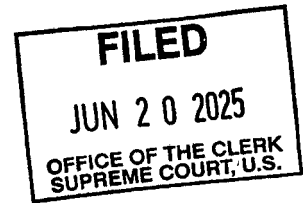


No. _____

ORIGINAL

24-7516



IN THE

SUPREME COURT OF THE UNITED STATES

DARYL ALAN HESS

— PETITIONER

(Your Name)

vs.

STATE OF OKLAHOMA

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

OKLAHOMA COURT OF CRIMINAL APPEALS

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

PETITION FOR WRIT OF CERTIORARI

DARYL ALAN HESS

(Your Name)

P.O. BOX 97

(Address)

McALESTER, OK 74502

(City, State, Zip Code)

(OSP) 918 423 4700

(Phone Number)

QUESTIONS PRESENTED

1. Whether Oklahoma's application of its successive post-conviction procedural bars (22 O.S. §§ 1086, 1080.1) constitutes an adequate and independent state ground precluding federal review of Petitioner's Sixth Amendment claim, where Petitioner was denied counsel at a critical stage (preliminary hearing) because an assistant public defender actively misrepresented her status as his counsel, while simultaneously representing the key adverse witness, constituting a fraud on the court that is confirmed by newly discovered evidence, that prevented the claim from being adequately raised previously?
2. Whether the Oklahoma Court of criminal appeal's reliance on state procedural bars (22 O.S. §§ 1086, 1080.1) to deny review of Petitioner's claim of denial of counsel due to fraud – supported by newly discovered evidence – conflicts U.S. Supreme Court precedent regarding the reviewability of federal claims defaulted due to state action or fraud, particularly in light of the principles regarding dependent state grounds discussed in *Glossip v. Oklahoma*, 604 U.S. ____ (2025)?
3. Whether petitioner was denied counsel at a critical stage (preliminary hearing) requiring automatic reversal without pleading prejudice, in light of the principles in *CHRONIC*?

LIST OF PARTIES

X⁹ All parties appear in the caption of the case on the cover page.

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

RELATED CASES

*** Tulsa County District Court State v Hess CF-2007-2646**

***Oklahoma Court of Criminal Appeals Hess v State F-2008-1022**

***Oklahoma Court of Criminal Appeals Hess v State PC-2010-516**

***Oklahoma Court of Criminal Appeals Hess v State PC-2022-1068**

***United States District Court for the Northern District of Oklahoma, habeas corpus proceedings**

Hess v Trammell 10-CV-517-CVE-FHM

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APPENDIX C - Oklahoma Court of Criminal Appeals PC-2022-1068, petition in
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TABLE OF AUTHORITIES

Glossip v. Oklahoma

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Wood v. Georgia, 450 U.S. 261 (1981)

IRohan ex rel. v. Woodford, 334 F.3d 803, 806 (9th Cir. 2003)

State v. Debra A.E., 523 N.W.2d 727, 738 (1994)

Carter v. State, 706 So. 2d 873, 875 (Fla. 1998)

People v. Owens, 564 N.E.2d 1184, 1189-90 (111. 1990)

People v. Kelly, 822 P.2d 385, 413 (Cal. 1992)

State v. White, 815 P.2d 869, 878 (Ariz. 1991)

Brock v. State, 242 S.W.3d 430, 432-33 (Mo. Ct. App. 2007)

Ex parte Mines, 26 S.W.3d 910, 912-13 (Tex. Crim. App. 2000)

People v. Newton, 394 N.W.2d 463, 466 (Mich. Ct. App. 1986)

Smith v. Illinois, 390 U.S. 129, 131 (1968)

Brookhart v. Janis, 384 U.S. 1, 3 (1966)

Davis v. Alaska, 415 U.S. 308 (1974)

Michel v. Louisiana, 350 U.S. 91, 100

Carter v. Bradshaw, 644 F.3d 329 (6th Cir. 2011).

Engle v. Isaac, 456 U.S. 107 (1982)

United States v. Valenzuela-Bernal, 458 U.S. 858, 867 -869 (1982)

United States v. Morrison, 449 U.S., at 364 -365

Avery v. Alabama, 308 U.S. 444, 446 (1940)

United States v. Ash, 413 U.S. 300, 309 (1973)

McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970).

STATUTES AND RULES

6th U.S.C.A

14th U.S.C.A.

22 O.S. § 1080.1

22 O.S. § 1086

22 O.S. § 1080

OTHER

Hannah Robertson Miller, A "Meaningless Ritual": How the Lack of a Post-conviction Competency Standard Deprives the Mentally Ill Effective Habeas Review in Texas, 87 TEX. L. REV. 267, 276.

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

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

OPINIONS BELOW

☐ For cases from **federal courts**:

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

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

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

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

☒ For cases from **state courts**:

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

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

The opinion of the Tulsa County District Court court appears at Appendix B to the petition and is

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

JURISDICTION

☐ For cases from federal courts:

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

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

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

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

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

☒ For cases from state courts:

The date on which the highest state court decided my case was APR 8, 2025.
A copy of that decision appears at Appendix A.

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

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

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

2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

***U.S. Const. amend. V (No person shall be . . . deprived of life, liberty, or property, without due process of law)**

***U.S. Const. amend. XIV, § 1 ([N]or shall any State deprive any person of life, liberty, or property, without due process of law)**

*** 22 OK Stat § 1080.1 (2024)**

A. A one-year period of limitation shall apply to the filing of any application for post-conviction relief, whether an original application or a subsequent application. The limitation period shall run from the latest of:

- 1. The date on which the judgment of conviction or revocation of suspended sentence became final by the conclusion of direct review by the Oklahoma Court of Criminal Appeals or the expiration of the time for seeking such review by the Oklahoma Court of Criminal Appeals;**
- 2. The date on which the Governor revoked parole or conditional release, if the petitioner is challenging the lawfulness of said revocation;**
- 3. The date on which any impediment to filing an application created by a state actor in violation of the Constitution of the United States or the Constitution of the State of Oklahoma, or laws of the State of Oklahoma, is removed, if the petitioner was prevented from filing by such action;**
- 4. The date on which the constitutional right asserted was initially recognized by the United States Supreme Court, if the right has been newly recognized by the United States Supreme Court and made retroactively applicable to cases on collateral review; or**
- 5. The date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.**

B. Subject to the exceptions provided for in this section, this limitation period shall apply irrespective of the nature of the claims raised in the application and shall include jurisdictional claims that the trial court lacked subject-matter jurisdiction.

C. The provisions of this section shall apply to any post-conviction application filed on or after the effective date of this act.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

***22 OK Stat § 1080 (2024)**

Any person who has been convicted of, or sentenced for, a crime and who claims:

- 1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state;**
- 2. That the court was without jurisdiction to impose sentence;**
- 3. That the sentence exceeds the maximum authorized by law;**
- 4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;**
- 5. That the sentence has expired, the suspended sentence, probation, parole, or conditional release unlawfully revoked, or he or she is otherwise unlawfully held in custody or other restraint; or**
- 6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy,**

may institute a proceeding under the Post-Conviction Procedure Act in the court in which the judgment and sentence on conviction was imposed to secure the appropriate relief. Excluding a timely appeal, the Post-Conviction Procedure Act encompasses and replaces all common law and statutory methods of challenging a conviction or sentence including, but not limited to, writs of habeas corpus.

***22 OK Stat § 1086 (2024)(Subsequent application)**

All grounds for relief available to an applicant under the Post-Conviction Procedure Act, including claims challenging the jurisdiction of the trial court, must be raised in his or her original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.

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STATEMENT OF THE CASE

May 15, 2007: Case Filed (Hess, Solomon and Hamilton).

May 22, 2007: Hess Arraignment; Public Defender appointed.

June 13, 2007: Preliminary Hearing held; Hess represented by Julie Ball (Asst PD); Assistant district attorneys Steve Kunzweiler and Mickey Hawkins. Hess bound over. (Not a joint hearing).

June 18, 2007: District Court Arraignment passed; Richard Couch (Asst PD) representing Hess. Kunzweiler for state. Court orders motions filed by 7-13-07. Court signs order for transcript. Hess's appearance waived.

July 10, 2007: Application to Withdraw P D. filed by Couch. Court appoints Sharon Holmes. Hess's appearance waived.

July 23, 2007: District Court Arraignment passed, pending competency determination in CF-2007-2643. Holmes and Kunzweiler. Hess's appearance waived.

July 31, 2007: district court arraignment/motions passed. Holmes and Kunzweiler. Hess's appearance waived.

Aug 3, 2007: district court arraignment reset. Holmes and Kunzweiler. Hess's appearance waived.

Aug 27, 2007: district court arraignment passed. Holmes and Kunzweiler. Hess's appearance waived.

Aug 28, 2007: District Court Arraignment (Not Guilty plea entered); Jury Trial set Dec 3, 2007. Hess Present.

Oct 17, 2007: Hess files pro se motion for a fast and speedy trial, informs the court his appearances are being waived without his knowledge/consent, demands jury trial within 180 days. Informs court that a court-appointed attorney is not discussing the case with him and not meeting with him. (Never heard/ruled on by court)

Oct 29, 2007: Allen Hearing; Discovery complete. Hess's appearance waived.

Nov. 7, 2007: Discovery hearing. Holmes and Kunzweiler. Hess's appearance waived.

Nov 26, 2007: Motion to suppress-Pro Se (never heard/ruled on by court).

Nov 26, 2007: Motion for Discovery, Inspection and Production of Exculpatory Evidence-Pro Se (never heard/ruled on by court).

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Dec 3, 2007: Jury Trial reset. Hess's appearance waived.

Feb 4, 2008: Jury trial reset. Holmes withdraws; Allen Malone appointed. Hess's appearance waived.

Feb 11, 2008: Malone in agreement with a.d.a. Cain, jury trial reset to Feb 14th, 2008. Hess's appearance waived.

Feb 14, 2008: Malone in agreement with Cain, jury trial reset to March 24th 2008. Hess's appearance waived.

Mar 24, 2008: Malone in agreement with Cain, jury trial/motions passed to May 19, 2008. Hess's appearance waived.

May 19, 2008: Malone withdraws. Hess's appearance waived.

May 22, 2008: Trial date set. Brian Martin representing Hess. Hess's appearance waived.

June 9, 2008: Martin for Hess. Mickey Hawkins for the state. Jury trial reset to October 6th. 2008. Hess's appearance waived.

June 12, 2008: Motion for Discovery-Pro Se (never heard/ruled on by court)

June 12, 2008: Motion to Produce-Pro Se (never heard/ruled on by court)

July 22, 2008: motion to disqualify the District attorney's office-Pro Se (never heard/ruled on by court)

July 22, 2008: motion to withdraw counsel and represent himself-Pro Se (never heard/ruled on by court)

Aug 5, 2008: Hess wrote letter to judge explaining court appearances being waived against his wishes, he wants a fast and speedy trial, states his belief trial dates being manipulated so that codefendant (Solomon) can perform the terms of her agreement with the state by testifying against him in three other cases, before they get to this case where she is actually charged. Hess explains to the judge that his court-appointed attorneys are not meeting with him, not attaining available evidence to support his defense.(Court never addressed letter)

Sept 5, 2008: declaration-Pro Se (court never addressed filing)

Oct 6, 2008: jury trial passed to October 7th, 2008. Hess's appearance waived.

Oct 7, 2008: Jury Trial begins (Judge Kuehn)

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Oct 8, 2008: Jessica Solomon is called to testify for the state.

Oct 9, 2008: Jury Verdict (Guilty).

Oct 20, 2008: Formal Sentencing: 33 years consecutive to CF-2007-2643.

Jan 15, 2009: APPEAL RECORD (1), VOLUMES I AND II, WITH ONE COPY OF THE FOLLOWING TRANSCRIPTS TRANSMITTED TO OKLAHOMA INDIGENT DEFENSE SYSTEM BY CERTIFIED MAIL:

- 1) PRELIMINARY HEARING HEARD ON THE 13TH DAY OF JUNE, 2007,
 - 2) VOLUME I OF VOLUME III ON THE 7TH DAY OF OCTOBER, 2008,
 - 3) VOLUME II OF VOLUME III ON THE 8TH DAY OF OCTOBER, 2008,
 - 4) VOLUME III OF VOLUME III ON THE 9TH DAY OF OCTOBER, 2008,
 - 5) SENTENCING ON OCTOBER 20, 2008 ALSO FOR CF-2007-2334 AND CF-2007-2903, WITH ONE SET OF STATE'S EXHIBITS 1-16, DEFENDANT'S EXHIBIT 1 AND NOTES TO THE JURY IN SEALED MANILA ENVELOPE.
- ALSO ONE SET OF STATE'S EXHIBIT 1 IN SEALED MANILA ENVELOPE

March 29, 2010: OCCA affirms conviction/sentence on Direct Appeal (F-2008-1022)

April 19, 2010: First Application for Post-Conviction Relief. (Included a motion for court records; evidentiary hearing; Appointment of counsel)

April 22, 2010: Motion for ReConsideration of Petitioner's Second Request for Production of Documents/Transcripts at Public Expens (denied May 22, 2010)

May 17, 2010: State's Response to Application for Post Conviction Relief.

May 20, 2010: Order Denying 1st Application for Post-Conviction Relief. (Implicitly denied motions for records and counsel without hearing)

May 24, 2010: State's Response to Petitioner's Motion for Consideration of Petitioner's Second Request for Production of Documents/Transcripts filed (Arguing Hess should not receive any records).

May 26, 2010: Order Denying Petitioner's Motion for Consideration of Petitioner's Second Request for Production of Documents/Transcripts.

May 28, 2010: ORDER DENYING PETITIONER'S MOTION FOR CONSIDERATION OF PETITIONER'S SECOND REQUEST FOR PRODUCTION OF DOCUMENTS/TRANSCRIPTS AT PUBLIC EXPENSE FILED APRIL 22ND

June 10, 2010: OCCA Order Affirming Denial of 1st Application (PC-2010-518).

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June 17, 2010: Letter from Hess to judge requesting court records; Hess advised to contact Court Clerk

April 24, 2013: Second Application for Post-Conviction Relief (Included motions for records/evidentiary hearing/appointment of counsel)(begin the application by arguing issues regarding this case, about halfway through abruptly the argument switched to a different case, completely unrelated-see narrative below)

June 10, 2013: State's response (carefully argues waiver, does not mention the fact that application abruptly switched mid application to a different case)

June 14, 2013 Court denies application post conviction relief. (Echoes states response-implicitly denying motions filed within application without hearing-Hess did not appeal)

June 25, 2013: Hess's reply to the state's response.

July 14, 2021: Third Application for Post-Conviction Relief filed by Attorney James Hankins.
CLAIMS:

1. Ineffective assistance of counsel due to conflict of interest - subsequent representation (Hankins believed Attorney Julie Ball first represented Hess then Solomon);
2. Undisclosed benefits provided to Solomon by the State;
3. Cumulative error.

Requests: Evidentiary hearing and production of documents, including unsealing Solomon's court file, public defender files, district attorney files

Nov 24, 2021: State's Initial Response

Arguments: Claims barred by waiver/res judicata; conflict claim based on speculation (Facebook post); attaches 2007 PD withdrawal motion citing conflict

Nov 30, 2021 - Oct 19, 2022: Post Conviction hearings held regarding Solomon's sealed Court files. (Judge indicated he will unseal Solomon's file for the limited purpose of determining who her attorney had been)

March 23, 2022: States supplemental response (conceding that Ball represented Solomon)
Arguments: Adds waiver argument based on trial transcript mentions of Ball representing Solomon; argues res judicata on benefit claim based on Hess's 1st PCR application

March 24, 2022: District Court Order Unsealing Jessica Solomon's Record

Sept 6, 2022: Hess's reply to state's supplemental response

Arguments: Presents evidence from unsealed records confirming Ball's representation and Solomon's benefits. Counters waiver argument, stating Hess/trial counsel were unaware of conflict at trial

8

Sept 6, 2022: District Court Order Sealing Exhibit #1 (Solomon's pleadings located within the sealed court file, confirming attorney Ball's representation of Solomon).

Oct 7, 2022: District Judge Clifford Smith: POST-CONVICTION hearing reset to 10-19-2022 at 9:30 a.m.

Oct 7, 2022: District Court Order Denying 3rd Application. Ruling: Denies relief based on procedural bars (waiver/res judicata) and finding Hess failed to sustain allegations (calling initial proof speculation); does not address evidence from unsealed records.

Oct 19, 2022: Offer of Proof in support of Post-Conviction (Attorney Brian Martin stating his lack of knowledge of Ball's representation of Hess).

Dec 6, 2022: OCCA PC-2022-1068 Hess's Brief supporting appeal of 3rd Application denial. Argues District Court ignored unsealed evidence and misapplied procedural bars.

April 7, 2023: OCCA Order Affirming Denial of 3rd Application Appeal (PC-2022-1068). Finds claims waived as they could have been raised earlier; availability of sealed records does not excuse prior failure if facts were discoverable

Aug 27, 2024: Fourth Application for Post-Conviction Relief (pro se-included motions for records/evidentiary hearing/appointment of counsel).

Claims: Frames issue as denial of counsel/fraud based on "newly discovered evidence" Julie Ball's March 2024 letter to Oklahoma bar association stating (for the first time) she was only acting as "stand-in counsel" admitting (for the first time) that she had not prepared a defense for Hess's preliminary hearing. Arguing fraud overcomes procedural bars/time limits. Fraud on the court can be raised at any time

Citing Oklahoma's post conviction procedure act §1086 allowing for issues that have been inadequately raised in prior petitions to be heard without being procedurally barred, arguing that the Court's denial of records and evidentiary hearing stood as an impediment to the issue being fully developed in the July 14, 2021 post conviction petition

Oct 2, 2024: Hess's Pro Se Motion to Disqualify DA Kunzweiler, Argues DA is witness/participant in the alleged fraud/conflict, citing statutes prohibiting the participation of a witness

Dec 3, 2024: Hess's Pro Se Motion for Default/Summary Disposition. Argues State failed to timely respond to application/motions (statutory time limits). Lists alleged facts to be established:

Dec 11, 2024: State's Response to 4th Application (without leave of Court to file out of time). Arguments: Claims prohibited by 1-year time limit (22 O.S. § 1080.1) and procedurally barred (§ 1086).

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Dec 23, 2024: District Court Order Dismissing 4th Application.

Ruling: Dismisses based on § 1080.1 time bar and § 1086 procedural bar (claims identical, insufficient reason for delay).

Dec 26, 2024: Hess's Pro Se Reply to State's Response (4th Application) Argues State's Dec 11, 2024 Response was untimely under § 1083(A)

* Jan 27, 2025: Hess's Pro Se Petition in Error and brief appealing Dec 23, 2024 denial to OCCA (PC-2025-58) filed. (Docket shows certificate filed Feb 4, 2025).

Claims: District Court abused its discretion determining if there was no material issue a fact and denying the petition on the pleadings without a hearing; the petition posed several mixed questions a fact and law, that could not be disposed of on the record alone; attorney Julie ball committed fraud upon Hess and the court and took action to conceal it; the June 13th 2007 preliminary hearing was not conducted with even the minimal considerations of fundamental fairness and due process of law, therefore Hess did State a claim for post conviction relief; District Court committed error when it ruled that has his claims were identical, did July 14th 2021 claim was conflict of interest due to subsequent representation, when the actual issue is a complete denial of counsel and fraud at a critical stage; The District Court committed error by not applying the law of §1086 which states there is an exception to the procedural bar for issues that were inadequately raised in a previous petition; the court erred by failing to consider the fraud by deception fraud by concealment when it considered a sufficient reason, as well as not holding an evidence right here to determine if these facts were ever actually public record at all; the court aired and applying section 1080.1 the one year statute of limitations on all post conviction petitions as has clearly argued the exception as this relates back to the July 14th 2021 petition, which was before the enactment of the statute of limitations in 1080.1.

April 8, 2025: OCCA Order Affirming Denial of 4th Application Appeal, PC-2025-58. (subject of this petition)

CF-2007-2643 STATE v. HESS

*Filed May 5th 2007

*6-8-2007 assistant district attorney Mickey Hawkins conducts the preliminary hearing. (Same assistant district attorney).

*6-26-2007 application for determination of competency.

*7-2-2007 public defender files motion to withdraw from case citing conflict of interest (not stating the conflict offering in camera hearing) no hearing held. (Hess not present or informed).

*7-23-2007 public defender renews motion to withdrawal.

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*7-26-2007 court order to determine withdrawal of the public defender as attorney of record.

*7-26-2007 thru 8-31-2007 numerous hearings held represented by the public defender's office, without considering the conflict of interest and the motion to withdraw.

*Competency trial, Hess represented by assistant public defender Alan Malone (despite stated conflict of interest in motions to withdraw) jury finds Hess competent to stand trial.

Court appointed psychologist Dr. Cooper testified that he evaluated Hess extensively, in his professional opinion Hess was of borderline intelligence, slow to comprehend the charges against him, could not grasp legal theories, and would only be competent to stand trial as long as the court and his attorney carefully and diligently explained everything to him, he stated that Hess could not represent himself.

NARRATIVE

Hess was appointed to be represented by the public defender's office on May 22, 2007, he was not notified who his assistant public defender would be.

Attorney Julie Ball was assigned to represent Jessica Solomon, Hess's Co defendant on or about May 22, 2007.

Between May 15th and June 13th 2007, Attorney Ball and Solomon met with assistant district attorney's Steve Kunzweiler and Mickey Hawkins on numerous occasions, working out a plea agreement (in exchange for Solomon's testimony against Hess in this case and CF-2007-2903; CF-2007-2643; CF-2007-2334) and preparing her testimony for Hess's June 13, 2007 preliminary hearing. Kunzweiler filed documentation endorsing Solomon as a state witness, specifically stating she would testify at the June 13, 2007 hearing.

On June 13, 2007 attorney Ball had sheriff's deputies pull Hess out of a holding cell (Tulsa co. courthouse, 3rd floor) she had with her a file, stating she was his attorney, she went over the entire case with Hess, including four separate handwritten statements Solomon had written against Hess, in four separate pending cases, with Solomon endorsed as a state witness against him.

Attorney Ball told him that Solomon was present in the courtroom, ready to testify (she never told Hess that she was Solomon's attorney).

In court Ball stated to the Judge on record that she was Hess's attorney and ready to proceed with the hearing. (she did not inform the court she was actually attorney of record for co defendant Solomon who was present and endorsed as a state witness.

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Oct 2, 2024: Hess's Pro Se Motion to Disqualify DA filed. Alleges DA is witness/participant in the alleged fraud/conflict, the statutes prohibiting the participation of a witness.

Assistant district attorney Steve Kunzweiler stood up and notified the court that Jessica Solomon was a charged co-defendant in this case, she was present and would testify during the hearing. (Kunzweiler did not inform the court that he had been in discussions personally with attorney Ball and Solomon regarding her testimony for that very hearing).

The hearing was held and attorney Ball questioned several witnesses. Abruptly Kunzweiler notified the court that he no longer planned to call Solomon to testify at the hearing.

At that point Hess turned to Ball and asked her to call Solomon to the stand and question her about the many inconsistencies in her written statements, he wanted them on the record, Ball flat-out told him no.

From that day forward Hess never saw Ball nor Solomon again.

Shortly after the hearing, in an agreement between Ball, Kunzweiler, and Solomon, she was released on an O.R. bond, with an ankle monitor, under the supervision of the district attorney's office.

Between June 13th 2007 and October 7th 2008, Ball and Solomon appeared before Judge Clancy Smith on numerous occasions, two rule 8 hearings for failure to pay costs related to her ankle monitor, two failure to appear in which attorney Ball and Kunzweiler persuaded the judge not to issue warrants, as well as multiple material witness check-ins.

Motion for a fast and speedy trial, his hearings and trial dates were continuously being reset for absolutely no reason, at every court date his appearance was being waived. His attorney was not coming to the jail discussing the case with him, this in light of the competency proceedings and Dr. Cooper's evaluation, stating Hess was only competent to stand trial as long as his attorney and the court carefully and diligently explained everything to him, this was the testimony in which the jury found Hess competent. The court never ruled on the motion for a fast and speedy trial.

On October 7th 2008 attorney Ball and Solomon appeared before district judge Clancy Smith and notified Judge Smith that Solomon was present and ready to testify against Hess.

Due to a docketing issue with Judge Smith, the trial was transferred to district Judge Dana Keuhn.

The state called Solomon to the witness stand, she entered the courtroom with assistant public defender Mark Cagle, a bench conference was held outside the hearing of Hess and the jury,

Cagle informed Judge Keuhn that Ball had suddenly become unavailable and he was acting as stand-in counsel.

Solomon was heavily impeached on the witness stand.

The transcript shows that one time on the record Hess's defense counsel, Brian Martin, asked Solomon who her attorney was and she stated Julie Ball.

Oct 20, 2008: Formal Sentencing: 33 years consecutive to CF-2007-2643. (Hess requested Court run sentence concurrent with CF-2007-2643-judge States on record Hess had opportunity to take a plea agreement that would have ran the sentences concurrent but he chose not to- basically penalizing Hess for asserting his right to a jury trial)

January 15, 2009: Appeal record sent to Oklahoma indigent defense system (preparing the direct appeal) Solomon's records were not included, nor were Hess's or Solomon's public defender files. There is nothing in the records that would have alerted an attorney not familiar with the case to the Julie Ball issue (especially in light of the fraud and concealment)

In or around May of 2009, in an agreement with Kunzweiler, Solomon's charge was reduced to accessory after the fact, (even though her testimony was that she had planned the robbery herself prior to the act) the state waived thousands of dollars in fees related to Solomon's ankle monitor, sentenced her to two and a half years deferred (was just happened to be the exact amount of time from the charges being filed until May of 2009) her conviction was immediately expunged, and her records sealed, any mention of Solomon's name completely wiped from all records.

The sole issue on direct appeal, Hess was denied his right to a defense, when the Court ruled that has could not stand before the jury silently and present his physical characteristics (height and weight) into evidence, without waiving his right against self-incrimination, if he chose to enter his physical characteristics into evidence, he would be subject to full cross examination. (The alleged victim described the robber as being a light-skinned black male 5'6, 180 lbs, Hess is a white male 6'1, 230 lbs). His defense was misidentification.

The Oklahoma Court of Criminal Appeals found the argument persuasive, but decided that in light of co-defendant testimony (Solomon) the issue need not be decided. (Hamilton testified that he was too intoxicated to recall who had assisted him in the robbery and could not point to Hess as his accomplice). This is a case with zero physical evidence, the ledge victim who had a personal relationship with Solomon, both of which at different points completely change their versions of events both written, video recorded and verbally.

The alleged victim Mike King, called police and told them he was exiting the Sonic alone, he sent his cook and CarHop home early, as he was locking the door he was accosted by two men, who demanded his bank deposits, he told them he would have to return inside and retrieve

them from the safe, he reentered the store by himself, the two robbers waiting outside, he opened the safe, took out two bank bags containing around \$2,100, exited the store and gave them to the robbers, who then took him around behind the store, duct taping his wrists and ankles, he quickly freed himself and ran in the direction the robbers had ran but could not see them, taking out a spare set of keys, he reentered the store and called police, he told police Sonic had no cameras that could have caught the robbery. King described the robber that he later identified as Hess as a light skin black male 5 ft 6 and 180 lbs, he did not describe any kind of tattoos or distinctive features on the face in his verbal report to the police or in his written report on the scene.

Hess's mother had been a manager at a different Sonic location years past, his mother was always fearful when she had to deposit the bank bags and often took Hess with her. Therefore he knew Sonic's policy, that under no circumstances is the manager to leave the store at night with the bank deposits, Hess was also familiar with Sonic's having time lock safes, and alarm systems that if someone was to re-enter the store and not put their code into the keypad it would immediately contact the security company and call police silently. Hess was also familiar with Sonic policy that a manager could not send his employees home early at night, policy was to exit the store in a group for security purposes.

At the preliminary hearing on June 13, 2007 Hess had explained this to Ball, and she questioned King about it, at which point he testified that yes he had been mistaken, that in fact the safe had been broken that night, that he had sent his employees home early, exited the store alone, but gave the robbers the bank bags outside, that he never reentered the store until he freed himself from the duct tape and called police.

description of the robber and identifying Hess, he blamed it on poor lighting, but he did recall two teardrop tattoos by the left eye, which at the time he thought was maybe lint or fuzz stuck to the robber's face. (Hess has two teardrop tattoos near his left eye). This was testimony that he had not placed in his written reports or verbally to the officers investigating the robbery.

King testified that Sonic fired him, that he was part owner of that location and his business partners forced him to sell his stake, due to the robbery.

Solomon became a suspect and went to the police station for an interview with Robbery detective Bob little, the interview was videotaped, Solomon denied any involvement in the robbery, she admitted to knowing the alleged victim, but repeatedly denied any involvement, when detective little revealed to Solomon that he had proof of her involvement, Solomon became very sorrowful, explaining to detective little that her boyfriend Daryl Hess had forced her to participate in the robbery, that she was scared of him and what he would do if she refused, that he forced her to be The driver, but she also admitted to a meth problem, and that her daughter's birthday was the next day and she needed money for her present.

Solomon's testimony at the trial was a bit different, testifying that it was in fact her idea to Rob the Sonic, that due to her relationship with the alleged victim King, she knew how easily it could be done because she knew his movements

Hamilton testified that he had been too intoxicated to recall the events, anything he knew about the robbery he had learned from police reports. The Oklahoma Court of Criminal Appeals using Hamilton's testimony as overwhelming evidence in light of his testimony, is absurd.

On April 19, 2010 Hess filed his first post conviction application, which included a motion for his and Solomon's court files, public defender records; those motions were denied without hearing. The state filed a motion opposing his accessing any records, stating that Hess was on a fishing expedition. (The issue was concealed in a sealed court file, and those who were aware of it chose not to disclose it) Hess made several motions to reconsider, all denied without hearing.

Hess also filed a motion for appointment of counsel, citing his severe mental illness (Schizophrenia) as well as Dr Cooper's report and testimony from the competency proceedings, the Tulsa county district courts denial of Hess's motions to withdraw counsel and represent himself. The court denied those motions stating that due to his mental disabilities he could not effectively represent himself. In the post-conviction proceedings the court denied him appointment of counsel, these contradictory court rulings, issued by the same court, created a catch-22 scenario that denied him due process, and a fair hearing.

It is worth noting for this court, Hess was unaware that Solomon's court records had been sealed, and during his post conviction proceedings, the court did not advise of this fact. Nor the extra hurdles involved in accessing sealed court records.

*Second application pro se: Apr 24, 2013. this application petitioner began arguing this case. but halfway through the petition suddenly began arguing a separate case, the case that even arguing was actually a companion case CF-2007-2334. This is a classic example of schizophrenia.

State filed response on June 10th 2013, the state and the court in its order dismissing it completely ignored the fact that petitioner argue the separate case, with full knowledge of petitioners mental illness.

In May 2021 Attorney James Hankins was reviewing his cases, he was conducting a routine social media check of Solomon, when he discovered a post on Facebook by Solomon thanking attorney ball for her help.

On May 6, 2021 Hankins sent a letter to the Tulsa county public defender and the Tulsa county District Attorney Kunzweiler, providing screenshots of the Facebook post, requesting any information they had regarding Ball's representation of both Hess and Solomon. The public defender responded that he did not retain any files from this case, the district attorney did not respond at all.

Third Application (Attorney-Led): Attorney James Hankins filed the third application, raising claims about attorney Ball's conflict of interest (based off of the records that he was able to get he believed the issue was conflict of interest due to successive representation) and undisclosed

benefits given to Solomon. After initial arguments based on suspicion (e.g., a Facebook post), Hankins successfully moved to unseal Solomon's court file. He then filed a reply brief presenting evidence from those sealed records to support the claims.

Hankins Expressed clearly to the court, both in his filings and verbally during the hearings, that without the public defender's documentation, and the prosecutors files, he could not adequately discern all the facts involved.

On Mar 23, 2022: State filed supplemental response, "conceding" that Julie Ball had in fact represented Solomon "after" Hess. And arguing against any further discovery/evidentiary hearing. The state's filing was misleading because the state was fully aware that the issue was not successive representation.

The court unsealed Solomon's records for the sole purpose of determining who her attorney had been but denied all other documentation requests.

The court scheduled a post conviction hearing where testimony was to be had for October 12, 2022, but on October 7, 2022 the judge reset the hearing date (without notice to any party) for October 19, 2022, but for unknown reasons on the same date October 7, 2022 the judge issued an order denying the post conviction relief application.

Denial and Appeal (Third Application): The District Court denied the application, primarily citing procedural bars and finding Hess hadn't sufficiently proven the claims (despite the reply brief with the unsealed records). Hankins appealed to the OCCA, arguing the District Court ignored the new evidence. The OCCA affirmed the denial, emphasizing procedural bars (waiver under 22 O.S. § 1086) and stating that the facts suggesting the conflict were available or discoverable earlier (e.g., at trial).

Hess then filed a grievance against attorney Ball with the Oklahoma bar association, claiming that ball had represented him first and then his co-defendant in the same case.

The bar association made attorney ball respond to the grievance # IC-24-82

Hess received a letter from Lorraine D. Farabow, first assistant general counsel with Oklahoma bar association, dated July 31, 2024. The letter explained that they had asked attorney Ball to respond to the grievance, and she had done so and it was attached, she requested that Hess review it and answer in writing to any part that he disagrees with. She informed him that this was now an official investigation, that when they were done with the investigation it would be turned over to the Oklahoma supreme Court.

Attorney Balls letter is dated March 13, 2024. She states that she was never an attorney for Hess, that she has been acting as stand in counsel on June 13, 2007, and that her only role was to make sure that the state's offer had been related to Hess. Meaning she did not prepare a defense. This is the first time these facts have been disclosed by anyone.

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Fourth Application (Pro Se): Hess filed a fourth application, centering on a 2024 letter from Ball obtained via an Oklahoma Bar Association grievance. He argued this letter was newly discovered evidence proving a fraudulent denial of counsel from the start, distinct from the conflict of successive representation previously litigated.

Hess also argues that the Oklahoma post conviction procedure act provides an exception for when an issue was inadequately raised in a prior petition.

He also filed motions arguing the State defaulted by not responding timely and seeking to disqualify the DA.

He also filed motions for production of public defender files, prosecutor files, and appointment counsel.

Denial and Appeal (Fourth Application): The State responded, arguing the application was time-barred under the new one-year limit (22 O.S. § 1080.1) and procedurally barred under § 1086. The District Court agreed, dismissing the application on both grounds. Hess appealed this dismissal pro se. The OCCA affirmed this denial, again citing procedural bars under 22 O.S. § 1086 (res judicata/waiver) and finding he hadn't shown a sufficient reason why current grounds weren't raised or were inadequately raised previously.

REASONS FOR GRANTING THE WRIT

1. PRELIMINARY HEARING IS CRITICAL STAGE OF TRIAL IMPLICATING THE 6th & 14th AMENDMENTS RIGHT TO COUNSEL; AND DUE PROCESS RIGHT TO A FAIR PROCEEDING:

Coleman v. Alabama, 399 U.S. 1 (1970), determined that a state preliminary hearing is a critical stage of a criminal prosecution and requires the assistance of counsel. The Court recognized that even though a preliminary hearing doesn't involve a full trial, it can be a crucial point in the proceedings where a lawyer can significantly benefit the defendant.

2. PETITIONER WAS EFFECTIVELY DENIED COUNSEL AT HIS PRELIMINARY HEARING, WHERE AN ASSISTANT PUBLIC DEFENDER FRAUDULENTLY MISREPRESENTED TO HIM AND ON THE RECORD TO THE COURT, THAT SHE WAS PETITIONER'S ATTORNEY, CONCEALING THE FACT SHE WAS ACTUALLY ATTORNEY FOR CO-DEFENDANT/ADVERSE STATE WITNESS, JESSICA SOLOMON, WHO WAS ACTUALLY AN ENDORSED STATE WITNESS AT THAT VERY HEARING, VIOLATING THE 6TH & 14TH AMENDMENTS U.S. CONSTRUCTION.

United States v. Cronin, 466 U.S. 648 (1984) An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities, not luxuries." 70/ Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be "of little avail," 8 as [466 U.S. 648, 654] this Court has recognized repeatedly. 9 "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." 10

1 The special value of the right to the assistance of counsel explains why "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). The text of the Sixth Amendment itself suggests as much. The Amendment requires not merely the provision of counsel to the accused, but "Assistance," which is to be "for his defence." Thus, "the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States v. Ash*, 413 U.S. 300, 309 (1973). If no actual "Assistance" "for" the accused's "defence" is provided, then the constitutional guarantee has been violated. 11 To hold otherwise could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of [466 U.S. 648, 655] assistance of counsel cannot be satisfied by mere formal appointment." *Avery v. Alabama*, 308 U.S. 444, 446 (1940) (footnote omitted). Thus, in *McMann* the Court indicated that the accused is entitled to "a reasonably competent attorney," 397 U.S., at 770, whose advice is "within the range of competence demanded of attorneys in criminal cases." *Id.*, at 771. 12 In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), we held that the Constitution guarantees an accused "adequate legal assistance." *Id.*, at 344. And in

Engle v. Isaac, 456 U.S. 107 (1982), the Court referred to the criminal defendant's constitutional guarantee of "a fair trial and a competent attorney." *Id.*, at 134

When a true adversarial criminal trial has been conducted - even if defense counsel may have made demonstrable errors 18 - the kind of testing envisioned by the Sixth Amendment has occurred. 19 But if the process loses [466 U.S. 648, 657] its character as a confrontation between adversaries, the constitutional guarantee is violated. 20

Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated. See *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867-869 (1982); *United States v. Morrison*, 449 U.S., at 364-365; *Weatherford v. Bursey*, 429 U.S. 545 (1977). 22 Moreover, because we presume that the lawyer is competent to provide the guiding hand that the defendant needs, see *Michel v. Louisiana*, 350 U.S. 91, 100-101 (1955), the burden rests on the accused to demonstrate a constitutional violation. 23 There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. 24 [466 U.S. 648, 659]

Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. 25

Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice was required in *Davis v. Alaska*, 415 U.S. 308 (1974), because the petitioner had been "denied the right of effective cross-examination" which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Id.*, at 318 (citing *Smith v. Illinois*, 390 U.S. 129, 131 (1968), and *Brookhart v. Janis*, 384 U.S. 1, 3 (1966)).

3. PETITIONERS THREE PREVIOUS ATTEMPTS AT POST-CONVICTION RELIEF WERE UNFAIR

The Oklahoma Court of Criminal Appeals, supports its procedural bar by claiming that petitioner was fully afforded his opportunity for post-conviction relief, citing the three previous post conviction relief applications. (APP'X A pg.2).

Petitioner suffers from severe mental illness, including schizophrenia, he underwent competency proceedings pretrial, the court appointed psychologist who evaluated petitioner determined that he did not have the mental capacity to comprehend or litigate legal issues, without the court and his attorney carefully and diligently explaining everything to him.



Petitioner attempted to withdraw his court-appointed attorney and represent himself at his trial, the Tulsa County District judges overseeing this case in his two companion cases, denied his Sixth Amendment constitutional right to self representation, citing the mental health assessment, as well as the Court's own doubt about petitioner's mental abilities.

A review of the docket sheet in this case reveals a troubling pattern of attorneys and the court waiving petitioners appearance at critical Court hearings, out of (22) twenty-two scheduled Court hearings, petitioner was present an astonishing (3) three times. (Those dates are listed in detail in the statement of the case section above).

There exists an unusually high turnover of court appointed attorney's in this case, and while actively representing him, were not discussing the case with him, as the competency evaluation dictated, and in his pro se filings, he raised that to the court pre-trial (detailed above in statement of the case).

COURT AND STATE IMPEDIMENTS BLOCKING THE DISCOVERY OF ISSUE

In all (3) three of Hess's pro se applications for post conviction relief, he submitted a motion for the production of documents, transcripts and other court records, including his and Jessica Solomon's public defender files, district attorney files, and court files. And a motion for an evidentiary hearing.

Also included in the applications were motions for the appointment of counsel, in his motion petitioner referenced his previous competency proceedings, and Tulsa County District Court's previous rulings that he was not mentally fit to represent himself. The court denied it, creating a catch-22 scenario, the same court made opposing rulings, violating United States constitutional Amendment 6 due process right to a fair process.

ABA Criminal Justice Mental Health Standards §7-5.4 (1984). This section provides:

(c) Mental incompetence of the defendant during the time of appeal shall be considered adequate cause, upon a showing of prejudice, to permit the defendant to raise, in a later appeal or action for post-conviction relief, any matter not raised on the initial appeal because of the defendant's incompetence.

The Ninth and Sixth Circuits embraced a right to assist counsel on appeal until the U.S. Supreme Court overruled them. See *Carter v. Bradshaw*, 644 F.3d 329 (6th Cir. 2011) (holding that habeas proceedings challenging a capital tosentence should be stayed until the petitioner is competent to proceed), abrogated by *Ryan v. Gonzales*, 133 S. Ct. 696 (2013); *Rohan ex rel. v. Woodford*, 334 F.3d 803, 806 (9th Cir. 2003) (creating a statutory right to competency in federal post conviction proceedings). Wisconsin, Florida, and Illinois have endorsed a right to assist counsel on appeal. See *State v. Debra A.E.*, 523 N.W.2d 727, 738 (1994) (recognizing a statutory right to competency in state post conviction claims in the noncapital context); *Carter v. State*, 706 So. 2d 873, 875 (Fla. 1998); *People v. Owens*, 564 N.E.2d 1184, 1189-90 (111.

1990). California, pArizona, Missouri, Texas, and Michigan have rejected a right to assist counsel on appeal. See People v. Kelly, 822 P.2d 385, 413 (Cal. 1992); State v. White, 815 P.2d 869, 878 (Ariz. 1991); Brock v. State, 242 S.W.3d 430, 432-33 (Mo. Ct. App. 2007); Ex parte Mines, 26 S.W.3d 910, 912-13 (Tex. Crim. App. 2000); People v. Newton, 394 N.W.2d 463, 466 (Mich. Ct. App. 1986); see also Hannah Robertson Miller, A "Meaningless Ritual": How the Lack of a Post-conviction Competency Standard Deprives the Mentally Ill Effective Habeas Review in Texas, 87 TEX. L. REv. 267, 276 (2008).

A Tulsa County jury found petitioner to be competent to stand trial, on the testimony of Dr. Cooper, the court appointed psychologist who evaluated him, his testimony to that jury was that petitioner was competent to stand trial only if the court and his attorney carefully and diligently explained everything to him, he testified that petitioner could not comprehend legal issues, was of borderline intelligence, and suffered from severe mental illness, including schizophrenia. Had that jury been aware that his attorneys would not just be indifferent, but actually collaborate with prosecutors against him, that jury would have decided differently.

Petitioner had no contact with the Oklahoma indigent defense system attorney who prepared his direct appeal, during the preparation and filing. There is clear, demonstrable constitutional error in this case, clearly trial and appellate counsel were ineffective, the United States supreme Court must take up this issue, and create guidelines for the states to follow, and protect the rights of the mentally ill defendants all across this country who face the same set of indifference from the courts, and the court appointed attorneys.

The denial of access to crucial records (public defender files, Solomon's sealed records).

As clearly shown on the docket sheet (listed in detail in section "statement of the case" above) petitioner made numerous requests for the production of Court records and documents, all were denied. This was an impediment created by the courts and the prosecutors.

During post-conviction proceedings (3rd Application) the Tulsa County District Court granted access to Jessica Solomon's sealed court records, but only to determine who her attorney had been (records confirmed attorney Julie ball did represent Jessica Solomon), however the court completely ignored the records as fact, actually ignored they existed at all.

The Tulsa County Public Defender refused to Grant petitioner access to his own public defender file, and the Tulsa County District Court denied motions to force them to produce it.

The fraud by Attorney Julie Ball, couldn't be fully investigated without those records.

FRAUD ON THE COURT CAN BE RAISED AT ANY TIME, IN ANY COURT, AT ANY STAGE IN THE APPEAL PROCESS

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Contrast with GLOSSIP 2025: Just as the Supreme Court intervened when procedural rules were used to deny a fair hearing on a federal claim, this case warrants review because procedural rules were applied to deny a hearing on the fraud/denial of counsel claim.

RES JUDICATA

The precise claims petitioner now raises are not the same as those in prior applications. The new evidence (Ball's letter) fundamentally changes the nature of the claim.

WAIVER

For any claims the OCCA says petitioner "waived" by not raising them earlier, petitioner couldn't have raised them adequately without the withheld evidence, making the waiver unfair.

INADEQUATELY RAISED EXCEPTION

22 O.S. § 1086: The Purpose of this exception is meant to prevent injustice in situations like this, where procedural rules are used to shield misconduct.

OCCA's FINALITY ARGUMENT

The courts must balance finality with Fairness, petitioner acknowledges the state's interest in finality, but it must be balanced against the need to correct fundamental constitutional errors.

MISCARRIAGE OF JUSTICE

This situation is one where strictly applying procedural bars would lead to a grave miscarriage of justice. It conflicts with Glossip.

HABEAS CORPUS

Habeas corpus exhausted, claim doesn't meet threshold for §2244(b), (does not prove innocence)

CLAIMS ARE GROUNDED IN ESTABLISHED LEGAL PRINCIPLES

McCarty v. State
Turrentine v. State

STATE PROCEDURAL BAR DEPENDENT ON ANTECEDENT RULING ON FEDERAL LAW

In the July 14, 2021 application for post conviction relief, Hess raised ineffective assistance of counsel due to a conflict of interest, based on successive representation. It was presented as a federal question under the 6th and 14th amendments to the United States Constitution. Citing

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Wood v. Georgia, 450 U.S. 261 (1981); Holloway v. Arkansas, 435 U.S. 475 (1978); Cuyler v. Sullivan, 446 U.S. 335 (1980).

On October 7, 2022 Tulsa county District Court denied that issue stating Hess failed to sustain his allegations.

On April 7, 2023 the Oklahoma Court of Criminal Appeals upheld that ruling. PC-2022-1068.

On Aug 27, 2024 Hess filed an application for post conviction relief, arguing complete denial of counsel and fraud, and that the issue from the July 14, 2021 petition was inadequately raised.

On Dec 11, 2024 the state filed a response claiming Hess raised an identical issue in a previous post conviction petition.

On Dec 23, 2024 Tulsa county district judge Clifford Smith denied post-conviction and claimed that Hess had raised an identical issue in a previous petition.

On Apr 8, 2025 the Oklahoma Court of Criminal Appeals upheld that ruling, and specifically stated Hess raised an identical issue. PC-2025-58.

Both Oklahoma courts explicitly rejected the constitutional violation, stating has failed to sustain the allegation, before applying the state procedural bar, the state procedural bar is dependent on an antecedent ruling on federal law, thus not "independent".

The Oklahoma Court of Criminal Appeals decision in this case was dependent upon federal law, despite citing §1086.

To determine if Hess has shown "sufficient reason" under §1086 for not adequately raising the claim earlier, the Oklahoma Court of Criminal Appeals necessarily had to evaluate the significance of the New evidence under federal constitutional standards (sixth amendment right to counsel/fraud).

Therefore, the OCCA's application of the state procedural bar (§1086) is dependent on an implicit or antecedent assessment of the merits of the federal claim presented based on the New evidence (i.e. finding the New evidence didn't actually establish a significant constitutional violation sufficient to excuse the default.

This dependency makes the state ground not independent, similar to the situation in GLOSSIP.

STATE PROCEDURAL BAR NOT ADEQUATE

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Adequate: The state procedural rule must be "firmly established and regularly followed" by the state courts at the time the alleged procedural default occurred. It can't be a rule that is applied sporadically, ambiguously, or in a surprising way.

Hess's specific factual claim, (an attorney misrepresenting their status at his preliminary hearing while actually representing the key adverse witness) so rare, perhaps even novel in Oklahoma law that there isn't a "regularly followed" practice for applying §1086 or § 1080.1 procedural bar.

IMPORTANT FEDERAL QUESTION

The novelty of this issue, attorney misrepresentation of status, combined with conflict at a critical stage of the proceedings (preliminary hearing).

Fraud on the court, attorney Ball on the record indicated to the court that she was Hess's attorney, when she was not, coupled with the prosecutor's duty to disclose, not only failing to disclose, but taking action immediately to conceal it from the court (not calling his endorse witness to the stand).

Tulsa county district Court on numerous occasions, as listed above, denied access to court records, both public and sealed, as well as Hess's own public defender file, Hess's numerous motions and motions for reconsideration of documents and court records show diligence on his part and also shows the impediment by the state in accessing these records, the procedural bars by the state and do not apply.

Procedural Bars vs. Constitutional Claims: The central conflict is between Oklahoma's strict post-conviction procedural rules (22 O.S. §§ 1086, 1080.1 emphasizing finality) and petitioners assertion of fundamental constitutional rights violations (Sixth Amendment right to conflict-free counsel, Fourteenth Amendment Due Process)

The OCCA's reliance on state procedural bars (§ 1086) to dismiss Petitioner's Sixth Amendment denial-of-counsel/fraud claim, despite the presentation of newly discovered evidence (Ball's 2024 letter), raises a significant federal question regarding the adequacy and independence of state procedural grounds, potentially conflicting with principles from *Glossip v. Oklahoma* and *Coleman v. Thompson*. The argument would be that determining the applicability of the bar required an antecedent evaluation of the federal constitutional claim presented based on the new evidence.

The OCCA's decision failed to adequately address whether the alleged fraud by counsel at a critical stage constitutes a "sufficient reason" under § 1086 to overcome procedural default, or whether it implicates exceptions to the § 1080.1 time bar, thus applying state procedural rules in a manner that unduly restricts federal constitutional review.



The underlying claim – denial of counsel through fraudulent misrepresentation by an attorney at a critical stage, involving collusion or concealment by the State – presents an important and substantial question of federal constitutional law under the Sixth and Fourteenth Amendments warranting this Court's review.

Guidance is needed on the application of state procedural bars when faced with claims of fraud on the court and newly discovered evidence revealing a fundamental constitutional violation.

The OCCA's denial pursuant to §1086, stating the grounds were or could have been previously raised, and no sufficient reason was shown why it was not. However petitioner clearly demonstrated fraud on the court, fraud by deception, fraud by omission, how district attorney kunzweiler abruptly decided not to call Solomon to the stand, (the reason petitioner believes is because he was aware of the conflict, having recently met with Ball and Solomon together on numerous occasions, Solomon being a charged co-defendant in the case, having not yet entered a plea, would have required her attorneys presence, and as her attorney was Ball, both the district attorney and Ball faced disciplinary action by the judge for not disclosing this fact to the court, Kunzweiler instead chose to not call Solomon to the stand, actively participating in the deprivation of Hess's Rights).

Hess clearly showed how on the date of his trial, Ball was present with Solomon that morning, but did not accompany her into the courtroom (Hess believes this was done to conceal her representation of Solomon).

Hess clearly demonstrated the numerous motions for documents and court records that were all denied without hearing.

Hess clearly demonstrated his motions for the production of his and Solomon's public defender files, which were denied without hearing, (the public defender files being the only record containing the fact that Ball was never Hess's attorney).

Hess clearly demonstrated that attorney Hankins upon discovering the Facebook post by Solomon sent a letter to the Tulsa county public defender and Tulsa county district attorney requesting any documentation on Ball's representation of both Hess and Solomon, both refusing to provide any records.

The Oklahoma post conviction procedure act, allows for exceptions when an issue was inadequately raised in a previous petition, attorney Hankins clearly explained to the court both in filings and during post-conviction hearings that he was unable to adequately address the issue as Solomon's records were sealed and the public defender's office had refused to provide their files, the issue was hidden in those files, The district Court denied the motion to force the public defender's office to provide those files, the court was the impediment to this issue being adequately addressed in the July 14, 2021 petition. His argument in the recent post conviction application is that it was inadequately raised in the July 14, 2021 petition.

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The facts were not clearly discernible until Ball provided the Oklahoma bar association with a letter, in which she stated for the first time that she was not Hess's attorney at all, and that she had not prepared a defense for the preliminary hearing; those are facts disclosed for the very first time.

The October 19, 2022 Offer of proof in support of post-conviction, where attorney Brian Martin indicates that he was unaware that attorney Ball had represented Hess, and had he been aware, he would have objected, it either proves ineffective assistance of trial counsel on Brian Martin, or proves Ball was successful in her attempts to conceal the issue, either way this should not be held against Hess. The district court judge had scheduled a post-conviction hearing for October 12, 2022, in which an actual hearing was to be conducted on the record regarding the facts that were discovered, attorney Hankins had prepared attorney Martin to testify at that hearing, however, abruptly, on October 7th 2022 the district court judge reset the hearing for October 19th 2022.

But on the same date October 7th 2022 (adopting the state's original response to the petition word for word) denied the application for post conviction relief, preventing Hess's attorney from presenting the newly discovered facts into the record, effectively denying due process and a fair hearing, after announcing that there would be a hearing, or Hankins would have prepared and filed documentation relating to these facts before the court denied the petition.

Attorney Hankins as well as Hess's sister, appeared on Oct 19, 2022 for the scheduled hearing, not being advised that the court had denied the petition, due to this unusual resetting of hearing dates without notice, Judge Smith allowed the offer of proof in support to be submitted into the record, however it was not factored into Judge Smiths reasoning or order.

The hearing dates being reset without notice to the defense, then abruptly denying the petition on the same date it was reset, shows an impediment, proves the states procedural bars inadequate and inapplicable to this case.

The states response (Nov 24, 2021) to the July 14th 2021 post conviction application, stating the issue was nothing but speculation, when the state was aware the whole time of the issue, and had duty to be candid with court, but did not, this is evidenced by the states supplemental response filed on March 23rd 2022, (after the post conviction hearing in which the court indicated it would sign order unsealing Solomon's records, and a day before the court signed the order) in which the state conceded that Julie Ball did in fact represent Solomon. It shows a further impediment by the state, and shows that state procedural bars are inadequate and inapplicable in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Daryl Hess

Date: Daryl Hess 6/20/25

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