**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

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| **KARL FONTENOT,** | ) | |
| | ) | |
| **Appellee/Petitioner,** | ) | |
| | ) | **No. 19-7045** |
| **vs.** | ) | |
| | ) | **Eastern District of Oklahoma** |
| **SCOTT CROW, Interim Director,** | ) | **No. CIV-16-069-JHP** |
| | ) | |
| **Appellant/Respondent.** | ) | |

**MOTION FOR STAY AND BRIEF IN SUPPORT**

COMES NOW the Appellant/Respondent, Scott Crow, by and through Matthew D. Haire and Theodore M. Peeper, Assistants Attorney General, and respectfully moves for a stay of the district court's judgment conditionally granting habeas corpus pending the appeal in this case. Respondent has duly sought a stay of the judgment from the district court after first giving notice of his appeal to this Court; that relief has been denied. Fed. R. App. P. 8(a)(1)(A); Fed. R. App. P. 8(a)(2)(A)(ii). Respondent now comes to this Court to stay the judgment. Fed. R. App. P. 8; 10th Cir. R. 8.1.

**JURISDICTION**

The United States District Court for the Eastern District of Oklahoma, on August 21, 2019, issued an Opinion and Order granting Appellee/Petitioner conditional habeas corpus relief (Opinion and Order, Aug. 21, 2019, Doc. 151) (Attachment 1). Judgment was entered on August 27, 2019 (Judgment, Aug. 27,

2019, Doc. 152) (Attachment 2). On September 13, 2019, Respondent filed a Notice of Appeal in the Eastern District of Oklahoma (Notice of Appeal, Sept. 13, 2019, Doc. 153) (Attachment 3). On the same day, Respondent also filed a Motion for Stay and Brief in Support pending the appeal (Motion For Stay and Brief in Support, Sept. 13, 2019, Doc. 154) (Attachment 4). The court denied the Motion for Stay on September 30, 2019 (Opinion and Order, Sept. 30, 2019, Doc. 160) (Attachment 5). Respondent satisfies the requirements of Fed. R. App. P. 8(a)(1)(A) and Fed. R. App. P. 8(a)(2)(A)(ii). Respondent now seeks a stay of the judgment pending appeal pursuant to Fed. R. App. P. 8(a)(2) and 10th Cir. R. 8.1.

## PROCEDURAL AND FACTUAL BACKGROUND

On April 28, 1984, Petitioner and his co-defendant Tommy Ward kidnaped Donna Haraway from McAnally's convenience store in Ada and ultimately murdered her. Several months later, while the investigation was continuing, both men were questioned. Ward inculpated Petitioner and himself. *Fontenot v. State*, 742 P.2d 31, 32 (Okla. Crim. App. 1987). Petitioner's October, 1984, videotaped confession was substantially in agreement with Ward, who also confessed to the crimes. *Fontenot*, 742 P.2d at 32. Both were first tried together in September 1985, convicted of murder and kidnaping and robbery, and sentenced to death. On appeal in 1987, the Oklahoma Court of Criminal Appeals (OCCA), reversed their convictions. *Fontenot*, 742 P.2d at 32-33. Petitioner was retried separately from

Ward in June 1988, and again convicted and sentenced to death. *Fontenot v. State*, 881 P.2d 69, 73 (Okla. Crim. App. 1994). On appeal in 1994, the OCCA affirmed Petitioner's convictions; he was ordered to be resentenced for the murder. *Fontenot*, 881 P.2d at 86 & n.8. Petitioner, while represented by counsel, voluntarily agreed to serve a sentence of life imprisonment without parole for the murder on September 18, 1995. Petitioner was silent for 17½ years until he filed a state post-conviction application claiming he was "actually innocent" of Ms. Haraway's murder, prosecutor error had occurred in his case, and revived his other direct appeal claims. The state court procedurally barred Petitioner from relief on the ground of *laches*.

## ARGUMENT AND AUTHORITY

Petitioner has now brought an action under 28 U.S.C. § 2254. Respondent filed a motion to dismiss based on three (3) procedural bars. The district court denied the motion to dismiss because: (a) alleged *Brady* error was present; (b) the state bar of *laches* was insufficient to bar relief; and (c) Petitioner allegedly presented new and reliable evidence of "actual innocence" considered so powerful it was "'more likely than not, no reasonable juror would have convicted him.'" (Att. 1, p. 22) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); *see also* Att. 1, pp. 48, 190. The court then utilized *de novo* review to grant every claim Petitioner raised in his petition, even those that were denied on the merits in state court (Att. 1). The court

has ordered Respondent to grant Petitioner a new trial, or order his permanent release from custody, in 120 days (Att. 1, p. 190). The court's writ of habeas corpus will therefore issue on **December 19, 2019**.

**The District Court's Denial**

The court found that Respondent had not overcome the presumption of correctness afforded when the broad discretion in conditioning habeas corpus relief is exercised:

> After an evaluation of all the factors, the court finds that Respondent has failed to meet the burden required to overcome the presumption of correctness of this court's initial custody determination. Fed. R. App. P. 23(d). Respondent does not assert there is the possibility of flight or risk to the public, and the court finds the remaining factors weigh heavily toward [Petitioner]'s retrial or release pursuant to the Order Granting Writ of Habeas Corpus.

(Att. 5, p. 2).

Yet, Respondent clearly argued the possibility of flight in his motion (*see* Att. 4, pp. 19-20) (noting that this was a "first-degree murder and kidnaping case," that Petitioner has "strong reasons to flee a system he claims wrongly convicted him of murder and incarcerated him for many years," and further observing the "great emotional toll on the surviving family members of the victim in this case, who have already been forced to relive the very painful circumstances of this murder so many times"). In addition to this error, Respondent will show that the court did not

properly weigh the factors required by *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) and 10th Cir. R. 8.1. A stay pending appeal preserves the *status quo* of the underlying proceedings until this Court has an opportunity to review them. *McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996). A stay is "an exercise of judicial discretion," and "'[t]he propriety of its issue is dependent upon the circumstances of the particular case.'" *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton*, 481 U.S. at 777). The party requesting the stay bears the burden of establishing the stay's necessity. *Nken*, 556 U.S. at 434. In determining whether to grant a stay pending an appeal, this Court considers the following factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
>
> (2) whether the applicant will be irreparably injured absent a stay;
>
> (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and
>
> (4) where the public interest lies.

*Hilton*, 481 U.S. at 776; *see also* 10th Cir. R. 8.1. "With respect to the four stay factors, where the moving party has established that the three 'harm' factors tip decidedly in its favor, the 'probability of success' requirement is somewhat relaxed." *F.T.C. v. Mainstream Marketing Services, Inc.*, 345 F.3d 850, 852 (10th Cir. 2003) (footnote omitted). Thus, if the State meets all the other requirements for a stay pending appeal, it will have also satisfied the "likelihood of success on appeal"

component by showing "questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation." *McClendon*, 79 F.3d at 1020. All of those were satisfied here. For as the Supreme Court has reminded:

> The fact that the issuance of a stay is left to the court's discretion "does not mean that no legal standard governs that discretion . . . '[A] motion to [a court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.'"

*Nken*, 556 U.S. at 434 (citing *Martin v. Franklin Capital Corp*. 546 U.S. 132, 139 (2005) (quoting *United States v. Burr*, 25 F. Case. 30, 35 (No. 14, 692d) (C.C. Va. 1807) (Marshall, C.J.) (ellipses and brackets in original))).

Here, the district court erred by not finding Respondent met the requirements for a stay pending appeal. A stay should now be entered.

## I.

### Respondent Can Demonstrate A Likelihood of Success on Appeal.

Respondent moved to dismiss the habeas petition as untimely and procedurally barred. The district court determined that Petitioner overcame the procedural bars, denying Respondent's motion to dismiss (Att. 1, pp. 12-48). The court also excused Petitioner's failure to exhaust all of his claims (Att. 1, pp. 48-62). Then, **without giving Respondent the opportunity to submit a merits response to the petition after denying the motion to dismiss**, the court reviewed all

allegations of error *de novo*, **even those which the OCCA addressed on the merits** (Att. 1, pp. 62-188). The court gravely erred. In light of the limited word count permitted for this motion, Respondent will highlight only a few of the district court's failures to follow the law.

### A. Standard for Showing Actual Innocence

The district court believes Petitioner is actually innocent (Att. 1, pp. 17-48). To reach that conclusion, the court appears to have credited every allegation by Petitioner and resolved every conflict in his favor. More importantly, the court failed to defer to state court legal and factual determinations as required by 28 U.S.C. §§ 2254(d) & 2254(e)(1). *See Simpson v. Carpenter*, 912 F.3d 542, 563 (10th Cir. 2018) (section 2254(e)(1) applies even when there is no state court merits ruling). As will be shown, Respondent is likely to succeed on appeal in showing the district court erroneously held that Petitioner satisfied his "extraordinarily high" burden of showing actual innocence. *Schlup*, 513 U.S at 316.

To pass through the "actual innocence" gateway a habeas petitioner must present *new reliable evidence* of his actual innocence. *Frost v. Pryor*, 749 F.3d 1212, 1231-32 (10th Cir. 2014) (citing *Schlup*, 513 U.S. at 324). The Court holds:

> To make a credible showing of actual innocence, a "petitioner must 'support his allegations of constitutional error with *new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence* – that was not presented at trial.'" This new evidence "*must be*

> *sufficient to 'show that it is more likely than not that no reasonable juror would have convicted the petitioner in the light of the new evidence*.' This standard is "demanding and permits review only in the extraordinary case."

*Frost*, 749 F.3d at 1231-32 (internal citations omitted, emphasis supplied). Only the highest caliber of evidence is to be considered for an "actual innocence" claim:

> To be credible, such [an actual innocence gateway] claim requires [the habeas] petitioner to support his allegations of constitutional error with new reliable evidence – *whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial*. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.

*Schlup*, 513 U.S. at 324 (emphasis supplied). What Petitioner was required to show the district court had to be (1) new, (2) reliable, and (3) *so strong that it was more likely than not that no juror would have convicted him*.

**B. Petitioner's Delay**

The Court has stated: "'The timing of the [petition]' is a factor bearing on the 'reliability of th[e] evidence' purporting to show actual innocence." *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) (quoting *Schlup*, 513 U.S. at 332) (brackets in original). Federal courts are guided regarding delay when "actual innocence" is considered:

> *Unexplained delay* in presenting new evidence bears on the determination whether the petitioner has made the requisite showing. . . . As we stated in *Schlup* "*[a] court*

> *may consider how the timing of the submission and the likely credibility of [a petitioner's] affiants bear on the probable reliability of . . . evidence [of actual innocence*]."

*Perkins*, 569 U.S. at 399 (quoting *Schlup,* 513 U.S. at 332) (emphasis supplied). It is highly important that delay be considered when one, like Petitioner, makes a request to pass through the "actual innocence" gateway; the less excusable the delay, the less reliable and/or believable the proffered information may become.

The OCCA affirmed Petitioner's conviction in 1994. *Fontenot v. State*, 881 P.2d 69 (Okla. Crim. App. 1994) (Attachment 6). In 1995, Petitioner agreed to serve a sentence of life without parole for the murder in this case (Hearing on Negotiated Plea, CRF-88-43, Sept. 18, 1995, pp. 5-12) (Attachment 7). Petitioner raised no legal claim regarding his conviction at all for nearly *eighteen years* after his direct appeal, when he filed his first post-conviction. Many of the documents (860 pages from the Oklahoma State Bureau of Investigation (OSBI)) and much information upon which Petitioner's habeas petition is based was available to him since 1992. Petitioner had, in 1992, been granted an order by the OCCA for the OSBI to release its materials, amounting to about 860 pages of material that became available (Order attached to *Reply to Response to Motion to Dismiss Habeas Corpus Petition As Procedurally Barred by the Statute of Limitations and the State Bar of Laches, and Because It Includes Unexhausted Claims,* Dec. 8, 2017, Doc. 99-11) (Attachment 8).

The district court does not appear to have placed any weight on Petitioner's unreasonable delay. Instead, without citing any authority, the court noted a lack of evidence "that [Petitioner] personally knew" of evidence that was provided to the Oklahoma Indigent Defense System in 1992 (Att. 1, p. 14).[1] The court also excused him from any delay because he was allegedly mentally unstable, and because his counsel allegedly took some of his records (Doc. 151, p. 14). That is not the law. The AEDPA informs a habeas petitioner that a petition must be brought within one year from "the date on which the factual predicate of the claim or claims presented *could have been discovered* through the exercise of due diligence." 28 U.S.C. § 2254(d)(1)(D) (emphasis supplied). Further, these alleged facts, even if true, cannot excuse the extremely lengthy delay in this case.

The court erred in excusing Petitioner's delay without legal authority. Petitioner had access to virtually all of the material at issue, but waited nearly eighteen years while memories faded and possible witnesses died before seeking collateral relief. Petitioner's claim that he is innocent, and has compelling evidence thereof, is highly doubtful in light of his unexplained delay. Respondent has a sufficient likelihood of success on appeal.

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[1] Regardless of no right to counsel on post-conviction, the court did not consider proof that Petitioner *had* counsel (*see* Declaration of Mark Barrett attached to *Reply to Petitioner's Brief in Opposition to Respondent's Motion to Dismiss and Brief in Support*, Oct. 17, 2018, Doc. 109-1, pp. 2-5) (Attachment 9). This factual error is critical and also should be reviewed.

### C. The District Court Failed to Defer to State Court Findings as they Relate to Both Petitioner's Claim of Innocence, and the Merits of his Claims

As alluded to above, the court made a critical error when it failed to defer to state court legal and factual findings under 28 U.S.C. §§ 2254(d) & 2254(e)(1). In particular, Respondent believes the treatment of Petitioner's confession was erroneous. The court heavily relied upon circumstances surrounding Petitioner's confession in determining both his "actual innocence" and allegations of "*Brady*" violations (*see, e.g.*, Att. 1, pp. 18-20, 138-166).

On direct appeal, Petitioner claimed his confession was coerced. *Fontenot*, 881 P.2d at 74 (Att. 6). The OCCA denied this claim on the merits, finding "no evidence of police misconduct directed toward him either just prior to or during his confession" and "no evidence that the police exploited these possible weaknesses [Petitioner's alleged low intelligence and mental instability] and coerced him into confessing." *Id*. at 77. The OCCA concluded that "[Petitioner]'s confession was voluntarily given." *Id*.

Petitioner also claimed his confession was unreliable and uncorroborated. *Id*. The OCCA held that "[t]he State in the present case did provide sufficient, corroborative evidence independent of [Petitioner]'s confession to show its trustworthiness[.]" *Id*. In particular: Petitioner made incriminating admissions to two non-law enforcement individuals; three eyewitnesses to the abduction

testified consistently with Petitioner's confession; witnesses placed Petitioner with Ward—who also confessed and was convicted of Ms. Haraway's murder—in a truck matching the description of that used in the abduction on other occasions; an eyewitness observed men matching Petitioner's and Ward's descriptions at the scene; another witness placed men matching their descriptions near the scene; Petitioner said he and Ward took about $150 from the store at which Ms. Haraway worked--$167 was stolen; Petitioner accurately described Ms. Haraway's blouse and shoes; and evidence suggested Ms. Haraway would not have willingly walked away from her life. *Id*. at 78-79. The OCCA considered inconsistencies between the confession and other evidence, but found they did not render the confession untrustworthy. *Id*. at 80.

The court, however, deferred to none of the state court's findings of fact or conclusions of law. *See Harrington v. Richter*, 562 U.S. 86, 102 (2011) ("Here it is not apparent how the Court of Appeals' analysis would have been any different without AEDPA [28 U.S.C. § 2254(d)]."). Contrary to the OCCA's conclusions, the court determined Petitioner's confession was involuntary and unreliable, that he was "fed" facts, that his alleged mental disabilities were exploited, and that there was "absolutely no evidence" corroborating the confession (Att. 1, pp. 138-66). The court determined Petitioner's confession to be involuntary **without considering** Petitioner's repeated incriminating admissions while in jail that he "knew we would

get caught" (*see* excerpt from Jury Trial, Jun. 10, 1988, pp. 203-210) (Attachment 10). There is a substantial likelihood that Respondent will succeed on appeal in light of the district court's disregard of the limitations on its review.[2]

### D. The District Court Uncritically Accepted Petitioner's Evidence and Disregarded Contrary Evidence in the State Court Record

The district court seemed to view all of Petitioner's proffered "evidence" of "innocence"—brought so many years after the fact—in a favorable manner while simultaneously ignoring, or giving inadequate weight to, record evidence. For example, the court relied on a hearsay affidavit from the husband of a deceased "snitch" claiming the "snitch" had an undisclosed plea agreement (Att. 1, pp. 58-59). However, the court failed to recognize that this "snitch" *never* testified at Petitioner's 1988 trial or explained how this non-witness could have affected the outcome.

The court further credited a theory of alibi regarding the supposed pregnancy of Ms. Haraway (*see* Att. 1, pp. 46-48). Petitioner theorized that because Ms. Haraway allegedly gave birth during the period of time she was missing and by the time he was already incarcerated, he had to be innocent of her murder. The court

[2] The court even found that the State failed to comply with a state evidentiary rule – the "corpus delicti" rule, another proposition Petitioner had raised in his state direct appeal (Att. 1, pp. 152-66). The OCCA used Petitioner's 1994 opinion to dispense with further use of that evidentiary rule 25 years ago. *See Fontenot*, 881 P.2d at 77-78 (Att. 6). This supposed violation of state law is not a proper basis for a writ of habeas corpus. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

agreed, finding it to be "impossible" for Petitioner to have killed Ms. Haraway under this circumstance (Att. 1, p. 47). The court relied on two lines of an anthropology report showing "[m]arks on the pelvis" that "indicated she had given birth to at least one child[,]" a 1978 article about the subject, and hearsay from friends (Att. 1, pp. 46-48). Respondent rebutted this, and even exposed Petitioner's own concession that a fetal birth could never be proved for certain due to the lapse of time (*see* excerpt from Second Amended Petition for Writ of Habeas Corpus, Doc. 123, pp. 44-46) (Attachment 11). Despite the weaknesses in Petitioner's "actual innocence" claim, the court determined Ms. Haraway's alleged pregnancy to be a "startling revelation . . . undermin[ing] the state's entire theory as to the motive of Ms. Haraway's kidnapping and what happened to her in the months leading up to her death" (Att. 1, p. 47). Petitioner presented no affidavit from anyone who actually saw Ms. Haraway's pelvis, or proof from a relative, or anything else (perhaps the child that was supposedly born). These are the types of unreliable and untrustworthy "facts" which the court determined were "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." *Frost*, 749 F.3d at 1231-32 (internal citations omitted). This type of frail, untested proof helped Petitioner overcome procedural bars.

Similarly, the court incorrectly credited Petitioner's "new" alibi evidence. The court relied on Petitioner's handwritten decades-old "recantation," witnesses

from a party Petitioner claims he attended at the time of the murder who "recall" his presence, to find (1) a persuasive alleged alibi and (2) the State failed to provide him this information (Att. 1, pp. 22-29). However, the court overlooked state trial testimony of Gordon Calhoun, the host of the party in question, who testified that Petitioner was *not* at the party (*see* excerpt from Jury Trial, Jun. 8, 1988, pp. 144, 150-51) (Attachment 12). The court never acknowledged Calhoun's testimony, nor did the court explain how Petitioner's three-decade-old memories are more reliable than Calhoun's trial testimony to the contrary. The court instead relied upon testimony from another trial – Ward's 1989 retrial – that was never in this state court record, available since 1992 (Att. 1, pp. 24-28).

Further, Petitioner always would have known his own whereabouts; thus, it could not now be "new" evidence, or information "withheld" from him. *See Harris v. Kuba*, 486 F.3d 1010, 1015 (7th Cir. 2007) (in context of suppression claim, reasoning,"Harris knew where he was (and was not) at the time" and therefore, "Harris's own alibi was not concealed from him and is therefore not properly a claim under *Brady*."); *United States v. Lee*, 399 F.3d 864, 865 (7th Cir. 2005) (reasoning that *Brady* deals with the concealment of exculpatory evidence unknown to the defendant and because "Lee was aware of his own pants," the claim was not properly one under *Brady*); *see also United States v. Pickard*, No. 00-40104-01/02-RDR, 2009 WL 939050, *11 (N.D. Kan. Apr. 6, 2009) (no *Brady* violation where alibi

evidence was available to defense from other sources and defense was aware of essential facts necessary to obtain evidence) (citing *Spirko v. Mitchell*, 368 F.3d 603, 611 (6th Cir. 2004) (unpublished)).[3]

Petitioner's claim that eyewitness testimony at trial was too weak, and therefore showed his "actual innocence," was also problematic. Karen Wise, for instance, testified to the jury at Petitioner's 1988 trial that she was not sure whom she saw while working at J.P.'s, a nearby convenience store, and could not make any positive identification (*see* excerpt from Jury Trial, Jun. 8, 1988, pp. 177) (Attachment 13). Now, Petitioner presents evidence from Wise that is nearly the same – only stronger in that she is now nearly positive she did not see Petitioner (*see* Att. 11, pp. 35-36).[4] But Petitioner's jury heard an unsure witness at his trial. The district court did not acknowledge this testimony or the fact that Petitioner was convicted despite Wise's doubts.[5] The court's failure to acknowledge, or even

[3] Unpublished decision cited for persuasive value only, pursuant to Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[4] And even Petitioner's proffered affidavit reveals his defense counsel had access to the information he deems more important in this proceeding. During the 1988 trial, Wise appears to admit that she spoke to Petitioner's counsel on the very subject (*see* Att. 11, p. 36).

[5] The court further failed to take into account the unreliability of recanted testimony. *See Case v. Hatch*, 731 F.3d 1015, 1044 (10th Cir. 2013) ("recanted testimony is notoriously unreliable, easy to find but difficult to confirm or refute: witnesses forget, witnesses disappear, witnesses with personal motives change their stories many times, before and after trial" (citing *Carriger v. Stewart*, 132 F.3d 463, 483 (9th Cir. 1997) and *In re Davis*, 565 F.3d 810, 825 (11th Cir. 2009) (internal quotes omitted))).

recognize the existence of some of, this trial testimony while accepting untested hearsay information generated many years later must be reviewed by this Court.

The court's flawed factual findings and conclusions were used to permit Petitioner to pass through state and federal procedural bars and have his petition reviewed. Worse, Petitioner was then permitted relief on his claims without respect for state court findings required by federal law. There is a substantial likelihood that Respondent will succeed on appeal.

**E. Conclusion**

Respondent need not show that he will be meritorious on appeal in order for a stay to be granted. Rather, once he shows – as he does below – that the other "harm" factors tip in his favor, Respondent need only demonstrate that there are "questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation." *Mainstream Marketing Services, Inc.*, 345 F.3d at 852; *McClendon*, 79 F.3d at 1020. However, the above discussion would satisfy any standard. The district court ignored significant limitations on its authority. Respondent desires a fair opportunity to present his arguments to this Court. A stay of the district court's Judgment is necessary for that purpose.

**II.**

**There Is a Threat of Irreparable Harm to the State If a Stay Pending Appeal Is Not Granted, Petitioner Will**

**Not Be Unduly Prejudiced By A Stay Pending Appeal, and There Are Vital Public Interests at Stake Served By Staying the Judgment Pending Respondent's Appeal.**

Respondent requests this stay because it will be irreparably harmed without it. Further, Petitioner will not be unduly prejudiced and there are vital interests at stake.

### A. Oklahoma Will Suffer Irreparable Harm

Oklahoma has a great interest in the preservation of its state court judgments and sentences. *See Calderon v. Thompson*, 523 U.S. 538, 539 (1998). Respondent is appealing a district court judgment that has overturned a first-degree murder conviction that became final twenty-five years ago. Chief Justice Roberts has observed:

> It takes time to decide a case on appeal. Sometimes a little; sometimes a lot. No court can make time stand still while it considers an appeal, and if a court takes the time it needs, the court's decision may in some cases come too late for the party seeking review. That is why it has always been held, . . . that as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal. A stay does not make time stand still, but does hold a ruling in abeyance to allow an appellate court the time necessary to review it.

*Nken*, 556 U.S. at 421 (internal quotes and citations omitted). If this Court does not grant a stay, its decision will come too late for Respondent (Response to Motion For Stay and Brief in Support, Sept. 27, 2019, Doc. 159, p. 4) (noting that an appeal

"could easily take two years to resolve considering the voluminous record" and even if this Court were to reverse the district court Petitioner would appeal to the United States Supreme Court) (Attachment 14).

In light of the district court's belief that Petitioner's confession was coerced—which directly conflicts with the OCCA's determination—it is unclear whether that evidence can be used at a retrial. The State is, therefore, in an impossible position. The State can proceed with a retrial without a valuable piece of evidence, a confession which will likely be determined by this Court to be uncoerced in light of the OCCA's merits adjudication, or risk reversal by using the confession because the district court's ruling will not be final.

The "conditional" nature of this writ is illusory because it contemplates release under virtually any circumstances, not a realistic chance to appeal. On one hand, if the retrial is completed before this Court decides Respondent's appeal, Respondent will have effectively been denied the right to an appeal. On the other hand, if this Court rules in Respondent's favor, a great deal of time and resources will have been wasted. Such simultaneous, overlapping, inefficient court proceedings would not be the best use of this Court's time, the state court's time, or the parties' time. Respondent recognizes the court's discretion in this matter. However, the Opinion and Order denying the stay was entered just one business day after Petitioner filed his response and, as shown above, the only factual finding upon

which it apparently rests was incorrect. The very real threat of irreparable harm in this case, at the very least, does not seem to have been appropriately measured. *Nken*, 556 U.S. at 434. The district court has effectively rendered its decision unreviewable.

**B. Petitioner will not be Unduly Prejudiced**

Petitioner cannot legitimately show that he would be unduly prejudiced by a stay pending resolution of the appeal. Petitioner's response in the district court focused on his desire to be released from custody (Att. 14, pp. 3-5). Whether or not this Court grants a stay, Petitioner – in his capacity as one charged with and awaiting retrial for first-degree murder and kidnaping – will continue to be incarcerated by Oklahoma pending his retrial. Thus, Petitioner's position will be unchanged by Respondent's requested stay.

**C. There are Vital Public Interests at Stake**

Petitioner has strong reasons to flee a state system he claimed wrongly convicted him of murder. Even if indigent, Petitioner apparently has many sources of assistance given the high profile nature of this case. On the other hand, as shown above, there would be no substantive change in Petitioner's status during appeal or a retrial.

There is not only a great risk of harm to the public interest, that same interest would be advanced by a stay of the district court's judgment. It can never be

forgotten that conditional habeas corpus relief has been granted to someone twice convicted by Oklahoma juries for murder in the first-degree. Oklahoma has a grave interest in ensuring that its convicted murderers, like Petitioner, are punished and not at large to the public.

A stay would also prevent the initiation of unnecessary proceedings to retry Petitioner should this Court eventually decide, upon thorough review, that the court misapplied federal law during Petitioner's habeas corpus proceedings. A successful appeal, as touched upon above, would save the public time and money in its pursuit of justice in Petitioner's case and would save the witnesses from having to return to court once again for potential proceedings that might never be essential if Respondent's appeal prevails. And Oklahoma has a strong interest in ensuring its jury verdicts are not overturned unless there is an extreme malfunction in its criminal justice system. *See Richter*, 562 U.S. at 102-03.

Lastly, this Court should never forget the great emotional toll that a potentially unnecessary retrial would take on the surviving family members of the victim in this case. These survivors have already been forced to relive the very painful circumstances of this murder so many times. A stay pending appeal would merely preserve the *status quo* and keep any emotional harm at bay until this Court could make a decision.

By contrast to all these circumstances, an unsuccessful appeal would merely put the parties back in the present condition for the State to retry Petitioner.

## CONCLUSION

Respondent has met all of the "harm" factors above such that they "tip decidedly in [his] favor." Hence, the "probability of success requirement is somewhat relaxed." *Mainstream Marketing Services, Inc.*, 345 F.3d at 852. Respondent, as demonstrated above, then need only show "questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation." *McClendon*, 79 F.3d at 1020. Respondent has done so by revealing the court's failure to observe the AEDPA standard of review requiring deference to state court findings of fact and conclusions of law.

Based upon the foregoing argument and authority, Respondent's motion for a stay of this Court's August 27, 2019, Judgment pending appeal to this Court, should be granted.

Respectfully submitted,

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**ATTORNEYS FOR RESPONDENT**

## CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of October, 2019, I electronically transmitted the attached document to the Clerk of using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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**s/ MATTHEW D. HAIRE**
**s/ THEODORE M. PEEPER**

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1. This document complies with the word limit of Fed. R. App. P. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains **5131** words.

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