

MAR 28 2023

OFFICE OF THE CLERK

Docket Number: _____

23-5161

IN THE
SUPREME COURT OF THE UNITED STATES

Derek M. Funk

Petitioner

vs

The State of Oklahoma

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
To the Oklahoma Court of Criminal Appeals
for the State of Oklahoma

ON PETITION FOR A WRIT OF CERTIORARI

Derek M. Funk, (832254)
Oklahoma State Reformatory
P.O. Box 514
Granite, OK 73547
Phone: (unavailable)

May 10, 2023

DATE SUBMITTED

ORIGINAL

QUESTION(s) PRESENTED

1. Mr. Funk respectfully asks:

*Are Oklahoma statute(s) 21 O.S. § 1040.12(a), 21 O.S.1040.8 (a), and 21 O.S. § 1024.1 in conformity with the United States Constitution, Amendment(s) IX and XIV?
[facially and/or their application]*

2. Mr. Funk respectfully asks:

The 4th and 10th Circuits have conflicting ruling(s), regarding the language contained within "Logan v. State" 2013 OK CR 2. Is this O.C.C.A. ruling a waiver of exhaustion of remedies requirement of 28 U.S.C.A. § 2244(d)?

3. Mr. Funk respectfully asks:

*Does **Kallmann Syndrome** ¹ (KS) undermine the State's ability to prosecute "**alleged**" child pornography case(s) without identifying the portrayed individual(s)²?*

4. Mr. Funk respectfully asks:

Did the State Government violate the Constitutional Rights of Mr. Funk by refusing to establish the date photographs/video, [prosecution evidence], were published?³

5. Mr. Funk respectfully asks:

*Did the Trial Judge prevent Mr. Funk from presenting a defense to the allegations, when the Court **prevented** his counsel from reading the definition(s) of the charged statute(s) before the Jury and preventing a **jury nullification** defense?⁴*

¹ Attached as Exhibit #1A from the National Organization for Rare Disorders (NORD)

² 14th Amendment due process of law violation and 6th Amendment, (*confrontation clause*), violation?

³ As clearly established **FEDERAL** law identifies certain images published prior to a certain date to be exempt from prosecution. (i.e.: **Brooke Shields'** movies "**Blue Lagoon**" and "**Pretty Baby**" or movies seen on T.C.M. T.V. Network).

⁴ Violating Mr. Funk's United States Constitution, Amendment(s) V, VI, IX, and/or XIV

LIST OF PARTIES

- The Petitioner in this case is Derek M. Funk, “representing himself” [*and no other(s)*].
- The Respondent in this case is the State of Oklahoma, who may be represented by and through the Oklahoma Attorney General’s Office.
- The proceeding(s) of this matter arise from a “*timely filed post-conviction*” that has been ruled by the Oklahoma Court of Criminal Appeals.
- As this Certiorari is filed in Direct Collateral Review of his post-conviction, pursuant to 28 U.S.C.A. § 1257 (a).

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⁵ National Organization for Rare Disorders

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⁶ National Organization for Rare Disorders

OPINIONS BELOW
[STATE COURT'S]

Mr. Funk filed POST-CONVICTION before the Wagoner County District Court of Oklahoma, upon case number *CF-2018-134*. On the *12th day of July, 2022* the Wagoner County District Court denied Mr. Funk's post-conviction in an order that was not complicit with Oklahoma Law, Court Rule(s) and various ruling(s) of O.C.C.A. An appeal was filed to O.C.C.A., [*case number PC-2022-634*] – [*unpublished opinion*], requesting to reverse and remand with instruction to correct the order(s). On the *3rd day of November, 2022* the O.C.C.A. agreed with Mr. Funk by issuing an order reverse and remanded with instruction to "*specifically address each claim the petitioner is entitled relief.*" On the *22nd day of November, 2022* the Wagoner County District Court issued its AMENDED order denying Petitioner's Application of Post-Conviction Relief." The county district court again failed and/or refused to comply with the order of the O.C.C.A. by neglecting to address Mr. Funk's actual factual innocence. The county district court also violated Oklahoma Law by refusing to grant an evidentiary hearing, pursuant to *22 O.S. § 1084*. This denial was appealed to O.C.C.A. and despite the incomplete order and refusal to develop the record, O.C.C.A. affirmed conviction on the *6th day of January, 2023*, [*case number PC-2022-634*] – [*unpublished opinion*], Certiorari filed before this Great and Honorable Court.

JURISDICTION

The Oklahoma Court of Criminal Appeals entered its Order denying review on Post-Conviction Appeal on the 6th day of January, 2023. This Great and Honorable Court was provided its jurisdiction by the United States Congress, to hear this *GREAT WRIT OF CERTIORARI* upon a final ruling of a State's highest court has had an opportunity to hear the matter, pursuant to 28 U.S.C.A. § 1257 (a).

Oklahoma Title 22, Ch. 18, § V, O.C.C.A. Rule 5.5 (Final Order; Exhaustion of State Remedies): "Once this Court has rendered its decision on a post-conviction appeal, that decision shall constitute a final order and the petitioner's state remedies will be deemed exhausted on all issues raised in the petition in error, brief and any prior appeals. A petition for a rehearing is not allowed and these issues may not be in any subsequent proceeding in a court of this State. ..."

28 U.S.C.A. § 2403 (b) which provides:

In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer or employee thereof is not a party wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Appendix D 21 O.S. § 1040.12(a)
2. Appendix E 21 O.S.1040.8 (a)
3. Appendix F 21 O.S. § 1024.1
4. Appendix G Oklahoma Constitution, Article II, § 6
5. Appendix H United States Constitution, Amendment I
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7. Appendix J United States Constitution, Amendment IX
8. Appendix K United States Constitution, Amendment XIV

STATEMENT OF THE CASE

1. I, Derek M. Funk, was formally charged by the State of Oklahoma through the filing of information on or about **August of 2016** with the following count(s): 21 O.S. § 1040.12(a) and 21 O.S. 1040.8 (a) [*possession of child pornography*]. The State of Oklahoma dismissed the charges for lacking of probative evidence. Then refiled on or about **March of 2018**. The first prosecutor resigned from the case because the lacking of probative evidence, then shortly after the second prosecutor resigned for the same reason(s). The District Attorney appointed a junior Assistant District Attorney to the case and she pushed for a conviction despite the lacking of probative evidence.

During the trial, defense counsel attempted to read the statute defining the charge(s), [21 O.S. § 1024.1], the A.D.A. objected to the reading and the objection was sustained. Mr. Funk was prohibited from presenting a defense that the charged statute(s) were and/or are unconstitutional, as counsel attempted to move for a jury nullification defense.

The language of the statute does not only prohibit an item or material, it mandate(s) the reader of the statute to reflect upon their feeling(s) and/or response to material once it is presented to an individual. This provide(s) arbitrary enforcement of each statute and Justice Gorsuch identifies these type of statute(s) as *chameleonic statute(s)*. This means the same exact item shall be legal to possess by one person but not another person, simply based upon the way the individual felt when they review the material. For an example: Brooke Shields' movie "Blue Lagoon" would be illegal for one person due to their finding that it stimulating while completely legal to another person as their inert feeling(s) that it was just a movie.

Oklahoma law mandate(s) the District Judge to Order the District Attorney's office to file a *direct appeal*, pursuant to 22 O.S. § 1051.1, [*Automatic appeal of judgments*

holding statutes unconstitutional in criminal actions.”]. In review of 21 O.S. § 1040.12(a), 21 O.S.1040.8 (a), and 21 O.S. § 1024.1 the court would conclude that each statute fails to conform to the Ninth (9th) and Fourteenth (14th) Amendment(s) fair warning doctrine. Thus, Mr. Funk’s due process of law was violated, by the State of Oklahoma, Trial Judge and the prosecution.

2. Mr. Funk continued investigating his Actual Factual Innocence. Oklahoma post-conviction procedures act mandates a litigant to present evidence that has not been presented before the jury or the court, [22 O.S. §1080]. Through his research and due diligence he found probative evidence that exonerates him of the charge(s). His post-conviction presented meritorious argument(s) regarding *Kallmann Syndrome*¹ (KS)² and outlining how he is actually innocence of all charge(s).

The State utilized a Doctor, [Sarah Passmore who is a pediatrician], to testify that she can look at any image and discern the chronological age of persons depicted within. NORD, [National Organization for Rare Disorders], articulated to identify the chronological age of a person mandates an endocrinologist³, physical examination and forensic lab testing. The presented evidence also impeached Dr. Sarah Passmore who testifies in countless case(s) for the State of Oklahoma as their expert in determining the age of photographed individual(s).

¹ Attached as Exhibit #1A from the National Organization for Rare Disorders (NORD)

² The application of Kallman Syndrome in all case(s) pertaining to “child pornography” will significantly impact the entire nation. This will significantly affect the prosecution of all Federal, State and Territory investigation(s), conviction(s), court proceeding(s) and those who are currently incarcerated. This is by no means a GET OUT OF JAIL FREE CARD. If a criminal defendant’s seized electronics contain evidence that the defendant was diligently searching for child pornography, through their internet archives. In Mr. Funk’s case, the State of Oklahoma never attempted to present this style of evidence as it would have proven Mr. Funk’s innocence of charges and/or allegations.

³ **endocrinology** *n.* the branch of medicine dealing with the endocrine glands and their hormones

The Oklahoma prosecution knowingly presented false evidence in trial and barred Mr. Funk from his defense. Resulting in, Mr. Funk's unfair and bias trial. It is absolutely impossible to look at any photograph and with your bald eyes and discern the year the photo graph was taken and/or published, the chronological age of any individual depicted or whether or not they have a medical disorder.

The Officer, [who testified in trial], clearly stated that he never attempted to identify any person depicted within any image. After testifying that he pursues cases like this, to ensure the victims receive restitution. The District Attorney vouched for the Officer's extensive career in law enforcement to justify the legality of the images.

Had the State of Oklahoma simply conducted its due diligence in verification of the true and actual chronological age person(s) depicted and date of publication of the image(s), Mr. Funk would not be incarcerated to this date.

It is understandable that the Government must regulate content within the vast *world-wide-web* to protect children from exploitation. In doing so, the Government must, also have the same due diligence to ensure the innocent are protected from *malicious* incarceration.

In review of the transcripts Mr. Funk's lawyer advised the court that he was statutorily barred from investigating the case and preparing a defense for his client as if he attempted to do such, that he, [counsel], would be subjected to criminal prosecution for possession of illegal material. Counsel's only defense available to him was to challenge the constitutionality of the charged statute(s). [*Reference the two (2) Oklahoma prosecutor(s) who were convicted for possession of child pornography, which was State's Evidence.*]

The State Court(s), [*County District Court and the Oklahoma Court of Criminal Appeals*], refused to address the merits of his meritorious post-conviction, most likely out of fear for the domino effect. The State Court(s) opted to procedurally bar and *Actual Factual*

Innocence claim instead, which violates this Honorable Court's precedential ruling(s) of *McQuiggens v. Perkins*.

3. The State of Oklahoma utilized an Oklahoma Court of Criminal Appeals⁴ ruling of "*Logan v. State*" 2013 OK CR 2 to procedurally bar an actual factual innocence claim. This ruling is unconstitutional infringing upon the Ninth (9th) and Fourteenth (14th) Amendment(s) of the United States Constitution.

The ruling of "Logan" is absolutely confusing as the Tenth (10th) Circuit and Fourth (4th) Circuit have a difference of opinion in the language of "Logan". That language is:

"...and issues that were not raised on previously on Direct Appeal, but which could have been raised, are waived for further review."

The State of Oklahoma utilizes this ruling as a crowbar to deprive destitute, incarcerated litigants who are representing themselves for their due process of law and stripping them of their Oklahoma State Constitution, Article II, § 6, (access to the courts). The Tenth (10th) Circuit Court has procedurally barred countless incarcerated litigant(s) of their meritorious claim(s) citing "Logan v. State" 2013 OK CR 2. The Fourth (4th) Circuit Appeals rendered a ruling of "*Stem v. Turner*" 370 F.2d 895 (4th Cir. App. 1966), [*years before the ruling of Logan*]. The 4th Circuit's ruling clarifies the language as the State's waiver of exhaustion remedies, pursuant to 28 U.S.C.A. §2254:

*"...statute on post-conviction relief clearly prohibits raising a ground in a successive petition which could have been raised earlier, and in regard to the point in issue in McNeil case, North Carolina case law held the point waived unless it had been raised prior to entry of plea, '*** we must hold that the petitioner now has no rights available under the state law which require exhaustion.' Absent a definitive state adjudication to the contrary, we deem the professed language of the statute to prevail over trial court practice and conclude that appellant no longer has an available state remedy."*

⁴ This is the ruling in controversy as there is a clear SCOTUS Rule 10 issue in which this Great and Honorable Court need to address. The Fourth Circuit Court of Appeals and the Tenth Circuit Court of Appeals have issued two different understandings of the language contained within "Logan". The Fourth Circuit Court of Appeals ruled in "Stem v. Turner" (4th Cir. App. 1966) in which "Logan" was not rendered until 2013.

One Circuit Court procedurally bars meritorious claims and the other circuit held the State Government waived its exhaustion of remedies by enforcement of such procedures which bars post-conviction claims within the State Courts. Oklahoma incarcerated litigants are left without any remedy to proceed with meritorious claims when their Appellant Counsel botches their direct appeals. However, if those *same* claims arise out of North Carolina, the Fourth Circuit Court permits the claims to proceed, as the State waived its exhaustion of remedies. [*Equal protection of the law issues claims arise out of this.*]

4. It is clearly established federal law that the Government must establish the date photograph(s) are published when investigating subject matter. Oklahoma Law Enforcement must adhere to this standard when conducting their forensic investigation into cybercrimes. This logic stems from the State's jurisdiction to conduct the investigation in the first place arising from federal statute. Clearly established federal law has grandfathered such material that was published prior to 1996. This is relevant as Turner Classic Movies, [T.C.M.], still broadcast such material on television and through F.C.C. approval.⁵

Mr. Funk's search browser and/or search history had zero probative search history or evidence of his alleged child pornography crime. Mr. Funk was searching "GOOGLE" for legal content. It is common knowledge that Google will redirect and/or make suggestions to commonly searched material and/or content. It would be presumed by the general public that any recommendation by Google Corporation would only be to legal content. The average internet user would never think Google Corporation would sponsor and/or index and/or direct a lay user to any illegal content.

⁵ Reference: Brooke Shields movie "*Blue Lagoon*" and "*Pretty Baby*" – In pretty Baby Ms. Shields was 12 years old and filmed nude throughout the movie in a sexual manner. Her virginity was auctioned off within the scene of a brothel. In Blue Lagoon, Ms. Shield was 14, the film depicted a sexual scene. The material possessed by Mr. Funk as allegedly being child pornography has no sexual element beyond the imagination of the viewer.

Mr. Funk never access the dark and/or black web as indicated through his trial. Mr. Funk was completely unaware what this website was or contained and only heard of it through his trial. The only reason he was convicted of his alleged crime, was the perjured testimony of Dr. Passmore and the Defense being barred from presenting any defense to the charge(s).

5. The trial judge obstructed Mr. Funk's defense by preventing his counsel from investigating the charge(s), as the investigation of child pornography is a violation of State and Federal Law. The only agency and/or individual(s) authorized by law to investigate such material would be law enforcement who are assigned to those special taskforce(s). The trial judge refused to assign such agent and/or officer to the defense counsel to conduct required investigation of the alleged charges. Counsel advised the court multiple times that his investigation was stymied by the law itself.

Defense Counsel attempted implicate the constitutionality of the charged statute(s) by reading them in open court to the jury and investigating officer, (who was sitting on the stand). Mr. Funk has an absolute and fundament right to utilize ***jury nullification***⁶ as a defense to the charge(s). It has been clearly established law, since the founding of the United States and the American Jurisprudence, that it is the duty of the trial jury to determine if the statute(s) charged are legally applied and/or their facial compliance with their understanding of law.

Had the trial judge permitted Mr. Funk to present any sort of defense to the allegations charged, [*beyond a first (1st) amendment defense*], the jury would have rendered a completely different ruling and Mr. Funk would have walked that day as a free man.

⁶ Black's Law Dictionary (11th Ed. 2019): **Jury Nullification**: "A jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is large than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness. Cf. verdict contrary to law under VERDICT (1) rogue jury under JURY."

REASONS FOR GRANTING THE GREAT WRIT

Mr. Funk's defense counsel put it upon the record that he was statutorily barred from presenting an adequate defense to the allegations, because his research and/or investigation was a direct violation of Federal Law and it would land him in Federal Prison. (This was stated to the Judge of Record and should have been transcribed.) Mr.

Funk was stripped of presenting a defense because counsel could not adequately investigate the allegations he faced in trial, from facing an accuser, and from arguing the constitutionality of charged statute(s). This is the sole reason why he was convicted of a crime he never committed.

The People of Oklahoma are left without the basic knowledge or understanding of the above statute(s) as they are held to a different meaning and/or understanding of the allegations based upon which officer is investigating, which Assistant District Attorney is prosecuting, and which Judge is signing the warrant(s) and/or hearing the trial. The equal protection of the law is stymied by the chameleonic interpretation of these laws. Yet more so that the law does not only prohibit the possession of material. It punishes those who have a disagreeable reaction to the material. The Oklahoma Legislature(s) are attempting to "parent" the mind and feelings, [thought crimes], of the citizens of Oklahoma. *For this reason, we the people, beg this Honorable Court to intervene in Oklahoma's repugnant enforcement of chameleon statute(s).* The prosecutor summed everything up when she stated, [paraphrasing], "Don't you think a Detective of [X], amount of years would know what is and isn't prohibited?"⁷ It should not take an educated, train in law, and experienced person

⁷ Apologizes to the court for not recalling the exact phraseology of the prosecutor or the exact number of years the Detective had worked with his department. Mr. Funk does not wish to enter any false or misleading information to the Court. He has been attempting to obtain his transcripts since the date of his conviction. The Court has denied all efforts despite his offer to pay for those records.

to understand what is or is not prohibited by statute. All statute(s) should be concise, plain and clear for all persons to understand how to curve their conduct.

CONCLUSION

Should this Honorable Court deny Certiorari, it will subject the citizen(s) of Oklahoma to arbitrary enforcement of chameleon statue(s) depending upon which police unions threaten which ever District Attorney during election years. The arbitrary enforcement of statute(s) in Oklahoma has lead the State to hold and possess the title for **NUMBER ONE** incarceration of men and women in the world. When Oklahoma Governor Kevin Stitt first took office, he was interview by a News Station, [believed to be Oklahoma News Report (O.N.R.)]. In this interview Governor Stitt admitted that Oklahoma has the most repugnant laws in the nation. Ever since that admission, Governor Stitt has not even attempted to cure the deficiencies of Oklahoma's statute(s).

I, *Mr. Derek Funk*, respectfully submit this Certiorari humbly and respectfully, requesting this Great and Honorable Court to grant in the name of justice.

PRAYER FOR RELIEF

Mr. Funk is respectfully requesting this Great and Honorable Court to grant this GREAT WRIT OF CERTIORARI and conduct the most comprehensive de novo review of the question(s) posed within that has ever been conducted by this Great and Honorable Court.

Should this Honorable Court deny Certiorari, the people of Oklahoma will continuously be incarcerated for action(s) which are not illegal but subjected to religious agenda and/or personal sensitivity of the police, prosecutor(s) and local judge(s) who seek conviction rating(s).

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares, (or certifies, or verifies, or states), under penalty of perjury that he is the Appellant in the above complaint action, that he has read the above complaint and that the information contained therein is true and correct. 28 U.S.C. § 1746 and 18 U.S.C. § 1621.

Executed at the Oklahoma State Reformatory, on the 10 day of May, 2023.

Respectfully Submitted,

/s/ Derek Funk
Derek M. Funk, [OK – DOC # 832254]