

No. 22-6661

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IN THE  
SUPREME COURT OF THE UNITED STATES

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BRENT ALLEN MORRIS,

*Petitioner,*

v.

THE STATE OF OKLAHOMA,

*Respondent.*

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On Petition for Writ of Certiorari to  
the Oklahoma Court of Criminal Appeals

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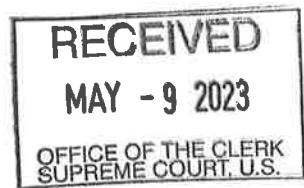
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REPLY TO RESPONDENT'S  
BRIEF IN OPPOSITION

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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

April 24, 2023



**No. 22-6661**

**COUNTER-QUESTION PRESENTED**

Whether statutory or equitable tolling applies to a certiorari application to this Court for a person who does not seek certiorari review after their direct appeal, but timely pursues state-court post-conviction and/or other collateral review and is again denied relief by the State's highest court, may seek certiorari review including their direct appeal and/or collateral claims in this Court within 90 days after collateral relief is denied?

## REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

Respondent opposes Petitioner's claim on the grounds that the claim is untimely, not exhausted, and not cognizable. Even in the very most favorable light this Court could shine, Respondent's Opposition is disingenuous, misleading, and a mischaracterization of Petitioner's claim.

### **The Petition for Writ Certiorari is Timely**

Respondent tells the Court that "Petitioner has identified no authority supporting the notion that a later-filed state post-conviction application can render timely an otherwise untimely certiorari petition challenging a state court's order on direct appeal." Respondent's 'Brief in Opposition' at p. 6.<sup>1</sup> But Respondent has identified no authority supporting the notion that a later-filed state post-conviction application *does not* statutorily or equitably toll *all claims* presented to a state's highest court while a prisoner seeks development of his claims and exhaustion of available state remedies in good faith, and within the one-year statute of limitations for seeking federal habeas review.

Instead, Respondent concedes that "[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the interests of justice so require." Resp. Opp. at 8 (quoting *Schact v. United States*, 398 U.S. 58, 64 (1970) (emphasis added by Respondent)). Respondent also "reitera[tes] that this Court has 'treated the rule-based time limit for criminal cases differently.'" Resp. Opp. at 8 (quoting *Bowles v. Russell*, 551 U.S. 205, 212 (2007)). Cf. 28 U.S.C. § 2101(d) ("The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be prescribed by the rules of the Supreme Court."); Sup. Ct. R. 13.1. Certainly this Court knows how to apply its own Rules better than Respondent.

Respondent's argument and the Court's post- Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) decisions support statutory and/or equitable tolling to Sup. Ct. R. 13.1. And nothing in Respondent's argument shows Petitioner is *required* to include a motion, supported by affidavits, presenting facts "showing the petitioner had acted in good faith and that the delay in filing the petition for certiorari was brought about by circumstances largely beyond his control." Resp. Opp. at 8 (quoting *Schact*, 398 U.S. at 64). Petitioner asserts that his diligent

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<sup>1</sup> Hereinafter, Resp. Opp. at \_\_\_\_.

pursuit to expand and develop the record and attempts at exhaustion is sufficient to establish his good faith and compliance with this Court’s teachings.

Besides, there are substantial differences between appeals of right and petitions for certiorari, as shown in the Court’s pre-AEDPA cases. *Cf.* Sup. Ct. R. 13.1 with *Durham v. U.S.*, 401 U.S. 481 (1971) (timeliness under then Sup. Ct. R. 22(2) of petition for certiorari to review judgment of court of appeals in criminal cases presents no jurisdictional question), *overruled* “[t]o the extent that [Durham] may be inconsistent with” *Dove v. United States*, 423 U.S. 325 (1976) (*per curium*). *See Teague v. Comm’r of Customs Region II*, 394 U.S. 977, 982 (1969) (Black, J., and Douglas, J., dissenting denial of certiorari) (“ ‘jurisdictional’ ” nature of the statute does not “deprive[] this Court of all power to hear cases filed after the 90-day period, regardless of” the circumstances); *Deal v. Cincinnati Bd. of Educ.*, 402 U.S. 962, 962-963 (1971) (collecting cases where the Court excused Court Rule untimeliness) (Douglas, J., dissenting denial of certiorari).

Considering Petitioner’s lone proposition and counter-question, this case is an ideal vehicle to answer what appears to be a compelling and novel question. Sup. Ct. R. 10(c). *See Testa v. Katt*, 330 U.S. 386, 388 (1947) (whether state courts may decline to enforce federal law is a question of great importance).

If answering an important and compelling question in furtherance of the Court’s appellate jurisdiction overcomes a non-jurisdictional Court Rule, then the question from Petitioner’s Direct Appeal before this Court is timely. And it is well-established that this Court’s vertical *stare decisis* affords liberal construction to the *pro se* pleadings of prisoners. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972). But liberal construction does not allow Respondent to misconstrue or mischaracterize Petitioner’s examples as unexhausted claims.

In light of liberal construction, the Court could alternatively grant the Petition out of time because it is a “compelling reason” to prevent Respondent from exercising *carte blanche* authority to change the rules and hide the ball after it loses the game. Sup. Ct. R. 10.<sup>2</sup> Similarly,

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<sup>2</sup> The trial judge below told Respondent “you didn’t get there with intent.” To be sure, criminal procedure in Tulsa County is a game. The current Tulsa County District Attorney, Steve Kunzweiler, rewards his prosecutors’ wins – especially those resulting in life or *de facto* life sentences and Death – with trophies, plaques, awards, and other incentives. For example, a prosecutor who “wins” the most trials is rewarded with the Office’s “Top Gun” award. Make no mistake, DA Kunzweiler (and his predecessors) has gamified the adversarial process, and their version of video game “cheat codes” is achieved by violating *Brady* and other Constitutional mandates handed down by this Court. This Court should be on high alert when it receives petitions alleging prosecutorial and judicial misconduct in Tulsa County.

this Court could grant certiorari review under Rule 11. *See* 22-CV-0091-CVE-SH (N.D. Okla.) (Petitioner’s federal habeas petition including the claim pending before this Court); Sup. Ct. R. 11.

Respondent’s single-minded approach has been consistently disapproved by this Court. Instead, a person’s case is to be considered using a “flexible” standard that encompasses all of the circumstances and the cumulative effects of those circumstances. Many of Petitioner’s claims in his First- and Second Post-Conviction Appeals relate to the question before this Court.

For example, Petitioner’s original attorney before trial, a former prosecutor in the same office which prosecuted Petitioner below, was re-hired by as an Assistant District Attorney (ADA) mere weeks before Petitioner’s trial. The trial judge allowed the attorney to withdraw, citing an actual conflict, and the attorney’s quasi-partner took over as Petitioner’s trial attorney. But because of the eleventh hour change and the new trial attorney’s comparative lack of trial experience, the former attorney-turned-ADA continued to “help” the new attorney prepare for trial, including but not limited to the Defense strategy. The fix was in well-before the fatal variance and constructive amendment due process violations now before the Court.

The Tulsa County DA’s culture of prosecutorial misconduct is deeply seated, knows no bounds, and starts at the top. *See, e.g., Browning v. Trammell*, 717 F.3d 1092 (10<sup>th</sup> Cir. 2013) (granting conditional writ in death penalty case because the prosecution suppressed material exculpatory and impeaching evidence).<sup>3</sup> For the DA’s Office and trial judge below, a fatal variance and constructive amendment is child’s play.

But violating the State and Federal Constitutional rights of the accused and convicted doesn’t cease at the district courts in Oklahoma; as Respondent tipped his hat to the subject, the OCCA’s Rule 3.4(E) renders attempts at exhaustion for nonfrivolous *pro se* arguments inadequate and futile, because the OCCA summarily denies such claims when an appellant is represented by appointed or retained counsel. Certain nonfrivolous and potentially meritorious

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<sup>3</sup> This Court denied *certiorari* review, 549 U.S. 963, 127 S.Ct. 406 (Mem.), 166 L.Ed.2d 288, but then, the Court was unaware of the *Brady* violations. The current Tulsa County DA, Steve Kunzweiler, and Petitioner’s trial judge, Doug Drummond, were the ADAs who buried the material exculpatory and impeaching evidence which resulted in Mr. Browning spending more than a decade on Oklahoma’s infamous Death Row, but snatched defeat from the jaws of victory when Oklahoma’s Northern District and the Tenth Circuit caught them cheating. After a subsequent mistrial with 10 jurors voting in favor of acquittal, Mr. Browning entered a plea agreement and is now a free man.

claims against attorney/prosecutorial/judicial misconduct are strongly disfavored and result in retaliation against attorneys brave enough to stand up to Respondent's misdeeds.

Conversely, a *pro se* appellant can submit unlimited frivolous claims to the OCCA which are certainly a waste of the OCCA's time and other judicial resources. OCCA Rule 3.4(E) is unconstitutional on multiple levels, and exhaustion under such circumstances should not be required "whenever it may become clear that the alleged state remedy is nothing but a procedural morass offering no substantial hope of relief." *Marino v. Ragen*, 332 U.S. 561, 564 (1947) (Rutledge, J., concurring). *See* 28 U.S.C. § 2254(b)(1)(B).

When Respondent and the OCCA – politely stated – utilize procedural ingenuity to achieve convictions without proving every element of the offense as charged in the Felony Information, Amended Information, and Second Amended Information, and as *intent* was extensively argued by Respondent – and defended by Petitioner's trial counsel – at preliminary hearing and trial, and was excused by the preliminary and trial judges, Respondent's ill-begotten conviction should never have been justified by the OCCA. Petitioner's conviction is in violation of the State and Federal Constitutions and cannot be allowed to stand. This Court should grant certiorari review.

#### **I. Sup. Ct. R. 13.1, AEDPA, Statutory and Equitable Tolling**

A prisoner whose direct (or collateral) appeal(s) have been denied by the state's highest court has 90 days to file for a writ of certiorari in this Court before their conviction becomes final after direct appeal. Sup. Ct. R. 13.1. A state conviction is "final" after the expiration of this 90 day window. *Teague v. Lane*, 489 U.S. 288, 295 (1989). Under the AEDPA, a prisoner has 1-year after their conviction is final to pursue other collateral attacks and/or alternative relief in the state courts to seek federal habeas relief pursuant to 28 U.S.C. § 2254.

"The [AEDPA] ... requires state prisoners to 'exhaus[t] the remedies in the courts of the State' before seeking federal habeas relief." *Shinn v. Ramirez*, 142 S.Ct. 1718, 1724 (2022). The requirement is codified at 28 U.S.C. § 2254(b)(1)(A), which provides, "An application for a writ of habeas corpus ... shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State."

The exhaustion doctrine expresses a policy of federal-state comity. Its purpose is to give the States an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights. *Picard v. Connor*, 404 U.S. 270, 275 (1971) (citation omitted). Congress "enacted

AEDPA to reduce delays in the execution of state and federal criminal sentences,” *Woodford v. Garceau*, 538 U.S. 202, 206 (2003), and “to further the principles of comity, finality, and federalism.” *Williams v. Taylor*, 529 U.S. 420, 436 (2000).

This Court has said exhaustion of all available state court remedies furthers these principles and preserves scarce judicial resources, which certainly includes this Court’s resources. *See Wall v. Khali*, 562 U.S. 545, 558 (2011) (“If a defendant receives relief in state court, the need for federal habeas review may be narrowed or even obviated, and this furthers principles of ‘comity, finality, and federalism.’ ”) (citation omitted).

Certiorari review is best after further development of the record and at least *attempted* exhaustion of all available remedies. Common sense and logic dictates that because Petitioner’s claim is timely under § 2254, then his additional attempts to further develop the record and at exhaustion below could have “narrowed” or even “obviated” “the need for federal habeas review,” 562 U.S. at 558, and certiorari review in this Court. This Court should apply equitable tolling to Sup. Ct. R. 13.1, because the same equitable principles which apply to the AEDPA should allow a prisoner to seek certiorari review of any claim exhausted on direct and collateral appeal within 90 days of a state’s highest court denying relief when such claims are still timely under the AEDPA. In no way does this equitable remedy narrow the Court’s equitable powers; instead it would further the principles of federalism, comity, finality, and development of cases seeking certiorari review.

## **II. Petitioner’s claim is cognizable**

Respondent argues that “the decision below hinged on an interpretation of state statutory law,” Resp. Opp. at 10, and that essentially, the claim was not federalized on Direct Appeal. This is demonstrably false as evidenced by: (1) Respondent’s ‘Brief of Appellee’ on Direct Appeal, which responded to the claim under the Fourteenth Amendment to the U.S. Constitution; and (2) the OCCA’s decision below.

The Fourteenth Amendment holds:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV, § 1. This Court has said that Due Process violations can arise from two sources, “the Due Process Clause itself and the laws of the States.” *Ky. Dep’t of Corr. v.*

*Thompson*, 490 U.S. 454, 460 (1989) (internal citation omitted). “The Due Process Clause, our decisions instruct, safeguards not the meticulous observance of state procedural prescriptions, but ‘the fundamental elements of fairness in a criminal trial.’ *Rivera v. Illinois*, 556 U.S. 148, 158 (2009) (quoting *Spencer v. Texas*, 385 U.S. 554, 563-564 (1967)). *See Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) (state court’s finding of state law error can be so “arbitrary or capricious as to constitute” federal due process violation).

And “[o]n rare occasions, the Court has re-examined a state-court interpretation of state law when it appears to be an ‘obvious subterfuge to evade consideration of a federal issue.’ ” *Mullaney v. Wilbur*, 421 U.S. 684, 691 n.11 (1975) (citation omitted). 21 O.S. § 652 is deployed and enforced by Respondent as a safety valve catch-all when it can’t meet its burden to prove every charged element of an alleged offense, and the trial judge and OCCA were all-too-happy to justify Respondent’s tactics.

Respondent claims that “under state law, Petitioner was ‘fully apprised....’ of the facts and charge against him. Resp. Opp. at 22. The “facts” are certainly a critical component here – but it is the failure by Respondent to *prove* its “factual” assertions under the First, Amended, and Second Amended Informations’ *mens rea* and *scienter* elements beyond all reasonable doubt. Factual determinations are unquestionably the province of the jury; but legal determinations, like whether or not Respondent “g[o]t there with intent” is the province of the trial judge, and Count 1 should have been dismissed and never reached the jury. Instead, Respondent and the trial judge changed the rules and the OCCA justified their unconstitutional tactics.

As such, Respondent’s citation of *Massachusetts v. Sheppard*, 486 U.S. 981, 988 n. 5 (1984) (issue not reached by the Court was “a fact-bound issue of little importance since similar situations are unlikely to arise with any regularity”), is baffling. Resp. Opp. at 22. If Petitioner’s claim is nothing more than a “fact-bound” one “of little importance” that is “unlikely to arise with any regularity,” then Respondent should have asked the trial judge why he said:

THE COURT: (discussing intent in the criminal Informations for 21 O.S. § 652) I just hope when these things happen you go back and make some course corrections so it doesn’t *happen again*. (emphasis added). *And this has happened before....* (emphasis added).

THE STATE: I concur Judge, we should have done it differently *this time*. (emphasis added).

Petition at 7. *See also* Trial Transcript at 1024-25. But why should Respondent “do[] it differently” when the trial judge and OCCA allow Respondent to violate the State and Federal Constitutional rights of the accused and convicted? After all, “this has happened before,” and without this Court’s review and intervention, it will happen again.

Next, perhaps Respondent could be bothered to explain this recent decision from the OCCA:

However, in a situation such as this, I feel it is incumbent upon this [c]ourt to *the potentially unforeseen effects of the practical application of this statute to the [Oklahoma] legislature’s attention* so that they may have a clear opportunity to amend the language away from it, if they so choose.”

*Purdom v. State*, 523 P.3d 54, 62 (Musseman, J., special concurrence) (discussing *intent* in 21 O.S. § 652(C) – the statute now before this Court). “[W]hen considering the purpose of a challenged statute, this Court is not bound by ‘[t]he name, *description or characterization* given it by the legislature or the courts of the State,’ but will determine for itself the practical impact of the law.” *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). If the trial judge’s and OCCA Judge Musseman’s issues with the Informations’ reliance on intent and the actual language of the statute, respectively, and notwithstanding their willingness to allow Respondent to violate Due Process with impunity, isn’t enough of a “compelling reason” in Respondent’s eyes, then nothing is.

Even if this issue were purely one of fact and state law, Respondent’s Opposition fails.

#### A.

A central tenet of our federal system is that state and federal courts are jointly responsible for the enforcement of federal constitutional guarantees. The Constitution binds state and federal judges alike. U.S. Const. Art. VI. To hold that citation to a state case analyzing a federal constitutional issue is insufficient to alert a state court to the federal nature of a petitioner’s claim – as Respondent does here while trying to maintain a straight face – when citation of a comparable federal case would be sufficient for that purpose, would be to conclude that the state courts are not genuine partners in the enforcement of federal constitutional law.

Notwithstanding Petitioner’s genuine belief that the OCCA is extremely hostile to this requirement in recent years, for analysis of Respondent’s argument, its suggestion is inconsistent with the responsibility and dignity of the state courts in our federal system:

Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them....

*Robb v. Connolly*, 111 U.S. 624, 637 (1884). *See Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (“[W]e have consistently held that state courts have inherent authority, and are thus *presumptively* competent, to adjudicate claims arising under the laws of the United States.”); *Irvin v. Dowd*, 359 U.S. 394, 404 (1959) (quoting *Robb*, 111 U.S. at 637). *See also, e.g.*, *McCandless v. Vaughn*, 172 F.3d 255 (3d Cir. 1999) (relying on state cases employing constitutional analysis in like situations is enough to communicate a federal claim); *Barrett v. Acevedo*, 169 F.3d 1155, 1161-62 (8<sup>th</sup> Cir. 1999) (“a state case raising a pertinent federal constitutional issue” fairly presents the federal claim); *Hannah v. Conley*, 49 F.3d 1193, 1196 (6<sup>th</sup> Cir. 1995) (“state decisions employing constitutional analysis in similar fact patterns” fairly presents the federal claim); *Verdin v. O’Leary*, 972 F.2d 1467, 1480 (7<sup>th</sup> Cir. 1992) (“state cases applying constitutional analysis *or making reference to the Constitution*” fairly presents the federal claim); *Daye v. Att’y Gen. of N.Y.*, 696 F.2d 186, 194 (2d Cir. 1982) (*en banc*) (holding that “reliance on state cases employing constitutional analysis in like fact situations” fairly presents the federal claim); *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9<sup>th</sup> Cir. 2003) (for purposes of exhaustion, a citation to state case analyzing a federal constitutional issue serves the same purpose as a citation to a federal case analyzing such an issue).

Petitioner’s attorney on Direct Appeal characterized the claim in violation of Due Process and cited federalized State cases. Even if this could have been read as insufficient federalization of the claim, Respondent read it as a federalized claim and thus federalized its Direct Appeal response. *See* Brief of Appellee, F-2018-551 at p. 37 (citing U.S. Const. Amends. V, XIV). Respondent’s contention that Petitioner’s Due Process claim is not cognizable as a “jurisdictional claim” and “remised on state law,” Resp. Opp. at 14, is disingenuous and misleading.

The Tenth Circuit is in agreement with its sister circuits as shown above. *Prendergast v. Clements*, 699 F.3d 1182, 1184 (10<sup>th</sup> Cir. 2012) (“the crucial inquiry is whether the ‘substance’ of the petitioners claim has been presented to the state courts in a manner sufficient to put the courts on notice of the federal constitutional claim”) (citing *Connor*, 404 U.S. at 278) (Kelly, J., Tymkovich, J., and Gorsuch, J.). Between Petitioner’s “due process” claim on Direct Appeal and

Respondent's response at the Direct Appeal stage, the OCCA had sufficient notice of Petitioner's federal constitutional claim and responded as such.

To be sure, the OCCA denied the claim, holding Petitioner's "due process claim must be denied." *See Order and Opinion, F-2018-551 at p.11 (Affirming Petitioner's conviction and citing Parker v. State, 1996 OK CR 19, ¶ 24, 197 P.2d 986). Cf. Oxley v. State, 1997 OK CR 32, ¶ 4, 941 P.2d 520, 521 (Okl.Cr. 1997) ("In Parker [197 P.2d], we also addressed state and federal constitutional due process requirements that an Information be sufficient to put the accused on notice").* The OCCA's decision in *Parker*, 917 P.2d, was denied certiorari review by this Court *sub nom* in *Parker v. Oklahoma*, 519 U.S. 1096, 117 S.Ct. 777 (Mem.), 136 L.Ed.2d 721 (1997).

And Petitioner raised the claim in his federal habeas petition as violative of his rights under the U.S. Constitution. *See* 22-CV-0091-CVE-SH (N.D. Okla.) at Dkt. 1. There, Respondent made no such claim – as it does here – that this claim is not cognizable under federal habeas. *See* State's Response in 22-CV-0091-CVE-SH (N.D. Okla.). Instead, Respondent resorts to the U.S. Constitution and federal case law to rebut Petitioner's claim. *Ibid. See Orange v. Calbone*, 318 F.3d 1167, 1170 (10<sup>th</sup> Cir. 2003) (claim was properly before federal Court of Appeals where claim was exhausted and state's motion to dismiss outlined in detail course of direct appeal). *See also Prendergast*, 699 F.3d at 1184 (a petitioner need not invoke "talismanic language" or cite "book and verse on the Federal Constitution") (citation omitted). If anything, Respondent's Opposition claim should be deemed waived by *its* actions below. Sup. Ct. R. 15.2.

Respondent's contention that Petitioner's question before this Court seeks error-correction on a determination of state law fails. And Petitioner's assertion that no attorney should be expected to provide effective assistance to a client charged under a divisible statute like 21 O.S. § 652 – with any number of possible element and jury instruction combinations – shows a conflict (albeit in the context of the statute being divisible for the purposes of the Federal Armed Career Criminal Act sentencing enhancement) between the OCCA and Tenth Circuit. Sup. Ct. R. 10(h). Petitioner did not present a new and unexhausted Ineffective Assistance of Counsel claim, even if that is how Respondent chooses to construe the intent of the example. But even if it were a new claim, the procedural morass utilized by Respondent and the OCCA shows that any attempt to exhaust such claims with particularity would be inadequate and futile. Respondent's arguments fail, and this Court should grant certiorari review.

## B.

After filing the first felony Information, Respondent amended it twice to add more charges but made no changes to Count I. Respondent had ample opportunity – after the Defense brought the matter to its attention at Preliminary – to remove the *mens rea* and *scienter* elements from any one of the three felony Informations for Count I. If Respondent chooses to charge a person with “willfully and intentionally” committing an assault and battery on another person, then Respondent better be prepared to convince a judge and jury of a defendant’s willful and intentional purpose in committing the charged crime.

And general principles of statutory construction teach that by using two separate words, (1) willfully; and (2) intentionally, the words do not mean the same thing. If they did, the Oklahoma Legislature should have used one word, not both. Legislative intent is further shown by its use of the conjunction “and.” *See* Respondent’s Information, Amended Information, and Second Amended Information.<sup>4</sup>

Further, where Respondent accuses Petitioner of “cherry picking” the transcripts and “ambush tactics,” Petitioner recites the school yard verse of rubber versus glue. If Respondent did not believe it was bound by the “willful” and “intentional[]” elements in each of the Informations, then Respondent wasted a lot of time arguing intent at Preliminary and Trial.

Respondent even concedes “the State read the charging Information to the Jury” at Trial. Resp. Opp. at 13. And critically, Respondent did not waste a drop of ink denying that the trial judge told Respondent it “didn’t get there with intent.” If Respondent, the Defense, and the trial judge were confused on the required elements, and Respondent argued intent at multiple critical stages including at trial, the risk of the jury being confused or fooled by Respondent’s fatal variance and constructive amendment tactics isn’t great; it is unconstitutional.

## C.

Had the trial judge or the OCCA complied with its obligations under the Oklahoma and U.S. Constitutions and recognized the fatal variance at issue here, it would have vacated the judgment and sentence below. *See* 22 O.S. § 914 (“When the defendant is acquitted on the ground of variance between the charge and the proof, the verdict must be ‘not guilty by reason of variance between charge and proof.’ ”).

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<sup>4</sup> In Oklahoma, proof of every element beyond all reasonable doubt can be brushed aside because Respondent and the OCCA believe they are not bound by the Oklahoma and U.S. Constitutions.

The fact 21 O.S. § 652 is recognized by the Tenth Circuit as a divisible statute for the purposes of the ACCA evidences there is not adequate notice. Even Respondent would have a difficult time spinning effective assistance of trial counsel where counsel would be expected to defend any number of unspecified elements possible in a felony Information for a divisible statute. And the fact Respondent “didn’t get there with intent” is not a ground for *reversal* on the Petition in Error on Direct Appeal, it is a ground for *acquittal*. (emphasis added). Add to this the fact Counts II and III were merged with Count I, and Double Jeopardy is further implicated.

The OCCA’s interpretation of the law regarding a variance between the charge in each of the three- (3) felony Informations below and the evidence and argument presented does not comport with this Court’s law. “[I]t is a fundamental precept of federal constitutional law that a ‘court cannot permit a defendant to be tried on charges that are not made in the indictment.’ ” *Hunter v. State of New Mexico*, 916 F.2d 595, 598 (10<sup>th</sup> Cir. 1990) (quoting *Stirone v. United States*, 361 U.S. 212, 217 (1960)). The Sixth Amendment affords every defendant “the right to be informed of the nature and cause of the accusations filed against him.” *Id.* (citation omitted). Therefore, “[a] fatal variance denies a defendant this fundamental guarantee because it destroys his right to be on notice of the charge brought in the indictment.” *Id.* (citation omitted). *See Sup. Ct. R. 10(b).*

Had Respondent done its job, it would not Oppose certiorari review of a conviction achieved by the unconstitutional application of an unconstitutional statute that even the OCCA has recently called to the attention of the Oklahoma Legislature. *Purdom*, 523 P.3d at 62 (Musseman, special concurrence). And had the Oklahoma Legislature heeded the warnings of the OCCA – warning Respondent failed to disclose to this Court – it would be unnecessary for this Court to even *consider* certiorari review.

Petitioner has shown sufficient evidence that he was prejudiced by “his ability to defend himself at trial,” “the general fairness of the trial,” and “the [Information’s] sufficiency to bar subsequent prosecutions,” *United States v. Miller*, 471 U.S. 130, 138 n.5 (1985), to warrant this Courts review. Sup. Ct. Rules 10(b) and 10(c). This Court should GRANT certiorari review.

IT IS SO PRAYED.

Dated: April 24, 2023

**PROOF OF SERVICE**