22-7575

No.

ORIGINAL

IN THE

Supreme Court of the United States

LARRY D. EDMOND
PETITIONER

vs.

JEFF BUTLER, WARDEN – REPRESENTED BY KRISTAFER R. AILSLIEGER
OFFICE OF ATTORNEY GENERAL
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Larry D. Edmond Pro Se
Inmate #42554
Oswego Correctional Facility
2501 W. 7th St.
Oswego, Kansas 67356

QUESTION(S) PRESENTED

1. Whether district court trial abuse its discretion and violated the defendant's constitutional right to an impartial jury when it refused to grant a mistrial or, in the alternative, denied defendant request to prove actual bias regarding allegations of juror partiality? ; and

i. Whether trial judge, Clark V. Owens II, demonstrated the lack of an impartial judge i.e., actual bias, and committed structural error warranting automatic reversal, when he refused to grant a mistrial or, in the alternative, denied defendant – who is African American – request to question a certain juror regarding potential juror bias that he had identified for the trial court, that he claimed to had overheard state she was offended by evidence he had used a "racial slur" toward white people, the term "peckerwoods." And instead stated the following reasons for his refusal and denial:

> "And if [Mr. Edmond] chooses to use something that would have racial overtones, I guess he uses that in language at his own risk"; "so it would be a good idea not to use that word if you don't it to be used against you at a later time"; "[t]he defendant had been told in the telephone conversation, every one he does, that these phone calls are monitored, so it wasn't like he had an expectation of privacy, that he could use a racial slur without ever having any consequences that some fact finder [i.e., jury or juror] might not ever hear this"; and, "[y]ou know, the word came out of his mouth, and if that made someone [juror] unhappy , then it shouldn't have came out of his mouth. He has a consequence for having made that statement."

2. Whether trial counsel, failure to investigate potential witnesses he had been informed existed by the defendant, and provided with contact information, names, addresses and cellphone numbers of such witnesses who testimonies would have supported his innocence and would have challenged the states witnesses credibility making an adversarial testing of the state's case, reasonable trial strategy or, amount to ineffective assistance of counsel?; and

i. Did trial counsel failure to investigate, interview and called witnesses who he had been properly informed existed by the defendant, deprived defendant's due process right to present a defense, and have witnesses in his behalf?

3. Whether district court violated defendant's due process right to confrontaion

4. Was Petitioner denied due process under the *Fourteenth and Sixth Amendment right to the United States Constitution*, upon his convictions. Insufficient Evidence.

LIST OF PARTIES

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

Jeff Butler, Warden - Represented by Kristafer R. Ailslieger
Office of Attorney General.

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 subject of the petition is as follows:

1. Kansas Court of Appeals

2. United States District Court for the District of Kansas

RELATED CASE

- State v. Edmond, No. 109,617. Court of Appeals of Kansas. Judgment entered May 23, 2014

- Edmond v. State, No. 119,226. Court of Appeals of Kansas. Judgment entered December 13, 2019

- Edmond V. Butler, No. 20-3248-SAC, U.S. District Court for the District of Kansas. Judgment entered September 6, 2022.

- Edmond V. Butler, No. 22-3197, U.S. Court of Appeals for the Tenth Circuit. Judgment entered December 29, 2022.

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APPENDIX C **September 24, 2020.**Kansas Supreme Court denied review of Kansas Court of Appeals affirming the denial of Petitioner's K.S.A. 60-1507 (habeas corpus). *Edmond v. State*, 2020 Kan. Lexis 350 (Decision without Published Opinion) (No. 119,226).

APPENDIX D **September 6, 2022.** United States District Court for the District of Kansas denied relief pursuant to U.S.C. § 2254. No Certificate of Appealability (COA) will issue. *Edmond v. Butler*, 2022 U.S. App. Lexis 35853, WL 4079011 (Case No. 20-3248-SAC).

APPENDIX E **October 7, 2022**. United States District Court for the District of Kansas granted motion to proceed on appeal in forma pauperis. Denied motion for certificate of appealability.

APPENDIX F **December 29, 2022.** Tenth Circuit Court of Appeals denied Petitioner's request for COA. *Edmond v. Butler*, 2022 U.S. App. Lexis 35853, WL 17986127 (unpublished).

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JURISDICTION

On September 24, 2020, Kansas Supreme denied Petitioner's Petition for Review under K.S.A. 60-1507 Habeas Corpus. This Court has jurisdiction under 28 U.S.C. § 1257(a). The decision under review from the United States Court of Appeals for the Tenth Circuit order was rendered on December 29, 2022, denying Petitioner's Request for a Certificate of Appealability (COA). The instance Petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides, in relevant part:

"In all criminal cases the accused shall enjoy the right . . . by an impartial jury . . . 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 defense."

The Fourteenth Amendment of the United States Constitution provides, in relevant part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the protection of the laws."

Section 2254 of title 28 of the United States code, as amended by the Anti-terrorism and Effective Death Penalty Act (AEDPA) provides:

(d) A writ of habeas corpus will not be granted unless the state court's adjudication of the claim

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court the United States;
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

STATEMENT OF THE CASE

On the morning of October 16, 2011, Tracey Williams, Petitioner's girlfriend and Danny Hendricks an associate of petitioner, both accompanying one another, went to northeast police substation, Wichita, Kansas, where Williams made a domestic violence complaint against Edmond, and Hendricks a criminal deprivation of a motor vehicle compliant, that Edmond had taken his truck without his permission or knowledge, six days prior. Both, Williams and Hendricks are crack cocaine addicts.

Upon finding out about the complaints Williams and Hendricks had alleged earlier that day, October 16, 2011, against him, Edmond contacted Hendricks via cellphone and talked with regarding their dealings with the truck, and the false accusation. Edmond, upon returning Hendricks truck to him – not wanting nor needing any unnecessary problems involving Hendricks and his truck, at which he had in fact rented from Hendricks in exchanged for

crack cocaine, Edmond was subsequently arrested at the location they were to meet, and booked into the Sedgwick County Detention Facility on misdemeanor issued warrants for domestic battery against Williams in violation of *K.S.A. 2011 Supp. 21-5414(a)*, case No. 11C072546, and criminal deprivation of a motor vehicle *K.S.A. 21-5801*, case No. 11C516897.

Edmond appeared before the City of Wichita Municipal Court via video October 17, 2011, the following morning after his arrest, and after entering a plea of not guilty was released on an own recognizance (OR) bond.

On October 17, 2011, the following day after her initial complaint made to Officer Joletta Vallejo on the morning of the 16th, Williams contacted Detective Benjamin Jonker of domestic violence and sex crimes unit, and informed detective Jonker of Edmond's arrest and alleges accusation she had not alleged, nor had made in her initial uniform criminal complaint information to Officer Vallejo, the morning of October 16, 2011. She now alleges to having been kidnapped by Edmond, choked, and that she had lost consciousness several times. Williams directed Detective Jonker to the Calvary Towers apartment complex where she claimed the incident had occurred and should be caught on surveillance videotape footage. She further insisted that detective Jonker to contact Hendricks and alleged there was evidence in his truck as well. Detective Jonker, schedule Williams for an interview for October 18, 2011.

On October 18, 2011, following up on Williams lead, detective Jonker went to the Calvary Towers apartment complex and view surveillance camera videotape footage of the time frame Williams had told him the incident had occurred. After having viewed the surveillance videotape footage and being unable to download the any footage, instead of seizing or confiscating what he would testify to at preliminary hearing and in his trial testimony as being incriminating evidence specifically supporting the crime and petitioner's charge of a kidnapping detective Jonker walked away from this evidence and went to the residence of Williams mother's and conducted his scheduled October 18, 2011, interview with Williams.

On October 19, 2011, the following day of after his interview with Williams, detective Jonker contacted the City of Wichita municipal court and had the domestic battery in violation of *K.S.A. 2011 Supp. 21-5414(a)*, case No. 11C072546, and criminal deprivation of a motor vehicle *K.S.A. 21-5801*, case No. 11C516897 dismissed, so he could charged Edmond with the more severe felonies charges and crimes.

On October 20, 2011, after having the City dismiss its misdemeanor charges of domestic battery, and the criminal deprivation of a motor vehicle against Edmond, as requested, only then did detective Jonker interview Hendricks, who now alleges that the Edmond had taken his possession of his truck by force while visiting Edmond at Edmond's residence, accusation he

had not alleged, nor had made in his initial uniform criminal complaint information to Officer Sara Whitlock, the morning of October 16, 2011.

On October 21, 2011, Mr. Edmond was arrest and booked into the Sedgwick County Detention Facility for a second time, and charged with Attempted first-degree murder and aggravated kidnapping, case No. 11-CR-3087 against Williams, and robbery against Hendricks, both the same case number.

November 22, 2011, preliminary hearing was held, despite Williams' recanted testimony and admitting that she lied (i.e., fabricated) about having been kidnapped by Edmond and that Edmond had attempted to murder her, and that her motive for having lied ("I was hurt, I was angry, because he no longer wanted the relationship with me, so I wanted him to hurt [suffer] just as much as I was"), and the medical record in the state's possession that showed Williams had sustained only "minimal" (i.e., minor) injury, the State amended an additional count, charging Edmond with aggravated battery.

August 13-17, 2012, Trial by Jury, Mr. Edmond was ultimately convicted of attempted second-degree murder, aggravated kidnapping, and aggravated battery against Williams, and robbery of Hendricks truck..

September 28, 2012, the sentencing court imposed a 586 months sentence.

REASONS FOR GRANTING THE PETITION

I. DISTRICT COURT COMMITTED STRUCTURAL ERROR REQUIRING AUTOMATIC REVERSAL

During direct-examination of detective Jonker by assistant district attorney Justen Phelps, the State introduced in evidence discovery it call "Exhibit 25," a CD containing five abstracted edited portions of recorded jailhouse phone calls conversations between Petitioner and the alleged victim, Tracey Williams. In one edited portion of the recordings, Edmond who is African American, is heard by an all-white jury referring to white people as "peckerwoods," which one witness testified was a racially derogatory term used to describe a white person, (R. 10, 470). Defense counsel objected stating, "I'm going to have to object at this point. We're going to have to approach." At the bench by Court and counsel, counsel stated: "I should have objected when it was first said, but I didn't realize we would go into it. And I'm going to move for mistrial," pointing out that Mr. Edmond is black while the jurors are all white, and accused the state of improperly appealing to the bias and prejudice of the all-white jurors by "trott[ing] out racially motivated statements against white people." (R. 10, 470).

The state argued at the bench that its meaning, "peckerwoods" was evidence "highly relevant" to show who "[Mr. Edmond's] speaking about. (R. 10, 470-71). The trial court reasoned, "And if [Mr. Edmond] chooses to used something that have racial overtones, I guess he uses that in his language at

his own risk." (R. 10, 471). The trial court then suggested to assistant district attorney Phelps, "why don't you just reiterate that question, that it's your understanding [Mr. Edmond] was talking about the case detective." (R. 10, 471). Clearly, the "peckerwoods" reference and its supposed meaning was of no evidentairy value nor relevant to any material fact of the crimes charged. It is also clear, that this was purely an improper appeal by the prosecution to the bias prejudice of Mr. Edmond's all-white jury – deliberately designed to divert the jury from its duty to decide Mr. Edmond's case based solely on the evidence and controlling law, and prejudice Mr. Edmond of his constitutional right to a fair trial be an impartial jury.

When counsel had returned back from the bench, Petitioner informed counsel of a juror he had overheard found his use of term "peckerwoods," to be offensive, and identified that particular juror he heard that had express offense to his use of the term to counsel. (R. 10, 511). Disturbed by counsel failure to addressed the trial court concerning potential bias from that one juror in particular he had informed, and had identified to counsel the previous day following the bench conference, that he had overheard express offense to his use of the term "peckerwoods" before court had adjourned, Mr. Edmond addressed the trial court, and spoke in his own behalf concerning potential juror bias affecting the outcome of his trial, informing the trial court that the previous day, he had overheard one of the jurors state that "she was offended

by the fact that [he had] used the word 'peckerwoods.'" (R. 10, 507).

The district court was skeptical, pointing out that it would have difficult to hear the jurors over the "pink noise" that plays during conference at the bench. (R. 10, 508). Defense counsel requested a mistrial, or in the alternative, that the district court inquire of the juror whom Mr. Edmond alleged had heard stated offense of his use of the term (peckerwooods). The district court denied both requests. (R. 10, 513, 517-519). The court apparently denied Petitioner [Mr. Edmond's] motion for mistrial, not necessarily based on an analysis of whether there had been a fundamental failure in the proceeding and whether that failure had resulted in injustice, but based on its opinion that Mr. Edmond had, in fact, used the racial slur at issue, and should, therefore, suffered the consequences of his action. In response to counsel repeated requests for mistrial, the district court responded by lecturing Petitioner [Mr. Edmond] for using the term "peckerwoods," making comments such as:

> "And if [Mr. Edmond] chooses to use something that would have racial overtones, I guess he uses that in language at his own risk"; "so it would be a good idea not to use that word if you don't it to be used against you at a later time"; "[t]he defendant had been told in the telephone conversation, every one he does, that these phone calls are monitored, so it wasn't like he had an expectation of privacy, that he could use a racial slur without ever having any consequences that some fact finder [i.e., jury or juror] might not ever hear this"; and, "[y]ou know, the word came out of his mouth, and if that made someone unhappy, then it shouldn't have came out of his mouth. He has a consequence for having made that statement."

(R. Vol. 10, 471, 509, 515, 522-23).

Following the district court denying counsel request for mistrial the following exchange occurred between the Petitioner [Mr. Edmond] and the trial court:

DEFENDANT: With all due respect, Your Honor, to you and to your court, I'm not the system might have been on, but - - but what I heard is what I heard. And for you to tell me what I didn't hear and don't question this juror is - - I feel as though it's biased also. Because it might have been on, true enough, but I can hear them jurors in that box.

THE COURT: That's fine. You made your record on that. But to call them out, I don't think that's a remedy. To bring them out and say, "Is anyone offended by the word 'peckerwood[s]?'", then I think that does a lot more damage to bring the jurors out and ask them that question. Because we don't even know who the alleged juror was for sure.

DEFENDANT: I do.

THE COURT: Well, you yourself said you weren't sure. [Note: This is an incorrect misstated fact].

DEFENDANT: I seen her, I know who she was. She wears glasses, heavyset. She's sitting, I'm pretty sure it right there.

COUNSEL [MR. PITTMAN]: I know who he means, judge, but I don't her name. I know that in jury selection she next - - she worked at Wal-Mart, not Sam's, and she sat next to where Mr. Coley - -

DEFENDANT: She sat in 27. Right here (indicating).

THE COURT: Well, is defense counsel requesting that I bring this juror into the library and ask her whether or not she was offended when she heard the word "peckerwood"?

DEFENDANT: That would be fine with me.

COUNSEL [MR. PITTMAN]: I guess on behalf of my client I've got to make that request.

(R. 10, 517-519).

> Note: Counsel clarifying to district court that this juror, "she worked at Wal-Mart, not Sam's," indicates that district court had been informed of this juror's potential alleged bias conduct by counsel, and moreover, obviously had even discussed where "she worked at", at some point off the record prior to Mr. Edmond himself addressing the trial court concerning potential juror bias, in his own behalf.]

The district court not only refused counsel requested to question the juror in behalf of defendant – who had even told the district court exactly where this juror sat – designating the number of her seat – "27", and description of her identity, but in show of his own actual bias against the defendant or interested in the out come of his particular case remarked: "[y]ou know, the word came out of his mouth, and if that made someone [be it judge or juror] unhappy, then it shouldn't have came out of his mouth. [H]e has a consequence for having made that statement." (R. 10, 522-23).

ARGUMENT AND AUTHORITIES

Kansas Court of Appeals concluded:

> "Edmond's arguments related to motions for mistrial that were preserved for appeal, we have have carefully considered the merits by reviewing the record and the parties discretion. briefing. We conclude the trial court did not abuse its It fully weighed the complaints alleged by Edmond and the likelihood that his proposed remedies would cure any allege prejudice. The trial trial court applied the proper legal standard when making its rulings, and a reasonable person would agree with its conclusions. We find no error."

Edmond v. State, 324 P.3d 1153 (table), 2014 WL 2402001

"Under the abuse of discretion standard, a trial court's decision will

not be disturbed unless the appellate court has definite and firm conviction that the lower court has made court error judgement or exceeded the bounds of permissible choice in the circumstances." *United States v. Chanthadara*, 230 F.3d 1237, 1248 (10th Cir. 2000)(quoting *United States v. Thompson*, 908 F.2d 648, 650 (1991)(internal quotation marks omitted).

Under *K.S.A. 2011 Supp. 22-3423*(1)(c). The trial court may terminate the trial and order a mistrial at any time that he finds termination is necessary because prejudice conduct, in or outside the courtroom, make it impossible to proceed without injustice to either the defendant or the prosecution. This statute creates a two-step process. First, the trial court must determine if there was some fundamental failure of the proceeding. If so, the court moves to the second step and assesses whether it is impossible to continue without an injustice. In other words, the trial court must decide if the prejudicial conduct's damaging effect can be removed or mitigated by an admonition, jury instruction, or other action. If not, the trial court must determine whether the degree of prejudice resulted in an injustice and if so, declare a mistrial. *State v. Ward*, 292 Kan. 541, 550, 256 P.3d 801 (2011).

In Petitioner case, it was the trial court itself own prejudice conduct that was the fundamental failure in the proceeding that resulted in an injustice. To obtain habeas relief on the claim, Petitioner must show that the denial of a mistrial violated fundamental fairness. *Hays v. Ayers*, 632 F.3d 500,

515 (9th Cir. 2011) (observing that a habeas claim directed to the denial of a mistrial based on a jury's exposure to improper testimony is reviewed for fundamental fairness); *see also* Gray v. Whitten, 816 Fed, Appx. 240, 244 (10th Cir. 2011) (unpublished opinion) (holding that in order to warrant review of a state court denial of a mistrial, habeas petitioner must show the denial was "grossly prejudicial" and "denied the fundamental fairness that is the essence of due process.").

Petitioner was not only denied his *Sixth Amendment* right to a fair trial by an impartial jury, but a basic fundamental right to an impartial judge under the Due Process Clause of the *Fourteenth Amendment*.

The *Sixth* and *Fourteenth Amendments* guarantees criminal defendant a verdict by impartial indifferent jurors, and the bias of even a single juror violates the right to a fair trial. See Dyer v. Calderon, 151 F.3d 970, 973, (9th Cir. 1998). Accordingly, "[t]he presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice." (quoting United States v. Allsup, 566 F.2d 68, 71 (9th Cir. 1977). Like a judge who is biased, see Tumey v. Ohio, 273 U.S. 510, 535, 71 L. Ed. 749, 47 S, Ct. 427 (1927), the presence of a biased juror introduces a structural defect not subject to harmless error analysis. See generally Arizona v. Fulminante, 499 U.S. 279, 307-10, 113 L. Ed. 2d 302, 1246 (1991).

"Among those basic fair trial rights that can never be treated as

harmless is a defendant's right to an impartial adjudicator, be it judge or jury." *Gomez v. United States*, 490 U.S. 858, 876, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989), citing *Gray v. Mississippi*, 481 U.S. 648, 668 (1987)(quoting *Chapman v. California*, 386 U.S. 18, 23 (1967).

In *Bracy v. Gramly*, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 183 L. Ed. 2d. 97 (1997), this Court held, "The due process clause clearly requires a fair trial in a fair tribunal before a judge without no actual bias against the defendant or interested in the out come of his particular case." To show actual bias, petitioner must present "compelling" evidence. See *Fero v. Kerby*, 39 F.3d 1462, 1478 (10th Cir. 1994). "Such evidence may be in the form of facts showing actual bias or facts showing a strong interest in the outcome of the case." [Citation omitted] *Crawford v. Kansas*, 2015 Dist. Lexis 116243 * 12-13, WL 2015 512467 (D. Kan. Sept. 2015).

There is no question as to the strong interest the judge had in the outcome this particular case, his comments, that spoke volumes of his abuse of discretion denying Petitioner of his fundamental right be tried by an impartial unbiased jury, and obvious before an impartial unbiased judge. Not only did the lower court clearly make substantial court error judgement, but also exceeded the bounds of permissible choice under the circumstances.

"When a defendant's right to have his case tried by an impartial judge is compromised, there is a structural error that requires automatic reversal."

See *Tumey v. Ohio*, 273 U.S. 510, 535, 47 S. Ct. 437, 71 L. Ed. 749 (1927) (rejecting the argument that the judge's failure to recuse himself was harmless in light of defendant's clear guilt because "[n]o matter what the evidence was against him, he had the right to have an impartial judge"); See also *Chapman v. California*, 386 U.S. 18, 23, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (recognizing the right to an impartial judge as among those "constitutional right so basic to a fair trial that their infraction can never be treated as harmless error").

The Supreme Court "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." See *Smith v.Phillips*, 455 U.S. 209, 215, 102 S. Ct. 940, 71 L Ed. 2d 78 (1982).

Mr. did not forfeit his right to a fair trial by using a racial slur, and the district erred in implicitly finding otherwise and in basing its denial of Mr. Edmond's motion, at least in part on that finding. Because district court failed to apply the appropriate two-part test to Mr. Edmond's motion for mistrial, it made a legal error, thus clearly was an abuse of discretion. Given Mr. Edmond's claim that he had overheard a juror expressing offense at his use of the term "peckerwoods," and moreover, even identified for trial court the juror he had heard express offense, the district court should have at the least granted counsel's request to question the juror before denying the motion for

mistrial. Obviously, the trial judge had trouble separating himself from his own actual bias, and the offense he himself had taken from Edmond's use of the term "peckerwoods" as he so stated.

Because the district court's failure to grant mistrial was a fundamental failure of the proceeding, thus denial was "grossly prejudicial" and "denied the fundamental fairness that is the essence of due process," in light of his refusal at the very least to question the juror Mr. Edmond had identified for the court, and then his his own show of actual bias against the defendant or interested in the out come of his particular case, clearly was structural error. Thus, deprive Mr. Edmond of fair trial by an impartial jury and impartial judge.

II. TRIAL COUNSEL FAILURE TO INVESTIGATE WAS NOT TRIAL STRATEGY

August 1, 2012, Petitioner informed newly appointed defense counsel, Quentin L. Pittman, that Parisha Edmond, who was present on or about the 10th day of October 2011, when Danny Hendricks came to petitioner's place of resident and in exchange for crack cocaine rented out his Dodge pickup truck to Petitioner, and that Parisha had given Hendricks a ride to his resident at petitioner's expense, to retrieve his other vehicle.

Petitioner had also informed defense counsel Pittman of Martha Edmond, who was present at the apartment complex during the same time as Hendricks was, and a witness to alleged crimes, and who's testimony and observation was different from Danny Hendricks testimony and observation,

who had testified at trial, that from the stairwell to the exit of the building Williams "had the crap beat out her she could hardly walk;" that "they [implicating Martha] [drug] [Williams] all the way from the stairwell to the truck." and that she appeared "almost like she was lifeless and dead at that point."(*R. 10, 345 Ln. 10-12.*). Martha's testimony and first hand observation and account, would have corroborated Jonker and apartment complex manager Tarrell Pledger's surveillance videotape observation from the stairwell to exit of the building. (*R. 17, 38 Ln. 19-25, 39 Ln. 1-11; R. Vol. 8, Trial Trans. 279*). (*See* Sufficiency of Evidence, *infra. at * 25-26*).

Martha testimony would have furthered discredited and contradicted Hendricks trial testimony when he arrived at the apartment complex, why he was there at apartment complex and what he was doing (i.e., "engaged in") while there at the apartment complex, prior to getting into his truck at the apartment complex the evening of the 15th, and leaving with Williams and Petitioner – *who was "passed out" in the backseat* –, and the three of them (Williams, Hendricks, and Petitioner) not return back to the apartment complex until the early morning hours in question, of the 16th, with Petitioner still "passed out" in the backseat. (R. Memorandum in Support of 60-1507 at * 34-37, (same) Attached Affidavits).

Parisha and Martha's affidavits establish that not only would their testimony have challenged the State key witness Danny Hendricks credibility

before the jury – *that went untested by trial counsel* –, and was exculpatory, sufficient and central to the whole of Petitioner's case, but moreover, neither had been served with subpoenas – *contrary to the ROA* –, investigated, interviewed or had been contacted by defense counsel Pittman or investigator for the defense. (*See* Attached Exhibit 2-2A; also see Parisha and Martha Affidavits).

Their affidavits further establish Hendricks was a crack addict, lier, presented false and misleading evidence, and not to be believed.

Counsel was informed of original reporting officer Sara Whitlock, who testimony by itself would have contradicted Hendricks report made to detective Jonker, preliminary hearing testimony, and trial testimony, that his truck was taken from his person or presence forcefully, but that he had reported to her his truck was taken "without his permission or knowledge," by petitioner. (See Attached Exhibit).

Despite counsel having been informed and provided these witnesses names, cellphone numbers, and locations, trial counsel made absolutely no attempt to investigate, interview or contact any of these witnesses in petitioner's defense against the charged crimes alleged. In other words, counsel abandoned any line if defense, and leaving petitioner defenseless to defend against any of the alleged charged crimes.

Moreover, when request[ed] for additions to record on appeal the

August 3, 2012, Issued Subpoena/Return, District Court Clerk Appeals Department, was unable to locate "Certificate of Service Subpoenas Served on Martha Edmond, Parisha Edmond and Officer Sara Whitlock" in the records from 11CR3087. And when requested, from Clerk of the District Court Records Department copy of August 3, 2012, Certified Subpoena/Return that was issued and served on Martha Edmond, Parisha Edmond and for Officer Sara Whitlock, the records were deined. The reason for the denial was: "The record requested is not made, maintained, kept by, or in the possession of this office. Requested copies not in the case file." (*See* Attached Exhibit 4 1 of 3). Thus, is sufficient evidence, corroborating Martha and Parisha affidavits that they were not served with subpoenas to testify at trial, moreover, defense counsel never contacted or interviewed them. Both witnesses Martha and Parisha testimony was central and exculpatory to all charges. Why counsels abandon this investigation only counsel could have answered and the state court's.

ARGUMENT AND AUTHORITIES

The Kansas courts found that:

> Edmond does not present any facts or argument that would meet his burden of showing that the failure to call Martha and Parisha did not result from strategy following adequate investigation. Edmond concedes that Martha and Parisha were subpoenas and served to testify at trial, so trial counsel must have done some investigation and must have known what the witnesses would say when he ultimately decided not to call them. The credibility of these witnesses could have been impeached because they were related to Edmond. And although

> the witnesses claimed testimony may have been relevant to the robbery charge against Edmond, the testimony would not have been central to Edmond's defense on the charges of attempted second-degree murder, aggravated kidnapping, and aggravated battery of Williams. Thus, on the record, Edmond fails to show that trial counsel's performance was deficient and he also fails to show prejudice. Edmond v. State, 2019 WL 6794879, at *11
>
> [Evidence in the form of Affidavits submitted by Martha and Parisha, presented by Petitioner, is substantial showing that counsel failure to in call them was not the result of strategy following a "thorough investigation" or "less than complete investigation."]

Nowhere does there exist in the record on appeal as of a fact, that (1) "Edmond concedes that Martha and Parisha were subpoenaed and served to testify at trial," and (2) the Kansas court of Appeals assumption that "trial counsel must have done some investigation and must have known what the witnesses would say when he ultimately decided not to call them" is based on decision objectively unreasonable.

Under *Strickland*, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91.

Failing to give appropriate weight to the entirety of available evidence renders a decision objectively unreasonable. *Williams*, 529 U.S. at 397-98 (holding the state court decision unreasonable because it "failed to accord appropriate weight to body of evidence" supporting the claim); *Wiggins v.*

Smith, 539 U.S. 510, 527-28, 123 S. Ct. 2527, L. Ed. 2d 471 (2003) (finding unreasonable state court's assumption that investigation was adequate where evidence showed the contrary).

The Tenth Circuit has found that when a petitioner sought an evidentiary hearing in state court and submitted affidavits, he has been diligent under § 2254(e)(2). See. e.g., *Milton v. Miller*, 744 F.3d 660, 673 (10th Cir. 2014).

[Petitioner requested a full evidentiary hearing on the affidavits of Martha Edmond and Parisha Edmond, and "remand to district court for evidentiary hearing."] (K.S.A. 60-1507 Memorandum in support of Habeas, at * 21; see also Appellant Brief at *14-15). Counsel obviously "must [had not] done some investigation and must [had not] known what the witnesses would say when he ultimately decided not to call them."

Just as Williams' mother, Dorthy Fields and Williams ex-husband, Greg Williams, both witnesses for the state, who were related to Williams the victim, qualified as witnesses, Martha and Parisha who were related to defendant, both who were present at the locations the dates and times the alleged crimes charged were supposedly committed, and yes their credibility was subject to impeachment just as the state witnesses credibility are subject to impeachment, but because they were related to Petitioner did not disqualify them as defenses witnesses.

"A criminal defendant's right to present a defense is essential to a fair trial. *United States v. Valenzuela-Bernal*, 458 U.S. 852, 875, 73 L. Ed. 2d 1193, 102 S. Ct. 3440 (1982)(O'Connor, J., Concurring).

The right offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has a right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. *Washington v. Texas*, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967).

Petitioner was not afforded this constitutional right. "[An appellate court] may not neither weigh conflicting evidence nor consider the credibility of witnesses. It is for the jury, as fact finder to resolve conflicting testimony, weigh the evidence, and draw inferences from the facts presented." *United States v. Mckissick*, 204 F.3d 1282, 1289-90 (10th Cir. 2000).

Martha testimony was relevant and most central to Edmond's defense to the charged crimes, attempted first-degree murder, aggravated kidnapping, and aggravated battery of Williams, as supported in her sworn Affidavit, and Parisha testimony was relevant and most central to the robbery charge of Hendricks' truck, as supported in her sworn affidavit. There can be no doubt

counsel ineffective assistance in his failure to investigate Martha and Parisha was not the result of strategy, and deprived petitioner of his fundamental due process right to present his own witnesses to establish a defense.

III. DISTRICT COURT VIOLATED DUE PROCESS RIGHT TO CONFRONTATION

Prior to opening statements an evidentiary hearing was held to determine the availability of the alleged victim Tracey Williams. The trial court found that Williams, who had refused to appear at petitioner's trial, to be an "uncooperative witness", and an unavailable witness for trial. (R. 9, 207 Ln. 20-25). Having found Williams an unavailable witness for trial, the trial court allowed the State proceed trial with Williams' sworn testimony from preliminary hearing under hearsay exception "prior testimony where the defendant had the opportunity for cross-examination." (R. 9, 208 Ln. 1-2, 22-25; 209 Ln. 1-2).

The district court permitted the State to introduce into evidence a redacted – edited version of Williams preliminary hearing testimony to be read to the jury.

Though the trial court had found Williams was an uncooperative witness and unavailable for trial, and had allowed the State to proceed trial with Williams' sworn testimony from preliminary hearing under a hearsay exception, trial court erred in not finding as required by Kansas statutory provisions, that Williams contemporaneous out-of-court hearsay statements it

permitted and allowed the State to introduced into evidence at trial, through the testimony of Debra Hermes, Dorthy Fields, Danny Hendricks, and Detective Benjamin Jonker, offered to prove the truth of the matter asserted, satisfied *K.S.A. 60-460(d)(3)* hearsay exception. Trial counsel Pittman, did not contemporaneously object to any of Williams alleged out of-court statements on the basis of any confrontational or hearsay grounds that the trial court permitted and allowed the State to introduced as evidence through the testimony of Hermes, Fields, Hendricks, and Jonker of Williams, its unavailable witness (declarant). The trial court, State, and defense counsel Pittman, all were aware from Williams' availability evidentiary hearing prior to opening statements, that Williams was an unavailable witness for trial and would not be called by the state as a witness for trial, thus, would not be subject to full and effective cross-examination with respect to the out-of-court statements offered to prove the truth of the matter asserted or testimonial statements.

ARGUMENT AND AUTHORITIES

Trial counsel failure to lodge contemporaneous objection to the admission of this evidence on the basic of any constitutional or hearsay grounds fell below an objective standard of reasonableness based on prevailing professional norms was deficient and prejudice the defense, and denied Mr. Edmond of a fair trial.

The Kansas Court of Appeals in its concluded:

> Edmond argues in his supplemental brief that his trial counsel was ineffective for failing to object to the admission of Williams' preliminary hearing testimony and her out-of-court statements presented through the testimony of Hermes, Fields, Hendricks, and

> Jonker. He argues that this testimony was hearsay and it violated his rights under the Confrontation Clause of the United States and Kansas Constitutions. The State argues that Edmond identifies no specific testimony that he believe to be hearsay and thus did not adequately brief the issue. The State argues that Edmond's arguments have no merit because on direct appeal to this court, in discussing Edmond's challenge to the sufficiency of the evidence, our court implicitly found the statements met a hearsay exception.
>
> To begin, the district court erred by relying on res judicata to summarily deny this claim. The district court summarily denied three of Edmond claims . . . . But Edmond raised no claim in his direct appeal that his counsel was ineffective for failing to object to Williams' hearsay statements. Thus, the district court erred in summarily denying the ineffective assistance of counsel claim based on res judicata.
>
> In any event, Edmond claim has no merit. Edmond first argues that trial counsel was ineffective for failing to object to the admission of Williams' preliminary hearing testimony. But Edmond can show no prejudice based on trial counsel's failure to object. On direct appeal, this court agreed with the district court that Williams' preliminary hearing testimony was admissible because she was found unavailable at trial. So even if trial counsel had objected, the preliminary hearing testimony would have been admitted. Thus, Edmond cannot show prejudice based on trial counsel's failure to object to the admission of the preliminary hearing testimony.
>
> Edmond v. State, 2019 WL 6794879, at *22-23

First, nowhere in Edmond's supplemental brief does he ever claim that "trial counsel was ineffective for failing to object to the admission of Williams' preliminary hearing testimony," thus is a misstated factual findings of the record by the KCOA. *Second*, as for "Edmond identifies no specific testimony that he believe to be hearsay." (R. 1, at *15-17; (same) K.S.A. 60-1507 Petiton)

Petitioner argues, that trial counsel failure to lodge contemporaneous

objection to the admission of this evidence on the basic of any constitutional or hearsay grounds fell below an objective standard of reasonableness based on prevailing professional norms was deficient and prejudice the defense, and denied Mr. Edmond of a fair trial.

State v Rowe, 252 Kan. 243, 843 P.2d 714 (1992) details most extensively the application of *K.S.A. 60-460 (d)(1), (2)* and (3). Citing Judge Gard the court explains the difference between (d)(1) and (d)(2). . . . 'Clauses (1) and (2) of this section . . . describe conventional res gestae, admissible hearsay when the characteristic-perception or from the excitement which carries over from the event. . . . Whether a statement measures up to the requirement of spontaneity is largely a matter for the discretion of the trial court. . . ." 1 Gard's Kansas C. Cir. Proc. 2D Annot. § 60-460(d), p.236 (1979).

In *Rowe*, the court cited Barbara on Kansas Evidence Objections with Evidentiary Foundations, that the state failed to show that an "event or condition occurred" as required to establish proper foundation of *K.S.A. 60-460(d)*, and under *K.S.A. 60-460(d)(2)*, the state failed to prove the declarant made the statement "startlingly sufficient to nervous excitement" (pp. 249-50).

Under clause (3) above, before any hearsay statements are admissible, the trial judge must find:

(1) the declarant is unavailable as a witness;

(2) the matter described was recently perceived by the declarant and made while memory was fresh; and

(3) the statement was made under circumstance so as to show that it was in good faith, before there was any action pending, and with no incentive to falsify or distort.

This finding was not made by trial court, and, KCOA finding otherwise is incorrect. Other than having found William to an uncooperative witness and unavailable for trial, and allowed the State proceed trial with Williams' sworn testimony from preliminary hearing under hearsay exception "prior testimony where the defendant had the opportunity for cross-examination" the record is silent that one or more of these requirements were met. In *Fisher v. State*, 222 Kan. 76, 563 P.2d 1012 (1977), K.S.A. was considered in light of a criminal defendant's constitutional right of confrontation. In *Fisher*, Kansas Supreme Court held that the admission of a witness' out-of-court statement does not violate the right of confrontation, guaranteed by the Sixth Amendment to the United States Constitution and Section 10 of the Kansas Bill of Rights, as long as the declarant has been called and testifies as a witness and is subject to full and effective cross-examination. This court emphasized that in a criminal proceeding, the declarant must testify at trial before testimony of hearsay evidence can be admitted under 60-460(a). Kansas Supreme Court later modified this rule in *State v. Davis*, 236 Kan. 538, 541, 694 P.2d 418 (1985), where it held that if a declarant is available and actually testifies at trial, hearsay evidence of out-of-court statements can be admitted before or after

the declarant testifies.

Because the State was permitted to present Williams' previous testimony under one hearsay exception does not open the door for Williams' other out-of-court statement. *See State v. Brown*, 252 Kan. 374, 383, 904 P.2d 985 (1995) (holding that "each hearsay statement admitted at trial must satisfy a hearsay exception, but other out-of-court statements made by the same witness not admissible when a specific hearsay exception does not apply to the other statements. The fact that Gray's prior testimony was admitted does not make his other out-of-court statements admissible unless the statements satisfy some other hearsay exception."

The trial judge did not find that Williams' out-of-court statements allegedly made to Hermes, Fields, Hendrick, and Jonker satisfied one or more hearsay exception, specifically, *K.S.A. 60-460(d)(3)*.

Trial counsel knowing Williams was unavailable and would not be called by the State to testify, and failing to lodge contemporaneous objection on the basis of any constitutional or hearsay grounds, not only fell below an objective standard of reasonableness based on prevailing professional norms and was deficient and prejudice the defense, and denied Mr. Edmond of a fair trial, but egregious and prejudice. There are additional safeguard against miscarriages of justice in criminal cases, . . . "[it] is the right to effective assistance of counsel, which, as this Court has indicated, may in the right case

be violated by even an isolated error of counsel if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496, 91 L. Ed 2d 397, 106 S. Ct. 2639 (1986). (quoting *United State v. Cronic*, 466 U.S. 648, 657[.]

Clearly Petitioner was denied effective assistance of this claim and error was egregious and prejudicial.

IV. *Sufficiency of Evidence*

In it opinion, KCOA denied Petitioner permised:

> "Edmond's sole argument is that Williams' testimony at preliminary hearing did not support his convictions. That is generally true, but other evidence did support the convictions. We have detailed most of the incriminating evidence in the Factual and Procedural Background section of this opinion. Hendricks' observations, the surveillance videotapes from the apartment complex, and Williams contemporaneous statements made to numerous persons about the time of the attack were consistent with each other and, taken as whole, clearly shows Edmond's guilt. To reweigh Williams' preliminary hearing against this evidence would exceed our standard of review. Considering all the evidence in light most favorable to the prosecution, a rational fact finder could have concluded Edmond was guilty beyond a reasonable doubt.
>
> (Memorandum Opinion, No. 109617, Lexis 410 (Kan. Ct. App. 2014))

ARGUMENT AND AUTHORITIES

The KCOA finding is not based on sufficient evidence.

(1) Edmond sole argument, was not just that Williams' had admitted to having lied about him having committed the crimes charged during her recanted testimony at preliminary hearing did not support his convictions,

but her scorn motive behind the accusations lead to the charged crimes:

> On direct-examination: "I was upset, I was angry, I was hurt." (*R. 17, 14 Ln. 9-12.*)
>
> On cross-examination: "Like I said, I was hurt, I was angry, because he no longer wanted the relationship with me, so I wanted him to hurt just as much as I was." (*R. 17, 20 Ln.14-20*).

(2) Hendricks observation, does not corroborate with Jonker's surveillance videotape observation, that prosecutor instructed the jury one of it distinct multiple acts relied on who observation conflicts with apartment complex manager Tarrell Pledger surveillance videotape observation. Hendricks observation begin where Jonker and Pledger's continues on the first floor from second floor, the first floor stairwell, to the exit of the building.

The KCOA relied on Hendricks observation – which tremendously conflicted with Jonker's and Pledger's observation – after considering all the evidence.

Hendricks observation, was that "[William] pretty much had the crap beat out her she could hardly walk. They was basically dragging her all the way from the stairwell to the truck." (*R. 10, 345 Ln. 10-12.*) "[] form the stairwell when the came down. But when they came down, I mean, it was just like - - almost like she was lifeless and dead at that point." **Q**: was she not walking? **A**: "No, no. She was – I mean, when I said pretty much they were carrying her out and dragging her, that's pretty much what it was." (*R. 10, 363*

Ln. 8-15).

Detective Jonker surveillance videotape observation, was . . . **Q:** When you see them exit the stairwell of the first floor how you describe that? **A:** "The camera, I believe was number five, its a distant shot off toward the stairwell, you can see them bunch up, everybody, there was a large group of people and then they walk out toward the camera, which is the exit to the apartment complex." **Q:** And could you get a good look at Tracey? **A:** "You could that it's Tracey." **Q:** Was anybody - - you said there was kind of a group around her? **A:** "Well when they were grouped up as they exited the stairwell there was a group of people, they stood there, I mean it appeared they were talking for a little bit and then Larry escorts her out of the building." (*R. 17, 38 Ln. 19-25, 39 Ln. 1-11*).

Tarrell Pledger, apartment complex manager, was "It was obvious that was some [sort of] confrontation" occurring, but there was nothing that caught [his] eye and transpired right there from the stairwell to the exit of the building." (*R. Vol. 8, Trial Trans. 279*).

Both Jonker's and Pledger's observations does not corroborate with Hendricks, but tremendously conflicts. This conflict is sufficient, specifically, to the charge and conviction of kidnapping. Martha's testimony would have, but if not for counsel's ineffective assistance, corroborated both Jonker's and Pledger's observation. (See Attached Affidavit). And though there were no

surveillance videotape discovery for the jury to view, nor KCOA to make its factual findings, neither Jonker's or Pledger's observations depicted her appearing "lifeless and dead," not walking, or Edmond, nor anyone else "carrying her out and dragging her," from the stair well to exit of the building. Jonker described it as "escorts her," Pledger "nothing that caught [his] eye and transpired right there from the stairwell to the exit of the building."

Where Jonker's and Pledger's observation conflict, is that Jonker's surveillance videotape observation was that Edmond "pulls [Williams] into the stairwell," and "yanks." (*R. 10, 401 Ln. 2-3; R. 10, 378 Ln. 18-19*), to where Pledger's surveillance videotape observation was "Obvious some discussion going on, then two of them, one being Tracey and Mr. Edmond entered into the stairwell." (*R. 9, 279 Ln. 7-10*). This conflict is also sufficient to the charge of kidnapping.

Pledger does not described Edmond as being aggressive or forceful in any kind of way in his above descriptive observation of Edmond and Williams entering into into the stairwell.

(3) KCOA in its sufficiency of evidence findings, it claimed that other evidence did support [Edmond's] convictions, make numerous reference to what the surveillance videotapes shows. Simply put, those findings are objective unreasonable and insufficient, because there is no surveillance videotape[s] evidence (i,e., "discovery") that depicts its "factual findings,"

detective Jonker testified he was unable to obtain a copy of the surveillance videotapes before they were recorded over and as a result were not shown to the jury. (*R. 17, 49 Ln. 5-21; R. 10, 386 Ln. 6*). This is sufficient because the bulk of the state's and KCOA evidence in supported of the convictions is based on detective Jonker testimony of what the surveillance videotapes shows and Williams told him what happened at the apartment complex that cannot be substantiated.

Because the videotape evidence was destroyed, the testimony by Hendricks, Jonker and Williams accusations comprise that crucial evidence supporting Petitioner's claim of insufficient evidence that the state courts "failed to accord appropriate weigh to" in their decision making. "If there is not sufficient evidence of each elements of a crime, *K.S.A. 22-3219(1)* a court "shall order the entry judgment of acquittal . . . (emphasis added). Thus, a trial court decision to grant a motion for judgment of acquittal is not discretionary." *State v. Dinh Loc Ta*, 296 Kan. 230, 236, 290 P.3d 652 (2012); see also *Caft v. State*, 3 Kan. 450, 485-86 (1866) ("But upon the question of whether there is any evidence of a particular material fact, they [the jury] are not the exclusive judge. The law requires the court, after the jury should made its finding, to determine that."

When the sufficiency of the evidence is challenged in a criminal case, the appellate court must "review all the evidence" albeit in the light most

favorable to the state. By making their decisions without having examined the actual surveillance videotapes, it is evident they did not "view all the evidence"; consequently, there is no adjudication on that particular requirement, and now this court (Tenth Circuit) must review it de novo, the KCOA unreasonable determination of petitioner's claim. See *Blend v. Sirmons*, 459 F.3d 999,1010 (2006).

4. As for Williams contemporaneous statements made to numerous persons about the time of the alleged "attack," as word by the KCOA, being "consistent with each other and, taken as a whole shows Edmond's guilt."

One, Officer Joletta Vallejo, the desk officer who had taken Williams' first report recalled Williams' account that "she and [Edmond] her boyfriend [,] got in an argument about money, and that he punched her several times and . . . choked her . . . but that she 'never lost conscious.'" Officer Vallejo had noted "minor injuries" on Williams face, specially "two bumps" around her eye and swelling about her lip. Officer Vallejo said she took photographs of the injuries and offered to contact EMS, but Williams refused. The Officer recalled telling Williams that Edmond be arrested domestic violence. *Edmond v. State*, No. 109,617, 2014 WL 2402001 at 10) (See Attached Exhibit 1 1-2). Two, Williams' medical record was consistent with officer Vallejo report Williams did not suffer injuries required by law to elevate the offense from misdemeanor domestic violence to attempted first-degree murder, aggravated

kidnapping, or an aggravated battery, the least of the crimes the state charge Edmond with after Williams called detective Jonker a day later scorned. (See Attached Exhibit 1A 1-10) Three, Williams contemporaneous out-of court statements made to numerous persons the State introduced as evidence, was constitutionally inadmissible hearsay. Under clause Kan. Stat. Ann. § *60-460(d)(3)*. (*See* (2) B Ineffective Assistance of Trial Counsel, *supra*. *)

Finally, considering Williams preliminary hearing evidence testimony admitting to having lied on Mr. Edmond, about having committed the crimes charged during her testimony at preliminary hearing does not support his convictions, and her motive behind the accusations that lead to the charged crimes, that the state courts "failed to accord appropriate weigh to" in their considering all the evidence was objectively unreasonable, and is an insufficient finding.

It's moreover, insufficient evidence, for the state and detective Jonker who chose not to seize and confiscate surveillance videotape evidence, after having viewed footage of what he testified to as a kidnapping on surveillance videotape, and KCOA finding what those surveillance videotapes "shows" without having discovery of surveillance videotapes to view depicting any of its findings of what it showed, is also objectively unreasonable.

Considering the above witnesses inconsistencies their non-corroborating observations and testimonies there is insufficient evidence to sustain

kidnapping as defined in *K.S.A. 21-5408(a)*:

Kidnapping is the taking or confining of any person, accomplished by force, threat or deception, with the intent to held hold such person:

(1) for ransom, or as a shield or hostage;

(2) to facilitate flight or the commission of any crime;

(3) to inflict bodily injury or to terrorize the victim or another;

(4) to interfere with the performance of any government or political function.

During jury instruction 19. The State claims distinct multiple acts which each could separately constitute the crime of aggravate kidnapping or one of the lesser included offenses.

In order for the defendant to be found guilty of aggravate kidnapping or one of the lesser offenses, you must unanimously agree upon the same underlying act. (R. 10 532-533).

In closing arguments the prosecution told the jury "[] you kind of have two situations here that might fit aggravate kidnapping. **(1)** That "[Edmond] grabbed [Williams] by the arm, forced her down the second floor hallway of the Calvary Towers into the stairwell, where he beat her, or **(2)** That "after they leave the stairwell, [Edmond] forces [Williams] to the truck, takes her to the dead end, and beat her in the truck." "And so the multiple acts instruction, what that is there - - you have to be unanimous to which of two acts is

aggravate kidnapping. And they both fit aggravated kidnapping. You have ample evidence on both instances. But you have to be unanimous to convict him on aggravated kidnapping." (R. 10, 542-543). The jury did not specify as to which one of the two underlying distinct multiple acts, or both, it unanimously agree upon that constituted the crime of aggravate kidnapping, as instructed, in reaching its verdict that "We the jury, unanimously find [Mr. Edmond] guilty of aggravate kidnapping as alleged in Count 2." (R. 10, 571).

The jury did not specified which one of the two, or both, underlying acts it was instructed to unanimously agreed upon constitute the crime of aggravate kidnapping, the jury instead just found Mr. Edmond "guilty of aggravate kidnapping as alleged in Count 2." Thus, is insufficient evidence in itself.

CONCLUSION

For the reasons set forth above, Petitioner Larry D. Edmond respectfully prays that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in his case.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Larry Edmond

Date: **March 24, 2023**

CERTIFICATE OF COMPLIANCE

NO. _____

LARRY EDMOND
Petitioner

v.

JEFF BUTLER
Respondent

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains **8,883** words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on **March 24, 2023**.

Larry Edmond

Larry Edmond Pro Se