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The Response to Brecheen v. Reynolds: Oklahoma's System For Evaluating Extra-Record Constitutional Claims In Death Penalty Cased

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THE RESPONSE TO *BRECHEEN V. REYNOLDS*: OKLAHOMA'S SYSTEM FOR EVALUATING EXTRA-RECORD CONSTITUTIONAL CLAIMS IN DEATH PENALTY CASES

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> Post-conviction counsel are creative lawyers. Just as they found a way to force this Court to "analyze" a substantive claim under the guise of ineffective assistance of appellate counsel, so here will they figure out a way to present sufficient evidence in support of their claim to necessitate a remand for an evidentiary hearing and possible relief.[1]

This article focuses specifically on the breakdown of Oklahoma's system for evaluation of claims based on facts outside the traditional appellate record, but the article's primary goal is to use this discussion to more broadly illustrate the dangers inherent in the current movement in both federal statutes and caselaw to limit evaluation of state court decisions on extra-record claims. As the commentary of Judge Lumpkin of the Oklahoma Court of Criminal Appeals quoted above shows, reviewing courts often approach these claims as an evil to be avoided whenever possible. These claims include denial of constitutionally effective counsel, conflicts of interest, failure by the State to disclose exculpatory evidence, and other claims based on facts not necessarily directly focused on the issue of

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1. Walker v. State, 1997 Okla. Crim. App. 3, ¶ 13, 933 P.2d 327, 343 (Lumpkin, J., concurring) (emphasis added) ("*Jack Dale Walker*"). [Editor's Note: Because Oklahoma is one of the states employing a system of public domain citation, this article provides parallel citations to both the Oklahoma official public domain citation and the regional reporter. To learn more about public domain citations, see Coleen M. Barger, *The Uncertain Status of Citation Reform: An Update for the Undecided*, 1 J. APP. PRAC. & PROCESS 59 (1999).]

guilt or innocence,[2] but rather on the validity of the process by which a determination of guilt or innocence was made.

I. OKLAHOMA'S INITIAL REFUSAL TO CONSIDER SYSTEMIC CHALLENGES TO CAPITAL CONVICTIONS

From 1994 to 1998, one of the cases cited most often in capital post-conviction briefs filed by Oklahoma defense attorneys was *Brecheen v. Reynolds*.[3] *Brecheen* was cited, not because it was a successful case for the defendant involved—it was not—but because in *Brecheen* the Tenth Circuit responded to a long-standing refusal of the Oklahoma Court of Criminal Appeals to evaluate systemic constitutional challenges to convictions in death penalty cases.[4] The *Brecheen* court's findings succinctly summarize the dilemma facing a capital defendant under Oklahoma law at the time the case was decided:

> [Mr. Brecheen] did not have an opportunity to develop any additional facts relating to trial counsel's performance in the direct review process since *evidentiary hearings are unavailable at the appellate level.* He was, however given this opportunity when he filed his post-conviction petition, and his claim was ultimately denied on the merits after hearing. *Yet on appeal, the Court of Criminal Appeals refused to review this claim on the merits, even after hearing had taken place, because it concluded the claim was waived for not having been raised on direct appeal.* While this determination provides an "independent" state law ground for rejecting this claim, we do not believe it is an adequate basis. The practical effect of this ruling is to force Mr. Brecheen either to raise this claim on direct appeal, with new counsel but without the benefit of additional fact-finding, or have the claim forfeited under state law. This Hobson's choice cannot constitute an adequate state ground under the controlling case law

2. *See, e.g.*, Strickland v. Washington, 466 U.S. 668 (1984); Brady v. Maryland, 373 U.S. 83 (1963).

3. 41 F.3d 1343 (10th Cir. 1994).

4. *See id.*; *see also* Brecheen v. Reynolds, 1992 Okla. Crim. App. 42, 835 P.2d 117; *but see* Wilhoit v. State, 1991 Okla. Crim. App. 50, 816 P.2d 545 (affirming a district court decision granting relief in a capital case in post-conviction proceedings on grounds of ineffective assistance of counsel).

> because it deprives Mr. Brecheen of any meaningful review of his ineffective assistance claim.[5]

Even in the wake of the *Brecheen* decision, the Oklahoma Court of Criminal Appeals often refused to consider systemic constitutional challenges such as ineffective assistance of counsel that were raised in the first instance in post-conviction proceedings. The court developed a jurisprudence dealing with claims of ineffective assistance of counsel, juror misconduct, *Brady* violations, and other claims requiring extra-record fact finding, that required significant guesswork on the part of counsel to determine where those claims were to be raised. In *Pickens v. State*, the court held that if a court in post-conviction proceedings found that the claims (even ineffectiveness claims) could have been resolved without recourse to extra-record facts, the claims were waived if not raised in direct appeal proceedings.[6] However, if direct appeal counsel raised record-

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5. *Brecheen*, 41 F.3d at 1364 (emphasis added).

6. See *Pickens v. State*, 1996 Okla. Crim. App. 6, ¶ 17-18, 910 P.2d 1063, 1068-69, in which the court responded to a claim of ineffective assistance of counsel brought on post-conviction:

> Appellant alleges ineffective assistance of counsel both at trial and on direct appeal. Appellant could have raised the issue of ineffective trial counsel on direct appeal; however, the State urges us to address the issue, citing *Brecheen v. Reynolds*, 41 F.3d 1343 (10th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2564, 132 L.Ed.2d 817 (1995).
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> This we refuse to do. The pertinent language in the *Brecheen* case reads:
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> > This need to give a meaningful opportunity to assess and develop a claim of ineffective assistance of counsel, coupled with the fact that such claims may require an opportunity to develop additional facts, compel the conclusion that "ineffective assistance claims may be brought for the first time collaterally." (Citations omitted). *Osborn* [*v. Shillinger*, 861 F.2d 612 (10th Cir. 1988)] indicates that this result is dictated by the interplay of two factors: the need for additional fact-finding, along with the need to permit the petitioner to consult with separate counsel on appeal in order to obtain an objective assessment as to trial counsel's performance.
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> *Brecheen*, 41 F.3d at 1363-64. While we recognize there may be instances where additional fact-finding is necessary to fully develop a claim of ineffective trial counsel, this case is not one where that occurred. And, while we recognize the Tenth Circuit's generous interpretation of its own review provisions, we refuse to sacrifice our post-conviction laws and case-law on the altar of one-stop convenience. Rather, *we shall continue to do what we have done in the past: review each case on its individual merits, examining each specific proposition in connection with the specific facts of each case as that need arises. See Berget v. State*, 907 P.2d 1078, ___ (Okl.Cr. 1995); *Sellers v. State*, 889 P.2d 895 , 897 (Okl.Cr.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 214, 133 L.Ed.2d 146 (1995).

See also Clayton v. State, 1995 Okla. Crim. App. 3, ¶ 5, 892 P.2d 646, 651; Smith v. State,

based claims of ineffective trial counsel, the court refused to permit *any* claim of ineffectiveness to be raised in post-conviction, holding that the issue of ineffectiveness itself was res judicata, regardless of the need for extra-record fact development, and regardless of whether there was a different underlying basis for the ineffectiveness claim brought in post-conviction.[7] This was so even though the facts supporting such a claim could be raised for the first time only in post-conviction proceedings, and even though there was no other state court forum in which those claims could be litigated.[8]

The obvious problem with the court's "refus[al] to sacrifice our post-conviction laws and case-law on the altar of one-stop convenience"[9] was that it provided neither appellate counsel nor post-conviction counsel with any guidance for determining when the court would find that ineffectiveness claims would be determined to be "resolvable" on the record alone. Perhaps even more importantly, the *Pickens* rule meant that no forum was available at all in which to litigate extra-record issues of ineffectiveness of counsel where both record-based and extra-record-based claims of ineffectiveness existed in the same case, and where direct appeals counsel raised the record-based claims on direct appeal.

In response to the problems created by *Brecheen*, in 1995 the Oklahoma legislature and the Oklahoma Court of Criminal Appeals undertook to make sweeping changes in the methods by which extra-record claims were evaluated in capital cases. There is no question that the Oklahoma court was fully aware of the *Brecheen* ruling when it was implementing its new standards for evaluating claims of ineffective counsel. *Brecheen* was

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1996 Okla. Crim. App. 13, ¶ 13, 915 P.2d 927, 931 (Lumpkin, J., concurring). In *Berget*, cited above by the court, the court went so far as to contend, despite the specific provisions of the court rules in effect at the time, that extra-record claims could in fact be developed in direct appeal proceedings. Berget v. State, 1995 Okla. Crim. App. 66 ¶ 20, 907 P.2d 1078, 1084.

7. *See* Moore v. State, 1995 Okla. Crim. App. 12, ¶ 12, 889 P.2d 1253, 1253 n.3; *see also* Fowler v. State, 1995 Okla. Crim. App. 29, 896 P.2d 566.

8. At the time of the Tenth Circuit's decision in *Brecheen*, the Oklahoma Criminal Procedure Rules relating to direct appeals explicitly prohibited "supplementation of the record with evidentiary materials which could have been introduced in the trial court but were not." OKLA. STAT. ANN. tit. 22 App., § 3.11 (West 1986). Supplementation with any other material was limited to "the rare case of extreme necessity." *Id.*

9. *Pickens*, 1996 Okla. Crim. App. 6, ¶ 17-18, 910 P.2d at 1068-69.

highly visible in opinions in which the court justified the changes that had been made in post-conviction procedure. In *Braun v. State*, the court stated:

> We are painfully aware that at least one federal court has, in the past, viewed this Court as inconsistent in the application of its rules, and as a result deemed our ruling of waiver as insufficient to establish a procedural bar on habeas review. *See Brecheen v. Reynolds*, 41 F.3d 1343 (10th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2564, 132 L.Ed.2d 817 (1995). [10]

II. CAPITAL POST-CONVICTION REDEFINED

In 1995, a series of changes to Oklahoma procedure were initiated, beginning with the enactment of significant amendments to the Post-Conviction Procedure Act.[11] These changes radically changed the methods by which issues could be raised in capital appeals and post-conviction proceedings, and they also significantly limited the time frames in which those issues could be raised. The changes in the Post-Conviction Procedure Act, set out below, were limited to post-conviction proceedings *in capital cases.*[12]

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10. Braun v. State, 1997 Okla. Crim. App. 26, ¶ 9, 937 P.2d 505, 508.

11. *See* OKLA. STAT. ANN. tit. 22, § 1089 (West Supp. 2000).

12. *Id.* Post-conviction proceedings in non-capital cases in Oklahoma continue to be governed by language of the prior post-conviction procedure act. *See* OKLA. STAT. ANN. tit. 22, § 1080 (West 1986). Oklahoma's statutory distinction between capital and non-capital cases raises an entirely different set of Eighth Amendment concerns which fall outside the scope of this article. Where different post-conviction standards apply to capital and non-capital cases, and where the standards applicable to capital cases are as restrictive as those detailed here, the question arises as to whether Eighth Amendment concerns of reliability have been protected. *See* Hopper v. Evans, 456 U.S. 605, 610-11 (1982); Beck v. Alabama, 447 U.S. 625, 635-37 (1980). Distinctions between the methods by which capital and non-capital post-conviction proceedings are handled in Oklahoma include the fact that non-capital applications are still brought in the first instance in district court with the court of criminal appeals acting as an appellate court in those proceedings. In addition, non-capital defendants are not required by controlling caselaw to raise "available" ineffective assistance of counsel claims on direct appeal where the same attorney handles both trial and appeal. Non-capital petitioners are also permitted to file *after* the completion of direct appeal.

A. New Procedural Rules Established by the 1995 Amendments

The revision to the act itself made numerous changes to the methodology for evaluating extra-record issues in capital cases. Those changes included requirements that post-conviction petitions be filed in the first instance in the court of criminal appeals (rather than in district court, as required under the prior statute) and imposition of deadlines that required filing of post-conviction applications prior to the completion of direct appeal proceedings.[13]

In addition, the amendments contained new statutory language limiting issues that can be raised on post-conviction. Under the terms of the amendments, the only issues that can be raised in post-conviction proceedings in capital cases are those that (1) were not and could not have been raised in a direct appeal; and (2) support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent.[14]

The provisions of these paragraphs do not establish standards of review for the issues raised, but instead establish the minimal showing that must be made before a claim brought in post-conviction proceedings is even subject to review. These threshold standards are themselves much higher than the constitutional standards of review that should apply to substantive evaluation of many of the constitutional claims that would traditionally be raised in post-conviction proceedings;[15] however, the primary impact of these standards in Oklahoma has

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13. Under the 1995 act, post-conviction applications in capital cases must be filed within 90 days of the filing of the final brief on direct appeal. *See* OKLA. STAT. ANN. tit. 22, § 1089(D)(1) (West Supp. 2000). From a practice standpoint, it is important to note that if no reply brief is filed on direct appeal, the time for filing runs from the date on which the State's response is filed, not from the prospective deadline date for filing a reply.

14. *See* OKLA. STAT. ANN. tit. 22, § 1089(C) (West Supp. 2000).

15. *See, e.g.*, Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980) (holding that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief"); Strickland v. Washington, 466 U.S. 668, 687 (1984) (requiring reversal where constitutionally deficient performance of counsel results in trial whose outcome is "unreliable"); Ake v. Oklahoma, 470 U.S. 68 (1985) (applying harmless error analysis to question of denial of expert assistance at trial). Thus, whatever the constitutional error, few if any errors are subjected to as strenuous an evaluation as that required by the language of Oklahoma statute, which by its terms requires proof that the outcome of trial *would* have been different—not simply a determination of whether trial was impacted or its result is unreliable.

been on the court's evaluation of claims of ineffective assistance of appellate counsel. This is so because the court of criminal appeals' reinterpretation of the "record on appeal"[16] has meant that few, if any, other claims reach a paragraph two evaluation.

B. The Court as Advocate

Another significant change was made in Oklahoma procedure when the 1995 amendments were enacted. In all but the most exceptional of cases, the State no longer even participates in post-conviction review. The amendments to section 1089 contain no specific provision relating to a response from the State in post-conviction proceedings, and the court of criminal appeals has generally refused to require a response.[17] Instead, the Oklahoma Court of Criminal Appeals serves both as arbiter and as advocate for the State.[18]

C. The Oklahoma Court of Criminal Appeals' Reinterpretation of the 1995 Amendments

In analyzing the terms of the 1995 amendments to Oklahoma's post-conviction statutes, the Oklahoma Court of Criminal Appeals placed a significantly different interpretation on the statutory language than the interpretation that might be arrived at by simply reading the terms of the statute as they have traditionally been understood.[19]

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16. *See* discussion *infra* Part C(1).

17. The court has held that the provisions of title 22, section 1089(D)(3) of the Oklahoma Statutes govern responses, and it has denied requests by petitioners that the State be required to respond. *See* Gilbert v. State, 1998 Okla. Crim. App. 17, ¶¶ 17-18, 955 P.2d 727, 733; Charm v. State, 1998 Okla. Crim. App. 2, ¶ 15, 953 P.2d 47, 51.

18. At present the writer is aware of only two reported capital post-conviction cases under the new amendments in which a response was requested from the State: *McGregor v. State,* 1997 Okla. Crim. App. 10, 935 P.2d 332 and *Slaughter v. State,* 1998 Okla. Crim. App. 63, 969 P.2d 990.

19. Indeed, the court's holding in *Walker* was so counterintuitive that it directly conflicted with the court's first two decisions under the statute, which addressed the "appellate record" as it has been traditionally understood. *See* Walker v. State, 1997 Okla. Crim App. 3, ¶ 7, 933 P.2d 327, 332; Medlock v. State, 1996 Okla. Crim. App. 58, 927 P.2d 1069; Spears v. State, 1996 Okla. Crim. App. 44, 924 P.2d 778.

1. The Re-Definition of the "Appellate Record"—Walker v. State

In *Walker v. State,*[20] the Oklahoma court appeared to have finally made a determination as to the forum in which it would require future extra-record claims to be raised in Oklahoma. In order to conform its determination with the language of the statute, the court in *Walker* redefined the term "appellate record" to include any facts that "were available to Walker's direct appeal attorney and thus either *were* or *could have been* used in his direct appeal."[21] In application, the court found that facts contained in affidavits that were included in Walker's post-conviction application in support of claims of ineffective assistance of counsel, while "not physically part of Walker's direct appeal record" were "available to his direct appeal attorney and thus could have been argued on direct appeal."[22] By so holding, the *Walker* court virtually eliminated any mechanism through which claims of ineffective trial counsel could be brought in post-conviction proceedings, because, with few exceptions, facts developed in post-conviction proceedings could have been developed through investigation by direct appeal counsel.[23]

In addition to redefining the "appellate record" to include extra-record facts, the court developed new standards for evaluation of claims of ineffective assistance of appellate counsel. In establishing those standards, the court determined that petitioners must establish deficient performance "as a precondition to having their underlying claim reviewed."[24] The court lamented that under the prior post-conviction scheme, which required *Strickland* analysis of ineffectiveness claims, the "[c]ourt was essentially forced to examine the merits of the allegedly mishandled but technically waived claim in order to

20. 1997 Okla. Crim. App. 3, 933 P.2d 327.

21. *Id.* ¶ 7, 933 P.2d at 332.

22. *Id.*

23. The court has applied the same "appellate record" analysis to other types of extra-record claims in addition to those for ineffective assistance of counsel. *See, e.g.*, Richie v. State, 1998 Okla. Crim. App. 26, 957 P.2d 1192 (claims of juror bias waived); Cargle v. State, 1997 Okla. Crim. App. 63, 947 P.2d 584 (waiving prosecutorial misconduct claims, *Brady* claims, and juror misconduct claims).

24. *Walker*, 1997 Okla. Crim. App. ¶ 12, 933 P.2d at 334.

determine whether it was so serious as to deprive the defendant of a fair trial."[25] The court found that its new test permitted analysis of deficient performance without an examination of the merits of the underlying claim. What the court did not provide was any explanation of how deficient performance could in fact be shown without reference to the issue that gave rise to the claim of deficient performance in the first place.[26]

2. Changes in the "Intervening Change in Law" Standard

Under the prior incarnation of Oklahoma's post-conviction procedure act, Oklahoma had consistently permitted post-conviction claims where those claims were based on an "intervening change in law." The Oklahoma court had held that an intervening change in the law constituted a sufficient reason for why an issue could not have been raised on direct appeal.[27] However, the provisions of the new amendments to the act have been interpreted by the Oklahoma court as superseding the prior standard and permitting issues to be raised as "intervening changes of law" in the most limited of circumstances.[28]

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25. *Id.* ¶ 12, 933 P.2d at 334.

26. For a more detailed discussion of the constitutional problems inherent in the Oklahoma court's new standards for evaluation of claims of appellate ineffectiveness, see Brian Lester Dupler, *The Inglorious Revolution: Walker v. State and Capital Post-Conviction Procedure*, 68 OKLA. B.J. 2624 (1997); Jennifer Golm, Note, Walker v. State, *Dooming Challenges to Appellate Counsel's Effectiveness*, 51 OKLA. L. REV. 601 (1998).

27. *See* Fowler v. State, 1995 Okla. Crim. App. 29, ¶ 5, 896 P.2d 566, 570 (holding that *J.E.B. v. Alabama*, 511 U.S. 127 (1994), which was decided after the defendant's direct appeal and after his first application for post-conviction relief was at issue, constituted an intervening change in law and allowed the defendant to assert for the first time that the State had systematically and unconstitutionally excluded female jurors); *see also* Van Woundenberg v. State, 1991 Okla. Crim. App. 104, ¶ 2, 818 P.2d 913, 915; Stafford v. State, 1991 Okla. Crim. App. 77, ¶ 2, 815 P.2d 685, 687 (holding that while the Supreme Court's decision in *Maynard v. Cartwright*, 486 U.S. 356 (1988), was based upon principles of law previously announced in *Godfrey v. Georgia*, 446 U.S. 420 (1980), *Cartwright* still constituted an intervening change in law because the constitutionality of the "especially heinous, atrocious or cruel" aggravating circumstance "was not definitively decided until addressed by the Supreme Court in *Cartwright*").

28. In *Walker v. State*, 1997 Okla. Crim. App. 31, 940 P.2d 509 ("*Gary Alan Walker*") (the appeal of Gary Alan Walker, not to be confused with the appeal of Jack Dale Walker, *Walker v. State*, 1997 Okla. Crim. App. 3, 933 P.2d 327 ("*Jack Dale Walker*"), the opinion generally discussed in this section) the Oklahoma court held that the amendments to the Post-Conviction Procedure Act permitted a claim to be brought in post-conviction proceedings as an intervening change in law only if "the legal ground supporting it either was not recognized by a court as precedent at the time of his direct appeal or is a new rule

3. Requirements that Attorneys Raise Ineffectiveness Claims on Themselves

In *Neill v. State*, the Oklahoma Court of Criminal Appeals determined that

> [n]o exception is made in the statute for the situation where trial counsel and appellate counsel are the same. Therefore, as the information forming the basis of [Mr. Neill's] claims was available to direct appeal counsel . . . [Mr. Neill's] claim of ineffective assistance of trial counsel is waived because it could have been raised on direct appeal but was not.[29]

4. Retroactive Application of the New Standards

In both *Walker* cases, in *Neill*, and in many other cases decided after *Jack Dale Walker v. State*, the Oklahoma court applied the waiver rules established in *Jack Dale Walker* to cases that had been briefed and in some instances decided on direct appeal prior to the passage of the amendments to the post-conviction procedure act and the decision in *Jack Dale Walker*.[30] In reviewing the state court's decision in Gary Walker's case,

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of constitutional law which has been given retroactive effect. *Gary Alan Walker*, 1997 Okla. Crim. App. 31 ¶ 3, 940 P.2d at 510 (quoting *Jack Dale Walker*, 1997 Okla. Crim. App. 3, 933 P.2d at 339). The court determined that the petitioner's claims under *Cooper v. Oklahoma*, 517 U.S. 348 (1996), did not meet either of these exceptions and were therefore waived. In *Jack Dale Walker*, Judge Lane dissented with regard to an equivalent finding, writing:

> The majority finds that both of these issues were waived because they were not raised on direct appeal. I believe that the majority has incorrectly interpreted [OKLA. STAT. ANN. tit. 22, § 1089 (West Supp. 2000).] . . . The majority does not cite, nor do I find any cases that determined either of these issues [*Cooper* and *Flores v. State*, 896 P.2d 558 (Okla. Crim. App. 1995)] prior to the time that Petitioner filed his appellate brief. . . . [I]t would be very difficult for us to say that the [*Cooper*] claim could have been reasonably formulated from one of our prior decisions.

Jack Dale Walker, 1997 Okla. Crim. App. 3, ¶ 2, 933 P.2d 327, 334 (Lane, J., dissenting).

29. 1997 Okla. Crim. App. 41, ¶ 7, 943 P.2d 145, 148, 151. *But see id.* ¶ 1, 943 P.2d at 151 (Chapel, J., concurring) (although concurring in the result, Judge Chapel contended that the majority's requirement that counsel raise ineffectiveness claims on themselves "absurd").

30. *See, e.g.*, McGregor v. State, 1997 Okla. Crim. App. 10, 935 P.2d 332; Valdez v. State, 1997 Okla. Crim. App. 12, 933 P.2d 931 (Lane, J., dissenting) (finding that he "would remand this case to the trial court for a proper determination of competency for the same reasons [he] dissented in [*Jack Dale*] *Walker*").

the Tenth Circuit held that the state court's decision to apply the new waiver rules to Gary Walker constituted an impermissible retroactive application of those rules.[31]

D. Changes in Direct Appeal Procedure

In addition to the changes made in post-conviction procedure by the legislature and court, the court of criminal appeals made changes in Oklahoma Criminal Appellate Rule 3.11, which relates to supplementation of the record on direct appeal.[32] The new rule permitted supplementation of the record where the direct appeal contained an allegation of ineffective assistance of trial counsel, and where that allegation "is predicated upon an allegation of failure of trial counsel to properly utilize available evidence or adequately investigate to identify evidence which could have been made available during the course of trial."[33] The rule also established a threshold for obtaining an evidentiary hearing based on this type of ineffectiveness claim requiring that "the application and affidavits must contain sufficient information to show this Court by clear and convincing evidence there is a strong possibility trial counsel was ineffective."[34] The modified rule does not contain any provision for supplementation of the record for any other type of extra-record constitutional claim.

III. PROCEDURES HAVING THE FORM OF CONSTITUTIONALITY, BUT DENYING THE POWER

From the foregoing discussion, several conclusions may be drawn concerning Oklahoma's current procedure for evaluation of extra-record claims. First, there is still no readily available forum in which extra-record claims can be litigated on their

31. *See* Walker v. Attorney Gen., 167 F.3d 1339 (10th Cir. 1999) (citing Fields v. Calderon, 125 F.3d 757, 760 (9th Cir. 1997). The Tenth Circuit remarked that "[a] defendant cannot be expected to comply with a procedural rule that does not exist at the time, and should not be deprived of a claim for failing to comply with a rule that only comes into being after the time for compliance has passed." *Id.* at 1345.

32. OKLA. STAT. ANN. tit. 22 App. § 3.11 (West Supp. 2000).

33. *Id.* § 3.11(B)(3)(b).

34. *Id.*

merits in state court proceedings. Instead, petitioners are forced to litigate their claims in terms of the threshold requirements for obtaining evidentiary hearings, and except in rare cases where such hearings have been granted, those claims do not receive any further review.[35] Indeed, the court is generally utilizing the evidentiary hearings to maintain the same record review/extra-record review dichotomy that was present in the prior post-conviction waiver scheme. The only difference is that while once the court used the terms "waiver" and "res judicata" to justify its determination not to review extra-record claims on their merits, it now uses rule 3.11's threshold requirements, denying evidentiary hearings without factual analysis, and otherwise remaining silent with regard to the specific claims for which a hearing was requested.[36] The court continues to address record-based claims of ineffectiveness, but only in very rare cases has the court actually conducted a substantive analysis of extra-record ineffectiveness claims.[37] In addition, the amended statute and amended court rules make no provision for raising other extra-record claims outside of ineffective assistance of counsel. In *Jack Dale Walker,* the court urged the "importance of the direct appeal as the mechanism for raising all potentially meritorious claims."[38] However, the court has provided only limited mechanisms for raising those claims in direct appeals proceedings. Further, recent caselaw indicates that the court fully intends to circumscribe even more severely the availability of avenues in direct appeal proceedings for raising such claims. In *Anderson v. State,* the court denied a request for evidentiary hearing on an issue of juror misconduct and found that the claim

35. *See* Thornburg v. State, 1999 Okla. Crim. App. 32, 985 P.2d 1234; Short v. State, 1999 Okla. Crim. App. 15, ¶ 94, 980 P.2d 1081, 1108. The impact of the refusal of the court to grant evidentiary hearings is twofold: First, development of factual evidence to support a petitioner's claims is severely limited, and second, the refusal of the grant often ends the court's inquiry, as it did in these cases. No further formal finding on the underlying merits of a petitioner's constitutional claims is made. The point here is not that merits-based review is not afforded when evidentiary hearings are granted, *see, e.g.,* Phillips v. State, 1999 Okla. Crim. App. 38, 989 P.2d 1017, but that, when those hearings are not granted, neither are constitutional standards applied to the extra-record-based claims of ineffectiveness.

36. *See, e.g., Thornburg,* 1999 Okla. Crim. App. 32, ¶ 29, 985 P.2d at 1245; *Short,* 1999 Okla. Crim. App. 15, ¶ 96, 980 P.2d at 1108.

37. *See* Washington v. State, 1999 Okla. Crim. App. 22, 989 P.2d 960.

38. *Jack Dale Walker,* 1997 Okla. Crim. App. 3, ¶ 5, 933 P.2d at 331.

was waived because it was filed outside the statutory deadline under which a motion for new trial could be filed.[39]

The net effect of the radical changes made in Oklahoma's methodology for evaluation of extra-record claims has been to provide a new method for achieving the same result as that reached by the court of criminal appeals in *Brecheen*. Extra-record claims remain unexamined under constitutional standards in many direct appeals cases, instead being disposed of without consideration on the merits of the underlying claims by recourse to the threshold requirements for evidentiary hearings or through application of new, even earlier, findings of waiver.[40]

The court has returned to its stated goal of achieving a system in which it can evaluate cases on a "case-by-case" basis, without regard to what it considers "liberal" rules that permit equivalent issues to be considered in all cases. The court has made it even more difficult to "figure out a way to present sufficient evidence in support of [a] claim to necessitate a remand for an evidentiary hearing and possible relief."[41] Far from solving the problems identified in *Brecheen*, the Oklahoma system has simply recharacterized its treatment of the claims that the *Brecheen* opinion was written to protect. Extra-record claims, when they are considered at all, are considered in a haphazard fashion, devoid of predictability, and dependent not on established procedural rules, but on the interest the court may have in addressing, or failing to address, a particular extra-record claim in a given case. Further, by re-couching evaluation of claims in terms of the threshold requirements, the court has created a mechanism under which actual evaluation of constitutional claims can be avoided while still presenting the appearance of a substantive evaluation of the claim. This appearance of substantive review, rather than denial of process, is particularly important when the implications on federal review are considered.

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39. 1999 Okla. Crim. App. 44, 992 P.2d 409. It is clear from the court's opinion that appellate counsel, faced with the ambiguity of the court's rules relating to supplementation of the record filed *both* a motion for new trial, and a request for an evidentiary hearing in direct appeal proceedings. *Id.* ¶ 60, 992 P.2d at 425. The court did not even affirmatively address the evidentiary hearing request in finding that the issue was waived.

40. *See id.*

41. *Jack Dale Walker*, 1997 Okla. Crim. App. 3, ¶ 13, 933 P.2d at 343 (Lumpkin, J., concurring).

IV. THE OPTIONS FOR FEDERAL CORRECTIVE ACTION

The commentary made by Judge Lumpkin in his concurrence in *Jack Dale Walker,* quoted at the beginning of this article, was made in the context of a critique of the majority's decision to reinterpret Oklahoma's method of evaluating ineffective assistance of counsel claims. It was not Judge Lumpkin's concern that the majority's method would bar defendants from review of their claims, but rather that the majority's method might result in "a test for ineffective assistance of counsel which is actually more lenient for post-conviction than it is for direct appeal."[42] Given Oklahoma's current methods for dealing with extra-record claims, including ineffectiveness of counsel claims, it seems that Judge Lumpkin's fears were unfounded, but it is the existence of those fears themselves that is troubling.

The Oklahoma court has demonstrated a clear intention, not simply to deny claims of systemic failure, but to deny petitioners a predictable forum in which those claims can be litigated. The remedy for such a situation would be to provide a forum in federal court in which the claims could be brought as *de novo* federal claims in habeas corpus.[43] In Oklahoma's case, the Tenth Circuit in the past has shown a willingness to protect the procedural avenues for raising constitutional claims where they are denied in state court proceedings.[44] Where the circuit has been less protective, however, is with regard to the nature of the substantive evaluation that is given to claims on their merits by the state court, regardless of the actual nature of the constitutional analysis conducted.

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42. *Id.* ¶ 12, 933 P.2d at 343.

43. *See* Berget v. Gibson, 188 F.3d 518 (10th Cir. 1999) (table) (for text, see *Berget,* No. 98-6381, 1999 WL 586986 (10th Cir. Aug. 5, 1999); Hickman v. Spears, 160 F.3d 1269, 1271 (10th Cir. 1998).

44. Walker v. Attorney Gen., 167 F.3d 1339, 1345 (10th Cir. 1999) (finding that "[a] defendant cannot be expected to comply with a procedural rule that does not exist at the time, and should not be deprived of a claim for failing to comply with a rule that only comes into being after the time for compliance has passed"); English v. Cody, 146 F.3d 1257, 1263 (10th Cir. 1998) (raising "serious questions about the adequacy of the actual Oklahoma procedural mechanism" for evaluation of extra-record ineffective assistance of counsel claims on direct appeal); Brecheen v. Reynolds, 41 F.3d 1343, 1363 (10th Cir. 1994) (finding Oklahoma's waiver scheme in post-conviction cases did not constitute a valid bar to federal consideration of ineffective assistance of counsel claims).

The circuit's decision in *Sellers v. Ward*[45] illustrates the restrictions under which the Tenth Circuit has determined it must operate. In *Sellers* the circuit found that Sean Sellers had presented evidence that he suffered from Multiple Personality Disorder, which, if borne out in evidentiary proceedings, would have merited relief under state post-conviction statutes. The circuit characterized petitioner's claims as "supported by significant evidence the person facing death for three murders is not the person who committed the crime."[46] The court also found that Sellers' evidence constituted newly discovered evidence of actual innocence and that "the claim is grounds for post-conviction relief under Oklahoma law."[47] However, in Sellers' case, the Oklahoma Court of Criminal Appeals, in an analysis significantly similar to that of its analysis of Robert Brecheen's claims of ineffective assistance of counsel, had determined that the issue of newly discovered evidence was waived because it had not been raised on direct appeal.[48] It was this waiver issue that proved to be ultimately dispositive of Sellers' habeas petition. In analyzing Sellers' procedural posture, the circuit found that

> [t]he first hurdle Petitioner must overcome is that his principal constitutional argument does not revolve about trial error but about matters that occurred subsequently. He maintains the *Sellers II* court mistakenly barred him from airing his evidence of MPD because of its erroneous interpretation of an Oklahoma statute relating to post-conviction review. Assuming the contention is correct and the Oklahoma court mistakenly construed the statute, the error is one of state law not cognizable in habeas corpus because "federal habeas corpus relief does not lie for errors of state law." Although Petitioner indeed finds himself in a judicially created "Catch 22," the dilemma is not one we can reach through the limited access provided by our jurisdiction.[49]

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45. 135 F.3d 1333 (10th Cir. 1998) ("*Sellers III*").

46. *Id.*

47. *Id.* n.3.

48. *See* Sellers v. State, 1995 Okla. Crim. App. 11, ¶ 5, 889 P.2d 895, 897 ("*Sellers II*"). Sellers' direct appeal was decided in *Sellers v. State*, 1991 Okla. Crim. App. 41, 809 P.2d 676.

49. *Sellers*, 135 F.3d at 1339 (citations omitted).

In citing *Matthews*, the court apparently disregarded the second half of the *Matthews* analysis—an analysis that would have been particularly useful to Sellers in this instance. After making its statement in *Matthews* with regard to the petitioner's claims that a state court evidentiary ruling was invalid, the Tenth Circuit then applied another analysis to Matthews' claims, and stated:

> Alternatively, Mr. Matthews argues that the trial court's exclusion of the Cardenas boys' statements offends his rights under the Fifth and Fourteenth Amendments. We review due process challenges to state evidentiary rulings only for fundamental unfairness.[50]

The implication of this holding is that, contrary to the stated holding of *Sellers III*, the Tenth Circuit did not lack jurisdiction to correct the "judicially created 'Catch 22'" in which Sellers found himself, but simply declined to exercise it.

Sellers III is not the only instance in which the Tenth Circuit has demonstrated an inclination to avoid analysis of the substantive due process concerns that are implicated by the Oklahoma Court of Criminal Appeals' haphazard application of procedural default rules and standards of review. In *Brewer v. Reynolds*[51] the Tenth Circuit joined six other courts of appeals,[52] rejected the reasoning of the Eighth and Second Circuits,[53] and determined that it would unconditionally apply the harmless error standard in habeas corpus proceedings established by the Supreme Court in *Brecht v. Abrahamson*.[54] In *Brecht*, four members of the Court adopted a position that the "harmless

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50. Matthews v. Price, 83 F.3d 328, 331 (10th Cir. 1996) (citations omitted).

51. 51 F.3d 1519, 1529 (10th Cir. 1995).

52. *See* Hassine v. Zimmerman, 160 F.3d 941, 953 (3d Cir. 1998); Kyger v. Carlton, 146 F.3d 374, 382 (6th Cir. 1998); Hogue v. Johnson, 131 F.3d 466, 499 (5th Cir. 1997); Curtis v. Duval, 124 F.3d 1, 6 (1st Cir. 1987); Sherman v. Smith, 89 F.3d 1134, 1140-41 (4th Cir. 1996) (en banc); Horsely v. Alabama, 45 F.3d 1486, 1497 n.11 (11th Cir. 1995). The Seventh Circuit appears to have an internal conflict with regard to this issue. *Compare* Enoch v. Gramley, 70 F.3d 1490, 1500 (7th Cir. 1995) *with* Tyson v. Trigg, 50 F.3d 436, 446-47 (7th Cir. 1995).

53. *See* Cox v. Norris, 133 F.3d 565, 572 (8th Cir. 1997) (reaffirming that "[w]hen a state court has not conducted a harmless error review, we must use the strict standard found in *Chapman v. California*, 386 U.S. 18 (1967) in conducting harmless error review"); Lyons v. Johnson, 912 F. Supp. 679, 688-89 (S.D.N.Y. 1996), *aff'd*, 99 F.3d 499 (2d Cir. 1996).

54. 507 U.S. 619 (1993).

beyond a reasonable doubt" standard of review established in *Chapman v. California*[55] was not applicable to federal habeas corpus proceedings. Justice Rehnquist, writing for four justices, found that the standard established in *Kotteakos v. United States*[56]—whether the constitutional error complained of "had substantial or injurious effect or influence in determining the jury's verdict"—should instead be applied in federal habeas cases. Four members of the Court dissented, and it was Justice Stevens' concurring opinion that determined the outcome.[57]

The specific question on which the circuits disagree about *Brecht* is whether its more restrictive standard of review applies in cases in which no *Chapman* harmless error analysis has been conducted in state court proceedings. The reason for the split among the circuits is Justice Rehnquist's policy justification for the more difficult *Brecht* standard. Justice Rehnquist wrote, "The reason most frequently advanced in our cases for distinguishing between direct and collateral review is the State's interest in the finality of convictions that have survived direct review within the state court system."[58] Issues of comity, federalism, and the importance of maintaining the prominence of the trial process were also considered. Justice Rehnquist then found that

> [i]n light of these considerations, we must decide whether the same harmless error standard that the state courts applied on direct review of petitioner's *Doyle* claim also applies in this habeas proceeding. We are the sixth court to pass on the question whether the State's use for impeachment purposes of petitioner's post-*Miranda* silence in this case requires reversal of his conviction. Each court that has reviewed the record has disagreed with the court before it as to whether the State's *Doyle* error was "harmless." State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under *Chapman*, and state courts often occupy a superior vantage point from which to evaluate the effect of trial error. For these reasons, it scarcely seems logical to

55. 386 U.S. 18 (1967).

56. 328 U.S. 750 (1946).

57. *See Brecht*, 507 U.S. at 639 (Stevens, J., concurring). Justices White, Blackmun, O'Connor, and Souter were the four dissenting Justices.

58. *Brecht*, 507 U.S. at 635.

> require federal habeas courts to engage in the identical approach to harmless error review that *Chapman* requires state courts to engage in on direct review.[59]

The problem in application of this holding occurs when no state court has applied harmless error analysis to the constitutional claims raised. This situation has occurred often in Oklahoma because of the waiver rules discussed above.

A federal habeas corpus action filed under 28 U.S.C. § 2254 is the single legal mechanism available to a prisoner facing the death penalty through which he can litigate unconstitutional error by the state court. "Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty."[60] In addition, death penalty cases implicate not only due process concerns, but issues of systemic reliability in sentencing concerns under the Eighth Amendment.[61]

The current concern is whether, in the wake of the passage of the Anti-Terrorism and Effective Death Penalty Act of 1996,[62] and their interpretation of Supreme Court decisions such as *Brecht*, the federal courts will choose to retain the authority to correct the failures of the state court system where that system re-couches its historic waiver jurisprudence in terms of substantive review. As the current status of the Oklahoma system demonstrates, problems exist in state court process that

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59. *Id.* (citations omitted).

60. McFarland v. Scott, 512 U.S. 849, 859 (1994).

61. *See* Hopper v. Evans, 456 U.S. 605 (1980); Beck v. Alabama, 447 U.S. 625 (1980).

62. 28 U.S.C.A. § 2261 (West Supp. 1999); *see* 28 U.S.C.A. § 2254 (West 1994) ("AEDPA"). The Tenth Circuit has found that under the terms of the AEDPA,

> [i]f the claim was not heard on the merits by the state courts, and the federal district court made its own determination in the first instance, we review the district court's conclusions of law *de novo* and its findings of fact, if any, for clear error. But when reviewing a claim already decided by the state courts on the merits, we are bound to deny relief unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d).

Berget v. Gibson, 188 F.3d 518 (10th Cir. 1999) (table) (text at *Berget*, No. 98-6381, 1999 WL 586986, at *4 (10th Cir. Aug. 5, 1999) (citations omitted). The court also noted that, "[q]uite simply, the 'AEDPA increases the deference to be paid by the federal courts to the state court's factual findings and legal determinations.'" *Id.* (citing Houchin v. Zavaras, 107 F.3d 1465, 1470 (10th Cir. 1997)).

can only be protected in subsequent federal habeas corpus proceedings. Failure by the federal courts to retain and exercise their authority to remedy those problems will result in a system in which fundamental due process rights are not only unprotected, but potentially cannot even be litigated. Adoption of a federal judicial philosophy that assumes state courts are applying federal constitutional standards, without requiring an evaluation in each case as to whether those standards were in fact applied, equals an abdication of the federal courts' responsibility to ensure the fundamental fairness of the process by which condemned petitioners have been found guilty and sentenced. Adoption of a philosophy of limiting jurisdiction over fundamentally unfair state court process, such as the determination made by the state court in *Sellers II* and permitting petitioners' otherwise valid claims to be destroyed by judicially created "Catch 22's" does nothing to increase confidence in the process. Instead, such a choice would indicate a willingness to permit state courts to engage in exactly the type of "case-by-case" analysis contemplated by the Oklahoma Court of Criminal Appeals, without recourse for petitioners to firmly established rules of procedure and review in state court proceedings.