

ORIGINAL

NO. **18-6962**

FILED  
OCT 08 2018  
OFFICE OF THE CLERK  
SUPREME COURT, U.S.

In The  
SUPREME COURT OF THE UNITED STATES  
IN RE: WALTER EDWARD KOSTICH – PETITIONER

vs.

JIMMY MARTIN, WARDEN  
THE STATE OF OKLAHOMA AND  
THE OKLAHOMA COURT OF CRIMINAL APPEALS

On (*Amended*) Petition for a Writ of Mandamus  
From the Oklahoma Court of Criminal Appeals

PETITION FOR WRIT OF MANDAMUS  
28 U.S.C. §1651(a) Rule 20.1,2,3  
AMENDED AS REQUESTED

In Re: WALTER EDWARD KOSTICH Pro se,  
595066 D-North 127  
North Fork Correctional Center  
1605 E. Main Sayre, Oklahoma. 73662  
Imprisoned inmate no phone #

## QUESTIONS IN CONTROVERSY PRESENTED

**Question #1). Whether,** the State prosecution or Courts has the authority to prosecute a criminal case, in the absence of a statutory required signed “*Bind-Over Order*” initiated by the Magistrate pursuant to *22 O.S. §258 through §264* necessary to confer jurisdiction, for trial proceedings, without offending Due Process, Equal Protection of the law, under the U.S. Constitution 5th & 14th Amendments?

**Question #2). Whether,** a State Court, or prosecution may act contrary to Constitutional, & “State created” legislative statutory double jeopardy prohibitions, while suppressing material information beneficial to the defense, without offending Equal Protection, Due Process of law, United States Constitution 5th & 14th Amendments,

## TABLE OF AUTHORITIES CITED

<u>UNITED STATES SUPREME COURT CASES</u>	<u>PAGE NUMBER</u>
Barklay v. Florida 413 U.S. 939 (1983).....	7, 13
Brady v. Marilyn 373 U.S. 83 (1963).....	16, 17
Clemmons v. Mississippi 494 U.S. 738, (1990).....	10
Coleman v. Thompson 501 U.S. 722, 750, 115 S.Ct. 2546 (1991).....	12, 14, 15
Ex Parte Republic of Peru La 1943 63 S.Ct 793, 318 U.S. 578 LED 1014 Key 3126.....	5
Harrington v. Richter 562 U.S. 86, 131 S. Ct. 770, (2011).....	10
Hicks v. Okla. 477 U.S. 343 (1980).....	10
Johnson v. U.S. 520 U.S. 46, 117 S.Ct. 1544 (1997).....	12, 16
Kentucky DOC v. Thompson 490 U.S. 454 (1989).....	13, 15
Louisville and Nashville R Co. v. Mottley 211 U.S. 149, 29 S. CT. 42 (1908).....	11
McMann v. Richardson 397 U.S. 759 (1940).....	10
Miller v. Fenton 474 U.S. 104 (1985) .....	18
Murry v. Carrier 477 U.S. 478 (1986).....	11, 15
Olano 507 U.S. 732 (1993) .....	12
Payne v. Tennessee 501 U.S. 808 (1991).....	16
Ross v. Okla. 487 U.S. 81 (1988).....	10
Solem v. Bartlett 465 U.S. 463 (1984).....	16
Townsend v. Sain 372 U.S. 293 (1963).....	10
U.S. v. Bass 404 U.S 336 (1971).....	15

U.S. v. Cotton 535 U.S. 625, (2002).....	11
U.S. v Kostich #05-CR-TCK.....	8
Viteck v. Jones 445 U.S. 480, 100 S. Ct. 1254 (1980).....	10
Wolf v. McDonnell 418 U.S. 534. S. Ct. 2963 (1974).....	10
Williams v. Taylor 529 U.S. 420, 437 (2000).....	12, 17

**10th CIRCUIT COURT OF APPEALS** **PAGE NUMBER**

Bryan v. Mullin 335 F.3d 1207 (10th Cir. 2003).....	10
Snow v. Simmons 474 F.3d 693 (10th Cir 2007).....	16
U.S. v. Bigford 365 F.3d 857 (10th Cir. 2014).....	15
U.S. v. Kostich 197 Fed. Appx. 753, 2006 WL 2709665. (10th Cir. 2006).....	8

**NORTHERN DISTRICT OF OKLAHOMA** **PAGE NUMBER**

U.S. v Kostich 05-CE-13-TCK (2005).....	17
---	----

**U.S. CONSTITUTIONAL CITATIONS** **PAGE NUMBER**

Article III of the U.S. Constitution.....	6
U.S. Constitution Amendment(s) 5 & 14.....	9

**U.S. STATUTES AND RULES** **PAGE NUMBER**

28 U.S.C.A. §1651(a).....	1, 6
28 U.S.C. §§1331, 1366-67, 1651-52.....	1,6 ,14
U.S. Atty. Manual §9-2.301(A).....	2, 8, 9, 16, 17-18
Rule 20.1-2.....	1,6
Federal Rules of Evidence Rules 101-1101, Rules 302& 502.....	6, 17

**OKLAHOMA STATE CASES**

**PAGE NUMBER**

Aven v. Reeh 878 P.2d 1069, 1994 OK. 67..... 13

Board of Commissioners of Muskogee v. Lowery  
136 P.3d 639, 2006 (Okla. 31)..... 10

Calghorn v. Brown 505 P.2d 998, 1973 OK. CR. 21..... 11

Chandler U.S.A. Inc., v. Tyree, 87 P. 3d 598 ..... 7

Cobb v. Mills 163 P.2d 558 (OCCA 1945)..... 18

D.M.H v. State 136 P.3d 1054, 2006 OK CR. 22..... 10

Ex-parte Johnson 97 Okl. Cr. 374, 264 P.2d 367 (1954)..... 16

Ex-parte Story 203 P.2d 474, 88 Okl. Crim. 356..... 10

Hisel. State 1997 OK. CR. 356, 264 P.2d 375..... 13

Hogan v. State 2006 OK.CR.10, 139 P.3d 907..... 14, 16

In Re M.B. 145 P.3d 1040, (Okla. 2006)..... 9

In Re [..] City of Ada 352 P.3d 1196, 2015 Okla. 18 ..... 11

In Re Gable 73 Okl. Cr. 155, 118 P.2d 1035 (1941)..... 17

Inverarity v. Zumualt 279 P.2d 372,377 Ok.Cr. 1955..... 11

King v. State 553 P.2d 529..... 4

Kostich v. State HC-17-901..... 6

    Kostich Post-Conviction PC-2011-1076..... 8

    Kostich District Court Case #2007-1480 ..... 9, 12

    Kostich Certiorari appeal #C-2009-892..... 8

    Kostich State Habeas Corpus OCCA appeal # HC-17-901.....1, 7

    Kostich Habeas Corpus to Beckham County #WH 17-2.....1, 7

Lafortune v. District Court, Tulsa County  
1998 OK.CR. 65, 972 P.2d 868..... 13

Morgan v. State 675 P.2d 677, 1981 OK. CR. 242.....	14
Muskogee v. Lowery 136 P.3d 639, 2006 (Okla. 31).....	9
Nesbitt v. Apple 891 P.2d 1235, (OCCA 1994) .....	19
Newlin v. State 2015 OK.CR. 7, 348 P.3d 209.....	8
Olsen v. Cont. Res. Inc. 109 P.3d 351 Okla Civ. App Div. 3 2004.....	11
Pate v. Dist. Court of OKC. 414 P.2d 586, 1966 OK.CR. 60.....	18
Petuskey v. Freeman 1995 OK. 9, 890 P.2d 948.....	13
Pickens v. State 393 P.2d 881,.....	18
Powell v. Smith 534 P.2d 689 (Okla. Cr. 1975).....	14
Robertson v. State 888 P.2d 1023, 1995 OK.CR. 6.....	18
Rogers v. State 285 P.3d 715, 2012 Ok. Civ. Div. 12.....	18
State v. Berry 799 P.2d 1131 Okl. Cr. 1990.....	12
State v. Day 1994 OK. CR. 67, 882 P.2d 1096.....	13
State v. Delso 2013 OK.CR. 5, 289 P.3d 1192.....	11
State v. Iven 335 P.3d 264, 2014 OK.CR. 8 .....	11
State. v. Nelson 356 P.3d 1113, 2015 OK.CR. 10.....	11
State. v. Young 874 P.2d 57, 1994 OK CR. 25.....	14
Town of Watonga v. Crane Co 189 Okla. 184, 114 P.2d 941 (1940).....	10
Welch v. Armer 776 P.2d 847, (Okla. 89).....	13
Wiley v. State 349 P.2d 30, 1960 OK.CR. 4.....	15

**OKLA. STATE CONSTITUTIONAL CITATIONS** **PAGE NUMBER**

Okla. Const., Art II §10 Habeas Corpus..... 3, 7  
Okla., Constitution Art., II §§6,7,20, 21..... 9  
Okla., Constitution Art., II §12..... 19

**OKLA. STATE STATUTES AND COURT RULES** **PAGE NUMBER**

OCCA RULE Rule 6.5 .....14  
OCCA RULE 10.1 ..... 3, 4, 7  
OCCA RULE Rule 38..... 1  
12 O.S. §§91 & 101..... 19  
12 O.S. §696..... 10, 14, 15  
12 O.S. §990 A.....13  
12 O.S. §1331..... 3, 7, 11, 12, 14, 15, 16, 17  
12 O.S. §1334..... 12  
12 O.S. §1341..... 17  
19 O.S. §215.8 ..... 19  
20 O.S. §3001.1..... 17  
21 O.S. §11..... 16, 18, 19  
21 O.S. §701.7..... 12  
21 O.S. §1401..... 3, 19  
22 O.S. §48..... 13  
22 O.S §§14,130,522 ..... 16, 18, 19  
22 O.S. §§258(6th) through 268..... 2, 4, 11, 12, 13, 14

22 O.S. §§401-413.....	12
22 O.S. §443.....	12
22 O.S. §508.....	14
22 O.S. §1080.....	3, 8, 20
22 O.S. §1401.....	2
74 O.S. §18 h (A)(3).....	13



**TABLE OF CONTENTS**

OPINIONS BELOW..... iii.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... ii

JURISDICTION..... 1

STATEMENT OF THE CASE..... 7

EXHAUSTION OF STATE CREATED RELIEF .....5

EXCEPTIONAL CIRCUMSTANCES WHY THE WRIT WILL BE IN AID  
OF AND WARRANT THIS COURT’S APPELLATE JURISDICTION.....5

REASONS FOR GRANTING THE WRIT..... 9

JURISDICTIONAL FAILURES GROUND ONE .....10

JURISDICTIONAL FAILURES - GROUND TWO ..... 15

CONCLUSION and PRYOR FOR RELIEF..... 22

## I. PETITION FOR WRIT OF MANDAMUS

**COMES NOW** In Re, Walter Edward Kostich, pro se, in the above styled case seeks a petition for *writ mandamus* pursuant to *U.S.C. §1651(a) Rule 20.1, 2, 3* from this Honorable Court. In a case involving violations of Constitutional, statutory, & court rule dimensions that are so serious, that under a “totality of the circumstances” review, reflects a Fundamental Miscarriage of Justice, as would shock the conscious of the Court. A diligent review exposes a manifest injustice.

### **REQUEST FOR INQUIRY / INTERVENTION FOR OKLAHOMA’S VIOLATIONS OF FUNDAMENTALLY SECURED RIGHTS RESULTING IN OVERCROWDING OF THE OKLAHOMA PRISON SYSTEM**

*Upon information & belief “stating in good faith” there exist willful misconduct of the District Courts & the OCCA in persistent failure to perform their judicial duties and functions required by Okla., legislature, and other conduct prejudicial to the administration of justice & that brings both the courts, judicial office & the administration of justice into serious disrepute. A Judge or (or Judges) should strive to maintain confidence in our judicial system (Preamble to Code of Judicial Conduct) but Oklahoma courts actions consistently destroy confidence in the judicial system when they conspire one with another to undermine & override the wisdom and will of legislature.*

## II. STATEMENT OF JURISDICTION

**[X]** *For cases from state courts:*

The date on which the highest state court’s “Summary” Denial was **03-07-2018 Case # HC-17-901**. A copy of the decision appear at **Appendix Exhibit A-1** that was timely appealed from Beckham County District Court **Case #WH 17-2. Aug 09, 2018. Appendix Exhibit B-1.**

### **JURISDICTIONAL DISCUSSION REGARDING 28 U.S.C. §1651, RULE 20.1.**

1). Petitioner appeals directly to the U.S. Supreme Court instead of the Western District of Oklahoma, due to the fact that exceptional circumstances exist,

petitioner is **NOT** attacking the judgment & sentence issued by the state. Instead Petitioner is asserting that the state was void of jurisdiction to mount successive prosecutions, and the state was void ab-initio of authority to re-prosecute Kostich. Who is being unlawfully imprisoned & denied justice required by law. This Courts intervention is necessary to establish uniform application of the law of the land.

2). Considering the fundamental character of this case, appeal is inadequate for extraordinary cases such as this. Substantial question(s) of public importance are involved. Classes of Constitutional foundation, cases such as this, are likely to involve the majority of the people of Oklahoma & the U.S. The OCCA has fallen short of substantial compliance of Due Process, rejecting the values of this court & the laws of Oklahoma legislature as controlling, that cannot be ignored, as a matter of law.

3). Petitioner, shows this Court a *prima fascia case*, with clear, convincing evidence, to review the State Courts unreasonable denial and failure to consider the facts and law presented. The OCCA is consistently eroding, and ignoring the wisdom of Legislative intent, Due Process, Okla. Double Jeopardy, & Equal Protection laws.

4). **FIRST:** The State Prosecution voluntarily abdicated jurisdiction in favor of a Federal Trial, pursuant to *U.S. Attorney Manual §9-2.301(A)*. Determining *that the Federal Courts was the best "single forum" to prosecute the matter resolving both state and federal interest.* (Which the state prosecution withheld from the defense) **SECOND:** Factual basis exist, showing a *void process* absent a "*jurisdictionally required*" Bind-Over Order *22 O.S §258-264*.

5). **THIRD:** Petitioner was held for a Federal jury trial, (*a court of competent jurisdiction*), resulting in two acquittals, & two convictions on the “*four corners square*” of his crime. The Federal Court heard and carefully considered all relevant facts & law, it was petitioner’s first offence at the age of 50, the case did not involve loss of life, or physical injury, and Kostich was least likely to reoffend. The Honorable judge Kern, made a fair and just sentence of 63 Months in Federal Prison, & \$154,000 in restitution, as the Court saw fit. On Federal appeal the 10th Cir. Ruled that “Under Oklahoma law, if convicted, Kostich’s conduct would constitute first-degree arson. OKLA. STAT. tit 21, §1401”. See: Exhibit C-1. Resolving any question that Oklahoma Double Jeopardy law(s) applied in Kostich’s case. However, the state Courts consistently fail to recognize “*fundamental laws*” in collateral attack(s) required by **22 O.S. §1080** et seq. As a result Kostich continues to be unlawfully imprisoned for over NINE (9) years, despite the fact, he had reasonable expectations of finality, after discharging a lawfully executed federal sentence, and the state’s actions triggering Okla. Legislatures ban on double prosecutions.

6). **Furthermore,** Having diligently attempted, to resolve all factual issues, by state created means, of appeal, & post-conviction, being thoroughly & dilligently exhausted. Then Kostich invoked the Beckham County’s jurisdiction to review his valid claims under the State’s *Habeas Corpus 12 O.S. §1331, Okla. Const. Art. II §10* procedure. The Court failed to serve notice to the prosecution, allowing the State prosecution to respond, & petitioner to reply. The Court failed to adequately consider the evidence or questions presented, facts & law raised in the petition. The dismissal

order(s) are consistently void of a finding of fact conclusions of law. The Court dismissed the case denying Kostich Due Process, or the benefit of legislative intent.

7). Pursuant to *OCCA Rule 10.1* Petitioner, timely submitted a *Writ of Error to the OCCA*. This Court also failed, or refused to address the jurisdictional failures involved requiring relief & “*immediate release*” and summarily dismissed the case.

8). All attempts to address jurisdictional failures were, obstructed by boiler plate procedural bars & waivers, not applicable to jurisdictional claims of unlawful, unauthorized imprisonment in Oklahoma Habeas Corpus, from barred successive prosecutions. Where it was the state who chose to voluntarily, knowingly and intelligently, waive jurisdiction in the first instance. Then being aware Due Process, Res judicata, Equal Protection & double jeopardy protections. Sought to institute a successive prosecution, due to dissatisfaction federal trial. The State presented no new facts, or evidence, nor were there laws established in Oklahoma, authorizing subsequent prosecutions. Then the Courts resorted to avoiding exposing the state prosecution’s violations of law by obstructing justice, in an unlawful cover up.

9). It was upon unreasonable compulsion by Kostich’s public defender and promise of leniency. Petitioner with no understanding of Okla. Double Jeopardy law but, without a record of waiver of any Constitutional or Statutory prohibitions, did enter a blind plea that was not, nor could have been knowing, intelligent or voluntary under the King v. State id., guidelines *553 P.2d 529*. However, the court lacked authority having no statutory “jurisdictionally” required Bind-Over order *22 O.S. §264 See: Exhibit B-3*. The list Due Process violations is nothing less than shocking,

but this has become “*business as usual*” in Oklahoma Courts. The Courts should be held accountable and bound to the laws established by legislature.

**III. PETITIONER HAS EXHAUSTED ALL STATE CREATED MEANS OF RELIEF LEAVING NO OTHER FORUM TO PERUSE RELIEF.**

1). Petitioner having exhausted all “*state created*” means of relief. Kostich now turns to this court, with hopes this court will not allow the kind of “judicial tyranny” to continue, that is suffered by many Oklahoma citizens, through unlawful actions of the State Courts, that are so egregious this court should feel compelled to act on which applying to all citizens of similar circumstance, charged with a crime in Okla., or in any other state of the union, subject to the supervision of this court.

**IV. SUBSTANTIAL REASONS AND EXCEPTIONAL CIRCUMSTANCES EXIST THAT THE WRIT WILL BE IN AID OF AND WARRANT THE COURT’S APPELLATE JURISDICTION**

1). *When State Courts are unbridled and unrestrained by the rule of law* established by Federal, State, & legislative Due Process rules, becomes a law unto themselves, acting beyond the law with extreme bias and prejudice to the law. There must be intervention by a higher power to maintain a system of orderly justice.

*“but the power will be exercised only where a question of public importance is involved, or where questions of such a nature that it is peculiarly appropriate that action by the Supreme Court be taken” Ex Parte Republic of Peru La 1943 63 S.Ct 793, 318 U.S. 578 LED 1014 Key 3126.*

2). Now is the time for intervention from a higher power, to compel State Courts to follow and apply the established rule of law as legislature intends. Notably, this review is not just for petitioner to seek relief, but will aid in this courts appellate jurisdiction to be recognized for all Okla., or U. S. criminal defendants.

3). Okla. Courts consistently deny Due Process rights to a vast number of criminal defendant's at an ever expanding pace, leading to the highest rates of imprisonment & overcrowding of a prison population, bursting at the seams. Resulting in unlawful imprisonment of many, who would not be imprisoned if the courts would correctly apply the law.

4). There are a number of instances this court has heard and decided in favor of different Petitioners & against the State of Okla. Such as *Ake v. Okla*, *Harris v, Okla*. Etc. Etc. Considering this case involves a denial of *substantial fundamental rights*. There can be no greater compelling reasons for this court to intervene & issue a Writ of Mandamus requiring the OCCA to compel Beckham County to, re-open Kostich's state Habeas Corpus case numbers *HC-17-901 & WH-17-2*. Serve the opposing party, require the state to respond to petitioner's jurisdictional claims, hold an evidentiary hearing, & take evidence supporting petitioner's claims. (*Which the state courts have consistently & prejudicially failed to do*) Requiring the issue of fact and law resolved according to the rule of law, not a subterfuge of inapplicable bars, waivers, and boilerplate procedures denying petitioners the benefit of the law, such as in the case at hand.

5). Therefore, This Court has original jurisdiction, and In Re Petitioner has standing in accordance with *Article III of the U.S. Constitution, Rule 20.1-2, 28 U.S.C.A. §1651(a)*. This Court also has Supplemental Jurisdiction pursuant to Federal Rules of Evidence *Rules 101-1101, Rules 302& 502, 28 U.S.C. §§1331, 1366-67, 1651-52. Tit. 12 O.S. §1331*. Violations of state law are cognizable where

they result in a denial of Equal Protection, or Due Process of Law *Barklay v. Florida* 413 U.S. 939 (1983).

#### **V. ARGUMENTS IN FAVOR OF PETITIONER**

In order for this court to grant Petitioner's request, Mr. Kostich must show this Court he has a clear legal right to the relief he seeks. See *Chandler U.S.A. Inc., v. Tyree*, 87 P. 3d 598 (Okla. Supreme Court):

- (1) Party seeking has no alternate adequate remedy,
- (2) Possess a clear right to relief sought established by legislature.
- (3) Respondent has duty regarding relief sought,
- (4) Respondent has refused to perform the duties required by law,
- (5) Respondent's duty does not involve discretion.
- (6) Petitioner will continue to be irreparably harmed & injured in failing to provide relief the law requires in such a case as this.

#### **VI. STATEMENT OF THE CASE**

1). Petitioner timely seeks a writ of mandamus from this Court upon the unreasonable "Summary" Denial on 03-07-2018 Case # HC-17-901 of the Oklahoma Court of Criminal Appeals (Hereafter OCCA) Oklahoma Habeas Corpus *Rule 10.1-6* et seq. Petition in Error *Exhibit A-1*. Note none of the following cases cited contain a valid "finding of fact conclusions of law" required under the circumstances. *Nor has any courts alleged petitioner's claims were frivolous or lacked merit, as they have done in a vast number of cases.* The Courts are clearly aware, Kostich has valid claims, requiring relief sought, but have chosen to obstruct justice by turning blinded eyes & covered ears.

2). On 08-09-2017 Case #WH-17-2. Petitioner's *Tit 12 O.S. §1331* et seq. *Okla. Const., Art II §10 Habeas Corpus* Application was unreasonably denied by the Beckham County District Court. *Exhibit B-1*.



3). On 01-27-12 Case # PC-2011-1076. Petitioner's *Tit 22 O.S. §1080 et. seq.* Post-Conviction Relief was unreasonably "Summarily Denied" by the OCCA of the States SIXTH (6th) Charge for the same act of 01-12-2005 in *District Court Case #2007-1480. Exhibit A-3*

4). On 06-18-2010 Case #C-2009-892. "Summary Opinion" Denying Certiorari appeal by the OCCA in Dist. Court Case #2007-1480 Exhibit 4-A.

Note: petitioner insisted that appellate counsel raise *double jeopardy defenses preserved for appeal in the trial court*. Contrary to the law Appellate Counsel was unfamiliar with the applicable law, in a case of first impression, failed to raise jurisdictional arguments, resulting in an unreliable break down of the judicial process beyond Kostich's control. Then the Court consistently applied procedural barrs & waivers due to appellate counsel's incompetents & unreliable results, as if all the 6th & 14th Amend., right to counsel does not exist.

5). On 03-16-2007 Case # 2007-1480. The Third in a series of Information & indictments on now a sixth (6th) charge for the "same act" [barred by Okla., Law] By Chief Prosecutor "Tim Harris" Exhibit B-2. This case tainted by withholding of material evidence, substantial violations of State and Federal law. Resulting in a substantial Miscarriage of Justice, specific details to follow.

6). On 09-22-06 U.S. v. Kostich, Case #197 Fed. Appx. 753, 2006 WL 2709665, 10th Cir. Court of Appeals. Case #05-CR-TCK. Exhibit C-1. Including Notice of release set for 08-08-2009, Exhibit C-2 for the same act charged in both the First & Second State information(s) Exhibit C-4.

7). On 03-22-2005 Case #2005-0514, Exhibit B-4 (First of three Prosecutions that was dismissed *under the discretion of Chief Prosecutor “Tim Harris”* who withheld material information of an “*undisclosed agreement*” pursuant to the U.S. Atty. Manual §9-2.301(A) “That the federal Court was the best single forum, for satisfying both State and Federal interest.” (This is persuasive information of suppressed evidence that undoubtedly would have changed the outcome of the case).

## VII. REASON FOR GRANTING WRIT OF MANDAMUS

1). In Re, Walter Edward Kostich, pro se petitioner, [63-64] year old white male with no former record] seeking judicial discretion of this court with a Writ of Mandamus, exhausting all available state created remedies. Petitioner asserts, the State Court(s) *avoided* addressing the governing Rule(s) of law, of the case. They applied incorrect doctrine(s) of waiver’s & bars, ignoring evidence as well as fundamental issues of law raised. Resulting in violating Kostich’s unauthorized suspension of the State Writ of Habeas Corpus. Which is protected under the *U.S. Constitution Amend., 5th & 14th & Okla., Constitution Art., II §§6, 7, 20.*

2). Violation(s) of substantial rights is of great concern, resulting in Kostich being **held hostage** by the state court’s invalid/void judgment, wilful intent to circumvent of the law & deprive citizens of Due Process & Equal Protection.

3). Petitioner is reliant on *In Re M.B. 145 P.3D 1040, 1044* (Ok. 2006).

**“The Question of Jurisdiction is primary and fundamental in every case and cannot be conferred by consent of the parties. Waived by the parties or overlooked by the Court.”**

Petitioner has alleged facts that can be proven & would entitle him to an Evidentiary Hearing *Townsend v. Sain* 372 U.S. 293,312 (1963). The Denial(s) of the Okla., Courts have been made without petitioner's benefit of a factual findings, of the law of the case or Evidentiary Hearing findings. *Bryan v. Mullin* 335 F.3d 1207, 1215 (10th Cir. 2003). This case displays the rankest unfairness & indeed denigration of the rule of law *Mc. Mann v. Richardson* 397 U.S. 759, 786 (1940).

4). There was no reasonable basis to deny relief against the clear weight of the law & evidence presented entitling petitioner to relief sought. State law(s) procedural principles to the contrary *Harrington, 131 S. Ct. 770,784-85* (2011).

“A State law may create a liberty interest that cannot be denied without offending Due Process principles.” *D.M.H v. State* 136 P.3d 1054, 1056, 2006 OK CR. 22 ¶8 [1-2] *Clemmons v. Mississippi* 494 U.S. 738,746-47 (1990), *Ross v. Okla.* 487 U.S. 81, 91 (1988), *Hicks v. Okla.* 477 U.S. 343-46 (1980).Okla. Constitution can afford greater rights granted by the U.S. Constitution *Board of Commissioners of Muskogee v. Lowery* 136 P.3d 639, 2006 (Okla. 31).

*Hicks v State* 100 S. Ct. 2227, 2229 (1980)”.and that liberty interest is one that the 14th. Amendment preserves against arbitrary deprivation by the State.” See *Vitek v. Jones* 445 U.S. 480,488-89, 100 S. Ct. 1254 (1980). Citing *Wolf v. McDonnell* 418 U.S. 534. S. Ct. 2963 (1974). Such an arbitrary disregard of the petitioner's right to liberty is a denial of due process of law.

### VIII. JURISDICTIONAL FAILURES GROUND ONE

Contrary to Oklahoma Law. There was no jurisdictionally required  
Written and Signed Bind-Over Order  
22 O.S. §§258(6th) through 268, 12 O.S. §696 et. seq.

### STANDARD OF REVIEW.

*Town of Watonga v. Crane Co* 189 Okl., 184, 114 P.2d 941 (1940) see also *Exparte Story* 203 P.2d 474,475 88 Okl. Crim. 356 ¶5 [1-2] *Habeas Corpus* is available predicated upon certain Constitutional and Statutory rights. *The Trial Court does not obtain jurisdiction until after*

preliminary examination when the Magistrate enters his commitment order *State. v. Nelson* 356 P.3d 1113, 2015 OK.CR. 10 ¶11 [1-3]. Our review of the Magistrate decision is based on an abuse of discretion standard. *State v. Delso* 3013 OK.CR. 5, 289 P.3d 1192, 1194. See also *Calghorn v. Brown* 505 P.2d 998, 1001 1973 OK. CR. 21.

**“There is only one sovereign power in Oklahoma. That power exist in State Government through the State Legislature.”** In Re [..] City of Ada 352 P.3d 1196, 2015 Okla. 18 (3-9) ¶5 *States Key 360*. {However, the Okla. Courts consider themselves the sovereign power ignoring legislative intent when it does not satisfy their motives.}

“It is a fundamental principle in statutory construction that we must ascertain and give effect to the intent of Legislature.” *State v. Iven* 335 P.3d 264, 2014 OK.CR. 8

“Jurisdictional requisites are not present and invalid for want of jurisdiction.” *Inverarity v. Zumualt* 279 P.2d 372,377 Ok.Cr. 1955.

1). This case is truly a “special case” where interest of justice & Due Process are genuinely implicated *Murry v. ‘Carrier* 477 U.S. 478, 95, (1986). The OCCA’s denial is contrary to this court as stated in;

*U.S. v. Cotton* 535 U.S. 625, (2002) “defects in Subject-Matter Jurisdiction because it involves a courts power to hear a case, can never be forfeited or waived. Consequently defects in Subject-Matter Jurisdiction require correction regardless of whether the error was raised in district court See; *Louisville and Nashville R Co. v. Mottley* 211 U.S. 149, 29 S. CT. 42 (1908).

2). There was no statutory required “signed” Bind-Over order, *Okla., law(s)* 22 O.S. §§258(6th) through 268, and 12 O.S. §696.3. Rendering the state’s case a “sham legal process” *Olsen v. Continental Res. Inc.* 109 P.3d 351 Okla Civ. App Div. 3 2004. This comes from high and abundant authority, clearly established by Okla., Legislature, Okla. Supreme Court & the OCCA. Yet, these laws have

unreasonably gone ignored, creating a substantial Miscarriage of Justice. There was no de-novo standard of review, as law and justice require. Therefore this matter remains unresolved and now requires a Plain Error review *Johnson v. U.S. 520 U.S. 46,66-67 117 S.Ct. 1544* (1997).

*21 O.S. Stat Ann §701.7 Sub. B Tit. 22* Governing pre-trial procedure provisions of *§401-413 of Tit. 22* to be jurisdictional, general provisions of Ch. 4 of Tit 22 where subscription endorsing and verification of the information are required. Otherwise a properly endorsed information is filed in addition See. provisions of *Tit 22* provide the procedure in Oklahoma which must be utilized to initiate criminal charges in the District Court *State v. Berry 799 P.2d 131-33*, Deviation from this legal rule is error *Olano 507 U.S. 732-33 (1993)*, *Coleman v. Thompson 501 U.S. 722, 750(1991)* *Murry v. Carrier 427 U.S. 478,85 (1986)*. That failure to review the claims have and will result in a Fundamental Miscarriage of Justice *Williams v. Taylor 529 U.S. 420, 437 (2000)*.

3). Petitioner being unskilled in the science of law, not schooled in the matter of “Bind-Over Orders” while enduring a second gauntlet of prosecution, in Tulsa County. It was not until after Kostich was transferred to Granite reformatory, then had access to a law library, did he learn of the jurisdictional failures and implications of a non-existent “Bind-Over order” required by *22 O.S. §§ 258 through 264*.

4). Kostich obtained a statement from the Tulsa County Court Clerk. See: *Exhibits B-I). 6-11-2011. Case #2007-1480. Affirming “There is no official written Bind-Over Order filed in your case”*. See also *Exhibits B-II)*. “Blank Unsigned Bind-Over order.” that was an un-official minute entry by the court clerk.

### **FACTS AND LAWS NOT SUBJECT TO DISPUTE**

***Abundant authorities the OCCA and Districts Courts have Failed to consider, or apply in this case requiring a de-novo review.***

*The OCCA's dismissal is contrary to the law of the case.*

**22 O.S. §48.** “The undertaking must be transmitted by the Magistrate to the next District Court of the County *State v. Day 1994 OK. CR. 67, 882 P.2d 1096.* “However this Court is bound to construe this statute strictly against the State and liberally in favor of the accused” *Hisel. State 1997 OK. CR. 356, 264 P.2d 375.*

**22 O.S. §258(6th)** “... Once a showing of probable cause is made the *magistrate shall* terminate the preliminary hearing and *enter a bind-over order*; provided however, that the preliminary hearing shall be terminated *only if the state made available for inspection law enforcement reports within the prosecution attorney's knowledge...*” (Emphasis added.) [many facts of law have been withheld]

**22 O.S. §264.** “... the magistrate *must in like manner endorse on the complaint an order signed by him* to the following effect:” (Emphasis added.)

**22 O.S. §443** “The information must be set aside by the court in which the defendant is arraigned and upon his own motion in any of the following cases. 1). “When it is not found endorsed, presented or filed as prescribed by the statutes.”

The OCCA stated in *Lafortune v. District Court, Tulsa County 1998 OK. CR. 65, 972 P.2d 868* “Contrary to the States assertions. All criminal cases must proceed under and through **22 O.S. Supp. 1997 §258(6th)** before the can proceed under & through **22 O.S. §259.**”

*Petuskey v. Freeman 1995 OK. 9, 890 P.2d 948 ¶10.* “The administrate order being inconstant with this legislatively expressed intent accordingly must fail” Id. Then Statutes operate retrospectively *Welch v. Armer 776 P.2d 847, 50* (Ok 89).

“An Error in State law could be sufficiently egregious to a denial of Equal Protection or Due Process of law” *Barkley v. Florida 463 U.S. 939, 52-58* (1938). “A state law may create a liberty interest protected by the U.S. Constitution. A State law must satisfy two requirements. 1). In order to create a liberty, interest first the law must set fourth substantive predicates to govern official decision making , mandatory language”. *Kentucky DOC v. Thompson 490 U.S. 454, 62-63* (1989)

5). The OCCA has also ruled in, *Morgan v. State* 675 P.2d 677, 1981 OK. CR. 242 [1-2] “Should the reviewing District Judge [...] decide that a Magistrate ruling is erroneous *Rule 6.5* requires that the judge shall remand the cause to the Magistrate to enter the proper order.” However, here the law(s) are rarely applied!

*Aven v. Reeh* 878 P.2d 1069, 1070, 1994 OK. 67 [3]..” an appealable order must contain the signature of a judge, we additionally note that pursuant to 12 O.S. §696. A minute entry draft by a court clerk is not an order or judgment appearing of record [...] [4] The filing of a judgment or final order in the form as prescribed by statute begins time to appeal 12 O.S. Supp. 2003, §§ 696..2(c) 696.3, 990A. Such a final instrument is a jurisdictional predicate to an appeal,” 12 O.S. Supp. 1993 §696.2.

7). There exist and abundance of cumulative plain error, {which has never been addressed by the courts} regarding the absence of the required bind-over order affecting all jurisdictional aspects of the case at bar. The OCCA had no jurisdiction, except to remand the case back to the Beckham County District Court for proper application of the governing rule of law, & they failed to do so.

A). **Contrary to Legislative intent.** The undisputed evidence of an unsigned “*Bind-Over Order*” shows that. The Magistrate “*abused his discretion*” and failed to issue a proper “*Bind-Over Order*” which is a Due Process jurisdictional mandate *Exhibits B-I and B-II*).

B). Tulsa County District Court was in Plain Error having failed to determine whether the Magistrates ruling at preliminary, was erroneous or nonexistent. Nor did the District Court follow the state court *Rule 6.5 (A)*. First; the law 22 O.S. §§258(6th) & 264, 12 O.S. §696 et. seq. Set fourth substantive legislative predicates

governing official decision making policy. **Second**; the statutes contain mandatory language set forth in *Kentucky DOC Supra*. *This is of course if the prosecution was not procedurally barred by Oklahoma double jeopardy laws in the first instance.*

C). In an analysis of *12 O.S. §696 et. seq.* Because there was no written signed Bind-Over order, conveying jurisdiction from the Magistrate Court to the Tulsa County District Courts. Tulsa District Judges and the OCCA abdicated their jurisdictional responsibility. Constituting a monumental breach of judicial responsibility.

8). Petitioners right to relief is *clear and undisputable*. A clear showing has been made showing that relief is required & appropriate. Petitioner moves the court for application of remedial state precedent, under the Pendent Jurisdiction *Rules 101-1101, Rules 302& 502, 28 U.S.C. §§1331, 1366-67, 1651-52. Tit. 12 O.S. §1331*. So a proper resolution of the claims may be made as law and justice require.

#### **IX). JURISDICTIONAL FAILURES - GROUND TWO**

**Standard of review.** “Judgment rendered by a Court lacking jurisdiction are void. *U.S. v. Bigford 365 F. 3d 857* (10th Cir. 2014). The State is not allowed to pyramid upon a sentence already convicted punished & enhanced, would violate the established rule of construction that ambiguity concerning the “ambit or criminal statutes should be resolved in favor of lenity. *U.S. v. Bass 404 U.S. 363, 347* (1971). Extraordinary manifest injustice exist, requiring immediate intervention. This case is tainted by substantial Constitutional error resulting in a Fundamental Miscarriage of Justice a review of the merits of /constitutional claims is justified 513 U.S. 17, 115 S. Ct. 851 Petitioner asserts a valid cause that the state courts denials are tainted and cannot fairly be attributed to him. *Coleman v. Thompson 115 S. Ct 2546* (1991) *Murry v. Carrier 477 U.S. 478* (1981).



The OCCA stated it best in: *Wiley v. State* 349 P.2d 30, 36 1960 OK. CR. 4

“To hold otherwise in the case at bar would create a condition where a public offense would create a badge for fraud and create an instrument of chancery for praying on trusted citizens” [and now the OCCA has become the very thing it once forbade]

1). Petitioner asserts there exist undisputable PLAIN ERROR of the courts.

a). The state prosecution suppressed jurisdictional evidence.

b). The evidence was favorable to the accused. 2). The evidence was material to the defense. *Snow v. Simmons* 347 F.3d 693,711 (10th Cir. 2002). And affected the fairness integrity or public reputation of the judicial proceedings *Johnson v. U.S.* 520 U.S. 461, 467 (1997) See also: *Hogan v. State* 2006 OK. CR. 10 ¶38, 139 P. 3d 907,923. The Due Process clause provides a mechanism for relief *Payne v. Tennessee* 501 U.S. 808, 825 (1991). In this case a state Habeas Corpus.

2). Intervention by this Court is necessary in the national interest of, Due Process and Jurisdictional predicates involved. The content herein applies to all others similarly situated. This Court’s decision could help create a uniform compliance with the governing rule of established legislative intent. Resolving any doubts to fundamental questions of law and reducing the courts workloads overworking the judicial system.

**COMPELLING FACTS AND LAW NOT SUBJECT TO REASONABLE DISPUTE. PROVING THE TULSA COUNTY DISTRICT COURT WAS VOID OF JURISDICTION TO CONDUCT A SUCCESSIVE PROSECUTION**

1). “A petitioner in custody pursuant to a {not just voidable} but void judgment issued by an incompetent court, that lacked jurisdiction over him is entitled to the issuance of an unconditional writ:” *Solem v. Bartlett* 465 U.S. 463,466 (1984). 12

*O.S. §1331* Inquiry is limited to whether the court had jurisdiction & authority to pronounce judgment & sentence rendered: *Ex parte Johnson 97 OKL. CR. 374, 264 P.2d 367, 375* (1954).

It is clear & obvious that both the Beckham County District court See: *Exhibit B-1*. Then the OCCA See: *Exhibit A-1* abdicated their judicial responsibility by failing to issue a finding of fact, conclusions of law as to why, Kostich's Habeas should not be granted. This leaves material matters of Jurisdiction fact & law open for a Plain Error Review that remains unresolved.

2). 12 O.S. §1331 Application made to District Court must be filed in Court of the county which petitioner is confined. *In re Gable 73 OKL. CR. 155, 118 P.2d 1035* (1941). Petitioner objected to the fact that the Beckham county court stated that: *"This matter should have been resolved in Tulsa County"* Which is contrary to the law of the case. In the Writ of error to the OCCA petitioner requested a remand to Beckham county with instructions to hold an Evidentiary Hearing pursuant to *12 O.S. §1341*. The Court(s) have consistently failed to administer these laws. The result is obstruction of justice & continued imprisonment of Kostich who is subject to immediate unconditional release. Resulting in an ongoing Miscarriage of Justice under both State & Federal Due Process of law See: *20 O.S. §3001.1*.

3). The *U.S. Attorney Manual §9-2.031* provides persuasive evidence that the U.S. and State prosecutors are required to have a meeting of the minds to determine the best "single forum" to proceed after filing of federal charges case #05-CE-13-TCK. It is evident there was a behind closed doors" meeting of the minds &

agreement that the states interest was best served in the Federal Courts when the state dismissed its original charge, without reservation, of future proceedings.

“...whenever a matter involves overlapping Federal & State jurisdiction. Federal prosecutors should, as soon as possible, consult with their state counterparts to determine the most appropriate single forum in which to proceed to satisfy the substantial federal & state interest involved, & if possible to resolve all criminal liability for the acts in question.” *U.S. Atty. Manual §9-2.031*

4). However, the above information was suppressed by both federal and state prosecutions which is contrary to *Brady v. Marilyn 373 U.S. 83* (1963).

**THIS SUCCESSIVE PROSECUTION WAS JURISDICTIONALLY BARRED PURSUANT TO LEGISLATIVE INTENT. CHIEF PROSECUTOR TIM HARRIS WAS THE FIRST AND ONLY PROSECUTOR OUT OF 77 OKLAHOMA COUNTIES TO PERUSE SUCH A DOUBLE PROSECUTION.**

1). Considering that the State Prosecution was jurisdictionally barred pursuant to *21 O.S. §11, 22 O.S. §§14.130.522* where the OCCA “*sua sponte*” raised constitutional & statutory proscriptions in the “stare dicisis” case of *Cobb v. Mills 163 P.2d 558* (OCCA 1945) [of almost indistinguishable situations.]

**STANDARD OF REVIEW** See: *Pate v. Dist. Court of Oklahoma City 414 P.2d 568, 1966 OK. CR. 60* The Statutes barring prosecution for crimes are considered as being fundamental to our society and criminal law. Rendering this successive prosecution is a legal nullity *Robertson 888 P.2d 1023, 1995 OK.CR. 60* This brings a bright line rule of certainty that was not carried out to the letter of the law citing *CF Miller v. Fenton 474 U.S. 104* (1985) See also *William v. Taylor 120 S. Ct. 1495* (2000).

2). In *Rogers v. State 285 P.3d 285 P.3d 715 2012 OK Civ. Div. 12 ¶12* (5) “The OCCA has on many occasions spelled out what constitutes jeopardy & what consequences flow from finding of jeopardy. the general rule is that the prisoner has been put in jeopardy when he has been but on trial before a court of competent jurisdiction upon and indictment or information sufficient to try the case & the jury was

discharged without sufficient cause & without defendants consent & such discharge of the jury although improper results in an acquittal of the defendant” *Pickens v. State* 393 P.2d 881, 91, 92 ¶.

Under Oklahoma law *12 O.S. §§91 &102*. Statutory Bar is absolute. *That is not subject to judicial discretion, but the law of the land in Okla.*

### FACTS NOT SUBJECT TO REASONABLE DISPUTE

a). The after states first acquired subject matter jurisdiction See: *Exhibit B-4*. the case was dismissed, by an undisclosed agreement that the federal court would be *“the best single forum satisfying both the federal and states substantial interest.”*

b). The federal court was a court of competent jurisdiction.

c). A federal trial resulted in two counts of acquittal and two counts of guilty. See *Exhibit C-1* where [after Kostich had been punished by the 4 corners squire of his criminal act], the 10th circuit ruled that Under Oklahoma law .. Kostich-s conduct would constitute first-degree arson *OKLA STAT tit 21, §1401*.

d). The finality of the Federal Trial was the triggering mechanism involving Okla. Double Jeopardy laws *21 O.S. §11, 22 O.S. §§14, 130, 522. Oklahoma Constitution Art II §21*. These Statutory bars are absolute. Kostich had a reasonable expectation of finality, for over two years after the State dismissed its case. This is so regardless of the judge’s contempt for the law.

e). Never before in Oklahoma history has the state I. Voluntarily divested its self of subject matter jurisdiction by dismissing the original charge. II. The Tulsa County “Elected” Chief Prosecutor held a dual office, in violation of. *Okla. Const. Art II §12 & 19 O.S. §215.8* and SAUSA in the federal court while working with

Kostich's Federal Prosecutor [angry with the outcome of his prosecution.] **III**). presumably the federal prosecutor turned to Harris for a "BEHIND CLOSED DOORS FAVOR". **IV**). Then the State court pressed for a second and successive prosecution for, for the same criminal act with no new evidence or facts. After Equal Protection, Res judicata, Due Process & legislative barrs had been triggered. Which cannot be resurrected from the dead by the will of the prosecution.

f). Petitioner invoked the Post-Conviction procedures act **22 O.S. §1080** which was designed specifically for cases of the prosecutors jurisdictional violations and violations of secured fundamental rights.

g). The OCCA has become "shockingly bias and indifferent" to the laws petitioner cited. Without a plain error review. Failing to consider Okla.'s double jeopardy laws. Due Process of the law. Stated that Jurisdictional issued ware barred and waived (Contrary to the law of the case). *See Exhibit A-3*. Affirmed the Post-Conviction dismissal.

h). Kostich then sought his last avenue of relief in the state and invoked the Oklahoma Habeas Corpus. Kostich believing that the OCCA would at long last consider and rule on the law Kostich cited in his brief. However, Once again the OCCA failed to consider the law. Offered no reasoning why Kostich was not entitled to "*relief the law required,*" other than his previous causes of action had been dismissed. While at the same the Kostich's District Court Judge who failed to originally apply Okla. Double Jeopardy laws, now worked for the OCCA. Kostich presumes although Judge Kuehn did recuse herself, she certainly had motive,

opportunity and access to the appellate judges to persuade them to dismiss Kostich's Habeas Corpus. That would expose Judge Kuehn's bias motivations.

### **BRIEF RECAP**

1). The Oklahoma Courts have developed, little if any respect for the laws formed to safeguard petitioner's fundamentally secured rights. This is demeaning to public expectation of confidence in the integrity and impartiality of the judiciary. The Courts are not faithful to maintain professional competence with reckless deliberate indifference regarding the established rule of law.

2). Further The Court(s) conscientiously, arbitrarily, capriciously, deliberately, intentionally, & knowingly: Engage in conduct in violation of their duty as judges, engage in actions violating the supreme law of the land & the law(s) of Oklahoma, conspire to promote fraud upon the court under color of law, exceed their lawful authority in imprisoning people regardless vested immunities, engage in actions to interfere with the legal duty imposed on the litigant to address the OCCA with respect to the right to be heard.

3). Engage in actions of cover up of the prosecutions unlawful acts. Commit fraud upon the people of the State of Oklahoma, aid & abetted one another in criminal activity. As well as suppressed material evidence and law(s) beneficial to an accused. Here as in many cases there was no statutory subject matter jurisdiction ever conferred upon the trial court, rendering the courts power to convict void ab-initio to imprison this petitioner to prison in a case which was barred for consideration from its inception. The time has come that something must be done.

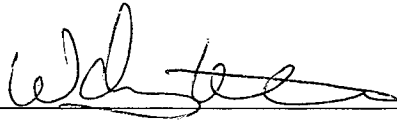
4). The Okla. Courts know & have the duty to know that a void judgment of a court lacking subject matter jurisdiction remains void even if they fail to address the applicable

issues of law. Petitioner has a reasonable expectation a void judgment is not affirmed nor validated by the courts failure to properly exercise their required judicial duty and the wisdom of legislature.

**CONCLUSION & PRYOR FOR RELIEF**

***Pryor for Relief.*** The State of Oklahoma's judicial process is badly broken infecting integrity, judicial reputation of the Court System, undermining the public trust & interest, requiring immediate intervention by this court for a de-novo consideration of petitioner's claims. Or any other relief this court deems that justice requires

**Respectfully submitted.**



---

**Walter Edward, Kostich 595066 DN-127  
North Fork Correctional Center  
1605 E Main, Sayre, Oklahoma 73662**