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Case No. _____
(Lower Court Case No. CF-2003-3112)
(Oklahoma County)

IN THE COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

TINA LOUISE HAIGH,

Petitioner-Appellant

v.

STATE OF OKLAHOMA,

Respondent-Appellee.

APPEAL FROM DENIAL OF APPLICATION FOR POST-CONVICTION RELIEF

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IN THE COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

TINA HAIGH, Petitioner-Appellant, v. STATE OF OKLAHOMA, Respondent-Appellee.	Case No. _____

APPEAL FROM DENIAL OF APPLICATION FOR POST-CONVICTION RELIEF AND SUPPORTING BRIEF

Appellant, Tina Haigh ("HAIGH") does hereby submit this brief in support of her appeal from Denial of her Application for Post-Conviction Relief. This Court remanded the case to the district court for further proceedings in *Haigh v. State,* PC-201-225. *Without conducting a hearing or even inviting any sort of response*, the district court denied Petitioner's application. The nineteen page order was entered without hearing and without notice to Petitioner. The April 15, 2013 Order appears to have been drafted by the district attorney and presented to the district court without notice to Petitioner. Petitioner appeals from that Order of the district court.

STATEMENT OF PROCEEDINGS

1. Plea, Sentence, and Direct Appeal.

On June 6, 2003, in the Oklahoma County District Court, the State charged Ms. Haigh by Information with Permitting Sexual Abuse of a Child, a violation of OKLA. STAT. tit. 21, § 843.5. Ms. Haigh was represented in these proceedings by James Rucker, an attorney with minimal trial experience.

On June 26, 2007, Ms. Haigh entered a blind plea of *nolo contendere* to the § 843.5 charge. HAIGH was sentenced on September 19, 2007. The district court sentenced her to 19 years imprisonment. After sentencing HAIGH instructed her trial counsel to file a Motion To Withdraw her plea of no contest. Her trial counsel failed to follow her instructions. HAIGH then hired Howard Owens who filed an Application for An Appeal Out of Time. This Court granted her the right to file a Motion To Withdraw the guilty plea out of time. A hearing was held. The district court denied the Application. HAIGH then filed a direct appeal. This Court rejected it.

2. Application for Post-Conviction Relief.

On June 26, 2007, HAIGH filed an Application for Post-Conviction Relief. In this Application, HAIGH argued that she did not voluntarily enter her no contest plea because her trial counsel did not fully inform her of all the possible defenses and consequences of her plea. HAIGH argued that her trial counsel was ineffective due to the lack of disclosure. In addition, HAIGH argued that her appellate counsel was ineffective because she failed to fully investigate all of the circumstances surrounding the plea and relied only on the record.

3. Ms. Haigh's Amended Application for Post-Conviction Relief.

On January 19, 2012, HAIGH filed an Application for Leave to File an Amended Application for Post-Conviction Relief. On January 23, 2012, counsel for the State of Oklahoma filed an Application to Strike HAIGH's Amended Application. Counsel noted that HAIGH's Amended Application and Memorandum of Argument and Authorities totaled twenty-seven pages. Despite the fact that the Post-Conviction Relief Act contains no page limitations. The district court incorrectly applied the local rules.

4. The District Court's Denial of Application for Post-Conviction Relief February 10, 2012.

On February 10, 2012, after hearing arguments from counsel, the district court issued an Order Denying Application for Post-Conviction Relief. After summarizing the procedural history, the court ruled that HAIGH's claims that she received ineffective assistance of counsel at the plea and sentencing proceedings "were or could have been raised on direct appeal." *See* Order filed February 10, 2012 at 6. According to the District Court, those claims were barred from consideration in her post-conviction application by the *doctrines of res judicata* and *waiver*. The district court specifically rejected HAIGH's arguments that the proper adjudication of her ineffective assistance of counsel claims required consideration of evidence that was not included in the record on direct appeal and that, as a result, those claims were not barred. Citing Rule 3.11(B)(3)(b), the district court stated that "[t]he Rules of the Court of Criminal Appeals expressly provide a means by which the record on appeal may be supplemented with matters outside the trial record to support a claim of ineffective assistance of trial counsel." *Id.* at 7-8.

The district court did acknowledge that HAIGH's claim for ineffective assistance of appellate counsel was properly before it. However, the court concluded , "Ms. Haigh has failed to meet her burden of demonstrating objectively unreasonable performance and resulting prejudice . . . . " *Id.* at 6.

5. Haigh's Appeal of the District Court denial in PC-2012-225.

Appellant timely filed an appeal from the district court's denial in *Haigh v. State of Oklahoma*, No. PC-2012-225 in the Oklahoma Court of Criminal Appeals. HAIGH argued that the district court had incorrectly ruled that she was barred from presenting her allegations of ineffective assistance of counsel. HAIGH also argued that the district court's vague explanation of this denial

of her ineffective assistance of counsel argument was in error. Finally, HAIGH argued that the district court erred when it refused to allow her to amend her Application.

6. Court of Criminal Appeals Decision of March 13, 2013.

On March 13, 2013, the Oklahoma Court of Criminal Appeals issued an Order in PC-2012-225 vacating the district court's denial of post-conviction relief and remanded the case for further proceeding. This Court found that the district court had entered an "incomplete order" in denying Petitioner's application for post-conviction relief.

This Court did not rule on the issue of whether Petitioner was precluded from pursuing her ineffective assistance of trial counsel arguments. In addition, the Court did not address HAIGH's argument when the district court erred by refusing her leave to amend her application.

7. District Court's Order on Remand On April 15, 2013 Denying Appellant's Application for Post-Conviction Relief.

Without conducting a hearing or even inviting any sort of response, the district court denied Petitioner's application. The nineteen page order was entered without hearing and without notice to Petitioner. The April 15, 2013 Order appears to have been drafted by the district attorney and presented to the district court without notice to Petitioner.

In *Haigh v. State,* PC-201-225, this Court's remanded the case for "further proceedings." Petitioner sought an evidentiary hearing. The district court did not provide any notice, hearing, or opportunity to be heard on any issue, including the question of whether an evidentiary hearing is necessary. Petitioner does not believe that the April 15, 3013 Order entered without notice or hearing, constitutes the "proceedings" that this Court ordered.

The pertinent sections of this Order include:

1. The district court found no need for an evidentiary hearing because there are adequate grounds to address all the issues regarding ineffective assistance of appellate's counsel.

2. The district court applied *Strickland v. Washington*, 468 US 668 (1984). According to the district court, prejudice can only be shown if the direct appeal would have been decided differently.

3. The guilty plea form proves that Applicant had discussed the charges with her attorney.

4. In order to satisfy the test for determining prejudice in the context of a guilty plea, an applicant must demonstrate that he or she would not have entered a plea of guilty. The district court used this rule to reject Applicant's Proposition 2-6.

5. The district court found that Petitioner was advised that she was pleading guilty to an 85% crime.

6. The district court ruled that Appellate counsel's failure to investigate was not ineffective because no alleged deficiencies would have made any difference.

7. The district court ruled that Petitioner entered a voluntary plea.

8. The district court ruled that all the allegations were mere tactical decisions.

9. The district court ruled that the various suggested motions in limine would not have been successful.

10. The district court found that HAIGH's trial counsel filed several motions.

11. There is no error in failing to raise a constitutional argument.

12. The district court found that Judge Black considered only relevant factors.

STATEMENT OF FACTS

The prosecution began with a report from Ms. Haigh herself as the complaining witness. In April 2003, Ms. Haigh called the police and told them that she had discovered a videotape of her fourteen year old daughter having sexual intercourse with her current husband, Kevin Haigh. Ms. Haigh's call led to the immediate arrest and prosecution of Kevin Haigh.

During the victim's initial interviews with the police in 2003, the victim stated that Kevin Haigh had engaged in sexual activity with her on two or three occasions. The victim stated that her mother, Ms. Haigh, was did not know Kevin Haigh was molesting her.

The victim had previously accused Mr. Haigh of sexual abuse. In the April 2003 interviews, she told the police that a year before, in March 2002, she was angry at Mr. Haigh and made up some allegations against him, telling the police that he had raped her. As a result, charges were filed against Mr. Haigh. However, the victim told the police, she later went to court and testified that she lied. Accordingly, the prosecution dismissed the earlier charges against Mr. Haigh.

The terms of the dismissal of the previous charges against Kevin Haigh became an important issue in Ms. Haigh's case. At Ms. Haigh's sentencing hearing, Connie Smotherman—a former Oklahoma County Assistant District Attorney who was the prosecutor in the first case against Mr. Haigh—stated that after making the initial allegations, the victim recanted and stated that the allegations were not true. In addition, Ms. Haigh told Ms. Smotherman that since the time she reported the abuse, Ms. Haigh had come to believe that no abuse had occurred. *See* Sentencing Hrg.

Tr. at 7-8. Ms. Smotherman stated that she disagreed with Ms. Haigh and believed that abuse had occurred. However, Ms. Smotherman elected to not prosecute the 2002 case against Mr. Haigh.

Then, Ms. Smotherman told Ms. Haigh that, as a prosecutor, she intended to impose a kind of strict liability upon her:

> I told her at that time that if she put that child back in that house and he molested that child again that we would file permitting child abuse charges against her . . . . She told me that she understood.

Id. at 9.

After the charges were dismissed against Kevin Haigh in August 2002, the victim lived with her grandparents. Ms. Haigh was separated from Kevin Haigh. Subsequently, Ms. Haigh began living with Kevin Haigh again. The victim wanted to live with her mother. The victim protested until she was allowed to move back in with her mother and Kevin Haigh. Shortly after the victim moved back in with her mother, Ms. Haigh found a tape of Kevin Haigh having sex with someone. The victim informed her mother that the person on the tape was the victim. Ms. Haigh again immediately called the police. Kevin Haigh was arrested the same day.

The State carried out Ms. Smotherman's threatened prosecution. Notwithstanding that Ms. Haigh immediately reported Kevin Haigh after her daughter informed her that videotape showed Kevin Haigh engaging in sexual relations with the victim, the State charged her with violating OKLA. STAT. tit. 21, § 843.5, which authorizes a sentence up to life imprisonment for any person "who shall willfully or maliciously engage in enabling child sexual abuse." Notably, the State chose not to charge Ms. Haigh with a lesser-included offense and more appropriate offense—that she

"[k]nowingly permit[ed] physical or sexual abuse of a child." OKLA. STAT. tit. 21, § 852.1. The maximum sentence for a violation of § 852.1 is four years' imprisonment.

Despite the seriousness of these allegations, Ms. Haigh's attorney (James Rucker) did little to defend her against them them. As Ms. Haigh explained in her affidavit, "[b]ased on my conversations with Mr. Rucker, I was convinced that my situation was hopeless." *See* HAIGH Affidavit, ¶ 5 (Application for Post-Conviction Relief, Ex. B). Ms. Haigh was convinced that she would be convicted and there was a real possibility that she would receive a life sentence. In her words, Mr. Rucker "never presented me with any indication that the State's case was vulnerable to any sort of attack or that I could present a reasonable defense." *Id.*

In particular, Mr. Rucker never explained to Ms. Haigh that she could defend the allegations on the grounds that she lacked the *mens rea* required by § 843.5—the willful and malicious enabling of child abuse. That defense was highly relevant in light of the lesser-included offense set forth in OKLA. STAT. tit. 21, § 852.1 that required the State to prove that a defendant "knowingly" permitted child abuse." *Cf. United States v. Obiechie*, 38 F.3d 309, 315 (7th Cir. 1994) ("'[W]illfully'" must mean something more than "knowingly," as the government has conceded."). Here, there was scant evidence that HAIGH knew of any sexual abuse until she discovered the videotape and contacted the police. Nevertheless, in HAIGH's words, Mr. Rucker never explained to her "that the charge could be defended against if [she] did not know of the sexual abuse until she discovered the tape." *See* Haigh Affidavit, at ¶ 4h. Nor did he explain to her that the statute concerning the willful and malicious permitting of child abuse was subject to constitutional challenge on the grounds that it did

not provide guidance as to the conduct that it prohibited. *Id.* Finally, Rucker never explained that there was a lesser included offense to the charge.

In addition, Mr. Rucker never explained to Ms. Haigh that she could raise significant challenges to the admissibility of a substantial amount of the evidence that the State would have offered if the case had gone to trial, in particular (1) the testimony of former Assistant District Attorney Connie Smotherman; (2) the visitation logs from the Oklahoma County Jail indicating that she had visited Mr. Haigh there; and (3) the videotape of Mr. Haigh engaging in sexual intercourse with Mr. Haigh's daughter. *See id* at ¶ 4a, 4b, 4i.

Further, Mr. Rucker did not explain several significant effects of a plea of guilty or nolo contendere to the willful and malicious enabling of child abuse under § 843.5B. He did not explain the meaning of the 85% rule—that she would serve 85% of her sentence prior to becoming eligible for parole on earned credits. He also did not tell her that, upon her release, she would be required to register as a sex offender for life. Finally, he did not disclose his lack of trial experience. *See* HAIGH Affidavit, at ¶ 11.

Ms. Haigh further explained that Mr. Rucker's failure to provide this information influenced her decision to plead *nolo contendere*. In her words:

> If the videotape and visitation logs had been excluded, the perception of the jury would, in my opinion, been changed. If these items could have been excluded[,] much of the basis for Mr. Rucker's dire opinions would have been eliminated. If the tape had been excluded, I would not have been as concerned about dragging my daughter though this.
>
> . . . If I had been informed of [the possibility of moving to exclude the visitation logs from the Oklahoma County Jail] I would have insisted that this item be presented prior to pleading non contest . . . .

> . . . If I had been informed of the possibility of the "time line" defense [i.e. that the charge could be defended against if she did not know about the sexual abuse until she discovered the videotape] I would have insisted on going to trial. I am innocent of the charges. I did not know that my husband raped my daughter until I saw the tape.
>
> . . . If I had been informed of the meaning and explanation of the 85% rule, I would not have entered a plea of no contest to the charges . . .
>
> . . . If I had been informed of the consequence of being forced to register as a sex offender, I would have entered a plea of not guilty. I am not guilty of these charges and would not have agreed to accepting these consequences voluntarily. I would not have been willing to abandon my principles and register for life.
>
> . . . If I had been informed of the argument [that the testimony of Assistant District Attorney Connie Smotherman could be excluded] I would have insisted that this argument [be] advance[d] prior to my pleading no contest.

Id. at ¶ 7.

Following her *nolo contendere* plea, HAIGH's counsel continued to provide deficient representation to her. Mr. Rucker failed to follow her instructions to file a timely motion to withdraw the plea. Howard Owens was hired and did file a motion to withdraw her plea. However, Mr. Owens did not discuss the merits of the issues with her and he did not present her testimony at the hearing. *See id.* at ¶ 9.

On direct appeal, Ms. Haigh was represented by counsel from the Oklahoma Indigent Defense System. However, appellate counsel never discussed the merits of the appellate issues with her. Nor did Appellate counsel send HAIGH a draft of the appellate brief before filing

Summary of Argument

Petitioner involuntarily entered a plea of no contest due to her trial counsel's failing to completely inform her of all the facts and circumstances surrounding her case. HAIGH's appellate

counsel turned trial counsel's failure into a disaster by failing to fully investigate h trial counsel's inadequate performance.

HAIGH has maintained her innocence from the start. She continues to assert her innocence. HAIGH should be allowed to test her innocence by being allowed to withdraw her guilty plea and proceed to trial.

ARGUMENT & AUTHORITY

PROPOSITION I. THE RECORD ON FILE UNEQUIVOCALLY ESTABLISHES THAT HAIGH RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

A. The Record Contains Sufficient Evidence to Establish That Haigh's Appellate Counsel Did Not Fully Investigate the Facts Surrounding the Entry of a Guilty Plea.

The record contains Appellant's affidavit in which she swears that her appellate counsel did not fully interview her as to the circumstances involved in the underlying case. In preparing her direct appeal, counsel relied upon the record only and did not take the time to fully discuss with Petitioner all factors involved in making the decision to give up her trial rights. This evidence is undisputed.

Despite having several opportunities to gather and produce evidence that HAIGH's appellate counsel did fully investigate the circumstances surrounding the plea, the State did not do so. The State could have sought a counter-affidavit from HAIGH's appellate counsel. Perhaps they did contact counsel and counsel confirmed that she did not fully investigate the guilty plea. The State presented no counter evidence despite having sufficient opportunity to do so. As such, the only

evidence in the record demonstrates that appellate counsel did not fully discuss the surroundings of the guilty plea.

In its Order, the district court did not find that appellate counsel had sufficiently consulted with Petitioner. The court merely concluded that no prejudice was shown. The issues of prejudice will be discussed below. At this point, the critical fact is established. Appellate's counsel did not fully consult with HAIGH.

B. As a General Rule, When Evaluating a Guilty Plea, Appellate Counsel Should Fully Consult With Defendant.

Appeals from guilty pleas involve different issues than an appeal from a full-blown trial. The major difference is that appeals from full trials center on admission of evidence, prosecutorial misconduct, jury instructions, and other similar issues The issue in an appeal from a guilty plea is limited to whether the plea was voluntarily entered.

The difference in the issues involved results in different tasks placed on appellate counsel. In evaluating a trial, the majority of issues can be resolved by merely referring to the written record. A reliance on the record is not possible in a guilty plea context.

So much of the voluntariness of a plea depends upon what trial counsel communicated to the defendant. The written record does not contain what was said and discussed outside of the courtroom. It does not disclose what trial counsel told the client that influenced the decision to go to trial or to enter a plea. For instance, determination of whether this plea was voluntary is almost totally dependant on conversations that were not recorded.

C. It Appellate Counsel Had Fully Interviewed Petitioner and Investigated The Circumstances of the case, Haigh Would Have Discovered More Than Ample Support To Describe The Plea As Involuntary.

1. Theory. A criminal defendant can plead guilty only when her or she is fully aware of the nature of the charges and the consequences of the plea. The United States Supreme Court said that this full understanding was a due process requirement. *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 231 L. Ed. 2d 274 (1969).

The Oklahoma Court of Criminal Appeals has recognized the need for a defendant to be fully advised of material facts related to the crime and plea. *Lewis v. State*, 2009 OK CIV 30, 220 P.2d 1140. *Lewis* specifically recognizes that the range of punishment including the way the sentence is calculated is a material factor.

2. Specifics. Petitioner entered her no contest plea on the basis of the advice provided by her counsel. The American Criminal Justice System assumes and encourages defendants to rely on the thoughts and suggestions of counsel. Petitioner's Affidavit demonstrates that she maintained her innocence throughout the pre-trial period. The Affidavit also establishes that she continues to maintain her innocence to this day. The sincerity of this assertion of innocence is demonstrated by the fact that she basically caused the initiation of the case against her turning in the only real proof of any abuse. Human nature tells us that a person who thought she was guilty would not have functionally turned herself into the police. This consistent claim of innocence infers that HAIGH's counsel significantly influenced her. His influence resulted from counsels failure to provide adequate and full disclosure of all possible defenses and consequences.

Petitioner had planned to defend against the charges until the very last moment. The sudden change in HAIGH's plans had to be caused by something. The "something" was the communications between Petitioner and her counsel. No other explanation is even remotely possible. This explanation is supported by the lack of preparation done by trial counsel. While it is true that Rucker filed several motions, it is also true that the motions filed were nonsensical and appear to be a "canned set "of generic motions. The Affidavit of David Pierce establishes that there were a number of relevant, case specific motions available that were based on sound reasoning that trial counsel neglected to file.

The Affidavit submitted with the Application demonstrate that her trial counsel begin his pattern of misleading Petitioner from the very start of their relationship. HAIGH swore that her trial counsel led her to believe that he had significant trial experience. The Affidavit of David Pierce demonstrates that Petitioner's trial counsel had conducted very few serious trials. The use of the generic motions rather than specific targeted motions raise an inference that HAIGH's counsel wanted her to enter a plea so that his lack of familiarity with the case would not be disclosed. In fact trial counsel failed to follow her instructions to attempt to withdraw her guilty plea.

The misinformation provided by counsel played a significant role in Petitioner's decision to give up her trial rights. HAIGH's Affidavit indicates that her trial counsel painted a very bleak picture of her chances. Believing her attorney's statement that her chances were hopeless, or at least believing that her attorney did not think he could defend her, she sacrificed her right to a trial. This sacrifice was made despite the fact that she consistently maintained her interest. This sacrifice was

essentially made under duress as her counsel had stacked the deck in favor of giving up her trial rights.

It is important that the Court understands the exact nature of Petitioner's Application. Petitioner wishes to withdraw her plea of no contest. In order to justify a withdrawal she must demonstrate that her plea was not entered voluntarily.

HAIGH's plea was involuntarily entered because she was not fully informed of her chances of success at trial and the consequences of a conviction. The Court must determine if HAIGH's counsel failed in disclosing all relevant factors and consequences to her. In fact HAIGH's counsel actively encouraged her decision to give up her rights. Without full information, Petitioner could not rationally and completely assess the risks of proceeding to trial.

Several specific examples support HAIGH's contention. Initially, Petitioner claims that counsel did not fully advise her of all the elements of the charged offense. The district court rejected this argument by saying that HAIGH's only support consisted of a self-serving affidavit. Applicant is a bit confused by this comment as all affidavits, by definition, are self-serving. Few affidavits are not self-serving. It is doubtful that a litigant would submit an affidavit that could be classified as "other side serving." The district court also referred to the guilty plea form in which HAIGH swore that her counsel had discussed the changes with her. Petitioner claims that her counsel did not discuss the elements of the crime with her counsel. The guilty plea form does not say "my counsel discussed the elements of the crime with me. He fully discussed the elements of the crime with me."

The guilty plea statement does not contradict the current affidavit. There is no doubt that counsel probably did indeed discuss certain things about the charges. The Affidavit tells us that

counsel discussed the case with HAIGH and left her with the feeling that her situation was hopeless. It is, however, undisputed that HAIGH's trial counsel did not discuss the elements of the crime with her. This omission was critical given her unwavering assertion of innocence.

Counsel's failure to discuss the elements of the crime effectively withhold from her the information that there was a lesser included offense with significantly lower penalties available. The charged crime required the State to prove that she willfully and maliciously enabled child sexual abuse. There is however a statute which prohibits knowingly permitting child sexual abuse. The former is considered much more significant as it carries a potential life sentence while the latter maxes out at 5 years.

HAIGH's Affidavit establishes just how critical this misinformation was to her decision making process. The misinformation caused her to believe that a jury might find her guilty and sentence her life or even mete out a totally outrageous sentence of 1,000 years or so. If Haigh had known about that lesser included offense, she could have defended on the basis of "At the most I might have known of the danger but I did not wish this abuse on her."

The evidence that the Assistant District Attorney warned Haigh, if admissible at all, fits more into the lesser included offense charge. The warning, at best, might establish that HAIGH might have known of the risk. This evidence does not come close to suggesting that HAIGH acted willfully and maliciously. In her Affidavit, Haigh expressly said that she would have insisted on asserting her innocence if she had known that a jury could find her guilty of a crime that only carried four years.

The district court then moved to Petitioner's arguments two through six. All of these subpropositions involved certain pieces of evidence and the possibility of increasing her chances of success by attempting to exclude this evidence from the trial. Rather than considering the specifics, the district court lumped all the evidence arguments together and dismissed them by saying that she only offered "self-serving statements."

The district court did not offer any explanation as to "what else petitioner could have offered." There is no other proof available other than Petitioner's testimony that her counsel did not discuss these evidence questions with her. There would be "no written record" of "things not said" by her counsel. HAIGH had no idea of these possible evidentiary questions. HAIGH has no way of knowing that she needed to record all her conversations with her counsel under the district court's standard.

HAIGH submitted evidence demonstrating that she attempted to obtain support for her assertions. While preparing her Application, she tried to obtain evidence from trial attorney. However, Rucker refused to assist Petitioner or even to discuss these issues with her counsel. The only evidence on file demonstrates that her trial counsel did not discuss these possible arguments. The district court had no principled basis to reject HAIGH's arguments.

The impact of counsel's failure to fully explain the possible challenges to the State's evidence is easy to discover. The only purpose of the questioned evidence was to divert a jury's attention to a question of HAIGH's character rather than her guilt or innocence. For example, the only purpose of the admission of the jail logs showing that HAIGH visited the alleged rapist in jail was to argue that HAIGH was such a lousy mother that she was willing to visit her child's rapist in

jail. The general description of her as a lousy mother has no relation to any element of the charged crime. Likewise, the State intended to introduce evidence that HAIGH had sex with her ex-husband after his arrest. HAIGH wonders which element this evidence proves. The only purpose could be to inflame the jury. The State also wanted to show a tape of the stepfather raping the victim. HAIGH never intended to dispute this element. HAIGH would have rapidly stipulated to this fact that the rape occurred. This evidence would have been pointless.

Finally, the State intended to place Connie Smotherman on stand to testify that HAIGH had been warned that if the husband was accused again, she would be included as a defendant. There is no doubt that this was the only reason that HAIGH was prosecuted. There was no other evidence making any suggestion that HAIGH was guilty of willfully or maliciously permitting sexual abuse. This evidence was not admissible to prove the link the State desired. HAIGH had no obligation to act on the basis of a prediction by an unqualified source about a person who had not been convicted of a child sex abuse crime. Particularly, a person who had just had charges dismissed because there was no witness to support the accusations. A district attorney is not entitled to "pre-file" charges without investigating the specifics of the actual crime. A district attorney is not authorized to tell a wife that she cannot live with her husband.

HAIGH contends that her counsel should have advanced these arguments. HAIGH's Affidavit states that if she had known of these arguments she would not have entered a plea before trying them. There was no downside to advancing these arguments. HAIGH entered a blind plea. She did not risk anything by trying to even the odds by advancing all reasonable arguments.

Petitioner next claims that counsel did not discuss the impact of the 85% rule. Petitioner claims that her counsel never told her the full impact of the 85% rule. In its latest order, the district court noted that the Court of Criminal Appeals ruled on direct appeal that the record clearly indicates that Petitioner was advised that she was entering a plea to an 85% crime. There is no doubt that Petitioner was told that she was entering a plea to an 85% crime. Likewise, there is no doubt that the court did not explain to her the impact of an 85% crime, and how much time she would be expected to serve. Petitioner's Affidavit establishes that her counsel did not explain the importance of whether a crime is an 85% crime. The record is devoid of any explanation of the 85% rule.

It is important to note that the Oklahoma Court of Criminal Appeals recognized, after HAIGH's plea, that the mere description of a crime as an 85% crime is not enough to fully explain its impact. The Court now requires a much more detailed explanation (Uniform Guilty Plea Form 13.10). A defendant is not now allowed to pled guilty without acknowledging an understanding of the importance and the specific details of the 85% rule.

The district court then proceeded to ask "what more appellate counsel could have done to effectively present the 85% argument." This answer is found in the Application and Affidavit. If appellant counsel had interviewed HAIGH, she would have discovered that her counsel had not explained the impact of the 85% rule, that even after the court described the crime as an 85% crime, she did not know what that rule meant. The district court said that there was no proof indication that Petitioner misunderstood the 85% rule. HAIGH's Affidavit says that she did not fully understand the 85% rule.

Finally, HAIGH's Affidavit establishes that counsel did not explain that she would be subject to registration as a sex offender if she entered a plea of no contest. In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the United States Supreme Court held that a plea can be considered involuntary if the defendant is not aware of significant collateral consequences. Lifetime registration as a sex offender is certainly a significant collateral consequence. This Court recognizes the significance of sex offender registration as it has added a specific reference to the guilty plea form requires that a defendant be notified of the registration requirements.

D. Haigh Presented Ample Evidence to Conclude That She Would Not Have Entered a Plea of No Contest and Sacrificed Her Trial Rights If She Had Been Fully Informed.

HAIGH filed an Affidavit which claims that she would not have entered her plea of no contest if she had been fully informed as to possible defenses, elements and consequences. There is no evidence in the records that contradicts her statements. HAIGH's contention that she would not have entered a plea of no contest if she had been fully informed is not disputed on any principled basis .

The district court summarily rejected Petitioner's argument by saying that HAIGH needed more than a self-serving conclusory affidavit. Of course, it is important to note that the district court provided no notion of what else should have been provided.

HAIGH provided much more than just a self-serving statement. In her Affidavit, HAIGH stated that the reason her plea was the feeling of hopelessness of her situation. This feeling was generated by her counsel's failure to fully disclose and discuss all the arguments and legal issues. Essentially, her counsel gave her no change of avoiding a significant sentence.

HAIGH presented the Affidavit of David Pierce to discuss the importance of the various omissions/representations of Petitioner's trial counsel. Pierce is an experienced legal researcher who is qualified to discuss legal arguments and research that might be used by a criminal defendant.

Pierce's affidavit does not claim that the arguments and suggestions were "dead bang winners." but merely contends that these omissions, and misrepresentations of the trial attorney were serious enough to alter Petitioner's decision-making process. Pierce's Affidavit establishes that the State's case was not as invulnerable as Petitioner's trial counsel told her. HAIGH was mislead into believing that she had no chance of winning.

However, reality was different. Some of the evidence that most frightened HAIGH was subject to serious admissibility challenges. For instance, the relevance of whether HAIGH visited her husband in jail is non-existent. Whether she visited her husband does not make it any more or less likely than HAIGH was aware that her daughter was being raped.

HAIGH's contention is that her counsel did not present her a full assessment of her charges, the possible punishments and consequences. As such, her plea was not voluntary. The point of Pierce's Affidavit is that Petitioner's contention that if she had been made aware of all these misstatements by her counsel, she would not have entered a plea of no contest is very plausible. This Affidavit establishes that it would have been a rational choice to insist on going to trial.

A criminal defendant has a right to try his or her innocense in front of a jury. If a defendant wishes to risk conviction that is that defendant's choice. The American system rests on the assumption that a defendant should be allowed to make a fully informed decision. HAIGH was not fully informed in this case. HAIGH's choice to enter a plea was not voluntary.

PROPOSITION II. APPELLATE COUNSEL'S PERFORMANCE IS NOT ENTITLED TO ANY DEFERENCE.

In its Order on Remand, the district court took great pains to say that a court is obligated to give deference to the counsel's decision. This position is not applicable to this case.

Appellate counsel did not fully investigate the case. Counsel did not sufficiently interview the client. Counsel did not make any effort to go outside the record to discover what really happened. Appellate counsel made no effort to look beyond the sterile record. The fact of the matter in this case is that Petitioner was not fully informed as to all the consequences, defenses and strategies involved in the case.

Appellate counsel in this case is not entitled to any deference because she did not fulfill the most fundamental responsibility of an attorney handling the appeal of a guilty plea. The only issue in a guilty plea case is the voluntariness of a plea -- any reasonably competent attorney would know that the voluntariness issue revolves around the intent of the pleading defendant and what may have been communicated between the defendant and trial counsel.

Petitioner contends that in a guilty plea contexts it is an ineffective assistance of counsel per se if appellate counsel fails to fully investigate the circumstances of the plea and interview the client. There is no reasonable way to assume that the appellant's counsel's decision should be considered great strategy.

PROPOSITION III. THE DISTRICT COURT ERRED WHEN IT FAILED TO ALLOW DEFENDANT TO AMEND HER PETITION.

Petitioner attempted to amend her Application for Post-Conviction Relief. Prior to the decision being made. The State objected on the basis of Rule 37 of the Local Rules. Rule 37 does

use the term "application." However, there is a strong reason to reject the idea that Rule 37 governs applications for post convictions.

The rules of this Court dictates the use of a particular form for post-conviction applications. There is no page limit specified on the form. In fact it is highly doubtful that a page limit could be applied to the initiating document in a constitutional manner. Applicants must raise all issues in the first filing or be barred from later filings. If a State prisoner does not file all issues ,they cannot later file the omitted issues in federal court. A district court has no authority to limit a prisoner from fully arguing their case.

Even if a district court did have sufficient authority, in most cases it would be an abuse of discretion to deny leave to amend. In *Mahen v. Norvell*, 1958 OK 179, 328 P.2d 424, the court wrote " it was never intended that justice should or might be defeated by rejecting an amendment which shows on its face that justice would be served."

PROPOSITION IV: IN HAIGH, THIS COURT INCORRECTLY APPLIED A PROCEDURAL BAR TO HER INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ARGUMENT.

In its opinion in Haigh, this Court stated that the ineffective assistance of trial counsel argument was barred because the these arguments could have been raised on direct appeal. HAIGH disagrees. The ineffective assistance of trial counsel argument was all based on matters outside the record. The Tenth Circuit held in *English v. Acody*, 146 F.3d 1257 (1998) that Oklahoma can impose a procedural bar on ineffective assistance of trial counsel claims brought for the first time in a collateral attack only when the defendant had different trial and appellate counsel and the allegations can be resolved on the record.

HAIGH's allegations cannot be resolved on the record as most of the allegations center on what was said by HAIGH and her counsel. In addition, the supplementation allowed by Rule 3.11 does not apply to this case. Rule 3.11 supplementation is limited to how evidence is used or not used by trial counsel. There is no provision that allows a party to supplement the record with evidence related to the case discussions between client and attorney.

As such, Oklahoma does not have an adequate procedural bar to prevent consideration of HAIGH's ineffective assistance of trial counsel argument.

CONCLUSION

HAIGH is innocent of permitting child abuse. She has maintained her innocense throughout the proceeding involved in this case. Despite her innocence, she entered a plea of no contest because her trial counsel failed to fully inform her of the true strength of the State case, the potential defenses and all of the possible consequences of the plea.

Appellate counsel can sometimes rescue a defendant from a mistake made at trial. In this case, appellate counsel did not even bother to fully investigate the situation. Petitioner's appellate counsel did not even bother to find out what Petitioner was told.

The State would lose nothing by allowing Petitioner to withdraw her plea of no contest. If the system had operated effectively, a trial would have occurred. Petitioner merely seeks a resolution on the merits.

Respectfully submitted,

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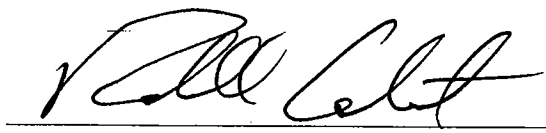
CERTIFICATE OF MAILING

This is to certify that on this 15th day of May, 2013, a true and correct copy of the above and foregoing instrument was:

(X) mailed via U.S. Mail, postage prepaid
(__) mailed via U.S. Mail, certified, return receipt requested, postage prepaid
(__) hand delivered
(__) transmitted via facsimile
(__) other _____

to wit: David Prater, District Attorney
320 Robert S. Kerr, Room 505
Oklahoma City, OK 73102
Attorney for State of Oklahoma

I further certify that a copy of the foregoing document was mailed for filing to the Office of the Court Clerk of the Oklahoma County, Oklahoma on the 15th day of May, 2013.



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