22-7790

No.

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ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

LANCEY DARNELL RAY—PETITIONER

VS.

STATE OF OKLAHOMA; ERIC PFEIFER, CHIEF MEDICAL EXAMINER STATE OF OKLAHOMA; AND INAS YACOUB, STATE MEDICAL EXAMINER—RESPONDENTS

On Petition for a Writ of Certiorari
To the Oklahoma Court of Criminal Appeals
For the State of Oklahoma

PETITION FOR A WRIT OF CERTIORARI

Lancey D. Ray
Oklahoma State Reformatory • G2-223
1700 E. First Street
P.O. Box 514
Granite, OK 73547

June 1, 2023

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QUESTIONS PRESENTED

Active duty service members, i.e., Airmen, Soldiers, Marines, Sailors, and Space Force alike, with civilian dependents stationed in the continental United States at installations garrisoned by units of the armed forces that are under the exclusive jurisdiction of the United States, oftentimes reside in adjacent local communities outside the installation. Veterans of Foreign Wars and Veterans, after completion of service, oftentimes remain to reside in adjacent local communities, but rely on health care providers at medical facilities on the installation.

1. Whether Oklahoma Courts, under state law, can properly exercise criminal jurisdiction involving a "separable controversy", over active duty service members and dependents, and Veterans detained in state custody, based on opinions of state medical examiners where state medical examiners are without jurisdiction to conduct a forensic pathology investigation, whereas federal law provides for a complete forensic pathology investigation by the Armed Forces Medical Examiner.

2. Whether the Oklahoma Court of Appeals' legal analysis regarding claims of actual innocence comport with the Supreme Court of the United States holding in *House v. Bell*, 547 U.S. 518, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006).

3. Does the term "willful", as it is employed in the context of Okla. Stat. tit 21 Sec 701.7, subsection C, comport with Fourteenth Amendment Due Process.

——Nothing Follows——

LIST OF PARTIES

The List of Parties (Respondents) includes the following:

1. Gentner Drummond, Attorney General for the State of Oklahoma, 313 N.E. 21st, Oklahoma City, OK 73105;

2. Eric Pfeifer, Chief Medical Examiner for the State of Oklahoma, Office of the Chief Medical Examiner, 921 NE 23rd St., Oklahoma City, OK. 73105; and

3. Inas Yacoub, Medical Examiner for the State of Oklahoma, Office of the Chief Medical Examiner, 921 NE 23rd St., Oklahoma City, OK. 73105

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The Appendix includes the following documents:

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2. Appendix B, District Court for Comanche County "Order denying post-conviction relief";

3. Appendix C, District Court for Comanche County "Order denying motion to stay execution of its incomplete order";

4. Appendix D, Petitioner's stamped "Received" copy of his Motion to Recall OCCA's mandate issued on post-conviction appeal;

5. Copy of *Weimer v. State,* PC-2023-255 (Okl. Cr. May 26, 2023) (not for publication), judgment entered by OCCA on May 26, 2023.

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For the State of Oklahoma

June 1, 2023

PETITION FOR WRIT OF CERTIORARI

Petitioner, former U.S. Army First Lieutenant and Veteran of the War in Iraq, Lancey Darnell Ray, *pro se*, respectfully prays that a writ of certiorari issue to review the judgment below. Petitioner requests latitude of a layman in the above styled cause of action pursuant to this Court's holding in *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972).

OPINIONS BELOW

The decision of the Oklahoma Court of Criminal Appeals (Appendix A) affirming the state district court's Order denying post-conviction relief and denying Petitioner's applications for evidentiary hearing is not published. The decision of the District Court of Comanche County (Appendix B) denying Petitioner's application for post-conviction relief is not published. The decision of the District Court of Comanche County (Appendix C) denying Petitioner's motion to stay execution of its incomplete order denying post-conviction relief. No judgment by the Oklahoma Court of Criminal Appeals was entered regarding Petitioner's motion to recall its mandate (Appendix D).

JURISDICTION

The Oklahoma Court of Criminal Appeals entered its Order affirming denial of post-conviction relief on March 3, 2023. This Court has jurisdiction under 28 U.S.C.A. § 1257 (a), where in the petition before it, (1) the validity of a statute of the State of Oklahoma is drawn in question, (2) a right and privilege are claimed under the Constitution to the United States, and (3) a commission was held and

authority exercised under the United States. Furthermore S. Ct. Rule 10 (b) and (c) applies in the instant case.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

- This case involves the "Unreasonable Searches and Seizures" Clause of the Fourth Amendment to the Constitution of the United States.
- This case involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.
- This case also involves the following federal provisions:
  - Title 10 Armed Forces, USCA § 1471 [Forensic pathology investigations] which provides in relevant part:

> Under regulations prescribed by the Secretary of Defense, the Armed Forces Medical Examiner may conduct a forensic pathology investigation to determine the cause or manner of death of a deceased person if such an investigation is determined to be justified under circumstances described in subsection (b). The investigation may include an autopsy of the decedent's remains. . . .
>
> (A) the decedent- -
>
> (i) was found dead or died at an installation garrisoned by units of the armed forces that is under the exclusive jurisdiction of the United States
>
> (B) in any other authorized Department of Defense investigation of matters which involves the death, a factual determination of the cause of manner of the death is necessary.

  - Title 18 USCA § 1385 [Use of Army, Navy, Marine Corps, Air Force, and Space Force as Posse Comitatus] which provides in pertinent part:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses part of the Army, [...] as a posse comitatus, **or otherwise** to execute the laws

shall be fined under this title or imprisoned not more than two years, or both.

• Title 45 C.F.R. § 164.512 (e) (1) (i) (ii) [Standard: Disclosures for judicial and administrative proceedings] which provides in pertinent part:

> (1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding: (i) In response to an order of a court or administrative tribunal . . . or (ii) In response to a subpoena, discovery request or other lawful process. . . .

• Title 28 USCA, Rule 702, Federal Rules of Evidence [Testimony by Experts], in part:

> If other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

• This case further involves the following provisions of the statutes of Oklahoma in effect at the time:

• Okla. Stat. tit 12 Sec 2702 [Testimony by Experts] (12 O.S. § 2702), in part:

> If specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise, if: 1. The testimony is based upon sufficient facts or data; 2. The testimony is the product of reliable principles and methods; and 3. The witness has applied the principles and methods reliably to the facts of the case.

• Okla. Stat. tit 63, **2010**, Sec 939 [Production of records, documents, evidence or other material] (63 O.S. 2010, § 939), in part:

> Except as otherwise provided by law, the chief medical examiner shall produce records, documents, evidence or other material of any nature only upon the order of a court of competent jurisdiction.

- Okla. Stat. tit 63, **2010**, Sec 940 A, [Cooperation of state and county officials—Notification of deaths] (63 O.S. 2010, § 940 A, in part:

> All law enforcement officers **and other state and county officials** shall cooperate with the Chief Medical Examiner and all other medical examiners in making investigations . . . Said officials and the physician in attendance of the deceased . . . shall promptly notify the medical examiner of the occurrence of all deaths coming to their attention which, pursuant to the provision of Sections 931 through 954 of this title, are subject to investigation, and shall assist in making dead bodies and related evidence available for investigation.

- Okla. Stat. tit 63, **2010**, Sec 940 B, Para 1, 2 [Cooperation of state and county officials—Notification of deaths] (63 O.S. **2010**, § 940 B, Para 1, 2), in part:

> Deaths that occurred in institutions within the pathologist's purview were "[t]he death of any patient, inmate, ward, or veteran in a **state hospital** or other institution, **except Oklahoma Medical Center Hospitals and clinics thereof** shall be reported by the chief administrative officer of the hospital or institution or his designee to the Office of the Chief Medical Examiner at the time of the death and prior to release of the body.
>
> 1. Within thirty-six (36) hours, a written report shall be submitted and shall be accompanied by true and correct copies of all medical records of the hospital or institution concerning the deceased patient.
>
> 2. The Chief Medical Examiner shall have the authority to require production of any records, documents, or equipment or other items regarding the deceased patient deemed necessary to investigate the death.

- Okla. Stat. tit 63, **2010**, Sec 941 [Investigation by county examiner] (63 O.S. 2010, § 941), in part:

> [T]he investigation medical examiner shall have access at all times to any and all **medical** and dental **records** and history of the deceased, including, but not limited to, **radiographs**...in the course of his official investigation to determine the cause and manner of death.

- Okla. Stat. tit 21, Sec 92 (21 O.S. § 92):

> The term "**willfully**" when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act or the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

RELATED CASE

Weimer v. State, PC-2023-255 (Okl. Cr. May 26, 2023) (not for publication), judgment entered by the Oklahoma Court of Criminal Appeals on May 26, 2023. As in *Ray v. State,* PC-2022-1067 (March 3, 2023) (not for publication), in *Weimer* the OCCA declined to remand to the district court so that the district court could conduct the required legal analysis of Weimer's multi-prong appellate ineffectiveness claim, by comparing the 3 claims raised by appellate counsel on direct appeal with the 12 claims Weimer asserted counsel should have been raised.

Among the 12 claims Weimer asserts counsel should have raised on direct appeal are (1) a *Schlup* actual-innocence claim, (2) the state medical examiner lacked jurisdiction to conduct a forensic pathology investigation on J.P.G., who died at an installation under exclusive jurisdiction of the United States, and (3) a claim that state medical examiner Dr. Yacoub's opinion testimony was "legally insufficient".

STATEMENT OF THE CASE

1. On October 31, 2022, pursuant to 22 O.S. 2021, § 1086 [Subsequent application], Petitioner filed his third application for post-conviction relief. Petitioner relied upon the "sufficient reason" and "inadequately raised" provisions of § 1086.[1] Under his second proposition for relief regarding ineffective assistance of appellate counsel Petitioner *inter alia* presented his claim that the state medical examiner lacked jurisdiction to conduct a forensic pathologic investigation, and as a result that investigation was incomplete, hence, unreliable. Under a separate, third, proposition for relief Petitioner presented his claim of actual innocence. Moreover under Petitioner's first proposition for relief Petitioner showed as "sufficient reason", i.e., the assistant district attorney's professional misconduct, why his claim that the state medical examiner's opinion testimony was legally insufficient and that there was evidence of material facts not previously presented and heard in support thereof, was presented but not heard during a prior post-conviction proceeding. Contrary to state procedural law no response to any of Petitioner's pleadings was filed by the state.[2] Contrary to state procedural law (22 O.S. §§ 1083,

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[1] 22 O.S. 2021, § 1086 "All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for subsequent application, **unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.**"

[2] "[T]he **state shall respond** by answer or by motion which may be supported by affidavits. . . the respondent shall file with its answer the record or portions thereof that are material to questions raised in the application" 22 O.S. § 1083(a) [Response by state—Disposition of application].

1084) the state district court denied relief.[3] *See* Appendix B. Furthermore Petitioner presented a question of federal law regarding the unconstitutionality of the term "willful" as employed in the context of 21 O.S. § 701.7 C.

2. On November 14, 2022, Petitioner timely filed a motion to stay execution of the district court's order denying post-conviction relief. Petitioner argued in relevant part: (1) that the district court's "order is not in compliance with state law, i.e. 22 O.S. § 1083 (A) (B), that requires the state's response" where the state had not responded; (2) "[t]he Court's order is not in compliance with state law, i.e. 22 O.S. § 1083 (C), that requires the order state the court's findings regarding the issues presented by the Petitioner", (3) "[t]he Court's order is not in compliance with . . . *Logan v. State*, 2013 OK CR 2, 293 P. 3d 969, 976 'the reviewing court must consider the relative merit of the omitted issues, in relation to any appealed issues, in order to determine whether appellate counsel's performance was adequate'", (4) relating to Petitioner's claim of actual innocence, "there exists evidence of material facts not previously presented and heard, that requires vacation of the conviction in the interest of justice"; therefore, "Petitioner's subsequent application could not have been disposed of on the pleadings and record", and (5) the "claim of ineffective assistance of appellate counsel involves a jurisdictional issue regarding lack of jurisdiction of the Oklahoma Chief Medical Examiner".

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[3] "When a court is satisfied, on the basis of the application, **the answer or motion of respondent**, and the record . . . it may order the application dismissed" 22 O.S. § 1083 (b) [Response by state—Disposition of application]. And "[i]f the application cannot be disposed of on the pleadings and record, or **there exists a material issue of fact, the court shall conduct an evidentiary hearing** at which time a record shall be made and preserved" 22 O.S. § 1084 [Evidentiary hearing. . .]

3. On November 22, 2022 the state district court's Order denying Petitioner's motion to stay execution of the court's order was filed. *See* Appendix C. In contradiction with the order denying post-conviction relief wherein the district court stated it had "reviewed said pleadings and the response filed thereto [*sic*]", the district court's order denying the motion to stay read "[t]he Court did not require the state to respond to the application for post-conviction relief filed herein by the Defendant."

4. Petitioner timely filed with the district court a notice of intent to appeal the order denying the application for post-conviction relief.

5. On December 6, 2022 Petitioner's petition-in-error to the Oklahoma Court of Criminal Appeals (OCCA) was filed. Case No. PC-2022-1067 was assigned.

6. On December 30, 2022 Petitioner's amended petition-in-error and brief of petitioner were filed. Pursuant to Rules 5.2 (C) (7) via 3.11 (B) (3) (b) *Rule of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2022), an application for evidentiary hearing regarding ineffective assistance of appellate counsel based on evidence not in the record—showing Petitioner's actual innocence was filed; and pursuant to Rule 3.11 (A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2022),[4] an application for evidentiary hearing regarding the professional misconduct of the assistant district attorney which obstructed the due

[4] After the Petition in Error has been timely filed in this Court, and upon notice from either party or upon this Court's own motion, the majority of the Court may, within its discretion, direct a supplementation of the record, when necessary, **for a determination of any issue**; or, when necessary, may direct the trial court to conduct an evidentiary hearing on the issue. 3.11 (A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2022)

administration of the post-conviction law rendering Ray's original post-conviction proceedings fundamentally unfair, as the described conduct prevented the hearing of material fact issues that require vacation of the conviction, was filed in the Oklahoma Court of Criminal Appeals.

On post-conviction appeal Petitioner *inter alia* presented claims regarding "actual innocence", "state medical examiner's lack of jurisdiction", and "legally insufficient evidence". Petitioner relied in part on the OCCA's decision in *Slaughter v. State,* 2005 OK CR 6, ¶ 6, 108 P. 3d 1052, holding ("[T]his Court's rules and cases do not impede the raising of factual innocence claims at any stage of an appeal. We fully recognize innocence claims are the Post-Conviction Procedure Act's foundation."). Moreover the Petitioner relied on this Court's decision in *House v. Bell*, 547 U.S. 518, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006) regarding claims of actual innocence. Among the federal questions presented on post-conviction appeal was "[w]hether the statutory definition of the term 'willful' employed in the context of 21 O.S. § 701.7 (C) comport with Fourteenth Amendment due process."

7. On January 3, 2023 Petitioner, pursuant to 3.11 (A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2022),[5] filed an application for evidentiary hearing regarding the lack of jurisdiction of the state/county medical examiner (1) to conduct a lawful forensic pathologic investigation and (2) to conduct a complete forensic pathologic investigation of M. R., because, prior to his death, M.R. was initially treated at the Reynolds Army

[5] *Id.*

Community Hospital at Fort Sill and later the Oklahoma University Medical Center in Oklahoma City, where he passed away.

*** State law, § 1086 Jurisdictional Claim on post-conviction appeal.**

On January 12, 2023, the OCCA, contrary to the law at the time, denied Petitioner's application for evidentiary hearing regarding the lack of jurisdiction of the state/county medical examiner. Petitioner had presented the jurisdictional issue in his third application for post-conviction relief pursuant to the laws in effect at the time under Oklahoma's Post-Conviction Procedure Act.[6] The OCCA's denial of the application for evidentiary hearing regarding the jurisdictional issue contradicted its own reasoning in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶ 39, 497 P. 3d 686 regarding (1) a trial that has not produced an accurate picture of the accused's conduct, (2) questions of innocence that arise from the jurisdictional flaw in the petitioner's convictions, *Matloff* at 690 (¶20), (3) a state court's faulty jurisdiction affecting the procedural protections afforded at trial, *Matloff* at 694 (¶39), and (4) the consequential wrongful conviction of an innocent person because of the jurisdictional flaw. *Id.*[7] This Petitioner asserted his actual innocence.

Prior to *Matloff* however, the OCCA had long held ". . . some constitutional rights which are never finally waived. Lack of jurisdiction, for instance, can be

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[6] "Any person who has been convicted of a crime and who claims that the conviction was in violation of the Constitution of the United States or laws of this state . . . . May institute a proceeding under this act in the court in which the judgment and sentence on conviction was imposed to secure the appropriate relief." 22 O.S. 2021, § 1080.

[7] *Matloff* was decided in August 2021, in aftermath of the U.S. Supreme Court's decision in *McGirt v. Oklahoma*, ---U.S. ----, 140 S. Ct. 2452, 207 L. Ed. 2d 985 (2020).

raised at any time." *Johnson v. State*, 1980 OK CR 45, ¶ 30, 611 P. 2d 1137, 1145. *Matloff* was decided contrary to existing state law under Oklahoma's Post-Conviction Procedure Act regarding a trial court's jurisdiction.[8] The OCCA has shown that its decisions are generally consistently inconsistent. The OCCA's decisions in (1) disposing of this Petitioner's application for evidentiary hearing regarding the state medical examiner's lack of jurisdiction, and (2) Petitioner's properly presented proposition, regarding the state medical examiner's lack of jurisdiction, on appeal was contrary to that court's holding in *Woodruff v. State*, 1996 OK CR 5, n. 1, 910 P. 2d 348. In *Woodruff* the court explained that, because Petitioner's post-conviction application was filed prior to the enactment of the current post-conviction statutes, arguments must be reviewed in that context. *Id.*

Petitioner's jurisdictional issue was a matter admitted during the recent post-conviction proceedings; and pursuant to the OCCA's Rule 3.11A Petitioner applied for an evidentiary hearing.[9] Moreover the OCCA's Order denying Petitioner's application for evidentiary hearing regarding the lack of jurisdiction of the state medical examiner, where it reads "[n]or has the Petitioner shown that the

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[8] The State Legislature subsequent to the OCCA's decision in *Matloff*, enacted § 1080.1, thereby having amended Oklahoma's Post-Conviction Procedure Act to apply a "limitation period . . . irrespective of the nature of the claims raised in the application and shall include jurisdictional claims that the trial court lacked subject-matter jurisdiction" which became effective November 1, 2022. 22 O.S. § 1080.1.

[9] Rule 5.2 (7), regarding appealing final judgment under the post-conviction procedure act, prescribes "Rule 3.11 applies to any request to supplement the record in an appeal of a denial of post-conviction relief in non-capital cases." And Rule 3.11 A, provides in pertinent part "upon notice from either party . . . the majority of the Court may ...direct a supplementation of the record when necessary, for a determination of any issue."

jurisdictional issue regarding the state medical examiner was a matter admitted during the [post-conviction] proceedings in the trial court" is erroneous. Clearly the record on appeal reflected that Petitioner has presented the jurisdictional issue in the recent third application for post-conviction relief, under his claim of ineffective assistance of appellate counsel. The latter claim of ineffective assistance of appellate counsel arguably had been "inadequately raised" in prior post-conviction proceedings.[10]

8. On March 3, 2023 the OCCA affirmed the order of the District Court of Comanche County denying Petitioner's third application for post-conviction relief in Case No. CF-2010-571, and denied Petitioner's Motion for Direction of Judgment of Acquittal on the basis of insufficient evidence regarding the medical examiner's incomplete forensic pathology investigation. *Ray v. State*, PC-2022-1067 (March 3, 2023) (not for publication). *See* Appendix A.

*** State law, § 1086 "sufficient reason" claim on post-conviction appeal.**

Contrary to state procedural rules the OCCA concluded "Petitioner has not established sufficient reason for not asserting his current grounds for relief in previous proceedings." Order p. 2. In doing so the court exercised quasi-judicial power having ignored the "sufficient reason" provision of 22 O.S. 2021, § 1086. The OCCA failed to remand to the district court to conduct a proper fact-finding analysis to determine whether Petitioner had shown "sufficient reason", i.e., "a special circumstance" why material fact issues had been presented but not heard in

[10] *See* 22 O.S. § 1086, the state created provision phrased "inadequately raised in the prior application" is a gateway claim to otherwise adjudicated claims.

Petitioner's original application for post-conviction relief. *See Maines v. State,* 1979 OK CR 71, 597 P. 2d 774, 776 ("Appellant is advised that, on remand, he must articulate some 'sufficient reason,' **i.e. special circumstances**, as required by s 1086, explaining his failure to appeal in order to proceed to adjudication of the merits of his application.") (Bold emphasis added)

In the instant case, Petitioner, in all of his pleadings, had shown as **sufficient reason**, i.e., **a special circumstance**, that the assistant district attorney's professional misconduct prevented the hearing of material fact issues raised in Petitioner's original application for post-conviction relief. And that the described misconduct was in violation of Rule 3.3 (d) *Oklahoma Rules of Professional Conduct.*[11] Petitioner submitted an application for evidentiary hearing "regarding the professional misconduct of assistant district attorney which obstructed due administration of the post-conviction procedure law rendering original post-conviction proceedings fundamentally unfair", and affidavit with document in support, filed 12-30-22. The OCCA did not reach the merits of Petitioner's sufficient reason claim, thus, the claim was not "necessarily decided".

*** State law, § 1086 "inadequately raised" claim on post-conviction appeal.**

Furthermore the OCCA did not broach the subject of Petitioner's "inadequately raised" claim that appellate counsel was constitutionally ineffective where Petitioner presented issues he argued should have been raised on direct appeal. Again, in doing so the court exercised quasi-judicial power having ignored

[11] "In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse." Rule 3.3 d. *Oklahoma Rules of Professional Conduct*

the "inadequately raised" provision of 22 O.S. 2021, § 1086. The OCCA failed to remand to the district court to conduct a proper fact-finding analysis to determine whether Petitioner had shown that he had inadequately raised his claim of ineffective assistance of appellate counsel in his prior applications. *See Carter v. State,* 1997 OK CR 22, 936 P. 2d 342, 344 ("[A]ll grounds for relief must be raised in the original, supplemental or amended application **unless the Petitioner shows** sufficient reason why a ground for relief was not previously asserted or **that a ground for relief was inadequately raised in a prior application.**") (Bold emphasis added).

Moreover the OCCA's decision not to remand to the district court the Petitioner's ineffective assistance of appellate counsel claim is in conflict with its own decision in *Logan v. State,* 2013 OK CR 2, ¶ 6, 293 P. 3d 969, In Logan the court held, "that remand was required for trial court to analyze Petitioner's claim of ineffective assistance of appellate counsel through comparison of single claim raised on direct appeal with claims that Petitioner asserted should have been raised "and "[i]n analyzing such claims, the court must consider the merits of the omitted issue." *Id.*

*** Petitioner's Schlup claim on post-conviction appeal.**

Neither the state district court for Comanche County nor the OCCA made a factual determination regarding Petitioner's actual innocence claim shown with "new reliable evidence." Having ignored Petitioner's reference to evidence of medical records and radiology reports in his recent application for post-conviction relief, in

its order filed November 4, 2022, the district court stated, "[t]he Defendant/Petitioner alleges that he is actually innocent and alleges that new reliable evidence exists [*sic*]." Order p. 2. One day prior to the district court's ruling however the Petitioner, relying on this Court's decision in *House*, mailed to the district court a motion requesting evidentiary hearing regarding his actual innocence with the "new reliable evidence" attached thereto. Petitioner's request for evidentiary hearing was filed in the district court on November 7, 2022. To date his request to the district court has not been answered nor ruled on, though it was made a part of the record transmitted to the OCCA on post-conviction appeal.

On post-conviction appeal to the OCCA Petitioner renewed his request with an application for evidentiary hearing nonetheless titled "ineffective assistance of appellate counsel based on evidence not in the record—**showing evidence in direct contradiction with the evidence the state presented at trial which shows petitioner's actual innocence**" filed 12-30-2022. The OCCA did not make a ruling on Petitioner's application.

In its order affirming denial of post-conviction relief, though the OCCA held its, "rules and cases do not procedurally bar the raising of factual innocence claims in a post-conviction application", contrary to *Schlup*, the OCCA concluded "[t]he post-conviction record lacks sufficient evidence to support a conclusion of factual innocence." Order p. 3.

9. Pursuant to Rule 3.15 B [Mandate stayed], Petitioner timely submitted to the Clerk of the Appellate Courts (OCCA), his "Motion to Recall the Mandate". The

motion was stamped "Received APR-5 2023 Clerk's Office", but not filed and returned to Petitioner with a copy of Rule 5.5 attached. For a second time Petitioner submitted said motion, but to the Presiding Judge for the OCCA with a letter dated April 10, 2023. Again Petitioner's motion was not filed, but stamped "Received APR 13 2023 Clerk of the Appellate Courts" and returned to Petitioner with a copy of Rule 5.5 attached.

Rule 5.5, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2022), specifically disallows a petition for rehearing of the issues raised in the petition in error, brief and any prior appeals after the OCCA has rendered its decision on a **post-conviction** appeal. The rule further states "[t]he Clerk of this Court shall return to the movant any petition for rehearing tendered for filing." No rule however disallows a motion to recall the mandate on a post-conviction appeal.

Rule 3.15 B however provides in part "[t]he mandate shall not be recalled . . . unless a majority of the Court, **for good cause shown**, recalls or stays the mandate." (Emphasis added). And the court itself has held "[t]he mandate may be recalled after it is spread upon the records of the trial court where there has been . . . **inadvertence** . . . in connection with the issuance of the mandate" and "it is competent for it to determine whether it will resume jurisdiction **for any purpose**, and having decided to do so, it may then request the court below to return the mandate so that re-argument may be had . . ." (Emphasis added) *Denton v. Hunt*, 79 Okla. Crim. 166, 152 P. 2d 698, 700.

In Petitioner's motion to recall the mandate he argued in part, that "the fundamental standard of review with respect to a petitioner asserting actual innocence as a gateway to defaulted claims in light of new reliable evidence that was not presented at trial" is *House v. Bell*, 547 U.S. 518, 519, 126 S. Ct. 2064, 164 L. Ed. 2d 1 ("Because a Schlup claim involves evidence the jury did not have before it, the inquiry requires the court to assess how reasonable jurors would react to the overall newly supplemented record" and "the standard does not address a district court's independent judgment as to whether reasonable doubt exists."), And "[t]o be credible a gateway claim requires new reliable evidence . . . that was not presented at trial."

Wherefore because Petitioner's motion to recall the mandate was not filed in the appellate court, thus not made a part of the record, Petitioner has provided the stamped received copy of the motion to recall as Appendix D.

Reasons for Granting the Petition

Active duty service members, i.e., Airmen, Soldiers, Marines, Sailors, Space Force, and Veterans of Foreign Wars alike, with civilian dependents stationed in the continental United States at installations garrisoned by units of the armed forces that are under the exclusive jurisdiction of the United States, oftentimes temporarily reside in housing within the local community off the installation. Service members and Veterans rely heavily on health care providers working at medical facilities on installations garrisoned by units under the exclusive jurisdiction of the United States.

A case in point, regarding Oklahoma's Office of the Chief Medical Examiner lack of jurisdiction to investigate deaths of persons who either died at or were treated at an installation garrisoned by units under the exclusive jurisdiction of the United States, is of importance in that on May 26, 2023, the Oklahoma Court of Criminal Appeals decided *Weimer v. State*, PC-2023-255 (Okl. Cr. May 26, 2023) (not for publication).

The circumstances and the case against *Weimer* was very close similar to the case against this Petitioner: (1) the OCCA declined to address the jurisdictional issue regarding the state medical examiner's lack of jurisdiction, (2) the OCCA declined to address the "legally insufficiency" evidence claim regarding the opinion testimony of Dr. Yacoub, (3) Weimer is a Veteran of the War in Iraq, (4) Weimer took the son of his live-in girlfriend to the Reynolds Army Community Hospital at Fort Sill for emergency medical treatment where he died, (5) state medical examiner Dr. Yacoub conducted the forensic pathology investigation, i.e., autopsy though she had not reviewed the medical records generated at the Reynolds Army Community Hospital on J.P.G., (6) Weimer was tried in the state district court for Comanche County, and (7) Weimer is Filipino, otherwise a person of color.[12]

Therefore the importance of this case is not only important to the Petitioner but to other active duty service members and Veterans alike.

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[12] The significance of the latter demonstrates "confirmation bias" on the decision of the medical examiner. A 2021 study in the *Journal of Forensic Science* revealed "that for unnatural deaths (those which are usually examined) examiners were more likely to attribute the deaths of Black children to homicide and white children to accidents." DROR, 1, Melinek J. Arden JL, et al. "Cognitive bias in forensic pathology decisions." *J Forensic Science*, 2021; 66: 1751-1757

I. OKLAHOMA COURTS, UNDER STATE LAW, CANNOT PROPERLY EXERCISE CRIMINAL JURISDICTION INVOLVING A "SEPARABLE CONTROVERSY", OVER ACTIVE DUTY SERVICE MEMBERS AND DEPENDENTS, AND VETERANS DETAINED IN STATE CUSTODY, BASED ON OPINIONS OF STATE/COUNTY MEDICAL EXAMINERS THAT ARE WITHOUT JURISDICTION TO CONDUCT A FORENSIC PATHOLOGY INVESTIGATION; WHEREAS FEDERAL LAW PROVIDES FOR A COMPLETE FORENSIC PATHOLOGY INVESTIGATION BY THE ARMED FORCES MEDICAL EXAMINER.

The OCCA's decision in *Ray v. State*, PC-2022-1067 (March 3, 2023) (not for publication), is in conflict with its own recent decision in *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶ 39, 497 P. 3d 686. In *Matloff* the OCCA, regarding a faulty jurisdiction, suggested, if: (1) The trial had not produced an accurate picture of the accused's conduct, (2) questions arise about the truth-finding function, (3) procedural protections were affected because of the jurisdictional flaw, and (4) the proceedings resulted in the wrongful conviction or punishment of an innocent person: A reversal of the final conviction would be just. Consequently the OCCA's decision in *Ray v. State,* PC-2022-1067 (March 3, 2023) conflicts with its own decision in *Matloff*; therefore, S. Ct. Rule 10 (b) applies.

The OCCA's decision in *Ray v. State*, PC-2022-1067 (March 3, 2023) (not for publication) regarding the jurisdictional issue which prevented a complete forensic pathology investigation by the state medical examiner, was in conflict with this Court's relevant decision in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed 2d 560 (1979); therefore, S. Ct. Rule 10 (c) applies.

Furthermore the OCCA decided an important question of federal law regarding Petitioner's jurisdictional issue that has not been, but should be settled by the Supreme Court for the United States. Supreme Court Rule 10 (c).

In *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P. 2d 202, 203-04, the OCCA adopted the criteria for review of sufficiency of evidence claims articulated in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 61 L. Ed 2d 560 (1979) ("[W]hether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier o fact could have found the essential elements of the crime charged beyond a reasonable doubt."). And that criterion requires a determination whether **record evidence** could reasonably support a finding of guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S., at 318, 99 S. Ct., at 2789. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony. *Jackson* at 319, 99 S. Ct., at 2789. And upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law. *Id.*

Bearing in mind, absent an order from a court of competent jurisdiction, the state medical examiner lacked jurisdiction to access medical records generated at the Reynolds Army Community Hospital at Fort Sill; [13] moreover, under state law at the time the state medical examiner lacked jurisdiction to conduct an autopsy on

[13] *See* 45 C.F.R. § 164.512 (e) [Standard: Disclosures for Judicial and Administrative proceedings]

a decedent or access medical records and radiology reports generated at the Oklahoma University Medical Center in Oklahoma City.[14]

In *Bosse v. State*, 2017 OK CR 10, ¶ 79, 400 P. 3d 834, 862, citing state law, 63 O.S. § 941 [Investigation by county examiner], the OCCA recognized the state forensic pathology investigation "includes a physical examination of the body of the deceased, collection of physical specimens from the body, review of medical records...".[15] The state medical examiner in the case against Petitioner testified detailing a forensic pathology investigation, "[d]epending on what case we have at hand, we collect some information, what's known about this case, what's the story, what are the circumstances of death . . . And this information is obtained, we can get from the medical records..." (Tr. Vol. 3. p. 27). That statement by state medical examiner Dr. Yacoub regarding information obtained from medical records, is in conflict with her statement that, "I have not seen this child, treated him and put him on monitors and measured his heart rate and breathing and pulse and blood pressure, monitoring him while he's alive. I'm observing him after he has passed away . . . How did those injuries [*sic*] make a person die? . . . . not being the treating

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[14] Okla. Stat. tit 63, **2010**, Sec 940 B provided for a forensic pathology investigation, "[t]he death of any patient, inmate, ward, or veteran in a **state hospital** or other institution; except Oklahoma Medical Center Hospitals and Clinics thereof; shall be reported . . . to the Office of the Chief Medical Examiner. . ."

[15] Okla. Stat. tit 63, **2010**, Sec 941 provides: [t]he investigation medical examiner shall have access at all times to any and all **medical** and dental **records** and history of the deceased, including, but not limited to, **radiographs**...in the course of his official investigation to determine the cause and manner of death.

physician to say that he dropped his blood pressure because of those injuries, I'm after that stage" (Tr. Vol. 3 p. 61).[16]

Dr. Yacoub had not reviewed any of the medical records generated at the Reynolds Army Community Hospital at Fort Sill; neither had Dr. Yacoub reviewed the medical record, the radiology report nor the specimen inquiry generated at the Oklahoma University Medical Center in Oklahoma City. The information regarding M.R.'s heart rate, blood pressure, pulse, **et cetera**, necessary to conduct a complete forensic pathology investigation, were documented in the medical records generated at the respective hospitals—hospitals Dr. Yacoub lacked the jurisdiction to conduct a forensic pathology investigation, absent an order from a court of competent jurisdiction.

A reasonable review pursuant to *Jackson*, supra, of Dr. Yacoub's conflicting testimony, regarding the methodology employed in the forensic pathology investigation and what the pathologist actually reviewed (or not), was required to determine whether the pathologist's testimony supported a finding of guilt beyond a reasonable doubt. A reasonable view of Dr. Yacoub's testimony would not permit a rational jury to convict—given the substantial conflict in the state pathologist's testimony. Given the jurisdictional issue complained of on post-conviction appeal, which inherently made for the legally insufficient opinion testimony of the state medical examiner, the OCCA's decision not to conduct a review pursuant to *Jackson*

[16] The state medical examiner, Dr. Yacoub, testified in the form of an opinion. *See* 12 O.S. § 2702 [Testimony by Expert].

is in conflict with this Court's decision in *Jackson* regarding claims of insufficient evidence.

The OCCA's decision regarding the Petitioner's sufficiency of evidence claim is in conflict with its own decision in *Taylor v. State*, 1995 OK CR 10, 889 P. 2d 319; therefore, S. Ct. Rule 10 (b) applies. In *Taylor* the court decided to "abandon the *Frye* test and adopt the more structured and yet flexible admissibility standard set forth in Daubert,"[17] and in deciding *Taylor* it relied on 12 O.S. § 2702 [Testimony by Experts]. The OCCA noted "[w]e have previously considered federal opinions in interpreting our State Evidence Code provisions.[18] *Taylor v. State*, 1995 OK CR 10, n. 29, 889 P. 2d 319. *See also United States v. Campbell*, 963 F. 3d 309, 314 (4th Cir. 2020) (Applying medical expertise to form an opinion on the cause of death is often the types of **specialized knowledge** that can help a jury.)

The OCCA's decision regarding Dr. Yacoub's legally insufficient testimony is in conflict with the Standard of Review explained by the Tenth Circuit court of appeals in *U.S. v. Avitia-Guillen*, 680 F. 3d 1253, 1256 (10th Cir. 2012). On post-conviction appeal the OCCA generally held, "[a]ll issues previously ruled upon are *res judicata*, and all issues not raised in the direct appeal and previous application for post-

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[17] In *Taylor* the OCCA explained "[s]hortly after the evidentiary hearing in this case, the United States Supreme Court held in *Daubert v. Merrell Dow Pharmaceuticals* that *Frye* had been superseded by the Federal Rules of Evidence and most specifically by Rule 702." *Id.*

[18] Oklahoma's 12 O.S. § 2702 is identical to Rule 702 in that it is a counterpart section in Federal Rules of Evidence. *See Beck v. State*, 824 P. 2d 385, 389 (Okl. Cr. 1991) (concluding that in the absence of state cases interpreting a particular section of the Evidence Code this court will look to United States Supreme Court's construction of counterpart section in Federal Rules of Evidence).

conviction relief, that could have been raised, are waived." Order p. 2. The issue of Dr. Yacoub's legally insufficient testimony though raised in the original application for post-conviction relief was *not* **necessarily decided**. Regarding this particular claim however the Tenth Circuit has held, "We review de novo whether the district court applied the proper standard in admitting expert testimony" and "[w]e review de novo whether the court actually performed its gatekeeper role in the first instance." *U.S. v. Avitia-Guillen*, 680 F. 3d 1253, 1256 (10th Cir. 2012).

The OCCA held "[t]he admission of expert testimony is governed generally by 12 O.S. 1981, § 2702 which provides that [i]f scientific, technical or other **specialized knowledge** will assist the trier of fact to understand the evidence or **to determine a fact in issue**, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise." *Taylor* at 326 (¶ 14) (Bold emphasis added).

The lead detective in the case against Ray had obtained medical records from the Reynolds Army Community Hospital in violation of 45 C.F.R. § 164.512 (e) (1) (i) (ii) supra, as well as the Posse Comitatus Act, i.e., 18 USCA § 1385 supra. The detective admitted as much:

> Q: How long did you spend out there at the hospital?
> A: Possibly 45 minutes to an hour.
> Q: What did you do during that period of time?
> A: We talked to Dr. Ware, got a brief statement from him. Talked to Dr. Tolson, got a brief statement with him. **We utilized Agent Kroll to start gathering medical records for [M.R.'s] visit that night at the hospital.**

Tr. Vol. 3 p. 9

The Eighth Circuit in *Bissonette v. Haig*, 776 F. 2d 1384, 1386, 54 USLW 2288 (8th Cir. 1985) held:

> [T]he decisions of the Supreme Court embody certain limitations of the use of military personnel in enforcing the civil law, and that searches and **seizures** in circumstances which exceed those limits are unreasonable under the Fourth Amendment.

The detective had in fact seized the medical records regarding M.R. contrary to the Fourth Amendment against unreasonable seizure.

Dr. Yacoub reasonably should have known that she was acting contrary to 63 O.S. **2010**, § 940 B. Dr. Yacoub testified:

> So before we assume jurisdiction on a case, we - - **once our investigator gets a death call they determine is this a case that falls under our jurisdiction**, the office's jurisdiction or not...Why is this person here, what is the complaint about this case, **why are we taking jurisdiction.**

Tr. Vol. 3 Pp. 26, 27

Dr. Yacoub, as shown herein above, nonetheless failed to access the medical records generated at Fort Sill which in fact documented evidence in direct contradiction with her opinion testimony at trial. Furthermore the post-conviction appeal record shows that medical records from the Oklahoma University Medical Center (OUMC) were faxed to the Office of the District Attorney for Comanche County from OUMC the morning of 27 December 2010. Petitioner was arraigned on one count of second degree murder in the District Court of Comanche County the late afternoon of 27 December 2010. Dr. Yacoub had failed to access the OUMC medical records.

A. The OCCA's decision regarding the state medical examiner's insufficient opinion testimony is in conflict with the circuit courts.

The OCCA's decision not to order remand for an evidentiary hearing regarding the state medical examiner's lack of jurisdiction—which, in the instant case, inherently involved the issue of an incomplete forensic pathology investigation—was a decision of an important federal question of federal law that is in conflict with the United States court of appeals decisions in *Claar v. Burlington N.R.R.*, 29 F. 3d 499, 502 (9th Cir. 1994) and *In re Paoli R. R. Yard PCB Litig.*, 35 F. 3d 717, 745 (3d Cir. 1994). S. Ct. Rule 10 (b) applies.

In *Claar* the district court had found that neither of the two doctors that testified in the proceedings made any effort to rule out other possible cause for the injuries even though they admitted that this step would be standard procedure before arriving at a diagnosis, and because the doctor's failed to review certain other records they could only testify reliably to certain conditions. Likewise was the case against Ray where the state medical examiner had not reviewed "certain other records".

In *In re Paoli R. R. Yard PCB Litig.*, the court held that "any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology."

B. The OCCA's decision regarding ineffective assistance of appellate counsel regarding medical evidence not considered by the medical examiner is in conflict with its own previous decision.

The decision of the OCCA in *Ray v. State*, PC-2022-1067 (March 3; 2023) (not for publication) is in conflict with its previous decision in *Brafford v. State*, PC-2014-803 (Okl. Cr. September 11, 2015) (not for publication), to the extent the court in *Ray* failed to remand for evidentiary hearing regarding the radiology reports the Dr. Yacoub had not reviewed. Information in the radiology reports concerning M.R., is in direct contradiction with what Dr. Yacoub testified at trial.

Brafford was convicted of killing her fourteen month old stepson. On post-conviction appeal the OCCA reversed the district court's order denying post-conviction relief and remanded for an evidentiary hearing for the district court to address the allegation of the ineffectiveness of trial counsel predicated upon an allegation of the failure of trial counsel to either properly utilize available evidence or adequately investigate to identify medical evidence the state medical examiner had not reviewed.

Eventually in *Brafford* the OCCA reversed and remanded the case for a new trial based on (1) a showing of actual innocence and (2) the medical examiner who conducted the autopsy had not considered all available evidence, i.e., radiology report, at the time he conducted his forensic pathology investigation. *Brafford v. State,* PC-2014-803 (Okl. Cr. March 26, 2019) (not for publication). The OCCA however utilized the "newly discovered standard".

Petitioner likewise on post-conviction appeal presented separate claims that (1) he is actually innocent, (2) the state medical examiner lacked jurisdiction, and (3) because the medical examiner lacked jurisdiction, she was prevented from

conducting a complete forensic pathology investigation which should have included a review of the medical records, radiology reports, and specimen inquiry of M. R., (4) appellate counsel was ineffective for not raising the issues on appeal.

Similar to *Claar* and *Brafford* the medical examiner in the case against Ray had *not* considered certain medical records, radiology report, and specimen inquiry.

C. The OCCA's decision is in conflict with this Court's decision in Burks v. United States, 437 U.S. 1, 18.

The OCCA's decision not to conduct the required determination regarding whether the record testimonial evidence of Dr. Yacoub's opinion could reasonably support a finding of guilt beyond a reasonable doubt circumvented the only just remedy according to this Court's decision in *Burks v. United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L. Ed. 2d 1. S. Ct. Rule 10 (c) applies. The Court in *Burks* held, "[T]he the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only 'just' remedy available for that court is the direction of a judgment of acquittal." *Burks* 437 U.S. 1 at 18.

Ultimately, because Petitioner showed that the medical examiner's forensic pathology investigation was incomplete because of the jurisdictional flaw, and as a consequence the evidence was legally insufficient to sustain a conviction as the medical examiner's opinion testimony was not based upon sufficient fact and data nor had she applied forensic pathology principles and methods reliably to the facts of the case, the only just remedy available for the OCCA was the direction of a judgment of acquittal. *Burks* at 437 U.S. 1, at 18

II. THE TERM "WILLFUL" AS EMPLOYED IN THE CONTEXT OF OKLA. STAT. TIT 21 SEC 701.7 (C) DOES NOT COMPORT WITH FOURTEENTH AMENDMENT DUE PROCESS.

Petitioner reasonably believes the question regarding the unconstitutionality of the term "willful" is an important question of federal law that should be settled by this Court. S. Ct. Rule 10 c.[19] The OCCA failed to address Petitioner's question of federal law regarding the unconstitutionality of the term "willful" as employed in the context of 21 O.S. § 701.7 C. And there exists a conflict between the terms, i.e., distinct elements "willful" and "malicious" which are employed in the context of a 21 O.S. § 701.7 C death of a child.

Under § 701.7 C, in relevant part, "[a] person commits murder in the first degree when the death of a child results from the willful or malicious injuring . . . or using of unreasonable force by said person. . . .It is sufficient for the crime of murder in the first degree that the person either . . . used unreasonable force upon the child or maliciously injured or maimed the child."

The conflict needs to be settled where the term "willful" connotes a general intent crime but "malicious" used in the same text connotes specific intent; therefore, S. Ct. Rule 10 (c) applies. *See* 21 O.S. § 95 [Malice-Maliciously]: "The terms 'malice' and 'maliciously,' when so employed, import a wish to vex, annoy or injure another person, established either by proof or presumption of law." Whereas per 21 O.S. § 92 [Willfully defined], provides in relevant part: "The term 'willfully'

[19] "[A] state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

when applied to the intent with which an act is done or omitted . . . does not require any intent to violate law, or to injure another."

The majority in *Fairchild v. State,* 1999 OK CR 49, ¶ 51, 998 P. 2d 611, 622-23, acting as a super-legislature, created the existing conflict. The majority overruled *Hockersmith* and *Bannister.* In so doing the court changed the law. It held that the intent to injure mentioned in previous cases means only that general intent is included within the terms "willfully" with "injure" in the context of 21 O.S. § 701.7 C does not require a specific intent to injure, but only a general intent, included in the term willfully, to commit the act which causes the injury. *Fairchild* at 622-23 (¶ 51).

In *Hockersmith v. State,* 1996 OK CR 51, ¶ 11, 926 P. 2d 793, 795 the OCCA quoting *Drew v. State,* 1989 OK CR 1, ¶ 16, 771 P. 2d 224, held: Where the prosecution attempts to utilize ¶ 701.7 C for a murder conviction, it must first establish that all of the elements of child abuse under 21 O.S. 1981, § 843[.5][20] are proved beyond a reasonable doubt. Included among those elements is the requirement that the acts be committed in a willful or malicious manner. *Hockersmith* at 795 (¶ 11).

Moreover the Court held that instruction defining the term "willful" as not requiring any intent to violate the law, or to injure another, or to acquire any advantage created conflict with statute establishing penalty for crime, which requires specific intent, and was improper. *Hockersmith* at 795 (¶12). That definition nonetheless is the language used by the State Legislature when it created

[20] Section 843 has since been renumbered to 843.5.

of 21 O.S. § 92, [Willfully defined]. Section 92 reads in relevant part, "It does not require any intent to violate law, or to injure another, or to acquire any advantage." Furthermore the OCCA acknowledged an "elimination of the intent to injure included in [the] definition [of willful] is contradictory to the statutory language of § 843 and its **specific intent**." *Hockersmith* at 795 (¶ 12).

In *Bannister v. State*, 1996 OK CR 60, ¶ 5, 930 P. 2d 1176, the OCCA reasoned: "Considering the context and terms employed in the child abuse murder statute, one cannot be guilty of this crime unless he or she intends to injure, torture, maim or use unreasonable force on a child. These instructions effectively and unconstitutionally relieved the State of its burden to prove all the elements of the crime charged beyond a reasonable doubt." *Bannister* at 1178 (¶ 5). The court further explained, "[t]he definition of "willful" as provided both by statute and in the uniform instructions, is at odds with the plain meaning of that term as it is used in the statutes defining the crimes of child abuse and first degree child abuse murder. Accordingly, this definition of "willful" should not be included in jury instructions when the accused has been charged with either child abuse or first degree child abuse murder. Defendants facing charges of either child abuse or first degree child abuse murder are thus entitled to have their juries instructed that both "willful" and "malicious"—collectively the *mens rea* component in each of these crimes require a wish or an intent to injure, vex or annoy another person. *Bannister* at 1178, 1179 (¶ 6).

A. OCCA Presiding Judge Strubhar's dissent in *Fairchild* recognized the constitutional quandary created by the majority.

In dissent in *Fairchild* presiding Judge Strubhar explained, "[W]illfully as defined in section 92 connotes general intent rather than specific intent. The terms 'malice' and 'maliciously' when used in a criminal statute mean 'a wish to vex, annoy or injure another person, established either by proof or presumption of law.' 21 O.S. 1991, § 95. Said definitions of 'willfully' and 'maliciously' are to be employed throughout Title 21 unless a different sense plainly appears. 21 O.S. Supp. 1997, § 91." *Fairchild v. State*, 1999 OK CR 49, ¶ 2, 998 P. 2d 611, 633 (Strubhar, P.J., dissenting).

Referring to *Hockersmith* presiding Judge Strubhar explained, "the Court correctly concluded the statutory definition of 'willful' did not comport with the crime of child abuse and that a 'different sense of willful plainly appeared in this context. 21 O.S. Supp. 1997 § 91.'"[21] *Fairchild* at 633 (¶ 3) (Strubhar, P.J. dissenting).

Attempting to resolve the conflict where clearly the statutory definition of willful employed in the context of 21 O.S. § 701.7 C does not comport with said criminal statute, the phrase "or to injure another" was removed from the definition in Instruction No. 4-39 OUJI-CR (2d) (Supp. 1997, now 4-40D, OUJI-CR 2d). *Fairchild* at 626 (¶ 75). In that instance the OCCA effectuated the change in the

[21] *See* 21 O.S. § 91 "Wherever the terms mentioned in the following sections are employed in this title, they are deemed to be employed in the senses hereafter affixed to them, **except where a different sense plainly appears.**"

present law. Whereas the Oklahoma State Legislature's role is to create a definition for "willful" to be employed in the first degree murder context involving the injuring of a child.

Although the majority in *Fairchild* overruled the *Hockersmith* and *Bannister* decisions, it directed the definition of willful, absent the phrase "or to injure another", should continue to be used in prosecution for the felony murder of a child under 21 O.S. § 701.7 C. *Fairchild* at 626 (¶ 75).

Quoting *Hockersmith,* Presiding Judge Strubhar wrote in part, "While 21 O.S. 1991 § 92 then provides that a person may act 'willfully' and yet not intend to injure, 'a different sense of the term 'willfully' plainly appears' when it is used in the statutes on child abuse and first degree child abuse murder. As employed in those statutes, the term willful—used interchangeably with malicious—must require an intent to injure if the mens rea element for those crimes is to make any sense. *Fairchild* at 634 (¶ 3) (Strubhar, P.J. dissenting).

B. OCCA Judge Chapel dissent in *Fairchild* recognized the constitutional quandary created by the majority.

Also in dissent of the majority's decision in *Fairchild* was Judge Chapel. Judge Chapel wrote in part, "I have concluded our case law clearly holds that child abuse murder by willful use of unreasonable force is a specific intent crime." *Fairchild* at 636 (¶ 1) (Chapel, J., dissenting).

Judge Chapel explained, "The narrow question raised in *Fairchild* is whether 'willful use of unreasonable force' requires specific intent . . . If not, this Court has [just] held a general intent crime is eligible for the death penalty without any

finding of intent to injure or kill, or any showing of reckless disregard or indifference to the value of human life." *Fairchild* at 637 (¶ 3) (Chapel, J., dissenting).

Further Judge Chapel explained, "The majority concludes that child abuse murder is a general intent crime. However, this conclusion creates not only a logical anomaly, but a serious constitutional error. This Court cannot and should not make a general intent crime eligible for the death penalty. The majority merely concludes that a defendant who actually kills may be death-eligible without any finding of intent to kill or even injure. This conclusion is constitutionally unsound. The Supreme Court has never upheld such a conclusion and has strongly indicated it will not so rule. *Fairchild* at 637 (¶ 4) (Chapel, J., dissenting).

Petitioner therefore submits to this Court that the majority's unprecedented conclusion that first degree murder under 21 O.S. § 701.7 C is a general intent crime, was indicative of a super–legislature where the majority in *Fairchild* has undone a clear legislature decision, in order to make first degree murder under 21 O.S. § 701.7 C a specific intent crime. Compare *Hoover v. State*, 2001 OK CR 16, ¶ 2, 29 P. 3d 591, 596-97 where Judge Lile acknowledged, "[t]oo often, this Court has acted as a super legislature and modified legislature enactments to fit its own views on policy grounds rather than upon constitutional grounds. Under our system of government, a properly enacted legislative directive is law, unless it is unconstitutional. This Court does not have the legal right, nor the moral

prerogative, to out legislate the legislature." *Hoover* at 596-97 (¶ 2). (Lile, J., dissenting)

Having concurred in result in the original opinion which affirmed *Fairchild*, Judge Chapel dissented on Rehearing. As stated by Judge Chapel, "[t]hat vote was based upon a very, very narrow resolution of the intent issue." *Fairchild v. State*, 1999 OK CR 49, ¶ 1, 998 P. 2d 611 (Chapel, J., dissenting). Judge Chapel explained, that the OCCA had never reached the issue of "intent" necessary to support death-eligibility. In the case of *Wisdom v. State*, 1996 OK CR 22, 918 P. 2d 384, Wisdom beat his stepson to death and was convicted of child abuse murder by "use of unreasonable force." The OCCA rejected Wisdom's Enmund/Tison argument using a remarkably facile analysis.[22] The OCCA nevertheless reversed the death conviction and remanded the sentence on other grounds. As stated by Judge Chapel, "[t]hus, the United States Supreme Court did not have the opportunity to review this dubious pronouncement." *Fairchild* at 637 (¶ 6) (Chapel, J., dissenting).

Therefore, because the majority in *Fairchild* concluded that child abuse murder is a general intent crime, but did not explicitly make the felony-murder analogy the question of intent provoked by the term "willful" which is at odds with the term "maliciously", where both are employed in the context of 21 O.S. § 701.7 C, is a question of federal law that has not been, but should be settled by the Supreme Court of the United States.

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[22] *See Enmund v. Florida*, 458 U.S. 782, 800, 102 S. Ct. 3368, 3378, 73 L. Ed. 2d 1140 (American criminal law has long considered a defendant's intention and therefore his moral guilt to be critical to the degree of his criminal culpability, and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing.)

III. THE OCCA's LEGAL ANALYSIS REGARDING CLAIMS OF ACTUAL INNOCENCE DOES NOT COMPORT WITH THE SUPREME COURT OF THE UNITED STATES HOLDING IN HOUSE V. BELL, 547 U.S. 518, 126 S. CT. 2064, 165 L. ED. 2D 1 (2006)

The Oklahoma Court of Criminal Appeals decision regarding this Petitioner's actual innocence claim conflicts with the decision of the United States Court of Appeals for the Tenth Circuit. S. Ct. Rule 10 (b). Furthermore the OCCA decided the issue in a way that conflicts with this Court's decision in *House v. Bell*, 547 U.S. 518, 126 S. Ct. 2064, 165 L. Ed. 2d 1.

A. Circuit Courts are split on what constitutes "new evidence" presented with a Schlup claim.

The OCCA's decision presents two problems with the OCCA's analysis which is in conflict with the Tenth Circuit's decision in *Fontenot*. The Tenth Circuit Court addressed both problems in *Fontenot*. Circuit courts are split on whether the evidence must be newly discovered or whether it is sufficient that the evidence was not presented to the fact finder at trial. *Fontenot* at 1032. In *Fontenot*, regarding "new" evidence the Tenth Circuit court adopted the "newly presented" view of *Schlup* evidence. *Fontenot* at 1032 (10th Cir. 2021).

The actual innocence exception serves as an unconditional safety net to ensure that constitutional claims receive consideration. Disallowing new evidence from being used in support of a *Schlup* claim if that evidence was always within the

reach of a petitioner's personal knowledge erects a cause barrier where the Supreme Court has made clear that one does not belong. *Fontenot* at 1033 (10th Cir. 2021).[23]

Furthermore the Tenth Circuit explained "adding diligence to the new evidence requirement does nothing to further its purpose. The aim is to lend credibility to the claim of innocence by showing it is not based solely on evidence a jury has already found sufficient to convict the petitioner." *Fontenot* at 1033. To be credible an actual innocence claim requires petitioner to support his allegations of constitutional error with new reliable evidence that was not presented at trial. Whether the petitioner's jury could have heard the new evidence if he had been diligent in developing and presenting it is beside the principal point of avoiding a manifest injustice. *Fontenot* at 1033, citing *Schlup*. As mentioned the circuit courts are split on what is new evidence for purposes of an actual innocence claim under *Schlup*.

B. The OCCA's decision concerning actual innocence regarding new evidence is in conflict with the Tenth Circuit Court's decision in Fontenot.

Slaughter v. State, 2005 OK CR 6, ¶ 6, 108 P. 3d 1052, 1054 was decided March 10, 2005 whereas *House* was decided June 12, 2006. Citing *Slaughter*, according to the OCCA in its order affirming the district court's denial of post-conviction relief regarding Petitioner's actual innocence claim: "The actual

[23] This Supreme Court is reminded nonetheless that, as shown as a "sufficient reason" during recent state post-conviction proceedings, this Petitioner's "new evidence" was presented during original post-conviction proceedings but prevented, by an assistant district attorney's, who not named here, professional misconduct, from being heard by the district court. The record on post-conviction appeal with the OCCA should reflect.

innocence exception is applicable only to factual innocence, where a petitioner can make a **colorable showing** he is actually innocent of the crime for which he is convicted. Petitioner's assertions fail to meet this standard." (Emphasis added) Order p. 2

The OCCA, in its reference to a colorable showing, also relied in part on *Slaughter* supra, having applied the "clear and convincing" standard of review to this Petitioners actual innocence claim. Clearly the OCCA's decision regarding this Petitioner's actual innocence claim conflicts with the decision of the United States Court of Appeals for the Tenth Circuit. S. Ct. Rule 10 (b). In *Fontenot v. Crow*, 4 F. 4th 982, 1030 (10th Cir. 2021), quoting *Schlup v. Delo*, 513 U.S. 298 115 S. Ct. 851 130 L. Ed. 2d 808 (1995), the Tenth Circuit Court of Appeals held, "[t]he showing of 'more likely than not' imposes a lower burden of proof than the 'clear and convincing' standard. Thus a petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict."

Whereas Petitioner had relied on *Slaughter* to the extent factual innocence claims can be raised at any stage of an appeal, the OCCA in deciding Petitioner's case relied in part wherein it was held "we continue to find the evidence presented at trial and on appeal does not support or make a clear and convincing showing of factual innocence." *Slaughter* at 1054 (¶6). Where the OCCA recently held in *Ray* that he failed to "make a **colorable** showing he is actually innocent" (Order p. 2, Appendix A), it did in fact, apply the "clear and convincing" standard to his claim of

actual innocence. Colorable, *adj.* 1. (Of a claim or action) appearing to be true, valid, or right <the pleading did not state a colorable claim>, *Black's Law Dictionary* Eighth Edition.

Further the OCCA acknowledged, at best, the existence of "medical records and radiology reports from Oklahoma University Medical Center and Reynolds Army Community Hospital." Order p. 3. And that the "petitioner alleges" those documents "are new reliable evidence." *Id.* The court however held, "[p]etitioner fails to assert any facts or supporting documentation that the records are **new evidence** and **could not have been raised as error in prior appeals.** The post-conviction record lacks sufficient evidence to support a conclusion of factual innocence." (Emphasis added) Order p. 3.

That decision was also in conflict with *Fontenot,* where citing *House,* the Tenth Circuit held, "[i]n assessing the adequacy of a petitioner's showing . . . the innocence inquiry requires a holistic judgment about all the evidence and its likely effect on reasonable jurors applying the reasonable-doubt standard." *Fontenot* at 1032. And that "[d]isallowing new evidence from being used in support of a Schlup claim if it was always within the reach of a Petitioner's personal knowledge or reasonable investigation would hinder a court from determining whether a federal constitutional error resulted in the incarceration of an innocent person. *Fontenot* at 1033. Therefore Petitioner's question regarding the OCCA's analysis of a *Schlup* claim and its decision warrants resolution by this Court.

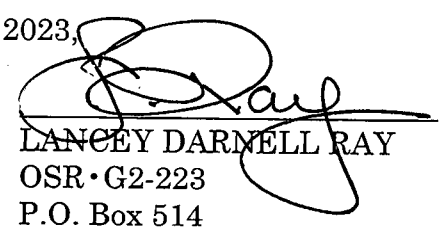
The federal claims presented hereinabove were properly presented to the OCCA, the highest state court that rendered the decision Petitioner asks this Court to review. *Howell v. Mississippi*, 543 U.S. 440, 443, 125 S. Ct. 856, 160 L. Ed. 2d 873 (2005).

CONCLUSION

Petitioner reasonably believes the petition for a writ of certiorari should be granted, and that this Court should hold the following:

1. That "new evidence" in support of a Schlup claim means evidence the trial jury did not have before it, which requires a holistic judgment about all the evidence old and new and its likely effect on reasonable jurors applying the reasonable-doubt standard;
2. That the term "willful" as employed in the context of 21 O.S. § 701.7 C does not comport with Fourteenth Amendment Due Process; and
3. That without an order of a Judge Advocate General or military tribunal of competent jurisdiction, subpoena, discovery request, or other lawful process, state courts, under state law, cannot properly exercise criminal jurisdiction over active duty service members and dependents, and Veterans treated at facilities where a state medical examiner lacks lawful access to medical records, radiology reports, et cetera.

Respectfully submitted this 1 day of June 2023,

By, 

LANCEY DARNELL RAY
OSR • G2-223
P.O. Box 514
Granite, OK 73547