No. 23-6369

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPH R. CYR — PETITIONER

vs.

SCOTT CROW — RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOSEPH R. CYR
Oklahoma State Reformatory
P.O. Box 514
Granite, Oklahoma 73547

Petitioner pro se

December 21, 2023

QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court's charge to Petitioner's jury violate his Due Process rights as articulated in *Sandstrom v. Montana*, 442 U.S. 510 (1979), because a reasonable juror could have interpreted it charged instruction as effectively creating an impermissible conclusive presumption that improperly relieved the State of the burden of proving the Petitioner guilty on all elements of malice aforethought murder?

2. Whether the Tenth Circuit Court of Appeals erred when denying a COA; accepting the District Court's conclusions regarding the Oklahoma Court of Criminal Appeals' application of transferred intent, because although the OCCA is the final authority on application of Oklahoma State law, it is not the final authority on the interpretation which a jury could have given the instructions under *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979), and the application of transferred intent by the OCCA created a hypothesized verdict that the jury never in fact rendered violating the jury-trial guarantee condemned in *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)?

3. Whether the State committed waiver of the Fourth Amendment claims as expressed in *Steagald v. United States*, 451 U.S. 205, 209 (1981) and confessed the claims under Fed. R. Civ. P., Rule 8(b)(6) by not answering the allegations in both State court and on habeas? Did the Tenth Circuit Court of Appeals err in denying a COA by not permitting review of claims under 2253(c) on claims of ineffective assistance of appellate counsel in part, on the basis ineffective assistance of trial counsel for failing to investigate and motion to suppress evidence obtained by multiple warrantless and illegal seizures in violation of the Petitioner's Fourth Amendment right to expectation of privacy that were not answered by the State? Did the Tenth Circuit Court err giving deference to the lower court's rulings when the State plainly misrepresented the underlying Fourth Amendment claims on post-conviction and on habeas causing the State courts and the U.S. District court to unreasonably apply *Franks v. Delaware,* 438 U.S. 154, 156 (1978) to the underlying merits of the ineffective assistance claims that are indeed not *Franks* claims; was the lowest state court's decision an 'adjudication on the merits' warranting deference under §2254(d)?

LIST OF ALL PARTIES TO THE PROCEEDING

Joseph R. Cyr, acting *pro se*, was the Appellant in the proceedings before the United States Court of Appeals for the Tenth Circuit which are the subject of this Petition. Mr. Cyr is a prison inmate confined by the Oklahoma Department of Corrections.

Scott Crow was the Appellee in the Tenth Circuit proceedings referenced above. Mr. Crow is the Director of Oklahoma Department of Corrections. Mr. Crow has been represented throughout the underlying proceedings by the Office of the Attorney General, State of Oklahoma.

TABLE OF CONTENTS

Page

INDEX TO APPENDICES

Cases

Statutes

Rules

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

The opinion of the United States Court of Appeals appears at **Appendix A** to the petition, *Joseph R. Cyr v. Scott Crow*, No. 23-6020 and is reported at the WESTLAW citation 2023 WL 6864503.

STATEMENT FOR THE BASIS OF JURISDICTION

1. The date on which the United States Court of Appeals decided my case was October 18, 2023.

2. A Petition For Rehearing En Banc was timely filed and denied by the United States Court of Appeals on November 21, 2023 and a copy of the order denying rehearing appears at **Appendix B**.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253(c):

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;...

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.....

28 U.S.C. § 2254:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground he is in custody in violation of the Constitution or laws or treaties of the United States....

(d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

U.S.C.A. Const. Amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Joseph R. Cyr stands convicted by the Oklahoma County District Court in an entirely circumstantial case where an Oklahoma jury convicted Cyr on two counts of first degree murder with malice aforethought for the killing of a woman and her fetus.

A. The Homicide

At the trial it was shown the woman was a sex worker that whom Cyr had sex with in December 2011. Her partially decomposed body was found near a dirt bike trail on January 7, 2012 and had been stabbed 29 times. (Tr. II 208-210). The woman and her husband Justin Adams were supporting themselves and their three children by prostitution. The night she disappeared she left her home to meet a man at a hotel in Norman, Oklahoma.

(Tr. V. 999). Justin stayed home with their three sons. (Tr. 1059). The woman was approximately seven (7) weeks pregnant at the time of her death. (Tr. VII 1357). They employed a system of communication to tell him where and when she was meeting with someone. (Tr. V. 1000). That night they exchanged several texts and a phone call. At 11:33 p.m. on December 9 2011 she texted him that she was at a Best Western at I-40 and meridian and the guy was a "no-show". (Tr. V 1006). The two then spoke by phone about where she was and that she had a possible meeting at a McDonalds in Midwest City. (Tr. V 1006). At 12:16 a.m. she texted "He is here" to which he responded "Okay babe." (Tr. V 1007).

Sometime after the 12:16 a.m. text Mr. Adams' phone ran out of power. (Tr. 1007). He did not have a charger since the woman had it with her and did not charge the phone until becoming worried he had not heard anything from her since the text just after midnight. (Tr. V. 1007-1009). Around 3:00 a.m., Mr. Adams went to his mother's house situated next to his and plugged his phone in to be charged. At that time he saw a text the woman had sent at 12:53 a.m. saying "He never showed." (Tr. V 1010). After that he became very concerned and he and his mother, Tina Clarke, both testified they went out searching for the woman. After going to the places the woman reportedly had been that night, and driving in the Draper Lake area, they ultimately found the Adams' mini-van parked in a McDonald's parking lot. (Tr. V 938-939). Adams and Clarke could not open the van and they waited until 5:12 a.m. to call 9-1-1 to report Ms. Adams missing.

OCPD patrol officer responded to the scene at 5:25 a.m. where he came in contact with Justin Adams and Tina Clarke. (Tr. II 175-176). Officer Spillman described Mr. Adams as agitated. (Tr. II 176). Mr. Adams initially asked Officer Spillman to use his "slim jim" to open the mini-van. Since Mr. Adams had no proof he owned the van, Officer Spillman would not open it for him. (Tr. II 181). Mr. Adams initially told the police the same lie he had actually told his mother that night before about the whereabouts of Ms. Adams. He told the Officer that she had gone to the grocery store in Blanchard, then to meet a friend. (Tr. II 179). Mr. Adams explained that he told the lie at his mother's urging because they did not think the police would respond if they found out Ms. Adams was a prostitute. (Tr. V 940) (Tr. V 1045-1046). Officer Spillman dictated a report leading to a missing person report being dispatched. The van was impounded the next day by Officer Donald Drake. (Tr. II 195-196, 201-202). Ms. Adams cell phone and computer were never recovered. (Tr. III 448).

Dr. Inas Yacoub performed the autopsy on Ms. Adams. The manner of death was multiple stab wounds consisting of 29 stab wounds to her back, head and upper abdomen. (Tr. VII 1345-1351). Some wounds were deeper than others but several impacted her vital organs. (Tr. VII 1378-1379). She also had a broken jaw. (Tr. VII 1352). The wounds were caused by a sharp instrument like a knife or a piece of glass. (Tr. VII 1362). Dr. Yacoub testified that Ms. Adams was seven to eight weeks pregnant at the time of her death. (Tr. 1357). None of the injuries directly affected the fetus. (Tr. VII 1359).

The detectives consulted with an archeologist and an entomologist to help determine how long Ms. Adams body had been in that location. Dr. Kent Buehler, concluded that her body could have been there for the entire 29 days she was missing. (Tr. VI 1134). Dr. Heather Ketchum analyzed the bug activity in the field and Ms. Adam's body and determined her body could have been there no earlier than December 3rd and December 15th. (Tr. V 1163-1164).

B. The investigation and arrest of Joseph Cyr

A missing persons investigation began in December of 2011 when Ms. Adams was reported missing. However, homicide investigators were also assigned to the case and followed a couple of different theories. According to Detective and case agent Cris Cunningham they believed it was possible that Ms. Adams had left on her own. (Tr. III 384). However, they also became suspicious of Justin Adams. Early in the missing persons investigation Justin Adams agreed to be interviewed by police and he allowed his phone and computer to be examined at the same time, but wanted them back when his interview was done. (Tr. IV 772). At that time, OCPD Det. Rob Holland performed a logical extraction on the phone creating an image of what was in the phone that included e-mails, texts, contacts, call logs, and web browser history. (Tr. III 389)(Tr. IV 774-775). That information was handed over to the missing persons investigators. (Tr. IV 776). He also consented to the search of his trailer and gave a DNA sample. (Tr. III 389-390, 394). DNA samples were taken from other people whom Ms. Adams had contact with before her death, to include her friend Amanda Shea, and former "johns" Zach Chilton, David Webster, and

Matthew Azcueta. The "johns" were excluded by DNA but called to testify about their interactions with Ms. Adams that night.

After the discovery of Ms. Adams' body and the determination that she was the victim of a homicide based on the condition of her body, Justin Adams was arrested and charged with the murder of his wife and unborn child. (Tr. 407-408). The reason law enforcement focused on him was because he initially lied to them and they knew there was a history of domestic violence, and the analysis of his phone records placed him in the same location as his wife the night she disappeared instead of being at home as he and his mother had told them. (Tr. III 380-381)(Tr. IV 778-785)(Tr. VI 1316).

The investigation then shifted when there was a glitch in the Sprint cell system that explained why Justin Adams' cell phone record were not consistent with his story of that night.(Tr. IV 795)(Tr. VII 1432-1433)(Tr. VII 1433).

Detectives knew Ms. Adams had contact with Mr. Cyr the night of December 9th through Cyr's AT&T phone record. (Tr. III 411)(Tr. V 859). Those records indicated that Mr. Cyr and Ms. Adams had been in contact and that they had been in proximity to each other. (T. III 411) Det. Cunningham first contacted Mr. Cyr on December 12th at that time Mr. Cyr admitted he had phone contact with Ms. Adams but denied meeting her in person. (Tr. VI 1287)(Tr. VI 1288). An in person interview with Mr. Cyr occurred on December 20th. (Tr. VI 1288). His contact with Ms. Adams began when he responded to her Craigslist ad by an e-mail (State's Exhibit 70, 6:16-6:25). He could not remember the exact contents of their e-mail exchange but he thought he asked for a picture. (7:35-7:49) a couple of hours

later he got an e-mail from Ms. Adams with her prices. (8:35-8:42). He subsequently asked for her number and gave her a call. (9:04-9:30). The e-mails were never produced by the State at trial. Mr. Cyr told Det. Cunningham that when he spoke to Ms. Adams he told her he wasn't interested in meeting with her. (11:03-11:32). That night Mr. Cyr went to a Walmart at MacArthur and Reno in Oklahoma City. (12:40-12:56). He explained his actions at Walmart (15:10-15:15). During the interview Det. Cunningham did not see any injury to Mr. Cyr's face or hands suggesting he had been in a struggle. (Tr. VI 1312). No photographs of his appearance were taken of his appearance on December 20th. (Tr. VI 1313).

In 2012 it was discovered by OCPD's chemist, Elaine Taylor, an unknown DNA/ sperm sample was found on a vaginal slide from the Medical Examiner's Office. The presence of the unknown DNA/sperm sample profile prompted to obtain a warrant for a buccal swab from Mr. Cyr whom had not previously given a sample. (Tr. III 414-415). The testing could not exclude Mr. Cyr as the contributor of a sperm fraction that was isolated from the vaginal swab taken at autopsy but did exclude him as a contributor of DNA found inside the used condom found and collected near Ms. Adams' body. (State's Exhibit 124 p.10) (State's Exhibit 124)(Tr. VI 1256-1262, 1264). This evidence directly conflicted with the autopsy report which stated that no sperm was found on the vaginal swabs (Appendix W at 11).

Testimony at trial from Mr. Cyr's ex-girlfriend explained when Mr. Cyr had gotten home the night he met with Ms. Adams and confirmed parts of his story (Tr. IV 555-562). She

testified that he did not wash his clothes that night and did not have blood on him when he returned home. (Tr. IV 566, 613-614). She testified that she had told him about a leaking tire on his truck and that they ran errands the next day, having breakfast at a Denny's at her suggestion near where Ms. Adams' van was found, and that they went to a car wash after breakfast where they cleaned dust of his dash and doors and went through a drive through car wash, but did not vacuum out the truck. (Tr. 571-578).

Mr. Cyr and his ex-girlfriend had moved in January of 2012 accepting job offers in the Tulsa area. (Tr. IV 587-588)(Tr. 631-632). Mr. Cyr's trucks were searched in January of 2012 the Chevy was seized and the Ford voluntarily submitted and did not produce anything fruitful. (Tr. III 435-436)(Tr. IV 597-598)(Tr. IV 667-668). The trucks were seized again in July of 2012 and examined and could not confirm the presence of blood or DNA. (Tr. IV 688). Mr. Cyr's ex-girlfriend testified and admitted that she had acquired and read the search warrants and autopsy report (Tr. IV 628) and also posted on a website called "*Websleuths*" about the case and that she did not meet with Det. Cunningham in person until July of 2013 after the arrest of Mr. Cyr and after meeting her current husband. (Tr. IV 628-629, 638, 643). The defense called three witnesses at trial. Misty Birchfield a criminalist with Oklahoma State Bureau of Investigation testified that on January 14, 2016 she received the seat covers found by Mr. Cyr's ex-girlfriend from his truck and the samples collected from Investigator Baxter and all her tests were negative for the presence of blood. (Tr. VII 1528-1533). Malcom Brummet testified that in December 2011 he worked as a deputy patrolman for the Grady County Sheriff's Office and spoke to Justin

Adams on the morning of December 11th and he did not appear emotional or make eye contact with him. (Tr. VII 1537-1537). Heidi Teeter testified that her National Guard unit had drill that weekend and Justin Adams failed to report that weekend. (Tr. VII 1541). All other necessary facts will be contained in the questions presented below.

ARGUMENT

1. Whether the trial court's charge to Petitioner's jury violate his Due Process rights as articulated in *Sandstrom v. Montana*, 442 U.S. 510 (1979), because a reasonable juror could have interpreted it charged instruction as effectively creating an impermissible conclusive presumption that improperly relieved the State of the burden of proving the Petitioner guilty on all elements of malice aforethought murder?

2. Whether the Tenth Circuit Court of Appeals erred when denying a COA; accepting the District Court's conclusions regarding the Oklahoma Court of Criminal Appeals' application of transferred intent, because although the OCCA is the final authority on application of Oklahoma State law, it is not the final authority on the interpretation which a jury could have given the instructions under *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979), and the application of transferred intent by the OCCA created a hypothesized verdict that the jury never in fact rendered violating the jury-trial guarantee condemned in *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)?

SUMMARY OF ARGUMENT

In the modified instructions to the jury in this case, the trial court charged the jury that:

> A human being shall include an unborn child. An unborn child means an unborn offspring of human beings from the moment of conception, through pregnancy, until live birth. *The Oklahoma statute does not require proof that the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant or that the offender intended to cause the death or bodily injury to the unborn child.*
>
> (Instructions to the Jury, Instruction Number 8, Appendix X)(emphasis added)

The instruction was given over a timely defense objection. (Tr. VII 1546-1553), Appendix Y). This modified and contested instruction created great confusion with the jury on how or if malice aforethought applied to the fetus on Count Two. The jury posed a question to the trial court on this issue: "Does Instruction #8 [sic] supercede Instruction #11 regarding Count Two. Need to know if malice aforethought applies to the fetus." (Tr. VIII 1655-1656, Appendix Z). The trial court gave no corrective instruction.

Since the unconstitutional charge here related to an issue highly disputed, the error was not harmless under either circumstance of *Chapman v. California*, 386 U.S. 18, 22-24 (1967), enunciated in *Connecticut v. Johnson*, 460 U.S. 73 (1983). The *Johnson* Court's view that *Sandstrom* error can only be harmless when intent (i) is not at issue, (ii) has been conceded or (iii) has no bearing on the offense in question, id. at 87, is consistent with this Court's past consideration of constitutional errors affecting the very core of the truth-finding function.

The State for all intents and purposes argued for the application of transferred intent for the first time on direct appeal. Transferred intent was never argued at trial, nor was the jury was instructed on the theory of transferred intent. The State argued against the giving of a transferred intent instruction during a jury instruction conference over defense objection. (Tr. VII 1546-1553, Appendix Y). The OCCA on direct appeal sidestepped the *Sandstrom* issue of how the jury could have interpreted the instruction and instead applied the doctrine of transferred intent, in which was never presented to the jury, to affirm the

conviction. This created a hypothesized verdict that the jury never in fact rendered violating the jury-trial guarantee expressed in *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

I.

The Jury Charge Was Unconstitutional Because A Reasonable Juror Could Have Interpreted It Effectively Creating A Mandatory Presumption Regarding Petitioner's Intent To Take Away The Life Of Another Human Being.

A. It Is Unconstitutional To Create An Impermissible Conclusive Presumption that Relieves The State Of Its Burden To Prove Every Element Necessary Of The Crime Charged

The Due Process Clause of the Fourteenth Amendment protects an accused from conviction except upon proof beyond a reasonable doubt of every element of a criminal offense. *In Re Winship*, 397 U.S. 358, 364 (1970). Instructions that relieve the state of its burden of proving every element of the charged offense, beyond reasonable doubt are erroneous. *Sandstrom v. Montana*, 442 U.S. 510, 524, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

B. The Jury Charge In Petitioner's Case Set Forth An Impermissible Conclusive Presumption With Respect To A Critical Element Of The Crime: Malice Aforethought

Petitioner was accused of two counts of murder in the first degree. Under Oklahoma law, malice aforethought is a necessary element of the charged crime. *See* (Instruction to the Jury, Instruction Number 10, Appendix X). The crafted Instruction #8 was contested at trial during a jury instruction conference. (Tr. VII 1546-1553, Appendix Y). The challenged instruction created an impermissible conclusive presumption that effectively relieved the state of the burden of proving that the "offender intended to cause the death" of the unborn child. This crafted instruction included borrowed language from **Okla. Stat. tit. 21 § 723** and inserted it into Instruction #8. In 2016, § 723 read as follows:

> Any offense committed pursuant to the provisions of Sections 652 and 713 of title 21 of the *Oklahoma Statutes does not require proof that the persons engaging in the conduct had knowingly of should have had knowledge that the victim of the underlying offense was pregnant or that the offender intended to cause the death or bodily injury to the unborn child.* (emphasis added)

It is important to note that the OCCA on direct appeal ruled that this very modification of the jury instructions including language from §723 was an abuse of discretion and did not apply to any form of homicide. *See* OCCA Slip op. at 14, Appendix E). The instructions clearly set forth an impermissible conclusive presumption towards the "Oklahoma statutes does not requiring proof that persons engaging in the conduct"..."the offender intended to cause the death or bodily injury to an unborn child."

The question before this Court is whether the challenged instruction had the effect of relieving the State of proving every element enunciated in *Winship* on the critical question of malice aforethought.

C. The Charge Was Unconstitutional Because A Reasonable Juror Could Have Construed It As Being A Conclusive Presumption Or Burden-Shifting Presumption

1. It Is For This Court To Determine How A Reasonable Juror Could Have Interpreted The Instruction

Whether or not the challenged instruction was unconstitutional "depends upon the way in which a reasonable juror could have interpreted the instruction." *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979). This was argued on direct appeal and never rebutted by the State. (Appellant Brief, at 23, Appendix Q). The OCCA failed to address this inquiry under *Sandstrom*. On Petition for Rehearing, the Petitioner raised this issue to the OCCA. *See* (Petition for Rehearing, Appendix S). The OCCA did not address the *Sandstrom v.*

Montana claim towards an impermissible conclusive presumption. The Tenth Circuit in adopting the District Court's findings did not undertake this crucial inquiry.

2. In Making This Determination, It Is Prudent To Examine First The Challenged Instruction Itself.

Before determining that the challenged instruction could, indeed, have been interpreted as effectually creating an impermissible conclusive presumption regarding Petitioner's malice aforethought, this Court must consider that instruction in the context of the charge as a whole. *Cupp v. Naughton*, 414 U.S. 141, 146-47 (1973). However, it is obviously prudent to review the challenged instruction itself first, because that review may make it apparent that there is no possible constitutional problem. Thus as in *Cupp v. Naughton* itself, an initial look at the challenged instruction itself may make unnecessary an examination of the remainder of the charge. Id. at 148-49. In cases like *Sandstrom*, the initial review revealed a serious possibility that the challenged instruction may have had an unconstitutional effect. In such cases, it is necessary to consider the challenged language in the context of the charge as a whole to determine if unconstitutional interpretations were "removed by other instructions given at trial." *Sandstrom v. Montana*, 442 U.S. 510, 518 n.7 (1979).

The Tenth Circuit Court adopted the reasoning of the District Court and concluded: The OCCA determined the instruction accurately stated the law in Oklahoma and, under the doctrine of transferred intent, Cyr's intent to kill the woman transferred to the fetus to establish the element of intent." *See* (Order Denying COA at 4, Appendix A). No examination was undertaken towards, how the jury could have interpreted the charge, or

that the possibility a reasonable juror could have interpreted the language as an impermissible conclusive presumption. This was an unreasonable determination under *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979).

3. When The Charge As A Whole Is Considered, It Is Apparent That The Danger Of An Unconstitutional Interpretation Intensified, Not Eliminated

a. OCCA's Application Of Transferred Intent

On direct appeal, the State for all intents and purposes argued for the application of transferred intent for the first time, completely sidestepping the *Sandstrom v. Montana* claim.(Appellee Brief at 23-27, Appendix V) Thus the State has waived this issue and it should and should have be deemed confessed for failing to answer the allegation. Transferred intent was never argued at trial and in fact an instruction for transferred intent was argued against by the State when the defense suggested that a transferred intent instruction may be necessary during the jury instruction conference. (Tr. VII 1546-1553, Appendix Y). The OCCA applied the State's proffered transferred intent argument ignoring the critical inquiry of the *Sandstrom v. Montana* claim. Their application of transferred intent also ignored critical facts of this case: (i) the State waived transferred intent by acquiescing to the crafted jury instructions, arguing against an instruction on transferred intent and never arguing it at trial, (ii) the jury was never instructed on transferred intent and (iii) the challenged jury instruction actually did have injurious effect on the jury leaving the jury with conflicting instructions on how to apply malice aforethought and with questions that went unanswered by the trial court.

On Petition for Rehearing before the OCCA, Judge Hudson on dissent confirms that the State never argued transferred intent at trial and that the jury was never instructed on transferred intent:

> "We affirmed this conviction based in part on this Court's application of the transferred intent doctrine — an alternative factual theory never presented to the jury in the written charge. Indeed, the record shows the State did not argue doctrine of transferred intent at trial, nor did the trial court instruct the jury on this theory. The first time, for all intents and purposes, invoked application of the transferred intent theory was before this Court on appeal." (OCCA Slip op., Hudson, J., Dissenting, Appendix F).

The jury had posed a question to the trial court: "Does Instruction #8 [sic] suprecede Instruction #11 regarding Count Two. Need to know if malice aforethought applies to the fetus." *See* (Tr. VII 1655-1656, Appendix Z).

b. <u>Language Of The Challenged Instruction</u>

The challenged instruction was cast in the language of a command. It instructed the jury that "The Oklahoma statute does not require proof" and that "the offender intended to cause the death or bodily injury to the unborn child." The jurors were not given a choice, or that they might infer that conclusion; they were told only that law "does not require proof". It is clear that a reasonable juror could have viewed such an instruction as mandatory. In this way the instructions ""undermine the factfinder's responsibility at trial, based on evidence adduced by the state, to *find* the ultimate facts beyond a reasonable doubt" *Ulster County Court v. Allen*, supra, 442 U.S., at 156, 99 S.Ct., at 2224 (emphasis added)." *Francis v. Franklin*, 471 U.S. 307, 316, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

c. <u>Jury Charge As A Whole Confused The Jury</u>

The record at trial is clear, the jury had serious issue with the two conflicting jury instructions and did not know how to apply malice aforethought. This is evidenced by the question they submitted to the trial court: "Does Instruction #8 [sic] suprecede Instruction #11 regarding Count Two. Need to know if malice aforethought applies to the fetus." *See* (Tr. VII 1655-1656, Appendix Z). Based on what the jury asked, this Court can definitively say that the instructions taken as a whole did not relieve the unconstitutional instruction's effect, it intensified it. This Court holds that: "Our cases make clear that "[s]uch shifting of the burden of persuasion with respect to a fact which the State deems so important that it must either be proved or presumed is impermissible under the Due Process Clause." *Patterson v. New York*, 432 U.S., at 215, 92 S.Ct., at 2329." *Francis v. Franklin*, supra.

In the face of confusion and lack of curative instruction to the jury, there would be no way of knowing "which one they decided to apply, or whether they did something in between," so the charge must be held unconstitutional. *Francis v. Franklin*, supra.; *Bollenbach v. United States*, 326 U.S. 607, 613-14 (1946); *Smith v. Smith*, 454 F.2d 572, 578 (5th Cir. 1971), cert. denied, 409 U.S. 885 (1972).

As this Court reiterated in *Sandstrom*: "'It has long been settled that when a case has been submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside. See e.g., *Stromberg v. California*, 283 U.S. 359 (1931)' *Leary v. United States*, 395 U.S., at 31-32." *Sandstrom v. Montana*, 442 U.S. 510, 526 (1979)(citations omitted).

d. <u>Other Aspect Of The Charge As A Whole</u>

The other portions of the charge do not dissipate or eliminate the juror confusion. The unanswered question the jury posed, evidences there was no curative instruction to overcome the unconstitutional instruction. The evidence of this case was not overwhelming. This case was entirely circumstantial. The OCCA stated this in their opinion: "The case against the appellant was entirely circumstantial" (OCCA slip op. at 7, Appendix E). The request for further instructions on malice aforethought on Count Two lends further substance for this Court to conclude that evidence in this case was far from overwhelming. That is the very approach this Court found in *Francis v. Franklin*, 471 U.S. 307, 326, supra. Where this Court held: "The jury's request for reinstruction on the elements of malice and accident, App 13a-14a, lend further substance to the court's conclusion that the evidence of intent was far from overwhelming in this case." The *Franklin* Court went on to hold the instructions unconstitutional.

II.

The Unconstitutionality Of The Jury Charge Cannot Properly Be Deemed Harmless Error Beyond A Reasonable Doubt, Because It May Have Distorted The Jury's Consideration Of The Crucial Disputed Issue In The Case

As demonstrated above, the charge in this case was unconstitutional, because a reasonable juror could have construed it as an impermissible conclusive presumption that relieved the state of its burden to prove malice aforethought, an essential element of first degree murder. The remaining issue is whether the constitutional error is harmless beyond a reasonable doubt, under *Chapman v. California*, 386 U.S. 18, 22-24 (1962).

Petitioner submits that a *Sandstrom* error can never be harmless when malice aforethought (intent to kill) is a disputed element of the alleged crime. But even if that view is not accepted and this Court applies instead the test enunciated by the dissent in *Connecticut v. Johnson*, 460 U.S. 73, 97-99 (1983)(Powell, J., dissenting), the *Sandstrom* error cannot be deemed harmless beyond a reasonable doubt, because of the crucial disputed issue in this case.

A. OCCA's Harmless Error Analysis Was That Similar To The Dissent In *Connecticut V. Johnson*.

The OCCA sidestepped the presumption analysis enunciated in *Sandstrom* and applied the State's proffered transferred intent argument. The OCCA never considered how or what the jury might have interpreted the unconstitutional instructions as, and this was unreasonable under *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979). The OCCA had to apply transferred intent to find the relevant *mens rea* element on Count Two. (OCCA Slip op, Hudson, J., dissent at 1, Appendix F)

B. *Sandstrom* Error Can Never Be Harmless Where Malice Aforethought Is A Disputed Element Of The Alleged Crime

In *Chapman v. California*, 386 U.S. 18 (1967), this Court recognized that the violation of constitutional rights which are "basic to a fair trial" can "never be treated as harmless error," id. at 23 (footnote omitted), but that harmless error analysis may be used with respect to "unimportant and insignificant" constitutional violations, id. at 22. Where the constitutional error directly relates to the truth-finding function of a trial, the very core of the trial has been affected. Under *Chapman* such error can never be harmless.

The trial's truth-finding function is sabotaged when the constitutional error relieves the State of proving an element of the crime charged. This challenged element in controversy is center piece of the truth-finding function—the jury—is prevented from functioning properly and prevents the jury from deciding the case in a proper manner. Hence an unconstitutional impermissive conclusive presumption relating to a charged element can never be harmless error.

The forgoing conclusion is consistent with this Court's opinion in *Francis v. Franklin*, 471 U.S. 307, 307 (1985) that "*Sandstrom v. Montana* made clear that the Due Process Clause of the Fourteenth Amendment prohibits the state from use of jury instructions that have the effect of relieving the state of the burden of proof enunciated in *Winship* on the critical question of intent in a criminal prosecution. 442 U.S., at 521, 99 S.Ct., at 2457."

C. A Reviewing Appellate Court Cannot Substitute Their Belief To Hypothesize A Guilty Verdict

The OCCA had to apply doctrine of transferred intent to find the relevant *mens rea* element in Count Two "Specifically, the Court applied the transferred intent doctrine to find the relevant *mens rea* element had been sufficiently proven (Proposition I), and further relied upon our application of the doctrine to find the trial court's instructional error harmless (Proposition II)." (OCCA Slip op. at 3, Hudson, J., dissenting, Appendix F).

The application of transferred intent was never put before the jury. "Yet in our analysis, we bypassed the fact that Cyr's Count 2 guilt was not determined by the jury on this factual theory and never considered the impact, if any, the trial court's failure to

instruct the jury on this theory of transferred intent had." (OCCA Slip op. at 3, Appendix F).

The deference given to the OCCA by the Tenth Circuit Court and the District Court was error and accepting the OCCA's application of transferred intent runs contrary to this Court's holdings. The Tenth Circuit and District Court had a duty to examine not what the "State Supreme Court declared the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning. *Sandstrom*, 442 U.S., at 516-517, 99 S.Ct., at 2455 (state court "is not the final authority on the interpretation which a jury could have given the instruction.")" *Francis v. Franklin*, supra.

By accepting the OCCA's application of transferred intent to deem the unconstitutional instruction harmless, a theory not put before the jury was applied to affirm a guilty verdict. This was error and in conflict with this Court's holdings. This Court in *Sullivan v. Louisiana*, 508 U.S. 275, 279-281, 113 S.Ct. 2078, 124 L.Ed.2d 182 held:

> "*Chapman* itself suggests the answer. Consistent with the jury-trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. See *Chapman*, supra, 386 U.S., at 24, 87 S.Ct., at 828 (analyzing the effect of error on "verdict obtained"). Harmless-error review looks, we have said, to the basis on which "the jury *actually rested* its verdict." *Yates v. Evatt*, 500 U.S. 391, 404, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991)(emphasis added). The inquiry, in other words, is not whether in a trial that occurred without error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely attributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee. See *Rose v. Clark*, 478 U.S. 570, 578, 106 S.Ct. 3101, 3105, 92

L.Ed2d 460 (1986); id., at 593, 106 S.Ct., at 3114 (BLACKMUN, J., dissenting); *Pope v. Illinois*, 481 U.S. 497, 509-510, 107 S.Ct. 1918, 1926, 95 L.Ed2d 439 (1987)(STEVENS, J., dissenting)"

Consistent with this Court's holdings, the OCCA was barred from applying transferred intent, because the jury was not instructed or charged on the theory of transferred intent and this barred them from treating evidence of malice aforethought in Count I as a necessary finding of malice aforethought to Count II. *See Yates v. Evatt* 500 U.S. 391, 409 (1991) where this reviewing Court, found themselves barred, under the same circumstances: "But the jury was not charged on a theory of transferred intent, and we are therefore barred from treating evidence of intent to kill Wood as underlying the necessary finding of intent to kill Wood's mother."

Where the truth-finding function has been substantially impaired, through use of a burden relieving instruction bearing on a charged element, the constitutional error may well have caused the jury to engage in a different kind of review of the facts and therefore to have reached a different conclusion than if it had been charged properly. In view of that possibility, a harmless error holding would be inconsistent with "the place of importance that trial by jury has in our Bill of Rights," because a holding like the one given by the OCCA could only be based on a substitution of: "the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be." *Bollenbach v. United States*, 326 U.S. 607, 615 (1946)

Indeed, "[n]o matter how strong the evidence may be" with respect to the malice aforethought element: "For a judge may not direct a verdict of guilty no matter how conclusive the evidence. There is no way of knowing here whether the jury's verdict was based on facts within the condemned instructions ***. Failure to charge correctly is not harmless, since the verdict might have resulted from incorrect instruction." *United Brotherhood of Carpenters and Joiners of America v. United States*, 330 U.S. 395, 408-09 (1947).

Hence there is strong justification for the view of the majority holding in *Connecticut v. Johnson*, 440 U.S. 73, 87 (1983), that a *Sandstrom* error can never properly be deemed to be harmless where intent (i) was at issue, (ii) was not admitted and (iii) had a bearing on the offense for which the defendant was convicted.

In this case, the constitutional error was not harmless under the *Johnson* Court's view, because malice aforethought was at issue, was not admitted and had a bearing on the charge of murder in the first degree as a require fourth element finding, the offense for which the Petitioner was convicted.

CONCLUSION

For all the reasons above, Petitioner respectfully requests this Court to grant certiorari, to vacate the Petitioner's convictions and lower courts orders, remand this case and grant relief as needed in this matter.

3. Whether the State committed waiver of the Fourth Amendment claims as expressed in *Steagald v. United States*, 451 U.S. 205, 209 (1981) and confessed the claims under Fed. R. Civ. P., Rule 8(b)(6) by not answering the allegations in both State court and on habeas? Did the Tenth Circuit Court of Appeals err in denying a COA by not permitting review of claims under 2253(c) on claims of ineffective assistance of appellate counsel in part, on the basis ineffective assistance of trial counsel for failing to investigate and motion to suppress evidence obtained by multiple warrantless and illegal seizures in violation of the Petitioner's Fourth Amendment right to expectation of privacy that were not answered by the State? Did the Tenth Circuit Court err giving deference to the lower court's rulings when the State plainly misrepresented the underlying Fourth Amendment claims on post-conviction and on habeas causing the State courts and the U.S. District court to unreasonably apply *Franks v. Delaware,* 438 U.S. 154, 156 (1978) to the underlying merits of the ineffective assistance claims that are indeed not *Franks* claims; was the lowest state court's decision an 'adjudication on the merits' warranting deference under §2254(d)?

SUMMARY OF ARGUMENT

The case against the Petitioner was a close one. There was a reasonable probability that but for the admission of cell phone record evidence and testimony concerning the cell phone evidence, and evidence pertaining to the Petitioner's truck, he would have been acquitted. The lowest state court on post-conviction never made any findings of fact, entitled to deference by the federal courts, that the cell phone evidence and testimony pertaining to the below mentioned ***Subclaims 3,4 and 5*** did not affect the outcome. Mr. Cyr was plainly denied his Sixth Amendment right to effective counsel when his trial counsel failed to move to suppress the evidence obtained from the illegal seizures of his cell phones and his trucks, which was beyond a doubt the product of an illegal search and seizure. Mr. Cyr brought a claim of ineffective assistance of appellate counsel on post-conviction and later on habeas under **§2254** in part, on the basis of ineffective assistance of trial counsel for failing to investigate and move for suppression of evidence illegally obtained in violation of Petitioner's Fourth Amendment right to expectation of privacy

when the Oklahoma City Police Department (OCPD) illegally seized Petitioner's cell phone from his person, illegally seized cell phones outside the scope of a warrant from his residence when the warrant held no specificity for the seizure of cell phones, and illegally seized Petitioner's trucks without a warrant.

The facts of the illegal seizures went undisputed by the State in both state court on post-conviction and in federal court on habeas amounting to waiver and confession of these claims. Evidentiary hearings requested by Petitioner on the ineffective assistance of counsel and the Fourth Amendment violations were opposed by the State and denied in both state and federal court.

The State in response on post-conviction and on habeas, misrepresented the underlying merits claims at issue to be included with a separate claim that required analysis under ***Franks v. Delaware,* 438 U.S. 154, 156 (1978)**. The State wholly failed to address the allegations of the underlying merit of the claims at issue thus waiving their opportunity to answer the claims and confessing the factual allegations of the illegal seizures at issue. It is plain on the facts and pleading of the Fourth Amendment claims at issue they are not *Franks* claims. Accepting the proffered misrepresentation of the State, the lower courts unreasonably applied ***Franks v. Delaware,* 438 U.S. 154, 156 (1978)** as the controlling analysis towards the underlying Fourth Amendment claims that were in fact not *Franks* claims. This unreasonable application of *Franks* to the Fourth Amendment claims led to the unreasonable application of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) when analyzing the underlying merits of the claims. Giving

deference to the lower courts the Tenth Circuit applied the same unreasonable analysis applying ***Franks v. Delaware,* 438 U.S. 154, 156 (1978)** towards the Fourth Amendment claims at issue that are not *Franks* claims. This was error.

ARGUMENT

III.

A. Claims Brought Forth On Post-Conviction And Habeas Were Not Claims Reviewable Under *Franks v. Delaware*, 438 U.S. 154, 156 (1978)

The following underlying merits claims were brought as Subclaims on post-conviction and a habeas

1. ***Subclaim 3*** Trial counsel was ineffective, failing to investigate, litigate and move for suppression of a cell phone and its related records that was seized from Petitioner's person in violation of the his Fourth Amendment right to expectation of privacy falling below defense counsel norms under *Strickland.* Counsel had a duty to investigate and bring challenge meet the State's case; *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S.Ct. 2574, 2587-88, 91 L.Ed.2d 305 (1986), here counsel did not make any pre-trial investigation or action. The phone and relating records evidence were used to convict Petitioner and went unchallenged by counsel. Had counsel investigated the events of the illegal seizure and moved to suppress the cell phone and related records evidence he would have succeeded; the cell phone, testimony and related records would be suppressed as 'fruit of the poisonous tree' because of the illegal police activity. *United States v. Olivares-Rangel*, 458 F.39 1104, 1108-1109 (10th Cit. 2006); *Mapp v. Ohio*, 367 U.S. 643, 648, 81

S.Ct. 1684, 6 L.Ed.2d 1081 (1961); *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The inaction of counsel upset the adversarial balance and was not part of any sound trial strategy. The cell phone at issue was used to convict the Petitioner; suppression of the cell phone, its related records and testimony regarding those records would have created reasonable doubt in the case brought by the state because the state relied heavily on the evidence obtained from the cell phone and its records.

The Facts of this illegal seizure went undisputed by the State on post-conviction and on habeas. On July 27, 2012 between the hours of 1:00 p.m. and 2:30 p.m., OCPD Investigator Benevides made contact with the Petitioner in an undercover capacity revealed himself as OCPD and using Tulsa County search warrant SW-2013-151 service copy (Appendix AA), *See* also (Appendix BB) (for authentication of warrant), illegally seized Petitioner's cell phone from his person at his residence in Osage County. See (Petitioner's Sworn Affidavit Appendix CC). SW-2013-151 did not authorize seizure outside Tulsa County. This event was corroborated in a search warrant affidavit for Petitioner's residence; See (Search Warrant SW-2013-23, Appendix DD).

> "Investigators with the Oklahoma City Police Department's Homicide Unit made contact with Cyr, in an undercover capacity, through the Craigslist ad. The investigators true identity was revealed. **Cyr's phone was seized pursuant to a search warrant**. Investigators met Cyr at the above listed location. Cyr identified it as his current residence."

OCPD, Det. Cris Cunningham, to cover up the illegal seizure of the Petitioner's cellphone, obtained an after-the-fact warrant later that same day; that warrant was filed at 3:03 p.m. see (Search Warrant SW-2013-22, Appendix EE). Exposing cover-up, Det.

Cunningham inadvertently included in her warrant affidavit for SW-2013-23 above, the events that corroborate the illegal seizure; SW-2013-23 was filed in Osage County at 2:57 p.m. see (Appendix DD). The Osage County warrant for Petitioner's phone was later filed at 3:03 p.m.(Appendix EE) The timing of these warrants are of critical importance; they evidence the timing of the illegal seizure and later cover-up. As the initial illegal seizure took place earlier that day between the hours of 1:00 and 2:30 p.m. The allegation in ***Subclaim 3*** went unanswered and undisputed by the State.

2. *Subclaim 4*

Trial Counsel was ineffective for failing to investigate, litigate and move for suppression of cell phones and related record evidence seized in violation of Petitioner's Fourth Amendment right to expectation of privacy. On July 27, 2012 cell phones were seized by OCPD outside the scope of a search warrant for Petitioner's residence SW-2013-23 (Appendix DD). Falling below defense counsel norms under *Strickland,* counsel did not investigate and motion for suppression of illegally obtained phones and their related records evidence. A suppression motion would have succeeded based on the plain language contained in the warrant and unauthorized items seized. Counsel had a duty to investigate and bring challenge to meet the State's case; *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S.Ct. 2574, 2587-88, 91 L.Ed.2d 305 (1986). Here counsel did not conduct any pretrial investigation in to this illegal seizure this fell below defense counsel norms. The State relied heavily on the use of these cell phones and related record evidence to convict

Petitioner; suppression would have undermined the case and created reasonable doubt in the State's case.

The warrant in this case; *See* (Search Warrant, SW-2013-23, Appendix DD) showed no particularity towards the four cell phones listed in warrant return; *See* Warrant Return (Appendix DD). This Court holds that warrants under the Fourth Amendment must show particularity and cannot take on a wide-ranging exploratory search; *United States v. Otero*, 563 F.3d 1127, 1131-1133 (10th Cir. 2009); *Maryland v. Garrison*, 480 U.S. 79, 84, 107 S.CT. 1013, 94 L.Ed.2d 72 (1987). *See* also *Marron v. United States*, 275 U.S. 192, 196, 48 S.Ct. 74, 72 L.Ed. 231 (1927). When the seizure of cellphones takes place there must be particularity for the seizure of those cell phones; *United States v. Russian*, 848 F.3d 1239, 1244-1246 (10th Cir. 2017); *Riley v. California*, 573 U.S. 373,134 S.Ct. 2473, 2493, 189 L.Ed.2d 430 (2014). The plain language of the warrant SW-2013-23 (Appendix DD) shows no particularity for the seizure and search of cell phones. This Court holds evidence seized outside the scope of a warrant should be suppressed and not used in criminal proceedings against the victim of the illegal seizure; *United States v. Angelos*, 433 F.3d 738, 746-747 (10th Cir. 2006); *Coolidge v. New Hampshire,* 403 U.S. 443, 454-55, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); *See* also *United States v. Foster*, 100 F.3d 846 (10th Cir. 1996); *United States v. Medlin*, 842 F.2d 1194, 1199 (10th Cir. 1988). The allegation in ***Subclaim* 4** went unanswered and undisputed by the State.

3. ***Subclaim 5***

Trial counsel was ineffective failing to litigate and move for suppression of Petitioner's illegal seized trucks. Evidence from these trucks was used to convict the Petitioner evidenced in trial record by testimony of Everett Baxter (Tr. VI 667-710, Appendix FF). Falling below defense counsel norms under *Strickland*, counsel did not investigate and motion for suppression of illegally obtained evidence. Counsel had a duty to investigate and bring challenge to meet the State's case; *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S.Ct. 2574, 2587-88, 91 L.Ed.2d 305 (1986). Here counsel did not conduct any pretrial investigation in to this illegal seizure this fell below defense counsel norms. Evidence from petitioner's trucks was used to convict the Petitioner. Motioning for suppression of the two trucks would have succeeded and the evidence concerning Petitioner's trucks would have been inadmissible because it was discovered as a direct result of unlawful police activity; *United States v. Olivares-Rangel*, 458 F.3d 1104, 1108-1109 (10th Cir. 2006); *Mapp v. Ohio*, 367 U.S. 643, 648, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

The facts of this illegal seizure went unchallenged and undisputed in state court and on habeas that: OCPD, Investigator Benevides, arrived at the Petitioner's residence in Osage County between the hours of 1:00 p.m. and 2:30 p.m.in undercover capacity as a potential buyer for Petitioner's truck, served Tulsa County warrant SW-2013-151 for his cell phone, then seized the Petitioner's trucks at his residence in Osage County;

(Petitioner's Sworn Affidavit, Appendix CC)

> "He ordered me to turn off my phone and hand it over or I'd be arrested and spend the duration of the search cuffed up in a police cruiser, and that he was also there for both of my trucks and was seizing them." (at page 1)
>
> "No warrants for the search or seizure of my trucks or house were presented to me by that point only the Tulsa County phone warrant." (at page 2)

; *See also* (Search Warrant for residence SW-2013-23, Appendix DD):

> "Investigators with the Oklahoma City Police Department's Homicide Unit made contact with Cyr, in an undercover capacity, through the Craigslist ad. The investigators true identity was revealed. **Cyr's phone was seized pursuant to a search warrant**. Investigators met Cyr at the above listed location. Cyr identified it as his current residence."(emphasis added)

Investigator Benevides outside his jurisdiction had no authority and without warrant seized the Petitioner's trucks from his custody and control violating his Fourth Amendment right to expectation of privacy. In Osage County later that day, to cover up their illegal seizure OCPD obtained after-the-fact warrants for Petitioner's trucks; see Search warrants SW-2013-24 (Appendix GG) and SW-2013-21 (Appendix HH). The allegation in ***Subclaim* 5** went unanswered and undisputed by the State.

As shown, these claims were not *Franks* claims and subject in any fashion to review of the merits under ***Franks v. Delaware,* 438 U.S. 154, 156 (1978)**. Plainly the Tenth Circuit Court erred in giving deference to the lower courts in their analysis of these claims under *Franks.*

B. <u>The State Misled And Misrepresented The Above Fourth Amendment Claims To The Lower Courts On Post-Conviction And Habeas.</u>

The State misled the lower courts to review these claims under *Franks v. Delaware*, 438 U.S. 154, 156, 98 S.Ct. 2674, 57 L.Ed. 2d 667 (1978) by lumping together and including them together in their response to Petitioner's **Subclaim 1**. Subclaim 1 contained

a *Franks* claim see; (Appendix O at 3-6) and (Appendix L at 18). Plainly the above claims do not contain allegations of omissions, falsehoods or misleading statements in warrants. They are plainly illegal seizure claims. The State's responses on post-conviction and on habeas evidence misleading and misrepresentations to the courts:

1. States Response To Petitioner's Post-Conviction (Appendix U at 11, *search warrants*)

> In sub-claims 1, 3, 4 and 5, Petitioner contends that counsel should have requested a *Franks* hearing and moved for suppression of certain evidence obtained pursuant to search warrants based on Petitioner's own allegations that the affidavits supporting warrants contained materially false and misleading statements.

2. State's Response To Petitioner's Habeas (Appendix T at 80)

> in his first, third, fourth and fifth subpropositions to his first proposition on post-conviction review, Petitioner alleged that his appellate counsel was ineffective for failing to allege that trial counsel was ineffective for not requesting a *franks* hearing and moving for suppression of certain evidence obtained to the search warrants.

C. <u>The Misapprehension Made By The State In Response Wholly Failed To Address Petitioner's Contentions In State Court And On Habeas Amounting To Waiver And Admission Of The Claims.</u>

The State failed to carry their burden of the effectiveness of the seizures by not answering the allegations made on habeas and in the lower state court on post-conviction. Petitioner argued on post-conviction reply (Appendix P at 2-3)and on habeas (Appendix L at 20-23), (Appendix M at 17-20) that waiver and concession should be enforced against the State based on the above misapprehension the state made to the courts and that the State wholly failed to address the allegations made in the *Subclaims* above. Petitioner argued that waiver and admission be enforced in his objection to the report and recommendation

in the District court and that the district court was being misled by the State. (Appendix K at 37-60) The Petitioner argued for the enforcement of waiver and confession before the Tenth Circuit. (Appendix I at 18-27). In the Tenth Circuit it is clearly established that: "By failing to submit an answer or other pleading denying the factual allegations of Plaintiff's complaint, Defendant admitted those allegations, thus placing no further burden upon plaintiff to prove its case factually. Fed.R.Civ.P. 8(d) ("Averments in a pleading to which a responsive pleading is required... are admitted when not denied in responsive pleading."". *Burlington Northern R.Co. v. Huddleston*, 94 F.3d 1413, 1415 (10th Cir. 1996).

This Court holds, principles of waiver apply that the government can waive an issue pertaining to Fourth Amendment grounds for failing to raise it in a timely fashion during litigation. *Steagald v. United States*, 451 U.S. 205, 209, 68 L.Ed. 29, 38, 101 S.Ct. 1642 (1981).). This Court has a duty to enforce waiver and admission of these claims against the State and to accept facts of these allegations as established by the Petitioner true and confessed; *Wood v. Milyard,* 556 U.S. 463, 466, 184 L.Ed. 2d 733 (2012) (explaining that "a court is not at liberty, we cautioned, to bypass, override, or excuse a state's deliberate waiver of a limitation defense."); *See* also *Bland v. California Dept. of Corrections*, 20 F.3d 1469, 1474, (9th Cir. 1994), cert. denied, 513 U.S. 947, 115 S.Ct. 357, 130 L.Ed.2d 311(1994) (holding that when the State's return fails to dispute the factual allegations contained in the petition and traverse, it essentially admits the allegations). And because the Federal Rules for Civil Procedure apply on habeas: **Rules for Habeas Corpus Rule 12.** An allegation is admitted if a responsive pleading is required and the allegation is not

denied. **Fed. R. Civ. P., Rule 8(b) (6)**. *See* also *Noble v. v. Kelly*, 246 F.3d 93, 100-01 (2nd Cir.)(per curiam), cert. denied, 534 U.S. 886 (2001) (rejecting a state's argument that district court erred in granting writ without holding evidentiary hearing: "the state not only failed to request such a hearing but opposed the petitioner's attempt to expand the record"). Petitioner also requested an evidentiary hearing was opposed by the State and denied at state and federal levels. (Appendix II), (Appendix JJ) and (Appendix KK).

An injustice has occurred, these claims have went unanswered by the State and such a blatantly obvious waiver has been side stepped and overlooked and has not been assessed by any court up to this point. The Petitioner asks this Court to enforce waiver on the above claims and deem them confessed and admitted on the uncontested facts established by the Petitioner. The Tenth Circuit plainly erred by in overlooking this and a COA should have issued on these claims.

D. State's Misapprehension Of Claims Directly Misled State Courts, District Court, And The Tenth Circuit To Apply *Franks v. Delaware* To Claims That Were Not *Franks* Claims.

On post-conviction and habeas the State misapprehended Petitioner's previously mentioned Subclaims 3, 4, and 5 in their responses.

1. State's response post-conviction (Appendix U at 11, *search warrants*)

> In sub-claims 1, 3, 4 and 5, Petitioner contends that counsel should have requested a *Franks* hearing and moved for suppression of certain evidence obtained pursuant to search warrants based on Petitioner's own allegations that the affidavits supporting warrants contained materially false and misleading statements.

2. State's response habeas (Appendix T at 80)

> in his first, third, fourth and fifth subpropositions to his first proposition on post-conviction review, Petitioner alleged that his appellate counsel was ineffective for failing to allege that trial counsel was ineffective for not requesting a *Franks* hearing and moving for suppression of certain evidence obtained to the search warrants.

The Tenth Circuit adopted the decision of the District Court. (Appendix A at 8) Deciding the District Court's decision was not debatable; the Panel adopted the same position as the report and recommendation and used analysis under *Franks*, citing *Harte v. Bd. of Comm'rs*, 864 F.3d 1154, 1162, (10th Cir. 2017) for the above *Subclaims* (Appendix A at 8). This was the same misapprehended approach the District Court used to give deference to the State Court's reasoning for denial (Appendix D at 40). The District Court adopted the Report and recommendation clearly showing the State's misrepresentation in its analysis. The District Court made assessment of the Petitioners underlying claims following the misapprehension proffered by the State. *See* (Appendix D at 40)

> Petitioner alleges that the warrants for his home, truck, and cellphone were supported by affidavits containing false and misleading statements, so trial counsel should have requested a *Franks* hearing to challenge the warrants validity. **Id. Ex. 10, at 3-5, 7-11.**

The referenced identifier "**Id. Ex. 10 at 3-5, 7-11**" relates directly to include the Petitioner's Subclaims 3, 4 and 5. It is beyond reasonable doubt that the State's misapprehension in responsive pleadings misled the decision of the lower courts. It is undeniable because they contain the same *Franks* analysis towards the claims above that are not *Franks* claims.

E. Unreasonable Application Of Supreme Court Precedent; Claims Were Not Adjudicated On The Merits.

***Franks v. Delaware,* 438 U.S. 154, 156 (1978)** (explains that a warrant is invalid if there is substantial evidence to support deliberate falsehood or reckless disregard for the truth, and exclusion of the false statements would undermine the existence of probable cause.)

The Tenth Circuit and District Court adopted the reasoning of the lowest state court ruling that applied analysis under *Franks v. Delaware,* supra. in their assessment of the underlying merits of the Petitioner's ineffective assistance claims above. Plainly, this was a direct result of the State misleading the lower courts in their response on post-conviction and habeas. An evaluation under *Franks v. Delaware* towards the claims above fatally undermined the fact-finding process. This was an unreasonable application of Supreme Court precedent to the facts of this case and clearly support that the claims were not adjudicated on the merits. This Court holds that "it is sufficient to hold that when a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case, a federal court applying §2254(d)(1) may conclude that the state-court decision falls within that provision's "unreasonable application" clause." *Williams v. Taylor*, 529 U.S. 362, 409, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The Petitioner argues that the circumstances in this case show that the state-court's decision as adopted by the District Court and the Tenth Circuit applying *Franks v. Delaware,* supra, prove the underlying merits of the claims above were not adjudicated. It is plain the state-court decision was guided by the

misapprehension made by the State in their response and that the facts of this case in *Subclaims 3,4 and 5* above were unreasonably analyzed under *Franks v. Delaware*, supra.

It was error and unreasonable for the Tenth Circuit to overlook the facts of this case regarding the unanswered claims and unreasonably apply *Franks v. Delaware*, supra. to claims that were not *Franks* claims. This fatally undermined the fact-finding process when applying *Strickland,* because analysis of the underlying merits of the chief claim of ineffective assistance of appellate counsel had never been made. Deference to the State court findings should not have been given.

F. Eliminating The Evidence Obtained From The Cell Phones At Issue And The Trucks At Issue, The Tests Performed And Testimony Regarding The Evidence Is More Than Sufficient To Undermine Confidence In The Petitioner's Conviction.

The case against the Petitioner was entirely circumstantial and did not include any direct link of the Petitioner to the murder of the victim and her unborn child. The Oklahoma Court of Criminal Appeals (OCCA) had stated so: "The case against the Appellant was entirely circumstantial" (Appendix E at 7). And the State itself in opening argument announced that they could not prove the "why" of the crime and that they would rely on the pieces of a puzzle or inferences to make their case: "There's a lot of pieces to this puzzle, not necessarily some smoking gun. But when you put that together, I think you'll come to the same conclusion law enforcement did." ... "and the "why" we won't be able to prove that to you beyond a reasonable doubt. But certainly there's indications that he had a certain way of treating women sexually; that Jaymie Adams was not that kind of person, one, she didn't allow that when she was meeting Johns; and, two, if something

happened that she didn't like, she wasn't afraid to be physical."... "Is that what happened? I don't know for sure, but I think you will see, at the end of the day, that we have excluded every other possibility other than Joseph Cyr". (Appendix LL at 82-83). The Federal District Court on habeas concluded that the cell phone evidence and the evidence of Petitioner's trucks were an important factor in this case (Appendix D at 14).

The challenged evidence certainly was crucial to the State's circumstantial case. It allowed them to piecemeal together a timeline to make inferences and make inferences to evidence of stains in the Petitioner's truck that were later confirmed to not be blood. The State used nothing but inferences to fit the circumstances they theorized when there was no direct link of the Petitioner to the crime of murder. Eliminating this evidence would have undermined the State's case and created reasonable doubt in the State's case. Failure of trial counsel to move to suppress this illegally obtained evidence wholly failed to meet and challenge the State's case. Any reasonable attorney would have challenged the actions of OCPD in the acquirement of illegally seized evidence.

G. The Prejudice Inquiry

The legal test for determining whether one has been sufficiently prejudiced by the ineffectiveness of his counsel is set forth in *Strickland v. Washington*, 104 S.Ct. 2052 (1984) While "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding," he "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." 104 S.Ct. at 2067-68.

The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

... the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome. 104 S.Ct. at 2068.

In the circumstances of this case, the testimony about the Petitioner's cell phones and corresponding records evidence, and the testimony of presumptive blood evidence in the Petitioner's trucks, which later testing yielded no confirmed blood evidence; clearly the elimination of that evidence in this entirely circumstantial case would cause a reasonable fact-finder to lose confidence in this conviction. Inasmuch as "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged," 104 S.Ct. at 2069, can any reasonable person honestly conclude and maintain that it was not fundamentally unfair for the State to utilize the illegally obtained cell phones and trucks against Mr. Cyr and that appellate counsel once apprised of the illegal seizures should have sought the above ineffective counsel claims on direct appeal? They were indisputable and warranted reversal of conviction if brought on appeal and were much stronger than other claims brought on direct appeal.

H. The Performance Inquiry

application of *Strickland* on the chief claim of ineffective assistance of appellate counsel. It is beyond a doubt that this chief allegation was never answered in state court and on habeas because the underlying merits were never answered or denied by the State. This claim of ineffective assistance of appellate counsel should be deemed confessed and waived by the State.

CONCLUSION

For the foregoing reasons, Petitioner Joseph R. Cyr respectfully asks this Court to GRANT certiorari, deem the claims of ineffective assistance of appellate counsel and trial counsel, and the underlying merits of the Fourth Amendment violations above *Subclaims 3, 4 and 5* waived and admitted by the State and issue the writ of habeas corpus remanding this case excluding the challenged evidence above.

SUBMITTED ON THIS 21 day of December 2023.

Joseph R. Cyr

Appelant pro se

Joseph R. Cyr #753094
Oklahoma State Reformatory
P.O. Box 514
Granite, Oklahoma 73547