No. 24-6954

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

John Stephen Routt — PETITIONER
(Your Name)

vs.

Micheal Miller — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for The Tenth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

John Routt #200765
(Your Name)

6888 East 133rd Road
(Address)

Holdenville, Oklahoma 74848-9033
(City, State, Zip Code)

none
(Phone Number)

QUESTION(S) PRESENTED

(1) Did the Court of appeals err in denying a certificate of appealability by merging Title 28 U.S.C. §§ 2254 (d)(1) and (2) with 28 U.S.C. § 2253 (c) and by ruling on the merits of the claims without Jurisdiction at this stage and does the Pro Se form used by the Court of appeals encourage a ruling on the merits by combing a request for a certificate of appealability and opening brief?

(2) Did the district Court abuse its discretion in denying an evidentiary hearing and not holding a hearing when a Petitioner raises actual innocence and the state Courts do not hold a hearing to review and hear the evidence to prove innocence?

LIST OF PARTIES

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

RELATED CASES

There are no related cases.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished

The opinion of the United States District Court appears at Appendix B to the petition and is unpublished

JURISDICTION

The date on which the United States Court of Appeals decided my case was October 15, 2024.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: December 16, 2024, and a copy of the order denying rehearing appears at Appendix C.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Amendments

Sixth amendment, U.S. Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and Public trial, by an impartial jury of the state and district wherein the crime Shall have been committed which district shall have been previously ascertained By law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment, U.S. Constitution

All person born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or Immunities of citizens of the United States; Nor shall any shall deprive any Person of life, liberty, or property without due process of law; Nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions

28 U.S.C. §2253(c)(2)

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

28 U.S.C. § 2254 (d)(1)&(2)

(d) An application for a writ of Habeas Corpus on behalf of a person custody pursuant to the judgement of a state court shall not be granted with respect to any claim that was adjudicated on the merits in the 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;
(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 proceedings.

28 U.S.C. §2254(E)(2)

If the applicant has failed to developed the factual basis of a claim in a state court proceeding, the court shall not hold a evidentiary hearing on the claim unless the applicant shows that—
(A) the claim relies on—
(i) a new rule of constitutional law, made retroactive to cases on collateral review

By the Supreme Court, that was previously unavailable; or
(ii) a factual predicate that could that could not have been previously discovered through the exercise of due diligence; and
(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have the applicant guilty of the underlying offense.

21 Okla. St. Ann, 1999 §11

If there be in any other provisio0ns of the law of this state a provisions making specific act or omission criminal and providing the punishment therefore, and there be any in this title any provision or section making the same act or omission a criminal offense or prescribing the punishment thereof, shall be governed by the special provisions made in relation thereof, and not by the provisions of this title. But an act or omission which is made punishable in different ways by different provisions of this title may be punished under any such provisions, except cases in section 7 of this act or section 54 of this title, the punishment therein are substituted for those prescribed for a first offense, but in no case can a criminal act or omission be punished under more than one section of law, and an acquittal or conviction and sentence under one section of law bars the prosecution for the same act or omission under any other section of law.

63 Okla. St. Ann., 2012, §2-402(b)(1)

(b)Any person who violates this section with respect to:
(1) Any schedule I or II substance, except marihuana or a substance included in section D of section 2-206 of this title, is guilty of a felony punishable by imprisonment for not less than two (2) years nor more than ten (10) years and by a fine not exceeding five thousand dollars ($5,000.00). A second or subsequent violation of this section with respect to schedule I or II substance, except marihuana or a substance included in subsection D of section 2-206 of this title, is guilty of a felony punishable by imprisonment for not less than four (4) years nor more than twenty (20) years and by a fine not exceeding ten thousand dollars (10,000.00).

STATEMENT OF THE CASE

The Petitioner was charged by amended information in the Tulsa County District Court (TCDC), case No.: CF-2016-4467, with Count 1: Kidnapping; Count 2: Burglary in the First Degree, Count 3: Assault with a Dangerous With weapon, Count 4: Threatening an Act of Violence (misdemeanor), and Count 5: Unlawful Possession of a Controlled Drug (methamphetamine). A supplemental information was filed alleging ten prior convictions. Preliminary Hearing was held on October 16, 2016, before the Honorable judge Jefferson D.

Sellers, District Judge. After hearing evidence, the defense demurrer was overruled and the State's request to amend Count 1 to reflect a different victim was granted. Jury trial was held on October 9-11, 2017, before the Honorable Judge Doug Drummond, District Judge. The Petitioner was tried in a single stage proceeding. After conclusion of the evidence, the jury found Petitioner guilty on Counts 2, 4, 5, and not guilty on Counts 1 and 3. The jury assessed sentences of forty (40) years on Counts 2 and 5, and six (6) months in the county jail on Count 4. Formal sentencing was held on October 23, 2017, and Petitioner was sentenced in accordance with the jury's verdict with count 2 and 4 to be served concurrently to each other and count 4 to be served consecutively. The Petitioner filed a direct appeal to the Oklahoma Court of Criminal Appeals (OCCA), case no: F-2017-1126, unpublished. The Petitioner was represented by Counsel who raised: (1) search of Petitioner's backpack was unconstitutional, (2) The evidence at trial was insufficient to establish every element of count 5, Possession of a controlled substance, (3) Petitioner's 14th amendment rights were violated by the trial court in failing to adequately instruct the jury [on count 5], Plain error occurred through cross examination, improperly elicited information regarding probation and parole, (4) Improper prosecutorial argument violated Petitioner's Due Process rights to a fair jury under the 6th and 14th amendments U.S. Constitution, (a) The State impermissibly vouched for the credibility of its witnesses, (b) The State's argument cast asperasions on the defense, and (c) The State misstated the evidence. The Petitioner was denied the right to effective assistance of counsel: (a) Counsel was deficient for failing to file a motion to suppress, (b) Counsel was ineffective for failing to object to the improper and incomplete jury instruction, and (c) Counsel was ineffective for failing to object to the instances of prosecutorial misconduct. The Petitioner, through appellant counsel, filed a Pro Se supplement brief raising: (1) Information from testimony was left out, (2) Trial counsel failed

to instruct the jury on consent, (3) Trial counsel was ineffective: (a) Counsel never impeached Anthony Lewis, (b) Counsel failed to call an exculpatory witness, (c) counsel failed to properly investigate the case, (d) Counsel failed to object to the enhancement of petitioner's sentence and jury instruction therein, (3) The Petitioner's sentence for count 5, Possession of a Controlled drug is illegal and allows for arbitrary deprivation of liberty (4) The prosecution failed to meet all the elements for Burglary in the first degree, denying the Petitioner Due Process, and (5) The petitioner is actually innocent of Count 2 and 4. On December 28, 2018, the OCCA affirmed the conviction in a summary opinion.

On April 1, 2019, the Petitioner filed an application for post- conviction relief in the TCDC, Case No: CF-2016- 4467, raising: (1) The Petitioner is actually innocent and was convicted on false evidence/perjured testimony resulting in a miscarriage of justice, (2) The Petitioner was denied the right to effective assistance of counsel: (a) Trial counsel denied the Petitioner the right to due process and a fair trial by not calling witnesses and presenting evidence on his behalf, (b) Counsel failed to investigate the case before trial, (c) Counsel failed to advocate the Petitioner's cause and meet the case of the prosecution, (d) Counsel conceded knowledgement of the methamphetamine without the Petitioner consent, (3)The information was insufficient to notify the Petitioner of what to defend against, (4) There was an illegal variance and/or constructive amendment, (5) State's reliance on the kidnapping and assault with a dangerous weapon to prove the intent element of the first degree burglary violates double jeopardy and/or is barred by collateral estoppel, (6) There was no waiver of the right to present witnesses, (7) The cumulative errors deprived the Petitioner of a fair proceeding and reliable outcome, (8) The Petitioner was denied the right to have the jury to determine the application of the law, (9) The Petitioner was denied the right to effective assistance of appellant counsel, (10)

The Petitioner was denied a fair appellant review of his claims in violation of due process and equal protection. The TCDC dismisses the application, order signed on June 3, 2019, order filed June 7, 2019. The Petitioner appealed the dismissal to the OCCA.

On April 8, 2020, the Petitioner filed a Writ of Habeas Corpus in the Comanche Court District Court, Case no: WH-2020-1, issues raised (1) The Petitioner was denied his right to have a jury render a verdict in his trial and of substantive and procedural due process to have a proper reasonable doubt instruction. It was dismissed for raising a trial error.

On August 12, 2020, The Petitioner appealed the Writ of Habeas Corpus

the OCCA which denied a Writ of Habeas Corpus.

REASONS FOR GRANTING THE WRIT

QUESTION 1

This Petition is brought by a Pro Se litigant concerning the dismissal of a first Writ of Habeas Corpus by the lower Federal Courts. The Court of Appeals (10th Cir.) has and is using a standard at the Certificate of appealability (COA) stage that directly conflicts with the standard this Honorable Court set out in **Miller-El v. Cockrel, 537 U.S. 322 (2002)** and the limits set by Congress in **28 U.S.C. §2253(c)**. The use of such a standard has been rejected in a line of cases from this Honorable Court arising out of the Fifth circuit. **See Buck v. Davis, 580 U.S. 1001 (2017)** (Reiterating the procedure set in Mill-El v. Cockrell, 537 U.S. 322 (2002)); **Tennard v. Dretke, 542 U.S. 274 (2004); Banks v. Dretke, 540 U.S. 668 (2004)**; **Miller – El v. Cockrell, 537 U.S. 322 (2002)**. In denying a COA, the 10th Cir. recited the proper standard for deciding a COA, but then rules on the merits of the claims and intertwined the "demanding standard for habeas relief" with Title **28 U.S.C. §2253(c)**. **See Appendix (App.) A at 4-5**. In addressing the

merits of the ineffective assistance of counsel claims (grounds 2 & 11), the 10th Cir. cited the standard for ineffective assistance of counsel and required the Petitioner to prove the standard for habeas relief, the "doubly deferential judicial review "for habeas Petitioner's. **Id at 5**. The Court goes on and stated: "For substantially the reasons it discussed, Mr. Routt has not shown the OCCA's decision were so beyond the realm of reasonableness that they could be considered contrary to or an unreasonable application of **Strickland**". **App. A at 6,7**. The 10th Cir. reviewed the rulings of the State Court to make a ruling on the merits and then based its denial of a COA on that ruling. **App. A at 6.** The 10th Cir. should have only reviewed the Federal District Court's ruling, then determine if jurists of reason could disagree with the District Court's resolution of the Constitutional claims or that the issues deserve encouragement to proceed further. **Miller-El, 537 U.S. at 327**. The 10th Cir. did the same merits review before denying a COA on all the claims denied on the merits. **See App. A at 7-8 (ground 3), 8-9 (ground 4), 9-10 (grounds 5 & 6), & 10 (ground 12)**. The Court jumped straight from rejection of petitioner's claim on the merits to a rejection of Petitioner's request for a COA, a leap that leaves no doubt the Court failed to give any attention to the threshold inquiry required. **Miller – El, 537 U.S. at 342** (Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of the COA). **Miller–El** clearly stated that use of such a standard is outside the scope of this Honorable Courts precedents and the COA standard provided in **Title 28 U.S.C. §2253(c)**. The truncated merits adjudication performed at the COA stage means that Petitioners often have potentially meritorious claims rejected without full consideration of the claims by the Federal Courts. By treating the COA stage as a quasi – merits stage, it effectively gives various petitioner's varying degrees of process and adjudication. **See e.g., Lonchar v. Thomas, 517 U.S. 314, 323-24;116 S.Ct.1293 (1996)** ("And it is why this Court, in **McCleskey**, also reaffirmed the

importance, 'in order to preclude individualized enforcement of the Constitution in different parts of the Nation' of laying down as specifically as the nature of the problem permits the standards or directions that should govern the District Judges in the disposition of applications for habeas corpus by prisoners under sentence of State Courts."). Such an amorphous inquiry makes it nearly impossible to determine what kind of showing the Petitioner must make. This defies good judicial practice, as courts should follow the rules propagated by the legislature and this Honorable Court in order to ensure Due Process for all Petitioner's. More important, is that this practice leads to glaring injustices. "And the argument against ad hoc departure from settled rules would seem particularly strong when dismissal of a first habeas petition is at issue. "Dismissal of a first habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the great Writ entirely, risking injury to an important interest in human liberty." **Lonchar, 517 U.S, at 324**. Although used as a gateway for any alleged procedural bar, this case shows the Petitioner is actually innocent and the Petitioner raised this claim with new evidence not presented to the jury, in which this new evidence was not given any weight or sufficiency, nor was any of the other evidence presented by petitioner. This is too demanding of a standard used by the 10th Cir.. The 10th Cir. was incorrect to resolve the merits of the claims before issuance of a COA, the Court had no jurisdiction to resolve the merits of the Constitutional claims presented at this stage. **Miller – El, 537 U.S. at 341-42.** The Pro Se forms provided to Pro Se Petitioner's by and used by the 10th Cir. is a combined form for a request for a COA and an Opening Brief. Use of such form enables and encourages such a standard to be used and is confusing as to what standard to argue and meet by a Pro Se Petitioner. This is clearly shown by the 10th Cir.'s order, "Before this court, Mr. Routt attacks the sufficiency of the jury instruction rather than challenging the district court's reasoning". **See App. A at 8-9**.

The Petitioner did not know when or where to provide an argument on the merits or an argument for a COA. As the form sets out instructions and guidance in which a combined opening brief and Request for COA is to be filed. Guidance is needed to be provided to the Tenth Circuit and all other Circuit Courts using this standard so that the correct standard, analysis and procedure will be used and a form for Pro Se Petitioners is used that does not contain the requirement of a combined opening brief and a request for a COA. The Petitioner has found that at least to other circuits conducts a merits review then denies a COA. See **Williams v. Administrator, New Jersey State Prison, 2023 WL3839952 (3d Cir. March 7, 2023) (unpublished)**, (For substantially the reasons set forth in that opinion, which cogently explains why these claims lack merits, Appellant cannot make the showing required by **Miller-El**, Accordingly, Appellant's COA application is denied); **Clifton-Short v. Administrator, New Jersey State Prison, 2022 WL18684948 (3d Cir. Oct. 28. 2022)** (unpublished) (The court did the same thing, a merits review, before denying the COA); **Webster v. Horton, 795 Fed. Appx. 322, 326 (6th Cir. 2019)**(unpublished) (...Webster has failed to show that actual prejudice resulted from the error, particularly in light of the overwhelming evidence of his guilt, as described below. As a result, reasonable jurists would not debate the district court's resolution of his claim based on its rationale that any error was harmless).[1] This is a clear departure of the basic premise of the justice system, a denial of due process, and denial of fundamental fairness by the 10th Cir.. The Petitioner has shown a substantial denial of a constitutional right and had a threshold inquiry been made, then a COA would have more than likely been granted, as shown below.

Grounds ruled on the merits

[1] This and all other cited unpublished opinions is used for their persuasive value. Fed. R. App. Proc., R. 32.1.

GROUND 2 Ineffective Assistance of Counsel

The Petitioner claimed counsel was ineffective for failing to investigate the case prior to trial, failing to impeach the State witnesses, failing to call witnesses and present evidence, the advice not to call Gina as a witness -was ineffective advice, ineffective for conceding acknowledgement of the methamphetamine, and the cumulative errors of counsel denied the Petitioner of the right to effective assistance of counsel. **DOC. #1 at 7, attached page 3**. In "**Williams v. Taylor, 529 U.S. 362 (2000); Wiggins v. Smith, 539 U.S. 510 (2003); and Rompilla v. Beard, 545 U.S. 374 (2005) ...** the Court drew from these cases a constitutional duty to investigate and the principle that it is prima facia ineffective assistance for counsel to abandon their investigation...." **Cullen v. Pinholster, 563 U.S. 170, 195 (2011).** The Petitioner did his part by conveying to counsel verbally and through letters advising counsel that an investigation needed to be conducted and at no time did counsel consult with the Petitioner on the information provided. **See Memorandum of Law in Support of Writ of Habeas Corpus. (Memo) Ex. 5 & 6**. (For unknown reasons this Document does not appear on the docket, but was sent with the Application for Writ of Habeas Corpus).[2] "Counsel's actions are usually based...on information supplied by the defendant... What investigation decisions are reasonable depends critically on such information". **Strickland v. Washington, 466 U.S. 668, 691 (1984).** An "inquiry into counsel's conversation with the defendant may be critical to a proper assessment of counsel's investigation decisions,...." **Id U.S. at 691**. In this case, counsel simply ignored the information provided by the Petitioner or refused to conduct an investigation of the case. See also **Andus v. Texas, 590 U.S. 806, 816 (2020)** (...Counsel ignored pertinent avenues for

[2] This document and reference to "DOC #", refers to documents filed in the Federal District Court

investigation of which he should have been aware,...); **Porter v McCollum, 558 U.S. 30, 40 (2009)** (...counsel may not ignore pertinent avenues for investigation of which he should have been aware); **Wiggins v. Smith, 539 U.S. 510, 521-22 (2003)**(holding that counsel must investigate to make informed decision about strategy). The Petitioner gave a precise and detailed statement of what the investigation would have uncovered had an investigation been conducted, with citation to the record on what was testified to in regards to what would be disproved by the evidence uncovered, in turn, the evidence uncovered would be irrefutable exculpatory and impeachment evidence, as well as, supporting Gina's account of the events as stated in her affidavit. **DOC 35 at 24-25**. Se e.g., **U.S. v. Bagley, 473 U.S. 667 (1985)**(Impeachment evidence,..., as well as exculpatory evidence, falls within the Brady rule. Such evidence is favorable to the accused, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal); **Glossip v. Oklahoma, 604 U.S. -; - S.Ct. -; 2025 WL 594736 (2025)**(Evidence can be material even if it goes only to the credibility of the witness,..., indeed, the jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence). The evidence would show that it was not possible for the Petitioner to have shoved Gina through a door that was opened a little bit, as testified to by Mary Lewis. Had the Petitioner shoved Gina through the door, the door would have only hit Mrs. Lewis in the face, never opened, and Gina would have not went in the Apartment, as well as leaving injuries on Mary. See **Doc # 35 at 24-25**. The District Court never assessed this claim, but only mentioned it in a footnote. See **DOC # 51 at 8**. It would have been discovered that there was a cubby hole by the front door, the Petitioner could not have hidden as testified to by Mr. Lewis, impeachment evidence to test his credibility. (The District Court incorrectly referenced this was testified to by Mrs. Lewis, when the Petitioner was referring to Mr. Lewis and

impeachment evidence, compare DOC #35 at 25 with DOC 51 at 8). Counsel would have also found out that the Petitioner had a key to the apartment and could have enter the apartment without the occupants knowledge if he wanted to commit a crime while inside. The District Court's statement that this would have proved Petitioner had consent at one time, but was withdrawn, is rebutted by the record. The Petitioner was authorized to come back to the apartment after he was told to moved out by Mr. Lewis. See **DOC #21 EX 33 Vol. II, pg. 211, lines 6-11**. This also shows consent to enter, a defense to the charge of first degree burglary and requirement for jury instruction on consent, as well as, impeachment evidence against Mrs. Lewis. **See DOC #21 EX 33, TR. Vol. II, pg. 266, lines 1-3**(Had he been back to the apartment – No) Counsel also failed to investigate the file prepared by prior counsel. Had counsel investigated the file she would have been aware of the letters written by Petitioner and the inconsistent statements and testimonies of the state witnesses through police reports and preliminary transcripts. See **Rompilla v. Beard, 545 U.S. 374, 387-89 (2005)** (Holding Counsel was ineffective in failing to examine the Defendant's prior-conviction file for mitigating evidence). The Petitioner was represented by Brian Boheim all the way up until two (2) weeks before trial when the decision was made that Cierra Freeman would represent the Petitioner at trial, a partner in the same law office. In **Williams v. Taylor, 529 U.S. 362, 395 (2000)**, the court found counsel ineffective for not preparing for sentencing until two (2) weeks before and failing to contact a witness was negligence not a strategy. The near same act by counsel in this case, not preparing for trial until two (2) days before trial and not contacting a witness. Counsel came to visit the Petitioner two (2) days before trial to only go over the questions she would ask the petitioner. In failing to investigate, counsel failed to impeach the state witness. **Davis v. Alaska, 415 U.S. 308, 318 (1974)** (holding because of counsel's performance, the jury was never

informed of the state witnesses prior inconsistence statements and testimony and could not appropriately draw interferences relating to the reliability of the witnesses). Since the state's case rested squarely on the jury's assessment of the state's witnesses, impeachment was an important aspect of the defense. This was amplified by the state's closing argument. The state told the jury "there was no conflicting testimony presented to it and Mary sat up there and was very honest with you". **DOC # 21 Ex. 33 J Tr at 384**. When the defense discussed that Mary was not entirely honest with the jury, the state argued "There's no testimony of that. Mary has absolutely no reason to lie. Id J. Tr. 326. The State goes on to state: "... Mary's making all of this up."" Common sense tells you that's just not what's the truth... you believe Mary because that's what is the truth". The State repeatedly told the jury they should believe their witnesses.

Counsel's failure to call witnesses was not a strategy but negligence. The record clearly reflects negligence. **DOC # 21 Ex 33 J Tr at 340-41**(I have not been able to get a hold of her today....). Although counsel talked to the Petitioner about calling Gina as a witness, the record does not reflect the conversation between counsel and Petitioner where Petitioner wanted to call Gina as a Witness and never waivered from this decision. It was counsel who wanted to proceed with trial and advised Petitioner so. **Padilla v. Kentucky, 559 U.S. 356 (2010)** (Counsel has a duty to give correct advise and failure to give correct advise is constitutional deficiency under Strickland). It was counsel who failed to keep Gina's phone number. She was just trying to cover up her negligence. See,e.g., **Williams, 529 U.S. at 373 (2000)**(Holding Counsel's failure to contact a witness not a strategy but negligence). The record must show some evidence that counsel's decision was a strategy for deference to apply. **Wood v. Allen, 558 U.S. 290, 308 (2010)**. The district Court determined that it was a strategy not to call Gina. **DOC # 51 at 8-9**. This determination was nothing more than the District Court inventing a strategic reason and

justifying why counsel did not call Gina as a witness. See, e.g., **Marcum v. Luebbers, 509 F.3d 489, 502 (8th Cir. 2007)**((Citing Rompilla v. Beard, 545 U.S. 374, 395-96 (2005); Wiggins v. Smith, 539 U.S. 510, 526-27 (2003); Kimmelman v. Morrison, 477 U.S. 365, 385 (1986)) Holding: The Supreme Court has held in several cases that the habeas court's commission is not to invent strategic reasons or accept any strategy counsel could have followed, without regard to what actually happened when a petitioner shows that counsel's actions actually resulted from inattention or neglect, rather than reasoned judgment, the petitioner has rebutted the presumption of strategy,....). This reasoning is rebutted by the record and the fact that counsel tried to call Gina to testify. **DOC # 21 Ex 33 J Tr at 340-41**.See e.g., **Jones v. Galloway, 842 F3.d 454, 464 (7th Cir. 2016)**(Without an explanation from Dosch about his reason for not calling stone, there was no factual foundation for the State appellate Court's determination that he omitted stone as a matter of trial strategy). The Petitioner has never been given the chance to prove these allegations by having counsel appear at a hearing and undergoing questioning. Further, this invented strategy by the District Court is nullified by the fact that the jury asked where Gina was during deliberations, as stated to Petitioner by defense counsel. The jury asking where Gina was, shows the jury was interested in her testimony on the finding of guilt or innocence. The District Court should not invent strategies for counsel. And that her testimony should not automatically be determined to be cumulative or found unreliable by the jury, this was pure speculation on the part of the District Court. **Arizona v. Fulminate, 499 U.S. 279, 299 (1991)** (second defendant's confession was not merely cumulative of first defendant's confession where they could reinforce and corroborate each other); See also **Mosley v. Atchison, 689 F.3d 838, 849 (7th Cir. 2012)** ((cited cases) Testimony of additional witnesses cannot automatically be categorized as cumulative and unnecessary). Since this case came down to the credibility of witnesses, Gina's

testimony being exculpatory and impeachment evidence was an important aspect to the defense since the petitioner was the only defense witness presented. See **U.S. v. Vickers, 442 Fed Appx. 79, 84 (5th Cir. 2011)**(Such corroboration was beneficial, if not necessary, in a case that was largely decided on the credibility of the prosecution witness versus that of the Defendant's witnesses); See also **Toliver v. Pollard, 688 F.3d 853, (7th Cir. 2012)**(In a swearing match between the two sides, counsel's failure to call two useful, corroborating witnesses, despite the family relationship, constitutes deficient performance); **Goodman v. Bertrand, 467 F.3d 1022, 1030 (7th Cir. 2006)**(indicating the testimony of witnesses who would corroborate the defendant's account was a crucial aspect of the defense) **Branch v. Sweeney, 758 F.3d 226, 234 (3d Cir. 2014)**(Counsel's failure to call two witnesses was prejudicial because if witnesses had offered testimony supporting their pre-trial statements, jury would have ruled differently); **Riley v. Payne, 352 F.3d 1313, (9th Cir. 2003)**(This was a cast of characters and witnesses of such a nature that corroboration most certainly would have been critical value to the jury....); Since the state's witness stated the Petitioner carried the orange backpack all the time, in which the drugs were found, Shirley's testimony was important to the defense and valuable impeachment evidence, as this witness is an elderly women, at the time, in her 80's. She has no criminal record, an upstanding citizen with no reason to provide anything but truthful facts. Counsel was ineffective for conceding ackowledgement of the methamphetamine. This went against the defense presented at trial. Counsel never consulted with the Petitioner over this strategy. The state even used this fact on Petitioner's direct appeal. **DOC #21, EX 5 at 15**. Further, had counsel investigated the bag that the methamphetamine was found in, it would have been shown that it was a make up bag belonging to a female. This would have been in furtherance of the defense that someone placed the drug in the backpack without the Petitioner's knowledge.

GROUND 3 Insufficient Evidence to Establish Possession of Methamphetamine

The Petitioner was charged with Possession of a Controlled Substance where the possession was constructive. The backpack in which the drug was found, was found in the middle of the floor by the kitchen away from the Petitioner, in an orange backpack by Gina. No witness was able to remember who carried the orange or the black backpack. The drug was found in a bag inside the backpack, which was a women's makeup bag. In order to prove constructive possession, it must be proven there was knowledge of and intent to possess the drug. **U.S. v Henderson, 575 U.S. 622, 626 (2015)** (Constructive possession is established when a person, though lacking such physical custody, still has the power and intent to exercise control over the object). The Petitioner denied knowledge of the drug and so acknowledged by the Oklahoma Court of Criminal appeals (OCCA). **DOC 15 EX 1 at 7**. Nor was there any evidence of an intent by the Petitioner to possess the drug. The 3rd Circuit has stated that "mere potential ability to exercise dominion and control does not establish constructive possession absent intent to exercise it". **U.S. Garth, 199 F.3d 99, 112 (3d Cir. 1999)**. Although Petitioner accompanied Gina while she exercised dominion and control over the backpack, that association should not transform Petitioner's proximity into culpability for her actions or establish any vicarious responsibility for the drug. **Id at 112**. Dominion and control are not established by mere proximity to the contraband or mere presence where its located or mere association with the person who does control the contraband. **Id**. Involvement of multiple actors does not negate the requirement knowingly having the power and intent to exercise dominion and control. **Id.** The orange backpack was picked up from Mary's Apartment the night before these alleged acts by Gina, but counsel never knew because she visited the Petitioner two days before trial and only to

go over the question she would ask the Petitioner when he testified. This was when counsel prepared for trial.

GROUND 4 Violation of Due Process When the Trial Court Failed to Adequately Instruct the Jury

Trial Courts are charged with instructing the jury on all the law that may be applied to the evidence. The question was whether the Petitioner was in constructive possession of the drug, a crucial one. However, the jury was not adequately instructed on constructive possession or what must be found be found in order for a conviction to be based on constructive possession. The jury was instructed that the law recognizes two kinds of possession: actual and constructive possession. The jury was instructed that someone who has the power and intent to exercise dominion and controlled over a thing has constructive possession. They were instructed that both kinds of possession is prohibited by law. The jury was not instructed as to the final two paragraphs of the jury instruction given. **DOC 21 EX 34 OR 144**. That is, the jury was not instructed that mere proximity to a substance is insufficient proof of possession and that there must be additional evidence of the Defendant's knowledge and control. It further provides that knowledge must be proven beyond a reasonable. The District Court found that this concept that is alleged to be lacking was inherent in the instruction given. **DOC 51 at 14**. This is no different than saying that the instruction makes a presumption for the jury. The Petitioner has the right to have the jury determine the laws application to the facts of the case. See **U.S. v. Gaudin, 515 U.S. 506, 513 (1995)** (The jury's constitutional responsibility is not limited to the determination of the facts, but extends to the application of the law to those facts and the ultimate decision of guilt or innocence). In Oklahoma, the additional knowledge requirement is an element of the offense of possession. See **Martin v. Addison, 2011 WL2516273 *5 (W.D. Okla. May 19,**

2011)(Noting Okla. Law requires additional independent factors which show a defendant's knowledge and control of a drug). Allowing an instruction to omit an element of an offense would allow a jury to make a finding of guilt without find all the elements of the crime and beyond the reasonable doubt requirement of the Fourteenth amendment. **Neder v. U.S., 527 U.S. 1, 10 (1999)**(In both cases-misdescriptions and omissions-the erroneous instruction precludes the jury from making a finding on the actual element of the offense). "Like an omission, a conclusive presumption deters the jury from considering any evidence other than that related to the predicate facts...and directly forecloses independent jury consideration of whether the facts proved establish certain element of the offense...." **Id.**

GROUND 5 Improper Prosecutorial Argument Violated the Petitioner's Due Process and Right to a Fair Jury Trial

The State impermissibly vouched for the credibility of its witnesses. The state told the jury that there had been no conflicting testimony presented to it, and that "Mary sat up there and was very honest with you and vey emotionally distraught." **DOC #21 Ex 33 J Tr 384**. When discussing the defense that Mary was not entirely honest, the state argued that "There's testimony of that. Mary has absolutely no reason to lie". **DOC 21 EX 33 J TR 326**. The State then told the jury: "Mean while, Mary comes before you and says I've got warrants. I've got a past. I'm sitting up here in front of 13 people who are rightfully judging me and telling me and judging what's gonna happen to my brother, but yet, Mary's making this up. Common sense tells you that that's just not right. That's just not what's the truth. When you go back to the jury room, think hard about what you want to tell Mary. Tell Mary with your verdict that you believe her. You believe Mary because that's what is the truth". **DOC 21 Ex 33 J TR 391**. This repeated assurance by the state that its witness was telling the truth, told the jury that the prosecutor had

evidence not presented to it of the witness' truthfulness. This is clearly prohibited. **U.S. v. Young, 470 U.S. 1, 18-19 (1985)**; See also **Douglas v. Workman, 560 F.3d 1156, 1179 (10th Cir. 2009)** (Prosecutor's statement that government's witness had nothing to hide and that its witness' testimony was the truth improper vouching because it implied that prosecutor had knowledge of witness' truthfulness outside of the evidence presented). The State's argument also cast aspersions on the defense. The defense in the case at bar, was that the Petitioner had not threatened Mary and had merely gone over to her apartment to have a discussion about her selling his possessions. The State told the jury "he was coming over to confront her about, you know, him-her selling his stuff and she—he just wanted to talk to his sister. He loved his sister, he just wanted to chat. Don't be fooled by that smoke and mirrors". **DOC 21 Ex 3 J TR 374.** With regard to whether the Petitioner had the intent to commit a crime when he entered Mary's Apartment, the state argued "so he did have an intent to commit a crime. Don't let the defense try and fool you". **DOC 21 Ex 33 J. TR 375.** Finally, the state told the jury that "common sense would lead you to believe that all these things he did August 15 because he can't –and he can't take responsibility for his actions. He sits up here, a few crocodile tears, telling you Mary made this up. **DOC 21 Ex 333 J Tr 390-91.** Such blatant acts would seem to fall in the category of impermissible prosecutorial misconduct, as the state repeatedly pressed upon the jury their witnesses was telling the truth by knowledge of evidence outside the record.

GROUND 6 The Petitioner's Sentence for Count 5 is Illegal and allows for arbitrary deprivation of liberty

The 10th Cir. stated that "it cannot emphatically review a state court's interpretation of its own state law" and that "a Petitioner cannot transfer a state law claim into a federal one merely by attaching a due process label". Request for Certificate of Appealability (RCOA) at 9. The Petitioner clearly argues the claim as a violation of Due Process. **Id.** The lower courts just refuse

to review the State Courts decision for a violation of a Federal Constitution violation. A clear departure from this Courts precedent. Whether a state's application of its own laws comport with the Fourteenth amendment's Due Process clause is a matter of Federal law not state law. See,e.g., **Hicks v. Oklahoma, 447 U.S. 343, 345-46 (1980)**; **Boddie v. Connecticut, 401 U.S. 371, 379 (1971)**; **Lisenba v. California, 314 U.S. 219, 236 (1941)**. See also **Mullaney v. Wilbur, 421 U.S. 684, 691 and fn 11 (1975)**;(Manes interpretation of its law, even if novel, does not frustrate consideration of due process); **Bozza v. U.S., 330 U.S. 160, 166, 91 L.Ed. 818 (1947)** (It is well established that a sentence which does not comply with the letter of the criminal statute which authorizes it is so erroneous that it may be set aside on appeal, ..., or in habeas corpus proceedings). The Oklahoma Courts are only allowed to impose the punishment that is authorized by statute. **Chapman v. U.S., 500 U.S. 543, 465 (1991)** (...the court may impose whatever punishment is authorized by statute for his offense,....). Anything over what is authorized is an illegal sentence. In this case, the OCCA interprets the Oklahoma Drug possession statute in a way that allows the Prosecutor to be in the position of the legislature to determine the sentence a defendant receives when the legislature is clear in the punishment a defendant is to receive under the possession drug statute, Title **63 Okl. St. Ann. § 2-402**. Such interpretation of its laws allow for arbitrary deprivation of liberty by the prosecutor. The "Language of statute controls its interpretation when sufficiently clear in context" **Ernst & Ernst v. Hochfolded, 425 U.S. 185, 201 (1976); See** also **Boui v. City of Columbia, 378 U.S. 347, 362-63 (1964)** (generally speaking, court is not justified in departing from plain meaning of words in search of interpretation of a statute which the words themselves do not suggest). The Petitioner was charged with violating Title **63 Okl. St. Ann. § 2-402**, with prior conviction of

drug offenses and was sentenced to 40 years when the law only allows a sentence of 20 years maximum. Title **63 Okl. St. Ann. § 2-402.** The OCCA also contradicts itself in interpreting this statute. In **Watts v. State, 2008 OK CR 28, ¶ 8, 197 P.3d 1094, 1096 (2008),** the Court stated:

> "When both the predicate and the new offense are drug offenses, any enhancement must be made pursuant to the provisions of the uniform Controlled Dangerous Substance Act."

The Court goes on to state:

> "We agree that when a specific enhancement provision for a violation Of the Uniform Controlled Dangerous Substance Act applies to An offense, that enhancement controls over the more general provisions of 21 O.S. Supp. 2002 § 51.1 or other law. See 21 O.S. 2001 § 11."

Id. See also **Clopton v. State, 1987 OK CR 189, 742 P.2d 586, 587 (1987); Faubion v. State, Okla. Crim. App., 569 P.2d 983 (1977); Hayes v. State, 1976 OK CR 113, 550 P.2d 1344 (1976); Wood v. State, 1973 OK. CR. 418, 515 P.2d 245.** Under Title **63 Okl. St. Ann. § 2-402**, when a defendant is charged under this statute and with prior convictions for drug offenses, the enhancement must be under this section. See Title **21 Okla. St. Ann. § 11**; **Faubion, 569 P.2d 1022 (1977)** (Language under this section contained in enhancement provisions of Uniform Controlled Substance Act, providing that a second or subsequent offense under this section is felony punishable by four to 20 years imprisonment, refers only to second or subsequent offence, and to qualify as second or subsequent offense under act, prior conviction need only be obtained under any section of act). The OCCA states that the specific enhancement of the drug statute applies when the predict offense is a drug, then allows the prosecutor to choose the enhancement statute. "The Legislative power is the Supreme authority except as limited by the constitution of the State, and the sovereignty of the people is exercised through statutes in the legislature, unless the fundamental law power is else reported" **Moore v. Harper, 600 U.S. 1143, (2023)**(Citing **McPherson v. Blacker, 146 U.S. 1, 6-7 (1892); U.S. v. Evans, 333 U.S. 483 (1948)** (holding

defining crimes and fixing punishment are legislature and not judicial function). "It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection". **Jones v. U.S., 463, 361 (1983).** The OCCA is allowing the state courts to violate defendant's federal constitutional rights and the 10th Cir. is allowing the violations to go uncorrected, in violation of their constitutional duty to uphold the federal constitution as this case shows. See also **Graham v. White**, 678 F. Supp.3d 1332 (N.D. Okla. 2023) (Holding the state courts denied Graham due process by violating its own laws); reversed in, **Graham v. White, 101 F.4th 1199 (10th Cir. 2024).** The 10th Cir. is Setting a dangerous precedent by not reviewing state courts interpretation of it's own laws for violation of the federal constitution due process clause. This gives the states the courage and ability to ignore what it's law requires and the checks and balance required by the constitution.

GROUND 10 Ineffective Assistance of Appellate Counsel

The Petitioner clearly makes out a claim of ineffective assistance of Appellate Counsel. The lower Courts are ignoring this Courts precedents in several ways on several issues. The 10th Cir. is using its own standards. The Petitioner clearly shows that there are grounds with merit that Appellate Counsel did not raise on appeal, but did raise grounds that have no merit. In Proposition I, Appellate Counsel argued that the search of the backpack was illegal. This proposition is against the law of searches. And in Proposition V, Counsel argued that the prosecution misstated the evidence, when in fact she did not. Instead of raising the claims argued in Grounds 7 and 8, as argued below. Thus, Counsels performance was below that required of an attorney and the grounds have merit to them, contrary to what the lower Courts have decided, therefore, the Petitioner was prejudiced by omitting them on Appeal. The lower Courts simply ignore this Courts precedents on those claims. See Grounds 7 and 8 below. Appellate Counsel

had the record of the trial proceedings and should have known about these claims. There is no excuse for the omittance of these on appeal.

GROUND 12 Cumulative Error

The Petitioner asserts that the cumulative errors deprived the Petitioner of a fair proceeding and reliable outcome. The lower courts having ignored the law on the claims. The Petitioner had no chance to even prove are present a claim of cumulative error. Further, due to the requirement of the 10th Cir. for the Petitioner to argue both a COA and a Merits brief, the Petitioner was limited on pages. That is, this documents requires both a COA and a Merits brief that should be two (2) separate documents and sixty (60) pages. Instead, the Petitioner had to cram sixty (60) pages into thirty (30).

CLAIMS DENIED AS PROCEDURALLY DEFAULTED

Ground 1 Factual Innocence

The Petitioner raised actual innocence in his Post-Conviction (PC) Application and the OCCA acknowledged the District Court did not apply a procedural bar and that the rules and cases do not procedurally bar factual innocent claims raised in PC Applications for the first time and that Factual Innocence claims are the PC Act's Foundation. See **DOC 21 Ex 20 at 3-4**(Stating Judge Greenough did not find Petitioner's claim of factual innocence procedurally barred and holding that their Court's rule and cases do not procedurally bar the raising of factual innocence claims in a Post-Conviction application and are the Post-Conviction Procedures Act foundation)(citing **Slaughter v. State, 2005 OK CR 6,¶5; 108 P.3d 1052, 1054 (2005)**). The Respondent incorrectly stated the ruling by the OCCA and the law of Oklahoma. Since the State highest court of last resort did not apply a procedural bar, the Federal District was clearly wrong

by following the Respondent's incorrect information on a procedural bar and applying it to this claim.

The Petitioner, in presenting this claim, presented sworn affidavits from two (2) witnesses, one with exculpatory testimony and one with testimony to be used as impeachment evidence against the state's witness(es). **DOC #21 EX 7at 1-3**. As well as stating that there is exculpatory evidence available from the Apartment where the alleged acts were stated to have taken place. That is, had Trial Counsel investigated the case, she would have found irrefutable evidence that the Petitioner could not have pushed Gina through the Lewis' front door of their Apartment as testified to by the Lewis', the breaking element of the first degree burglary charge. As stated, the Petitioner could not have shoved, throw, or push Gina into the apartment. First, the Petitioner was holding his six (6) month old dog, a large breed dog, Second, due to the design of the apartment, there is no way the Petitioner could have pushed, shove, or throw Gina into the Apartment. That is, because there is a wall that is jus a few inches (approx. 6 inches) away from the door as it opens, which it opens inwards. Mrs. Lewis only opened the door a little bit when she answered the door. If the Petitioner had done this to Gina, who is a small petit women and Mrs. Lewis is a fairly large women, at most, Gina would have hit the door and the door would have hit Mrs. Lewis in the face as she looked out. In no way could Gina possibly move Mrs. Lewis and land on the floor of the apartment. The way Mrs. Lewi was standing and there being a dividing wall right inside the apartment, the wall would have prevented Mrs. Lewis from being moved and therefore, the door would have hit Mrs. Lewis in the middle of her face due to the way she was looking out. Most certainly, this would have caused injury to her face and there was no injuries. Not only would this provide exculpatory evidence that is irrefutable, it would also provide evidence of credibility to Gina's affidavit and her testimony if she was called

to testified. This was done why the Petitioner was holding his dog and then supposively going after Mary Lewis with one hand grabbing her throat and putting a knife to her throat, still holding my dog. See **DOC #21 EX 33, TR Vol. II, pg. 277, lines 23-24**. The credibility of the witnesses were not assessed by any of the lower courts on the innocence claim.

There was never a procedural bar applied by the OCCCA, the State's last highest criminal court. The State Courts as well as the federal courts refused to apply any weight to the evidence presented by the Petitioner, as well as, the Petitioner never having an opportunity to provide proof of his innocence through an evidentiary hearing where evidence can be provided of the constitutional violations that resulted in the Petitioner's conviction and to provide evidence of innocence.

Ground 7 Sufficiency of Information

The information for the First Degree burglary charged stated : "to commit some crime therein". It failed to properly notify the Petitioner of what to defend against, Since there were several acts alleged, there was no notification of what crime or crimes was being that Petitioner was being accused of having an intent to commit. Especially since the Petitioner was acquitted on Counts 1 and 3. In **Hamling v. U.S.**, 418 U.S. 87 , 117-18 (1974), the court stated:

> "Undoubtly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description with which he is charged".

The intent element depends on specific identification of fact to give fair notice and this information did not provide that fair notice. See **Russull v. U.S., 369 U.S. 749, 764 (1962)** (The vice of these indictments, rather, is that they failed to satisfy the first essential criterion by which

the sufficiency of an indictment is to be tested, i.e.. that they failed to sufficiently appraise the Defendant of what he must be prepared to meet). This has merit.

GROUND 8 Constructive Amendment and/or Variance of the information

The information for Threatening an Act of Violence, provides: : "Threat to kill Mary Lewis while holding a sledgehammer". Nothing in the record shows the Petitioner ever threatened to kill Mary Lewis while holding a sledgehammer. The 10th Cir. acknowledges that the record shows a different statement made, that "Mr. Lewis testified that Mr. Routt took the sledgehammer away from Ms. Gibson and threatened to smash Ms. Lewis's head in with it". See RCOA at 12. The Court goes on to state that "Mr. Routt fails to show that reasonable jurists could debate the existence of a variance or a constructive amendment. Id. Clearly, the 10th Cir. required the Petitioner to show the claim had merit, a ruling on the merits of this claim that is not permitted at this stage and outside the threshold inquiry at the COA stage. **Miller-El, 537 U.S. 322, 336 (2003)**(The COA determination under §2253(c) requires an overview of the claims.... This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims**); Id U.S. at 338** (We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petitioner for habeas). Since the information stated specific language, the prosecutor was required to prove, beyond a reasonable doubt, that the petitioner did or said what that specific language stated. **Sehmuck v. U.S., 489 U.S. 705, 711 (1989)**(It is ancient doctrine of both the common law and of our constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him); **Stirone v. U.S., 361 U.S. 212, 218 (1960)** (The Court stated that even though the Hobbs Act does not require that an indictment specify the type of interstate commerce burdened, a conviction must rest on the charge specified on the indictment); **U.S. v. Hoover, 467 F.3d 496, 499 (5th Cir.**

2006)(The context of words is important because no two words are directly interchangeable); **U.S. v. Miller, 891 F.3d 1220, 1231-32 (10th Cir. 2018)**(Holding that a constructive amendment occurs when the indictment alleges a specific set of facts , but the evidence and instructions suggest the jury may find the defendant guilty on a different, even if related, set of facts). In **Miller, 891 F.3d at 1235**, the court acknowledges that "... it is settled law in this circuit, as elsewhere, that the language employed by the government in its indictment becomes an essential and delimiting part of the charge itself, such that if an indictment charges particulars, the jury instruction and evidence at trial must comport with those particulars) (collecting cases). Thus, the Petitioner has shown a substantial denial of a constitutional right warranting the granting of a COA so that full consideration can be had on the claim. Guilt depends crucially on the intent element and therefore, needed to be specified in the information.

GROUND 10 Deficient Reasonable Doubt Jury Instruction

The Petitioner argued this claim in a State Writ of Habeas Corpus in the District Court of Comanche County (CCDC) for the first time. The argument presented was that the jury was instructed to define reasonable doubt "as you see fit". **DOC 21, EX 33 J TR. Vol. I at 79, lines 9-12**. Even though there technically was not a definition, it allowed the jurors to define reasonable doubt in the "individuality of their own conscience, and reasons." "The jury was allowed to subvert the self explanatory character of reasonable doubt from anything of the slightest bit of doubt, to the stubborn refusal to budge even in the face of the strongest possible reasons and suggested that any attempt to cabin their definitionary discretion is an invasion of their province". See e.g., **Wansing v. Hargett, 341 F.3d 1207, 1214-15 (10th Cir. 2004)**. This lowered the standard of proof and is shown by the question presented to the Petitioner by the State concerning Count 5, possession of a controlled drug, when the state told the jury who

possessed the orange backpack. **DOC 21, EX 33, J TR, Vol. II at 335, lines 19-21** (The State asking the Petitioner if he forced Gina to carry the orange backpack). This question showed who possessed the backpack with the drugs in it, coupled with the fact, that the drugs were in a womens makeup bag. The high burden required by the beyond a reasonable doubt standard was lowered and allowed the jury to find the Petitioner guilty on all counts by this lowered standard. On count 4, the Petitioner was found guilty for a statement that was not alleged in the information and on Count 2, found guilty when the Petitioner had consent to enter the Apartment. Even though the instruction was a preliminary instruction, there was a likelihood of confusion of the standard and there was no instruction correcting the deficient instruction. See e.g., **U.S. v. Hernandez, 176 F.3d 719, 731-32 (3d Cir. 1999).**

When there is a deficient reasonable doubt instruction, the judgment is null and void in its entirety and the Petitioner was subject to release from the judgment. **Sullivan v. Louisiana, 508 U.S. 275, 281 (1993)**(...because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury -trial guarantee). "...a misdescription of the burden of proof, ...vitiates the all jury's findings." **Id 508 U.S. at 281**. This is qualifies as a structural error and not a trial error. **Id 508 U.S. at 282** The State Courts classifying this argument as a trial error was simply to bypass and ignore the federal constitutional question presented. The Federal District Court permitting the State's procedural bar to prevent review in Federal Court is against this Honorable Court's precedent. See **Cruz v. Arizona, 598 U.S. 650, 652 (2023)**(...an unforeseeable and unsupported state court's decision on a question of state procedure does not preclude this courts review of a federal question); **Johnson v. Williams, 568 U.S. 289, 303 (2013)**(When the evidence leads clearly to the conclusion that a federal claim was inadvertently overlooked in state court, §2254(d) entitles

the prisoner to make [her] case before a federal judge). The state court's classification of this argument as a trial error was unforeseeable as the OCCA's precedent clearly classifies a deficient reasonable doubt jury instruction as a structural error. See **Duclos v. State, 2017 OK CR 8, 400 P.3d 781, 784 (2017)**(The Court explaining difference between trial error and structural error, referring to reasonable doubt instruction); **Miller v. State, 2013 OK CR 11,; 313 P.3d 934, 1004 (2013)**(same); **Robinson v. State, 2011 OK CR 15; 255 P.3d 425, 428 (2011)**(same). In Oklahoma, the Writ of Habeas Corpus is constitutionally guaranteed. **Elam v. Municipal Court of Okla. City, 757 P.2d 1338 (1988)**(Hold the Writ of Habeas Corpus is constitutionally guaranteed); **Lamb v. State, 482 P.2d 615, 617 (1971)**(We therefore hold, that notwithstanding the provisions of 22 O.S. Supp. §1080 that the privilege of the Writ of Habeas corpus, being guaranteed by Art. 2§10 of the Okla. Constitution, is not suspended or otherwise changed by the statute); **Friend v. State, Okla. Crim. App., 379 P.2d 478 (1968)**(Proceeding in habeas corpus may be maintained to correct judgment void in toto at any time after its rendition); **State, ex. el. Att. Gen. v. Higgins, 76 Okla. Crim. 321,; 137 P.2d 273 (1943)**(Where personal liberty is concerned... question of Court's authority to imprison may be reviewed on habeas corpus). Even the Federal district Courts in Oklahoma recognize the states allowing a defendant to bring a Writ of Habeas Corpus petition, See **Jackson v. Elliot, 2023 WL5942271 (E.D. Okla. Sept. 12, 2023)**(In Okla., a remedy for unlawful detention is available through the Writ of Habeas Corpus in the state courts)(cited cases); **King v. Bridges, 2022 WL22672701 (W.D. Okla. Oct. 18, 2022)**(Same). Therefore, the procedural bar is inadequate and would not prevent review in Federal Court. The OCCA and the CCDC made an unsupported and unexpected ruling that applied a procedural bar. This would show the Federal District Court's procedural ruling was debatable among jurists of reasons allowing the granting of a COA.

Post-Conviction State Court was an Arbitrary Factfinder

The prosecution judge shopped in these proceedings by taking its response and a pre-typed order of dismissal to Judge Kelly Greenough, See **DOC #21 EX 7** (Judge Greenough typed on front page under case no.), when Judge Sharon Holmes had Petitioner's post-conviction application, Brief in support, motion for evidentiary hearing, motion to appoint counsel, and motion for record at public expense. See **DOC 21 Ex s 6,7,8,9,and 10** (copy to judge Holmes stamped under case no.), This allowed a partial decision on the merits without all the documents, records, arguments, and evidence presented by the Petitioner. Any decision made in the post-conviction proceedings is based on an unreasonable and defective fact finding process, not entitled to a presumption of correctness. Further, the OCCA intertwined the Petitioner's post-conviction appeal with that of another person, where it used Case No.: F-2015-200 (OK CR May 18, 2016) when Petitioner's direct appeal case no Case No.: F-2017-1126 (OK CR Dec. 27,2018) and stated Petitioner was convicted of First Degree Robbery and sentenced to life on counts 2 and 5. Petitioner was convicted of First Degree Burglary and sentenced to Forty (40) years on counts 2 and 5. The OCCA states Petitioner only raised nine (9) propositions of errors when he raised fifteen (15). This denied the Petitioner fundamental fairness in the post-conviction proceedings. **Distr. Att. Office for the Third Judicial Distr. V. Osborne, 557 U.S. 52, 69 (2009)**(holding that state's post-conviction procedures was to comport to fundamental fairness). This also proves a deficient factfinding process that takes away the presumption of correctness from the state's factfinding. Therefore, the Federal courts should have held a de novo review of the claims presented in the state post-conviction proceedings. See e.g., **Taylor v. Maddox, 366 F.3d 992, 1008 (9th Cir. 2004)**((citing Miller-El v. Cockrel, 537 U.S. 322, 346 (2003)) failure to consider key aspects of the record is a defect in the fact finding process); **Smith v. Aldridge, 904**

F.3d 874, 882 (10th Cir. 2018)(We consequently have little trouble concluding the procedures a state court employs to make factual determinations-,…-can affect the reasonableness of the subsequent factual determinations); **Medina v. Barnes, 71 F.3d 363, 369 (10th Cir. 1995)**(presumption of correctness does not apply when some reason to doubt the adequacy or the accuracy of the fact finding proceeding exists). The Petitioner raised this in the RCOA. See RCOA at 27-28.

I am asking that this Court provide guidance to the 10th Cir., and the other circuit courts, so that there is uniformity in all the circuits as is required by this Court and Congress. This will provide each Circuit of this Courts interpretation and provisions, and for uniform compliance of federal regulations. A substantial denial of a constitutional right has been shown by the Petitioner. The lower courts have refused to give proper weight and sufficiency to the evidence presented by the Petitioner of is innocence and the constitutional violations.

Question 2

The District court abused its discretion in not holding an evidentiary hearing in this case since there was never a hearing held in the state courts and there is evidence outside the record that needed to be established to prove Petitioner's claims and his innocence. When a Habeas Petitioner presents a claim of actual innocence, **28 U.S.C.A. §2254(e)(2)**, does not apply. **House v. Bell, 547 U.S. 518, 539 (2006)**. Further, the Petitioner diligently tried to develop the facts of his claims in the state courts, therefore, he need not full fil the requirements of **§2254(e)(2)**. The Petitioner requested an evidentiary hearing in both, the TCDC and the OCCA. See DOC 21 EX 8 and 19. The Petitioner presented extensive evidence and specific facts in the state post-conviction proceedings that needed to be developed See DOC #21 EX 7 and attachments. An evidentiary hearing is required unless the state court trier of fact has after a full

hearing reliably found the relevant facts. **Townsend v. Sain, 373 U.S. 293, 312-13 (1963)**. This rule is necessary because a federal habeas court itself must insure that the relevant facts were found and correct legal standard was applied. In **Wilson v. Butler, 813 F.2d 664, 672 (5th Cir. 1987)**, the court concluded the Petitioner was entitled to an evidentiary hearing in the federal habeas court because no hearing held in the state court when determining whether the Attorney made a considered strategic decision or whether the Attorney's decision was reasonable. In this case, there is evidence outside the record that has not been considered in evaluating the Petitioner's Ineffective Assistance of Counsel and factual innocence claims. i.e., (counsel's testimony on why she failed to investigate case, evidence from the apt, where the alleged incident occurred concerning the design of the apt., there being a cubby hole, letters to both trial and appellant counsel, conversation between counsel and Petitioner during trial over Gina being called as a witness). This allowed the state courts to determine the issues on a record that was not fully developed and therefore, without full knowledge of all the exculpatory and impeachment evidence.

CONCLUSION

The petition for writ of certiorari should be granted,

Respectfully Submitted,

Date: March 11, 2025