

JUL 14 2023

OFFICE OF THE CLERK

No. 23-5747

IN THE

SUPREME COURT OF THE UNITED STATES

DARYL A. HESS — PETITIONER
(Your Name)

vs.

CHRISTI QUICK — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

OKLAHOMA COURT OF CRIMINAL APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

DARYL ALAN HESS
(Your Name)

P.O. BOX 97
(Address)

MALESTER, OKLA. 74502
(City, State, Zip Code)

918-423-4700
(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

1. Should this court treat this petition as a habeas corpus, when Petitioner filed with this court a 28 U.S.C. § 2254 petition, the clerk of this court returned it and directed Petitioner to submit a writ of certiorari, providing the forms and directing to "correct" within 60 days.
2. Should this court decline to enforce state courts procedural bar, when state court based its findings on facts that do not exist and refused to acknowledge newly discovered evidence?
3. Should the prosecutor, with full knowledge of conflict of interest due to subsequent representation by defense counsel, have informed the court, and by failing to do so was party to constitutional violation, and excuses Petitioner's failure to object prior to trial.
4. Federal habeas corpus review usually is not available to a defendant who defaults in raising a constitutional issue in state court. *Wainwright v. Sykes*, 433 U.S. 72, 82-83 (1977). These rules have never been invoked by the courts in successive representation cases. Should this issue be defaulted when petitioner was never advised, therefore never given chance to object. (This would be new point of law)
5. Did Petitioner have to object to the subsequent representation prior to trial, to preserve issue for appeal. The lower courts have not applied a contemporaneous objection rule in successive representation cases. In the few cases where failure to object was used as reason not to reverse, in each case there was evidence the defendant was aware of the subsequent representation. The Supreme Court has not ruled on this issue.
6. Previous attorney went on to represent co-defendant and state witness in same case and related cases, not only failed to disclose conflict of interest to the court, but engaged in a conspiracy to conceal her involvement from petitioner, does this render the trial fundamentally unfair and begs sanctions on attorney.

Questions presented

7. Did the Oklahoma Court of Criminal Appeals deny Petitioner due process and treat him differently than other similarly situated individuals by deny evidentiary hearing, ignoring newly discovered evidence, applying every procedural bar available based on non-existent facts. Does this record show they stayed silent on lower courts abuse of discretion.

8. Did Tulsa Police Officer Randall Solomon maliciously tamper into this investigation to clear his own niece and frame petitioner, did this violate the U.S. Constitution, And is facts of unrelated case where officer framed two men prove this case.

9. Did Tulsa police officer Chris With fabricate a confession on petitioner and does facts in unrelated case prove this.

10. Did the prosecutor give its star witness, Jessica Solomon special treatment or a plea deal and not disclose it, in this case and two others, where witness was impeached.

11. Was trial and appellate counsel ineffective for failing to identify the subsequent representation of counsel, where error does not appear in trial record, does this preclude raising issue.

12. Do these errors separately and taken together show a serious miscarriage of justice in violation of U.S. Constitution.

QUESTIONS PRESENTED

13. The State Appeals Court completely abandoned ERRONOUS Findings of Fact and Conclusions of Law made by Trial Court to impose procedural Bar, indicating they understood the Rulings were incorrect, should Federal Courts enforce procedural Bar
14. Does the Fact Tulsa County Special Judge, who lacks subject matter Jurisdiction to oversee felony cases, intervened in this case and denied post-conviction, without notice to defendant, to invalidate Rulings in State Court? And Fact states Appellate Court was advised of issue and failed to address it show HESS did not and cannot get a fair review in Oklahoma Courts?
15. Does Fact Special Judge who lacked subject matter Jurisdiction to oversee post conviction, who intervened and denied Application, Toll time limitations for Federal Review, as his decision is in Fact no decision at all, or is it grounds for equitable tolling
16. In light of Clerk of Court returning 28 U.S.C. § 2254 petition and directing HESS to "correct" with a writ of certiorari, incorrectly stating HESS failed to comply with filing requirements, will this Court liberally construe pro se petition to appropriate legal pathway to be heard, and consider filing timely based on court's reception of original petition
17. Did the State Courts failure to address in any way HESS's request for court records, HESS's be diligent proceeding in forma pauperis, violate the Sixth and Fourteenth Amendment due process protections.
18. Oklahoma enacted ~~22~~ 22 O.S. § 1080.1 (SEE Appendix B page 3) with MIRRORS word for word the one-year time limitations found in ~~the~~ ~~the~~ Anti-Terrorist and Effective Death Penalty Act (AEDPA) 28 USCA § 2244 + 28 USCA § 2254. There fore it RELYS on Federal Question, does this mean Federal Court will not enforce procedural Bar.

QUESTIONS PRESENTED

19. The Fact Petitioner underwent competency proceedings, was found able to stand trial under condition court and counsel carefully and diligently explained everything to him, coupled with fact trial counsel claims he himself was unaware of subsequent representation issue, excuse default.
20. must a defendant be directly advised of a conflict of interest from subsequent representation before it can be defaulted.
21. must a defendant actively lodge an objection to subsequent representation before it can be defaulted.

LIST OF PARTIES

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

[] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

CHRISTI QUICK - Warden - Respondent - Represented by:

Oklahoma Attorney General

Gentner Drummond

313 N.E. 21st St.

OKC, OKLA.

73105

RELATED CASES

- State of OKla. v. HESS CF-2007-2643. TULSA County District Court (OKla); Judgement Sept. 25, 2008.
Jury trial conviction Ct.#2 Robbery/Attempt w/ dangerous weapon, 20 yrs.
Ct.#6 Possession of FIREARM AFCE 3 yrs consecutive.
Date of sentencing Oct. 2, 2008.
- Direct Appeal - Oklahoma Court of Criminal Appeals
HESS v. State F-2008-975 (unpublished)
Affirmed conviction on Sept. 16, 2009
- First Application for post-conviction Relief
Tulsa County District Court CF-2007-2643 (unpublished)
Filed March 22, 2010 - Denied April 28, 2010

Related Cases

- Oklahoma Court of Criminal Appeals (unpublished)
Appeal of Post-conviction Relief Denial
HESS V. STATE PC-2010-445
Denied on June 10, 2010
- United States District Court - Northern District of Oklahoma
HESS V. TRAMMELL NO. 10-CV-0462-CVE-FHM
28 U.S.C. § 2254 habeas corpus (unpublished)
Filed July 20, 2010 Denied June 24, 2013
(COA denied)
- Tenth Circuit Court of Appeals
HESS V. TRAMMELL
Consolidated cases: 13-5091, 13-5092, 13-5093 (unpublished)
These are companion cases
Denied Certificate of Appealability on Oct. 23, 2013
- Second Application for Post-conviction Relief
Tulsa County District Court (Okla) (unpublished)
CF-2007-2643
Filed Jan. 5, 2023 Denied Feb. 28, 2023

Related cases

- Oklahoma Court of Criminal Appeals
Appeal of Post-conviction Relief Denial
HESS v. State PC-2023-213 (unpublished)
Denied May 17, 2023
- Tenth Circuit Court of Appeals
IN RE: DARYL ALAN HESS (unpublished)
28 U.S.C. § 2244(b) Petition
Consolidated cases NO. 23-5061 + 23-5065
These are companion cases.
Authorization Denied on June 27, 2023
NOTE: Petitioner is not requesting review of this decision
in any way
- United States Supreme Court
HESS v. QUICK
28 U.S.C. § 2254 habeas corpus petition
Postmarked July 14, 2023, Received by clerk July 21, 2023.
Clerk of the court returned to petitioner Aug. 7, 2023, along
with paperwork, forms and directions to petition for writ of
certiorari

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the State Trial court appears at Appendix B to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was May 17, 2023.
A copy of that decision appears at Appendix A.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case puts in issue the Fourteenth Amendment's due process clause: "no state shall... deprive any person of life, liberty, or property, without due process of law..." U.S. Const. Amend. XIV, § 1.
2. This case also puts in issue 28 U.S.C. § 2254 (a) ~~(a)~~: "The Supreme Court, a Justice, thereof, a Circuit Judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the constitution... of the United States."
3. This case also puts in issue the Sixth Amend. U.S. Const. Right to confer free counsel.
4. This case ~~also~~ also puts in issue as an alternative to habeas corpus, the All Writs Act 28 U.S.C.A. § 1651 (a) The Supreme Court and all courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
(b) An alternative writ or rule nisi may be ~~used~~ issued by a Justice or Judge of a court which has jurisdiction.
This act may be used to effectuate habeas jurisdiction as well.
5. United States Supreme Court Rule 10, 28 U.S.C.A. (c) State court of last resort has decided an important question of Federal law that has not been, but should be, settled by the Supreme Court, or has decided an important Federal question in a way that conflicts with relevant decisions of the Supreme Court.
6. ~~28 U.S.C.A. 2254 (b) (i) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment~~

Constitutional And Statutory Provisions Involved

6. This case also puts at issue 28 U.S.C.A. § 2249 "on application for a writ of habeas corpus... the Respondent shall promptly file... certified copies... such of them as may be material to the questions raised, if the petitioner fails to attach them..."

7. This case involves this court's decision *FEIKER V. TURPIN*, 116 S. Ct. 2333 (decided June 28, 1996) "Provision of AEDPA... does not... Repeal Supreme Court's Authority to entertain original habeas petitions"

STATEMENT OF THE CASE

To put this case into context this court must recognize this is one of four cases pending against HESS in 2007, and Jessica Solomon was the states star witness against him in all four cases.

In April 2007 HESS and Jessica Solomon visited two carlots in Tulsa Oklahoma, using stolen drivers license and stolen checks, they were successful at cheap cars R US in test driving a Maroon Dodge Ram TRUCK, together they drove off stealing the TRUCK.

Shortly after the TRUCK theft HESS and Solomon got into a domestic dispute where HESS ended up crashing a car into Solomons apartment at the Parkview Terrace Apartments (Tulsa Oklahoma) At that point Solomons mother, Kimberly Ashley threatened HESS with Tulsa Police officer Randall Solomon, Jessicas UNCLE on her fathers side. Ashley told HESS she would make sure he was gone from her daughters life for good and Tulsa police would hunt him like a dog.

On May 5, 2007, Shelby Cowen pulled into the parking lot of the Tindog Saloon, just after midnight, after having been at a golf event and consuming alcohol, but denies he was intoxicated. He parked next to a Maroon TRUCK, the passenger got out and pointed a chrome 9mm or 45 cal. semi-automatic handgun through the open drivers window and demanded his wallet. The TRUCK driver came around and Cowen saw his face. Cowen was very calm and very familiar with firearms and certain about his prescription of the gun. An important fact this court should be aware of, Cowen had been a court bailiff in Tulsa county courthouse for over 10 years, he had worked for every Judge, including the Judge handling this trial, he knew HESS's appointed counsel, prosecutors, and police officers involved in this case.

On May 7, 2007 around 6:30 AM Ronald Saizow lived in a gated community 91st & S. Yale Ave, Tulsa Oklahoma. He looked out a front window and observed a white male, in a short sleeved shirt walking down his driveway towards a red or maroon TRUCK parked on the street. He noticed the man was carrying a small white box that his wife kept in her vehicle. The vehicle was parked in his open garage.

Saizow exited his home, following the man down the drive demanding his wifes property back, He caught up with the man at the street when the man pulled

Statement of the case

a handgun on him. He described this handgun as being all black. The man walked Saizow back up the drive and into his home and demanded his wallet. Saizow then noticed the driver appear in his doorway holding a shotgun that had a wood stock and pump. They then fled.

It was raining on the morning of May 7, 2007. The Tulsa police motor cycle Traffic unit could not undertake their usual duties, according to officer Ed Trice. Trice claims he had received information that Hess had robbed Cowen on May 5 and Saizow that very morning. Trice and his motor cycle unit, of which the officers have never been named, decided to obtain police cars and hunt Hess down. Trice claims he had information Hess would be at Jessica Solomons Apartment and they set up surveillance on the apartment in marked police cars. It has never been revealed how this information pointing to Hess was obtained or at what time police arrived at Jessica Solomons Apartment. Hess believes surveillance may have been set up before the Saizow robbery even took place.

At some point after these motorcycle officers set up surveillance, it is unclear exactly what time, Trice called Sgt. Chris Witt to ask for assistance. Witt was the supervisor of the Fugitive Task Force. Trice informed Witt he had information Hess had committed the Cowen and Saizow robberies and had tracked Hess to Solomons Apartment. Witt and his Squad had not yet started their morning shift, this fact is what leads Hess to believe the Saizow robbery had not yet occurred.

Witt contacted his team and dispatched them to Parkview Terrace Apartments to assist Trice with surveillance. The only officer on Witt's team to ever be identified is Det. Phillip Forbrich. These officers set up around the complex in unmarked vehicles. Witt then travelled to the complex, on the way he conducted a records check and found both Hess and Jessica Solomon had warrants for their arrest, unrelated to Cowen or Saizow. Witt parked in a position with a view of Solomons Apartment and waited, until he watched arrive as a passenger in a maroon Dodge Ram truck.

Hess had spent the night before at the Royal Inn motel about a mile from Solomons Apartment. That morning Mitchell Sullivan showed up driving that Dodge Ram truck, Hess had traded the truck to Sullivan a couple days prior for some meth.

Statement of the case

Sullivan had some stolen credit/debit cards and asked Hess if Jessica would "run" them, identity theft was Solomons specialty at the time. Hess called her and she told him yes she would do it, to come pick her up at her apartment. Hess knew Solomons children would be getting on the school bus soon so they agreed to wait until then.

Hess waited till around 8:30 or 9am and rode with Sullivan, it was about a mile drive, they turned into the Parkview Terrace Apartments from the Union Ave entrance, immediately inside the complex Tulsa police had a red Chevy truck pulled over, several uniformed officers in marked cars with guns drawn on the truck. As they passed all the officers stared at them.

Sullivan turned off the main street into a cul-de-sac where Solomons Apt. was located. Hess noticed a brand new car with tinted windows backed in directly across from Solomons front door with a male in the drivers seat wearing a police vest, but otherwise in plain clothes. Directly in front of Solomons front door was a vehicle Solomon had been driving, a gold infinity SUV. They parked several spaces away from that vehicle and went up to Solomons door.

Hess attempted to open the front door and found it was locked, unusual as Solomon never locked the door and also she was expecting him. He then knocked on the door and Kimberly Ashley opened it, Jessica's mother, unusual because she did not live there and seldom visited, especially that early in the morning on a work day.

As Hess entered the apartment he seen three of Solomons school aged children appearing to be asleep on the living room couches, with all the lights turned on. Unusual as they were supposed to be in school, also they usually slept in their own bedrooms.

Ashley tells Hess Jessica is upstairs in her bedroom, Hess and Sullivan go up the stairs. The upper level consists of a bathroom and three bedrooms, Hess noticed that all the doors were wide open and all the lights turned on. Unusual.

Statement of the case

Sullivan went into the Bathroom as Hess went into Jessica's room. He found Solomon fully dressed looking out the window that overlooks where Hess had entered and the street, also Solomon's two year daughter was fully dressed playing on her bed.

Hess walked up to Solomon and looked out the window and every single marked police car had vanished and the red Chevy truck was just pulling away. He asked Solomon where all the police cars went, she responded "what police cars, your tripping" Hess seen who he now knows was Det. Phillip Farbrich looking up at him from the unmarked car backed in directly across the lot.

Hess then walked across the hall into Solomon's daughter's bedroom and looked out the back window that overlooks a back parking lot, he seen an SUV backed in with at least five plain clothed officers wearing ballistic vests with police written across them all looking directly at him, he also noticed other plain clothed officers on foot colonading on the back door.

Hess immediately went back to Solomon's bedroom and discovered she had vanished, leaving her two year old child on the bed. Almost immediately he hears Solomon call up the stairs "Daryl Baby come here" completely out of character. Hess opened the Bathroom door to Alert Sullivan when Sgt. Witt began yelling up the stairs, commanding Hess by first name to send down Solomon's daughter.

From the moment Hess got out of that truck till Witt began yelling up those stairs was 2-3 minutes tops. This all happened very quickly. Witt claims he knocked on the front door, Ashley answered, he asked if Hess was there and she said yes upstairs, he asked permission to enter and Ashley agreed, once inside he encountered Jessica, she confirmed Hess was upstairs and gave permission to stay in the apartment. Hess asserts this is not true, this was a low income Government Assistance Apartment, bare walls and linoleum floors, foot steps and voices carry, Hess was hyper aware of what was going on, he never heard a knock on the door or any conversations. Hess was set up.

Statement of the case

Hess began communicating with Witt and complied, sent Solomons Daughter down the stairs. Then went down himself.

The stairs descend half way then switch's back 180 degrees for the other half. Therefore you can't see all the way down. At the landing Witt directed Hess to come down backwards, before Hess Reached the bottom step he was grabbed, lifted off his feet, carried about four feet and slammed on his face next to the open back door on the kitchen floor. Through the open back door Hess seen numerous marked and unmarked police vehicles. He was handcuffed and physically restrained.

Witt then directs Sullivan to come down, he is handcuffed. Police found Zolent-Platten cards and credit/debit cards belonging to both Cowan and Sarzow on Sullivan and in the Bedroom Sullivan was in.

Witt asks if Hess was Hess, Forbeck hands him his Drivers license, Witt then open hand slaps Hess across the face, pulls him up and drops him to the stairs, up the stairs and into Solomons Daughters Bedroom. Push's Hess onto the bed and slaps him across the face again. Hess Rolled onto his side and pushed his face into the mattress to protect his face, Witt tells him "Sit up your a man" The Bedroom door was fully closed.

Witt begins to question Hess about Cowan and Sarzow. NEVER Read him his Miranda Rights. Hess denies being involved with never claims to have questioned Hess about the case he had warrants for (CF-2007-2334 Tulsa co).

Its important for this court to recognize Sullivan was not taken upstairs as Hess was, he was immediately taken out the open back door and placed in a police vehicle. Sullivan was also not assaulted by police.

Witt claims he had no forms on scene, Miranda waiver and witness statement forms, for Hess to fill out, so he verbally Read Hess Miranda warning, Hess verbally waived his rights and verbally confessed to Robbing Cowan and Sarzow. That he done so due to his drug habit and he needed help. Witt claims Hess identified Sullivan as his accomplice, that the truck he arrived in was the vehicle used and that the guns located in Jessica Solomons stolen infinity SUV were the guns he used. Thats a convenient confession when there was absolutely zero evidence linking Hess to either robbery.

Statement of the case

once Witt gave up on getting Hess to confess he opened the bedroom door and Hess seen two plainclothed officers standing just outside the door. He pulled Hess to his feet and pushed him to one of the officers telling him to take Hess to Detective Division. That unnamed officer walked Hess downstairs and out the front door to an unmarked SUV, as he was searching Hess and placing him in the passenger seat, Det. Phillip Forbrich walked up and stopped him, telling the other officer with wanted him to transport Hess, He was making fun of the officer that the officer had to stay at Solomons disgusting apartment and both remarked that child protective services would be called to remove Solomons four children. ~~Then~~

Forbrich walked Hess to the unmarked car backed in directly across from the apartment that Hess had noticed upon his arrival. Parked between Forbrichs car and Solomons front door was a gold colored infinity SUV.

on the drive to Detective division Forbrich engaged Hess in conversation. He told Hess what he knew about the Cowan Robbery, Hess continued to deny involvement, Hess then asked Forbrich about a robbery that morning that Witt questioned him about, Forbrich said he was unaware of any robbery that morning.

At Hess's trial Forbrich testified that he stood outside the bedroom door as Witt questioned Hess and overheard Hess say "He done it" but no other details. This tidbit was not in his report.

once Hess was at Detective Division, he was interviewed on camera by Det. Stephen St. Claire and denied any involvement in either robbery and denied any confession to Witt.

After Hess was transported, Witt claims Solomon was not under arrest and not detained, although he was aware she had warrants. Witt asked Solomon for permission to search her apartment for evidence against Hess. She agreed, Witt produced a search waiver form for her to sign.

During a search of Solomons apartment police found an entire identity theft operation, drugs, paraphernalia, and other stolen property.

Statement of the case

In each instance Witt provided witness statement forms to Solomon where she wrote statements against Hess putting blame on him.

Witt asked Solomon which vehicle outside belonged to her and could he search it for evidence against Hess. She told him the Gold Infinity SUV was hers and pulled the keys out of her jeans pocket and handed them to Witt. He had her sign a search waiver form. She explained to Witt a friend had allowed her to take over payments on the Infinity. This fact contradicts Witt's alleged confession as this was the first he was aware of this vehicle.

As police approached the Infinity they observed in plain view two shotguns and a Black .22 cal. Revolver. They ran the tag and found the vehicle stolen.

Witt confronted Solomon with these facts and she said oh Hess was actually the person who had given her the Infinity and in fact he had borrowed it around midnight and just brought it back that morning. There were no guns in it when she loaned it to him. That is in direct conflict with police surveillance. But once again Witt provided her a witness statement form and she wrote a statement against Hess. She was not charged with anything found in her apartment or stolen vehicle.

Using Solomon's statement as probable cause Tusa police booked Hess into the jail on possession of drug and drug paraphernalia charges. But the state declined to pursue the charges. Solomon was not charged even though these items were located throughout her apartment, including her bedroom and bedroom closet. Hess did not live with Solomon. It is unclear why the state wouldn't value Solomon's statement in this instance but did all the other statements.

Also on May 7, 2007 Solomon wrote a statement against Hess that he had told her he test drove the Dodge Ram truck from a carlot and not returned it leaving out her own involvement in the theft. The truck had not been reported stolen. It was impounded with a hold for robbery detectives.

On May 10, 2007 Tusa police officer Randall Solomon, Jessica Solomon's uncle, on his own initiative prepared a six man photo line-up containing a photo of Hess and travelled to Cheap Cars R Us. The carlot had not reported the truck

Statement of the case

Stolen or contacted police regarding the TRUCK at all. Randall Solomon had the owners of the carlot make a Report that left out the involvement of a Female accomplice, which was in fact his own niece, Jessica Solomon. The photo line-up did not contain a photo of Mitchell Sullivan, the man police observed driving the TRUCK. Randall Solomon took those Reports, his Nieces statement and the photo line-up and turned it over to Auto theft Detective EBERLE, who filed charges against HESS CF-2007-2903. This is the only factual evidence HESS has Randall Solomon tempered in this case maliciously. However there is more.

On May 7, 2007 TUSA police showed Ronald Saizow a six men photo line-up. But there is a dispute between Saizow and police, Saizow has NEVER wavered that he picked a suspect in that line-up on the day of his Robbery. He circled the suspect and wrote his initials over the photo. TUSA police claim Saizow did not pick anyone.

On May 10, 2007, some date Randall Solomon travelled to cheap cars R US, Saizow was shown a second photo line-up. A side by side comparison of the photo line-ups shown to cheap cars R US and Saizow reveal they are copies of each other. It is unclear if Randall Solomon was present when Saizow was shown the second photo line-up but it is clear there was coordination on some level. Cheap cars R US is located at 21st + S. Memorial DR. Ronald Saizow's home is at 91st + S. YALE AVE. less than 10 miles apart.

Further to this point, Saizow testified he never seen tattoos on the Robber or in the first photo line-up, only in the second photo ARRAY. HESS has extensive tattoos on his face and both arms from wrist to elbow.

THE COLEMAN and Saizow Robberies were conjoined for trial purposes. Due to the crimes being committed close to each other, some suspects and mode of crime. HESS asserts these some elements exist to link Randall Solomon and both photo line-ups.

HESS was charged in TUSA county district court, state v. HESS CF-2007-2643; CF-2007-2646; CF-2007-2334 and CF-2007-2903. All cases involve Jessica Solomon as a state witness and include witness statements she wrote at her apartment to with on May 7, 2007. except CF-2007-2646 arised a few days later.

HESS was appointed to be represented by the TUSA county Public defender

Statement of the case

In all four cases. These cases were before three different Judges. Hess's cases were pending for about two and half years, He had at different times seven different Attorneys, one Attorney he actually had twice, once as an Assistant public defender, then again as Appointed conflict counsel. Some of these Attorneys worked a single case, others worked all four together.

In this case Hess had competency proceedings. The Judge ordered he be evaluated by a mental health professional. Hess was extensively evaluated and the doctors professional opinion was that even though Hess suffered severe mental illness, and was slow to understand legal concepts or even the charges against him, he could stand trial as long as his Attorney and the court carefully and diligently explained everything to him. A competency jury agreed with that and Judge as well. In fact at trial Hess tried to withdraw his counsel and represent himself, the trial Judge ruled a jury had found him competent to stand trial but she herself had serious doubts about Hess's mental abilities.

Obviously Jessica Solomon was important to the states prosecution and therefore important to all Hess's defense counsel's.

In CF-2007-2646, a Robbery case in which Jessica was an actual charged co-defendant, Hess was assigned an assistant public defender, Julie Ball.

Hess met with Ball on several occasions in preparation of the preliminary hearing in CF-2007-2646. They had in depth conversations about Jessica Solomons statements in all four cases. About their relationship. About Randall Solomon. Impediment of Jessica was up utmost importance and her self-serving lies, therefore the facts of all four cases were relevant to Attorney Ball, and all Hess's Attorneys. Therefore Ball was well versed in Hess's defense in all four cases.

Unknown to Hess at the time, on June 12, 2007, Tulsa county Public defender withdrew from CF-2007-2903 and CF-2007-2334. The motion to withdraw cited an irreconcilable conflict of interest, due to confidentiality they would explain it to the Judge in an ex parte in camera hearing, it was granted on some date. Hess was not present or notified, and was not represented at ex parte in camera hearing, if one took place.

On June 13, 2007, Hess had a preliminary hearing in CF-2007-2646, represented by Assistant Public defender Julie Ball, whom did not inform Hess of any conflict of interest.

Statement of the case

Ball informed HESS Jessica Solomon was present and on the states witness list. Ball informed HESS she had spent the morning negotiating a plea deal on his behalf with PROSECUTORS STEVE KUNEWELTER and MICKY HEWITINS. The plea included all four of HESS'S cases, including this case. Life with parole was the offer. Meaning Julie Ball actively participated as his counsel in this case.

On June 18, 2007 Assistant public defender Richard Couch, whom HESS had never met or spoken to filed a motion to withdraw from CF-2007-2646, citing irreconcilable conflict of interest, due to confidentiality he would explain in an ex parte in camera hearing. HESS was not notified or present at this hearing took place. Granted same day.

Despite the known conflicts of interest, the public defender did not withdraw from this case until JAN. 10, 2008. A full six months after withdrawing from the first two cases, citing an irreconcilable conflict of interest and ex parte in camera hearing. Again HESS was not present or notified of a hearing took place.

HESS heard that Solomon had been released on a personal recognizance bond. \$50,000 bond on a violent felony Robbery charge.

HESS hadn't heard a word about Julie Ball since that preliminary hearing. Sum two years passed as these cases worked their way to trial. This case ^{and others} passed numerous times for no other reason than to make sure Solomon stayed on the hook.

Trial in this case began Sept. 22, 2008. Solomon did not have an attorney accompany her while she testified, HESS was told because she was not actually charged in this case. She was heavily impeached and a jury instruction was issued regarding her testimony.

The second trial for CF-2007-2646 began on Oct. 8, 2008. When HESS got to the courthouse he was told the Judge had started another trial and HESS'S was transferred to Judge Dona Kuhn. Kuhn is the Judge who had been presiding over two of HESS'S other cases CF-2007-2903 and CF-2007-2334.

When Jessica Solomon entered the courtroom she was accompanied by Assistant public defender Mark Cagle, a bench conference was had outside HESS'S hearing in which Cagle told the Judge Julie Ball was busy so he was standing in on Solomons behalf. Solomon was again heavily impeached. Jury instruction given.

HESS didn't know it but Solomons court records were sealed shortly after that.

In May 2021 Attorney James Hankins was conducting a REVIEW of Jessica Solomons Social media, He came upon a Facebook post by her Giving Thanks to Julie Ball for helping turn her life around. Hankins sent a letter to District Attorney Steve Kunzweiler and Toisa county Public defender Corbin Brewster on May 6, 2021, stating that the Records were sealed, could they verify or deny Attorney Julie Ball represented Solomon, that produced no results.

On June 14, 2021 Hankins filed a post conviction Application in CF-2007-2646, Attached that Facebook post and Requested access to Solomons sealed court file.

On Nov. 24, 2021 the State filed a Response and denied Julie Ball represented Solomon, calling Hess's allegation unsupported and self-serving, and arguing against unsealing Solomons Records.

A post-conviction hearing was held on March 8, 2022 and the Judge told Hankins to prepare an order to unseal the Records, he would grant it.

On March 23, 2022 The State filed a supplemental Response conceding the dual representation, showing that they were aware of it all along.

On March 24, 2022 The Judge signed the order unsealing the Records, but the Judge told Hankins he was not allowed to provide them to Hess.

Hankins accessed Solomons court Records and found Assistant public defender Julie Ball name first appears on Aug. 7, 2007 on paperwork waiving Solomons right to a jury trial and Solomons personal Recognition Bond, Julie Ball represented Solomon for the duration, including expungement of her conviction and sealing of the Records.

Significantly, Hankins found in Solomon's court docket that on the morning of Hess's trial, Ball appeared before Judge Clancy Smith with Solomon, but just a couple hours later, Solomon had stand in counsel, Hess believes Ball conspired to keep the dual representation a secret from him.

Wood v. Georgia,
450 U.S. 261, 268-72, 101 S.Ct. 1097, 1101-03, 67 L.Ed.2d 220 (1981) (the
guarantee of conflict-free counsel extends to any situation in which counsel for the
accused owes conflicting duties to the accused and to another person).

In *Holloway v. Arkansas*, 435 U.S. 475, 488, 98 S.Ct. 1173, 1180, 55 L.Ed.2d
426 (1978), the Supreme Court held that improper joint representation in a criminal
case requires automatic reversal if a timely objection is made.

Here, Hess had no opportunity to object because he was never informed about
the subsequent representation of Solomon by Ball, and had he known about it, he
would have objected. ~~See attached Exhibit "2" at 46.~~ Thus, he should be entitled to
the automatic reversal rule of *Holloway*.

In *Allen v. State*, 1994 OK CR 30, 874 P.2d 60, the Court confronted a situation
similar to what happened to Hess, where there was successive representation that
generated a conflict. The Court recognized that this situation implicates the ongoing
duty of loyalty to the client, even after the representation has concluded. *Id.* ¶ 11.

The Court also held that since there was no indication in the record that the
conflict was disclosed to the accused, and he was thereby given the opportunity to
object, he was "effectively precluded from lodging a timely objection." *Id.* ¶ 14.
Thus, the accused was not required to show an adverse effect from the actual conflict
of interest, and thus prejudiced is presumed and reversal is mandated. *Id.*

Thus, application of the rules of *Holloway* and *Allen* compel the conclusion that the conflict in Hess's case warrants automatic reversal without a showing of prejudice. Ball had an actual conflict representing first Hess, and then Solomon—two charged co-defendants in the same case; and Hess was not made aware of the conflict, had no opportunity to object to it, and would have had he been made aware of it.

In *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980), the Supreme Court discussed potential, rather than actual, conflicts of interest of counsel in cases involving multiple representation where no objection is made at trial. In such cases, the accused must have the opportunity to show that potential conflicts affected adversely his right to a fair trial. *Id.* 348 (“In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.”)

The Court in *Cuyler* made clear that “a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.” *Id.* 349-50. If Ball in fact represented Hess first, then Solomon, an actual conflict has been shown.

The situation with Hess is that his counsel acquired confidential and privileged information from him about the facts and circumstances of the State's

accusations—then represented the star witness for the State, armed with the knowledge that she had acquired from Hess.

The conflict was not merely potential. Solomon actually testified against Hess in this case, and also in the case before, and was prepared to testify against him in a third and fourth case—and surely would have done so had Hess not pled guilty. Ball was able to prepare Solomon to testify against Hess in an unconstitutional manner because she was privy to information from Hess himself.

This is an actual conflict with demonstrable prejudice to Hess. Thus, under either standard as established by *Holloway* or *Cuyler*, Hess received ineffective assistance of counsel and his case must be reversed.

An entangleable conflict of interest was present in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

In *United States v. Shepard*, 44 F.4th 305 (5th Cir 2022), the Fifth Circuit granted relief on similar facts. Where Shepard's pretrial counsel was also representing one of the Government's star witnesses.

This was a conflict that the Government knew about but failed to timely disclose to the court.

~~Background~~: The Records Indicate that the state
in fact offered its state witness a legal benefit in
exchange for her testimony and failed to disclose it

Supporting facts: At no time prior to or during this trial did
the state disclose any deal or special treatment with Jessica Solomon
Attorney James Henkins while review companion case CF-2007-2646
found it unusual that Solomon's conviction for a violent felony had been
expunged and her records sealed, in Henkins considerable typewritten
those types of things rarely happen without agreement by the state.
on July 14, 2021 Henkins filed a post conviction application in
CF-2007-2646 (Tusa co) alleging an undisclosed deal provided to Solomon
and requesting access to Solomon's sealed court file

Henkins provided Transcript & Xeroxes from the trial in CF-2007-2646
where the prosecutor told the jury in opening and closing arguments
that state had no deal with Solomon

The state countered in its response that Solomon under questioning
from Henks's defense counsel admitted she would get "consideration for
her honest testimony" In the states view that met their burden to
disclose and Henks couldn't complain about it now. That testimony about
"consideration" was two weeks after the conclusion of this trial.

Further Solomon was consistently impeached in both trials.

Attorney Henkins gained access to Solomon's court records by court
order signed March 24, 2021, Henks what he found:

Solomon's preliminary hearing was postponed by agreement several times
without cause given. You will recall Henks had competency proceedings that delayed
his.

on Aug. 7, 2007 in an agreement with the state Solomon waived her right to
a preliminary hearing and right to a jury trial and was released on a

• personal Recognizance Bond and ankle monitor, she was ordered to appear at all scheduled court dates, pay costs associated with her ankle monitor to court services and maintain full time employment. Her release was to be supervised by Tulsa county district Attorney.

Solomon Remained on that Bond for sum two and a half years without so much as entering a plea in her case.

Solomon Failed to appear at least twice, The Judge taking a warrant under colvisment but not issuing it, the state did not try to Revoke Bond.

Solomon Racked up thousands of dollars in court service fees in which she never paid a single cent, The court twice held Rule 8 hearings for her failure to pay, but in an agreement with the state her debt was waived and she was required to perform work hours, its unclear if she actually worked those hours.

No motions or discovery deadlines were ever scheduled in her case, No trial by Judge ever scheduled, No defense motions ever filed on her behalf, For two and a half years that case was pending.

For any Judge to allow a case to sit idle on their docket for two and a half years where the defendant has not even entered a plea, clearly shows some type of understanding between all parties and the Judge.

Further Solomon was allowed to stay represented by a free public defender for which she was not entitled.

she was free on Bond and required to maintain employment. Tulsa county requires anyone on any type of Bond to secure a private Attorney or the court revokes the Bond. A Public defender is a legal benefit.

Solomon ~~at~~ did not enter a Guilty plea until all of Hess's cases were resolved and the state no longer needed her.

she entered into an agreed plea, 2 1/2 yrs deferred, which was immediately expunged and her records sealed, making them undiscernable to Hess.

Statement of the case

Solomon's charges reduced to Accessory after the fact, which is inconsistent with her own trial testimony that she planned the robbery ahead of time. Robbery was actually her own idea and she actively drove to the scene and acted as a getaway driver. She then entered into an agreed upon plea, not a blind plea.

Not only did the state not disclose this prior to this trial, two weeks after the conclusion of this trial, Hess's second trial began. CF-2007-2646. In which the state told the jury they had made no deals at all with Solomon. During opening statements TR. II 213, ^{III 450} and closing arguments TR. II 235-36. elicited testimony from Solomon herself.

Had the state made any deals with Solomon in exchange for her testimony, it would have to have disclosed this fact to the defense. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963) (Requirement to disclose exculpatory information); United States v. Bagley, 473 U.S. 667, 677, 105 S. Ct. 3375, 3381, 87 L. Ed. 2d 481 (1985) (extending the Brady rule to impeachment evidence).

However, formal plea "deals" (which would be impeachment evidence ~~under~~ under Brady) are not all that is covered by the Brady rule. Tacit understandings of favorable treatment, even if not written in formal deals, require disclosure to the

defense. *Douglas v. Workman*, 560 F.3d 1156, 1186 (10th Cir. 2009) (“Like the majority of our sister circuits, we conclude that *Brady* requires disclosure of tacit agreements between the prosecutor and a witness). As the Tenth Circuit held in *Douglas*, “a deal is a deal—explicit or tacit.” 560 F.3d at 1186.

Hess finds it inconceivable that the State did not have at least a tacit understanding with Solomon that she would get a good deal if she cooperated and testified against Hess. She secured an O.R. bond on a robbery charge, admitted to using meth on the stand for which she was not charged, had drug/alcohol problems, and as it came to light in a companion case in CF-2007-2643, she had a pre-school aged daughter at her apartment along with stolen goods, a stolen car, and drug paraphernalia.

Even in the absence of a formal, written plea deal, it is clear that the State gave Solomon benefits in exchange for her testimony that were not offered to Hess or Hamilton. To make matters worse, the State then made a big production at trial denying that it had given Solomon any special treatment. In Hess’s view, the State’s representation that there were no deals was not true, and he requests discovery on this issue and to inspect the files of the prosecution for documentation of special treatment given to Solomon.

The conduct of eliciting testimony that there were no deals, when there in fact

was some kind of special treatment, is a violation of clearly established federal law affording basic constitutional guarantees of fundamental fairness and Due Process of law under the Fourteenth Amendment. *See Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

The Supreme Court has held that in evaluating *Napue* errors, courts apply a less demanding standard of review: whether “there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *accord United States v. Crockett*, 435 F.3d 1305, 1317 (10th Cir. 2006). This materiality standard is, in effect, a form of harmless error review, but a far lesser showing of harm is required under *Napue*’s materiality standard than under ordinary harmless error review. *See Smith v. Phillips*, 455 U.S. 209, 220 n.10, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982) (describing the “materiality requirement” that applies to *Napue* and *Giglio* claims).

Napue is directly on point. The prosecutor sponsored a star witness and elicited from that witness that the witness had received no promise of consideration in return for his testimony. This turned out to be false, since the prosecutor had in fact promised him consideration, but did not correct the witness on the stand. The Supreme Court found this situation to be a violation of Due Process.

In essence, a conviction obtained through the use of false evidence, known to

be false by the State, must fall under the Fourteenth Amendment. *Napue*, 360 U.S. at 269. In fact, even in the absence of an agreement, the Eighth Circuit has held that the fact that a sentence commutation hearing was to take place soon after the appearance of the witness a trial constituted exculpatory material under Brady. See *Reutter v. Solem*, 888 F.2d 578, 582 (8th Cir. 1989).

The error was that the State told the jury that the witness had nothing to gain from his testimony. *Id.* Similarly, Solomon clearly had something to gain by testifying against Hess and cooperating with the State. She had admitted to criminal activity, was in serious jeopardy of losing custody of her child, and she was not sentenced until all of Hess's cases were concluded and she was no longer useful to the State. This is the essence of a plea deal.

Under *Napue*, *Brady*, and *Bagley*, it was error for the State to argue and state that Solomon had no deal when she clearly received a benefit from her testimony, ultimately concluding with a deferred sentence which has since been expunged and all traces of her involvement in ~~this~~^{that} case erased from the public record. This violated the Fourteenth Amendment and Hess's conviction must be reversed.

Solomon had waived her right to preliminary hearing and jury trial in CF-2007-2646. NO trial by judge was even scheduled in that case. It sat idle on the Judges Rocket for two and a half years by agreement. NO judge would allow this without an agreement. Idle for no other purpose than to testify against Hess in all his cases.

Statement of the case

On March 31, 2022 Hess discovered the following facts: United States District Court for Northern District of Oklahoma. Malcolm Scott v. City of Tulsa, case no: 17-CV-400-TCK-CDL (Jan. 4, 2022). Tulsa County Dist. Court CF-94-4356

Malcolm Scott and Demarcus Carpenter were wrongly convicted for murder. Tulsa police officer Randall Solomon framed them due to a personal vendetta. Solomon falsified reports, fabricated evidence and coerced witnesses. He also recruited other officers to assist in the frame-up.

On May 13, 2016 Tulsa County District Judge Sharon Holmes ruled these men innocent. On Nov. 10, 2016 the Oklahoma Court of Criminal Appeals affirmed the findings of Judge Holmes.

These facts came to light years after Hess's state and federal appeals were exhausted.

These are the exact reasons and tactics Randall Solomon used on Hess.

On March 31, 2022 Hess discovered the following facts: United States District Court, Northern District of Oklahoma. ~~and~~ Smith v. City of Tulsa. case no: 11-CV-113-JHP-PJC (March 2012).

On July 27, 2010 Tulsa police officer Chris Witt responded to an intoxicated, unresponsive and nude man lying in a motel room bed. Unarmed. Witt was accompanied by a junior officer, he was the supervisor, Tina Kenemmer.

Witt shot Richard Smith 70-80 times with a pepperball gun, causing extensive injuries, including his armpits and bare genitals.

Witt and Kenemmer then manipulated the system to cover up the torture of Smith by not submitting police reports for arrest or charges. Only filing a use of force report, and falsifying the report claiming Witt shot Smith 5 times.

This conspiracy to hide Witt's crime of torture would have succeeded if not for hospital staff that diligently documented Smith's injuries, including photo/video evidence.

Witt further perjured himself in federal court, as did Kenemmer. The federal judge attributed Kenemmer's false reporting to the fact Witt was her supervisor.

Statement of the case

THESE ARE THE SAME TECHNIQUES WHICH WERE USED IN FABRICATING A FALSE CONFESSSION AGAINST HESS.

THIS CASE AROSE AFTER HESS'S STATE ~~APPEALS~~ APPEALS WERE EXHAUSTED. SMACK IN THE MIDDLE OF HESS'S FEDERAL HABEAS PROCEEDINGS. HESS FILED FOR AND WAS DENIED RECORDS PERTAINING TO WITH.

THIS POLICE MISCONDUCT MUST FALL UNDER UNDER
BRADY V. MARYLAND, 373 U.S. 83, 87, 83 S. CT. 1194, 1196-97,
10 L. ED. 2D. 215 (1963).

THESE OFFICERS MISCONDUCT VIOLATED HESS'S SIXTH
AND FOURTEENTH AMENDMENTS AND HIS CONVICTION
MUST BE REVERSED.

Statement of the case

Assistant District Attorney Micky Hawkins was lead prosecutor in all four of Hess's cases. On June 13, 2007 Hawkins engaged with Hess's public defender Julie Ball in plea negotiations and conducted the preliminary hearing in CF-2007-2646. In fact he conducted all four preliminary hearings in which Solomon was endorsed as a State witness.

Once Ball switched horses in the same case and became attorney for Jessica Solomon, Hawkins with full knowledge of the fact Ball was Hess's attorney, worked with Ball and Solomon to prepare Solomons testimony in this case and three others, he worked on agreement to release Solomon on a personal Recognizance Bond.

Hawkins never informed the court of Julie Ball's conflict of interest, instead he gleaned information from her that was confidential.

This violated Hess's Sixth and Fourteenth U.S. Constitutional protections. This case must be REVERSED.

Statement of case

Hess filed his application for post-conviction Relief ~~on~~
Jan. 5, 2023. It was assigned to District Judge.
on Feb. 24, 2023 Special Judge David Guten signed an
order dismissing Hess's application.

Special Judges lack subject matter jurisdiction
to handle post conviction Felony cases without written
agreement in advance. Hess was not notified of
Guten involvement and therefore not given chance
to object to his involvement.

This violated 20 OKla. St. Ann. § ^{95.7} ~~95.7~~ "A Judge
to whom a case has been assigned has continuing Authority over it,
including post-trial motions..."

20 OKI. ST. ANN. § 123 A. Special Judges may hear and
decide the following (11) other actions and proceedings... where
the parties agree in writing..."

This violated Hess's Sixth and Fourteenth
United States Constitutional Rights and his conviction
must be reversed.

REASONS FOR GRANTING THE PETITION

1. This IS the type of Sham prosecution the United States Routinely condemns countries such as Russia for conducting. If this conviction IS allowed to stand, and wrong does not Sanctioned, This country will be no better.
2. Justice demands it.
3. Hess did not receive a fair proceeding in state court.
4. Hess's Sixth and Fourteenth Constitutional Rights have been violated.
5. There exists structural error in this case from its inception.
6. The state court erroneously applied procedural bars, its clear their only goal was to deny Hess a fair proceeding. If this court allows this type of manipulation, no defendant in Oklahoma will ever have a fair proceeding, it will give Oklahoma license to stomp all over Federal violations.
7. U.S. Sup. Ct. Rule 10, 28 U.S.C.A. (e) a state court of last resort has decided an important question of Federal law that has not been, but should be, settled by the Supreme Court, or has decided an important Federal question in a way that conflicts with relevant decisions of the Supreme Court.

Must a defendant be directly advised of a conflict of interest arising from subsequent representation before it can be defaulted.

Must a defendant actively lodge an objection to subsequent representation

Reasons for granting the Petition

before it can be defaulted when the Record shows HE WAS NEVER advised of Subsequent Representation, but PROSECUTOR had Full knowledge and Failed to Inform Court.

Can ineffective assistance of counsel due to a conflict of interest be raised at any time when error was not in trial Record and Appellate counsel would not have been alerted to issue.

Can a prosecutors knowledge of and participation in a Subsequent Representation conflict, Failure to Inform Court, excuse a defendants default of the issue.

8. This Court should Review how Oklahoma uses its procedural default Rules. The Oklahoma Trial Court and Oklahoma Court of Criminal Appeals applied EVERY default procedure on their books to deny HESS any Review, clearly its only purpose was to deny due process, the Courts even Fabricated Facts on which to base Rulings. How many other defendants with viable structural constitutional violations have been erroneously Barred. There is not a single TRUE Statement in the denial Orders by either State Court in this case.

9. Must Oklahoma hold an evidentiary hearing on conflict of interest claims that do not appear in the Record before Ruling its defaulted

10. Oklahoma enacted 22 O.S. § 1080.1 effective NOV. 1, 2022, this put a one-year time limitations on post-conviction claims. HESS was sentenced in 2008, is it constitutional for Oklahoma to enforce this in cases that predate the statute. (See Appendix B page 3 for lengthy statute)

11. The Oklahoma Court of Criminal Appeals Abandoned ERRONOUS

findings made by Trial court to impose procedural Bars. Such as claiming 22 O.S. 1080.1 applied, claiming HESS had raised these claims in another case and were already adjudicated, and falsely claiming HESS's conviction became final in 2009 when he failed to withdraw his guilty plea, when in fact he was convicted by jury in 2008, clearly shows the Appeals court knew and knowingly disregarded the fact the trial court abused its discretion. This court should therefore not enforce the procedural bars.

12. In Oklahoma Special Judges have no authority to oversee felony cases without written agreement between all parties, including post-conviction cases, a special judge intervened in this case without notifying HESS and denied post conviction, without even identifying himself other than an illegible signature on the order. That special judge did not have subject matter jurisdiction and the state appeals court ignored these facts. And does these facts in fact toll any federal time limitations as special judges opinion is in fact void, its no decision at all legally. Is this grounds for equitable tolling.

13. The Supreme court has held Oklahoma's procedural bar does not apply to federal questions involving fundamental error, as this case does. This must apply evenly to all.

14. AFFIRMATIVE DEFENSE TO STATE BAR

The State District Court erroneously applied a blanket procedural bar to all Hess's claims on post conviction Application. The States procedural bar normally will preclude Federal Review.

Some Federal Courts have declined to enforce a States procedural bar where it was obvious that the State Courts Reliance on the procedural rule was in error. *Sivak v. Hardison*, 658 F.3d 898, 906-07 (9th Cir 2011) (holding that, while unusual, a Federal court may reject a State Courts use of a procedural bar if it was erroneously applied); *Hodge v. Haeblerlin*, 579 F.3d 627, 643 (6th Cir 2009), cert. denied, 130 S. Ct. 2107, 176 L. Ed 2d 736 (2010) (in determining whether to give preclusive effect to a procedural default, this court must consider whether the petitioner actually failed to comply with a State procedural rule...") *Richey v. Bradshaw*, 498 F.3d 344, 359 (6th Cir. 2007) (declining to enforce State procedural bar where it was "improperly invoked" by the State court)

Tulsa County District Court Filed its order dismissing Hess's post conviction Application on Feb. 28, 2023.

on page 2 of that order the court ruled "petitioners current Applications filed in CF-2007-2334 and CF-2007-2643 are IDENTICAL and RAISE claims adjudicated in CF-2007-2646. This COURT NEED NOT TACKLE THE MERITS of petitioners claims, HOWEVER, BECAUSE they ARE CLEARLY PROCEDURALLY BARRED."

THAT IS NOT ENTIRELY TRUE, ONLY TWO claims in this case MIRROR claims HESS RAISED in CF-2007-2646 (TUISA county), GROUND ONE: INEFFECTIVE assistance of counsel; GROUND TWO: an UNDISCLOSED deal by state to JESSICA SOLOMON, Applying that bar to HESS'S OTHER claims WAS ERRONEOUS.

REGARDING THE TWO adjudicated claims in CF-2007-2646 (TUISA county) HESS RELIES ON LEBERE v. ABBOTT, 732 F.3d 1224 (10th CIR. 2013) "When a state court declines to REVIEW the MERITS of a petitioners claim on the ground that it has done so already, it CREATES NO BAR to FEDERAL habeas REVIEW"

on page 3 THE DISTRICT COURT INVOKED 22 O.S. § 1080.1 which dictates one year timeline to initiate claims for post conviction RELIEF, THE COURTS determination was that the STATE applies to HESS, page 4 "petitioners Judgement and sentence became final in 2009 when he failed to withdraw his Guilty plea... PROHIBITED ... dismisses his application on this basis"

THIS IS CLEARLY ERRONEOUS, HESS WAS TRIED and convicted by a JURY in 2008, they applied this statute based on non-existent facts. FURTHER 22 O.S. § 1080.1, A.(5) RESETS that one-year clock FROM "THE date on which the Factual predicate of the claim OR

claims presented could have been discovered through the exercise of due diligence"

Hess carefully laid out in his application to the state district court that due to Jessica Solomon's court records being sealed they were undiscoverable, the corruption of Tulsa police officers Randall Solomon and Chris Witt was exposed years after Hess's trial and exhaustion of state appeals.

None of these claims exist in this trial record, they all require fact finding outside the record, therefore were not available for direct appeal or Hess first post-conviction application. Therefore the states 22 O.S. § 1086 procedural bar is erroneous, on page 5 the court ruled "petitioner makes no showing whatsoever" as to why he failed to assert or inadequately assert the claims in a prior application.

That is a completely false statement by the district court, Hess explained it in great detail in his post conviction application. Hess did not receive a fair review in district court.

Hess did raise ineffective assistance of counsel in his direct appeal, despite res judicata, an ineffective assistance claim can be brought on post conviction if it requires fact finding outside of the direct appeal record" *Turrentine v. State of Oklahoma*, 965 P.2d 985, 987-88 (Ok. Cr. App.); *United States v. Galloway*, 56 F.3d 1239, 1242-43 (10th Cir. 1995) "The fact that an ineffectiveness claim is raised and adjudicated on direct appeal will not procedurally bar the claim in 28 U.S.C. § 2255, where new reasons are advanced in support of that claim"

Hess appealed that clearly flawed opinion to the Oklahoma court of criminal appeals, Hess v. State, PC-2023-213.

The OCCA completely abandoned the district courts abuses of discretion in relying on facts that do not exist, and created their own basis for barring Hess's claims, which is outside their usual mode of operating.

The OCCA's standard of review on post conviction appeals, where the trial court has issued findings of fact and conclusions of law this court reviews the factual findings under an abuse of discretion standard, and conclusions of law de novo. King v. State, 2008 OK CR 13, ¶ 4, 182 P.3d 842.

The OCCA abandoned its duties and disposed of Hess's appeal differently than other petitioners pursuing post conviction.

The OCCA applied res judicata, and waivers for failing to raise these claims on direct appeal, and stated "we do not reach the merits of petitioner's first five claims of error because they could have been raised in his direct appeal or previous post conviction"

Hess has demonstrated that's untrue.

On page 3, the OCCA stated "petitioner alleges these claims are based on newly discovered evidence and are, therefore, properly raised in a subsequent post conviction application. On the contrary, he has presented no material evidence or facts that could not have been discovered at the time of the prior proceedings despite the exercise of due diligence"

That statement is untrue, Hess submitted court records from companion case CF-2007-2646 (Tulsa County) that had been

Filed In that case in the months just prior to this post conviction Application, showing how the Judge in that case unsealed Jessica Solomons court Records for Attorney James Henkins and he re-filed under seal in that case, I submitted the states Response in that case dated Nov. 24, 2021, showing the state outright lying to the court about the subsequent representation of the states star witness Jessica Solomon by Hess's former Attorney Julie Bell, calling Hess's claim self-serving and unsupporting, Arguing against the unsealing of Jessica Solomons court Records, The Judge indicating he would allow Attorney James Henkins access to the sealed court Records, on March 23, 2022 before the order was signed unsealing the Records, the state filed a supplemental Response conceding to the dual representation, March 24, 2022 the order was signed by the court to grant Attorney Henkins access.

Therefore the district and appellate court were clearly aware these Records existed and that Hess had no way to obtain them other than a court order. Further to that point CF-2007-2646 was pending before the OCCA some time as this case, they actually had the sealed Records in their possession and Hess pointed that out to them in his brief. That case was styled Hess v. State, PC-2022-1068.

Although Hess dont believe state court Judge shopping by the prosecutor is reviewable in federal court, this court should consider it when determining if Hess received a fair review. Hess's case was docketed before District Judge Dawn Moody, with no warning or opportunity to object the prosecutor had special Judge David Goyen sign the dismissal order.

The dismissal order is deceptively crafted, The Judges signature is illegible and no name appears in print below the signature to identify who the signature belongs to, Hess has never before seen a court order without the Judges printed name below the signature, It was only by way of a family who screenshoted the entry on OSCN.NET and sent it to Hess that it was discovered, In Oklahoma special Judges lack subject matter jurisdiction to oversee felony cases, including post conviction matters unless both parties agree to it in advance in writing, and Oklahoma does not allow for swapping of Judges without prior notice and an explanation. Hess raised this issue to OCCA and they failed to meet their obligation under law and allow a fraud on the court to stand.

~~BRANDY STEAKS, 334 F.3d~~ In Carlson v. Jess, 526 F.3d 1018, 1024 (7th Cir. 2008) "Because the trial court based its decision on an unreasonable factual determination, the substantive merits of Carlson's claim are analyzed under the pre-AEDPA standard - That is, de novo - because there is no state court analysis to apply AEDPA standards to"

The United States Supreme Court has found Oklahoma Waiver Rule does not apply to fundamental trial error. Hawkins v. State, ~~Supra at 440~~ 569 P.2d 490 (Okla. Crim. App. 1977) "State courts judgment does not rest on an independent state ground and that our jurisdiction is therefore properly exercised" Gaddis v. State, 447 P.2d 42, 45-46 (Okla. Crim. App. 1968) "Under Oklahoma law . . . Federal

Constitutional errors are Fundamental." ... *Herb v. Pitcairn*,
324 U.S. 117, 126, 65 S. Ct. 459, 463, 89 L. Ed. 789 (1945)
"Our Jurisdiction is not precluded"

This court has Jurisdiction to adjudicate this
habeas corpus on the merits of Hess's claims.

On Nov. 1st, 2022 Oklahoma enacted 22 O.S. § 1080.1
(see Appendix B page 3) which sets a one year statute of
limitations on all claims. This statute mirrors word for word
"AEDPA" statute found in 28 U.S.C.A. 2244 + 2254.

Therefore it Relies on Federal law. If this
court does not decide this question now, Federal
court, 10th circuit and Supreme court will be
flooded with challenges to Oklahoma's procedural
bars and waivers

Reason for granting Petition

This court received HESS'S 28 U.S.C. § 2254 habeas corpus petition on July 14, 2023 (Appendix C). The clerk of the court returned it along with forms for a writ of certiorari and directed HESS to "correct" his filing, citing RULE 14.1 (i) claiming the lower courts' opinions were not appended. HESS did submit those opinions as "exhibits" along with petition. 28 U.S.C.A. 2249 allows respondent to provide records of petition's ^{facts} to.

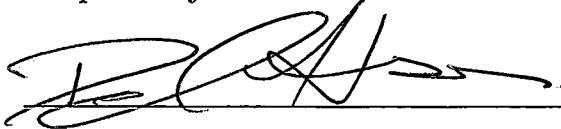
HESS did provide a "certificate of service" with that petition as required by RULE 29.5

DO to HESS'S Adhering to the Requirements with 28 U.S.C. § 2254 HESS REQUESTS this CERTIORARI be deemed timely, be construed as a direct appeal of the state courts decisions, and/or 28 U.S.C. 2254(a) and/or the all writs act 28 U.S.C.A § 1651(a) and 28 U.S.C. § 1257(a); OR any other action this court deem appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 8-28-23