No. 24-6588 ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

IN RE: LANCEY DARNELL RAY

On Petition for Writ of Habeas Corpus

PETITION FOR WRIT OF HABEAS CORPUS

LANCEY D. RAY
OK DOC# 666601
OSR • G2-223
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PRO SE LITIGANT

January 31, 2025

Preface to 1st Question: There was no question at the trial that the Petitioner had disciplined his son. The crucial factual dispute went to the sufficiency of the evidence to support a finding that the result of petitioner's discipline caused his death. This question must be gauged in the light of applicable Oklahoma law (12 O.S. § 2702) governing the admission of expert testimony. Under that law it is well settled that if, specialized knowledge will assist the trier of fact **to determine a fact in issue**, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise, if the testimony is the product of reliable principles and methods. This petition presents the recurring question of sufficiency of evidence involving the Office of the Chief Medical Examiner for the State of Oklahoma and its lack of authority to require production of medical records from the Reynolds Army Community Hospital at Fort Sill, which Oklahoma courts have ignored.

1st QUESTION PRESENTED

Whether state experts' failure to apply a reliable method to forensic pathology investigations, as required by state procedural law, when forming an opinion constitute an insufficiency of evidence claim under *Jackson v. Virginia,* U.S. 307, 324, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) and 28 USC § 2254 (f).

Preface to 2nd Question: Medical examiners are called upon to make two determinations when performing an autopsy after a suspicious death, both of which are separately and distinctly set forth on the report of autopsy: (1) the cause of death and (2) the manner of death. The cause of death, well rooted in medicine, generally is not disputed. Examples include blood loss (exsanguinations), cardiac arrest, asphyxiation, blunt-force trauma, etc. But manner of death—the mechanism by which the death occurred—is a subjective determination that is much more consequential. Manner of death determinations include suicide, homicide, accident, natural cases, and undetermined.

The U.S. is the last remaining country in the developed world where medical examiners testify about the manner of death. Manner of death is not a medical determination. It's a legal determination that necessarily involves processing nonmedical information. And medical examiners simply don't have the training to make those calls. Innocent parents, grandparents, siblings, and other caretakers have been sent to prison because a medical examiner determined a child's death to be a homicide when it was not. Ankney, Douglas. "Medical Examiners Biased Manner of Death Determinations Sending Innocent People to Prison..." *Criminal Legal News, Vol. 7 No. 6*, June 2024, Human Rights Defense Center. Sources: *The New Republic*; *Journal of Forensic Sciences*

2nd QUESTION PRESENTED

Whether testimony of state medical examiners' reported determinations—or any medical examiner for that matter—regarding manner of death as reported in report of autopsies violate principles of fundamental fairness and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States when such determinations are not medical determinations but in fact are subjective determinations.

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PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Lancey D. Ray, 1LT FA (Res.), *pro se*, in the above styled cause of action pursuant to S. Ct. Rule 20.2 *Procedure on a petition for an Extraordinary Writ.* Petitioner hails from the Oklahoma State Reformatory in Greer County, Granite, Oklahoma located in the close vicinity of Mangum,[1] Oklahoma.

JURISDICTION

The Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make, pursuant to Article 3, Section 2, of the United States Constitution. The Supreme Court or **Justice** thereof is authorized to entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court on the ground that the person is in custody in violation of the Constitution or laws of the United States under 28 U.S.C.A § 2254 (a).

PARTIES TO THE PROCEEDING

Habeas corpus proceedings are *ex parte.* S. Ct. Rule 20.4(b).

STATEMENT OF REASONS FOR NOT MAKING APPLICATION TO THE DISTRICT COURT WHEREFORE EXCEPTIONAL CIRCUMSTANCES EXIST

The United States District Court for the Western District of Oklahoma, wherein Petitioner is confined, demonstrated prejudice against him during federal habeas proceedings. Particularly, among other things, when it ignored "clear and convincing" evidence filed during habeas proceedings which supported Petitioner's

[1]Per 28 USCA § 116 "Court for the Western District shall be held at Chickasha, Enid, Guthrie, Lawton, **Mangum,** Oklahoma City, Pauls Valley, Ponca City, Shawnee, and Woodward."

claim that the state's conviction was based upon legally insufficient evidence. *Ray v. McCollum*, Not Reported in Fed. Supp., 2017 WL 1740468 (W.D. Okla. May 3, 2017). The District Court (1) sought out and supplied an unqualified opinion to round out the State's argument, and (2) that court having ignored clearly documented medical evidence in support of Ray's showing of actual innocence, which was not presented at trial, causes the Petitioner to reasonably believe that court will be inclined to behave wrongfully during a second habeas corpus proceeding, due to judicial prejudice.

The United States District Court for the Western District of Oklahoma has held that it, "[W]ill not supply additional factual allegation to round out a plaintiff's complaint or construct a legal theory on a plaintiff's behalf. *Morgan v. United States,* Slip Copy, 2020 WL 6947897 (W.D. Okla. October 29, 2020). The conduct of the judges described herein was just the opposite in *Ray v. McCollum,* Not Reported in Fed. Supp., 2017 WL 1740468 (W.D. Okla. May 3, 2017). In those federal habeas proceedings the first magistrate assigned to review the case applied an incorrect legal standard to the case, a second magistrate sought out and supplied an unqualified supposed factual allegation to round out the State's argument, and the district court itself constructed a legal theory in support of the State's theory.

The Court in *Williams v. Campbell,* Not Reported in Fed. Supp., 2016 WL 369689 (E.D. Michigan February 1, 2016) held "[a] habeas petitioner's 'unsupported accusations' and 'unfounded surmise' of bias on the part of a federal judge presiding over his or her habeas petition are insufficient to establish grounds for

disqualification of that judge from presiding over the case." This Petitioner's accusations of judicial prejudice however are supported by documented evidence of clear and convincing evidence of material fact presented during federal habeas proceedings that the judges ignored. Ultimately the judges altogether ignored precedence established in *U.S. v. Avitia-Guillen,* 680 F. 3d 1253, 1256 (10th Cir. 2012). Despite the obvious complex issues presented and the medical records shown in support thereof, the first magistrate wrote, "[t]he court also notes that to date no novel or complex issues have been presented [sic]." That is, to include the first magistrate, none of the judges conducted the required *de novo* review to determine whether the trial court actually performed its gatekeeper role in the first instance. *Id.*

As to the second magistrate assigned to review the case, that magistrate, in nominally addressing the petition regarding the state medical examiner's insufficient opinion testimony premised his Recommendation on the unqualified testimony of Doctors Ware and Tolson. Doctors Ware was the emergency room physician who treated M.R.; whereas, Dr. Tolson was the pediatrician who was referred to by Dr. Ware. The magistrate acknowledged as much when he reported, "Dr. Theodore Ware, an emergency physician at RACH [Reynolds Army Community Hospital], Dr. Daniel Tolson, the Chief of Pediatrics at RACH...]." The proper review however is to review *de novo* whether the trial court applied the proper standard in admitting the medical examiner's opinion testimony. *U.S. v. Avitia-Guillen,* 680 F. 3d 1253, 1256 (10th Cir. 2012). The magistrate accurately quoted the part of the

medical examiner's opinion testimony recorded on page 61; nonetheless, the magistrate ignored the former more relevant parts of the examiner's testimony recorded on pages 23, 27, and 61 that went to the methods employed or for her lack thereof in her forensic pathology investigation.

Therefore in basing his recommendation on the testimonies of Doctors Ware and Tolson rather than the proper review to determine whether the medical examiner's opinion testimony was based upon sufficient fact or data or whether the examiner had applied her described methods reliably to the facts of the case according to *Avitia-Guillen* supra, the magistrate showed partiality to the State which was not a deference to the state court. Furthermore a reverse is required should this Court find that the trial court's decision to admit expert testimony was arbitrary and a clear error of judgment. *Id.*

The actual district judge assigned the petition, nominally addressing the petition, wrote, "[t]here is no trial testimony regarding the type of shock for which [M.R.] was treated." However unbeknownst to the district judge was Dr. Ware's testimony at the preliminary hearing at which he testified he'd treated M.R. for Hypovolemic shock, i.e., blood loss (Prelim. Tr. p. 32). To the contrary, signs and symptoms documented in medical records reveal neurogenic shock. Moreover the district judge referred to the testimony of Doctors Ware and Tolson as described by the magistrate. The respective judges missed the fact that Tolson had testified to medical issues he himself had not been present to identify; moreover, the medical record contradict his testimony regarding "blood loss". Without having referenced

the medical records included with the habeas petition, the district judge nonetheless stated that Tolson's testimony "supports the State's theory". So again medical records reveal that the actual treating physician had already determined that neither blood nor fluid loss, i.e., leakage had occurred—annotated in the medical records at 22:01. And that not only had Tolson not provided treatment or care, but had not arrived "bedside" until 22:34, thirty-three minutes after the treating physician had already determined that there was no blood loss or blood leakage. The medical record-progress notes annotated as much: "22:34 Dr. Tolson @ BS. 16 french NG to Right nare, verified placement." Thus Tolson's testimony was factually inaccurate. The district judge having sought out and referred to the erroneous nonetheless unqualified testimony of Tolson, assumed the improper role of advocate for the State. Furthermore, the district court having stated, "[h]aving conducted this *de novo* review", is indicative of an improper review for the claim regarding a court's admission of an expert's testimony. Compare *U.S. v. Nacchio,* 555 F. 3d 1234, 1241 (10th Cir. 2009) ("We review for abuse of discretion the manner in which the district court performs this gate keeping role" and "[t]hough the district court has discretion in how it conducts the gatekeeper function, we have recognized that it has no discretion to avoid performing the gatekeeper function").

In nominally addressing Ray's petition regarding the admission of photographs which did not exactly reflect what the State said occurred, the district court noted, "[t]here is no evidentiary support for Petitioner's theory [*sic*] of cyanosis" (*Ray v. McCollum*, 2017 WL 1740468, n. 3). The district court ignored

Ray's presented facts, i.e., clear and convincing evidence of "**skin: cyanosis**" reported by the Oklahoma University Medical Center in its medical record. Neither the trial judge nor the jury had been made aware of the presence of gross skin cyanosis that had developed which was captured in the photographs, yet the State mislead the jury having argued the photographs represented "use of unreasonable force."

In sum the respective judges ignored the clearly presented evidence presented with Ray's habeas petition and abandoned the proper standard of review as prescribed by the court in *U.S. v. Avitia-Guillen,* 680 F. 3d 1253, 1256 (10th Cir. 2012). *See* Affidavit of Prejudice and Medical Evidence in support thereof petition for habeas corpus to the Supreme Court.[2]

Therefore Petitioner reasonably believes adequate relief cannot be obtained in any other form or from any other court.

STATEMENT OF EXHAUSTION OF AVAILABLE REMEDIES IN THE STATE COURTS

The grounds for habeas relief discussed herein were exhausted when the Oklahoma Court of Criminal Appeals (OCCA) affirmed the state district court's order denying post-conviction relief. *Ray v. State,* PC-2022-1067 (March 3, 2023) (not for publication).

STATUTORY PROVISION INVOLVED

- 28 USCA § 2242

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[2] Per S. Ct. Rule 14.2, "[a]ll contentions in support of the petition must be set out in the body of the petition and the Clerk will not file any petition to which any supporting brief is annexed or appended"; therefore, Petitioner's relevant medical documents, affidavit of prejudice, and record pertinent to a determination of the sufficiency of the evidence **have not** been attached hereto.

- 28 USCA § 2254 (a)
- 28 USCA § 2254 (b) (1) (A) The applicant has exhausted the remedies available in the courts of the State.
- 28 USCA § 2254 (d) (2) [T]he adjudication of the claim —
  . . . .

  (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.
- 28 USCA § 2254 (f)

  If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, **the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination.** If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

STATEMENT OF THE CASE

1. The name and location of the court which entered the judgment of conviction under attack is District Court of Comanche County for the State of Oklahoma, Lawton, Oklahoma. The date judgment of conviction was entered was June 18, 2012. The case number assigned was CF-2010-571. The length and terms of sentence is Life with the possibility of parole.

Petitioner is *not* presently serving a sentence imposed for a conviction other than the conviction under attack in this petition. The nature of the offense according to

the State of Oklahoma is First Degree Murder under *subsection C* of Section 701.7 of the Oklahoma Statutes title 21. Petitioner entered a Not Guilty plea.

Petitioner was tried by a jury which did not represent a fair cross-section of the community. Petitioner did not testify at trial.

2. Petitioner timely appealed from the judgment of conviction to the Oklahoma Court of Criminal Appeals in case number F-2012-538. Judgment of conviction was affirmed on September 24, 2013.

3. On October 2, 2013, Petitioner "properly filed" a *pro se* Motion for Suspension of Judgment and sentence after appeal under state law 22 O.S. § 994 in the trial court and requested an evidentiary hearing which to date is pending.[3] The federal court in *Nordstedt v. Louthan*, 22-CV-0414, GKF-CDL, 2023 WL 3689408, at *5 (N.D. Okla. May 26, 2023) held "that a § 994 motion is an application for 'other collateral review' for purpose of § 2244 (d) (2)."

Therefore in the instant case, Petitioner's limitation period, at least on the ground the state medical examiner's testimony is unreliable, remains tolled because the state district court has not ruled on his "properly filed" § 994 motion. Cf. *Smith v. Whitten*, No. CIV-20-1310-D, 2022 WL 811071, at * 1 (W.D. Okla. March 16, 2022) ("Petitioner's motion for a suspended sentence under Okla. Stat. tit. 22, § 994 was

[3] The state cannot seriously dispute that Petitioner Ray properly filed his Motion for Suspension of judgment and sentence after appeal under § 994. Regarding a properly filed § 994 motion the court in *Nordstedt v. Louthan*, 22-CV-0414, GKF-CDL, 2023 WL 3689408, (N.D. Okla. May 26, 2023) explained the plain language of the statute reveals only three filing conditions: (1) the defendant's criminal conviction must have been affirmed, in whole or in part, on appeal; (2) the defendant must file the motion within ten days of the OCCA's final order; and (3) the defendant must file the motion in the trial court. *Nordstedt* at *3. Like *Nordstedt*, Ray has satisfied all three conditions because the OCCA affirmed his judgment and sentence on September 24, 2013, and he filed the motion eight days later, on October 2, 2013, in his criminal case, in the Comanche County District Court Case No. CF-2010-571. Thus Ray's § 994 motion was "properly filed" for purposes of § 2244 (d) (2). *Id.*

filed almost ten years ago, and it remains pending.") (Emphasis added). Petitioner's § 994 motion was "properly filed" for purposes of § 2244 (d) (2).

4. On September 19, 2014, Petitioner filed an original application for post-conviction relief under state law 22 O.S. § 1080 in the trial court, wherein *inter alia* he raised as aground for relief the legally insufficient opinion testimony of the state medical examiner and presented fact issues in support. Relief was denied.

On March 18, 2015, Petitioner appealed the district court's order denying relief. The Oklahoma Court of Criminal Appeals affirmed the district court's order denying post-conviction relief. *Ray v. State*, PC-2014-1053 (March 18, 2015) (not for publication).

5. On April 17, 2018, Petitioner filed a second application for post-conviction relief in order to exhaust certain claims regarding plain error whereby the trial court failed to instruct the jury on all of the elements, i.e. underlying felonies, charged, duplicitously, under 21 O.S. 701.7 subsection C; moreover, Petitioner argued counsel was ineffective for not having presented that claim as plain error on direct appeal. Relief was denied.

Petitioner appealed the district court's order denying relief. The Oklahoma Court of Criminal Appeals affirmed the district court's order denying post-conviction relief on June 11, 2018. *Ray v. State*, PC-2018-390 (June 11, 2018) (not for publication).

6. On October 31, 2022 Petitioner filed a third application for post-conviction under the **sufficient reason** and **inadequately raised** provisions of § 1086 of the Oklahoma Post-Conviction Procedure Act. Petitioner *inter alia* argued "actual

innocence" and "jurisdictional issue regarding medical examiner" as grounds for relief. Contrary to clearly established state procedural laws the district court denied relief. On November 3, 2022 Petitioner delivered to the prison legal mail custodian his motion for an evidentiary hearing for mail to the state District Court for Comanche County. The state district court however filed its order denying post-conviction relief on November 4, 2022. In relevant part the Order read, "**[t]he Court having reviewed** said pleadings and **the response filed thereto**, makes the following findings of fact and conclusions of law." Order p. 2. (Emphasis added). Petitioner timely filed a motion to stay execution of the order denying relief wherein he argued the "Order is not in compliance with state law, i.e. 22 O.S. § 1083 (A) (B)" as the State had *not* responded.

On November 22, 2022 the district court filed its Order denying the motion to stay. Contrary to clearly established state law, i.e. 22 O.S. § 1083 (A)(B), and in contradiction to what the district court said in its order denying relief, the Order read, "[t]he **Court did not require the state to respond** to the application for post-conviction relief filed herein by the Defendant." Order, Para 1.

7. Petitioner appealed the district court's order denying relief. The Oklahoma Court of Criminal Appeals affirmed the district court's order denying post-conviction relief in *Ray v. State*, PC-2022-1067 (March 3, 2023) (not for publication).

INTRODUCTION

This case is about whether Petitioner has now made a credible showing of actual innocence with new reliable evidence not presented at trial, as previously

explained by the Tenth Circuit Court of Appeals in *Ray v. McCollum,* 727 Fed. Appx. 517, 524 (10th Cir. 2018). Title 28 § 2244 (b) (2) (B) (ii) answers that question.

Moreover this case is about whether Petitioner has now supported his assertion of actual innocence with evidence not admitted by counsel at trial and omitted by counsel on direct appeal, where neither the jury nor the court of criminal appeals had that evidence before it. The universe of facts that enter into the subparagraph (B) (ii) analysis consists only of evidence presented at the time of trial, **adjusted for evidence that would have been admitted or excluded** "but for constitutional error" during judicial proceedings. *Case v. Hatch,* 731 F. 3d 1015, 1038 (10th Cir. 2013). Petitioner herewith presents both (1) evidence counsel had not presented to the jury that should have been admitted, (2) evidence in the form of the State's investigating medical examiner's record testimony that should have been excluded, i.e. stricken at trial,[4] and (3) evidence in direct contradiction with the medical examiner's testimony that counsel should have utilized on direct appeal.

This case is about whether Petitioner has now developed his "stand alone sufficiency claim" following his first federal habeas petition which presented the "ground that his conviction was not supported by sufficient evidence" regarding the opinion testimony of the state medical examiner who conducted the autopsy in the case. *Ray v. McCollum,*727 Fed. Appx. 517, 525-26 (10th Cir. 2018).

This case is about whether Petitioner's pending motion pursuant to 22 O.S. § 994 [Suspension of judgment and sentence after appeal] filed stamped October 2, 2013 in the District Court of Comanche County for the State of Oklahoma, is a

[4] *See* footnote 2 hereinabove.

properly filed application for "other collateral review" for purposes of 28 USC § 2244 (d)(2). In the instant case the state court—i.e. the state's final decision maker as to a § 994 motion—has not ruled on Petitioner's § 994 motion.[5] Each federal district court in Oklahoma has answered this question. *See Estes v. Crow*, No. CIV-20-031-RAW-KEW, 2022 WL 301598, at *3-4 (E.D. Okla. Feb. 1, 2022) (unpublished) ('[T]he Court finds Petitioner's motion pursuant to § 994 constitutes 'collateral review.' Because the motion still is pending, Petitioner's limitation period remains tolled."). *See also Clements v. Franklin,* No. CIV-12-247-W, 2012 WL 2344430, at *3 (W.D. Okla. May 8, 2012) (unpublished) ("The Supreme Court has interpreted the phrase 'collateral review' to include any 'judicial review of a judgment in a proceeding that is not part of direct review,' including motions to reduce sentence under state law.").And more recently *Nordstedt v. Louthan,* No. 22-CV-0414-GKF-CDL, * 4, 6, 2023 WL 3689408 (In *Wall v. Kholi*, 562 U.S. 545, 547 (2011), "[t]he United States Supreme Court broadly interpreted the phrase 'collateral review' to mean judicial review of a judgment in a proceeding that is not part of direct review," and "[b]ecause Nordstedt's § 994 motion is a properly filed application for collateral

[5] This issue regarding the pending § 994 motion was discussed during recent 42 USC § 1983 pleadings wherein Plaintiff Ray complained of the assistant district attorney's professional misconduct which prevented the hearing of his "properly filed" § 994 motion. *Ray v. Quisenberry,* No. CIV-22-823-D, 2023 WL 2861429, *3 (W.D. Okla. Jan 24, 2023) (Not Reported in Fed. Supp.). Plaintiff Ray showed that the assistant district attorney drafted the state district court's order having intentionally cited 22 O.S. § 982a [Judicial Review] as the legal authority before the state court. In doing so the assistant district attorney (1) knowingly failed to disclose to the tribunal the legal authority in the controlling jurisdiction known to him to be directly adverse to his position in violation of Rule of Professional Conduct 3.3 a 2; (2) applied an improper legal standard; and (3) secured the state court's signature, thus having obtained an order by fraud in violation of Rule 8.4. The order read in relevant part: "[t]his matter comes before the Court, pursuant to the provisions of 22 O.S. Sec 982a on the application of the Defendant named above for modification/judicial review." And in spite of the fact Plaintiff had raised fact issues with his § 994 motion, the order read "...this matter should be decided without oral argument and without further hearings pursuant to District Court Rule 4 (h)"; whereas, Rule 4 (c) provides for a hearing for motions raising fact issues.

review ... his limitation period remains tolled because the state district court has not ruled on his § 994 motion.") In *Nordstedt* the court recognized that his § 994 motion had been pending for over four years, whereas in *Smith* the court recognized "[p]etitioner's motion for a suspended sentence under Okla. Stat. tit. 22 § 994 was **filed almost ten years ago**, and it remains pending." *Smith v. Whitten,* No. CIV-20-1310-D, 2022 WL 811071, *1 (W.D. Okla. Mar. 16, 2022) (Not Reported in Fed. Supp.).[6]

Furthermore, this case is about whether Petitioner's claim that the investigating medical examiner's opinion testimony was unreliable—i.e. not based upon sufficient fact or data and not the product of a reliable method, and testimony, regarding "blood loss [*sic*] in tissues" (Tr. Vol. 3 p. 61), did not fit the facts of the case to have led a rational trier of fact to find guilt beyond a reasonable doubt—state a federal constitutional claim. The U.S. Supreme Court's explanation in *Jackson v. Virginia,* 443 U.S. 307, 321, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) answers that question. In *Jackson* the Court explained "it is clear that a state prisoner who alleges that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt

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[6] This Court should take judicial notice that § 994 of the Oklahoma statutes title 22, provides for, not only a suspension of the sentence, but also for "[s]uspension of **judgment and sentence** after appeal". 22 O.S. § 994 provides:

> After appeal, when any criminal conviction is affirmed, either in whole or in part, the court in which the defendant was originally convicted may **suspend the judgment and sentence** as otherwise provided by law. **Jurisdiction for such suspension shall be vested in said trial court by a request by the defendant within ten (10) days of the final order of the Court of Criminal Appeals.** Any order granting or denying suspension made under the provision of this section is a nonappealable order.

beyond a reasonable doubt has stated a federal constitutional claim." *Jackson* at 307.

In short, on petition for writ of habeas corpus the Supreme Court for the United States reasonably should reverse on a finding that the evidence was insufficient to support the verdict; furthermore, in light of *Burks* this Court should maintain that the *Double Jeopardy Clause* precludes a second trial once the reviewing court has found the evidence legally insufficient, whereas the only "just" remedy available for this Court is the direction of a judgment of acquittal. *Burks v. United States*, 437 U.S. 1, *17-18, 98 S. Ct. 2141, 2150, 57 L. Ed. 2d 1 (1978).

REASONS FOR GRANTING HABEAS PETITION

A) (1) Ground One:

> THE TRIAL COURT PLAINLY ERRED WHEN IT ABANDONED ITS GATE KEEPING ROLE TO THE EXTENT IT DID NOT MAKE ANY FINDINGS REGARDING THE RELIABILITY OF THE INVESTIGATING MEDICAL EXAMINER'S TESTIMONY WHICH DENIED PETITIONER DUE PROCESS AND RESULTED IN THE WRONGFUL CONVICTION OF ONE WHO IS ACTUALLY INNOCENT.

The OCCA's recent adjudication of this claim resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented during the recent subsequent post-conviction appeal in *Ray v. State*, PC-2022-1067(Okl. Cr. March 3, 2023) Not for Publication. The claim was filed pursuant to the "sufficient reason" provision of 22 O.S. § 1086.

Standard of Review

- 28 USCA § 2254 (d) (2) [T]he adjudication of the claim —

. . . .

(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.

The trial court generally must first determine whether the expert is qualified by knowledge, skill, experience, training, or education to render an opinion. *U.S. Avitia-Guillen,* 680 F. 3d 1253, 1256 (10th Cir. 2012). In the instant case however the trial court determined only that the investigating medical examiner was qualified to render an opinion as an expert. The federal court nonetheless reviews *de novo* whether the court actually performed its gatekeeper role in the first instance. In the instant case, contrary to state procedural rules, i.e. 12 O.S. § 2702, the trial court had not performed its gatekeeper role where it had not determined admissibility based on a determination of reliability.[7] But, understandably, when a party fails entirely to object to expert testimony at or before trial, the federal habeas court reviews only for plain error. *U.S. v. Avitia-Guillen* at 1256.

(2) Supporting Facts:

The trial court's decision to admit the medical examiner's testimony was manifestly erroneous. A decision to admit can be manifestly erroneous when the expert opinion is based on data or a methodology that is simply inadequate to support the conclusions reached or the opinion is speculative or conjectural. *U.S. v. Jones,* 965 F. 3d 149, 162 (2d Cir. 2020).

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[7] Independent of *Daubert* and *Kumho,* reliability in Oklahoma is governed generally by § 2702. Oklahoma's version of federal rule of evidence 702 is section 2702 of title 12 of the Oklahoma Statutes regarding the admissibility of expert testimony. When abandoning the *Frye* test of admissibility and adopting *Daubert* however the OCCA made clear that "[t]he admission of expert testimony is governed generally by 12 O.S. 1981, § 2702."*Taylor v. State,* 1995 OK CR 10, ¶14, 889 P. 2d 319, 326.

The investigating medical examiner's opinion was conjectural where she testified, "So the mechanism exactly is hard for me to definitively point out, but I can offer that **probably** the blood loss [*sic*] that was extensive caused him to die..." (Tr. Vol. 3 pp. 61, 62). Conjecture: A guess; supposition; surmise. *Black's Law Dictionary* (11th ed. 2019). Furthermore the opinion was speculative where the examiner could not determine a mechanism of injury even though in another place the examiner had testified, "I did get training in anatomic and forensic pathology . . . And they also train us in knowing...**what's the mechanism of death**, what do these things mean and how to find out and document them and present them" (Tr. Vol. 3 p. 23). As shown from the record herein below, the investigating examiner's opinion was based on a method she had not applied reliably to the facts of the case where the examiner had not reviewed the medical records—which in the instant case makes the method inadequate to support the conclusion reached; even though she'd admitted that that is a step in the forensic pathology investigation (Tr. Vol. 3 p. 27). *See Claar v. Burlington N.R.R.*, 29 F. 3d 499 (9th Cir. 1994) Infra.

And where, after the state rested, trial counsel demurred to the evidence having argued, "[t]he non-fatal or the strap mark injuries that are attributable to Mr. Ray were described by the State's own expert witnesses as non-life threatening, and for that reason we would demur generally to the evidence" (Tr. Vol. 3 p. 86), the trial court should have stricken the investigating medical examiner's testimony and

instructed the jury not to consider it. Instead the trial court overruled the demur having stated, "Okay, that's overruled" (Tr. Vol. 3 p. 86).[8]

An examination of specific portions of the investigating medical examiner's record testimony reveals that the examiner had not applied the forensic pathology investigation methods—that she'd educated the jury about regarding medical records (Tr. Vol. 3 p. 27) —reliably to the facts of the case when investigating the death of M.R. In other words, the medical examiner's opinion does not reflect a reliable application of those methods to the facts of the case. Therefore a determination of the sufficiency of the evidence based upon the part of the trial record pertinent to such a determination will show that the examiner's testimony was not based upon sufficient facts.

B) (1) Ground Two:

INVESTIGATING MEDICAL EXAMINER'S TESTIMONY INSUFFICIENT (UNRELIABLE) EVIDENCE TO SUPPORT THE VERDICT

The OCCA's recent adjudication of this claim, under Petitioner's claim of ineffective assistance of appellate counsel, resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented during the recent subsequent post-conviction appeal in *Ray v. State*, PC-2022-1067 (Okl.

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[8] This court should be advised that despite the U.S. Supreme Court's ruling in *Kumho Tire Company, v. Carmichael,* 526 U.S. 137, 119 S. Ct. 1167, 1171, 143 L. Ed. 2d 238 (1999), that "[T]he trial judge's general 'gatekeeping' obligation applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge", the OCCA relegates *Daubert* reliability hearings to "novel scientific evidence". *See Oliver v. State,* 2022 OK CR 15, ¶ 11, 516 P. 3d 699, 705 ("As the evidence at issue was not novel scientific evidence, no Daubert hearing was required."). *But see Daubert* 509 U.S. 579, 601, **n.11**, (1993) ("Although the *Frye* decision itself focused exclusively on 'novel' scientific techniques, **we do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence.**") (Emphasis added).

Cr. March 3, 2023) Not for Publication. The claim was filed pursuant to the "sufficient reason" provision of 22 O.S. § 1086.

Standard of Review

- 28 USCA § 2254 (d) (2) [T]he adjudication of the claim –

  . . . .

  (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.

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(2) Supporting Facts:

The investigating medical examiner testified, in pertinent part:

> Depending on what case we have at hand, we collect some information, what's known about this case, what's the story, what are the circumstances of death, if they are known, what's known about the case at that point in time. **And this information is obtained, we can get from the medical record,** it can be obtained from our investigation, our investigator talking to police or with witnesses, a number of sources. So once I have the story or a history just like you go to the doctor and complain about something, then I take the examination form there, what is it that I'm dealing with.
>
> . . . .
>
> I photograph the body as I receive it, in what condition this person was in. Did he die at home with no evidence of medical treatment, **did he go to a hospital and he was treated,** document the findings on the body whether it is from medical intervention, whether it was from injury that was recent, that happened very close to the time of death or he had previous injuries.

Tr. Vol. 3 p. 27 (Emphasis added).

In response however to questions involving cause of death the investigating medical examiner testified to the contrary, shown here below:

> I'm a forensic pathologist. **I have not** seen this child, treated him and **put him on monitors and measured his heart rate and breathing pulse and blood pressure**, monitoring him while he's alive. I'm observing him after he has passed away, so you're asking about a mechanism of death . . . . So mechanisms I can suggest, but **not being the treating physician to say that he dropped his blood pressure because of those injuries, I'm after that stage.**

Tr. Vol. 3 p. 61 (Emphasis added)

A review of the medical records generated at the Reynolds Army Community Hospital at Fort Sill reveals M.R's "heart rate" at the time, as well as his "breathing", "pulse and blood pressure" at the time. So where the investigating medical examiner educated the jury on methods employed during forensic pathology investigations (Tr. Vol. 3 p. 27), but failed to employ the method of obtaining information from medical records during her forensic pathology investigation into the death of M.R., the testimony was unreliable, hence insufficient. In other words the investigating medical examiner's testimony was not the product of reliable methods; moreover, neither had that examiner applied her methods reliably to the facts of the case. *See* 12 O.S. 2010, §2702 which requires that some general standards be met in order for the expert's testimony to be admissible;[9] which are:

> If specialized knowledge will assist the trier of fact to understand the evidence or **to determine a fact in issue**, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise, if:
>
> 1. The testimony is based upon sufficient facts or data;
> 2. The testimony is the product of reliable principles and methods; and
> 3. The witness has applied the principles and methods reliably to the facts of the case.

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[9] Compare *Rooks v. State Through Oklahoma Corp. Com'n*, 1992 OK CIV APP 155, 842 P. 2d 773, 777 ("The Oklahoma statute [. . .] is adopted from and is identical to its federal counterpart [. . .] We may use federal case law to interpret Oklahoma procedural rules under those circumstances.")

The fact to determine was whether M.R.'s blood pressure dropped due to non-fatal or the marks that were attributable to Petitioner. And as shown above, the investigating medical examiner declined to determine whether those marks, referred to as injuries, caused a severe drop or any drop in blood pressure for that matter.

Further, conjecturing, the investigating medical examiner testified, ". . . those injuries [marks] were multiple, they were extensive, they were associated with blood loss [*sic*] in tissues and that blood loss, if it is not replaced and the reason for the blood loss corrected, that person is going to go into shock and if this shock is not treated in time, it's going to be irreversible and the person would die." Tr. Vol. 3 p. 61.

And though the investigating medical examiner explained that she was trained to know "what's the mechanism of death" (Tr. Vol. 3 p. 23), she later contradicted that statement when she stated, "So the mechanism exactly is hard for me to definitively point out, but I can offer that probably the blood loss [*sic*] that was extensive caused him to die from the injuries [marks]" (Tr. Vol. 3 pp. 61, 62).

And again, Oklahoma's 12 O.S. § 2702 is the state's counterpart to federal rule of evidence 702. Independent of *Daubert* and *Kumho*, reliability in Oklahoma courts is governed generally by § 2702. That is, "[t]he admission of expert testimony is governed generally by 12 O.S. 1981, § 2702."*Taylor v. State,* 1995 OK CR 10, ¶14, 889 P. 2d 319, 326.

Regarding "training in anatomic and forensic pathology" (Tr. Vol. 3 p. 23), the investigating medical examiner educated the fact finder as such: "[T]hey also train us in knowing what is the cause of death, what is the manner of death, **what's the mechanism of death**, what do these things mean and how to find out and document them and present them" (Tr. Vol. 3 p. 23) (Emphasis added). But later contradicted that statement with: "So the mechanism exactly is hard for me to definitively point out, but I can offer that **probably** the blood loss that was extensive caused him to die from the injuries" (Tr. Vol. 3 p. 62) (Emphasis added). Compare 12 O.S. § 2702 with Fed. Rules Evid. Rule 702, 28 U.S.C.A., Amendments 2000 ("The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and **not speculative** before it can be admitted."). Therefore the investigating medical examiner's testimony which (1) neither provided a mechanism, nor (2) was able to actually determine blood loss, failed to assist the trier of fact to determine a fact in issue. That is, it is truly debatable whether "blood loss" actually occurred. Petitioner shows by "clear and convincing evidence" that blood loss did *not* occur.

Also the question of "blood loss" was asked by the defense along these lines: "Were you told how much additional blood or how many additional fluids [M.R.] was given as part of his treatment?" (Tr. Vol. 3 p. 72), and then answered by the investigating medical examiner as such, "No, sir." *Id.* Even though no internal bleeding occurred, neither in the dermal or subcutaneous tissues, as shown by the medical records generated while at RACH at Fort Sill, the treating physician

ordered close to 2½ liters of blood & fluids be infused into M.R. Ordinarily testimony excluded where the expert failed to consider other obvious causes for the Plaintiff's condition. *Claar v. Burlington N.R.R.,* 29 F. 3d 499 (9th Cir. 1994). That condition, "diffuse soft tissue hemorrhage" as reported by the investigating examiner, contradicted by the condition of "diffuse soft tissue edema" as reported in the medical records generated at the Oklahoma University Medical Center in Oklahoma City. The latter, i.e., "diffuse soft tissue edema" or as Dr. Yacoub described "diffuse soft tissue hemorrhage" was caused by 2½ liters of blood & fluids infused.[10] But the testifying investigating medical examiner Dr. Yacoub failed to consider that obvious cause for M.R.'s condition as her investigation was premised on the report that "the father had whipped the child" (Tr. Vol. 3 p. 31).

Further the investigating medical examiner testified, "So this information was relayed to me before I started the examination. And after the child was referred from one hospital to the other, despite medical treatment he died" (Tr. Vol. 3 p. 31). Again the trial record reflects that the medical examiner had not reviewed any of the medical records (Tr. Vol. 3 pp. 61, 72). So in light of these facts, the investigating medical examiner's testimony was not sufficiently reliable to be considered by the trier of fact as the expert had unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *See General Elec. Co. v. Joiner,* 522 U.S. 136, 146 (1997) (noting that in some cases "there is simply too great an analytical gap between the data and the opinion proffered").

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[10] Edema is an abnormal accumulation of fluid in cells, tissues, or cavities of the body, resulting in swelling. *Webster's New World Dictionary and Thesaurus.*

Compare *Claar v. Burlington N.R.R.*, 29 F. 3d 499 (9th Cir. 1994) where the district court, having focused exclusively on the experts' methods, excluded testimony where neither of the two experts in the case made any effort to rule out other possible cause for the injuries plaintiff's complained of by their failure to review the medical records, even though they admitted that this step would be standard procedure before arriving at a diagnosis. *Claar* at *502. Similarly in the instant case the investigating medical examiner all but admitted that she had not reviewed the medical records (Tr. Vol. 3 pp. 61, 72), even though she testified that forensic pathology investigations included obtaining information from medical records (Tr. Vol. 3 p. 27). Trial record of her testimony reveals that she had not. Therefore the evidence was insufficient to support the verdict. Under *Jackson v. Virginia*, "the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 2791-92, 61 L. Ed. 2d 560 (1979).

In the instant case, pursuant to 28 USCA § 12106, the only just remedy available for this Court is the direction of a judgment of acquittal. *Burks v. United States,* 437 U.S. 1,*18, 98 S. Ct. 2141, 57 L. Ed. 2d1.

The evidence here, i.e. the state medical examiner's opinion testimony, which was presented at trial, was insufficient to support the verdict where "the witness [*had not*] applied the principles and methods reliably to the facts of the case". Furthermore in the examiner's failure to apply forensic pathology principles and

methods reliably to the facts of the case, the trial court's failure to conduct any reliability hearings violated state procedural law. 12 O.S. § 2702. Compare FRE 702.

The state forensic pathologist who conducted the autopsy failed to review said medical records, CT reports and specimen enquiry, even though she admitted that obtaining information from medical records was a step in forensic pathology investigations. *See*, attached to the petition, trial transcripts at volume 3 page 27. It is evident from the record before this Court that the state medical examiner had not reviewed the stated "new reliable evidence", i.e. medical records, during the course of her forensic pathology investigation to determine cause of death (Tr. Vol. 3 pp. 61, 72).

The medical records from RACH and OUMC support Ray's claim that the state's conviction lacks sufficient evidence to sustain the jury's verdict; moreover, the very existence of medical records which show evidence in direct contradiction with the testimony of the investigating medical examiner who conducted the autopsy, and that had not been reviewed by said examiner, makes it clear that the state failed to provide sufficient evidence as required by law, i.e., 12 O.S. § 2702. Compare FRE 702.

Therefore, independent of Petitioner's actual innocence claim, Petitioner states an insufficiency of evidence claim where the state medical examiner failed to review the medical records; moreover, Petitioner was tried contrary to principles of Due Process as guaranteed by the Fourteenth Amendment to the Constitution of

the United States. Under *In re Winship*, it is important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty. 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L. Ed. 2d 368 (1970).

In the case presented against 1LT Ray, prosecutors, defense, and the judge and jury heard about Yacoub's qualifications (Tr. Vol. 3 Pp. 21-24), forensic pathologists' methodology (Tr. Vol. 3 Pp. 23, 27) and Yacoub's conclusions (Tr. Vol. 3 p. 61). The Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F. 3d 1311, 1319 (9th Cir. 1995) explained, "We've been presented with only the expert's qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."

The medical examiner was qualified as an expert, given the pathologist's knowledge, skill, experience, training and education; still, 12 O.S. § 2702 requires that some general standards are met in order for the expert's testimony to be admissible. Dr. Yacoub's opinion testimony failed to meet those general standards set forth in § 2702.

The Oklahoma Statute 12 O.S. § 2702 is adopted from and is identical to its federal counterpart Federal Rule of Evidence 702 (FRE 702). Section 2702 however incorporates the first enumerated standard set forth in FRE 702 into the prerequisite of § 2702. That is, where FRE 702 sets forth a total of four enumerated

criteria a witness qualified as an expert must meet for the purpose of testifying, § 2702 sets forth a total of three criteria as shown hereinabove.

Because of extensive federal case law on FRE 702, pertinent federal case law is cited herein. FRE 702 was amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167, 1171 (1999). The Court in *Kumho* clarified that the gatekeeper function of the trial judge expressed in *Daubert* applies to all expert testimony, not just testimony based in science, but also to testimony based on technical and **other specialized knowledge**.

See Committee Notes on Rules-2000 Amendment:

> [T]he sufficiency of the basis of an expert's testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the sufficiency of the expert's basis **cannot** be divorced from the ultimate reliability of the expert's opinion.

An example of specialized knowledge as described by the Court in *U.S. v. Campbell*, 963 F. 3d 309, 314-15 (4th Cir. 2020):

> In appropriate circumstances, an expert may offer an opinion that applies the facts to a legal standard. And applying medical expertise to form an **opinion on the cause of death is often the type of specialized knowledge** that can help a jury.

In the State's case against 1LT Ray, the opinion testimony of the forensic pathologist was that "injuries [i.e. contusions]" "were severe" (Tr. Vol. 3 p. 61). And despite the fact "there was no clear source of bleeding" (Tr. Prelim HRG p. 19), according to Dr. Yacoub bruises were severe because they "were associated with blood loss in tissues" (Tr. Vol. 3 p. 61).

Dr. Yacoub previously explained "[a] contusion is a bruise in which there was an impact and the impact caused tissue damage" (Tr. Vol. 3 p. 34). Webster's New World Dictionary & Thesaurus defines bruise: (*vt.*) as to injure (body tissue), as by a blow, without breaking the skin but causing discoloration; (*n.*) a bruised area of tissue, of a surface, etc. So the assumption of a *severe* contusion is oxymoronic; as in, "pointedly foolish".

Further contrary to severe bruising as testified to by Dr. Yacoub (Tr. Vol. 3 p. 61), in the Report of Autopsy Dr. Yacoub wrote "[a]cute red hemorrhage *without* an inflammatory reaction is noted in the sections of contused areas . . ." (State's Exhibit 49 p. 7). Inflammation, a bodily response to injury, is defined by Webster's New World Dictionary & Thesaurus as:

> A condition of some part of the body that is a reaction to injury, infection, irritation, etc., and is characterized by varied combinations of redness, pain, heat, swelling, and loss of function.

So Dr. Yacoub's testimony, contradicted by her own Report of Autopsy regarding bruises without inflammatory reaction, is begging the question i.e. assuming the conclusion where she opined cause of death "blunt force trauma" having herself associated contusions with "blood loss" absent support for that claim. Furthermore as for the 12 O.S. § 2702 criteria:

> If . . . other specialized knowledge will assist the trier of fact . . . to determine a fact in issue, **a witness qualified as an expert** by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise . . .,

the district attorney, in 1LT Ray's case, having presented the pathologist's experience "18 years" and over "3000 autopsies" (Tr. Vol. 3 Pp. 22, 23), and having

presented the pathologist's training and education (Tr. Vol. 3 p. 22, 23), introduced the pathologist as "an expert in the field of pathology" (Tr. Vol. 3 p. 24).

The Court nonetheless in *Daubert v. Merrell Dow Pharmaceuticals,Inc.*, 43 F. 3d 1311, 1319 (9th Cir. 1995) held "[w]e've been presented with only the expert's qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."

In *Ray*, as to the ***First*** criterion of § 2702, *i.e.* testimony is based upon sufficient facts or data, on direct examination the pathologist testified "there was diffuse hemorrhage in the soft tissue" (Tr. Vol. 3 Pp. 42, 43), "all this diffuse hemorrhage" (Tr. Vol. 3 p. 43), and bruises "they were associated with blood loss in tissues" (Tr. Vol. 3 p. 61); however, on cross-examination to the question of whether the pathologist was aware of how much blood or how much fluids M.R. was given her answer was "No." (Tr. Vol. 3 p. 72).

Contrary to the pathologist's testimony of "diffuse hemorrhage" (Tr. Vol. 3 p. 43), the OUMC medical records annotated "Diffuse soft tissue edema." Edema is an abnormal accumulation of fluid in cells, tissues, or cavities of the body, resulting in swelling. *Webster's New World Dictionary and Thesaurus.* For certain RACH medical records-progress notes show that the total amount of normal saline fluid administered was 1400ccs (1000 milliliters + 400 milliliters) in addition to 2 units (1000 milliliters) of packed red blood cells, which together is almost 2½ liters, were given.[11]

[11] Bear in mind, there was "no clear source of bleeding" according to RACH-ER treating physician Dr. Ware (Tr. Prelim HRG p. 19)

As to the ***Second*** criterion of § 2702, *i.e.* "[t]he testimony is the product of reliable principles and methods," the prosecution presented expert testimony wherein Dr. Yacoub detailed the forensic pathologists' methodology. According to Dr. Yacoub, her methods involve: (1) "**find [ing] out what information we need to collect**"; (2) "examine decedents"; (3) "work up cases"; (4) "document our findings"; and (5) "prepare a report" (Tr. Vol. 3 p. 23). Dr. Yacoub further explained ". . . **and this information is obtained, we can get from the medical record** . ." (Tr. Vol. 3 p. 27).[12]

The Court in *Taylor v. State*, 889 P. 2d 319, 331 (Okl. Cr. 1995) referring to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993), cautioned that the focus of the Section 702 inquiry "**must be solely on principles and methodology**, not on the conclusions that they generate." Moreover the Court in *Kumho Tire Co. v. Carmichael,* 119 S. Ct. 1167, 1171 (1999) held "we conclude that Daubert's general holding [. . .] applies not only to testimony based on 'technical' and 'other specialized' knowledge."

And the Court in *In re Paoli RR. Yard PCB Litig.*, 35 F. 3d 717, 745 (3d Cir. 1994), "any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. **This is true whether the step completely changes a reliable methodology or merely misapplies that methodology**."

[12] Dr. Yacoub testified "Depending on what case we have at hand, we collect some information, what's known about this case, what's the story, what are the circumstances of death" (Tr. Vol. 3 p. 27).

Now pertaining to Dr. Yacoub's methodology, as she described, she misapplied the first step in her methods by several accounts which rendered her methods unreliable:

(1) By the first account, information clearly annotated in RACH medical records regarding how much blood or fluids was given, was not relayed to Dr. Yacoub (Tr. Vol. 3 p. 72); moreover, the pathologist failed to glean any information from said medical records for her investigation. See 63 O.S. § 2010, 941 *infra*, at Para 36.

(2) By a second account, information clearly annotated in the RACH medical records regarding M.R.'s heart rate, pulse, respirations, blood pH, blood pressure, body temperature, and et cetera, Dr. Yacoub failed to access. The state pathologist admitted as much when she testified:

> Q. What in and of itself, what would cause him to actually die?
>
> A. I'm a forensic pathologist. I have not seen this child, treated him and put him on monitors and measured his **heart rate** and **breathing** and **pulse** and **blood pressure**, monitoring him while he's alive. I'm observing him after he has passed away, so you're asking about a mechanism of death. . . . So mechanisms I can suggest, but not being the treating physician to say that he dropped his blood pressure because of those injuries, I'm after that stage.

Tr. Vol. 3 p. 61

Contrary to state law at the time, i.e. 63 O.S. **2010**, § 941, "[t]he investigation medical examiner **shall have access** at all times to any and **all medical** and dental **records** and history of the deceased. . ." See here below.

Some Reliable Information Not Accessed by Pathologist Yacoub

Medical Record-Progress Notes generated at RACH listed specific vital signs as such:

- "Rectal Temp 90.5" at 22:05 local time;
- "Rectal Temp 91.6" at 22:16 local time;
- "Rectal Temp 89.7" at 22:33 local time;
- "Brady[*cardia*] 60" at 22:26 local time;
- "Brady[*cardia*] to 40 BPM [i.e. beats per minute] at 22:44 local time;
- "Ø femoral pulse noted" at 22:54 local time;
- "weak carotid noted, HR [heart rate] 77 at 22:54 local time;
- "B/P š CPR 90/52", i.e. blood pressure without cardio pulmonary resuscitation ninety over fifty-two, at 22:54 local time;
- "Rectal Temp 89.1" at 22:57 local time;
- "B/P 70/36 at 23:03 local time; and
- "Rectal Temp 86.8" at 23:21 local time.

Further, RACH progress notes recorded signs of "respiratory acidosis" identified by blood pH 6.5; and OUMC Presbyterian Tower Emergency Room noted "respiratory distress", "skin: cyanosis", and "respiratory failure". Unsurprisingly, the state forensic pathologist who conducted the investigation noted "some pulmonary aspiration [*sic*]" in the Report of Autopsy p 7. Yacoub's small note regarding pulmonary aspiration would appear to be dismissive at least or at worst an attempt to bury that information. The pathologist also noted "[r]ed fluid similar to that in the lungs and stomach is observed in the airways" (State Exhibit 49, Report of Autopsy p. 4).

Nonetheless due to 63 O.S. **2010**, § 940 B's specific institutions set forth, Yacoub could not have conducted a complete investigation, because the Oklahoma Office of the Chief Medical Examiner lacked jurisdiction. Per 63 O.S. 2010, § 940, jurisdiction was limited to the death of "any **patient, inmate**, ward, or veteran in a **state hospital** or other institution, **except Oklahoma Medical Center Hospitals and Clinics thereof**...." 63 O.S. 2010, § 940 (B) (2).

Furthermore Dr. Yacoub failed to obtain the OUMC report which listed "Severe respiratory distress", "Respiratory failure" (Emergency Room Report, faxed page 2/15), and "Consolidative opacities in the dependent portions of the bilateral upper lobes and left lower lobe with near-complete consolidation of the right lower lobe, **most consistent with aspiration** . . ." (Computerized Tomography Consultation Report faxed page 12/15).

Dr. Yacoub, the medical examiner who conducted the autopsy, minimized evidence of respiratory pathological aspiration. Dr. Yacoub annotated "Red fluid similar to that in the lungs and stomach is observed in the airways" (State's Exhibit # 49, Report of Autopsy p. 4) and "some pulmonary aspiration" (State's Exhibit # 49, Report of Autopsy p. 7).

Dr. Ware testified "[w]hen we suctioned his lungs we didn't get what we would expect out of his lungs" (Tr. Vol. 1 p. 252), and "So my opinion is that he did not aspirate which is inhale vomit or suffocate on his vomit." *Id.* That testimony which dismissed aspiration is contradicted by Dr. Ware's statement to detectives "that [M.] Ray had fluid buildup in his left lung [*sic*]." See Police Investigative

Report authored by Det. Quisenberry. Furthermore Fort Sill security officers noted "11 YOM vomiting, Semi-Conscious, ENR TO RACH". The aforementioned documents, containing that exculpatory/impeachment information, were not disclosed to the judge or jury at trial.

As to the ***Third*** criterion of § 2702, *i.e.* "The witness has applied the principles and methods reliably to the facts of the case," where Dr. Yacoub failed to collect all the information regarding M.R. from the Reynolds Army Community Hospital medical records and the Oklahoma University Medical Center medical records and radiographs; therefore Dr. Yacoub could not have applied the methods, she testified to, reliably to the facts of the case.

Petitioner does not contend that the blood and saline administered were detrimental to M.R.'s health or contributed to his death, but does show that it was 1400ccs (1000 milliliters + 400 milliliters) in addition to 2 units (1000 milliliters) of packed red blood cells, which together is almost 2½ liters, that were given to a patient with documented signs of Neurogenic shock—which means treatment was an otherwise *medical* contraindication;

Irrespective of whether Petitioner contends or not that the in amount of blood and saline in the amount of 2½ liters administered was detrimental to M.R., the Court in *U.S. v. Chikvashvili*, 859 F. 3d 285, 294 (4th Cir. 2017) explained:

> Any alternative causes suggested by a defendant affect the weight that the jury should give the expert's testimony and not the admissibility of that testimony, **unless the expert can offer *no* explanation for why she has concluded that an alternative cause was not the sole cause.**

In Ray, as shown from the trial transcript, Yacoub offered no explanation for why she had concluded that an alternative cause of "diffuse soft tissue hemorrhage" or "diffuse soft tissue edema" as reported by OUMC was not the sole cause. *Compare Claar v. Burlington N.R.R.*, 29 F. 3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition).[14]

C) (1) Ground Three:

> THE OCCA DID NOT CONDUCT NOR DID IT ORDER THE LEGAL ANALYSIS OF THE FACTS PRESENTED THAT MUST BE DONE DURING RECENT SUBSEQUENT POST-CONVICTION PROCEEDINGS TO DETERMINE WHETHER PETITIONER HAD SHOWN AS "SUFFICIENT REASON": THAT **THE ASSISTANT DISTRICT ATTORNEY'S PROFESSIONAL MISCONDUCT PREVENTED THE HEARING OF PETITIONER'S MATERIAL FACT ISSUES PRESENTED WITH HIS ORIGINAL APPLICATION FOR POST CONVICTION RELIEF**: WHICH VIOLATED STATE PROCEDURAL RULES UNDER 22 O.S. § 1086.

The OCCA's adjudication of this particular claim resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented during the recent subsequent post-conviction appeal in *Ray v. State*, PC-2022-1067(Okl. Cr. March 3, 2023) Not for Publication. The claim was presented

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[14] *See Kumho Tire Co. v. Carmichael,* 119 S. Ct. 1167, 1176 (1999) "[B]oth to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, **and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.**" *See also U.S. v. Valencia-Lopez,* 971 F. 3d 891, 898 (9th Cir. 2020) "[T]he trial court's broad latitude to make the reliability determination does not include the discretion to abdicate completely its responsibility to do so. [A] **district court abdicates its gate keeping role, and necessarily abuses its discretion, when it makes no reliability findings.**"

application for post-conviction relief and accompanying motions. Moreover the assistant district attorney told a lie, committed fraud even, when he wrote:

> **[t]here are no genuine issues of material facts raised** in the Petitioner's pleadings [*sic*] and that this matter involves question of law and **does not require an evidentiary hearing** or appointment of counsel, and that this matter may be resolved as a matter of law [*sic*].

Response Pp. 2, 4, 8; Amended Response Pp. 1, 2, 4, 8

Further it appears the assistant district attorney drafted the court's order denying relief and Petitioner's request for evidentiary hearing which, read in part:

> The Court concludes **there are no genuine issues of material facts raised** by the Petitioner's pleadings [*sic*], or any of them [*sic*], that **this matter involves questions of law and does not require an evidentiary hearing** [*sic*] or appointment of counsel, and that this matter may be resolved as a matter of law.

Order p. 4—filed at 4:49 pm, fourteen minutes after the Amended Response was filed in the case. The OCCA affirmed the order denying relief despite the material facts—requiring vacation of the judgment and sentence according to Oklahoma procedural law, i.e. 22 O.S. § 1080 Para. 4, and § 1084 requiring an evidentiary hearing—presented during original post-conviction proceedings and the recent post-conviction appeal showing the assistant district attorney failed to disclose those facts.

In sum the assistant district attorney unlawfully concealed, from the state district court, material having potential evidentiary value in violation of Rule 3.4 [Fairness to opposing party and counsel] Rules of Professional Conduct which

amounted to obstruction of the due administration of the law according to Oklahoma's Post-Conviction Procedure Act.

Before trial Petitioner sought to have counsel use information documented in the medical records as it was information in direct contradiction with what the state medical examiner opined as cause of death. Counsel declined. Petitioner was tried and convicted. On direct (review) appeal Petitioner sought to have court appointed appellate counsel use that same information, and some additional information he'd discovered in the medical records. Appellate counsel declined. Petitioner presented that same information to the state district court during state post-conviction proceedings, but obviously the court having considered only the assistant district attorney's response ignored the "new" material facts. Contrary to *Schlup v. Delo,* 513 U.S. 298 and *House v. Bell,* 547 U.S. 518, the OCCA has ignored the "new" material facts presented—facts and data the medical examiner had not considered.

CONCLUSION

Based upon the otherwise "new" facts and data presented and citation of authority the petition for writ of habeas corpus should be granted; moreover, under *Burks* the only "just" remedy available for this Court is the direction of a judgment of acquittal.

Respectfully submitted this 30th day of January 2025.

By, _____

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