23-7231

IN THE SUPREME COURT OF THE UNITED STATES

BRYAN CHRISTOPHER O'ROURKE, PETITIONER,

vs.

STATE OF OKLAHOMA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
OKLAHOMA COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

Petitioner, *pro se*:

Bryan Christopher O'Rourke
#854732
GPCC Unit EE-09
P.O. Box 700
Hinton, OK 73047

Petitioner Bryan Christopher O'Rourke is a *pro se* state prisoner at the Great Plains Correctional Facility, P.O. Box 700 Unit EE-09, Hinton, Oklahoma 73047. The facility phone number is 405-778-7000.

Mr. O'Rourke's pauper's affidavit and other required filing documents were previously submitted to the Court in his request for a 60-day extension of time. However, he timely submits this petition for writ of certiorari.

QUESTION PRESENTED

This case involves a serious and important question about fair warning to United States citizens of a collateral and direct Second Amendment consequence and where the responsibility of fair warning lies, the constitutional guarantee of the effective assistance of counsel, and whether the U.S. Constitution provides at least equal, if not greater protections, to U.S. citizens as it does to a Lawful Permanent Resident.

In *Padilla v. Kentucky*, 559 U.S. 356, 364, 369 (2010), this Court held that counsel is constitutionally deficient by failing to advise a non- U.S. citizen of the collateral consequence and risk of deportation by entering a guilty plea. Because this case involves the question of whether *Padilla's* reasoning should apply to misdemeanor domestic violence convictions to ensure criminal defendants make fully and fairly informed decisions before waiving their right to a jury trial, and also involves review of an eventual federal conviction pursuant to 18 U.S.C. § 922(g)(9) (federal prohibition on firearms possession by those convicted of a misdemeanor crime of domestic violence), where the lack of knowledge on the federal firearms prohibition was raised to the federal district court, and a determination by this Court on the effect – if any – of 18 U.S.C. § 921(a)(33)(B) (providing either elements or affirmative defense exceptions to § 922(g)(9)) on the federal firearms prohibition, this case is an ideal vehicle to resolve and provide guidance to each of the states and federal circuits.

The questions presented is:

Whether, pursuant to *Padilla*, counsel is *a fortiori* constitutionally deficient for failing to notify a United States citizen of the direct and/or collateral consequence of the permanent and categorical loss of a fundamental, individual, and enumerated right to bear arms under the Second Amendment?

Whether the categorical loss of one's Second Amendment rights after a misdemeanor domestic violence conviction is a direct or collateral consequence, and where advisement to a criminal defendant of the consequence lies? Or alternatively, whether Oklahoma law requires courts to advise criminal defendants of *all* constitutional rights being surrendered by a guilty plea, including the loss of one's Second Amendment rights?

Whether Oklahoma's Uniform Post-Conviction Procedure Act is an inadequate and ineffective independent state law ground to resolve this purely federal question?

LIST OF PROCEEDINGS

The following proceedings are directly related to this case within the meaning of this Court's Rule 14.1(b)(iii):

- *State of Oklahoma v. Bryan Christopher O'Rourke*, No. CM-2007-3872
- *O'Rourke v. State*, No. PC-2023-742 (Okl.Cr. Oct. 31, 2023)
- *United States v. O'Rourke*, No. 4:10-cr-00171-GKF (N.D. Okla.) (currently stayed by the federal district court)[1]

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[1] Mr. O'Rourke has filed, and is awaiting disposition of, a motion to reconsider a stay imposed by the United States Court for the Northern District of Oklahoma on a writ of coram nobis in Case No. 4:10-cr-00171-GKF (N.D. Okla). That case involves the question presented to this Court, as well as whether an unadvised misdemeanor domestic violence guilty plea: (1) triggers the protections of 18 U.S.C. § 921(a)(33)(B)(i)(II)(bb), and; (2) whether 18 U.S.C. § 921(a)(33)(B) establishes elements of 18 U.S.C. § 922(g)(9) or affirmative defenses. The second issue appears to present a circuit split between the Tenth Circuit and the First and Eleventh Circuits. Upon the federal district court's decision on the motion to reconsider, Mr. O'Rourke will seek certiorari review on his federal conviction pursuant to this Court's Rule 18, and will request the Court to consolidate the instant petition with his impending Rule 18 petition. *See* Appendix 8 ('Motion to Reconsider Stay' in Case No. 4:10-cr-00171-GKF (N.D. Okla)).

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Appendix 7 (2015 Judgment and Sentence with Second Amendment Advisement by the state district court Pursuant to 18 U.S.C. §§ 922(g)(8)-(9))

Appendix 8 ('Motion to Reconsider Stay' in Case No. 4:10-cr-00171-GKF (N.D. Okla))

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TABLE OF AUTHORITIES

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CONSTITUTIONAL PROVISIONS INVOLVED

The Second Amendment of the U.S. Constitution provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The Sixth Amendment of the U.S. Constitution holds in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defence.

The Fourteenth Amendment of the U.S. Constitution holds in relevant part:

> No State shall ... deprive any person of life, liberty, or property, without due process of law.

Article 2, § 26 of the Oklahoma Constitution holds:

> The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons.

STATUTORY PROVISIONS INVOLVED

21 O.S. § 644(C) provides that:

> Any person who commits any assault and battery against a current or former intimate partner ... shall be guilty of domestic abuse. Upon conviction, the defendant shall be punished by imprisonment in the county jail for not more than one (1) year, or by a fine not exceeding Five Thousand Dollars ($5,000), or by both such fine and imprisonment.

22 O.S. § 1086 provides that:

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

18 U.S.C. § 922(g)(9) provides that:

> It shall be unlawful for any person who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 921(a)(33)(B)(i)(II)(bb) provides that:

> A person shall not be considered to have been convicted of such an offense for purposes of this chapter unless - - in the case of a prosecution for an offense described in this paragraph for which a person was entitled to a jury trial in the jurisdiction in which the case was tried, ... the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise.

STATEMENT OF THE CASE[2]

After threat and coercion by the State, and being unadvised by the State, the state court, and defense counsel of the direct and collateral Second Amendment consequences attending a misdemeanor domestic violence (MDV) conviction, Mr. O'Rourke entered a guilty plea of

[2] Pursuant to S. Ct. Rule 14.1(g).

Domestic Assault and Battery pursuant to 21 O.S. § 644(C) in Tulsa County, Oklahoma Case No. CM-2007-3872. He was sentenced to 12 months in the Tulsa County Jail, all time suspended, and was required to attend counseling classes.

A conviction pursuant to § 644(C) does not trigger a firearms prohibition under Oklahoma law. *See* Okla. Const. Art. 2, § 26. However, § 644(C) is a "misdemeanor crime of domestic violence" pursuant to the definition found in 18 U.S.C. § 921(a)(33)(A), and triggers an automatic firearms prohibition under federal law. U.S. Const. amend. II; 18 U.S.C. § 922(g)(9) (automatic Second Amendment prohibition under federal law after a misdemeanor domestic violence conviction). This is so even if there has been no determination of dangerousness by the misdemeanor court, even if the alleged facts in the case do not involve firearms, and even if a defendant has absolutely no knowledge from any source that their state conviction immediately prohibits them from continued firearms possession under federal law. Critically, Oklahoma law requires its courts to advise criminal defendants "of *all constitutional rights she relinquishes with her plea as well as the range of punishment.*" *Lewis v. State*, 2009 OK CR 30, ¶ 5, 220 P.3d 1140, 1142.

Mr. O'Rourke had owned firearms since his twelfth birthday and because he was never advised by anyone he could no longer own or possess firearms after his misdemeanor domestic violence guilty plea, he continued to own and possess firearms. In 2009, he was arrested and ultimately pled guilty to driving under the influence of alcohol. At the time he was pulled over by law enforcement, he had a properly stored handgun in his possession. He immediately notified the police officer of the presence of the gun, that it was properly stored, the clip and gun were separated, were beyond his reach, and there was no ammunition in the gun or within the vehicle. In addition to the driving under the influence plea, he plead guilty to possessing a

firearm while intoxicated, and those sentences were suspended. At no point in these proceedings was he advised by anyone that he could no longer possess firearms.

Nearly a year later, he learned he had been indicted by the U.S. Attorney for the Northern District of Oklahoma pursuant to § 922(g)(9) and 18 U.S.C. § 924(a)(2) (knowing violation of § 922(g) subject to fines and up to 10 years imprisonment).

In federal court, Mr. O'Rourke alerted the Government and the district court that he had never been advised by anyone of the direct and/or collateral Second Amendment consequence for pleading guilty to the state domestic violence charge, and that had he known of the consequence, he would not have entered the guilty plea and instead demanded a jury trial. While the federal judge indicated he believed this assertion, he stated that "ignorance of the law is no excuse." But this Court eventually expounded "[t]hat maxim does not normally apply where a defendant's mistaken impression about a collateral legal question causes him to misunderstand his conduct's significance, thereby negating an element of the offense" because it refers to a "collateral question of law, and a mistake regarding that status negates an element of the offense." *Rehaif v. United States*, 139 S.Ct. 2191, 2192 (2019).

Mr. O'Rourke entered his guilty plea in federal court, and wept during the allocution stage because he was being punished for exercising a constitutional right, not knowingly and/or intentionally violating federal law. Again, the federal judge indicated his belief that Mr. O'Rourke was completely unaware he had violated federal law, but nonetheless was bound by that same law to find him guilty and render a sentence.

Mr. O'Rourke was sentenced to 1 year and 1 day in the custody of the Bureau of Prisons, was allowed to self-surrender to serve his prison sentence, and served 100% of his sentence between federal and halfway house custody. During this time, parental consortium with his

daughter was completely disrupted, he lost his marriage, his businesses, his home, his car, and most of his clothes and other possessions. While he was able to resume his work for National Lampoon covering the Ultimate Fighting Championship (UFC) upon his release, and the United States Probation Office granted him an exception to travel to Las Vegas and throughout the United States for that work, he was banned from traveling to major events in Canada during this timeframe because of his federal felony conviction, as well as suffering from other well-known consequences attending a felony conviction. For example, even though Mr. O'Rourke owned a medical clinic which was forced to close because of his imprisonment, he could no longer get accredited by the Centers for Medicare and Medicaid Services and open a new clinic (or any number of businesses within the medical industry) because of his federal felony conviction.

Within one year of this Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S.Ct. 2111 (2022), Mr. O'Rourke sought post-conviction relief in state court and provided evidence that his MDV guilty plea was: (1) coerced under threat by the state; (2) that he was never advised by anyone of the Second Amendment consequences attending an MDV conviction, and (3) that at some point after his MDV conviction in 2007, Oklahoma's district courts began formally and expressly advising criminal defendants, in accordance with Oklahoma law, that an MDV conviction would result in a federal firearms prohibition pursuant to § 922(g)(9).

The state district court and Oklahoma Court of Criminal Appeals (OCCA) erroneously denied relief on procedural grounds despite his assertions as to why he did not raise his claims sooner, and the state courts did not address the merits of his claims in an " 'obvious subterfuge to evade consideration of a federal issue.' " *Mullaney v. Wilbur*, 421 U.S. 684, 691 n.11 (1975) (quotation omitted).

Similarly, he filed a writ of error coram nobis in the United States Court for the Northern District of Oklahoma challenging his conviction under § 922(g)(9) as unconstitutional both facially and as-applied pursuant to *Padilla*, *Rehaif*, and *Bruen*. That case is currently stayed by the federal district court pending resolution by the Tenth Circuit of a different case raising only a facial challenge to § 922(g)(9).

REASONS FOR GRANTING THE PETITION

Mr. O'Rourke respectfully requests the Court to vacate the judgment and sentence below because he provided sufficient evidence that his plea was coerced under threat by the State, and at no point was he advised of the collateral and direct Second Amendment consequences by the State, the court, or his defense attorney. Further, Oklahoma's Uniform Post-Conviction Procedure Act, 22 O.S. § 1080, *et seq.*, is inadequate and ineffective to determine the purely federal questions now before the Court.

I. Counsel is Constitutionally Deficient for Failing to Advise of the Collateral and Direct Second Amendment Consequence Attending a Misdemeanor Domestic Violence Conviction

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense." U.S. Const. amend. VI. The purpose of the constitutional right to counsel "is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938). The right to counsel applies in any charged offense – misdemeanor or felony – for which a term of imprisonment is imposed, *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972), and extends to the plea-bargaining process. *See Missouri v. Frye*, 566 U.S. 134 (2012). Nowhere is counsel more important than at a plea proceeding. "[A]n intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney."

Brady v. United States, 397 U.S. 742, 748 n. 6 (1970). Thus, criminal defendants are "entitled to the effective assistance of competent counsel" during that process. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012) (internal quotation marks omitted).

Competent defense counsel is usually going to advise their client of the serious collateral consequence of a conviction. *See* Standards for Criminal Justice Standard 14-3.2(f) (Am. Bar Ass'n 1999) ("To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea."); *see also* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 713-18 (2002) (surveying further professional standards and guidance that direct counsel to advise a client of a guilty plea's collateral consequences). Where a defendant enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was "within the range of competence demanded by attorneys in criminal cases." *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). *See Strickland v. Washington*, 466 U.S. 668 (1984).

To satisfy *Strickland's* prejudice prong, a defendant must show "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59; *see Lee v. United States*, 582 U.S. 357, 364-365 (2017) (the question is whether the defendant would have gone to trial, not whether the result of trial would have been different than the result of the plea bargain). Put differently, a defendant "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356 (2010). Mr. O'Rourke presented

evidence below that had he been advised by counsel, the state, or the state court of the Second Amendment prohibition attending a MDV conviction, he would have demanded a jury trial.

In *Padilla*, the Court held that a defendant's counsel performed deficiently by providing him false assurances that his conviction would not result in removal from the United States, but "[t]he consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect." 559 U.S. at 368-369. The Court simultaneously recognized, however, that "[w]hen the law is not as succinct and straightforward ..., a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.* at 369. *Padilla* includes that counsel can be constitutionally deficient not only for incorrect advice, but also for omissions. *Id.* at 370 (citing *Strickland*, 466 U.S. at 690 ("The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance")).

A categorical and permanent prohibition against firearm possession after an MDV conviction is similar to deportation in being "uniquely difficult to classify as either a direct or collateral consequence" of the conviction, such that a defendant could base an ineffective assistance of counsel claim on the failure to advise the client accurately regarding the potential impacts of conviction on the right to possess firearms. *Padilla*, 559 U.S. at 366.

If counsel can be constitutionally deficient under *Padilla* for failing to advise a noncitizen of a direct or collateral consequence of deportation after a guilty plea, counsel's failure to advise a United States citizen of the collateral and direct consequence of a categorical and permanent loss of a defendant's Second Amendment rights pursuant to a MDV guilty plea must be constitutionally deficient *a fortiori* pursuant to *Padilla*.

The federal statute at issue, 18 U.S.C. § 922(g)(9), and the definitions contained within 18 U.S.C. § 921(a)(33)(A), require a more fact-intensive analysis than the issues presented to the Court in *Rehaif*, 139 S.Ct. at 2200 ("[I]n a prosecution under 18 U.S.C. § 922(g) … the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.").

Perhaps in the early days after the enactment of § 922(g)(9) in 1996, every reasonable attorney representing a client facing a misdemeanor domestic violence charge in state court might have been unaware of the Second Amendment consequence under federal law. This is exacerbated where there is no apparent duty placed on the state or the judiciary to inform a defendant that they face the loss of their Second Amendment rights as a result of the guilty plea. *See, e.g.*, *Hill*, 474 U.S. (holding that a court taking a guilty plea has no duty to advise a defendant regarding the collateral consequence of parole eligibility, and that *Strickland* governs ineffective assistance of counsel claims for misadvise on the collateral consequence).

The burden on a defendant should be what Mr. O'Rourke showed below: credible proof that counsel gave no such advisement, and a showing that there is no such advisement in the plea colloquy of the Second Amendment consequences of the guilty plea.

The Court's holding in *Padilla* that defense counsel was ineffective for failure to advise the defendant about virtually certain deportation as a consequence of conviction "did not eschew" the distinction between direct and collateral consequences of conviction "across the board," but rather concluded that the distinction was "ill-suited" to dispose of Padilla's ineffective assistance claim because of the unique nature of deportation in its severity "and the 'automatic' way it follows from conviction." *Chaidez v. United States*, 568 U.S. 342, 355 (2013).

Similarly, an MDV conviction will always result in a federal firearms prohibition under § 922(g)(9).[3] Like in *Padilla*, when defense counsel represents an immigrant in a criminal prosecution, " '[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence,' " *INS' v. St. Cyr*, 533 U.S. 289, 322 (2001) (quoting 3 Bender, Criminal Defense Techniques §§ 60A.01, 60A.02[2] (1999)), the preservation of one's Second Amendment rights may be important enough to a defendant and – depending upon the facts of the case – determinative of their decision to enter a plea agreement or exercise their right to a jury trial.

At the constitutional floor, the categorical and permanent loss of a fundamental, individual, and enumerated right under the Second Amendment without *any* warning or knowledge before entering a MDV guilty plea implicates ineffective assistance of counsel. U.S. Const. amend. VI; *Strickland*, 466 U.S.; *Padilla*, 559 U.S.

Mr. O'Rourke's counsel below was constitutionally deficient for his failure to advise of the collateral and direct consequence of entering his MDV guilty plea. Mr. O'Rourke was prejudiced by the automatic federal firearms prohibition and ultimate indictment and federal conviction pursuant to § 922(g)(9).

II. The Categorical Loss of One's Second Amendment Rights After a Misdemeanor Domestic Violence Conviction is a Collateral and Direct Consequence, and Triggers Advisement by Counsel, the Government, and the Courts Before Accepting a Guilty Plea

[3] This is true regardless of whether a person is informed of the Second Amendment prohibition or not. If an uninformed person continues to own and possess firearms in what they believe to be an innocent exercise of their Second Amendment rights, they are nonetheless violating federal law and will likely only become aware of the prohibition if they are later indicted by the Government pursuant to § 922(g)(9). This is precisely what happened to Mr. O'Rourke, and his indictment under § 922(g)(9) was completely unexpected and indefensible in federal court.

Under the Due Process Clause, a court must ensure that a defendant's guilty plea is voluntary, knowing, and intelligently given. U.S. Const. amend. XIV. *See Kercheval v. United States*, 274 U.S. 220, 223 (1927); *Walker v. Johnston*, 312 U.S. 275, 286 (1941).

Courts must make a determination of a plea's voluntariness on the record by "canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences." *Boykin v. Alabama*, 395 U.S. 238, 242, 243-244 (1969). The Court later clarified that a guilty plea by a *properly counseled* defendant was voluntary if " 'entered by one fully aware of the direct consequences,' " absent coercion, threats, or improper promises or representations. *Brady v. United States*, 397 U.S. 742, 755 (1970) (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26 (1958) (per curiam)).

In *Hill*, 474 U.S., the Court held that while a court taking a guilty plea has no duty to advise a defendant regarding the collateral consequence of parole eligibility, the two- part *Strickland* test governs claims of ineffective assistance of counsel for misadvice on the same subject. But parole eligibility after a guilty plea is a matter of legislative grace, not the prohibition of a fundamental, individual, and enumerated constitutional right that is effectively a direct consequence stemming from a MDV conviction.

A. The Categorical, Permanent, and Immediate Second Amendment Prohibition Attending a MDV Conviction is both a Collateral and Direct Consequence

Whether described as collateral or direct, the loss of one's Second Amendment rights after a MDV guilty plea is significant enough to warrant a fully advised consideration by a criminal defendant before electing to enter a plea or proceed to trial. Neither counsel nor the state and federal governments and their judiciaries would be overly burdened by ensuring criminal

defendants understand specific constitutional rights being waived and/or lost before deciding whether to enter a MDV guilty plea or proceed to trial.

State and federal courts have formulated various and differing tests for distinguishing between direct and collateral consequences. *See, e.g., United States v. Salerno*, 66 F.3d 544, 551 (2d Cir. 1995) (a consequence is direct if it has a definite, immediate, and largely automatic effect on the range of punishment); *Mitschke v. State*, 129 S.W.3d 130, 135 (Tex. Crim. App. 2004) (a consequence of a guilty plea is direct if it is punitive); *El-Nobani v. United States*, 287 F.3d 417, 421 (6th Cir. 2002) (a consequence is direct if it is within the "control and responsibility" of the sentencing court); Jenny Roberts, *The Mythical Divide Between Collateral And Direct Consequences Of Criminal Convictions: Involuntary Commitment Of "Sexually Violent Predators,"* 93 Minn. L. Rev. 670, 689-93 (2008) (discussing tests formulated by lower courts to define "direct" consequences).

The prevailing standard is whether the consequence is within the court's responsibility and control. 5 Wayne R. LaFave, *et al.*, Criminal Procedure § 21.4(d) (3d ed. 2008) (LaFave). That approach limits the trial court's duty of advisement because collateral consequences are often subject to various factual matters or variations of state law. Under this view, requiring judges to explain *every* collateral consequence would "impose upon the judge an impractical burden out of all proportion to the essentials of fair and just administration of the criminal laws." *U.S. v. Cariola*, 323 F.2d 180, 186 (3d Cir. 1963). While it might be:

> impactable for a trial judge to advise the defendant of *all possible* consequences, especially because the judge will not be aware at the time of the plea of the special circumstances which would make some of those consequences possible. [D]efense counsel should be expected to discuss with his client the range of risks attendant [to] his plea.

LaFave § 21.4(d) at 829. This makes sense for collateral consequences which are not as substantial as a permanent and categorical prohibition of a fundamental, individual, and enumerated constitutional right. But where the consequence of a MDV conviction triggers an automatic firearms prohibition under federal law, the state, tribal, and federal governments and trial court judges would not be overly burdened to ensure a defendant is aware of the consequence where the prohibition under § 922(g)(9) is clear and automatic.

Depending on which of the above consequence tests are employed by state, tribal, and federal courts, it seems clear that even when the Second Amendment consequence is a collateral one in a state or tribal court, it is a direct and automatic consequence under federal law. As such, criminal defendants facing MDV charges should be made aware of the Second Amendment consequences not only to ensure a decision to waive their constitutional right to trial is knowingly, voluntarily, and intelligently given, but also as a concept of fair warning so they do not continue to own and possess firearms under the incorrect presumption they are lawfully exercising a fundamental, independent, and enumerated constitutional right. U.S. Const. amend. II.

Review by this Court is warranted to provide uniformity in this area of Second Amendment law concerning the knowing, voluntary, and intelligent waiver of *all* constitutional rights.

B. Congress Intended to Meaningfully Cabin the Scope of § 922(g)(9) by Limiting Predicate MDV Convictions

Under 18 U.S.C. § 921(a)(33)(B)(i)(II)(bb), a person is not "considered to have been convicted" of an MDV offense where the defendant was entitled to a jury trial on the charge unless either "the case was tried by a jury," or "the person knowingly and intelligently waived the right to have the case tried by a jury, by guilty plea or otherwise." While Mr. O'Rourke has

apply *a fortiori* to counsel's failure below to advise Mr. O'Rourke, a U.S. citizen, of the Second Amendment consequences attending a MDV conviction. 559 U.S. at 356, 364, 369.

III. Oklahoma's Post-Conviction Procedure Act, which Replaced the Common Law Writ of Coram Nobis, is an Ineffective and Inadequate Independent State Law Ground to Determine Purely Federal Questions

To preclude this Court's review, a state-law ground of a decision must be both "adequate" to support the judgment and "independent" of federal law. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991). The question of whether a state-court decision is supported by an adequate and independent state-law ground is itself "a matter of federal law." *Johnson v. Lee*, 578 U.S. 605, 608 (2016) (per curiam).

The decision below does not rest on an adequate or independent state-law ground. It violates federal law; discriminates against federal rights; continues to discount Second Amendment considerations, and; involves purely federal questions. It implicates many reasons this Court exercises jurisdiction over decisions that purport to rest on state law. Oklahoma law allows people convicted of any crime to raise federal claims in post-conviction proceedings, even after a guilty plea. This Court has said when a state allows such claims to be raised, the state courts "ha[ve] a duty to grant the relief that federal law requires." *Yates v. Aiken*, 484 U.S. 211, 218 (1988).

Where federal questions are properly presented – as they were below – a state court cannot evade this Court's review by refusing to address the questions. It is "well settled that the failure of the state court to pass on the Federal right" renders its decision reviewable where "the necessary effect of the judgment is to deny a Federal right." *Chi., B & Q. Ry. Co. v. Illinois*, 200 U.S. 561, 580 (1906) (Harlan, J.); *see Chapman v. Crane*, 123 U.S. 540, 548 (1887) (recognizing

that a right "claimed under the constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action").

This Court reviews state-court decisions for evidence of a "purpose or pattern to evade constitutional guarantees." *Walker v. Martin*, 562 U.S. 307, 321 (2011) (quoting *Beard v. Kindler*, 558 U.S. 53, 65 (2009) (Kennedy, J., concurring); *see Rogers v. Alabama*, 192 U.S. 226, 231 (1904). "On rare occasions the Court has re-examined a state-court interpretation of state law when it appears to be an 'obvious subterfuge to evade consideration of a federal issue.' " *Mullaney v. Wilbur*, 421 U.S. 684, 691 n.11 (1975) (quotation omitted). The Court should do so here.

A. Post-Conviction Procedural Background

On June 23, 2023, Mr. O'Rourke filed his first 'Application for Post-Conviction Relief' in the Tulsa County District Court. *See* App. 2 at p. 2.

On June 28, 2023, the State filed its 'Motion to Dismiss.' *See* App. 4 at p. 2.

On July 5, 2023, a mere five- (5) business days after the State filed its 'Motion to Dismiss,' the state district court signed its 'Order Denying Petitioner's Application for Post-Conviction Relief.'[4] It did so without allowing Mr. O'Rourke the time allowed by court rule to enter his opposition reply. *See* Rule 4(e), *Rules of the District Courts of Oklahoma*, T. 12, Ch. 2, App. (2023) ("Any party opposing a motion, ..., shall serve and file a brief or a list of authorities in opposition within fifteen (15) days after service of the motion, or the motion may be deemed confessed."). This is a common tactic employed by the State, Oklahoma's district courts, and consistently upheld by the OCCA. *But see Strange v. Troutt*, 2017 OK CIV APP 5, 389 P.3d 401

[4] Even if calculated by actual calendar days, the district court's order was entered seven- (7) days after the State filed its motion to dismiss.

(Okl.Civ.App. 2017) (holding that district court is required to provide inmate 15 days to respond to State's motion to dismiss).

The district court's order denied the application two theories.

First, that the application was prohibited by 22 O.S. § 1080.1 (enacted November 1, 2022 and setting a 1-year limitation period to seek post-conviction relief). *See* App. 2 at p. 3 ("Petitioner's judgment and sentence became final in 2007 when he failed to move to withdraw his guilty plea and/or appeal to the OCCA. Petitioner's current Application is prohibited under 22 O.S. § 1080.1, and the Court dismisses his Application on this basis."). *But see Hammon v. State*, 2023 OK CR 19, 540 P.3d 486 (holding that § 1080.1 required a one-year grace period to file an application for post-conviction relief, or until November 1, 2023). As shown below, Mr. O'Rourke specifically showed – like the Federal Circuit Court's found for the enactment of the AEDPA – that both the Oklahoma and United States Ex Post Facto Clauses prohibited the retroactive application of § 1080.1 to convictions which were final before its enactment, and that because the statute was silent on a grace period, the Oklahoma courts must expound one. *See* App. 3 at pp. 24-29.

Second, the district court denied the application pursuant to 22 O.S. § 1086. *See* App. 2 at p. 4-5 ("Petitioner fails to overcome the procedural bar imposed by 22 O.S. § 1086. Therefore, the Court dismisses Petitioner's Application on this basis as well."). But § 1086 provides exceptions to waiver, which Mr. O'Rourke's application met. *See* App. 3 at pp. 29-32.

On October 31, 2023, the OCCA affirmed the district court's denial of post-conviction relief. *See* App. 6. It did not address the district court's application of § 1080.1. Instead, it relied on § 1086, stating that "[a]ll issues that could have been raised in direct appeal proceedings but were not are waived, and may not be the basis of a post-conviction application." App. 6 at p. 1

(citing 22 O.S. § 1086; *Fowler v. State*, 1995 OK CR 29, ¶ 2, 896 P.2d 566, 569). Additionally, the OCCA held that "Petitioner has not established sufficient reason for not asserting his current grounds for relief in direct appeal proceedings." App. 6 at pp. 1-2 (citing § 1086 and *Fowler*, 1995 OK CR). But this is patently false. Mr. O'Rourke showed he was never advised by anyone – not defense counsel, not the State, and not the state district court – that by entering the coerced MDV guilty plea he would be automatically, categorically, and permanently prohibited from exercising his Second Amendment rights. *See* App. 3 at pp. 9, 15-17, 21, 32-40. A defendant cannot be expected to raise the several and significant constitutional issues before this Court on direct appeal when they were never advised by anyone of the Second Amendment consequence.

Roughly three years later, Mr. O'Rourke was federally indicted pursuant to § 922(g)(9) even though he never knew he was prohibited from owning and possessing firearms under federal law. This is not fair notice, nor is it fair play. A defendant can hardly be aware of a Second Amendment consequence attending a MDV guilty plea if they were never aware they had lost an individual, fundamental, and enumerated constitutional right. "Federal criminal statutes that are silent on the required mental state should be read to include 'only that *mens rea* which is necessary to separate' wrongful from innocent conduct." *Elonis v. U.S.*, 575 U.S. 723, 725 (2015) (quoting *Carter v. United States*, 530 U.S. 255, 269 (2000)). This is not a matter of mere innocent conduct, but constitutionally protected conduct. But the Federal Circuits have employed another species of means-end scrutiny to hold that the Government need only show a person indicted pursuant to § 922(g)(9) knew of their relevant status – meaning the defendant knew there was a plea or trial adjudication of guilt by a state, tribal, or federal court in a MDV proceeding.

A person who is unaware of the fact until years later cannot be expected to *attempt* to withdraw their guilty plea and raise the issue on direct appeal. And because the states and Federal Government have treated the Second Amendment as a collective and second-class right by utilizing means-end scrutiny to uphold Second Amendment restrictions both facially and as-applied, this issue was not meaningfully ripe until this Court's decision in *Bruen*, 142 S.Ct.

Mr. O'Rourke's application for post-conviction relief (and his writ of coram nobis in federal court) was filed within one-year of the Court's decision in *Bruen*.

B. The PCPA is Inadequate and Ineffective

In the 1940s, Illinois maintained a system of post-conviction review that amounted to a "procedural labyrinth" and "offer[ed] no adequate remedy to prisoners." *Marino v. Ragen*, 332 U.S. 561, 565 (1947) (Rutledge, J., concurring). In reviewing a state-court decision denying relief under that system, this Court acknowledged that it does "not review decisions which rest upon adequate non-federal grounds," but that "it is not simply a question of state procedure when a state court of last resort closes the door to any consideration of a claim of denial of a federal right." *Young v. Ragen*, 337 U.S. 235, 238 (1949). The same conclusion follows here.

For several reasons, Oklahoma's Uniform Post Conviction Procedure Act (PCPA), 22 O.S. § 1080, *et seq.*, is an ineffective and inadequate independent state law ground to determine the purely federal questions before the Court.[5] U.S. Const. amend. XIV. In the federal habeas context, the Tenth Circuit has been critical of the OCCA's rules as being overly complicated and burdensome, especially for *pro se* litigants, and that the PCPA is "inadequate when it is

[5] This Court seems to have raised this issue *sua sponte* in *Glossip v. Oklahoma*, --- S.Ct. ----, 2024 WL 21877 (Mem.) (Jan. 24, 2024) (directing the parties to brief and argue "[w]hether the Oklahoma Court of Criminal Appeals' holding that the Oklahoma Post-Conviction Procedure Act precluded post-conviction relief is an adequate and independent state-law ground for the judgment").

inconsistently applied." *Anderson v. Sirmons*, 476 F.3d 1131, 1141 n.9 (10th Cir. 2007). It has also held the PCPA's procedural bars to be inadequate when "it deprives a defendant of any meaningful review of his claims." *Spears v. Mullin*, 343 F.3d 1215, 1253-54 (10th Cir. 2003).

Under Rule 5.1, *Rules of the Oklahoma Court of Criminal Appeals*, T. 22, Ch. 18, App. (2023), the OCCA's post-conviction "procedures are provided to establish the manner of appealing in non-capital cases from a final judgment of the district court after an application for post-conviction relief has been heard in the district court."

Pursuant to Rule 5.2, *Rules of the Oklahoma Court of Criminal Appeals*, T. 22, Ch. 18, App. (2023), appeals "under the Post-Conviction Procedure Act constitutes an appeal from the issues raised, the record, and findings of fact and conclusions of law made in the District Court in non-capital cases." (citing *Yingst v. State*, 1971 OK CR 35, ¶¶ 6-7, 480 P.2d 276, 277). "For appeal out of time *see* Rule 2.1(E)." *Id.*, at Rule 5.2(A).

Because Mr. O'Rourke entered a guilty plea to the MDV charge, the OCCA's rules requires that "[i]n all cases, to appeal from any conviction on a plea of guilty …, the defendant must have filed in the trial court clerk's office an application to withdraw the plea within ten (10) days from the date of the pronouncement of the Judgment and Sentence, setting forth in detail the grounds for the withdrawal of the plea and requesting an evidentiary hearing in the trial court." Rule 4.2(A), *Rules of the Oklahoma Court of Criminal Appeals*, T. 22, Ch. 18, App. (2023). *See also* 22 O.S. § 1051(A) ("all appeals taken from any conviction on a plea of guilty shall be taken by petition for writ of certiorari to the Court of Criminal Appeals, as provided in subsection B of this section; provided, the petition must be filed within ninety (90) days from the date of the conviction").

As the guilty plea below was entered in 2007, and Mr. O'Rourke was never advised by anyone of the automatic Second Amendment consequence under federal law which attended his plea, he could not be reasonably expected to attempt to withdraw his plea within 10 days and file his appeal within 90 days. There are no exceptions under the OCCA's rules for issues like the one here, where his plea was also entered under duress and coercion by the State's threats to prosecute his girlfriend if she did not participate in the prosecution. To be sure, the State's threat to prosecute his girlfriend did not cease within the 10-day window to withdraw a guilty plea nor the 90-day window to file an appeal.

Consistent with Rule 2.1(E)(1), *Rules of the Oklahoma Court of Criminal Appeals*, T. 22, Ch. 18, App. (2023), Mr. O'Rourke filed for post-conviction relief pursuant to the PCPA. As relevant here, § 1080 provides that "[a]ny person who has been convicted of, or sentenced for, a crime and who claims:

> 1. That the conviction or sentence was in violation of the Constitution of the United States or the Constitution or laws of this state;
>
> 2. That the court was without jurisdiction to impose sentence;
>
> ...
>
> 4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
>
> ...
>
> 6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy,
>
> may institute a proceeding under the Post-Conviction Procedure Act in the court in which the judgment and sentence on conviction was imposed to secure the appropriate relief. Excluding a timely appeal, the Post-Conviction Procedure Act encompasses and replaces all common law and

> statutory methods of challenging a conviction or sentence including, but not limited to, writs of habeas corpus.

22 O.S. § 1080. *See Campbell v. State*, 1972 OK CR 195, ¶ 4, 500 P.2d 303 (Okl.Cr. 1972) (common law writ of coram nobis supplanted by statutory Post-Conviction Procedure Act, 22 O.S. § 1080, *et seq.*). *See also Griffiths v. State*, 1967 OK CR 65, ¶ 2, 426 P.2d 384, 385 ("The functions of a writ of error coram nobis are limited to an error of fact for which the statute provides no other remedy, which fact did not appear of record or was unknown to the court when judgment was pronounced, and which, if known, would have prevented the judgment, and which was unknown and could not have been known to the party by the exercise of reasonable diligence in time to have been otherwise presented to the court, unless he was prevented from presenting them by duress, fear, or other sufficient cause.").

However, before he was able to file his brief in support providing evidence that his plea was coerced under threat by the State and that he was never advised by anyone of the Second Amendment consequence of the guilty plea, *see, e.g.*, *Blades v. State*, 2005 OK CR 1, 107 P.2d 607; *Smith v. State*, 1980 OK CR 43, 611 P.2d 276, the district court adopted an order prepared by the State without any meaningful judicial review. Additionally, the district court did not allow Mr. O'Rourke time to enter his opposition to the State's motion to dismiss his post-conviction appeal in accordance with Rule 4(e), *Rules of the District Courts of Oklahoma*, T. 12, Ch. 2, App. (2023) ("Any party opposing a motion, ..., shall serve and file a brief or a list of authorities in opposition within fifteen (15) days after service of the motion, or the motion may be deemed confessed."). This is a common tactic employed by the State, Oklahoma's district courts, and upheld by the OCCA. *But see Strange v. Troutt*, 2017 OK CIV APP 5, 389 P.3d 401 (Okl.Civ.App. 2017) (holding that district court is required to provide inmate 15 days to respond to State's motion to dismiss).

(i) The District Court's Denial

Pursuant to Rule 5.4, *Rules of the Oklahoma Court of Criminal Appeals*, T. 22, Ch. 18, App. (2023), the trial court:

> judge assigned to adjudicate the application for post-conviction relief shall prepare a detailed order setting out specific findings of fact and conclusions of law on each proposition for relief presented in the application. The order shall also specify the pleadings, documents, exhibits, specific portions of the original record and transcripts, considered in adjudicating the application, which shall then become a part of the record on appeal as defined by Rule 5.2(C)(6).

Rule 5.4(A).

Instead of complying with its obligations under Rule 5.4(A), the trial court adopted a prepared order from the State and did not provide any meaningful judicial review. The district court erroneously denied Mr. O'Rourke's application on two grounds, which were entirely procedural.

First, it retroactively applied § 1080.1 to deny relief. Mr. O'Rourke specifically argued that, like the federal courts with the AEDPA, the Oklahoma courts must expound an appropriate grace period for convictions which were final before the enactment of § 1080.1.[6] *See* App. 3 at pp. 24-29.

In *Hammon v. State*, 2023 OK CR 19, 540 P.3d 486, the OCCA considered a post-conviction appeal from a December, 2001 conviction (six years before Mr. O'Rourke's case was final) for "drug and firearm offenses." 2023 OK CR at ¶ 1, 540 P.3d at 487. *Hammon* ultimately

[6] Section 1080.1 violates ex post facto under the Oklahoma and United States Constitutions for several reasons. It was enacted by the Oklahoma Legislature in response to this Court's decision in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020). The Legislature did not provide any grace period for cases which were final before its enactment. *See* Okla. Const. Art. 2, § 15 ("No ..., ex post facto law, ..., shall ever be passed"); 22 O.S. § 3 ("No part of this code is retroactive unless expressly so declared"); Beazell v. Ohio, 269 U.S. 167, 169-170 (1925) ("any statute which ... deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto").

determined a one- (1) year grace period applied to convictions which were final before § 1080.1 was enacted, or until November 1, 2023. Mr. O'Rourke's application was filed in the district court well-within this grace period.

While the district court's holding is wrong, *Hammon* still provides very important context under Oklahoma law which evidences why the OCCA's affirmance is wrong:

> At the time Petitioner's judgment and sentence was affirmed, *there was no limitations period governing the filing of a post-conviction application* pursuant to the [PCPA]. This remained the case until November 1, 2022, when Section 1080.1 of Title 22 of the Oklahoma Statutes became effective. This section instituted a limitations period for filing post-conviction applications which provides in pertinent part:
>
> > A one-year period of limitation shall apply to the filing of any application for post-conviction relief, whether an original application or a subsequent application. The limitation period shall run from the latest of:
> >
> > 1. The date on which the judgment of conviction ... became final by the conclusion of direct review by the Oklahoma Court of Criminal Appeals[.] 22 O.S.Supp.2022, § 1080.1(A)(1).

Hammon, 2023 OK CR at ¶ 2, 540 P.3d at 487 (footnotes omitted). The district court in *Hammon* held that the application was untimely because "the factual predicate of Petitioner's claims could have been discovered through due diligence" and that Hammon's application "demonstrate[s] that [Hammon] has had the information forming the factual predicate for his claims since at least December 4, 2007." App. 10 at p. 1.[7]

Second, the district court denied the application under § 1086. The OCCA's common law interpretations of § 1086 are similar to the specific exceptions set forth by the Oklahoma Legislature in § 1080.1. For example, pursuant to finality considerations, review of an application for post-conviction relief is limited to those issues that *were not and could not* have

[7] Despite the OCCA's purported concerns for notice and fairness, it issued its decision in *Hammon* after the 1-year grace period had expired.

been raised on direct appeal. *See Rojem v. State*, 1992 OK CR 20, ¶ 3, 829 P.2d 683, 684. *See also Carter v. State*, 1997 OK CR 13, 933 P.2d 926, 928; *McCarty v. State*, 1999 OK CR 24, ¶ 4, 989 P.2d 990, 993.

It is important to note that the district court often does not play by its own rules, especially when considering *pro se* applications. Mr. O'Rourke made clear to the OCCA that the district court did not allow him the time to enter his reply to the State's 'Motion to Dismiss' pursuant to Oklahoma District Court Rule 4(e). *See* App. 3 at p.24. He further provided the reasons the reasons he did not and could not raise his claims sooner. *See* App. 3 at pp. 17-18. The latter is an exception to procedural bar and waiver under § 1086:

> Post-conviction review affords criminal defendants in Oklahoma the opportunity to challenge their convictions by raising claims that could not reasonably have been raised on direct appeal, including claims of ineffective assistance of appellate counsel. *See, e.g., Logan v. State*, 293 P.3d 969, 973 (Okla. Crim. App. 2013); *see also* Okla. Stat. tit. 22, §§ 1080, 1080.1, 1086.

Small v. Rankins, Case No. Civ 22-098-RAW-KEW, 2023 WL 1818211 at *2 (E.D. Okla. Feb. 8, 2023) (slip copy).

(ii) The OCCA's Denial

This Court has "repeated[ly]" recognized that state procedural rules are not adequate if they "operate to discriminate against claims of federal rights." *Walker v. Martin*, 562 U.S. 307, 321 (2011); *see Lee v. Kemna*, 534 U.S. 362, 388 (2002) (Kennedy, J., dissenting) (a "state procedural ground" is adequate to bar federal review only if the procedure "do[es] not discriminate against federal rights"). This principle ensures that states cannot adopt procedural rules to "produce a result which the State could not command directly." *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

This Court has encountered numerous state procedural rules that are neutral to federal law and therefore permissible, even though they preclude federal claims in certain applications. *See Walker*, 562 U.S. at 310 (state time limitation); *Johnson*, 578 U.S. at 606, 609 (state procedural default rule); *Parker v. Illinois*, 333 U.S. 571, 574-576 (1948) (state waiver rule). But because the PCPA and the OCCA's interpretations of the PCPA allow exceptions to various procedural bars, as interpreted by the OCCA and applied to Mr. O'Rourke below, 22 O.S. § 1086 discriminates against federal claims under the Second, Sixth, and Fourteenth Amendments. As applied below, § 1086 deprived Mr. O'Rourke of "a reasonable opportunity" to assert federal rights. *Parker*, 333 U.S. at 574 (quotation marks omitted).

The OCCA affirmed the district court's denial pursuant to § 1086. *See* App. 6 at p. 1-2 ("All issues that could have been raised in direct appeal proceedings but were not are waived, and may not be the basis of a post-conviction application. 22 O.S.2011, § 1086; *Fowler v. State*, 1995 OK CR 29, ¶ 2, 896 P.2d 556, 569. Petitioner has not established sufficient reason for not asserting his current grounds for relief in direct appeal proceedings. *Id.*"). But as shown in App. 3 at pp. 29-32, Mr. O'Rourke established his claims met the exceptions under the statute pursuant to the OCCA's interpretations of § 1086.

> All grounds for relief must be raised in the original, … application unless the petitioner shows sufficient reason why a ground for relief was not previously asserted … This Court will not consider an issue which was raised on direct appeal and is therefore barred by res judicata, nor will we consider an issue which has been waived because it *could have been raised on direct appeal but was not.*

Plantz v. State, 1997 OK CR 23, ¶ 2. "The Post-Conviction Procedure Act is not designed or intended to provide … appeals of issues that … could have been raised but were not." *Glossip v. State*, 2023 OK CR 5, ¶ 16, 529 P.3d 218, *cert. granted*, --- S.Ct. ----, 2024 WL 21877 (Mem.) (Jan. 24, 2024).

Like the appellant in *Glossip*, who should not be expected to raise material exculpatory and impeachment evidence suppressed by the State before it was in his possession, Mr. O'Rourke cannot be reasonably expected to have attempted to withdraw his guilty plea and file a direct appeal regarding an unadvised Second Amendment consequence. He continued to exercise his Second Amendment rights after the MDV guilty plea until his federal indictment under § 922(g)(9) informed him he was categorically prohibited from owning and possessing firearms under federal law.

Where the OCCA has acknowledged its discretion to consider second and subsequent post-conviction applications even though a claim apparently could have been raised in earlier proceedings, it only does so when the issue "may so gravely offend a defendant's constitutional rights and constitute a miscarriage of justice." *Malicoat v. State*, 2006 OK CR 25, ¶ 3, 137 P.3d 1234, 1235. Oklahoma law does not limit a miscarriage of justice consideration to actual innocence claims. *See* 20 O.S. § 3001.1 ("No judgment shall be set aside ... in any case, civil or criminal, ... for any mater of pleading or procedure, unless it is the opinion of the reviewing court that the error complained of has probably resulted in a miscarriage of justice, *or constitutes a substantial violation of a constitutional or statutory right*"). *See Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923 (defining substantial violation of constitutional or statutory right as one affecting the outcome of proceeding). *See also Valdez v. State*, 46 P.3d 703, 710-11 (Okl.Crim. 2002) (OCCA retains the power to grant a successive post-conviction application despite § 1086 "when an error complained of has resulted in a miscarriage of justice, *or constitutes a substantial violation of a constitutional or statutory right*").[8] Had Mr. O'Rourke

[8] *But see Banks v. Workman*, 692 F.3d 1133, 1145 (10th Cir. 2012) (concluding that Oklahoma's procedural bar is independent of federal law, notwithstanding the OCCA's power to excuse default in "extreme cases"). *Banks* still requires an as-applied, individual case basis federal inquiry. Unfortunately, the unadvised categorical and permanent loss of one's fundamental, individual, and enumerated Second Amendment rights apparently does not

been advised of the Second Amendment consequence attending a MDV guilty plea, he would not have entered the plea and instead would have demanded a jury trial.

This is yet another example of another court treating the Second Amendment as a second-class right. Mr. O'Rourke contends that the unknown loss of a constitutionally protected right which could result in up to 10 years imprisonment – and only discovered years later – represents in the minds of many United States citizens a grave offense to one's constitutional rights and a miscarriage of justice.

(a) Appealing After a Guilty Plea

Under Oklahoma law, a voluntary guilty plea waives all but non-jurisdictional defects. *Cox v. State*, 2006 OK CR 51, ¶ 4, 152 P.3d 244, 247. Still, the trial court must ensure that a plea is knowingly, intelligently, and voluntarily entered. *King v. State*, 1976 OK CR 103, ¶ 7, 553 P.2d 529, 532 (relying on *Boykin v. Alabama*, 395 U.S. 238 (1969)). "To assure that" a guilty plea "is knowingly and voluntarily entered[,] [t]he findings of the trial court should be enunciated on the record for review to preclude any question on appeal." *Fields v. State*, 1996 OK CR 35, ¶ 28, 923 P.2d 624, 629-30 (alterations added). "To this end, a defendant *must* be advised of *all constitutional rights she relinquishes with her plea as well as the range of punishment*." *Lewis v. State*, 2009 OK CR 30, ¶ 5, 220 P.3d 1140, 1142. The relinquishment of constitutional rights advisement under Oklahoma law is broad and all encompassing, but "[t]he latter" range of punishment "requirement includes statutory sentencing provisions which amount to material consequences[9] which flow from the decision to enter a guilty plea." *Id.* (citing

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constitute an "extreme case" to the OCCA, but there should be no splitting of Constitutional hairs for the questions presented.

[9] *See* material, adj. (16c) "Of such a nature that knowledge of the item would affect a person's decision-making; significant; essential." Black's Law Dictitonary (11th ed. 2019) (Bryan A. Garner ed.). *See also* consequence (14c) "A result that follows as an effect of something that came before." *Id.*

Pickens v. State, 2007 OK CR 18, ¶ 2, 158 P.3d 482, 483 (defendant must serve 85% of sentence before parole eligibility, known as the 85% Rule); *Ferguson v. State*, 2006 OK CR 36, ¶ 3, 143 P.3d 218, 219 (85% Rule); *Robinson v. State*, 1991 OK CR 23, ¶ 9, 806 P.2d 1128, 1130-31 (required advisement of whether the defendant's sentence is eligible for probation or parole)).

"A defendant need not be told about every statutory sentencing requirement or option for her plea to be knowing and voluntary." *Lewis*, 2009 OK CR at ¶ 5, 220 P.3d at 1142 (citing *Fields v. State*, 1996 OK CR 35, ¶¶ 28-30, 923 P.2d 624, 630). However, the OCCA has provided no exceptions to the requirement that a defendant must be advised of all relinquished constitutional rights. *See Lewis*, 2009 OK CR at ¶ 5, 220 P.3d at 1142 ("a defendant *must* be advised of *all constitutional rights she relinquishes with her plea as well as the range of punishment*.").

On appeal, the OCCA's:

> Primary concern in evaluating the validity of a guilty plea is whether the plea was entered voluntarily and intelligently. *Boykin v. Alabama*, 395 U.S. 238, ... (1969); *Ocampo v. State*, 1989 OK CR 38, ¶ 3, 778 P.2d 920, 921. Petitioner has the burden of showing that the plea was entered unadvisedly through ignorance, inadvertence, influence or without deliberation, and that there is a defense to present to the jury. *Estell v. State*, 1981 OK CR 8, ¶ 8, 624 P.2d 78, 80. The voluntariness of the plea is to be determined examining the entire record. *Cox v. State*, 2006 OK CR 51, ¶ 28, 152 P.3d 244, 254 (*overruled on other grounds*, *State v. Vincent*, 2016 OK CR 7, 371 P.3d 1127).

Ricker v. State, 2022 OK CR 26, ¶ 8, 519 P.3d 1269, 1271. The OCCA also seems to consider whether a plea has resulted in surprise and prejudice. *See Fields*, 1996 OK CR at ¶ 31, 923 P.2d at 630 ("Even if such a requirement [of jury sentencing after a guilty plea] existed, Petitioner is unable to show either surprise or prejudice due to the trial court's failure to specifically advise Petitioner of the waiver.").

On appeal, Mr. O'Rourke showed he was both surprised and prejudiced by his eventual federal indictment and conviction pursuant to § 922(g)(9). *See* App. 3 at pp. 10-12. He provided evidence that his plea was entered under coercion through the State's threat to prosecute his girlfriend if she did not testify against him. *See* App. 3 at pp. 8-9. He further provided evidence that he was never advised by anyone of the Second Amendment consequence of entering his plea. *See* App. 3 at pp. 9, 15-17, 21, 32-40. And he showed sufficient reasons for not raising his claims sooner. *See* App. 3 at pp. 17-18. Because Oklahoma law requires that a "defendant *must* be advised of *all constitutional rights she relinquishes with her plea as well as the range of punishment*," *Lewis*, 2009 OK CR at ¶ 5, 220 P.3d at 1142, he provided a copy of his own judgment and sentence from 2007 that does not provide an advisement of the Second Amendment consequence attending an MDV conviction and another person's judgment and sentence from 2015 which does. *See* App. 3 at pp. 9 & n.7, 10, 21-22.

Additionally, upon receipt from the State of his copy of the State prepared appellate designation of record, Mr. O'Rourke filed his 'Notice of Non-Completion of Record,' showing that the district court did not provide the entire record for the OCCA's consideration. *See* App. 5 at p. 1 ("Specifically, the Tulsa County Appeals Clerk failed to include the: (1) 'Misdemeanor Information,' *see* Docket [for CM-2007-3872] at July 20, 2007; (2) 'Findings of Fact – Acceptance of Plea,' *see* Docket at November 2, 2007; (3) 'Judgment and Sentence,' *see* Docket at November 2, 2007"). *Cf. Ricker*, 2022 OK CR at ¶ 8, 519 P.3d at 1271 ("The voluntariness of the plea is to be determined by examining the entire record."). He also showed there was no court reporter present for his plea colloquy, but requested that all other recorded proceedings transcripts be provided to the OCCA. *See* App. 5 at p. 1 ("[t]he Tulsa County Appeals Clerk failed to include the: ... 'Testimony of Jenny Miller, Eric Cullen, and Defendant' proceeding

transcripts') (citing the docket in CM-2007-3872 at Jan. 26, 2009). The OCCA refused. *See* App. 9 at 09-14-2023 ("NOTICE OF NON-COMPLETION OF RECORD ** RECEIVED STAMPED 08/16/2023 ** ** NOTICE OF COMPLETION FROM 09/11/2023 IS STILL GOOD AS IT WAS RECEIVED AFTER THIS NOTICE OF NON-COMPLETION **").

Because the Second Amendment consequence was never advised and thus not raised before entering the plea, the OCCA's standard of review is for plain error.

(b) The OCCA Did Not Follow Oklahoma's Plain Error Standard

In Oklahoma, plain error, formerly known as "fundamental error," "arises from those 'errors affected substantial rights although they were not brought to the attention of the court.' " *Primeaux v. State*, 2004 OK CR 16, ¶ 72, 88 P.3d 893, 907 (quoting *Jones v. State*, 1989 OK CR 7, ¶ 8, 772 P.2d 922, 925); *see also Simpson v. State*, 1994 OK CR 40, ¶ 10, 876 P.2d 690, 694. Plain error has also "been defined as an error which goes to the foundation of the case, or which takes from a defendant a right essential to his defense." *Simpson*, 1994 OK CR at ¶ 12, 876 P.2d at 698. Plain error review under Oklahoma law mirrors this Court's reasoning in *Padilla*.

Pursuant to Oklahoma law, plain error consists of: 1) an actual error (*i.e.*, deviation from a legal rule);[10] 2) that is plain or obvious;[11] and 3) affects a defendant's substantial rights (*i.e.*,

[10] Oklahoma law requires a defendant entering a guilty plea be advised "of all constitutional rights she relinquishes with her plea as well as the range of punishment." Lewis, 2009 OK CR at ¶ 5, 220 P.3d at 1142.

[11] Like the automatic deportation consequence under federal statute in *Padilla*, the automatic Second Amendment consequence pursuant to § 922(g)(9) is plain and obvious.

affects the outcome of the proceeding.[12] *See Hogan*, 2006 OK CR at ¶ 38, 139 P.3d at 923; *Simpson*, 1994 OK CR at ¶ 12, 876 P.2d at 698; 20 O.S. § 3001.1.

If those elements are met, the OCCA will correct the plain error only if it "seriously affect[s] the fairness, integrity, or public reputation of the judicial proceedings" or otherwise represents a "miscarriage of justice." *Simpson*, 1994 OK CR at ¶ 30, 876 P.2d at 701 (citing *United States v. Olano*, 507 U.S. 725, 736 (1993)). Only structural errors, *i.e.*, defects that affect the framework within which the trial proceeds, rather than simply an error in the trial process, require reversal regardless of whether they affected the outcome. *Arizona v. Fulminate*, 499 U.S. 279, 309-311 (1991).

A citizen's constitutional rights being automatically, categorically, and permanently stripped without any warning by defense counsel, the government, or the courts seriously affects the fairness, integrity and public reputation of judicial proceedings. An unadvised guilty plea, by incorrect advice or omission by counsel, which effects the framework of the proceedings constitutes structural error. *See, e.g., Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017) ("the defining feature of a structural error is that it 'affect[s] the framework within which the trial proceeds.' ") (quoting *Fulminate*, 499 U.S. at 310).

> Plain error has always been a vehicle to present an alleged error to this Court that was otherwise forfeited.[13] "However, the fact an error may be plain and prejudicial does not automatically guarantee reversal. In other words, *it gets an appellant's foot in the door*;[14] it does not guarantee a sale, which should be 'hen's-teeth rare.' "

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[12] Not only was Mr. O'Rourke unknowingly stripped of a fundamental, individual, and enumerated constitutional right, he showed that he would not have plead guilty had he been appropriately advised of the Second Amendment consequence, thus changing the outcome of the proceeding.

[13] Emphasis added.

[14] Emphasis added.

Washington v. State, 2023 OK CR 22, ¶ 20, --- P.3d ----, 2023 WL 8824850 at *4 (quoting *Simpson*, 1994 OK CR at ¶ 29, 876 P.2d at 700). "As a result, *Chapman* harmless error beyond a reasonable doubt is no longer applicable to unpreserved constitutional errors; rather, the appellant must make a specific showing that the error affected the outcome of the trial as with any error subject to plain error analysis." *Washington*, 2023 OK CR at ¶ 21, 2023 WL at *4.

Even before the OCCA moved the goal post in *Washington*, this is precisely what Mr. O'Rourke showed below. *See* App. 3 at pp. 40-43 (setting forth plain error); App. 3 at pp. 43-51 (setting forth IAC from failure to advised of the Second Amendment consequence, resulting prejudice, and that if advised, he would have insisted on a jury trial affected the outcome of the guilty plea).

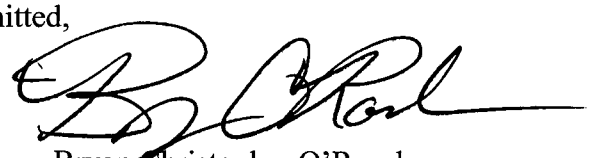
But the OCCA does not play by its own rules; it did not let Mr. O'Rourke get his foot in the door. Instead, it refused to answer the door when he appealed under the court's own standards of exception to the procedural bars set forth in § 1086. While relief in any form from the OCCA might be "hen's-teeth rare," so-too is meaningful review under inadequate and ineffective state law procedures.

CONCLUSION

For the foregoing reasons, Mr. O'Rourke prays the Court will grant *certiorari* review.

Dated: January 25, 2024

Respectfully submitted,



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