ORIGINAL

No. 23-5489

IN THE SUPREME COURT OF THE UNITED STATES

LONNIE DEE BROWN—PETITIONER

VS.

STATE OF OKLAHOMA—RESPONDENT

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

LONNIE DEE BROWN
OK DOC# 678049
OSR • C2-8
P.O. Box 514
Granite, OK 73547

PRO SE LITIGANT

August 21, 2023

QUESTIONS PRESENTED

1. Whether the Oklahoma Court of Criminal Appeals' review of trial courts decisions to admit or exclude expert testimony comport with the United States Supreme Court's decisions in Daubert v. Merrell Dow Pharmaceuticals, Inc. 509, U.S. 579, 113 S. Ct. 2786, 2795, 125 L. Ed. 2d 469 (1993) and Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

2. Whether the Oklahoma Court of Criminal Appeals' legal analysis regarding ineffective assistance of appellate counsel claims comport with the United States Supreme Court's decision in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

• • • Nothing Follows • • •

LIST OF PARTIES

The List of Parties (Respondent) includes the following:

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

APPENDICES

The Appendix includes the following documents:

1. Appendix A, OCCA "Order affirming denial of post-conviction relief";

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

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

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PETITION FOR WRIT OF CERTIORARI

Veteran of the Gulf War, 74 year old Petitioner, United States Air Force Master Sergeant (RET.), Lonnie D. Brown, *pro se*, prays that a writ of certiorari issue to review the judgment below. Mr. Brown requests latitude of a layman in the above styled cause of action pursuant to this Court's decision 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. The District Court of Cleveland County decision (Appendix B) to deny post-conviction relief.

JURISDICTION

The Oklahoma Court of Criminal Appeals entered its Order affirming denial of post-conviction relief on May 31, 2023. This Court has jurisdiction under 28 U.S.C.A. § 1257 (a), where in the petition before it involves a right claimed under the Constitution of the United States. S. Ct. Rule 10 (b) and (c) apply in the instant case.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

- This case involves the Sixth 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 provision:

•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.

RELATED CASES

The writ requested for Brown is similar to the writ requested for Charles E. Weimer in that both Petitioners were represented on direct appeal by the same reportedly Oklahoma renowned attorney. In both cases, however the appellate attorney failed to raise the *Daubert* issues that arose at or prior to trial. Expert testimony had been admitted over respective trial attorneys objections. Despite trial attorneys' objections the respective trial courts declined to conduct any reliability hearings, thus the courts abdicated their gate keeping obligations. And the renowned appellate attorney failed to raise the otherwise plainly meritorious

Daubert claim on direct appeal. Weimer is presently before this court on petition for writ of certiorari regarding a *Daubert* claim. What is more, it that the appellate attorney on direct appeal for Weimer had been present at his trial to see firsthand the particular admissibility error that counsel properly reserved for appellate review.

Additionally Brown's case is similar to the case against Lancey D. Ray in that the trial attorney for Ray had raised objection to the court admitting certain particular expert testimony because of lack of accreditation of the facility that particular expert conducted business. Trial counsel's objection essentially concerned the reliability of the principles and methods employed by that expert and had they been applied reliably to the facts of the case. The trial court, having relied solely on the expert's qualifications, overruled counsel's objection and allowed the expert to testify. Ray is presently before this Court on petition for writ of certiorari on a related issue.

STATEMENT OF THE CASE

1. On December 5, 2018, pursuant to 22 O.S. §1080 et seq.,[1] Petitioner through an attorney filed an application for post-conviction relief in case no. CF-2011-1341; simultaneously, Petitioner requested an evidentiary hearing regarding

[1] 22 O.S. § 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**

(Continued...)
asserted which for sufficient reason was not asserted or was inadequately raised in the prior application."

ineffective assistance of counsel on direct appeal. Five months later (May 29, 2019) the State filed its Response. Pending the state district court's disposition of the application, on June 24, 2020, Petitioner moved to supplement the pleadings under seal and for an evidentiary hearing. The State filed its Response to said pleadings on July 8, 2020. Two years later (February 17, 2022), pending the state district court's disposition of the pleadings, Petitioner moved to set the case for a hearing. One year later (March 3, 2023), (1) having abandoned the proper abuse of discretion review of a trial court's decision not to conduct a reliability hearing before admitting expert testimony especially over an objection by defense attorney, (2) not having directly assessed for reasonableness in all the circumstances whether the appellate attorney's decision not to investigate the reliability issue was ineffective assistance, *Strickland* at 691 and, (3) consequently not having made a prejudice inquiry to determine whether Petitioner had met the burden of showing that the OCCA's decision it reached on direct review would reasonably likely have been different absent the appellate attorney's omission i.e. error. *Strickland* at 696,

the state district court denied Petitioner's application for post-conviction relief.

2. Petitioner timely gave notice of post-conviction appeal.

3. On May 1, 2023 Petitioner's petition-in-error to the Oklahoma Court of Criminal Appeals (OCCA) was filed. Case No. PC-2023-386 was assigned.

4. On May 1, 2023 Petitioner's Brief in Support of Post-Conviction Appeal was filed. Under Petitioner's multi-pronged proposition regarding ineffective assistance of appellate counsel, Petitioner *inter alia* presented his claim that, (1) the

testimony of the physician assistant, who testified for the state, was unreliable, (2) contrary to *Taylor v. State*,[2] *Daubert* and *Kumho*,[3] the trial court admitted said testimony over the defense's objection, and (3) that the trial court had not conducted any reliability hearing regarding said testimony.

5. On May 31, 2023 the OCCA entered its decision affirming the district court's denial of application for post-conviction relief in Case No. CF-2011-1341. *Brown v. State*, PC-2023-386 (May 31, 2023) (not for publication). *See* Appendix A.

Reasons for Granting the Petition

Within the first six months of 2023 at least three cases that involved *Daubert* claims—where expert testimony had been admitted over trial counsel's objection—were decided by the OCCA contrary to the Supreme Court's decision. Yet a fourth case which inherently involved a *Daubert* related issue absolutely demanded a plain error review in which the OCCA declined to conduct. The OCCA's decisions in these cases, which include the instant case, were decided in a way that conflicts with the relevant decisions of this Court in *Daubert infra* and *Kumho infra.*

I. THE OKLAHOMA COURT OF CRIMINAL APPEALS' REVIEW OF TRIAL COURTS' DECISIONS TO ADMIT OR EXCLUDE EXPERT TESTIMONY DOES NOT COMPORT WITH THE UNITED STATES SUPREME COURT'S DECISIONS IN DAUBERT V. MERRELL DOW PHARMACEUTICALS INC., 509

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[2] 1995 OK CR 10, 889 P. 2d 319, 327 (Adopting, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)

[3] *Kumho Tire Company, v. Carmichael,* 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) ("We conclude that *Daubert's* general holding—setting forth the trial judge's general 'gatekeeping' obligation—applies not only to testimony based on 'scientific knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge.")

U.S. 579 AND KUMHO TIRE CO., V. CARMICHAEL, 526 U.S. 137, 152.

Under the Rules of Evidence, in this case 12 O.S. § 2702, the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant but reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509, U.S. 579, 113 S. Ct. 2786, 2795, 125 L. Ed. 2d 469 (1993).[4] And the primary locus of this obligation is Federal Rule of Evidence 702, which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify. *Id.*

The OCCA in *Taylor v. State,* 1995 OK CR 10, ¶ 15, 889 P. 2d 319, 328 adopted the admissibility standard set forth in *Daubert,* but not before it first explained that the admission of expert testimony is governed generally by 12 O.S. § 2702[Testimony by Experts]. *Taylor* at 326 (¶14). Moreover in *Taylor*, the OCCA made several references to the section 702 requirements of the federal Rules of Evidence in its reliance on 12 O.S. § 2702 in adjudication that case regarding novel scientific evidence. The holding in *Taylor* was clear; the "Daubert test would be adopted for determining whether novel scientific evidence could be admitted through expert testimony." In *Day v. State,* 2013 OK CR 8, ¶ 5, 303 P. 3d 291 however, the OCCA went further. Having extrapolated the court stated, "[i]n Taylor **we explicitly limited Daubert inquiry to novel scientific evidence**." And "[w]here the knowledge involved has 'long been recognized as the proper subject of expert testimony', the testimony is not novel and no *Daubert* hearing is necessary."

[4] Oklahoma's Evidence Code, Title 12, Oklahoma Statute Section 2702 was derived from FRE 702, even word-for-word.

Id. Thus the OCCA's reasoning since *Taylor*, regarding expert testimony, whether or not to conduct a reliability hearing before it is admitted, has been contrary to clearly established Federal law as determined by the Supreme Court of the United States in *Daubert*. Moreover under the OCCA's reasoning, the gatekeeping function of the trial court is essentially absolved; and that without a check against the otherwise established yet speculative, subjective and controversial methodology sought to be testified to.

Daubert involved testimony by a doctor whose experiences involved having served as a consultant for the National Center for Health Statistics and had published numerous articles in his field of study. The Petitioner in that case had also produced experts learned in statistics. The Court explained that the trial judge *must* ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. *Daubert* at 589. The Court further explained that "[t]he adjective 'scientific' implies a grounding in the methods and procedures of science;" and that, "[s]imilarly, the word 'knowledge' connotes more than subjective belief or unsupported speculation. The term 'applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds." *Daubert* at 590.

Therefore the core issue on post-conviction appeal in Brown's case, which involved the introduction of statistics as it did in *Daubert*, would rightly classify as scientific. Brown had objected to the trial court admitting the testimony of a physician assistant that purported to the accuracy of statistical information.

Nevertheless Brown proceeds to show the following in support of the above proposition.

A. The OCCA's decision in *Brown v. State*, PC-2023-386 (May 31, 2023) (not for publication), does not comport with this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509, U.S. 579, 113 S. Ct. 2786, 2795, 125 L. Ed. 2d 469 (1993).

The OCCA in *Taylor v. State*, 1995 OK CR 10, n. 29, 889 P. 2d 319, explained "[w]e have previously considered federal opinions in interpreting our State Evidence Code provisions.[5] Moreover *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). Bear in mind that Oklahoma's Evidence Code regarding expert testimony is identical to Rule 702 of the federal rules of evidence regarding expert testimony.

The Court in *Daubert* held the Federal Rules of Evidence assign to trial judge the task of ensuring that expert's testimony both rests on reliable foundation and is relevant to task at hand. Meaning under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable. *Daubert* at 589.

The record, in Brown's case, clearly shows that the trial court declined to conduct any reliability hearing to ensure that the admitted testimony regarding statistical information was relevant and reliable.

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[5] Oklahoma's 12 O.S. § 2702 is identical to Rule 702 in that it is a counterpart section in Federal Rules of Evidence.

Further the Court in *Daubert* explained that Rule 702 additionally requires that the evidence or testimony "assist the trier of fact to understand the evidence or to determine a fact in issue." And that that condition goes primarily to relevance. The Court further explained, "[e]xpert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Daubert* at 591.

Arguably, in Brown's case, the record shows that the testimony of the physician assistant regarding statistics was not used to assist the trier of fact to understand the evidence nor were the statistics capable of determining a fact in issue in the case.

Having cited *United States v. Downing*, 753 F. 2d 1224, 1242 (CA3 1985), the court in *Daubert* explained, "[a]n additional consideration under Rule 702—and another aspect of relevancy—is whether expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute."

There was no factual dispute as to the particular subject of the statistical information gathered by the State's witness; therefore, the State witness' statistical information was not tied to the facts of the case where the *actual* factual dispute in Brown's case concerned allegations of illegal conduct. As stated by the Supreme Court, "scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes." The Court explained, "[E]vidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night. Rule

702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Daubert* at 591-92.

The State's cynical use of the statistical information was admitted without a hitch. Regarding Brown's *Daubert* 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 clearly did neither.

B. The OCCA's decision in *Brown v. State*, PC-2023-386 (May 31, 2023) (not for publication), does not comport with this Court's decision in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L. Ed. 2d. (1999). Supreme Court Rule C applies.

The Supreme Court in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, held that, *Daubert's* 'gatekeeping' obligation, requiring an inquiry into both relevance and reliability, applies not only to 'scientific' testimony, but to all expert testimony. Bear in mind that Oklahoma's Evidence Code (12 O.S. § 2702) is identical to FRE 702.[6] Quoting Rule 702, the Court in *Kumho* explained, "[t]his language makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge. It makes clear that any such knowledge might become the subject of expert testimony. . . . [a]s a matter of language, the Rule applies its reliability standard to all 'scientific,' 'technical,' or 'other specialized' matters within

[6] Rule 702 itself says: "If 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 thereto in the form of an opinion or otherwise."

its scope. We concede that the Court in *Daubert* referred only to 'scientific' knowledge. But as the Court there said, it referred to 'scientific' testimony 'because that was the nature of the expertise' at issue." *Kumho* at 147-48.

As stated in Brown's post-conviction appeal, the basis of trial counsel's objection was that "there was no suggestion on the State's witness list that Donaldson would give expert testimony on statistics." And that the physician assistant's study-based testimony qualifies as expert, but not prior notice or request for *Daubert* hearing was given." In the instant case the merits of Brown's *Daubert* claim was not decided by the OCCA; moreover, in declining to adjudicate that issue the court's decision does not comport with the Supreme Court's decision in *Kumho*.

As shown hereinabove in the petition, the OCCA in *Day v. State,* 2013 OK CR 8, ¶ 5, 303 P. 3d 291 however relegates the *Daubert* decision to "novel scientific evidence". *Day v. State, supra.* But see, *Harris v. State,* 2004 OK CR 1, ¶ 29, 84 P. 3d 731 where writing the opinion for the court the Presiding Judge explained, "We adopted the *Daubert* analysis in *Taylor v. State,* 1995 OK CR 10, ¶ 15, 889 P. 2d 319, 328-29, and have likewise extended it (per *Kumho*) to other types of expert testimony."[7] So it would appear whichever of the OCCA's judge or judges at the helm will decide whether to limit *Daubert's* purview to scientific evidence or extend it to other types of expert testimony.

It was the court in *Harris v. State,* 2000 OK CR 20, ¶ 9, 13 P. 3d 489, citing *Kumho v. Tire Co. v. Carmichael,* 526 U.S. 137, 150-51, 119 S. Ct. 1167, 1175, 143

[7] Jimmy Dean Harris was the appellant named in the case against the State of Oklahoma, the Appellee. (Case No. D-2001-1268)

L. Ed. 2d 238 (1999), that explained, "the United States Supreme Court explained that the Daubert analysis is not limited to 'scientific evidence' but shall also be applied to all **novel expert testimony** introduced pursuant to Rules 702 [*sic*]".[8] Therefore the court in *Harris v. State* explained, "[I]n this case, the 'scientific, technical or other specialized knowledge' involved was not novel and has long been recognized as the proper subject of expert testimony." *Harris* at 493 (¶ 9). Respectfully, to the extent of a proper review of a *Daubert* claim, the OCCA's statements about *Kumho* disregarding recognized or established "scientific, technical or other specialized knowledge" could not be farther from the truth. Nowhere in *Kumho*, neither in the pages of *Kumho* the court in *Harris v. State* cited, does the Court in *Kumho* hint at such disposition of otherwise established principles and methods. In fact the Court in *Kumho* explained, "[w]e do not believe that Rule 702 creates a schematism that segregates expertise by type while mapping certain kinds of questions to certain kinds of experts. Life and the legal cases that it generates are too complex to warrant so definitive a match. *Kumho* at 151.

Moreover the Court in *Kumho* reiterated its previous opinion specifically regarding review of a trial court's decision regarding expert testimony: "Our opinion in *Joiner* makes clear that a court of appeals is to apply an abuse-of-discretion standard when it 'reviews a trial court's decision to admit or exclude expert testimony." *Kumho* at 152.

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[8] Benjamin Charles Harris was the appellant named in the case against the State of Oklahoma, the Appellee. (Case No. F-1999-625)

Therefore because the OCCA failed to apply the abuse-of-discretion review specifically to Brown's *Daubert* claim, the OCCA's decision not to conduct the required review does not comport with the Supreme Court's decision in *Kumho*.

II. THE OKLAHOMA COURT OF CRIMINAL APPEALS' LEGAL ANALYSIS REGARDING INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIMS—IN PRACTICE—DOES NOT COMPORT WITH THE U.S. SUPREME COURT'S DECISION IN STRICKLAND V. WASHINGTON, 466 U.S. 668, 104 S, CT, 2052, 80 L. ED. 2D 674 (1984).

The U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), held, "court must determine whether, in light of all circumstances, identified acts or **omissions** were outside wide range of professional competent assistance; in making that determination, court should keep in mind that counsel's function is to make adversarial testing process work in the particular case." The standard prescribed in *Strickland*, applicable in the instant case, required the OCCA to (1) assess for reasonableness in all the circumstances whether appellate attorney's particular decision not to investigate was ineffective assistance. *Strickland* at 691; and (2) the OCCA was required to make the prejudice inquiry by asking itself if Petitioner had met the burden of showing that the decision it previously reached on direct review would reasonably likely have been different absent the appellate attorney's errors. *Strickland* at 696.

The OCCA often boasts of its Rule 3.11(B), by stating, "[t]o obtain an evidentiary hearing to supplement the record on appeal regarding a claim of ineffective counsel under Rule 3.11 (B), this burden is less onerous than *Strickland*.

Under Rule 3.11 (B) appellants are required to show counsel was ineffective either by failing to identify or utilize the available evidence." *Williamson v. State*, 2018 OK CR 15, ¶ 53, 422 P. 3d 752, 763.[9] Albeit the OCCA more often than not declines to remand cases alleging ineffective assistance of appellate counsel due to failure to utilize available evidence.

A. The OCCA's decision in *Brown* is in conflict with the Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); S. Ct. Rule 10 (c) applies.

On post-conviction appeal, the OCCA having merely agreed with the district court, failed to assess whether, in light of all the circumstances, the identified omission by appellant attorney was outside the wide range of professional competent assistance required by Sixth Amendment.

Petitioner Brown had shown appellate attorney's omission was in fact objectively unreasonable; and consequently, that omission—regarding the trial court's failure to conduct any reliability hearing before admitting expert testimony over defense attorney's objection (Tr. Vol. 4 Pp. 744-756)—prejudiced Petitioner on direct appeal. *Strickland* at 693. The OCCA had merely agreed with the lower court's decision. Without ever having conducted Strickland's required assessment, the OCCA held that the state district court had "determine[d] that appellate

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[9] Rule 3.11 (B) (3) (b), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2023) (When an allegation of the ineffective assistance of trial counsel is predicated upon an allegation of failure of trial counsel to properly utilize available evidence or adequately investigate to identify evidence which could have been made available during the course of the trial, . . . appellate counsel may submit an application for an evidentiary hearing . . . ."); *See also* Rule 5.2 (C) (7) ("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 to include allegation of ineffective assistance of appellate counsel.")

counsel's performance was not objectively unreasonably probability that due to the alleged errors the outcome of the appeal would have been different [*sic*]." OCCA Order p. 2 (Appendix A); District Court Order, Para 11 (Appendix B). Therefore S. Ct. Rule 10 (c) applies.

B. The OCCA's decision in *Brown* is in conflict with the Circuit Court's decision in *Cargle v. Mullin*, 317 F. 3d 1196, 1205 (10th Cir. 2003); S. Ct. Rule 10 (b) applies.

The very focus of a Strickland inquiry regarding performance of appellate counsel is upon the merits of omitted issues, and no test that ignores the merits of the omitted claim in conducting its ineffective assistance of appellate counsel analysis comports with federal law. *Cargle v. Mullin*, 317 F. 3d 1196, 1205 (10th Cir. 2003). Moreover the Tenth Circuit in *Cargle* explained, because the OCCA's analysis of Petitioner's appellate ineffectiveness allegations had deviated from the controlling federal standard it was not entitled to deference.

Such is the instant case on Petition for Writ of Certiorari like so many post-conviction appeals presented to the OCCA, where the OCCA's failure to assess the merits of the omitted claim regarding the trial court's failure to conduct any reliability hearing and appellate counsel's failure to raise the claim, demonstrates the OCCA's deviation from the controlling federal standard in Strickland regarding claims of ineffective assistance of appellate counsel.

In *Cargle* such a deviation resulted in the Tenth Circuit Court having granted the writ both as to the convictions and the death sentences, with the

condition that the State may retry petitioner within a reasonable time. *Cargle*, 317 F. 3d at 1226.

Likewise, this Petitioner respectfully asks this Court to grant the request writ as to the convictions and sentences imposed, with the condition the State may retry petitioner within a reasonable time and that the trial court first performs its gatekeeping function in conducting the requested reliability hearing prior to trial.

C. The OCCA's decision in *Brown* is in conflict with its own previous decision in *Logan v. State*, 2013 OK CR 2, 293 P. 3d 969; S. Ct. Rule 10 (b) applies.

According to the OCCA, claims of ineffective assistance of appellate counsel may be raised for the first time on post-conviction, because it is usually a petitioner's first opportunity to allege and argue the issue. *Logan v. State*, 2013 OK CR 2, ¶ 5, 293 P. 3d 969. Moreover in reviewing a claim of ineffective assistance of appellate counsel under *Strickland*, a court must look to the merits of the issue(s) that appellate counsel failed to raise. *Logan* at 973 (¶6). And "the reviewing court must consider the relative merit of the omitted issue(s), in relation to any appealed issues, in order to determine whether appellate counsel's performance was adequate." *Logan* at 976 (¶13). In other words the reviewing court (the district court during state post-conviction proceedings under Oklahoma's Post-Conviction Procedure Act) is required to analyze claim by petitioner for post-conviction relief of ineffective assistance of appellate counsel through comparison of claims raised on direct appeal with claims that Petitioner asserted should have been raised. *Logan* at 977 (¶18). In the instant case, like so many other post-conviction appeals, the

district court's order does not reflect that it made the necessary comparison of the claims raised on direct appeal with Petitioner's *Daubert* claim or with any of Petitioner's claims he asserted should have been raised. See District Court Order, Para 11, (appendix B). Moreover though the district court's order covers eleven pages, it falls short of having actually made an examination of the merits of Petitioner's *Daubert* claim. In fact the district court relegated *Daubert* claims to "novel scientific evidence", having cited a previous Oklahoma case. *See* District Court Order, Para 11, (Appendix B). Whereas this Court's decision *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. Moreover the Court in *Kumho* held "Daubert's general holding—setting forth the trial judge's general 'gatekeeping' obligation—applies not only to testimony based on scientific knowledge, but also to testimony based on technical and **other specialized knowledge**." *Kumho* at 1171. It was the Court in *Daubert* nonetheless that originally explained, "[a]lthough the *Frye* decision itself focused exclusively on 'novel' scientific techniques, we do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence." *Daubert* n. 11, at 600.

But Oklahoma district courts, in deciding whether to conduct *Daubert* reliability hearings, as the court did in the instant case, have limited such a request for *Daubert* type hearings to novel evidence; furthermore, the OCCA has sanctioned those decisions.

So though the district court, when considering Brown's application for post-conviction relief, did address Petitioner's ineffective assistance counsel claims as the OCCA mentioned, the district court however did not reach the merits of Petitioner's Daubert claim. And the OCCA followed suit when it agree with the district court's improper legal analysis regarding Petitioner's Daubert claim which he had asserted appellate counsel failed to utilize on direct appeal. Petitioner's Daubert claim was not necessarily decided.

Therefore the OCCA decided an important federal question in a way that conflicts with the decision of another state court, i.e., its own decision in *Logan v. State*, 2013 OK CR 2, 293 P. 3d 969. For in *Logan* the court remanded the post-conviction appeal for the district 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.

Ultimately the OCCA's decisions regarding ineffective assistance of appellate counsel claims, in its wide spread practice, as this Court will see in *Brown*, *Weimer*, *Ray*, and *Hill* soon to follow on petition for writ of certiorari, are in conflict with this Court's decision in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

CONCLUSION

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

Petitioner reasonably believes the petition for a writ of certiorari should be granted, and that this Court should remand to the OCCA so that it can conduct a proper abuse-of-discretion review of the trial court's decision to admit expert testimony. Furthermore in the interest of justice this Court's decision regarding the proper abuse-of-discretion standard of review should be made retroactive in Oklahoma cases on collateral review regarding trial courts decisions to admit or exclude expert testimony when a *Daubert* claim is raised.

Respectfully submitted this 21 day of August 2023,

By, _____

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