

No.

IN THE

Supreme Court of the United States

LANCEY D. RAY,

Petitioner,

V.

JIMMY MARTIN, WARDEN

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *Schlup v. Delo*, 115 S. Ct. 851 (1995)-which involves evidence the trial jury did not have before it and requires federal courts assess how reasonable jurors would react to the overall newly supplemented record, and requires a holistic judgment about all the evidence-qualify for unfettered federal habeas review of a federal claim when a state court opined the newly presented evidence waived and with that opinion declined to conduct an evidentiary hearing regarding the newly presented evidence, and issued an opinion but failed to address the federal claim in question.

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PETITION FOR WRIT OF CERTIORARI

Lancey D. Ray respectfully submits this petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in the Federal Appendix and available at 2018 WL 1312805. The opinion of the district court, adopting the magistrate judge's report and recommendation is not reported in the Federal Supplement but is available at 2017 WL 174068, along with the report and recommendation available at 2017 WL 1753521. The opinion of the Oklahoma Court of Criminal Appeals is not reported but is referenced as *Ray v. State*, No. F-2012-538, slip. op. at 2-3 (Okla. Crim. App. Sept. 24, 2013) (unpublished).

JURISDICTION

The Tenth Circuit entered judgment on March 14, 2018. This Court has jurisdiction under 28 U.S.C. § 2254 (1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), provides, in pertinent part:

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

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

There is concern that law clerks assert their own personal values and policy preferences in making recommendations to the justices. A decision not to select this case given the sensitive nature of the allegation-unreasonable force upon a child-could be justified only by the belief in the presumed guilt of the convicted; clerks of that philosophy should in all honesty be willing to acknowledge as much: On December 27, 2010, Ray was arraigned in the District Court of Comanche County on a charge of Second Degree Murder. On April 18, 2011 Ray was bound over for trial pursuant to *Subsection C* of the Okla. Stat. tit 21 § 701.7 First Degree Murder – based on “Amended Information” which read in pertinent part:

LANCEY DARNELL RAY, then and there unlawfully, willfully, knowingly and wrongfully commit the crimes(s) of:

Count 1: Murder in the First Degree, a felony, on or about the 23rd day of December, 2010, by causing the death of M.R., a child under the age of eighteen (18) years, to wit: 10 years old, as a result of the said defendant’s **“willful and malicious injuring”** or **“use of unreasonable force”**... (Quotation marks and bold emphasis added)

The state charged Ray with committing three (3) out of the five (5) underlying felonies of the first degree *child abuse* murder statute.¹ That

¹ Okla. Stat. tit 21 § 701.7 (C): A person commits murder in the first degree when the death of a child results from the [1] willful or [2] malicious injuring, [3] torturing, [4] maiming or [5] using of unreasonable force by said person or who shall willfully cause, procure or permit any of said acts to be done upon the child pursuant to Section 843.5 of this title. (bracketed numbering of separate and distinct underlying felonies added)

shotgun-blast-type of allegation ensured a conviction where the state was unconstitutionally relieved of its duty to prove each element of the charged crime. Moreover, the State's third allegation (use of unreasonable force) which followed the conjunction "or" in the Amended Information is a disjunctive allegation; at worst the allegations are duplicitous.

The State introduced testimony that was: 1.) not based upon sufficient facts and data; 2.) not the product of reliable principles and methods; and 3.) the expert did not apply the principles and methods reliably to the facts of the case. *See*, Okla. Stat. tit 12 § 2702 *Infra* at page __ hereinafter. On May 31, 2012 a local jury convicted Ray of First Degree Murder.

In sum Ray was denied the guarantee of Due Process afforded by the Fifth and Fourteenth Amendment to the United States Constitution. Moreover Ray did not receive the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution.

A. In direct contradiction of evidence presented at trial, Oklahoma University Medical Center (OUMC) Computerized Tomography Report and Specimen Inquiry established that excessive amount of blood and fluids give resulted in "Diffuse soft tissue edema" Doc 22 Ex 4 p. 36 Para 6, as opposed to medical examiner's testimony of "Diffuse hemorrhage in the soft tissue" Tr. 3 pp. 42, 43, and "blood loss in tissues" Tr. 3 pp. 61, 62. A jury acting without assumption that "Diffuse hemorrhage in the soft tissue" and "blood loss in tissues" were caused by Ray would have found it necessary to establish some

different cause, or event far more speculative. The medical examiner who testified believes blood accumulated in tissues must have come from bruises. *Ibid.* Cross-examination revealed autopsy did not account for amount of blood and fluids given Tr. 3 p. 72.

Reynolds Army Community Hospital (RACH) Emergency Room records established a total of 1400ccs of *Normal* saline in addition to 2 x 500 milliliter bags of blood was given, as opposed to treating physician testimony of only "700 milliliters of Normal saline" Prelim. p. 19, see also Doc 22 Ex 6. Whereas testimony of "blood loss in tissues" seemed strong evidence of Ray's guilt at trial, the record now raises substantial questions about the bloods origin.

B. In direct contradiction of evidence presented at trial, OUMC ER report established: "Skin: Cyanosis". Cyanosis is a bluish, grayish, or dark purple **discoloration of the skin** due to inadequate oxygen intake. Cyanosis may occur secondary to any condition that interferes with ability of air to enter the respiratory tract. For literature on cyanosis see Doc 22 Ex 4 pp. 13, 14.

During closing arguments the prosecutor told the jury "Look at one of these pictures and I defy you to tell me that that's not unreasonable force" Tr. 3 p. 102. A jury acting without assumption that images of gross skin discolorations captured in photographs were caused by Ray would have found it necessary to establish some different cause. Further in direct contradiction of testimony by treating physician, both OUMC CT report and the report of autopsy established "aspiration". See State Exhibit 49 p. 4, see also Pet. Exh.

2 (Neck Organs) *see also* Doc 22 Ex 4 p. 36 Para 1. Moreover OUMC ER report established respiratory distress and respiratory failure. The RACH ER treating physician testified “So my opinion is that he did not aspirate which is inhale vomit or suffocate on his vomit” Tr. 1 p. 252. A jury acting without the evidence in support of trial counsel’s argument that “[Ray] tells them there was vomit in his airway and that he was choking”...thick Spaghetios” Tr. 1 p. 235; and “They treated a choking child who was choking on his own vomit as a *hypovolemic* shock patient” had no other reason but to esteem treating physician’s testimony as factual.

C. In direct contradiction to evidence presented at trial, RACH ER medical records established “Bradycardia” (a slow heart rate). RACH ER treating previously testified “he was hypovolemic or became or developed shock, hypovolemic shock” Prelim p. 32. However Bradycardia is a characteristic finding of-exclusive to-neurogenic shock. The report of autopsy established “The right ventricle appears dilated” States Exhibit 49 p. 4. *See also* Pet. Exh 2 (Cardiovascular System). In Neurogenic Shock systemic venous system pools blood, **blood vessels relax and dilate** hence a decrease in the overall blood pressure. OUMC CT report established “flattening of the inferior vena cava” (one of two largest veins in the body that returns blood to the heart) Doc 22 Ex 4 p. 36 Para 3. A treating physician having recognized the major clinical signs of neurogenic shock-low blood pressure and Bradycardia-would have exercised care to prevent excessive fluid

administration. Moreover a Crystalloid IV fluid-and not Normal saline-would have been the solution of choice to maintain a mean arterial blood pressure above 70 torr. Furthermore RACH ER treating physician testified "so I believe that he was in cardiac arrest due to shock and hypothermia" Tr. 1 p. 250. The usual symptom of neurogenic shock is hypothermia due to dilated vessels' inability to redirect blood flow from the periphery to the core circulation leading to excessive heat loss. A jury acting without the assumption that hypothermia could have been caused by something Ray facilitated, would have found it necessary to establish some different phenomenon.

This is a rare case, where-had the jury heard all the conflicting evidence-it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt. Ray has called into question testimony about blood and fluids, shock, aspiration, and hypothermia which were central issues used to convict him, and has put forward substantial evidence pointing to a different event-phenomenon-that caused the death.

Since then, Ray has sought in vain to have some court grant him an evidentiary hearing on the new evidence *i.e.* issues of material fact in dispute with the medical examiner's opinion concerning cause of death. Furthermore no federal court has assessed how reasonable jurors would react to the overall, newly supplemented record.²

² The *Schlup* inquiry requires a holistic judgment about "all the evidence," 513 U.S. at 328, 115 S. Ct. 851. The inquiry does not turn on discrete findings regarding disputed

1. The overriding cause of the state's conviction was trial counsel's: 1.) failure to present the evidence *i.e.* recorded facts and data in dispute with State witness' testimony; 2.) inept ability to conduct the necessary vigorous cross-examination on the complex medical issues involved; and 3.) counsel's failure to consult a qualified expert on the technical medical issues involved in which he was not sufficiently versed in.

Prior to the preliminary hearing, trial counsel mailed to him case files in CF-2010-571. The case files-which included medical records from RACH and OUMC-contained facts and data that confirmed respiratory aspiration. Moreover OUMC physicians noted "Respiratory Distress" and "Skin: Cyanosis". Ray informed trial counsel of those facts prior to the preliminary hearing. Further, data and recorded fact by both RACH and OUMC staff showed distinct signs and symptoms of *neurogenic* shock, as opposed to testimony of "Hypovolemic shock, and then sustained a cardiac arrest" Prelim Tr. p. 32.³ Ray informed trial counsel of the recorded data that confirmed *neurogenic* shock.

points of fact, and "[i]t is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses," 513 U.S., at 329 115 S. Ct. 851.

³ Neurogenic Shock is a type of shock (a life-threatening medical condition in which there is insufficient blood flow throughout the body) that is caused by the sudden loss of signals from the sympathetic nervous system that maintains the normal muscle tone in blood vessel walls. The **blood vessels relax and become dilated**, resulting in **pooling of the blood in the venous system** and an overall **decrease in blood pressure**. The usual symptoms associated with this condition are drying of skin, **low blood pressure**, **cardiac arrest**, anxiety, restlessness and **hypothermia**. (Bold letters emphasis added)

See Wordpress.com. (2009). *Emergency Medicine: Neurogenic Shock*. Retrieved from [https://emergency med.wordpress.com/2009/03/11/Neurogenic Shock](https://emergency%20med.wordpress.com/2009/03/11/Neurogenic-Shock)

Contrary to testimony by Dr. Ware at preliminary hearing that “He [Malik] got two units of packed red blood cells in addition to 700 milliliters of normal saline...”, Prelim Tr. p. 19, the RACH records clearly state he was given 1400 cc’s of Normal Saline. Ray informed counsel of those facts; moreover, OUMC physicians noted “diffuse soft tissue edema” as opposed to testimony of “blood loss in tissues”⁴ Tr. Vol. 3 p. 61.

Ray informed counsel that a total of 2 liters and 400 milliliters of blood and fluids were given to a ten year old who, according to the treating physician, had “no fresh blood or running, or blood coming from a wound” *Id.* Ray further explained RACH ER records show treating physician’s FAST exam revealed “negative blood and fluid” inside; that is, no internal bleeding.

Pertaining to the issue of pathologic aspiration, during the preliminary hearing, trial counsel asked RACH ER treating physician “Could vomit in the airway aspirate a child to the point of cardiac arrest?” The physician’s answered “Could, yeah.” Prelim Tr. p. 31

Trial counsel further asked whether Malik had aspirated; the treating physician downplayed the fact. Read excerpt from preliminary hearing below:

Q. How much vomit did you observe in the airway?

⁴ The court should note Ray served as an Emergency Medical Technician-Basic (army medic) for four years. In 2006 Sergeant Ray deployed to Baghdad, Iraq where he served as a technician in surgery. Ray’s served over six years as a technician in surgery. His training together with undergraduate studies involved instruction in human anatomy & physiology. He is a graduate of Columbia Southern University’s Bachelor of Science in Health Care Administration degree program.

A. Not enough that it prevented me from seeing the vocal chords, but there was there was vomit there, a tablespoon, I don't know how to quantify it any other way.

Prelim Tr. p. 23

However police reports show (Dr. Ware) “[he] stated that Malik had fluid build up in his left lung. He stated that Malik Ray did not have any fluid in his stomach.” Pet. Exh. 1.

After the preliminary hearing, Ray urged counsel to recruit the assistance of a medical expert to certify the record of facts and data discovered in medical documents that contradicted the above testimony and statement by Dr. Ware. Counsel sought out a pathologist.

Meanwhile, Ray notified counsel, of a missing page to the RACH ER medical notes. Counsel filed a Motion for Specific Discovery on December 30, 2011. *See* State’s Doc 22 Ex 4. The prosecutor however denied its existence; the missing medical document was not presented at trial.

Upon review of the report by trial counsel’s sought out pathologist, Ray informed him that the pathologist neglected to address the clear clinical signs of *neurogenic* shock. *See* fn. 3. The pathologist asserted, “whether this is hypovolemic or neurogenic shock is an academic discussion, in that both are most probably present”, and he failed to discuss the issue of “Skin: Cyanosis” recorded by OUMC physicians. Further, the pathologist misrepresented information recorded in the OUMC Computerized Tomography Consultation Report when he wrote “Multiple radiology studies were obtained, finding the

brain was shifting to the right about 6mm” [sic]. Had the pathologist read the CT report in its entirety he would have noted OUMC physician corrected and annotated “there is no strong evidence of diffuse cerebral edema and disease; no evidence of the left to right midline shift as the patient moved during the examination and his head was tilted” Doc 22 Ex 4. The pathologist also neglected to address the specific issue of “diffuse soft tissue edema” noted by OUMC physicians. In sum the pathologist formed his opinion on incomplete and incorrect information.

Counsel responded with a letter (Pet. Exh. 3) dated February 2, 2012 in which he wrote-in pertinent part:

“Lt. Ray-

I have received your 1/30/12 letter and wanted to address a few points for you. Please don’t take any of this the wrong way or think I’m being dismissive, I’m going to simply give you a numbered list of my observations, comments, etc. for purposes of efficiency and clarity of my opinions:

6) If you or your family want to give me the contact information for any other medical professional to interview or discuss your case with as a potential expert witness, I’m happy to do so. Get them in touch with me or get me their contact information.” (See Pet. Exh. 3)

Ray promptly obliged; he contacted-then Air Force Captain-Vascular & General Surgeon-Dr. Augustus Brown. His aunt via email gave the Surgeon’s contact information to trial counsel, but he neglected to contact the doctor. Ray last met with counsel at a *Burk’s* hearing held on March 9, 2012.

Over the course of three months, via letters Ray continued to present the record of facts in dispute with the medical examiner's opinion of cause of death.

At trial it became increasingly clearer that the medical examiner's opinion was unjustifiably extrapolated from an accepted premise to an unfounded conclusion where she testified "the father had whipped the child. 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."⁵ Tr. Vol. 3 p. 31

By the medical examiner's own words, she was not qualified to account for reasons for low or decreased blood pressure and Bradycardia (slow heart rate). The following excerpt of her testimony confirms:

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. How did those injuries make a person die? Did they cause bleeding? Did they cause damage to a vital organ? Did they cause infection, for example.

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. So all that I can say is **those injuries** were multiple, they were extensive, they were severe, **they**

⁵ TITLE 28, APPENDIX-RULES OF EVIDENCE: Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include: (2) whether the expert has 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 a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered").

were associated with blood loss 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

Moreover the medical examiner's opinion was speculative. The following excerpt of her testimony confirms:

So 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.
(Emphasis added)

Tr. Vol. 3 p. 62

The medical examiner failed to consider the other obvious explanation for "diffuse soft tissue edema"; instead, she opined "blood loss in tissues". However at Ray's request, trial counsel asked:

Q Were you told how much additional blood or how many additional fluids [name omitted] was given as part of his treatment?

A No, Sir
[Trial counsel's name omitted]: Nothing further.

Thank you very much, Doctor.

Tr. Vol. 3 p. 72

Obviously the almost two and a half liters of blood & fluids given had not been considered by the medical examiner to account for the "diffuse soft tissue edema".⁶ Because trial counsel was not versed in the technical subject

⁶ TITLE 28, APPENDIX-RULES OF EVIDENCE: Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include: (3) **Whether**

matter he squandered the opportunity to conduct an effective cross-examination, which called for answers to Okla. Stat. tit. 12 § 2702 in the affirmative-which are:

If scientific, technical or other 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.⁷

Cf. Title 28, Appendix-[Federal] Rules of evidence Rule 702. Testimony by Expert Witnesses.

Furthermore trial counsel never presented the evidence in dispute with the medical examiner's opinion, or any of the State's witnesses.

On May 31, 2012, the jury convicted Mr. Ray of the charged crime. Almost immediately Ray complained to the trial judge-among other issues-that counsel had not presented evidence *i.e.* the facts and data in dispute with the medical examiner's opinion of cause of death. The judge did not respond; instead, he forwarded Ray's letter to the trial counsel. Counsel

the expert has adequately accounted for obvious alternative explanations. See *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**). (Emphasis added)

⁷ See, *Daubert*, in regard to ineffective assistance, the Court noted that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."

however responded to Ray in a letter dated June 11, 2012 which read-in pertinent part:

“I’ve also been notified by Judge [name omitted] staff that you have been trying to contact him by letter.

We are set for sentencing on Tuesday, June 19, 2012.

The judge has asked me to inform you that it is improper for you to be attempting to contact him directly. He does not read anything you are sending him since you are a represented a party. (See Pet. Exh. 4)

At the June 19, 2012 sentencing hearing, trial counsel did not appear; his associate attorney appeared in his stead.

2. On direct appeal to the Oklahoma Court of Criminal Appeals (OCCA), Ray was appointed counsel from the Oklahoma Indigent Defense System (OIDS). Counsel raised four propositions of error. See Doc No. 22 Ex 1. None of which challenged the medical examiner’s opinion concerning cause of death. Neither did counsel present the facts in dispute *i.e.* “Skin: Cyanosis” in support of Proposition I (The trial court abused its discretion in admitting misleading and confusing photographs). Neither did counsel present the *Brady* violation. Nonetheless, Ray diligently sought to present the evidence in dispute on direct appeal.

When Ray met with appellate counsel and investigator at the Oklahoma State Penitentiary (OSP) in January 2013, he sought to discuss the record of facts that disprove the medical examiner’s opinion. Appellate counsel alluded to the unavailability of agency funds to support expert

investigation. Ray then informed counsel his family was looking to retain the assistance of a forensics specialist. The forensics specialist contacted counsel; without input from the specialist, counsel submitted the brief-in-chief on January 18, 2013. Ray immediately took issue with the brief.

In a letter to the OIDS division chief Ray asked her to intervene. Ray also asked the OIDS investigator to interview OUMC physicians to certify *their* record of facts and data-which disputed state witness' testimony at trial. Further Ray contacted the OCCA to inform the court of the inadequate brief counsel submitted. He wrote letters via his mother and directly to the Court- dated February 5, February 11, and February 18, 2013.

During the same time period, in a letter dated February 11, 2013, the OIDS Division Chief wrote:

"Dear Mr. Ray:

I received your letter to me dated February 2, 2103, and have discussed the concerns you raised in this letter in detail with your legal team, attorney [name omitted] and investigator [name omitted], [Counsel] provided me with a copy of a letter she wrote to you on February 11, 2013 addressing these concerns. After my discussion with [names omitted], and after reviewing these letters, I am satisfied your case is being handled in a competent and professional manner. She carefully examined each of your proposed issues and investigative requests. She has provided you with reasonable explanations as to why she did not raise these issues in your brief. I am confident she has acted in your best interest and included all meritorious arguments in your direct appeal.

Sincerely,
[Name omitted]

(See Pet. Exh. 5)

Around the same time, in a letter dated February 11, 2013, Appellate

Counsel wrote:

Although I did not hire an expert to look into your theories regarding the cause of [M.R.'s] death, it was not because of money. As I told you, though our agency is not flush with money, we do have resources to obtain experts when necessary. In my opinion, no expert was needed because there was simply no legal vehicle for arguing on appeal that [M.R.'s] death was caused by aspiration and that his death was the result of misdiagnosis and mis-treatment.

As we talked about in our visit, there are only two avenues for presenting new evidence on appeal. One is to allege that your attorney failed to investigate the case and/or present evidence on your behalf and that his failure constituted ineffective assistance of counsel. The other is a motion for a new trial based on newly discovered evidence. Neither applies in your case. (See Pet. Exh. 6)

Fact is, counsel never discussed a motion for a new trial with Ray, neither did she accept Ray's argument that trial counsel failed to present evidence on his behalf. Counsel further wrote:

In your letter to [Division Chief], you complained that I did not attach to my brief [forensics expert] "report stating the actual cause of death" (Quotation marks appear in original). To set the record straight, when your mother called me, I told her I *might* (italicized in original) need to ask for another extension of time because of a development in another case. As it turned out, I did not need more time, and I got no indication from [forensics expert] that she needed more time to do whatever she was doing for you. A week earlier, I had told you and your mother that if [forensics expert] had something for your appeal, I needed it right away. [Forensics expert] called me on January 18 and asked if I had filed the brief or requested an extension. I told her the brief was being filed that day and asked if she had found anything. She had nothing to report orally, and she never provided me with a written report of her findings.

Id. p 2

(See Pet. Exh. 6 p. 2)

Still Ray sought to present the evidence in dispute with the medical examiner's opinion by means of a *pro se* petition for evidentiary hearing.

In regard to the *Brady* violation *i.e.* the missing document, counsel wrote: "After [investigator] and I visited you in McAlester, [investigator] looked for, and found in the files we obtained from your trial attorney what we believe to be the complete report. I am sending you a copy with this letter" *Id.* at p. 3. Ray discovered-and related to counsel-information annotated in the document in addition to record of fact and data in a separate document that would have otherwise impeached state witness' testimony at trial.⁸

In a letter dated February 15 2013, Ray was informed by counsel that he could submit *pro se* arguments-via counsel. Ray's efforts to present the evidence in dispute were thwarted as counsel held his pleadings to a stringent standard as if he was a lawyer. Counsel wrote "You can prepare a *pro se* brief and send it to me. If it complies with the Court's Rules, I can certify it and recommend that the Court accept it for consideration".⁹

⁸ See *Strickler v. Greene*, 527 U.S. 263, 144 (1999) (noting under *Brady* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment); See also, *Lambert v. Blackwell*, 387 F 3d 210 (3rd Cir. 2004) (noting "Impeachment evidence falls within the *Brady* rule, because such evidence is evidence favorable to an accused").

⁹ *Haines v. Kerner*, 404 US 519, 30 L. Ed. 2d 652, 92 S. Ct 594 (1972): Pro se litigants pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers; if court can reasonably read pleadings to state valid claim on which litigant could prevail, it should do so despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigant's unfamiliarity with pleading requirements. (Emphasis added)

A few days later, the First Deputy Clerk for the OCCA in a letter dated February 19, 2013, wrote:

Dear Mr. Ray:

Receipt of your letter dated February 5, 2013 regarding case no. F-2012-538 is hereby acknowledged.

Please be advised that pursuant to Court of Criminal Appeals Rule 3.4 (E), all *pro se* legal arguments must be submitted to the Court through your attorney of record. Therefore, I am returning your letter to you so that you can contact your attorney regarding this matter. Enclosed is a copy of Court of Criminal Appeals Rule 3.4 (E) for your information.

Sincerely,
[Name omitted]
First Deputy Clerk

Cc: Bettye Ray (See Pet. Exh. 7)

Ray promptly drafted his *pro se* brief-which included arguments in support of his claims of new evidence not presented at trial-and mailed it to counsel. Days later he mailed his *pro se* motion for an evidentiary hearing. Counsel rejected both his *pro se* brief and motion for evidentiary hearing. In a letter dated March 18, 2013 counsel wrote:

Your mother called this morning and advised that you have revised your *pro se* brief and it is being mailed today. She said you want me to move for an extension of time.

As for your Motion for Evidentiary Hearing, I received that on Friday and am returning it with this letter because it does not comply with the Court's Rules. Aside from the fact that it is single-spaced and on 11 x 14 paper, the *pro se* brief you sent me did not include a proposition alleging ineffective assistance of counsel, which is a requirement. Also, you failed to attach affidavits setting out the items alleged to constitute ineffective assistance of trial counsel. (See Pet. Exh. 8)

The essence of Ray's argument is not that trial counsel was ineffective for not consulting with expert; rather his performance was deficient and thereby prejudiced resulted because he did not present the evidence clearly in dispute with state witness' testimony. On the other hand, appellate counsel was ineffective for failing to consult with an expert. Furthermore appellate counsel was ineffective where she failed to present the evidence clearly in dispute with state witness' testimony.

Further, counsel squandered the time to file a motion for new trial based on the newly discovered evidence. When Ray met with counsel in January 2013, she never informed him of a motion for new trial based on new evidence. Nonetheless contrary to the letter dated February 11, 2013, in a letter dated May 22, 2013 counsel wrote:

"Dear Mr. Ray:

This is in response to your letter explaining that the pro se Petition for Evidentiary Hearing you sent was not in regard to an ineffective assistance of counsel claim, as I assumed. Further, its purpose was for the Court to realize and acknowledge the medical examiner's lack of medical certainty regarding the cause of death and her inability to determine the mechanism of death." (Emphasis added)

A request to supplement the record on appeal with matters not presented to and included as a part of the trial court record is only available under the following two circumstances:

(a) Matters timely and properly admitted as a part of a motion for a new trial as set out in Sections 952 and 953 of Title 22 and Rule 2.1 of the Rules of the Court of Criminal Appeals;

Since no motion for new trial was filed, I assumed you were trying to get a hearing based on ineffective assistance of counsel.

The bottom line is that there is no avenue for filing for an evidentiary hearing. Even if there were, there were additional problems with what you sent, as I explained in the last letter. Again, we have filed everything we can file. Now we have to wait.” *See*, Pet. Exh. 9 pp. 1, 2; *See, also* Pet. Exh. 13

Appellate counsel was not completely honest. Ray discovered the timeline to file a motion for a new trial based on newly discovered evidence is one year after judgment is rendered. Okla. Stat. tit 22 § 953 reads in pertinent part:

A motion for a new trial on the ground of newly discovered evidence may be made within three (3) months after such evidence is discovered but **no such motion may be filed more than one (1) year after judgment is rendered** (Emphasis added).

Counsel’s letter to Ray was dated and postmarked May 22, 2013. Nine days remained for a motion for new trial based on the newly discovered evidence, and she never presented the evidence to the trial court.¹⁰

Ray complained to the Oklahoma Bar Association. His complaint centered around counsel’s (1) disregard for the evidence in dispute (2) failure to present the evidence on direct appeal and (3) her unwillingness to present the evidence. The Assistant General Counsel responded in a letter dated June 4, 2013 in which she wrote:

“Dear Mr. Ray:

¹⁰ During the last week of May 2013 and the first week of June 2013 scores of inmates were relocated to the maximum security facility Davis Correctional Facility (DCF) in Holdenville, Oklahoma from the dilapidated maximum security facility OSP in McAlester, Oklahoma. Inmates housed in the maximum security unit at DCF were allowed access to the law library only two hours per week.

We have received your complaint against the above-referenced attorney.

... [I]t is our opinion that we are not in position to resolve this matter for you at this time.

All of your allegations are matters that can be brought before the Appellate Court in your case.

Although the conduct of an attorney may seem inappropriate, it may not necessarily constitute a violation of the Oklahoma Rules of Professional Conduct.

... [W]e will take no action as the rules are not intended to be invoked by opposing parties as procedural weapons. The decision whether to open a matter for formal investigation rests solely within our discretion.

We will take no further action in this matter at this time.

Sincerely,
[Name omitted]
Assistant General Counsel”
(See Pet. Exh. 11)

Ray determined to have the evidence in dispute presented to the OCCA, submitted his own *pro se* motion to petition for evidentiary hearing directly to the OCCA on May 29, 2013. The first deputy clerk responded in a letter dated June 6, 2013:

“Dear Mr. Ray:

Receipt of your letter dated May 29, 2013 addressed to Judge [name omitted] and the enclosed Petition for Evidentiary Hearing is hereby acknowledged.

Please be advised that pursuant to Court of Criminal Appeals Rule 3.4 E, all *pro se* legal arguments must be submitted through you attorney of record. I am therefore returning the petition to you so that you may follow the proper procedure.

Sincerely,
[Name omitted]

First Deputy Clerk”

(See Pet. Exh. 12)

Ray then referenced *Holland v. Florida* 130 S. Ct. 2549 (U.S. 2010) (Concerning “extraordinary circumstances” where conduct on part of counsel and the rules that would not allow *Holland* to file any *pro se* papers with the court while he was represented by counsel). Ray wrote the OCCA in a letter in which he cited *Holland* and described counsel’s performance as inadequate and negligent. Ray explained what he perceived as counsel’s divided loyalty. Further Ray asked the court to reopen the investigation into the cause of death via evidentiary hearing. Ray also asked the court to allow introduction of amicus brief for the purpose of explaining the complex issues involved in his case. The Court Clerk “received-stamped”, Ray’s letter on June 24, 2013; however, it wasn’t until two months later that the clerk wrote-in a letter dated September 3, 2013:

“Dear Mr. Ray:

Receipt of the letter regarding attorney of record facts pertaining to appeal is hereby acknowledged.

Please be advised that pursuant to Court of Criminal Appeals Rule 3.4(E), any legal arguments must be submitted by your attorney of record. I am therefore returning the letter to you so that you may comply with this rule.

Sincerely,
[Name omitted]
First Deputy Clerk

See Pet. Exh. 16

On September 24, 2013 the OCCA filed its opinion in which it affirmed the judgment and sentence of the district court.

Ray timely motioned for a “suspension of judgment and sentence after appeal” pursuant to Okla. Stat. tit 22 § 994 and requested an evidentiary hearing regarding the medical examiner’s “legally insufficient” opinion testimony to the district court-filed October 2, 2013, in the district court. *See* Pet. Exh. 14 pp. 1-4. The district court however re-characterized Ray’s motion in an Order filed October 3, 2013 to an application for Judicial Review pursuant to Okla. Stat. tit 22 § 982a and denied a hearing on the issue raised. *See* Pet. Exh 15.

On October 9, 2013, Ray attempted to file a petition for rehearing to the OCCA. In an order dated October 29, 2013, the OCCA ordered the “return of tendered documents” and stated “Appellant is not counsel of record in this case, and cannot file any documents in this case without first submitting them to counsel of record for review and certification as required by this court’s Rule 3.4 F, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2013). *See* Pet. Exh. 18

Ray sought assistance from the OIDS counsel. In a letter dated December 2, 2013 counsel wrote: “Since I no longer represent you, I cannot file a pleading for you”. *See* Pet. Exh. 17

Acting *pro se* Ray filed a petition for review to the OCCA dated December 3, 2013. Ray sought to present the new evidence in support of

proposition one on direct appeal (The trial court abused its discretion in admitting misleading and confusing photographs). The evidence involved recorded facts *i.e.* “Skin: Cyanosis” data *i.e.* total amount of packed red blood cells and normal saline infused neither the trial judge or jury were made aware of.

The first deputy clerk for the OCCA in a letter dated December 13, 2013 wrote:

“Receipt of the pro se Petition for Review for filing in case no. F-2012-538 is hereby acknowledged.

Please be advised that the Court of Criminal Appeals issued a summary Opinion and mandate in this case on September 24, 2103.

The summary opinion and mandate are considered as final orders and nothing further can be filed. I am therefore returning the Petition for Review to you. If you wish to file a new case with the Court of Criminal Appeals, you must follow the Court Rules regarding the type of appeal you wish to pursue.

Sincerely,
[Name omitted]
First Deputy Clerk”

See Pet. Exh. 19

3. Acting *pro se* on September 19, 2014 Mr. Ray applied for state post-conviction relief in the District Court of Comanche County-pursuant to Okla. Stat. tit 22 § 1080 Post-Conviction Procedure Act-Right to challenge conviction: Any person who has been convicted of a crime and who claims:

(d) 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;

[m]ay institute a proceeding under this act in the court in which the judgment and sentence on conviction was imposed to secure the appropriate relief.

Ray declared "Petitioner is actually innocent" Doc. 22 Ex 4 p. 46. He raised seven (7) propositions for relief in his application for post-conviction relief. The seventh proposition (Ineffective assistance of appellate counsel) rested on the first six (6) propositions for relief (issues omitted on direct appeal). However, in violation of the Act specifically subsection (d), the state court deemed all six (6) of the issues/propositions waived. The seven (7) propositions for relief were:

- (1) the medical examiner's opinion is "legally insufficient";
- (2) the verdict is against the weight of the evidence;
- (3) the prosecution failed to disclose exculpatory evidence;
- (4) variances occurred at three separate (critical) stages;
- (5) false evidence denied him due process and an impartial jury;
- (6) ineffective assistance of trial counsel; and
- (7) ineffective assistance of appellate counsel.

On September 19, 2014 Mr. Ray motioned for evidentiary hearing regarding propositions one, three, and five with application for post-conviction relief with a simultaneous request for "Judicial Notice of Law" pursuant to Okla. Stat. tit 12 § 2201 regarding the Oklahoma Evidence Code Okla. Stat. tit 12 § 2702-Testimony by experts. Moreover Mr. Ray presented evidence of material fact *i.e.* ten medical documents that disproved the medical examiner's opinion, not previously presented and heard, that required vacation of the conviction and sentence. In addition over twenty

documents were submitted to serve as pedagogical support for review of the medical documents presented.

On November 14, 2014, in his response the assistant district attorney lied. He stated “[t]here are no genuine issues of material facts raised in the Petitioner’s pleadings and this matter involves questions of law and does not require an evidentiary hearing” Response pp. 1-2. Thus the district attorney effectively circumvented Okla. Stat. tit 22 § 1080 (d) Supra. His lie resulted in substantial prejudice to Mr. Ray’s application for post-conviction relief.

Fourteen minutes later, the state district court filed its order denying petitioner’s application for post-conviction relief and all accompanying motions. The district court swayed by the assistant district attorney’s lie, followed suit. In sum where (1) the district court asserted there were no genuine issues of material fact and (2) both the district court and appellate court deemed the issues of material fact waived (3) appellate court deemed claim of ineffective assistance of trial counsel barred, and (4) declined to conduct a hearing on the merits of the omitted issues of material fact: the courts stripped Ray’s Sixth Amendment claim down to a bare-naked claim of ineffective assistance of counsel-in which the district court by its own undoing “[f]ound Petitioner failed to provide sufficient evidence to support propositions six and seven, ‘by failing to provide sufficient evidence to meet his burden of showing that the verdict would have been any different at the

trial level or in his direct appeal' ". See Order p. 45-Doc 22 Ex 5; See also OCCA Order pp. 2, 4-Doc 22 Ex 6.

4. Acting *pro se*, on December 16, 2014 Ray filed an appeal of the order denying petitioner's application for post-conviction relief and all accompanying motions. Ray raised five propositions in error, the third of which rested on his claim that the district court violated the Due Process Clause. In pertinent part proposition three read "The district court abused its discretion when it did not comply with the law "Duties of the Judge of the District Court" Doc 22 Ex 5. In support of his claim Ray relied on the high court's opinion in *Logan v. State*, ¶ 22, 293, P. 3d 969 (Okla. Cr. 2013).¹¹

On appeal of the judge's order, Ray submitted 20 exhibits, ten of which presented were genuine issues of material fact in dispute with the testimonial evidence adduced at trial. An affidavit was filed in support. See Pet. Exh. 20 pp. 1, 2. Additionally Ray asked for evidentiary hearing on the material issues of fact in dispute. Pertaining to the new evidence, he also requested an Order for the district court to "set out specific findings of fact" pursuant to Okla. Stat. tit 22 § 1084.

On March 18, 2015 the OCCA filed its order affirming denial of post-conviction relief. In sum the high court merely agreed with the lower court's order-absent its own independent examination i.e. look at the merits of the

¹¹ See, *Logan v. State*, ¶ 22, 293, P. 3d 969 (Okla. Cr. 2013) (If a genuine issue of material fact exists in the case, i.e. if there is an actual dispute about a material issue of fact in the case, district court is required to conduct an evidentiary hearing on the post-conviction application.

issues omitted on direct appeal. The court explained, “Judge Neuwirth looked to the merits of the issues raised and concluded that appellate counsel’s performance was not deficient. We agree. The remaining issues have been waived. Further, the record does not support Petitioner’s contention the District Court erred in denying his post-conviction application without an evidentiary hearing.” Order p. 4-Doc 22 Ex 6.

For obvious reasons “the record [did] not support Petitioner’s contention the District Court erred in denying his post-conviction application without an evidentiary hearing” *Id.* The district court deemed Ray’s genuine issues of material fact waived. By doing so the district court effectively however illegally relieved itself of its duty to “conduct an evidentiary hearing” on the post-conviction application.¹² So the high court’s opinion that “Judge [] looked to the merits of the issues raised” is completely erroneous. *Id.* at p. 4.

5. Acting *pro se*, Ray timely filed a federal habeas petition in the United States District Court for the Western District of Oklahoma. His petition raised eleven claims, the eleventh of which was ineffective assistance of appellate counsel. Ray argued counsel was ineffective where she failed to present the evidence in dispute with the medical examiner’s opinion.

¹² See, Okla. Stat. tit 22 §1084, Evidentiary hearing - Findings of fact and conclusions of law: If the application cannot be disposed of on the pleadings and record, or there exists a material issue of fact, the court shall conduct an evidentiary hearing at which time a record shall be made and preserved.

The State conceded that, pursuant to *Schlup v. Delo*, 513 U.S. 298, 324 (1995) evidence must demonstrate “that in light of the new evidence, no juror, acting reasonably, would have voted to find [Petitioner] guilty beyond a reasonable doubt. *Id.* at 329.” Doc 22-Response p. 53. Nonetheless the State asserted “No evidentiary hearing is required and any request should be denied as the OCCA adjudicated Petitioner’s claims on the merits.” Doc 22-Response p. 2. Despite the fact the State recognized a *Schlup* claim; it argued “review under [28 U.S.C.] § 2254 (d) (1) is limited to the record that was before the state court that adjudicated the claim on the merits.” Doc 22-Response p. 2.

The State block-quoted the OCCA’s four paged opinion-on post-conviction. Doc 22-Response pp. 50-52 The State acknowledged “[t]he petitioner argues ineffective assistance of appellate counsel as his cause for failure to raise his procedurally defaulted claims on direct appeal” [*sic*]. And asserted “The Petitioner makes no allegations regarding the fundamental miscarriage of justice exception as required by *Schlup*...” Doc 22-Response p. 54 To the contrary, Ray articulated the fundamental miscarriage of justice exception where he (1) consistently sought to present genuine issues of material facts that disprove the medical examiner’s opinion and (2) consistently argued that the medical examiner’s opinion was legally insufficient. Moreover the magistrate acknowledged such in an order filed June 22, 2015 which read in pertinent part:

“Petitioner alleges in support of his motion that he is a layman; that respondent is an experienced lawyer, and has a team of skilled lawyers at his disposal”; that “[i]n the absence of professional assistance by Appellate counsel the ramifications could be fatal to [Petitioner’s] § 2254 Habeas Claim; **that he “is factually innocent”; and that he has evidence that “disproves the M.E.’s opinion regarding cause of death.”** Id. at 1-2.” (Emphasis added)

As the Supreme Court observed, “in most federal courts, it is the practice to appoint counsel in post-conviction proceedings only after a petition for post-conviction relief passes initial judicial evaluation and the court has determined that issues are presented calling for an evidentiary hearing.” *Johnson v. Avery*, 393 U.S. 483, 487 (1969); Doc 28 pp. 1-3

See Pet. Exh. 22

Ray’s motion for appointment of counsel was denied without prejudice. Three weeks later, Ray filed his motion for evidentiary hearing. In his motion Ray clearly stated “Judge [name omitted] and the OCCA failed to look to the merits of the issues or test the merits of the omitted claims. Thus the OCCA and Judge [name omitted] deprived Mr. Ray of ‘due process of law’ ... which amount to a miscarriage of justice”. Doc 30 p. 3. Ray further argued that no relevant findings have been made-in regard to his ineffective assistance of appellate counsel claim-unless the state court decided the constitutional claim tendered by the defendant on the merits-clearly established by the Court in *Townsend v. Sain*, 372 U.S. 293, 83 S. Ct. 745 (1963). Doc 30 p. 3 See also Ray’s Reply to Response to Motion f or Evidentiary Hearing, Doc 32 p. 1.¹³

¹³ Cf. *Billings v. Polk*, 441 F. 3d 238, 252 (4th Cir. 2006) (holding § 2254 (d) not to apply where petitioner “raised his Sixth Amendment claim before the North Carolina Supreme

On August 5, 2015 Ray's case (CIV-15-306R) was transferred from one magistrate judge to another. On January 15, 2016 Ray's Motion for Evidentiary was denied without prejudice.

On March 21, 2017 the magistrate relied on *Smith v. Duckworth*, 824 F. 3d at 1241 (citing 28 U.S.C. § 2254 (e) (1) as the Standard for Review, and recommended Ray's petition and supplemental petition be denied (parenthesis in original). Additionally the magistrate relied on *Sanchez v. Wyoming*, 557 F. App'x 883, 885 (10th Cir. 2014) and § under 2254 (e) (2), and recommended Ray's request for evidentiary hearing be denied, Doc 35 pp. 5, 24.

Contrary to the magistrate's recommendation, the U.S. Supreme Court in *House v. Bell*, 126 S. Ct. 2064 held "the standard for review in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254 (e) (2) is inapplicable on a showing of actual innocence. [The] *Schlup* claim involves evidence the trial jury did not have before it; the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record *Id.* at 331, 115 S. Ct. 851." The newly presented evidence at issue in Ray-as in *Schlup*-had not been assessed how reasonable jurors would react to the overall, newly supplemented record. Ray's claim-as in *Schlup*-was for an evidentiary hearing. Over Ray's objections, Doc 38, and Motion for Evidentiary Hearing, Doc 39, the district court adopted the

Court" but that court "limited its analysis" to a "state-law question," and "there is no indication" that the state court considered the federal claim)

recommendation and denied Ray's petition in full and his request for evidentiary hearing, Doc 40.

6. On request for a certificate of appealability to the Tenth Circuit, Ray argued that *de novo* review of his constitutional claim was necessary because the Oklahoma Court of Criminal Appeals failed to adjudicate it on the merits; instead adjudicating only his distinct claim-ineffective assistance of counsel under *Strickland* however with out an assessment of the issues omitted on direct appeal by appellate attorney.

Where Ray argued that the state district judge failed to consider the merits of the ineffective assistance claim i.e. omitted issues, the Tenth Circuit stated "[his] argument is irrelevant because we consider only the highest state court's adjudication of the merits" Order p. 4 n 1. The Tenth Circuit however failed to recognize that the high court (OCCA) did not actually adjudicate Ray's Sixth Amendment claim on the merits; the OCCA merely followed suit of the lower court's order when it too deemed the issues waived however with out an examination of the evidence presented.

On Ray's claim of appellate counsel's deficient performance, demonstrated in her failure to present the evidence on direct appeal the Tenth Circuit essentially conceded where it stated "we cannot discern what Mr. Ray's appellate counsel should have done differently. Obviously it would have been futile for the appellate counsel to inject her own 'medical' opinion disputing the medical opinions of the State's expert witnesses." Order p. 6

Further the Tenth Circuit erred, as to its understanding of supposed undeveloped arguments in Ray's case. The Court listed four appeal points in which it asserted were undeveloped. Order pp. 8, 9 However with the exception of point four, on state post-conviction Ray sufficiently developed his arguments that trial counsel was ineffective for failing to (1) dispute the legal sufficiency of the medical examiner's opinion with the contrary evidence,¹⁴ (2) present the facts regarding violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and (3) object to the fatal variance that occurred during the prosecution's closing arguments.

Also, pertaining to the newly presented evidence, the Tenth Circuit erred when it stated "Mr. Ray relies solely on his own 'medical opinion'" and "Mr. Ray does not present evidentiary support for his assertion" Order p. 10, and n 5. To the contrary, *first* the newly presented evidence was part of Ray's case file which contained recorded fact and data by the three sources, presented for the first time on application for state post-conviction relief; *second* Ray pointed out the evidence to the federal district court in what was actually prepared by the office of the attorney general as Doc 22 Ex 4. *See, also* Pet. Exh. 21. Therefore according to *Schlup* the federal district court as well as the circuit court needs only to "assess how reasonable jurors would react to the overall, newly supplemented record." Furthermore the newly

¹⁴ Cf. *Rivas v. Fischner*, 687 F. 3d 514 (2nd Cir. 2012) (Factual predicate supporting claims of misconduct and false testimony: newly discovered evidence regarding the conduct of the autopsy, the medical examiner's false evidence and the medical examiner's prior bad acts, warrant the grant of habeas relief)

presented evidence would suggest consideration of “the credibility of the witnesses presented at trial.”

REASONS FOR GRANTING THE PETITION

This Court has granted certiorari to clarify the scope of its earlier decisions and correct circuit courts’ thinking.¹⁵ By granting this petition, the Court would achieve this important objective: Although the court in *House v. Bell* reaffirmed the *Schlup* gateway applies to procedural defaults not expressly addressed by congress, it would clarify the scope to *Schlup*, and thereby: (1) correct the Tenth Circuit’s thinking that “a habeas Petitioner’s failure to exhaust claims in state court is excused [only] “where a petitioner makes ‘a credible showing of actual innocence’ ” Order p. 14; (2) correct the circuit court’s thinking to disregard supposed “undeveloped arguments” Order pp. 8, 9; and (3) direct circuit courts to engage in fact finding that a *Schlup* requires as opposed to the lean towards a summary-judgment-type inquiry. *House* quoting *Schlup* stated “First, [...] the habeas court must assess the likely impact of ‘all the evidence’ ” on reasonable jurors, *id.*, at 327-329, 115 S. Ct. 851. Second, rather than requiring absolute certainty about guilt or innocence, a Petitioner’s burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt.”

¹⁵ See, e.g., *Elder v. Holloway*, 510 U.S. 510, 515 (1994) certiorari granted to correct Ninth Circuit, which, “[i]n thinking its rule compelled by this court’s instruction,” misconstrued earlier case)

Furthermore the Tenth Circuit Court departed from the accepted and usual course of judicial proceedings regarding an actual innocence claim as determined by the U.S. Supreme Court in *Schlup* and reaffirmed by the Court in *House v. Bell*. The Tenth Circuit Court's departure calls for an exercise of this court's supervisory power. Consideration of the question presented here is of importance to the public as courts have recognized, an innocent person has a "powerful and legitimate interest" in obtaining release from incarceration.¹⁶ This case is an ideal vehicle-in light of Ray's preservation of the issues and the Tenth Circuit's assertion that his claims are "facially invalid or undeveloped" Order p. 18-to resolve the important question affecting wrongfully convicted persons in this nation.

1. **Post *Schlup*, the Court in *House* held inapplicable to first petitions the stricter standard AEDPA prescribed for second-or-successive petitions.**

The *Perkins* Court quoting *House*, reaffirmed-in regard to § 2244 (b) (2) (B) (ii) and 2254 (e) (2)-that "[n]either provision address[ed] the type of petition at issue...[,] a first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence." The *Perkins* Court held "a case not governed by those provisions, i.e., a first petition for federal habeas relief, the miscarriage of justice exception survived AEDPA's passage intact and unrestricted.

¹⁶ See, e.g., *Kuhlman v. Wilson*, 477 U.S. 436, 452 (1986); See also, *McCleskey v. Zant*, "The miscarriage of justice exception to cause serves as an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty..." 499 U.S. 467, 495 (1991) (citation omitted).

The *Perkins* Court further stated “We have applied the miscarriage of justice exception to overcome various procedural defaults. These include failure to develop facts in state court [,] *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11-12 (1992) and failure to observe state procedural rules, *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991). However in regard to Ray’s Sixth Amendment Claim and the issue that the medical examiner’s opinion testimony is “legally insufficient” the Tenth Circuit Court stated “Mr. Ray does not develop the standalone sufficiency claim, so we reject it”... “His other claims are also facially invalid or undeveloped.” *See* Order p. 18. The gateway *Schlup* presents is for “evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free non harmless constitutional error” 513 U.S., at 316.

Based on the Tenth Circuit’s thinking in regard to supposed “facially invalid or undeveloped” claims it thereby also rejected *Schlup*’s requirement to assess the evidence the trial jury did not have before it. Moreover in terms of how reasonable jurors would react to the overall, newly supplemented record, the assessment may also include consideration of “the credibility of the witnesses presented at trial.” *Ibid*; *see also ibid* further noting (“[i]n such a case, the habeas court may have to make some credibility assessments”).

2. **[P]risoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, “it is more likely than not that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt, *Schlup*, 513 U.S. at 327, 115 S. Ct. 851.**

The Court in *House* made clear rather than requiring absolute certainty about guilt or innocence, a Petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt. Because Ray-in post-trial proceedings-presented direct contradictions of evidence presented at trial, the Tenth Circuit's thinking that only a "credible showing of actual innocence" is excused, violated *Schlup*. Furthermore the circuit court will most likely continue to apply that erroneous thinking unless this Court corrects such thinking.

Because the district court had declined to conduct an evidentiary hearing, the guidance in *Schlup* was clear: "The point in *Schlup* was not simply that a hearing was required, but why because the District Court had to assess the probative force of the Petitioner's newly presented evidence, by engaging in fact finding rather than performing a summary-judgment-type inquiry, 513 U.S., at 331-332, 115 S. Ct. 851".

3. Under *Schlup*, a court may take into account how the timing of the submission...bear[s] on the probable reliability of the evidence. 513 U.S. at 332

The Tenth Circuit Court did not bother to weigh the timing of the submission of the new evidence-in which Ray sought to present prior to trial, during his trial, on direct appeal, on motion to suspend sentence with request for evidentiary hearing, on application for post-conviction relief, in petition to

the federal district court, and on request for certificate of appealability to the federal circuit court.

This Court made clear: In weighing whether the Petitioner has made the appropriate showing a court must consider the new evidence as part of “all the evidence” (including the evidence at trial, which a jury has necessarily found sufficient to convict) and including the “timing of the submission” (which will be long after the Petitioner’s conviction and incarceration) *Id.* at 328, 332.

Further this Court made clear: “[a] procedural argument that constitutional errors at trial, along with newly discovered evidence of his factual innocence, undermine the certainty of the Petitioner’s conviction.” *Schlup v. Delo*, 513, U.S. 298, 324 (1995)

The Court in *House* 547 U.S. 518, 536 (2006) reaffirmed that the *Schlup* gateway applies to procedural defaults not expressly addressed by congress. This is because procedural bars “must yield to the imperative of correcting a fundamentally unjust incarceration.” *Id.* (quoting *Engle v. Issac*, 456 U.S. 107, 135 (1982)). *House* reaffirmed that the *Schlup* guidance on how a district court should assess new evidence: The court “may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence,” and it “must assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial” 513 U.S., 332, 115 S. Ct. 851. Therefore-using Ray’s case-it

is imperative this Court makes clear to the circuit courts that an actual innocence claim requires courts to assess the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial.

4. This case is an ideal vehicle to resolve the question represented.

Ray's case is an ideal vehicle to resolve whether a *Schlup* claim qualifies for unfettered federal habeas review of a federal claim when a state court deemed the newly presented evidence waived, but failed to look to the merits of the federal claim in question.

Ray preserved his Sixth Amendment claim-and underlying issues-and argued to the court below that this claim should receive *de novo* review because the state court failed to adjudicate the facts *i.e.* look to the merits of the omitted issues-the newly presented evidence.

Moreover, the Tenth Circuit clearly erred when it opined that the state appeals court's rejection of his Sixth Amendment claims of ineffective assistance of appellate counsel, did not unreasonably apply clearly established federal law (*Schlup*) or unreasonably find facts from the evidence presented. This case thus clearly presents the question of *Schlup*'s qualification for unfettered federal habeas review of "procedurally defaulted claims" and "undeveloped facts"; moreover this case presents a miscarriage of justice. And the Tenth Circuit abandoned its own precedence set in *Cargle v. Mullin*, 317 F. 3d 1196, 1205 (10th Cir. 2003).

A. Ray clearly presented his Sixth Amendment Claim to the Oklahoma Courts, and those courts plainly failed to look to the merits of the issues counsel omitted on Direct Appeal. There is no dispute that Ray preserved his Sixth Amendment claim throughout state post-conviction proceedings. The State recognized as much in its response to Ray's habeas petition. *See* Doc 22

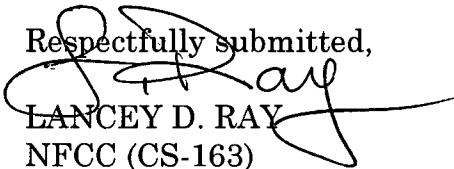
It is equally clear that, despite Ray's assertion of his Sixth Amendment right to effective assistance of counsel, the Oklahoma Court of Criminal Appeals failed to properly assess the claim. That is, the high court failed to conduct an independent and proper examination of the omitted issues; instead, it relied solely on the order of the lower court. *See* page 28

The Court in *Coleman v. Thompson*, 501 U.S. 754, (1991) held "[I]t is not the gravity of the attorney's error that matters, but that it constitutes a violation of petitioner's right to counsel, so that the error must be seen as an external factor, *i.e.*, 'imputed to the State'").

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,


LANCEY D. RAY
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June 11, 2018

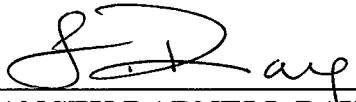
Pro se Litigant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and one true and correct copy of the foregoing petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit were hand carried this 11th day of June 2018 to the facility legal mail custodian to be mailed first-class postage prepaid in the prison mail system to:

Supreme Court of the United States
Office of the Clerk
Scott S. Harris
Washington, D.C. 20543-0001

Jay Schniederjan
Assistant Attorney General
313 NE 21st Street
Oklahoma City, OK 73105-4894



LANCEY DARNELL RAY

PRISON MAIL BOX RULE

I HEREBY INVOKE the prison mailbox rule and affirm under the penalty for perjury that an original and one true and correct copy of the foregoing petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit, were hand carried this 11th day of June 2018 to the facility legal mail custodian to be mailed first-class postage prepaid in the prison mail system to the parties listed above. I declare under penalty of perjury that the foregoing is true and correct. Executed on this 11th day of June 2018; I further invoke 28 U.S.C. § 1746.

Supreme Court of the United States
Office of the Clerk
Scott S. Harris
Washington, D.C. 20543-0001

Jay Schniederjan
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313 NE 21st Street
Oklahoma City, OK 73105-4894



LANCEY DARNELL RAY