeding one (1) year." 21 O.S. 644(D)(1).[5] Further confusing the jury, Petitioner was subject to the overcharging power of the government in violation of the Sixth and Fourteenth Amendments of the U.S. Constitution wherein one (1) alleged act received three (3) separate charges. Still, the jury refused to give the maximum sentences even in the lesser and more accurate charges in Counts 2 and 3.

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[4] 21 O.S. 644(f) (Any person convicted of domestic abuse as defined in subsection C of this section that results in great bodily injury to the victim shall be guilty of a felony and punished by imprisonment in the custody of the Department of Corrections for not more than ten (10) years....).

[5] 21 O.S. 644(D)(1) (Any person who, with *intent* to do bodily harm and without justifiable or excusable cause, commits any ... assault and battery upon an intimate partner ... with any ... dangerous weapon, upon conviction, is guilty of ... domestic assault and battery with a dangerous weapon which shall be a felony and punishable by imprisonment in the custody of the Department of Corrections not exceeding ten (10) years, or by imprisonment in a county jail not exceeding (1) year.).

Further, Count 1 is considered a crime of violence under Oklahoma law which requires 85% of the sentence to be served before one becomes eligible for parole. Conversely, Counts 2 and 3 are not considered violent crimes and generally discharge in a range of 25-45% of the imprisoned time. Had the Trial Judge dismissed Count 1 and merged Counts 2 and 3 instead of dismissing and merging Counts 2 and 3 with Count 1, and assuming the Trial Judge would again prescribe consecutive sentences on each count of conviction, Petitioner's sentence would soon be served in full. He has currently been in custody, pretrial and post-conviction, in excess of six (6) years.

The State could have charged Petitioner under any number of criminal statutes which more closely resemble the three (3) separate Felony Informations filed. With or without intent, those statutes prescribe a maximum sentence of five- (5) or ten- (10) years versus the maximum life imprisonment possible under 652(C). Instead of holding the State accountable under its three (3) separate Felony Informations, the Oklahoma Constitution, and United States Constitution, the Trial Judge allowed the State to amend the charge one last time after trial so it could obtain a conviction with a much lengthier sentence than any of the alternative statutes more closely related to the initial and two- (2) amended Felony Informations.

Instead of allowing the State to amend the charge one last time, to the detriment of Petitioner, the Trial Judge should have dismissed Count 1 the very second he informed the State it "didn't get there with intent." But the Trial Judge dismissed Count 2 (21 O.S. § 644(F)) and Count 3 (21 O.S. § 644(D)(1)), which are much more closely related to the three- (3) separate Felony Informations filed by the State and held a significantly lower sentencing range (5 years versus 25 years), as duplicitous under Double Jeopardy of Count 1. *See* Judgment and Sentence, Appendix D.

unforeseen effects of the practical application of this statute to the legislature's attention so that they may have a clear opportunity to amend the language away from it, if they so choose."). Judge Musseman also "would invite the Oklahoma Uniform Jury Instruction Committee to review Assault and Battery Definitions Instruction OUJI-CR(2d) 4-28." *Purdom*, 2022 OK CR at ¶ 4. That two of the five OCCA judges have an issue with this statute and one of them sees problems with the jury instructions related to the statute should not be ignored by this Court or by Respondent. The State's prosecutors, including Respondent, continue to be under an affirmative obligation to correct due process violations even after a conviction.

Consistent with the facts and authority presented above, the OCCA's conclusions are contrary to clearly established precedent of this Court and Oklahoma law and should be REVERSED. Premises considered, the Petition for Writ of Certiorari should be GRANTED.

PROOF OF SERVICE

I, Brent Allen Morris, do swear or declare that on this date, December 29, 2022, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.
The names and addresses of those served are as follows:

Attorney General of Oklahoma
313 N.E. 21st
Oklahoma City, OK 73105

I declare under penalty of perjury that the foregoing is true and correct to the very best of my knowledge, information, and belief.

Executed on December 29, 2022.

Brent Allen Morris
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