No. 23-5577

IN THE
SUPREME COURT OF THE UNITED STATES



**Brent Allen Morris**
**v.**
**STATE OF OKLAHOMA – RESPONDENT**

**ON PETITION FOR A WRIT OF CERTIORARI TO**
**the Oklahoma Court of Criminal Appeals**

Petitioner Brent Allen Morris is a *pro se* state prisoner at the James Crabtree Correctional Center, 216 North Murray Street, Helena, Oklahoma 73741-1017. The facility phone number is (572) 568-6000

## QUESTIONS PRESENTED

Whether the Fourteenth Amendment requires judges to disclose and disqualify at all stages of a criminal proceeding, including collateral appellate proceedings, when: (1) extreme facts are present which would allow a party to reasonably question the trial and post-conviction judges' impartiality; and/or (2) the extreme facts present an unconstitutional risk of or appearance of judicial bias at both the trial and post-conviction appellate stages?

Whether Article III courts sitting in habeas to review a state court conviction owe deference under the AEDPA when it is established the presiding judge had an undisclosed and disqualifying unconstitutional risk and appearance of bias?

Whether there is an exception to waiver of claims when a party's waiver is not voluntary, *e.g.*, after demanding their trial and/or appellate attorney make certain and nonfrivolous challenges to a judge, prosecutor, or fellow attorney when the challenged party's participation in those proceedings presents an issue of *per se* structural error, but their attorney refuses because challenges of a judge's impartiality, against a prosecutor, and/or against a fellow attorney are highly disfavored and often come with consequences of retaliation that can negatively affect that attorney's other clients, cases, and income?

## LIST OF PROCEEDINGS

The following proceedings are directly related to this case within the meaning of this Court's Rule 14.1(b)(iii):

- *State of Oklahoma v. Brent Allen Morris*, No. CF-2016-6899 (Tulsa County, OK May 2018) (trial proceeding);
- *Morris v. State*, No. F-2018-551 (Oklahoma Court of Criminal Appeals) (direct appeal) (unpublished);
- *Morris v. State*, No. PC-2022-327 (post-conviction appeal) (unpublished);
- *Morris v. State*, No. PC-2023-201 (post-conviction appeal) (unpublished);
- *Morris v. Bridges*, No. 22-CV-0091-CVE-SH (federal habeas) (currently in protective stay and abeyance).

## Constitutional Provisions



### Cases

Statutes and Court Rules



## STATEMENT OF THE CASE[1]

Petitioner was convicted after jury trial of **Count 1** – Assault and Battery with Intent to Kill and sentenced to 25 years imprisonment; **Count 4** – Violation of Protective Order, 1 year county jail; **Count 5** – Violation of Protective Order, 1 year county jail; **Count 6** – Violation of Protective Order, one year county jail; **Count 7** – Domestic Assault and Battery – Second Offense 4 years imprisonment; **Count 8** – Malicious Injury to Property, 1 year county jail; **Count 9** – Domestic Assault and Battery – Second Offense, 4 years imprisonment; **Count 10** – Violation of Protective Order, 1 year county jail; and, **Count 11** – Interference with Emergency Telephone Call, 1 year county jail.

[1] Pursuant to S.Ct. Rule 14.1(g).

Petitioner's convictions on direct appeal were affirmed in F-2018-551, and he timely sought post-conviction relief with the assistance of counsel, which was denied in PC-2022-327. During trial, Judge Drummond evinced the attitude of a prosecutor. *See Brinlee v. Crisp*, 608 F.2d 839, 852 (10th Cir. 1979) ("It is true that a trial judge should never evince the attitude of an advocate.") (citation omitted). Before his direct appeal and post-conviction cases were filed, he demanded his attorneys include certain claims challenging certain prosecutorial misconduct, surreptitious invasion of the Defense by the State, and failures to investigate and to call alibi witnesses. *See, e.g., Lott v. State*, 2004 OK CR 27, ¶ 164, 98 P.3d 318, 357 (Okl.Cr. 2004) ("This is not to say that counsel is to make all of the decisions in the case ... It is the (competent) client's case, not the lawyer's. While, counsel has the responsibility to advise, inform, and consult with the client, the defendant has the right [to] be involved in the decision process that will affect his or her life.") (citing *Faretta v. California*, 442 U.S. 806, 819 (1975)). And as demonstrated by the Henderson cases cited *supra*, there can be no waiver under § 1086 for an issue of extreme facts surrounding judicial participation at any stage of a criminal proceeding where the onus under the Oklahoma Code of Judicial Conduct, the Fourteenth Amendment, and the common law rests with the judge's duty to disclose and disqualify, not on a defendant, appellant, or their counsel to search for disqualifying issues in a judge's past or personal life. *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (there is a "presumption of honesty and integrity in those serving as adjudicators.").

Petitioner was also denied his counsel of choice. There was a conflict of interest created when his trial attorneys kept money for themselves paid for the retention of expert witnesses. Both his attorneys on direct and post-conviction appeal refused, not because the claims were

frivolous, but because, in Oklahoma, such claims are highly disfavored and often come with retaliation by the State.

Because these claims were not voluntarily waived by Petitioner, he submitted them in a second post-conviction proceeding. Those claims were denied by the district court as waived pursuant to 22 O.S. § 1086, and the OCCA affirmed.

Just before the OCCA denied relief in Petitioner's second post-conviction application, *see* Appendix 1 ('Order Affirming Denial of Second Application for Post-Conviction Relief' in PC-2023-201), he discovered that the judge in his first- and second- post-conviction applications, Tulsa County District Judge Michelle Keely, has been engaged in a long-term extramarital affair with his trial judge, Doug Drummond. He submitted his 'Brief in Support' for his 'Second Application for Post-Conviction Relief,' and included a request for his post-conviction judge to disqualify or to set an *in camera* disqualification hearing pursuant to Oklahoma law. *See* T. 12, Ch. 2, App., Rule 15 (2023). *See* Appendix 2 (initial pages of Petitioner's post-conviction pleading with demand for recusal or alternatively a request to initiate *in camera* disqualification proceedings). Judge Keely disqualified on June 1, 2023. *See* Appendix 3 (Oklahoma State Court Network Docket).[2]

On June 16, 2023, Petitioner submitted his 'Motion to Recall Mandate' to the OCCA on the basis of his trial judge and post-conviction appeal judges' unconstitutional risk and appearance of bias. *See* Appendix 4 ('Motion to Recall Mandate'). The OCCA declined to recall the mandate, construing his motion as a request for rehearing, which was denied pursuant to Rule 5.5, *Rules of the Oklahoma Court of Criminal Appeals*, T. 22, Ch. 18, App. (2023). *See*

[2] Available at https://oscn.net/dockets/GetCaseInformation.aspx?db=tulsa&number=CF-2016-6899 at 06-01-2023.

Appendix 5 (copy of Rule 5.5 sent by OCCA to Petitioner). The OCCA's clerk included a copy of Rule 5.5 and made clear his post-conviction claims are exhausted.

Further review in the state court is barred by 22 O.S. § 1086, Subsequent Applications ("Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application").

This is unconstitutional.

## REASONS FOR GRANTING THE PETITION

"Under the Antiterrorism and Effective Death Penalty Act ('AEDPA') , trying to persuade a federal habeas court to undo a state court's resolution of a federal constitutional issue is often a fool's errand. The statute requires us to give considerable deference to the state court's reasoning, allowing us to grant habeas relief only if we determine that the state court unreasonably applied clearly established federal law." *Lewallen v. Crow*, No. 21-5069, 2022 WL 17826002 at *1 (10th Cir. Dec. 21, 2022) (Carson III, J.) (unreported).

Petitioner's post-conviction proceedings at issue before this Court were presided over by a biased judge who disqualified after the fact when challenged on the extreme facts related to her long-term extramarital affair with his trial judge. Further, had Petitioner known about the judges' extramarital affair, he would have demanded his trial judge disqualify. This, in and of itself, should require a new trial.

There is scarce material available regarding extramarital affairs between judges. However, the Supreme Court of Connecticut considered an extramarital affair between a judge and a courtroom staff member damaged the public perception of, faith in, and integrity of the judiciary:

> Although it may be difficult to assess the degree to which the public at large now may condone or disapprove of one having a sexual affair with a married person, we are persuaded that, in general, such conduct is regarded as improper when it involves a subordinatein a professional, highly sensitive public context. Moreover, we think it is fair to say that a member of the public, aware of the aforementioned combination of factors, would reasonably conclude that the integrity of the judiciary was likely to be impaired. For instance, such a person could, we believe, reasonably conclude that there was an impermissible *risk* of [the court clerk] failing to render an accurate record of the proceedings in [the judge's] courtroom – either *because* of their relationship or because of an acrimonious termination of that relationship.

*In re Flanagan*, 240 Conn. 157, 190 & n.25, 690 A.2d 865, 881 & n.25 (Conn. 1997) (italics in original and footnote included). *Cf. Williams v. Pennsylvania*, 579 U.S. 1 (2016).

The questions presented is whether the Fourteenth Amendment requires judges to disclose extreme facts that might be disqualifying or otherwise lead to an unconstitutional risk and appearance of bias, and whether federal courts owe deference to proceedings presided over by a biased judge?

## I. The Appellate Judge Presiding Over Petitioner's Post-Conviction Proceedings has been Engaged in a Long-term Extramarital Affair with his Trial Judge

The state district court judge's failure to disclose and disqualify based on the now stipulated fact by Judge Keely that she had been engaged in a long-term extramarital affair with Petitioner's trial judge before considering – and ultimately denying *instanter* by signing the prepared order by the Tulsa County District Attorney's Office – is a failure to follow state law and state procedural rules under the Oklahoma Code of Judicial Conduct, as well as federal common law.

Viewed alone as a procedural issue during post-conviction proceedings, the trial court judge's failures to disclose, disqualify *sua sponte*, or otherwise transfer Petitioner's first and second post-conviction appeals would not generally be cognizable under federal habeas. *See*,

*e.g.*, *Sellers v. Ward*, 135 F.3d 1333, 1339 (10th Cir. 1998) ("[B]ecause the constitutional error Sellers raises focuses only on the State's post-conviction remedy and not the judgment which provides the basis for his incarceration, it states no cognizable federal habeas claim."); *Steele v. Young*, 11 F.3d 1518, 1523-24 (10th Cir. 1993) (stating in *dicta* that prisoner's "claim challenging the Oklahoma post-conviction procedures on their face and as applied to him would fail to state a federal constitutional claim cognizable in a federal habeas proceeding").

However, the judge's failure to disclose, disqualify, or transfer his post-conviction appeals – which certainly raised challenges to the legality of his confinement and his underlying judgment and sentence under the U.S. Constitution – deprived Petitioner of his right to Due Process under the Fourteenth Amendment. U.S. Const. Amend. XIV. And whether a state's application of its own laws comport with the Fourteenth Amendment's Due Process Clause is a matter of federal law, not state law. *See*, *e.g.*, *Hicks v. Oklahoma*, 477 U.S. 343, 345-346 (1980) (granting certiorari "to consider the petitioner's contention that the State deprived him of due process of law guaranteed to him by the Fourteenth Amendment"); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (explaining that "a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question"); *Lisenba v. California*, 314 U.S. 219, 236 (1941) ("The Fourteenth Amendment leaves [states] free to adopt, by statute or decision, and to enforce such rules as she elects, whether it conform to that applied in the federal or in other state courts. But the adoption of the rule of her choice cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law.") (emphasis added); *Leatherwood v. Allbaugh*, 861 F.3d 1034, 1043 (10th Cir. 2017) (citing the well-established rule that a federal

habeas court may not provide relief for state-law errors but explaining that a state prisoner may seek federal habeas relief "if a state law decision is so fundamentally unfair that it implicates federal due process."); *Guttman v. Khalsa*, 669 F.3d 1101, 1115 (10th Cir. 2012) (citing with approval district court's statement that "although the contours of a constitutional right can be defined by state law, the question of whether a state has afforded sufficient process to protect a constitutional right is not a question of state law"); *Cummings v. Sirmons*, 506 F.3d 1211, 1237 (10th Cir. 2007) (recognizing that "in rare circumstances, a determination of state law can be so arbitrary or capricious as to constitute an independent due process violation"); *Benson v. Martin*, 8 F. App'x 927, 930 (10th Cir. 2001) (citing *Hicks* for the proposition that "[i]f the state court did not follow its own rules, this error will not give rise to habeas relief unless failure to follow the rules also constituted a violation of due process guaranteed by the federal constitution"); *Aycox v. Lytle*, 196 F.3d 1174, 1179-80 (10th Cir. 1999) (citing *Hicks* for the proposition that "[i]f the state violated its own laws, [the petitioner] must show that the alleged violation of state law denied him due process under the Fifth and Fourteenth Amendments").

To be sure, prisoners have a right to a fair, impartial, disinterested, and unbiased judge at every single stage of their criminal proceedings.

**A. Factual Background of Post-Conviction Judicial Bias Claim**

1. Petitioner was convicted after jury trial in CF-2016-6899. His jury trial was presided over by Judge Doug Drummond. Petitioner timely sought direct review and the OCCA affirmed his conviction in F-2018-551.

2. After his direct appeal was denied, Petitioner filed motions in the state district court to obtain copies of his jury trial transcripts. These requests were ignored by the state court. *See* Docket, CF-2016-6899 at 05-07-2021.

3. Petitioner ultimately retained counsel to represent him in post-conviction proceedings (APCR). *See* Appendix 3, Docket for CF-2016-6899 at 11-22-2021. *See also Morris v. State*, No. PC-2022-327 (first post-conviction appeal) (unpublished). Petitioner's widowed mother, whom is retired and on a fixed income, was forced to borrow money to retain his post-conviction counsel. This sacrifice was at great cost and financial burden, and the State gives no consideration to this matter.

4. Petitioner's post-conviction proceedings were presided over by Judge Michelle Keely.

5. Petitioner's post-conviction counsel promised to file a supplemental brief with the claims he demanded be included in his first APCR. However, by the time Petitioner received a copy of the supplement – which had already been filed – it included only a federal preemption claim based on the Oklahoma Enabling Act (which was ultimately shot down in *Castro-Huerta*, 142 S.Ct.), and none of the nonfrivolous claims she agreed to present were included.

6. Judge Keely denied an evidentiary hearing before she even received the State's response. *See* Docket, CF-2016-6899 at 01-06-2022 ("JUDGE MICHELLE KEELY: DEFENDANT NOT PRESENT, REPRESENTED BY DEBRA HAMPTON, NOT PRESENT. STATE REPRESENTED BY MARIANNA MCKNIGHT. COUT DENIES DEFENSE'S REQUEST FOR EVIDENTIARY HEARING. STATE GRANTED TIME TO RESPOND TO DEFENSE'S SUPPLEMENTAL BRIEF IN SUPPORT. STATE TO RESPOND BY 1/26/2022. HEARING ON MOTIONS SET ON 1/31/2022 AT 9AM IN ROOM 401.").

7. Neither Petitioner nor his post-conviction counsel, Debbie Hampton, were notified of the January 6, 2022 hearing where the request for an evidentiary hearing was denied.

Nor were they made aware of the January 31, 2022 hearing set by Judge Keely. *See* Appendix 6, Affidavit of Brent Allen Morris.

8. Judge Keely denied relief, and the OCCA affirmed in PC-2022-327. Further, Judge Keely made scientific assumptions that are contrary to the charges and allegations that Petitioner had ripped out the complainant's insulin pump. *See Morris v. State*, PC-2022-327 (Keely, J.):

> Although the State asserted the victim laid there for over 33 hours, this statement does not necessarily support Petitioner's claim that the victim was without insulin for this long. Tr. Vol. II at p. 242. The evidence does not make clear exactly how or when the victim's insulin pump became disconnected. Mr. Morgan, one of the paramedics who treated the victim, testified the victim's insulin pump was still connected to her body but the lines from the pump were no longer connected to the port in the victim's arm when he examined her. *See* Tr. II at pp. 311-12, 322.

*Id.* But Judge Keely's statement contradicts itself, and the allegations made by the State. If the lines from the pump are "no longer connected to the port in the victim's arm," then it is no longer connected to her body. Also, Judge Keely is making incorrect technical assumptions about how that diabetic pump operates. Mainly, the complainant's pump is manual, not automatic. Complex equations with variables such as time and carbs/alcohol sugars consumed must be calculated before manually entering computations required for insulin disbursement. Still, these are material issues of fact and science that the jury was prevented from hearing because of Petitioner's trial attorney's actual conflict. Instead of hiring an endocrinologist or any other medical expert to rebut the State's medically impossible allegations, she kept the $5,000 paid to her for such an expert, and Petitioner continues to languish in prison for a crime he did not commit.

9. Because Petitioner insisted his post-conviction counsel include certain nonfrivolous claims, but she refused, Petitioner was forced to file a second application for post-

conviction relief. *See* PC-2023-201. His claims were not voluntarily waived, and they should not have been procedurally barred by the State in his second APCR.

10. Judge Keely presided over the second application for post-conviction relief. She denied relief *instanter*, and the OCCA affirmed. *See* PC-2023-201. For example, in denying the application, Judge Keely signed a prepared order by the State *instanter*, without any meaningful review or adherence to the requirements of Oklahoma's post-conviction procedures for evidentiary hearings and full and fair review by the court. *Cf.* Rule 4(e), *Rules of the District Courts of Oklahoma*, T. 12, Ch. 2, App. (2023) ("Any party opposing a motion, ... shall serve and file a brief or list of authorities in opposition within fifteen (15) days after service of the motion, or the motion may be deemed confessed."). Judge Keely's summary dismissal of Petitioner's First and Second PCR applications after the State's 'Motion to Dismiss' without allowing Petitioner fifteen days to oppose the State's Motion pursuant to District Court Rule 4(e) is "unfair and dishonest"; the State is refusing "to play by its own rules." *Stogner v. California*, 539 U.S. 607, 611 (2003). *See See Strange v. Troutt*, 2017 OK CIV APP 5, ¶ 6, 389 P.3d 401, 402 (Okl.Civ. Div. 4) (court rule permitting district courts to grant a motion without a hearing does not mean court can grant the motion *instanter* or without time to respond) (citing Okla. Dist. Ct. R. 4(h)).

11. Unbeknownst to Petitioner at the time of filing his first- and second- APCR, Judge Keely and Judge Drummond had been involved in a secret, long-term extramarital affair.

12. At no time during Petitioner's first- and second- applications for post-conviction relief did Judge Keely disclose the fact she has been engaged in a secret, long-term extramarital affair with Petitioner's trial judge, Doug Drummond.

13. Neither Petitioner, nor his post-conviction counsel, Debbie Hampton, had any knowledge of the secret extramarital affair between judges Keely and Drummond.

14. As such, neither Petitioner nor his post-conviction counsel were able to request recusal to address the issue of Judge Keely's bias during these proceedings because it was unknown to them.

15. Had Petitioner known, he would have initiated disqualification proceedings and request that Judge Keely recuse. *See* Appendix 6, Affidavit of Brent Allen Morris.

Any additional attempts to exhaust the trial and post-conviction judicial bias claim is futile. And, under Oklahoma law, they are exhausted upon the point Judge Keely recused pursuant to Rule 2.11 of the Oklahoma Code of Judicial Conduct, T. 5, Ch. 1, App. 4 (2023). *See* Rule 15, *Rules of the District Courts of Oklahoma*, T. 12, Ch. 2, App. (2023) (outlining process for initiating judicial disqualification proceedings and the appellate process through *mandamus* if the request is denied).

The Tulsa County Assistant District Attorney, Meghan Hilborn, filed an undated 'State's Response to Petitioner's Third Application for Post-Conviction Relief.' *See* Appendix 7. It was filed in and by the Tulsa County Court Clerk on August 1, 2023. *See* Appendix 3, Docket, CF-2016-6899 at 08-01-2023.

A mere seven- (7) days later, on August 8, 2023, **Washington County** District Court Judge Russell Vaclaw signed yet another prepared order by ADA Hilborn 'Dismissing Petitioner's Application for Post-Conviction Relief.' This prepared order, in response to what Ms. Hilborn mischaracterized as a third application, is actually in response to Petitioner's 'Brief in Support' of his Second Application for Post-Conviction Relief.

The problem here is that the fix is still in. Petitioner was not advised of who the assigned judge would be after Judge Keely recused,[3] and he was not allowed sufficient time under Rule 4(e), *Rules of the District Courts*, T. 12, Ch. 2, App. (2023). *See Strange v. Troutt*, 2017 OK CIV APP 5, 389 P.3d 401 (Okl. Civ. Div. 4) (holding that district courts are required to provide inmates 15 days to respond to State's motion to dismiss).

Rule 4(e) provides that:

> Any party opposing a motion, except those enumerated in Section c above, shall serve and file a brief or a list of authorities in opposition within fifteen (15) days and after service of the motion, or the motion may be deemed confessed.

Rule 4(e), *Rules of the District Courts*, T. 12, Ch. 2, App. (2023). But Petitioner was not allowed any time to respond after he was served with the State's Response. *See Strange*, 2017 OK CIV APP at ¶ 6, 389 P.3d at 402 (court rule permitting district courts to grant a motion without a hearing does not mean court can grant the motion *instanter* or without time to respond) (citing Okla. Dist. Ct. R. 4(h)). Instead, he received the Order dismissing the 'Brief in Support' of his Second Application the very same week he received the State's Response. *See* Appendix 8.

This is problematic, and it proves the State refuses to play by its own rules and laws when a prisoner is seeking relief *pro se*. Further, instead of being randomly assigned to another Tulsa County District Judge, it was instead transferred to Judge Vaclaw in Washington County sitting by designation. This is likely because the judges' extramarital affair is well-known and has been a subject of controversy in the Tulsa area legal community for many years, and as such, the

[3] Unfortunately, Petitioner has learned the hard way that while there may be a presumption of honesty and integrity in those serving as adjudicators, *see Withrow v. Larkin*, 421 U.S. 35, 47 (1975), it is unwise for the accused and convicted, at least out of Tulsa County, to leave any stone unturned once they are assigned to a judge. Of course, Petitioner could not research whether Judge Vaclaw has any disqualifying issues, and as Tulsa County's judges prove over-and-over, they will not comply with their Code of Judicial Conduct because the OCCA will only reverse convictions after judicial controversy is covered by the media.

Tulsa County Judiciary did not wish to expose its other judges with knowledge of the affair as potential witnesses in future discovery and evidentiary proceedings in federal habeas courts.

Finally, Petitioner's family hired his post-conviction counsel at great sacrifice. His widowed mother is on a fixed income and could not afford the attorney retained, much less, further representation. The proceedings below are prejudicial in more than one way – and have ultimately forced Petitioner into attempting to understand a crash-course of constitutional law and the AEDPA.

Petitioner has not received any meaningful review of his post-conviction pleadings, and any further exhaustion of the trial and post-conviction judicial bias claims would be futile.

### B. There is a Reasonable Probability that Petitioner's Judicial Bias Claim would have Succeeded on his First- and Second APCR

#### i. Legal Standards Governing Petitioner's Judicial Bias Claim

Fundamental conceptions of due process, and the Due Process Clause, entitle a criminal defendant "to an impartial and disinterested tribunal." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242. The guarantee of neutrality "preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done...." *Id.* (quoting *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)).

Due process accordingly dictates that "no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955). "[W]had degree or kind of interest is sufficient to disqualify a judge from sitting cannot be defined with precision." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986). The reviewing court – including this Court – however, should consider whether "under a realistic appraisal of psychological tendencies and **human weakness**, the interest poses such a risk of actual bias or prejudgment that the practice

must be forbidden if the guarantee of due process is to be adequately implemented." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883-884 (2009). The SCOTUS has held that a judge's emotional investment in the matter at hand may be disqualifying. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) (holding that a judge who is "personally embroiled" should not preside over contempt proceeding for lawyer who made personal attacks against him); *Offutt v. United States*, 348 U.S. 11 (1954) (same).

At least since the SCOTUS's early decision in *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), the law has recognized that only an objective standard is adequate to protect against the intrusion of judicial bias. The reviewing Court "asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, 'the average judge in [her] position is likely to be neutral, or whether there is an unconstitutional potential for bias.' " *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) (quoting *Caperton*, 556 U.S. at 881).

Lastly, denial of trial by a neutral judge is "structural" error. *See Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (citing *Tumey* for proposition that judicial bias "will always invalidate a conviction"). Structural error is a "defect[] in the constitution of the trial mechanism, which def[ies] analysis by harmless error standards." *Ariz. v. Fulminate*, 499 U.S. 279, 309 (1991).

This is precisely the issue Petitioner is submitting to the SCOTUS for *certiorari* review. Petitioner's post-conviction proceedings are owed the same judicial neutrality as at any other stage of a criminal proceeding, and because there is a glaring unconstitutional risk and appearance of bias present because of the secret, long-term extramarital affair between his trial judge and post-conviction appeal judge, this Court should give no deference to Judge Keely's denial of the requested evidentiary hearing and relief for each of the claims in his first- and second- APCRs.

### ii. Judge Keely's Secret, Long-term, Extramarital Affair with Judge Drummond Created an Unconstitutional Potential for Bias

The issue here is whether there is an "unconstitutional potential for bias" for a "average judge," who is in the midst of actively concealing a long-term extramarital affair with another judge to preside over post-conviction appeals to the trials presided over by her extramarital lover. *Williams*, 579 U.S. at 8.

The analysis should begin by noting that any judge who would find themselves in such a situation is not an "average judge." *Echavarria v. Filson*, 896 F.3d 1118, 1132 (9th Cir. 2018) (noting that judge who had been investigated for criminal conduct was "no ordinary judge"); *Bracy v. Schomig*, 286 F.3d 406, 411 (7th Cir. 2002) (noting of a corrupt judge that "the nature and extent of Maloney's dereliction of duty casts this case in an unusual light and makes it hard to put Maloney in any normal framework"). Any constitutionally appropriate analysis must begin with the basic fact that such a judge has already disavowed her ethical duties of neutrality. *See See also, e.g.*, *Fort v. State*, 2022 OK CR 12, 516 P.3d 690; *Hashagen v. State*, F-2021-203, slip op. (Okl.Cr. July 13, 2023). There can be no presumption that Judges Keely and Drummond, who have disgraced their moral and ethical obligations to their marriages and their benches, has acted ethically.

A sitting criminal judge carrying out an illicit extramarital affair and overseeing post-conviction appeals attacking the trial proceedings presided over by her extramarital lover *does* present an unconstitutional potential for bias, and there should be little question. Any person would balk at having such a judge preside over their appellate proceedings with their life and livelihood at stake; the appearance of impropriety is so great that it strikes one fundamentally and "viscerally." *Fort, supra*, at ¶ 1, 516 P.3d at 696 (Lumpkin, J., dissenting). But this is not

just a matter of bad appearances; the visceral response to the improprieties of Judges Drummond and Keely's extramarital affair is founded in a very real, concrete potential for bias.

The OCCA has recognized that there was a serious enough unconstitutional risk for bias in former Oklahoma County Judge Timothy Henderson presiding over cases involving his sexual partners. *Fort*, *supra*, at ¶ 4, 516 P.3d at 695; *see also Hashagen*, F-2021-203. And the Western District was forced to come to the same conclusion after the OCCA refused to correct the identical defects presented – albeit by *pro se* appellants, unlike in *Fort* and *Hashagen* – in federal habeas. *See Shelton v. Nunn*, No. CIV-21-1082-D, 2022 WL 17548600 (W.D. Okla. Oct. 12, 2022), *R&R adopted*, 2022 WL 16708244 (Nov. 4, 2022); *Smith v. Bridges*, No. CIV-22-48-HE, 2022 WL 17980057 (Oct. 21, 2022), *R&R adopted*, 2022 WL 17976797 (Dec. 28, 2022) (both cases granting conditional writs because the *pro se* petitioners' trials were presided over by former Oklahoma County Judge Tim Henderson). Yet there is further, clear potential for bias arising from Judges Drummond and Keely's improprieties that exists for *any criminal case* over which both judges presided at the trial and post-conviction stages while continuing to hide their illicit extramarital affair.

Recognizing – and displaying an amount of sympathy to both judges because of "human weakness" – Petitioner requested the OCCA to recall the mandates and withdraw its previous denials of Petitioner's post-conviction appeals to start anew. The OCCA denied the request, and made clear that each of his post-conviction claims are exhausted, thus requiring the SCOTUS and potentially this Court to engage in a "realistic appraisal of psychological tendencies and human weakness." *Caperton*, 556 U.S. at 883. Such an appraisal dictates that the judges' illicit, long-term extramarital affair could have tainted the judges' (already not particularly stalwart) senses of ethics and judicial neutrality. *Id.*

There is substantial and objectively reasonable risk that Keely was routinely biased toward post-conviction appellants whose trials were presided over by her extramarital lover, Judge Drummond, in order to ingratiate herself to him because being seen as defendant/appellant friendly could have endangered their extramarital relationship.

There is also an additional substantial and objectively reasonable risk that Keely could have been disposed to rule more favorably toward attorneys in the Tulsa County District Attorney's Office who had treated her extramarital lover well while he presided over that docket; equally, there is a further substantial and objectively reasonable risk that Keely was ill-disposed toward defense attorneys who had exchanged harsh words, or otherwise had poor working relationships with her lover. There is a substantial and objectively reasonable risk Keely showed compensatory bias toward the prosecution so that her bias toward her lover would not be obvious. *See Bracy*, 286 F.3d at 412 (noting that trial judge was "capable of camouflaging his actions in some cases" through his decisions in others); *State v. Holland*, 158 A.3d 597, 607 (N.J. Super. Ct. Law Div. 2017) (noting that potential for compensatory judicial bias "envelops the entire process by casting doubt and leaving the lingering question" of whether judge was biased). Had any other prosecutor – especially those assigned to Drummond and Keely's docket – become aware of the judges' extramarital affair, those prosecutors would hold the judges' personal and professional reputations, careers, and marriages in their hands; suffice to say neither Judge Drummond nor Judge Keely would be predisposed to upset such a person.

This morass of unethical potentialities is precisely why judges should not have secret sexual relationships with other judges, and to contend that the potential for bias in their example extends only to cases where Judge Drummond presided over a defendant's trial and Judge Keely

presided over that same defendant/appellant's post-conviction proceedings is so myopic as to be absurd.

Even the OCCA was forced – but only after the issue received media coverage – to hold that "common sense" dictates that a compromised judge could have been biased toward their illicit sexual partners and should have recused from presiding over those cases. *Fort*, ¶ 2, 516 P.3d at 695. Yet, "common sense" – the sense of justice that responds viscerally to such a compromised judge's actions – equally dictates that, had Petitioner timely known about the judges' illicit, long-term extramarital affair, and had Petitioner demanded Judge Drummond recuse pretrial because of Drummond's extramarital affair with another judge – and he would have, had Drummond and Keely's improprieties been known to him – Judge Drummond would have had no choice but to recuse. *See* Appendix 6 (Affidavit of Brent Allen Morris). It makes little sense now, because these judges were successful in hiding their improprieties from Petitioner, his trial attorney and his direct- and post-conviction counsel, that these judges' illicit, improprieties should be excused.

It is not Petitioner's task to show that Judge Drummond and Judge Keely "harbor[ed] an actual, subjective bias." *Williams*, 579 U.S. at 8. Indeed, such a showing is likely impossible, given that Petitioner cannot plumb the depths of Drummond and Keely's psyches. *See Bracy*, 286 F.3d at 429 (noting that a direct showing of bias is "all but impossible to make"). Were Petitioner required to make an impossible showing in order to vindicate his Due Process rights, it would render the Due Process protections meaningless. That is why the standard does not require a showing of actual bias; instead, the question is whether, "under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be

adequately implemented." *Caperton*, 556 U.S. at 883-884. As demonstrated, both judges' improprieties embroil them in a skein of constitutionally intolerable potential biases abhorrent to any notion of Due Process.

### C. Given the Above, Judge Keely's Recusal is Sufficient Evidence of Judicial Bias and this Court Owes No Deference Under the AEDPA to Petitioner's Direct Appeal, First- and Second- Post-Conviction Claims

Because there is a presumption of honesty and integrity in judges, *see Withrow v. Larkin*, 421 U.S. 35, 47 (1975), the onus was not on Petitioner, his trial counsel, nor his appellate counsel to search for disqualifying factors in the lives of Judge Drummond and Judge Keely. That burden rests with a judge, so either the *Withrow* presumption has been abrogated by the State of Oklahoma's Judiciary, or Petitioner's trial and appellate counsel was ineffective for failing to research these judges' personal and professional lives. *See Strickland v. Washington*, 466 U.S. 668 (1984).

If Judge Keely, Judge Drummond, or General Gentner Drummond are upset about this uncomfortable situation, they can thank the OCCA for refusing to accept Petitioner's request to recall that court's mandate denying relief. Instead, the OCCA made perfectly clear it would not, and that each of Petitioner's claims are exhausted.

Petitioner has demonstrated that but for Judges Drummond and Keely's failure to disclose and disqualify, he would have challenged their participation at every stage of his criminal proceedings below immediately upon learning of their illicit, long-term extramarital affair. With this knowledge, there is a reasonable probability that he would have prevailed on each of his appeals, from direct to post-conviction. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000) (discussing the standard for ineffective assistance of counsel). But ultimately, the "realistic appraisal of psychological tendencies and human weakness, the interest" posed by

Judge Drummond and Judge Keely's secret and illicit extramarital affair "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Caperton*, 556 U.S. at 883-884.[4]

Regardless, both Judges Drummond and Keely are in violation of their Code of Judicial Conduct, *see* Oklahoma Code of Judicial Conduct, T. 5, Ch. 1, App. 4 (2023), Canon 1, Rule 1.2 & Cmts. 1, 2, 3, 4, 5; Rule 2.1 & Cmt. 1; Rule 2.2 & Cmt. 4; Rule 2.3 & Cmt. 1; Rule 2.4 & Cmt. 1; Rule 2.6 & Cmt. 1; Rule 2.9; Rule 2.11; Rule 2.15, and; Rule 3.1, and the common law cited *supra*. And Petitioner has filed bar and judicial complaints against each of the parties aforementioned. *See* Appendix 9 (Bar Complaint – Assistant District Attorney Meghan Hilborn); Appendix 10 (Judicial Complaint – Judge Michelle Keely); Appendix 11 (Judicial Complaint – Judge Doug Drummond); Appendix 12 (Judicial Complaint – OCCA Judge Bill Musseman) (as a former Tulsa County District and Chief Judge, Judge Musseman knew of the long term extramarital affair between Judges Drummond and Keely, but apparently saw no problem with Judge Keely taking over her lovers docket when Judge Drummond was transferred to a civil docket while he was the Chief/Administrative Judge for Tulsa County, nor did he raise the issue *sua sponte* after he was appointed to the Oklahoma Court of Criminal Appeals).

## CLOSING

Consistent with the facts and authority presented above, the OCCA's conclusions are contrary to clearly established precedent of this Court and Oklahoma law and should be REVERSED. At a minimum, there is sufficient evidence to establish that both Petitioner's trial judge and his post-conviction judge had an unknown, unconstitutional risk and appearance of

[4] If a similar situation had happened in Federal Court, an extramarital affair between two judges presiding over the trial and appellate stages, respectively, of a criminal proceeding – stated politely – would be inconsistent with at least Canon 2 of the Code of Conduct for U.S. Judges ("A judge must avoid all impropriety and appearance of impropriety in all activities.").

bias that is disqualifying and requires a new trial, or no deference under the AEDPA for his post-conviction claims resulting in *de novo* review. Premises considered; the Petition for Writ of Certiorari should be GRANTED.

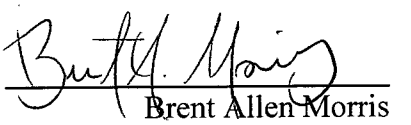
**PROOF OF SERVICE**

I, Brent Allen Morris, do swear or declare that on this date, August 29, 2023, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.
The names and addresses of those served are as follows:

Attorney General of Oklahoma
313 N.E. 21st
Oklahoma City, OK 73105

I declare under penalty of perjury that the foregoing is true and correct to the very best of my knowledge, information, and belief.

Executed on August 29, 2023.



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# Appendix 1

## (Order Affirming Denial of Second Application for Post-Conviction Relief)