

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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JOHN WILLIAM CHILDERS, :

Petitioner-Appellant, :

- v. - :

SCOTT CROW, Director of the Oklahoma :

Defendant-Appellant. :

-----x

On Appeal from the United States District Court
for the Northern District of Oklahoma
The Honorable Gregory K. Frizzell, District Judge
D.C. No. 17-cv-00416-GKF

MR. CHILDERS' SUPPLEMENTAL OPENING BRIEF

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ORAL ARGUMENT IS REQUESTED

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September 2020

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PRIOR OR RELATED APPEALS

There are no prior or related appeals in this court. Mr. Childers raised a claim like the ones raised here in the state courts, which they held to be defaulted. Those decisions are State v. Childers, Nos. CF-07-341 and CF-07-359, slip op. (Delaware Cty. Sept. 22, 2016) (Attachment 4 to this brief), and State v. Childers, No. PC 2016-0919, slip op. (Okla. Crim. App. Dec. 14, 2016) (Attachment 3 to this brief).

JURISDICTION

The United States District Court for the Northern District of Oklahoma had jurisdiction in this habeas-corpus action under 28 U.S.C. § 2254. That court entered judgment on January 6, 2020. Vol. 1 at 2 (docket sheet; entry 13); see also id. at 170 (judgment).

Mr. Childers filed his notice of appeal on February 3, id. at 171, within the thirty-day period for taking an appeal in this civil case, Fed. R. App. P. 4(a)(1)(A). This court has issued a certificate of appealability, which allows this appeal to proceed. 28 U.S.C. § 2253(c)(1)(A).

STATEMENT OF THE ISSUES

1. At the time of Mr. Childers' sex-offense convictions, Oklahoma law did not contain residency prohibitions for those who were required to register as sex offenders. An Oklahoma appellate court, interpreting the leading Oklahoma case on state ex post facto law in the context of the state's Sex Offender Registration Act (SORA), has held the residency prohibitions are those in effect at the time of conviction. Is Mr. Childers entitled to habeas relief for the due-process violation of being convicted of an offense that did not apply to him, and does his actual innocence of that offense excuse any procedural barrier to relief?

2. A duty to register under the SORA is an element of both of Mr. Childers's convictions at issue here. The leading Oklahoma case applying state ex post facto law to SORA makes the relevant version of the act the one in place at the time of conviction. But the reasoning of that case, and hornbook Oklahoma ex post facto law, makes it a state ex post facto violation to increase the punishment that attaches to the criminal act itself. At the time of Mr. Childers' sex-offense conduct, the registration period

was only two years if he completed a sex-offender-treatment program in the Department of Corrections, which he did. And the two-year period expired before his claimed violations of SORA occurred.

Is Mr. Childers entitled to habeas-corpus relief for the due-process violation of being convicted of offenses as to which an essential element was lacking, and does his actual innocence of those offenses excuse any possible procedural barrier to relief?

STATEMENT OF THE CASE

John Childers was convicted in Delaware County, Oklahoma of sex offenses. The conduct for which he was convicted occurred in 1992. Vol. 1 at 59.¹

In 1992, the Oklahoma Sex Offender Registration Act (SORA) called for the registration of those convicted of a qualifying sex offense to be kept for a period of ten years. Okla. Stat. Ann., tit. 57, § 583(C) (1991). The registration, for one sentenced to prison, was to begin at the time of release. Id., § 583(A).

But the registration period was only two years for those who “successfully complete the sex offender treatment program provided by the Department of Corrections.” Id., § 583(C). This shorter registration period was eliminated in November 1997. Okla. Stat. Ann., tit. 57, § 583(C) (1998). This was more than five years after Mr. Childers’ offense conduct.

Mr. Childers was not charged for the 1992 conduct until 1998. Vol. 1 at 8 (petition; identifying 1998 case number); see also Docket Sheet in CF-

¹ The record will be cited by volume number and by the page number that appears in this court’s header.

1998-00272, District Court of Delaware County, Oklahoma.² He pleaded guilty to the three, charged sex offenses. Docket Sheet at 7-8. The state court sentenced him to two suspended terms of ten years, and one unsuspended term of ten years. Vol. 1 at 8. The custodial term was itself to be suspended, for the balance that remained, on Mr. Childers' completion of the department's program of sex-offender treatment. Id. at 8-9.

Mr. Childers completed the sex-offender-treatment program. Id. at 9, 59. He was released from prison at the end of March 2005. Id. at 59. Mr. Childers registered under SORA a short time later. Id.

More than two years after that, in September and October of 2007, Mr. Childers was charged in two separate cases in Delaware County with violations of SORA. One of the charged violations was for failure to update his address. Vol. 1 at 4, 42. The other was for living within two-thousand feet of a school. Id. Both the failure to update address and the violation of the residency prohibition allegedly occurred in September 2007. Id. at 97-98 (recitation from appellate brief of admission to living

² This court can take judicial notice of records in court documents in related proceedings. Mr. Childers will be filing a motion for it to do so.

within two-thousand feet of a school and failing to update address that occurred between September 1 and September 17, 2007).

The prohibition on living within two-thousand feet of a school did not exist at the time of the 1992 offense conduct that led to his sex-offense convictions. Nor did the residency prohibition exist at the time of the convictions themselves. The prohibition was not added to the Oklahoma statutes until November 2003. Okla. Stat. Ann., tit. 57, § 590 (2004) (section titled “Credit(s),” noting provision added by Laws 2003, c. 223, § 1, eff. Nov. 1, 2003) (capitalization of section title omitted).

Mr. Childers pleaded guilty to the failure-to-update-address offense and to the residency offense. He was sentenced to life imprisonment on each conviction, with the sentences to run consecutively. Vol. 1 at 4, 42.

In Starkey v. Oklahoma Department of Corections, 306 P.3d 1004 (Okla. 2013), the Oklahoma Supreme Court addressed whether provisions of SORA could be applied retroactively to those who were convicted before they went into effect. One challenged provision in that case, which went into effect in November 2007, was the creation of a system of levels for registration, which increased the registration period to a minimum of

fifteen years and a maximum of life. Id. at 1010. The state supreme court concluded the legislature had not clearly shown an intent that this provision be applied to those convicted before its effective date. Id. at 1015-16. It therefore held this provision was to be applied prospectively only. Id. at 1016.

The Oklahoma Supreme Court held the second challenged provision to be invalid on state ex post facto grounds. This second provision , which went into effect in 2004, made the registration period run not from the date of registration, but rather from the completion of the sentence, including any period of parole or probation. Id. at 1017. This provision, the Oklahoma Supreme Court decided, was intended to have retroactive effect. Id.

The state supreme court proceeded to determine whether this extension of the registration requirements violated the bar on ex post facto laws in the Oklahoma Constitution. Id. at 1018. Considering both the 2004 amendment it had determined was retroactive, and the 2007 amendment the Department of Corrections was applying retroactively, id., the state supreme court held the registration requirements were punitive in effect

and outweighed their non-punitive purpose. Id. at 1018-30. It therefore concluded that the retroactive extension of SORA's registration period violated the Ex Post Facto Clause of Article 2, § 15 of the Oklahoma Constitution. Starkey, 306 P.3d at 1130.

Relying in part on Starkey, Mr. Childers sought post-conviction relief in the Oklahoma state courts. They dismissed his application on the theory that his claim could have been raised in prior proceedings, Vol. 1 at 151-52 (state district court), 153-55 (Oklahoma Court of Criminal Appeals), with the OCCA noting that he had exhausted his state remedies with respect to the claims raised in his post-conviction application, id. at 155.

Mr. Childers then filed a petition for a writ of habeas corpus, under 28 U.S.C. § 2254, in the United States District Court for the Northern District of Oklahoma. Vol. 1 at 4-38. In its response, the Director of the Oklahoma Department of Corrections, the respondent as Mr. Childers is being held at a private prison, id. at 170 n.1, invoked the one-year statute of limitations of 28 U.S.C. § 2244(d)(1) as to the claim relevant here, Vol. 1 at 42-49. The respondent maintained that only Mr. Childers' attack on the

denial of a later application for post-conviction relief was timely, and that it was unavailing as it raised a question of state law. Id. at 50-51.

The district court dismissed the petition as untimely. Id. at 165-69 (opinion and order); see also id. at 170 (judgment). It believed all of the claims were outside the limitations period, and that even were this not the case as to the claim the respondent treated as timely, that claim was of no merit. Id. at 168 n.4.

After Mr. Childers appealed, this court entered an order granting a certificate of appealability. The question on which it granted the COA was whether Mr. Childers' "two convictions violated due process." Childers v. Crow, No. 20-5014, slip op. at 1 (10th Cir. May 13, 2020) (COA order).

The order recited that his due-process challenge to his convictions was indeed time-barred. Id. at 5-6. But, it continued, Mr. Childers might be able to overcome the bar by showing he was actually innocent. Id. at 6. The order explained that Starkey held that retroactive extension of the registration period violated the ex post facto clause of the Oklahoma Constitution. Id. at 6-7. The order continued that Mr. Childers was convicted of sex offenses in 1998, and that he maintained his registration

period would have expired in 2008 under the 1998 version of SORA. Id. at 7. With amendments to SORA having extended the registration period between those dates, if he could prove his 2009 conviction was under a later version of SORA, and was contrary to the state's ex post facto provision, he would have been "convicted for an act that was not criminal under Oklahoma law." Id. And that would show actual innocence. Id.

The order also recounted that Mr. Childers might be able to show he was entitled to habeas relief. The Due Process Clause of the federal constitution requires that a conviction be based on the requisite proof of every element of a crime. Id. at 8. The requirement to register was an essential element of each of the SORA violations of which Mr. Childers was convicted. Id. So if Mr. Childers did not have to register, as a function of the ex post facto clause of the Oklahoma Constitution, his conviction of the SORA offenses would be contrary to his federal constitutional right to due process. Id. That would be a claim cognizable in federal habeas. Id.

The two claims Mr. Childers presses in this appeal are related to, but not precisely the same in their details, the challenge to his convictions that the COA order outlines. Under all versions of SORA, the registration

period for one who was sentenced to prison does not begin to run until release from prison. E.g., Okla. Stat. Ann., tit. 57, § 583(A)(1) (1996); see also Cerniglia v. Oklahoma Dept. of Corrections, 349 P.3d 542, 545 (Okla. Crim. App. 2013) (noting for conviction in 1999, that requirement was to register for ten years beginning with release from prison). For Mr. Childers, that was in 2005. That would mean that a registration period of ten years would not end until 2015. A duty to register under such a ten-year period would apply to an act done after that release that was subsumed in a 2009 conviction of which registration was an element.

Still, Mr. Childers' two convictions violate due process because one or more essential elements of each conviction were unavailable under state law. The convictions were for acts that, as to him, were not criminal under Oklahoma law, which establishes actual innocence, and allows him to overcome the time bar and any other, possible procedural hurdle.

For the conviction for living within two-thousand feet of a school by one required to register as a sex offender, that was not a crime at the time of Mr. Childers' sex-offense convictions. It could not, under Starkey, be applied against Mr. Childers, as the court in Graham v. Carrington Place

Property Assoc, Inc., 456 P.3d 1177 (Okla. Ct. Civ. App. 2018), expressly held.

Mr. Childers, proceeding *pro se* in the state and federal courts, had mistakenly believed the residency prohibition in SORA, found in § 590 of Title 57 of the Oklahoma statutes, had been in effect at the time of his 2009 sex-offense convictions. He thought that it allowed a maximum sentence much lower than the term of life to which he was sentenced. Mr. Childers' argument based on the ex post facto decisions of the Oklahoma courts was therefore directed against his sentence, which he urged was capped by the 1999 version of § 590.

In fact, § 590 did not then exist, so that same ex post facto theory actually called for the invalidation of his conviction for violating the residency prohibition of § 590. The Due Process Clause of the Fourteenth Amendment does not allow him to stand convicted of a statute that did not apply to him.

Mr. Childers also did not have a duty to register, an essential element of both of his residency-prohibition conviction and his failure-to-update-address conviction. At the time of his offense conduct for his sex offenses,

his registration period would be only two years if he completed a specified program of sex-offender treatment, which he did. Under Starkey, and settled principles of Oklahoma law, an extension of the registration period would violate Oklahoma's bar on ex post facto laws. And with a two-year period, he was not still required to register in September 2007, when his offense conduct for the two convictions took place.

SUMMARY OF ARGUMENT

John Childers was not subject to the residency prohibition of SORA. State law defines the elements of his conviction for violating the residency prohibition, found in § 590 of SORA. A state intermediate appellate court, applying the leading Oklahoma case on the application of Oklahoma's constitutional ban on ex post facto laws, has held that the version of § 590 that applies is the one in effect at the time of conviction of the underlying sex offense. At the time of Mr. Childers' sex-offense convictions, § 590 did not exist. He therefore was not subject to § 590 and could not be convicted for violating it.

Mr. Childers' conviction for an offense that did not operate as to him violates the Due Process Clause of the Fourteenth Amendment. He is also actually innocent of that offense. His actual innocence overcomes the one-year, limitations period of 28 U.S.C. § 2244(d), which the district court invoked to dismiss his petition. His actual innocence also overcomes any other potential, procedural barrier to relief. With no state-court decision on his claim, this court is also unconstrained by the standard of adjudication in 28 U.S.C. § 2254(d)(1). This court should reverse the judgment of the

district court and remand with instructions to grant Mr. Childers a writ of habeas corpus that vacates his § 590, residency conviction.

Mr. Childers is also entitled to habeas corpus relief on his SORA conviction for not updating his address, as well as for violating § 590, for a different reason. Under Oklahoma cases on the Ex Post Facto Clause of the Oklahoma Constitution in the context of SORA, he had no duty to register as a sex offender, an essential element of each offense.

The Oklahoma cases that hold there to be a state, ex post facto violation do state that the date of conviction determines what version of SORA applies. But in none of those cases was an earlier date urged, or material to the result. And the reasoning of the Oklahoma cases in this area, as well as elementary Oklahoma ex post facto law, shows that it violates state ex post facto law to increase the punishment that exists at the time of the act.

Here, the relevant act is when Mr. Childers engaged in his sex-offense conduct. That was in 1992. At that time, he was only subject to registering for two years if he completed a Department of Corrections' sex-offender-treatment program, which he did. Using a registration period of

two years, he had no duty to register at the time he was supposedly in violation of the SORA requirements that he update his address and that he not live within two-thousand feet of a school.

This means that an essential element of each of his SORA convictions -- that he have a duty to register -- was lacking. Again, that means that his convictions violate his federal right to due process and that he is actually innocent of the offenses, which overcomes any potential barrier to relief. He is, on this theory, therefore entitled to a writ of habeas corpus directing that both of his SORA convictions be vacated.

ARGUMENT

Point One: Mr. Childers' conviction for violating an Oklahoma residency prohibition for sex offenders violates his federal right to due process because, under Oklahoma law, the statute, which was enacted after his sex-offense convictions, could not be applied to him and he is entitled to a writ of habeas corpus.

For Mr. Childers' state convictions to comport with his right to due process, guaranteed under the Fourteenth Amendment to the United States Constitution, he had to be guilty of each element of the offense. But he was not guilty of *any* element of living within two-thousand feet of a school as a sex offender. That is because the statute did not apply to him at all. The statute, section 590 of Title 57 of the Oklahoma code, was not enacted until 2003, more than four years after Mr. Childers was convicted of the underlying sex offense. And under Oklahoma law, which defines the elements of the offense, the statute therefore could not be applied to him.

Mr. Childers was thus actually innocent of the § 590, residency offense. This allows him to proceed in habeas corpus outside of the time limitation of 28 U.S.C. § 2244(d)(1), and to overcome any possible procedural hurdles. It also entitles him to the writ, and to that vacation of his § 590, residency conviction and its associated sentence of life in prison.

Because the district court dismissed the petition on limitations grounds without ruling on either actual innocence or the due process claim renders him actually innocent, this court decides these questions for itself. See Postelle v. Carpenter, 901 F.3d 1202, 1225-26 (10th Cir. 2018) (where district court makes ruling on actual innocence, review is for abuse of discretion). On *de novo* review, it should vacate the judgment and remand with instructions to grant Mr. Childers a writ of habeas corpus with respect to his § 590, residency conviction.

- A. Under Oklahoma law, Mr. Childers was not subject to the residency prohibitions for sex offenders of section 590, which were enacted years after his sex-offense conviction.

Neither Oklahoma's highest criminal nor its highest civil court has addressed whether the residency prohibitions for sex offenders in § 590 can be applied retroactively without running afoul of the ex post facto clause of the Oklahoma Constitution. But a state intermediate appellate court has held that it cannot, and that this result is dictated by the decision of the Oklahoma Supreme Court in Starkey v. Oklahoma Dept. of Corrections, 306 P.3d 1004 (Okla. 2013). With no persuasive reason to doubt this holding, this court should accept it as a proper expression of Oklahoma

law. E.g., *Evanston Ins. Co. v. Law Office of Michael P. Medved, P.C.*, 890 F.3d 1195, 1200 (10th Cir. 2018).

Start with *Starkey*. There, the Oklahoma Supreme Court considered two provisions of the state's Sex Offender Registration Act (SORA). It determined that one, which lengthened registration requirements based on a new, tiered system, was intended to be applied prospectively only, and could not be used for Mr. Starkey. *Starkey*, 306 P.3d at 1015-16. The other provision at issue lengthened the registration period in a different way. It tied the end point to completion of the sentence, including parole, rather than to the date of registration. *Id.* at 1017. The Oklahoma Supreme Court determined this provision was intended to operate retroactively. *Id.* But it held that to apply it retroactively would violate the state constitution's ban on ex post facto laws. *Id.* at 1017-30.

The state supreme court considered the punitive effect of SORA as a whole to outweigh the act's non-punitive purpose, and thus to violate the Ex Post Facto Clause of the Oklahoma Constitution. *Id.* In doing so, it placed considerable reliance on the residency prohibitions in section 590. The Oklahoma Supreme Court considered the restrictions on where a sex

offender could live to be “similar to the traditional punishment of banishment,” id. at 1025-26; see also id. at 1026, and to promote deterrence, a traditional aim of punishment, id. at 1027.

The court in Graham v. Carrington Place Property Assoc., Inc., 456 P.3d 1137 (Okla. Civ. App. 2018), easily concluded that the ex post facto holding in Starkey, as to the length of the registration period, applied with full force to a change to § 590 that further restricted where a sex offender could live. At the time of Mr. Graham’s sex-offender conviction, § 590 prevented sex offenders from living within two-thousand feet of (among other places, like schools) a park established, operated or supported by a government entity. Id. at 1138. But it did not contain such a restriction as to a park established, operated or supported by a homeowners’ association. That limitation was added while Mr. Graham was in prison on his sex-offense conviction and was sought to be applied to him. Id.

The court in Graham held that even if this amendment were intended to apply retroactively, the ex post facto clause of the Oklahoma Constitution prevented this result. Id. at 1141. The court of appeals in Graham quoted portions of the decision in Starkey to the effect that the

residency prohibitions are similar to banishment, and have a punitive effect. Id. at 1141. It also quoted a passage from Starkey as to how the Kentucky Supreme Court had held a similar residency prohibition to be punitive, and how Oklahoma's prohibition applies to twice the distance of Kentucky's. Id. The decision in Starkey, the court of appeals concluded, compelled its ex post facto holding as to the amendment to Oklahoma's residency prohibition in section 590:

Although the Starkey Court was concerned with the retroactive application of SORA's registration provisions, pursuant to the analysis in Starkey and, in particular the portions of the Starkey Opinion quoted above, we conclude a retroactive application of § 590 would also violate Oklahoma's ex post facto clause. To conclude otherwise would be inconsistent with the Oklahoma Supreme Court's analysis in Starkey.

Id. at 1142. And so, the court in Graham held that "the version [of § 590] in effect at the time of Mr. Graham's conviction applies." Id.

Under Graham, it violated the ex post facto clause of the Oklahoma Constitution to convict Mr. Childers for violating a residency prohibition in § 590. The "version [of § 590] in effect at the time of [his sex-offense conviction] applies," id., and § 590 did not even exist then. There was

therefore no prohibition on him living within two-thousand feet of a school, and he could not be convicted for doing so.

Although Graham was decided by an intermediate appellate court, this court should still treat it as articulating Oklahoma law. Neither the Oklahoma Supreme Court nor the Oklahoma Court of Criminal Appeals has addressed whether retroactive application of § 590 is contrary to the ex post facto clause of the Oklahoma Constitution. And this court will “follow the opinions of an intermediate appellate court unless “convinced by other persuasive data that the highest court of a state would decide otherwise.”” Evanston Ins. Co., 890 F.3d at 1200 (quotation and internal quotation omitted). There is nothing like that here. The intermediate appellate court in Graham applied Starkey, the leading decision in Oklahoma on the state constitution’s ex post facto clause and SORA. And the decision in Graham rested on the explicit statements by the Oklahoma Supreme Court in Starkey as to the punitive effects of the limits in § 590 on where a sex offender can live.³

³ Oklahoma’s highest court in criminal matters, the Oklahoma Court of Criminal Appeals, has not addressed the state constitution’s ex post facto clause in the SORA context. In State v. Hurt, 340 P.3d 7 (Okla. Crim.

In short, Oklahoma law prevented § 590 from being applied to Mr. Childers.

- B. Mr. Childers' due process rights under the United States Constitution were violated by his Oklahoma conviction under a statute that, as a matter of state law, could not be applied to him.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prevents a conviction except on proof beyond a reasonable doubt of all elements of the offense. Jackson v. Virginia, 443 U.S. 307, 315-16 (1979); see also id. at 320-21, 324; In re Winship, 397 U.S. 358, 364 (1970). In the case of a state conviction, as here, state law defines the offense and its elements. The Jackson standard, that is, "must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law," Jackson, 443 U.S. at 324 n.16, including the

App. 2014), it concluded the provision held to have retroactive effect in Starkey instead was intended to operate prospectively only. Id. at 10. This made it unnecessary to address the ex post facto question posed by a retroactive application of any of SORA's provisions. This is no reason for this court to doubt that the Oklahoma Supreme Court in Starkey properly applied Oklahoma ex post facto law. Cf. State v. Young, 989 P.2d 949, 953 (Okla. Crim. App. 1999) (although not bound by decisions of Oklahoma Supreme Court, OCCA considers well-reasoned decision by that court persuasive).

interpretations of the state courts, Rael v. Sullivan, 918 F.2d 874, 876 (10th Cir. 1990).

In this case, the ex post facto clause in the Oklahoma Constitution prevented the residency prohibitions of § 590 from being applied to Mr. Childers *at all*. The state had no power to enact a law that worked an ex post facto violation. As the state constitution provides, “No bill of attainder, ex post facto law, nor any law impairing the obligations of contracts, shall ever be passed.” Okla. Const., Art. 2, § 15. By virtue of the clause, it was “beyond the State’s power” to convict someone like Mr. Childers of violating § 590. Pickens v. State, 74 P.3d 601, 603 (Okla. Crim. App. 2003). The decisions in Starkey and Graham only make plain what had always been the case. The recognition of the ex post facto prohibition in those cases must be applied to Mr. Childers’ 2009 conviction for violating § 590. Id.

Because Mr. Childers was not subject to § 590, there were no elements of the offense to which he was subject, and he thus could not be found guilty of any elements beyond a reasonable doubt. There was necessarily a violation of Jackson. See, e.g., Buggs v. United States, 163

F.3d 439, 443 (7th Cir. 1989) (claim of improper conviction for something law does not make criminal can be characterized as a challenge to the sufficiency of the evidence). Mr. Childers' "conviction for something the law does not make criminal is a denial of due process." Id. at 444; see also, e.g., Bousley v. United States, 523 U.S. 614, 620 (1998); Davis v. United States, 417 U.S. 333, 346 (1974) (such a conviction results in a complete miscarriage of justice).

- C. Because Mr. Childers is actually innocent of the § 590 charge, he overcomes the time limitation for the filing of this habeas action, and any other procedural failing, and is entitled to relief.

The district court held Mr. Childers' habeas petition was filed outside the one-year limitations period of 28 U.S.C. § 2241(d), and dismissed it on that ground. Vol. 1 at 164-69. But the Supreme Court has held a showing of actual innocence entitles a petitioner to proceed notwithstanding the expiration of the one-year period. McQuiggan v. Perkins, 569 U.S. 383, 386 (2013); see also, e.g., Farrar v. Raemisch, 924 F.3d 1126, 1130 & n.5 (10th Cir. 2019) (actual innocence allows habeas petitioner to overcome

procedural default and limitations defense), petition for cert. filed, No. 19-953 (U.S. Jan. 30, 2020).⁴

Mr. Childers is factually innocent of violating § 590. This is so for the simple reason that he was not subject to it. Section 590 did not, as a matter of Oklahoma ex post facto law, impose any restriction on him. Mr. Childers was free to live within two-thousand feet of a school, even if § 590 made it illegal for others to do so. His doing so thus was not a crime. Just

⁴ The actual-innocence test is often, as it was in McQuiggan, put in terms of whether, in light of new evidence, it is more likely than not that no reasonable juror would have convicted. McQuiggan v. Perkins, 569 U.S. 383, 386 (2013). But new evidence is not needed where an offense or one of its elements does not apply to a defendant.

Where the law does not cover the conduct of conviction, as Davis teaches, “[t]here can be no room for doubt that such a circumstance ‘inherently results in a complete miscarriage of justice.’” Davis v. United States, 417 U.S. 333, 346 (1974) (quotation omitted). So, in Bousley v. United States, 523 U.S. 614, 624 (1998), in light of a narrowing construction of a federal statute, the Court remanded for the petitioner to show his conduct was not within the statute as properly understood. It held that this would establish actual innocence, and cited habeas cases involving state prisoners, including Schlup v. Delo, 513 U.S. 298 (1995), see Bousley, 523 U.S. at 624, on which the Court in McQuiggan relied for the actual-innocence test, McQuiggan, 569 U.S. at 386 (quoting Schlup).

It is therefore enough in this context for Mr. Childers to show that, as a function of Oklahoma ex post facto law, the § 590, residency statute did not apply to him.

as it is a miscarriage of justice for one to be convicted of an act that the law does not make criminal, it is a miscarriage of justice for Mr. Childers to be convicted under a statute that does not operate against him. Mr. Childers was convicted for -- and received a life sentence for -- an act that, as to him, Oklahoma law did not make a crime.

That this is factual innocence as required, and not legal innocence, is clear from the fact that Oklahoma could not possibly have proved any set of facts that would permit Mr. Childers to be convicted of violating § 590. There is no proof Oklahoma could have adduced had Mr. Childers not pleaded guilty that would have established his guilt of the charge. See Bousley, 523 U.S. at 623 (in remanding for petitioner to show he was innocent of offense to which he pleaded guilty, and which had been held to have narrower reach, permitting government to present additional proof that it had). With the § 590, residency charge an invalid one as to Mr. Childers, it surely “is more likely than not that no reasonable juror would have convicted him” of it. Id. (quoting Schlup v. Delo, 513 U.S. 298, 327-28 (1995)). Indeed, no reasonable jury could have rationally convicted him for committing a crime that did not apply to him.

Mr. Childers is actually innocent of the § 590 charge. This serves to overcome the limitation period and means the district court's dismissal of his petition as to this claim was error.

The Oklahoma Court of Criminal Appeals did not consider whether the Oklahoma ex post facto clause applied to the residency charge. It considered the argument that Mr. Childers made in this regard to be procedurally defaulted, because not made in prior proceedings. Vol. 1 at 154-55; see also id. at 139-44. The actual-innocence showing overcomes the procedural default as well. McQuiggan, 569 U.S. at 393 (concept applies to failure to observe state procedural rules).

The claim pressed here is close to, but not exactly the same as, the one Mr. Childers made in the state court. There, he was under the mistaken impression that § 590 was in effect at the time of his 1999 conviction. Vol. 1 at 140. His argument was still that Oklahoma's ex post facto clause required the version in effect at the time of his conviction to be used. Id. at 140-41. Based on the best he was "able to ascertain," id. at 140, he believed § 590 was in effect at that time, and that it called for a misdemeanor sentence and a penalty of up to one year in county jail for a

second or subsequent offense, id. at 140-41. He therefore trained his attack not on his conviction, but on his life sentence, which he maintained could not have been lawfully imposed on the law as it stood at the time of his sex-offense conviction, even under recidivist provisions. Id. at 141-43. So, the ex post facto theory is the same, but the particulars are a bit different.

To the extent this results in the present claim not being fairly presented to the Oklahoma courts, there is an anticipatory procedural default. If Mr. Childers were to return to the Oklahoma courts, he would not be permitted to raise this close variation of the ex post facto theme. The same procedural defect that the Oklahoma Court of Criminal Appeals found as to his ex post facto theory as to the invalidity of his sentence would apply to an ex post facto theory as to the invalidity of his conviction. See Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991). Mr. Childers' showing of actual innocence overcomes this procedural hurdle as well. Id. at 750; Frost v. Pryor, 749 F.3d 1212, 1231 (10th Cir. 2014).

Because the Oklahoma courts never reached the merits of any ex post facto claim, the constraints of 28 U.S.C. § 2254(d) also are inapplicable. The limitation on the scope of this court's review arise only as to a "claim that

has been adjudicated on the merits in State court proceedings.” 28 U.S.C. § 2254(d). This court simply asks directly whether Mr. Childers’ residency conviction violates due process. For the reasons explained, it does.

In sum, Mr. Childers is entitled to have his claim that his state conviction for violating § 590 runs afoul of the Due Process Clause of the Fourteenth Amendment of the United States Constitution considered in federal habeas corpus. With § 590 unavailable as to Mr. Childers under Oklahoma’s ex post facto clause, he is also entitled to relief. This court should vacate the judgment and remand with instructions to issue a writ of habeas corpus directing that the § 590 conviction, and the associated life sentence, be vacated.

Point Two: There was insufficient evidence for both of Mr. Childers' convictions and they therefore violate due process because, under Oklahoma ex post facto law, his duty to register, an essential element of both crimes, had already expired at the time of the charged offense conduct and he is entitled to a writ of habeas corpus.

Mr. Childers' sex offenses, on which his duty to register as a sex offender arose, were for conduct in 1992. At that time, the registration period under SORA was at most ten years. Okla. Stat. Ann., tit. 57, § 583(C) (1991). But the period was only two years if the offender successfully completed a Department of Corrections' sex-offender-treatment program. Id.

The two-year-registration duty was the one that, under Oklahoma ex post facto law, applied to Mr. Childers, who completed the treatment program. The analysis in Starkey makes plain that an increase in his registration period would have a prohibited, ex post facto effect. Starkey and other Oklahoma cases in this area do identify the registration period in effect at the time of sentencing as the controlling one under the state's ex post facto clause. But in none of those cases was there any claim that the period should have been the one in effect at the time of the sex-offense conduct. And settled Oklahoma law ties the ex post facto effect of a law to

whether it results in an increase in punishment from that available at the time of the offense conduct. This dictates that it was the registration period from 1992 to which Mr. Childers was subject.

The registration period, which was only two years on Mr. Childers' completion of the sex-offender-treatment program, had expired by the time of the charged conduct for the two offenses at issue here. He thus had no duty to register. As that was an essential element of both the residency offense and the failure-to-update-address offense, there was insufficient evidence to sustain either conviction, and those convictions violate the due process clause of the Fourteenth Amendment. He is also actually innocent of both offenses, which allows him to overcome the expiration of the one-year limitations period and any other procedural barriers.

Accordingly, and again on *de novo* review because the district court did not decide actual innocence or the merits, see supra at 18, Mr. Childers is entitled to habeas relief as to both convictions.

- A. Under the registration period in effect at the time of his offense conduct, Mr. Childers only had to register for two years after his 2005 release from prison on that charge, and his duty to register expired before his 2007 offense conduct on the two convictions challenged here.

As an initial matter, if Mr. Childers only had to register for two years, he could not be guilty of either failing to update his address or living within two thousand feet of a school in 2007. For starters, a duty to register was an element of each offense. Only those who were “subject to the provisions of the Sex Offender Registration Act” and who changed their address had a duty to inform the authorities of the change. Okla Stat. Ann., tit. 57, § 584(D) (2006). Likewise, the residency restriction applied only to a person “registered pursuant to the Oklahoma Sex Offender Registration Act.” *Id.*, § 590. Mr. Childers was not subject to SORA, nor was he any longer registered pursuant to that act, if his registration period had expired.⁵

If his registration period were two years, Mr. Childers had no duty to register in September 2007, the time when he did not inform authorities of

⁵ The citations in the text are to the offenses in 2007. The duty to register was an element of each offense at all times from their inception through 2007.

his address change and lived within two-thousand feet of a school. Vol. 1 at 97-98. Mr. Childers was released from prison on his underlying sex offenses in March 2005. Id. That triggered his duty to register. A person who is incarcerated on a sex offense must register soon after “release of the person from a correctional institution.” Okla. Stat. Ann., tit. 57, § 583(A)(1) (1996) (registration required within ten days of release). Mr. Childers registered soon after his release. Vol. 1 at 59. His two-year period would have expired by March of 2007, well before his claimed SORA violations occurred.

The only possible wrinkle is that Mr. Childers was returned to custody in 2006 for a parole violation on his sex-offense conviction. Vol. 1 at 60. SORA does not contain any express statement as to the running of the registration period in this scenario. But the statutory text shows the period continues to run.

To begin, section 583 -- which, as its title states, deals with the “[d]uration” of registration, Okla. Stat. Ann., tit. 57, § 583 (1991) -- links the start of the registration period to release from prison if incarcerated. This is true even if there is a suspended sentence involved. Registration is to

occur within ten days of “being convicted or receiving a suspended sentence if the person is not incarcerated, or . . . of the release of the person from a correctional institution.” Id., § 583(A)(1).

At the same time, section 583 makes no provision for the registration period to be tolled. Nor does it provide for the re-starting of a registration period. It simply provides for a general, ten-year registration period, and, in the version that existed until November 1997, a two-year one for those (like Mr. Childers) who successfully complete the sex-offender-treatment program. Id., § 583(C). It surely must have been obvious to SORA’s drafters that one convicted of a sex offense could be returned to prison before the expiration of the registration period, either as a result of the revocation of a suspended sentence or parole, or conviction for a new offense. The failure to provide for tolling or re-starting of the period in such obvious situations can only be taken that neither was intended.

Indeed, if there were to be tolling or re-starting of the period, SORA would have to specify which one it was to be. Tolling and re-starting could lead to very different endpoints for the registration obligations. An offender would need to have notice of how long he had to register so he

could comply with his SORA obligations. That section 583 does not make the choice between the two is proof that there was no choice to be made, because once the period has begun to run incarceration has no bearing on the length of the registration period.⁶

In short, if the two-year, registration period applies -- and, as shown in the next subsection, it does -- it expired by March 2007. This was before the charged, offense conduct of failing to register and living within two-thousand feet of a school.

⁶ Section 583, which addresses whether the provisions of SORA apply during incarceration in an Oklahoma correctional facility, has no bearing on the tolling/re-starting question. The Oklahoma Supreme Court has interpreted § 583 to be concerned with the starting point of the registration period. Cerniglia v. Oklahoma Dept. of Corrections, 349 P.3d 542, 545 (Okla. 2013).

- B. Under Starkey and settled principles of Oklahoma law, the extension of Mr. Childers' registration period from that which would have applied at the time of his offense conduct is punitive and violates the ex post facto clause of the Oklahoma Constitution.

The decision in Starkey compels the conclusion that it violates the ex post facto clause of the Oklahoma Constitution to apply longer periods of registration to Mr. Childers. Starkey and other Oklahoma decisions refer to the date of sentencing as marking the version of SORA to be used. But no Oklahoma case presents a choice between the version in effect at the time of sentencing and that in effect at the time of the underlying, sex-offense conduct. And settled Oklahoma ex post facto law (including that referred to in Starkey) puts the relevant date as the date of the offense conduct.

1. Starkey requires the conclusion that the increase in the two-year registration period available at the time of Mr. Childers' offense conduct had a punitive effect.

The 2004 amendment to SORA at issue in Starkey changed the ending date of the registration period. The amendment provided that the period did not end ten years from the beginning of the duty to register, but

rather ten years from the completion of the sentence. Starkey, 305 P.3d at 1017. Were it not for this amendment, which had the effect of almost doubling Mr. Starkey's registration period, id., his duty to register would already have expired. The Oklahoma Supreme Court held this amendment was meant to operate retroactively, but that its retroactive operation violated the ex post facto clause of the Oklahoma Constitution.

In reaching this result, the Court assumed SORA was meant to be a civil regulatory scheme, and not a penal one, id. at 1020, as it must be to be covered by the ex post facto clause, id. at 1019. But, it continued, even if the intent was a regulatory one, SORA's effects are punitive. This punitive effect resolved the ex post facto issue in Mr. Starkey's favor as a matter of Oklahoma law. Id. at 1020. The Court specifically noted that although it drew the factors it considered to determine SORA's effects from a United States Supreme Court case, it was "not governed by how the federal courts have independently applied the same test" under the federal constitution, id., as Oklahoma was free to provide more protection than the federal constitution, id. at 1021.

In its analysis, the Court in Starkey considered not just the 2004 amendments, but also amendments from 2007 that it had held could only be applied prospectively, as they were in fact being applied retroactively. Id. at 1018. The state supreme court also considered a provision that went into effect only after Mr. Starkey's registration period would otherwise have expired in 2008. See id. at 1011 (initial ending date of registration period). The Court took into account the punitive aspect of a provision requiring in-person registration that took effect in 2009. Id. at 1022 and n.58. And it did so without addressing whether this post-extension change is what tipped the scale. That is, the Oklahoma Supreme Court did not consider whether the rest of SORA, apart from that change, would have had a punitive effect and resulted in an ex post facto violation. Instead, it considered everything that would apply to Mr. Starkey during the extended period, whenever it went into effect, to see whether the extension of the registration period had a punitive effect.

The change from a two-year registration period to a ten-year one would extend Mr. Childers' registration obligation from March 2007 (two years after his March 2005 release) to March 2015. Starkey shows that all

the effects during the extended period, including those enacted after the initial registration period expired, are to be considered under an Oklahoma ex post facto analysis. That makes Starkey, decided in June 2013, directly applicable here. So, the extension here of the registration period from March 2007 for another eight years is a violation of Oklahoma's ex post facto prohibition just like the ten-year extension of the registration period that would have expired in 2008 in Starkey was.

The result would be the same even if only the provisions in effect in September 2007, the time of Mr. Childers' failure to update his address and to live within two-thousand feet of a school, are considered. The analysis in Starkey makes clear that use of an extended period at that time still had punitive effect.⁷

The first factor in the analysis in Starkey is whether SORA works an affirmative disability or restraint. Starkey, 305 P.3d at 1021. In holding that it does, the Oklahoma Supreme Court noted the restrictions SORA

⁷ The petition notes Mr. Childers was released on the revocation of his suspended sentence in May 2007, Vol. 1 at 60, which was also after the two-year, registration period would have expired. The analysis under Starkey would be the same if this earlier date were used.

places on where “sex offenders can live and with whom they can work.” Id. at 1023. The two prohibitions it identified are ones that by 2007 applied to Mr. Childers. He could not live within two-thousand feet of a school, a property or campsite whose primary purpose was working with children, a park supported by public funds, or a child-care center. Id. That same section barred a sex offender from living with a minor child if (as was the case for Mr. Childers) the victim of his sex offense was a minor child. Id.; see also Vol. 1 at 59 (describing offense). And another section, effective in June 2006, made it unlawful for him to live with another registered sex offender. Starkey, 305 P.3d at 1203 & n.66 (citing Okla. Stat., tit. 57, § 590.1).

The Oklahoma Supreme Court in Starkey also pointed to how SORA made widely available information about sex offenders. By 2000, the effect of SORA amendments was to “remov[e] any restrictions on making registry information available.” Starkey, 305 P.3d at 1023. The internet, it continued, had “increased the unrestricted dissemination of personal information about sex offenders,” id. at 1023-24, and the “Department’s website provides the sex offender registry in a searchable format,” id. The

state supreme court quoted with approval the conclusion of another court that “such aggressive public notification of sex offender crimes ‘exposes sex offenders to profound humiliation and community-wide ostracism.’” Id. at 1024. And it proceeded to invoke other decisions, and a host of articles cited in one of those decisions, that noted the “harmful effects a registry places on an offender.” Id. at 1024 & n.81. All of the aspects of wide dissemination were equally true by 2007, when Mr. Childer’s registration period would otherwise have run.

The Court in Starkey noted, as an additional burden, that a sex offender must renew his driver’s license or identification card annually, resulting in four times the fees that a non-sex offender, who only has to renew every four years, must pay. Id. These obligations were also in place by 2007. Okla. Laws 2006, c. 294, §§ 2, 3 (adding provisions).

The Court in Starkey did also look to the fact that registration was to be done in person beginning in November 2007, and so were notifications of certain changes in status, as well as verification of address which was to be done once a year for the lowest level of offender, and every ninety days for those in the highest-tiered category. Id. at 1022. It continued that the

in-person, registration requirements could not be considered only minor and indirect, especially as non-compliance could be punished by up to five years in prison and a \$5,000 fine. Id. Indeed, for Mr. Starkey, who was subject to the most frequent reporting, it called the duties “significant and intrusive.” Id.

Still, although the Court in Starkey considered the requirements in their totality, id. at 1025, as it did throughout its analysis, see id. at 1026 (assessing second factor), the first factor would, under Starkey, weigh in favor of a punitive effect. There would remain the restrictions on where and with whom a sex offender could live, and the harmful effects from the wide dissemination of information about the sex offender (as well as the quadrupling of fees for a driver’s license or identification). These would seem to predominate quite heavily in their punitive effects over the duty to register in person (which could be as infrequently as once a year, and after certain changes). With the Court in Starkey concluding the factor of affirmative disability and restraint “clearly favors a punitive effect,” id. at 1025, the features that were common between SORA as it existed in August 2007 and as in Starkey would still decidedly favor a punitive effect.

The next factor is whether SORA contains sanctions that our society has historically regarded as punishment. Id. The Court in Starkey thought this to be the case with two aspects of SORA. One was that the driver's license of a sex offender bore those identifying words. Id. Citing the frequent need to share information on a license, the Court said this "subject[s] an offender to unnecessary humiliation and shame," akin to a "scarlet letter." Id. It deemed this, and the wide dissemination of information about sex offenders, to be analogous "to the traditional punishment of shaming." Id. The license label did not go into effect until after 2007, although the spreading of information about sex offenders (as already shown) existed by that time.

The other aspect involved the residency prohibitions, which of course were in effect in 2007. The Court described the prohibition on living in certain places as "similar to the traditional punishment of banishment," id. at 1025-26, noting they required one who owned a home within the restricted area to vacate it, id. at 1026.

Here too, the Oklahoma Supreme Court determined that the two restrictions together "weigh[ed] in favor of punishment." Id. But with it

identifying each of them as being like traditional punishment, it is hard to believe it would not have considered the residency prohibition alone to be of punitive effect. As well, the dissemination of information about sex offenders contributed some element of shaming to the banishment of the residency restriction. A straight-forward application of Starkey thus calls for this factor to be placed on the side of a punitive effect.

The third factor in the punitive-effect analysis was whether SORA's obligations depended on a finding of scienter. Id. The Court in Starkey looked to the triggering offenses for a sex-offender designation, most of which, but not all, require scienter, and determined this factor to be of little weight in the analysis. Id. With the triggering offenses largely the same in August 2007 as in Starkey, this factor is, as there, of little weight. Id. at 1027.

The fourth factor looks to whether a statute promotes retribution and deterrence, which are traditional aims of punishment. Id. The Court in Starkey thought the negative consequences of SORA, like eviction, living restrictions and humiliation, to reflect the promotion of deterrence. Id. But

it thought the retributive aspect of the statute was “[e]ven more compelling.” Id.

In reaching this conclusion, the Oklahoma Supreme Court looked to the risk levels, and their registration periods, which ranged from fifteen years to (as in Mr. Starkey’s case) life. Id. The Court stressed that the level and associated registration period was “based solely on” the statute of conviction, without any “individual determination of the risk the person poses to the community.” Id. It then quoted a decision of the Supreme Court of Kentucky to the effect that a restriction “‘imposed equally upon all offenders,’” and without regard to the threat a particular individual poses, “begins to look far more like retribution for past offenses than a regulation intended to prevent future ones.” Id.; see also id. (quoting, to similar end, Justice Souter’s opinion concurring in the judgment in Smith v. Doe, 538 U.S. 84, 109 (2003)).

In concluding that retribution and deterrence weighed in favor of a punitive effect, the Court in Starkey spoke in terms of the retroactive extension of SORA’s registration period. Id. at 1028. But it is just as true that increasing the two-year period available to Mr. Childers at the time of

his offense conduct, on completion of a DOC sex-offender-treatment program, to ten years, was based solely on the fact of conviction “and without regard to any mitigating factors.” Id. It applied across-the-board, to everyone who had been convicted of a sex offense that brought SORA into play. It also worked in derogation of mitigating factors, and not just without regard to them, by ratcheting up the registration period for those who would successfully complete a treatment program designed to reduce the risk that they would commit another sex offense. Just like in Starkey, the lengthened registration period here weighs in favor of a punitive effect.

It is the same with the fifth factor, namely that the behavior is already a crime. In counting this factor as indicative of a punitive effect, the Court in Starkey noted it is conviction for certain crimes and not an individual’s risk of recidivism that triggers the registration requirement. Id. That is true of the pre-November 2007 registration obligation (and that in effect at the time of Mr. Childer’s sex-offense conduct) also. See Okla. Stat. Ann., tit. 57, § 582 (2006); Okla. Stat. Ann., tit. 57, § 582 (1991).

The Court in Starkey agreed that SORA as a whole serves a non-punitive purpose of advancing public safety. Id. It relied on legislative

findings added to SORA in 1997 in reaching this conclusion. Id. Although this was after Mr. Childers' 1992 offense conduct, Mr. Childers does not contest here that SORA, even as it existed then, has a non-punitive purpose.

The seventh and final step in the analysis is whether the means used to advance the non-punitive purpose of SORA is excessive. Id. at 1028-29. As the lengthened registration period "extend[s] all requisite obligations" under SORA, id. at 1029, the determination is made based on the "overall scope" of SORA "in its entirety," id.

In determining the means to be excessive, the Court in Starkey noted several factors common to this case: that SORA applies to a wide range of crimes of varying severity; the lack of an individual determination of risk of recidivism or threat to the public; the lack of a mechanism to reduce the registration requirement; and the availability of sex-offender information on the DOC website. Id. at 1030. It also noted some not common to SORA as it existed in August 2007: the duty to register in person (which could be as often as every ninety days) and that the registration was potentially for life. These features produced the Court's ultimate conclusion that "[t]he

Act's many obligations impose a severe restraint on liberty without a determination of the threat a particular registrant poses to public safety," id. at 1030, and that this "is inconsistent with the ex post facto clause in the Oklahoma Constitution," id.

The lengthening of Mr. Childers' registration period also imposes a "severe restraint on his liberty" without an individualized risk assessment. Id. Although there was not by the time of his 2007 offense conduct a duty to register in person, the rest of the obligations that applied then were the same as in Starkey. Even without the in-person duty to register and the possibility of lifetime registration, the analysis in Starkey dictates the conclusion that retroactive extension of Mr. Childers' registration period from two years to ten years violates the ex post facto clause of the Oklahoma Constitution.

2. The relevant date for determining the ex post facto violation, and the registration period to which Mr. Childers was subject, is the date of his offense conduct in 1992.

The Oklahoma Supreme Court in Starkey put its ex post facto holding in terms of when Mr. Starkey became subject to the provisions of SORA. Because his sex-offense conduct and conviction were in Texas, Oklahoma had no ability to regulate or sanction him on that basis. It was his entry into Oklahoma that gave Oklahoma the right to exercise authority over him. As the Court put it, it was then that Mr. Starkey “submitted himself to the jurisdiction and enforcement of the Oklahoma SORA.” Starkey, 305 P.3d at 1030; see also id. at 1031 (date Mr. Starkey came to Oklahoma is date he “voluntarily subjected himself to SORA after his conviction”).

Given this, the Court determined the registration requirements of that date were the ones that applied to him. “The requirements of the registry to which he must comply would be established upon his entry and intent ‘to be in’ Oklahoma.” Id. Because he entered Oklahoma in 1998, and the registration requirements were the same throughout that year, the exact date of entry did not matter. Id. Although Mr. Starkey argued in the

state district court for the date of his Texas sentencing to be used, id. at 1012, it too was in 1998, id. at 1008.

The Oklahoma Supreme Court, in Cerniglia v. Oklahoma Dept. of Corrections, 349 P.3d 342 (Okla. 2013), applied Starkey's ex post facto conclusion to a woman convicted of a sex offense in Oklahoma. It used the date of her conviction as defining the version of SORA applicable to her, id. at 544-45, which was the date she sought and which sufficed to give her the relief of not being subject to the much-later-enacted, tiered registration system, id. at 543 (convicted and sentenced on same date), 544 (seeking use of date of sentencing). It explained the parallel between the two cases as follows:

The lesson to be found in Starkey is that the applicable version of SORA is the one in effect when a person becomes subject to its provisions. A person convicted in another jurisdiction is not subject to SORA until they enter Oklahoma with intent to be in the state. Whereas, a person like Cerniglia, who was convicted in Oklahoma, became subject to SORA when she was convicted.

Id. at 544 (citation omitted).

There was no claim in Cerniglia that any earlier date should be used for ex post facto purposes. Nor has there been such a claim in any later

Oklahoma ex post facto case involving SORA and an Oklahoma sex-offender conviction. Rather, each of those cases has simply used -- as sufficient to grant relief -- the date of conviction as determining the version of SORA that applies. E.g., Graham, 456 P.3d at 1140; Osburn v. Oklahoma Dept. of Corrections, 313 P.3d 926, 929-30 (Okla. 2013).

But the Oklahoma ex post facto principles articulated in Starkey call for the date of the offense conduct to be used for an Oklahoma offender, whose offense conduct is what makes him subject to the state's criminal law, and whose conviction for that conduct requires compliance with SORA. The Oklahoma Supreme Court in Starkey quoted from both United States Supreme Court and the Oklahoma Court of Criminal Appeals cases, which tie the ex post facto inquiry to the time the criminal act is committed. Describing the federal prohibition, the Court in Starkey explained that “the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission should not be altered by legislative enactment, after the fact, to the disadvantage of the accused.” Starkey, 305 P.3d at 1018 (quoting Beazell v. Ohio, 269 U.S. 167, 170 (1925)). Likewise, the federal clause “bars

a legislature from enacting ‘any statute . . . which makes more burdensome the punishment for a crime, after its commission.’” Id. (quoting Beazell, 269 U.S. at 169) (ellipses added). It continued that the Oklahoma Court of Criminal Appeals “has a similar interpretation,” id., which precludes a provision that “‘inflicts a greater punishment than the law annexed to the crime at (the) time it was committed,’” id. (quoting Maghe v. State, 429 P.2d 535, 540 (Okla. Crim. App. 1967)) (internal citation omitted; parentheses by the Court in Starkey).

As these passages make clear, it is the increase in punishment for an act after its commission that under Oklahoma law (as under federal law) produces an ex post facto violation. There is nothing in the principles of Oklahoma ex post facto law that would justify looking to the date of conviction, rather than the date of criminal act. That SORA becomes operative on a criminal conviction is no basis for doing so. This is no different than with a sentence of imprisonment or other criminal penalty. Only at the time of conviction is there a sufficient determination that the act took place to warrant punishment or the obligations of SORA.

Nor does the fact that SORA may have been intended as a civil, regulatory scheme, and may have initially worked in this fashion, warrant using the date of conviction. By crossing the line to having penal effects that outweighed that purpose, it ran afoul of the Ex Post Facto Clause of the Oklahoma Constitution. It impermissibly increased Mr. Childers' punishment, and the extent of that punishment was locked in, as a matter of Oklahoma law, at the time of his offense conduct. No matter what SORA's intended purpose, impermissibly increasing Mr. Childers' punishment from what it was at the time of his offense conduct violated the Oklahoma prohibition against ex post facto laws.

- C. Both of Mr. Childers' registration-dependent convictions violate his right to due process under the Fourteenth Amendment of the United States Constitution, as he had no duty to register and so there was insufficient proof of each conviction.

With Oklahoma law requiring the use of the SORA registration period in effect at the time of Mr. Childers' offense conduct on the underlying sex offenses, the conclusion that his federal constitutional rights were violated follows inescapably. He had no duty to register, an

essential element of each offense. His convictions were therefore based on insufficient proof and violated the due-process rule of Jackson v. Virginia.

As already discussed, the elements of each of Mr. Childers' SORA convictions is determined by state law. The duty to register was an element of both his conviction for not updating his address as a sex offender and for violating the residency prohibition that applied to sex offenders subject to SORA (if, that is, he was even subject to a residency-restriction offense that was enacted after his 1999 sex-offense convictions). And with a registration period of only two years, he had no duty to register after March 2007. But the failure to update his address and the violation of the residency prohibition was for what he did September 2007, after his duty to register expired.

For each of Mr. Childers' SORA convictions, then, there was therefore insufficient proof of the essential element of a duty to register. That proof is a requirement of a valid conviction under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Jackson, 443 U.S. at 315-16. Both of Mr. Childers' SORA convictions therefore violate his federal constitutional right to due process of law.

D. Mr. Childers' actual innocence of the SORA offenses means there is no procedural impediment to this court deciding his claim and granting him a writ of habeas corpus.

Mr. Childers is actually innocent of each SORA offense. The lack of a duty to register means he was not subject to either the registration statute or the residency-restriction statute. As explained in Point One, that means he is actually innocent of each offense, and that excuses his failure to file for habeas relief on these claims within the one-year limitation period of 28 U.S.C. § 2244(d)(1).

The claim here differs somewhat from the one Mr. Childers pressed in the Oklahoma courts. He argued there that there was an ex post facto violation in not using the version of SORA in effect at the time of his convictions, and that those statutes called for lesser sentences than what he received. Vol. 1 at 140-44. His ex post facto claim here is that the version of SORA in effect at the time of his offense conduct (and not at the time of his conviction) set his registration period, and that his convictions are therefore invalid (and not that his sentences were too long).

For the same reasons as in Point One, any change in this claim from the one presented in the state courts is excused by Mr. Childers' actual

innocence. The Oklahoma Court of Criminal Appeals dismissed as procedurally defaulted the claim raised in the state court as regarding the version of SORA that applied. It would no doubt do the same as to the claim as postured here, which is based on the registration period being set by the version of SORA in effect at the time of the offense conduct, and not the time of conviction, to the extent it is considered a different one. This would result in an anticipatory procedural default, which his actual innocence overcomes. See supra at 29.

Mr. Childers' claim based on Oklahoma ex post facto law also differs in this regard from the one presented to the federal district court, which tracked his ex post facto position in the state court. Vol. 1 at 8-12. He did not contend his duty to register had expired. Reciting that he was released from prison in 2005, he noted that he had a duty to register then and that he did so. Id. at 9.

A liberal construction of Mr. Childers' *pro se* petition should be held to include the due-process claim made here, which is based on the proposition that he had no duty to register as a function of Oklahoma ex post facto law. James v. Wadas, 724 F.3d 1312, 1315 (10th Cir. 2013). The

COA order evidently gave the petition such a reading to make a similar claim. The order first read the petition to include a claim of actual innocence because “his ex post facto claim necessarily implicates his guilt.” COA Order at 6 n.3 (citing James, 724 F.3d at 1315). The order noted that given the date of Mr. Childers’ sex-offense convictions, the registration period in effect at that time, and the date of the two SORA-based convictions at issue here, he evidently had no duty to register in connection with the SORA-based convictions. Id. at 7. The COA order explained that, if that were so, it would make Mr. Childers both actually innocent of the SORA-based convictions, id., and entitled to a writ of habeas corpus, id. at 8. The order did so despite the fact that the petition claimed his sentences were illegal, and not that his convictions were.

This approach sensibly recognizes the close connection between the ex post facto argument made in the petition, and the one described in the COA order. As to each, Oklahoma ex post facto law determines the extent to which Oklahoma could, consistent with the Due Process Clause of the Fourteenth Amendment, punish Mr. Childers. That is, the answer to the Oklahoma ex post facto question governs whether Oklahoma could validly

convict Mr. Childers and, if it could, the maximum amount of punishment it could exact.

So, the COA order read the petition liberally to reach a challenge to Mr. Childers' convictions on an ex post facto theory. And it also read the petition liberally to include a claim that Mr. Childers had no duty to register as a function of ex post facto law, even though he did not make that contention in his petition. The claim pressed here is likewise that he had no duty to register as a function of Oklahoma ex post facto law, and that his convictions therefore violated his federal, due-process rights. The petition should be read liberally to construe it to subsume this claim. The fact that Mr. Childers used the date of his sex-offense convictions as the key date for Oklahoma ex post facto purposes, and did not argue for the earlier date used in this part of the brief, also should not be taken to make his claim a new one on appeal.

But even if this court does decide that the claim in this part of the brief is a new one, his actual innocence allows this court to consider it. Actual innocence excuses procedural defaults in the state courts. The procedural-default doctrine, which generally precludes federal habeas

review of claims not properly raised in the state courts, is “grounded in concerns of comity and federalism,” Coleman, 501 U.S. at 730, and also in the finality of judgments, McClesky v. Zant, 499 U.S. 467, 493 (1991).

Actual innocence also excuses the habeas limitations bar, which serves the state interest in finality of its judgments. Duncan v. Walker, 533 U.S. 167, 179 (2001).

The concerns of comity and federalism are entirely absent in the context of any default or waiver that would result from the failure to include an argument in a federal habeas petition, and any federal finality interest is weaker than the state interest in finality that attaches to its criminal judgment. See Engle v. Isaac, 456 U.S. 107, 134 (1982) (as compared even to direct criminal appeal, “federal habeas challenges . . . to state convictions entail greater finality problems and special comity concerns”). If actual innocence is sufficient to overcome procedural rules that protect the weighty state interests implicated by federal habeas review, it is necessarily sufficient to overcome the interests served by a federal procedural rule. And with the question of Oklahoma ex post facto

law that undergirds this claim a pure legal question, there is no reason for this court not to decide the claim now.⁸

* * *

Oklahoma ex post facto law dictates that the date of Mr. Childers' conduct underlying his sex-offense convictions establishes his registration obligation. That obligation was two years on his completion of the Department of Corrections' sex-offender-treatment program. Because that two-year period expired by the time he supposedly violated SORA by not updating his address and by living within two-thousand feet of a school, the proof was lacking of an essential element of each offense. He was also actually innocent on those offenses, overcoming any procedural barrier to relief.

This court, which is unconstrained by 28 U.S.C. § 2254(d), see supra a 29-30, should reverse the judgment of the district court and remand with instructions that it grant Mr. Childers a writ of habeas corpus.

⁸ If the claim in Point One were considered to be a new one on appeal, actual innocence would for these same reasons allow this court to consider it too.

CONCLUSION

This court should reverse the judgment of the district court and remand with instructions to grant Mr. Childers a writ of habeas corpus vacating the two convictions challenged in this case.

Respectfully submitted,

VIRGINIA L. GRADY
Federal Public Defender

By: /s/ Howard A. Pincus
HOWARD A. PINCUS
Assistant Federal Public Defender (Digital)

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STATEMENT AS TO ORAL ARGUMENT

This case raises significant issues of entitlement to habeas corpus relief for acts that were not criminal as to Mr. Childers. Counsel believes oral argument would materially assist the court in its decisional process.

CERTIFICATE OF COMPLIANCE

Please complete one of the sections:

Section 1. Word count

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this document is proportionally spaced and contains 12,173 words.

Complete one of the following:

I relied on my word processor to obtain the count and it is Corel WordPerfect X5:

I counted five characters per word, counting all characters including citations and numerals.

Section 2. Line count

My brief was prepared in a monospaced typeface and contains _____ lines of text.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

By: /s/Howard A. Pincus
HOWARD A. PINCUS
Assistant Federal Public Defender

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing

MR. CHILDERS' SUPPLEMENTAL OPENING BRIEF

(1) all required privacy redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk, and;

(2) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program Symantec Endpoint Protection version 14.2.5569.2100, Virus Definition File Dated: September 21, 2020 r8, and, according to the program, are free of viruses.

/s/Howard A. Pincus
HOWARD A. PINCUS
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2020, I electronically filed the foregoing **MR. CHILDERS' SUPPLEMENTAL OPENING BRIEF** using the CM/ECF system, which will send notification of this filing to the following e-mail address:

Jennifer B. Miller
Deputy Attorney General
Email: jennifer.miller@oag.ok.gov

/s/ Howard A. Pincus
Howard A. Pincus

Attachment 1

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

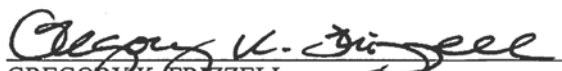
JOHN WILLIAM CHILDERS,)	
)	
Petitioner,)	
)	
v.)	Case No. 17-CV-416-GKF-JFJ
)	
SCOTT CROW, Director,¹)	
)	
Respondent.)	

JUDGMENT OF DISMISSAL

This matter comes before the Court on Petitioner’s 28 U.S.C. § 2254 petition for writ of habeas corpus (Dkt. 1). The issues having been duly considered, and for the reasons in the Opinion and Order filed contemporaneously herewith,

IT IS ORDERED, ADJUDGED, AND DECREED that the petition (Dkt. 1) is dismissed with prejudice.

ENTERED this 6th day of January 2020.


 GREGORY K. FRIZZELL
 UNITED STATES DISTRICT JUDGE

¹ Petitioner is incarcerated at the Davis Correctional Facility (DCF), a private prison in Holdenville, Oklahoma. Dkt. 1 at 1. Scott Crow, Director of the Oklahoma Department of Corrections, is therefore substituted in place of Joe Allbaugh as party respondent. See Habeas Corpus Rule 2(a). The Clerk of Court shall note the substitution on the record.

Attachment 2

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

JOHN WILLIAM CHILDERS,)	
)	
Petitioner,)	
)	
v.)	Case No. 17-CV-416-GKF-JFJ
)	
SCOTT CROW, Director,¹)	
)	
Respondent.)	

OPINION AND ORDER

Before the Court is John William Childers' 28 U.S.C. § 2254 habeas corpus petition (Dkt. 1). Childers challenges his convictions for failing to update his address as a sex offender and living within 2000 feet of a school, CF-2007-341, CF-2007-359. For the reasons below, the Court will deny the petition as untimely.

I. Background

Childers pled guilty to the above crimes on September 8, 2009. Dkt. 7-1 at 1. The state court sentenced him to life imprisonment on each charge. *Id.* He attempted to withdraw the plea after sentencing, but the Oklahoma Court of Criminal Appeals (OCCA) denied certiorari review. *Id.* Thereafter, he began filing various motions for post-conviction relief. The following timeline reflects the relevant state court activity between 2010 and 2017:

September 23, 2010: The OCCA denies certiorari review. Dkt. 7-1.

December 23, 2010: Childers does not appeal, the 90-day period to seek certiorari review with the United States Supreme Court expires, and the Judgment becomes final. *See United States v. Hurst*, 322 F.3d 1256, 1259 (10th Cir. 2003).

¹ Petitioner is incarcerated at the Davis Correctional Facility (DCF), a private prison in Holdenville, Oklahoma. Dkt. 1 at 1. Scott Crow, Director of the Oklahoma Department of Corrections, is therefore substituted in place of Joe Allbaugh as party respondent. See Habeas Corpus Rule 2(a). The Clerk of Court shall note the substitution on the record.

- 358 days pass -

December 16, 2011: Childers files a state application for post-conviction relief, which tolls the statute of limitations. Dkt. 7-2; *see also* 28 U.S.C. § 2244(d)(2). Childers supplemented the application with a petition for mandamus relief on April 18, 2013, urging the state court to rule. Dkt. 7-3.

June 17, 2013: The state court denies the application for post-conviction relief. Dkt. 7-4.

July 17, 2013: Childers does not appeal,² and the 30-day period for seeking review with the OCCA expires. *See Gibson v. Klinger*, 232 F.3d 799, 802 (10th Cir. 2000).

July 18, 2013: “The next day statutory tolling ceased, and the available time for filing a federal habeas petition [*i.e.*, seven days]³ resumed.” *Trimble v. Hansen*, 764 Fed. App’x 721, 724 (10th Cir.), *cert. denied*, 140 S. Ct. 283 (2019).

- 11 days pass, during which the one-year period expires -

July 29, 2013: Childers files another application for post-conviction relief. Dkt. 7-7.

March 20, 2014: The state court denies the application. Dkt. 7-9.

April 22, 2014: Childers does not appeal, and the 30-day appeal period expires.

- 114 days pass -

August 14, 2014: Childers files another application for post-conviction relief. Dkt. 7-10.

December 14, 2016: The OCCA denies relief on the application following an appeal. Dkt. 7-12.

- 212 days pass –

July 14, 2017: Childers files the instant § 2254 Petition. Dkt. 1

² Childers did file a petition for mandamus in the OCCA on June 24, 2013 - apparently before he received a copy of the Order Denying Post-Conviction Application - where he again urged the state trial court to rule. Dkt. 7-5. The OCCA denied the petition and declined jurisdiction by a summary order entered July 10, 2013. The Court will disregard the OCCA mandamus proceedings; doing so benefits Childers and does not change the result in this case.

³ The Court arrived at the seven-day figure by subtracting 358 (the number of days that passed without tolling between December 23, 2010 and December 16, 2011) from 365, the number of days in the one-year period.

Childers contends his conviction and sentence are unconstitutional based on: (Ground 1) ex-post-facto violations; (Ground 2) sentencing errors; and (Ground 3) ineffective assistance of counsel. The Petition also appears to raise a fourth ground challenging the state court's failure to issue findings and conclusions to support its rulings on post-conviction relief (Ground 4). Respondent filed an answer to the Petition, along with relevant copies of the state court records. Dkt. 7. Respondent contends Grounds 1 through 3 are untimely, and that Ground 4 fails on the merits. Childers filed a reply (Dkt. 11), and the matter is fully briefed.

II. Timeliness of the Habeas Claims

The Antiterrorism and Effective Death Penalty Act ("AEDPA") establishes a one-year limitation period for habeas corpus petitions. *See* 28 U.S.C. § 2244(d). The limitation period generally begins to run from the date on which a prisoner's conviction becomes final. *Id.* The one-year limitation period can be extended:

- (1) While a properly filed state habeas petition is pending, § 2244(d)(2);
- (2) Where unconstitutional state action has impeded the filing of a federal habeas petition, § 2244(d)(1)(B);
- (3) Where a new constitutional right has been recognized by the Supreme Court, § 2244(d)(1)(C); or
- (4) Where the factual basis for the claim could not have been discovered until later, § 2244(d)(1)(D).

Because AEDPA's one-year limitation period is not jurisdictional, the period may be extended through equitable tolling, *Holland v. Florida*, 560 U.S. 631, 645 (2010), or "overcome" through "a credible showing of actual innocence." *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013).

The record demonstrates Childers filed his § 2254 petition well after the AEDPA deadline. As noted above, the Judgment became final no later than December 23, 2010, after Childers declined to appeal the original OCCA ruling. *See Fleming v. Evans*, 481 F.3d 1249, 1255 (10th Cir. 2007) (Absent a further appeal to the U.S. Supreme Court, the one-year period begins to run 90 days after the OCCA affirms a conviction); *Rhine v. Boone*, 182 F.3d 1153, 1155 (10th Cir. 1999) (explaining that if the defendant fails to seek certiorari, the conviction becomes final after the 90-day period has passed). On December 16, 2011, with seven days remaining in the one-year period, Childers filed a tolling motion. *See* § 2244(d)(2). However, the initial state habeas proceedings concluded, at the latest, on July 17, 2013, when the post-conviction appeal period expired. *See Barnett v. Lemaster*, 167 F.3d 1321, 1323 (10th Cir. 1999) (the one-year period is tolled while a timely-filed state habeas petition is pending in the trial and appellate court). The clock restarted the following day, July 18, 2013, and the remaining seven days in the one-year period expired on July 25, 2013. Any state court petitions filed after that date did not - as Childers may believe - trigger a new limitations period or otherwise impact the untimely Petition. *See Fisher v. Gibson*, 262 F.3d 1135, 1142-1143 (10th Cir. 2001).

Childers argues he only missed the limitations period “by days.” Dkt. 11 at 1. It appears he is referring to his second post-conviction application, which he filed four days after the limitation period expired. Even if Childers filed that motion before July 25, 2013, such that it tolled the one-year period, the federal Petition would still be untimely. Over 600 days years elapsed without any tolling activity between 2011 and July 14, 2017, when Childers filed his federal petition.

Childers also appears to argue the statute of limitations should begin to run when the OCCA issued *Starkey v. Okla. Dept. of Corrections*, 305 P.3d 1004 (Okla. Crim. App. 2013) and *Cerniglia v. Okla. Dept. of Corrections*, 349 P.3d at 542 (Okla. Crim. App. 2013). Those cases address the retroactivity of amendments to the Oklahoma Sex Offender Registration Act, OKLA. STAT. tit. 57,

§ 581. However, only United States Supreme Court rulings can trigger the commencement of a new one-year period under 28 U.S.C. § 2244(d)(1)(C). *Starkey* and *Cerniglia* do not qualify under that exception, even if their holdings rely on federal law.

Childers finally argues the state court failed to make findings and conclusions in its rulings denying post-conviction relief; his sentence is unlawful; and he is nearly illiterate. While state post-conviction applications can trigger tolling, *see* § 2244(d)(2), defects in those proceedings have no bearing on the federal limitations period.⁴ Childers' arguments about his allegedly unlawful sentence are also unavailing. He "must show that he can satisfy the procedural requirements of" § 2244(d) "[b]efore [the Court can] address[] the merits of [his] claims. *United States v. Greer*, 881 F.3d 1241, 1244 (10th Cir.), *cert. denied*, 139 S. Ct. 374 (2018). Further, Childers' literacy issues and lack of legal assistance are not "extraordinary circumstances" warranting equitable tolling. *See Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000) ("ignorance of the law, even for an incarcerated *pro se* petitioner, generally does not excuse prompt filing").

For these reasons, the Court must dismiss the § 2254 action as untimely. The Court will also deny a certificate of appealability under Habeas Corpus Rule 11. Childers has not "made a substantial showing of the denial of a constitutional right" or demonstrated reasonable jurists would find the ruling debatable. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).


ACCORDINGLY, IT IS HEREBY ORDERED:

1. The petition for a writ of habeas corpus (Dkt. 1) is **dismissed**.
2. A certificate of appealability is **denied**.

⁴ The parties appear to believe the alleged defect (*i.e.* failure to make specific findings and conclusions in the order denying post-conviction relief) qualifies as a separate habeas claim, subject to a separate one-year limitation period. The Court disagrees, but in any event, the issue is frivolous. Regardless of the time-bar, there is no authority allowing federal courts to release state prisoners based on the brevity or lack of detail in a post-conviction order.

3. A separate Judgment will be entered disposing of the case.

ENTERED this 6th day of January 2020.


GREGORY K. FRIZZELL
UNITED STATES DISTRICT JUDGE

Attachment 3

PC 2016-0919, Childers v. State

September 22, 2016, finding these issues have already been ruled upon.

Petitioner's conviction was appealed to this Court. Therefore, all issues previously ruled upon by this Court are *res judicata*, and all issues not raised in the direct appeal, which could have been raised, are waived. Moreover, 22 O.S.2011, § 1086, directs that all grounds for relief available to an applicant under the Post-Conviction Procedure Act must be raised in the original application and that any ground not so raised, or bypassed, may not be the basis for a subsequent application unless sufficient reason is given for not asserting or inadequately raising the issue in the prior application or in any other proceeding taken to secure relief.

We find this to be Petitioner's second application for post-conviction relief which has been denied. The denial of Petitioner's first post-conviction application was not appealed to this Court. Petitioner has not asserted any issue that either was not or could not have been raised at trial, in his direct appeal, or in his prior post-conviction application. The issues of ineffective assistance of counsel and that his pleas were not knowing or voluntary were raised on direct appeal. The District Court's order reflects that the issue of improper enhancement was raised in Petitioner's first post-conviction application. These issues are, therefore, barred by the doctrine of *res judicata*. Sufficient reason has not been given for Petitioner's failure to adequately raise these issues in previous proceedings.

As Petitioner has failed to establish he is entitled to post-conviction relief, the order of the District Court of Delaware County denying Petitioner's second

PC 2016-0919, Childers v. State


application for post-conviction relief is **AFFIRMED**.

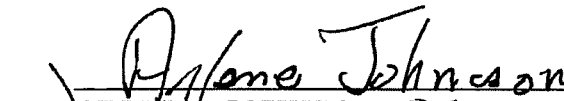
Petitioner has **EXHAUSTED** his State remedies regarding the issues raised in the applications for post-conviction relief. Subsequent application on these issues is **BARRED**. Rule 5.5, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016). Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

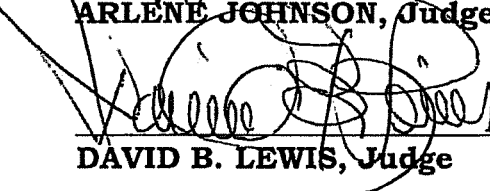
IT IS SO ORDERED.

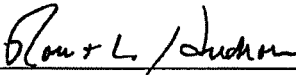
WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 14th
day of December, 2016.

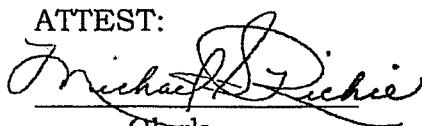

CLANCY SMITH, Presiding Judge


GARY L. LUMPKIN, Vice Presiding Judge


ARLENE JOHNSON, Judge


DAVID B. LEWIS, Judge


ROBERT L. HUDSON, Judge

ATTEST:

Clerk

PA

Attachment 4

IN THE DISTRICT COURT IN AND FOR DELAWARE COUNTY
STATE OF OKLAHOMA

FILED

SEP 22 2016

CAROLINE M. WEAVER
DELAWARE CO. COURT CLERK



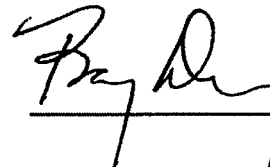
THE STATE OF OKLAHOMA,)
Plaintiff,)
)
vs.)
)
JOHN WILLIAM CHILDERS,)
Defendant.)

CF-07-341
CF-07-359

ORDER

Defendant, John Childers, initially filed an application for Post-Conviction Relief on December 16, 2011. The State responded January 27, 2012. On June 17, 2013, this Court issued its order denying Defendant's Application. Despite his statements in his previous application for post-conviction relief that he understood he could not bring any future Post-Conviction Relief Applications, Mr. Childers filed yet another Post-Conviction Relief Application on August 15, 2014. His new application raises one of the same issues he raised in his previous Post-Conviction Relief Application: that he did not have as many prior convictions as the State alleged that he did and that his sentence was more than the range of punishment allowed. Mr. Childers has now brought a Motion to Dismiss which claims the State has confessed his second Application for Post-Conviction Relief.

His August 15, 2014 Application is denied as it brings an issue already ruled on by this Court and which was or should have been known by Mr. Childers at the time he filed his December 16, 2011 Application.



Barry V. Denney,
Delaware County
Associate District Judge



CERTIFICATE OF DELIVERY

I hereby certify that on the 22nd day of September, 2016, I delivered via mail/hand delivered a true and correct copy of the above document to:

Delaware County District Attorney-hand delivered

*Davis Correctional Facility
John W. Childers #222461
6888 E. 133rd Rd.
Holdenville, Ok. 74848*


Bailiff