



ORIGINAL

FILED
SUPREME COURT
STATE OF OKLAHOMA

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

SEP 11 2024

TODD HIETT, Commissioner of the Oklahoma)
Corporation Commission,)
PETITIONER,)

JOHN D. HADDEN
CLERK

v.)
BOB ANTHONY, Commissioner of the Oklahoma)
Corporation Commission,)
RESPONDENT.)

Case No. 122,441

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**RESPONDENT'S OBJECTION AND RESPONSE TO PETITIONER'S APPLICATION
TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR WRIT OF
PROHIBITION**

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INTRODUCTION

Petitioner seeks a writ of prohibition, prohibiting Commissioner Anthony from "acting outside of his Constitutional authority as a Commissioner and from engaging in efforts to trample Commissioner Hiatt's rights."¹ Petitioner bases his Application and Brief largely on excerpts of comments drawn from rate cases which were adjudicated years ago, and in which the Commission acts in a legislative, non-judicial capacity, dating from 1986, as well as on comments excerpted from non-judicial Commission dockets that are similarly closed.

Petitioner further bases his request for extraordinary relief on a memo² which Respondent Commissioner Anthony sent to a law firm hired by the Commission. The hiring of the law firm, pursuant to 74 O.S. §20i, was approved by the Attorney General, to "conduct an independent investigation of Commissioner misconduct impacting Commission employees or others who do business with the Commission."³

Petitioner further bases his request for extraordinary relief on a Notice of Inquiry opened in Commission docket GD 2024-000003,⁴ which was opened to conduct an inquiry into the performance or nonperformance of duties and responsibilities at the Oklahoma Corporation Commission and to conduct an examination of past corruption and improper conduct involving the Oklahoma Corporation Commission, its staff and individual commissioners.⁵ No action has been taken against Commissioner Hiatt in that docket.

¹ Petitioner's Application, ¶20.

² The memo was publicly filed, but is not contained in Petitioner's Appendix. It is characterized as an attempt to "bully and intimidate" the independent investigation by the law firm. See Petitioner's Brief, page 9, middle paragraph.

³ The law firm's engagement letter is contained at Tab 10 in Petitioner's Appendix.

⁴ Contained at Tab 8 in Petitioner's Appendix, and Tab 5 in Respondent's Appendix.

⁵ The designation "GD" indicates General Docket. See OAC 165:5-5-1(a)(1). By definition, it includes notices of inquiry.

Respondent respectfully submits that there is no basis to issue a writ of prohibition, since Petitioner has failed to make a showing that the requirements for issuing such a writ have been met, and that the Petitioner's Application should be denied.

SUMMARY OF THE RECORD

Respondent does not agree with Petitioner's Summary of the Record, and therefore sets forth this Summary of the Record. Oklahoma Supreme Court Rule 1.11(e)(2).

A. Petitioner's Summary of the Record Includes Materials Which Are Not Relevant to the Issuance of a Writ of Prohibition

As shown below, one of the requirements for the issuance of a writ of prohibition is a demonstration that a court, officer, or person has or is about to exercise judicial or quasi-judicial power. **None** of the facts or materials presented by the Petitioner demonstrate any exercise or potential exercise of judicial or quasi-judicial power. The excerpted materials deal with the Commission's non-judicial ratemaking authority, which is legislative in nature. Except for the two General Dockets, in which Commissioner Anthony filed comments regarding potential consequences of Petitioner's behavior on rate cases and utility proceedings before the Commission, **none** of the excerpts from the cases or dockets or Attorney General opinions presented by Petitioner dealt with or related to the Petitioner, Commissioner Hiatt.

Rather, the Petitioner has presented a lengthy recitation of excerpts and comments from adjudicated rate cases and dockets which have been concluded, except for GD 2024-000003, as noted above.⁶

⁶ GD 2023-000005 was concluded on July 31, 2024 by Order No. 743122 issued on July 31, 2024, Order Closing Notice of Inquiry. This NOI dealt with an examination of alternative ratemaking methodologies regarding electric utilities. Petitioner has included a comment with a file stamp that was after that docket had been closed at Tab 9 of Petitioner's Appendix.

Respondent respectfully submits that all the facts and materials presented by the Petitioner in his Brief and in Petitioner's Appendix should be disregarded, since they do not relate to or demonstrate the exercise or potential exercise of judicial or quasi-judicial power by the Commission or by Commissioner Anthony.

B. Inaccuracies in Petitioner's Summary of the Record

Respondent will not undertake to burden this Court with a correction of all of the inaccuracies contained in Petitioner's Summary of the Record, since none of the facts and excerpted materials presented support a showing of exercise or potential exercise of judicial or quasi-judicial power.

However, Respondent is compelled to address the accusations of "personal vendetta," "bullying" and "pressuring" investigators, "tainting" the investigation, and "inciting the public," and otherwise impeding the investigation of the law firm which was hired to conduct an investigation.⁷

First, other than statements in Petitioner's Brief, Petitioner has offered no evidence in support of his characterizations and accusations. Second, the law firm engagement letter indicates that Mr. Don Bingham (OBA No. 794) and Mr. Melvin C. Hall (OBA No. 3728)⁸ are the attorneys designated to conduct an independent investigation. The Member Directory of the Oklahoma Bar Association indicates that Mr. Bingham was admitted in 1977, and Mr. Hall was admitted in 1982. On this basis alone, it is difficult to imagine how these two attorneys, with 47 years and 42 years of experience, respectively, would be "bullied" or "intimated" by Commissioner Anthony, or anyone else, in the performance of their investigation.

⁷ Petitioner's Brief, page 10.

⁸ Incorrectly noted as 3724 in the engagement letter.

Moreover, Mr. Hall refuted such accusations himself at a public meeting of the Commission on August 20, 2024, during which Mr. Hall was questioned extensively about how his law firm would conduct its investigation. The relevant exchange between Commissioner Anthony and Mr. Hall is as follows:

20 Okay. Do you consider that my August 14th
21 request for information that you received -- do you
22 think I was bullying you or your firm or
23 intimidating you or your firm? I filed it in the
24 case, and I emailed it to you gentlemen. Was I
25 intimidating you?

1 MR. HALL: No. I -- I have never had that
2 feeling. I've never felt --

3 COMMISSIONER ANTHONY: Well, good. These
4 are yes-or-no questions.

5 MR. HALL: So, I'm -- I'm fine. I'm good.

6 COMMISSIONER ANTHONY: I would answer for
7 you differently. To intimidate the -- the Riggs
8 Abney law firm, you know, I don't know who some of
9 your attorneys are. I don't think -- they don't
10 get intimidated too much.

11 All right. Let me try something else. Do you
12 consider public requests for information from me
13 about this investigation like the one that I filed
14 that we just referred to on August 14th to be
15 interference? Have I interfered with your
16 investigation because I had some ideas about some
17 of the features?

18 MR. HALL: No, I don't think so. I don't
19 think there's been any interference. And as I
20 would reiterate, the scope of the voluntary fact
21 finding, which I think is a more apt term to
22 describe this process, has not even started yet and
23 will be within the parameters that's specified in
24 the engagement letter.

25 And until our engagement has been changed or
1 modified or whatever, we're going to stick with
2 what we initially agreed to do and that only,
3 nothing else.

See Transcript of Commission Meeting En Banc on August 20, 2024, pages 37-39, included in Respondent's Appendix, Tab 1.

C. The Current Situation

Without going into detail, Commissioner Hiatt was involved in unfortunate inappropriate incidents stemming from his use of alcohol. These involved personnel associated with companies who have business before the Commission in rate cases and other utility proceedings. These incidents became public, as a result of which Commissioner Hiatt resigned as chairman of the Commission. Commissioner Hiatt has also publicly acknowledged his use of alcohol, and has stated that he is seeking treatment.

Currently, the Commission hired a law firm pursuant to 74 O.S. §20i (as indicated above) to conduct an investigation, the scope of which is specified in the law firm's engagement letter. As stated in the engagement letter, participation by individuals is entirely voluntary. The hiring of the law firm was approved by the Attorney General. See Letter dated August 20, 2024 from Kindanne C. Jones, Deputy Attorney General to Patricia Franz, Oklahoma Corporation Commission, included in Respondent's Appendix, Tab 2.

The hiring of the law firm was initiated by Brandy Wreath, the Agency Director of Administration and Appointing Authority of the Commission "under the OCC's personnel authority and duty," without a Commission vote. See email from Brandy Wreath dated August 14, 2024, Respondent's Appendix, Tab 3. See also transcript of Commission meeting dated August 13, 2024, Respondent's Appendix, Tab 4. Brandy Wreath described the hiring of a law firm to perform an investigation, the statement of work and the parameters of the investigation. In particular at page 4, lines 22-25, and page 5, lines 1-4, Brandy Wreath states as follows:

22 DIRECTOR WREATH: Commissioner, we're not
23 going to delay this investigation. This topic has come
24 up. The commissioners did not move to do an
25 investigation so I'm doing this under my authority as
1 the appointing authority with the duties you all

2 invested in me to do employee investigations.
3 If you want this additional investigation, you
4 can still post and do that. That would need to be
5 handled separate from an employee EEOC type
6 investigation.

At page 10, lines 2-14, the following exchange concerns communications with the investigator:

2 COMMISSIONER DAVID: And Commissioner
3 Anthony, perhaps you would feel better if you met with
4 the investigator to discuss your concerns?

5 COMMISSIONER ANTHONY: That would be
6 wonderful. I think the --

7 COMMISSIONER DAVID: Maybe that would --

8 COMMISSIONER ANTHONY: -- whole agency
9 has --

10 COMMISSIONER DAVID: -- be proper. I'm
11 sure the investigator would be fine with that.

12 DIRECTOR WREATH: Absolutely.

13 Commissioners would be an employee of the agency and
14 allowed to speak and a stakeholder.

There is also a Notice of Inquiry which was opened in GD 2024-000003.⁹ It was given a Commission docket number to accommodate public requests for open, non-confidential records.

Petitioner has indicated that he supports a fair and impartial investigation into the conduct of all Commissioners. See Petitioner's Brief at page 10, first sentence of first full paragraph.

ARGUMENT

As is very well known to this Court, the Oklahoma Supreme Court exercises its general superintending control over all inferior courts and all agencies, commissions and

⁹ Contained at Tab 5 in Respondent's Appendix.

boards created by law, including the Oklahoma Corporation Commission, under the Oklahoma Constitution, Article 7 Section 4, and Article 9 Section 20.¹⁰

Article 7 Section 4 provides in pertinent part as follows:

... The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior courts and all Agencies, Commissions and Boards created by law. The Supreme Court, Court of Criminal Appeals, in criminal matters and all other appellate courts shall have power to issue, hear and determine writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition and such other remedial writs as may be provided by law and may exercise such other and further jurisdiction as may be conferred by statute. ...

Article 9 Section 20 provides in pertinent part as follows:

No court of this State, except the Supreme Court, shall have jurisdiction to review, affirm, reverse, or remand any action of the Corporation Commission with respect to the rates, charges, services, practices, rules or regulations of public utilities, or of public service corporations, or to suspend or delay the execution or operation thereof, or to enjoin, reverse, or interfere with the Corporation Commission in the performance of its official duties; provided, however, that writs of mandamus or prohibition shall lie from the Supreme Court to the Corporation Commission in all cases where such writs respectively would lie to any inferior court or officer.

This Court has set forth the requirements for the issuance of a writ of prohibition on multiple occasions. In *Maree v. Neuwirth*, 2016 OK 62, 374 P.3d 750, this Court stated as follows at ¶6 with regard to issuance of writs of prohibition:

Before a writ of prohibition may issue, a petitioner must show: 1) a court, officer, or person has or is about to exercise judicial or quasi-judicial power; 2) the exercise of said power is unauthorized by law; and 3) the exercise of that power will result in injury for which there is no other adequate remedy. *Baby F. v. Oklahoma County Dist. Court*, 2015 OK 24, ¶8, 348 P.3d 1080; *James v. Rogers*, 1987 OK 20, ¶5, 734 P.2d 1298.

In *James v. Rogers*, this Court stated as follows at ¶5 (emphasis added):

If a petitioner fails to establish any of the three elements, the writ must be denied.

¹⁰ In what appears to be a typographical error, the Petitioner referred only to Art. 19, §20 at page 15 of Petitioner's Brief. That section does not exist.

Petitioner's Application fails to establish the three required elements, and the writ must be denied.

D. Petitioner Has Failed to Show Any Exercise or Potential Exercise of Judicial Power or Quasi-Judicial Power by the Commission or by Commissioner Anthony

As noted above, there are only two items pending at the Commission relevant to Commissioner Hiett's complaints. One is the hiring of a law firm pursuant to 74 O.S. §20i, which was approved by the Attorney General. The other is a Notice of Inquiry, GD 2024-000003. Nothing in these two matters constitutes the exercise of judicial power or quasi-judicial power.

As stated in the engagement letter, the law firm was hired "to conduct an independent investigation of Commissioner misconduct impacting Commission employees or others who do business with the Commission." As further stated in the engagement letter, participation of interviewees is voluntary, and confidentiality will be maintained:

The primary investigative tool will be interviews at locations to be agreed upon by the firm and the interviewee. All interviews will be strictly voluntary and will be arranged by [sic] anyone wishing to come forward and speak with the investigator(s) and the Firm. The Firm will maintain the confidentiality of those giving statements and will provide to the OCC an anonymized Report of Findings and Recommendations. If required, the Firm will prepare to defend the OCC in related civil litigation. Any information obtained during the course of the investigation that involves behavior of a criminal nature will be referred to the investigator assigned to this matter at the Office of the Attorney General.

The Notice of Inquiry in GD 2024-000003 is likewise an investigation. It is an inquiry into the performance or nonperformance of duties and responsibilities at the Oklahoma Corporation Commission and will conduct an examination of past corruption and improper conduct involving the Oklahoma Corporation Commission, its staff and individual

commissioners. The Commission's Rules of Practice do not limit who may file a Notice of Inquiry. The Commission's Rules provide as follows at OAC 165:5-1-3:

"Applicant" means any person commencing a proceeding requiring an application as the initiating document.

"Application" means any written request by an applicant commencing a proceeding for Commission action or relief.

As noted above, a GD (General Docket) designation includes a notice of inquiry, by definition.

Petitioner seems to suggest that despite the Commission's Rules, Commissioner Anthony has no authority to issue a fact-finding Notice of Inquiry relating to Commission functions. At page 3, first full paragraph of Petitioner's Brief, Petitioner seems to rely on a letter from then Attorney General Drew Edmondson, dated February 5, 2002, regarding AG Opinion AG 97-76, contained at Tab 3 of Petitioner's Appendix. Petitioner claims that the letter stated that "the Oklahoma Constitution does not vest a Commissioner with authority to make unilateral demands under Article 9, §28."

Contrary to what is claimed by the Petitioner, what is actually stated is that an individual Commissioner does indeed have the constitutional right to inspect the books and papers of any railroad company or other public service company and to examine their officers, agents or employees regarding the business affairs of those companies.

Nevertheless, Respondent respectfully submits that the February 5, 2002 letter has no applicability here.

The Notice of Inquiry does not contemplate any adjudication or enforcement actions unilaterally by Commissioner Anthony. Rather, as stated in the Notice, Commissioner Anthony will issue a written report to the Commission upon completion of his examination and may recommend new legislation (Okla. Const. Art. 9, Sec. 25) consistent with the written report.

Neither of these matters constitute or contemplate the exercise of judicial power or quasi-judicial power. Rather, they constitute the gathering of information. There is no adjudication or enforcement action contemplated in either matter.

This Court has previously dealt with the definition of judicial power in *Southwestern Bell Telephone Co. v. Oklahoma Corp. Comm.*, 1994 OK 38, 873 P.2d 1001. At ¶10, quoting Justice Holmes in *Prentis v. Atlantic Coast Line*, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150 (1908), the Court quoted the following definition in distinguishing between judicial functions and legislative rate-making functions:

"A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. ..."

It is clear that a judicial inquiry requires more than just an investigation of facts - and that a mere investigation of facts does not amount to a judicial inquiry, since there is no declaration or enforcement of liabilities.

This Court has previously dealt with a definition of quasi-judicial power in *Umholtz v. City of Tulsa*, 1977 OK 98, 565 P.2d 15, involving the suspension of police officers. At ¶9, this Court quoted a Kansas case¹¹ for the definition of quasi-judicial power:

"* * * quasi-judicial is a term applied to administrative boards or officers empowered to investigate facts, weigh evidence, draw conclusions as a basis for official actions, and exercise discretion of [a] judicial nature."

In that case, this Court found (at ¶10) that the police officers were not summarily suspended. Rather, the police officers were initially suspended, an investigation was conducted by the police department, and only after the investigation was the decision to suspend them made. This constituted the exercise of a quasi-judicial function and the exercise of quasi-judicial power.

¹¹ *Thompson v. Amis*, 208 Kan. 658, 493 P.2d 1259 (1972)

In stark contrast, in this case, the only function that is contemplated is the gathering of information. There is no weighing of evidence, drawing of conclusions as a basis for official actions, or exercise of discretion of a judicial nature contemplated against Commissioner Hiatt. Petitioner Hiatt has not provided any facts to the contrary.

Indeed, it is somewhat difficult to ascertain what conduct Petitioner seeks to prohibit. At pages 10 and 15 of Petitioner's Brief, Petitioner states that he seeks to prohibit Commissioner Anthony from taking any further part in the independent investigation,¹² from making any public comments or filings related to the investigation which are designed to "taint" the investigation, from attempting to perform his own investigation, and to prohibit any further efforts, whether public or private, to taint, derail, or impair the independent, fair and impartial investigation being performed by the Riggs Abney law firm as to all Commissioners.¹³ He further seeks to prohibit Commissioner Anthony from continuing to engage in the conduct detailed in his Brief (apparently whatever that conduct is).

One wonders what that conduct might be. In effect, Petitioner seeks to prohibit Commissioner Anthony from functioning as a Commissioner.¹⁴ The mere filing of public comments by a Commissioner in a Commission docket is not the exercise of judicial power. Merely asking questions in a memo is not the exercise of judicial power. Most of Petitioner's Brief consists of excerpts from prior adjudicated rate cases and closed docket cases in which the Commission was acting in its legislative, rate-making capacity. Mr. Hall, from the Riggs Abney firm, stated on the record that he was not intimidated by the memo sent to him by Commissioner Anthony. One is left to guess what unspecified "private conduct" Petitioner has in mind that should be prohibited, and whether such "private conduct" constitutes the exercise of judicial or quasi-judicial power.

¹² Commissioner Anthony has not "taken part in the independent investigation."

¹³ Petitioner used identical language in paragraph 19 of his Application.

¹⁴ This may also impinge on Commissioner Anthony's First Amendment rights.

Quite simply, Petitioner has failed to demonstrate any exercise or potential exercise of judicial power or quasi-judicial power. Having failed to prove this element, the writ must be denied.

E. Petitioner Has Failed to Show an Exercise of Judicial Power Unauthorized by Law

Petitioner is required to demonstrate the second requirement for issuance of a writ of prohibition, that there is an exercise of judicial power unauthorized by law. However, Petitioner has failed to demonstrate the first requirement - exercise of judicial power. It follows that there is no exercise of judicial power unauthorized by law.

It appears that Petitioner dislikes comments filed by Commissioner Anthony in the past. However, the mere filing of comments in dockets is not the exercise of judicial power, nor is it unauthorized by law.

In the absence of a showing of exercise of judicial power unauthorized by law, the writ must be denied.

F. Petitioner Has Failed to Demonstrate an Injury

The third requirement that Petitioner must demonstrate is that there is an injury which will result from the exercise of judicial power for which there is no other adequate remedy. Petitioner has not satisfied that requirement.

At page 15 of his Brief, Petitioner claims that future proceedings, if they occur, will be "tainted." Petitioner does not specify what those proceedings might be. Petitioner further cites *Rose v. Arnold*, 1938 OK 445, 82 P.2d 293, at ¶¶18-19, asserting that his office is a position, obtained by right of election, which rights are protected by all courts.

Petitioner then asserts that it is the duty of courts to protect a citizen in the enjoyment of every right which he acquires under statutory or constitutional authority.

The Petitioner's reliance on *Rose v. Arnold* is misplaced. The *Rose* case dealt with an order of a district court suspending members of the Board of Education of Oklahoma City.

No such situation is presented here. Furthermore, Commissioner Anthony acknowledges that neither he nor the Commission would have the authority to remove or suspend Commissioner Hiatt from office.

Furthermore, the *Rose* court noted, in the paragraphs referred to by Petitioner, that the rights of the public must be fully protected. Therefore, the Court fashioned a rule allowing a district court to suspend an accused official pending trial, after notice and a reasonable opportunity to be present and heard in opposition to an application to suspend. At ¶23, the Court held that the power to suspend exists by implication.

Again - no such situation is presented here. Commissioner Hiatt is not suspended, he is not in danger of being suspended or removed, nor is he on trial. The items currently pending at the Commission do not envision or request any such suspension or removal. Commissioner Hiatt can choose to participate in any fact-finding - or not.

The Petitioner has not identified any injury. The writ must be denied.

G. The Oklahoma Constitution Exhibits a Concern About Intoxication of Officials

There are three provisions in the Oklahoma Constitution which exhibit a concern about intoxication of officials. They are as follows (emphasis added):

Article 2, Section 11

Every person elected or appointed to any office or employment of trust or profit under the laws of the State, or under any ordinance of any municipality thereof, shall give personal attention to the duties of the office to which he is elected or appointed. **Drunkenness and the excessive use of intoxicating liquors while in office** shall constitute sufficient cause for impeachment or removal therefrom.

Article 7A, Section 1

(a) In addition to other methods and causes prescribed by the Constitution and laws, the judges of any court, exercising judicial power under the provisions of Article VII, or under any other provision, of the Constitution of Oklahoma, shall be subject to removal from office, or to compulsory retirement from

office, for causes herein specified, by proceedings in the Court on the Judiciary.

(b) Cause for removal from office shall be: Gross neglect of duty; corruption in office; **habitual drunkenness**; commission while in office of any offense involving moral turpitude; gross partiality in office; oppression in office; or other grounds as may be specified hereafter by the legislature.

(c) Cause for compulsory retirement from office, with or without compensation, shall be mental or physical disability preventing the proper performance of official duty, or incompetence to perform the duties of the office.

Article 8, Section 1

The Governor and other elective state officers, including the Justices of the Supreme Court, shall be liable and subject to impeachment for wilful neglect of duty, corruption in office, habitual **drunkenness**, incompetency, or any offense involving moral turpitude committed while in office. All elected state officers, including Justices of the Supreme Court and Judges of the Court of Criminal Appeals, shall be automatically suspended from office upon their being declared guilty of a felony by a court of competent jurisdiction and their pay and allowances, otherwise payable to such official, shall be withheld during the period of such suspension. In the event such verdict of guilty is reversed by a court of competent jurisdiction on appeal, such accumulated pay and allowances which have been withheld shall be paid to such official and he shall be automatically reinstated in office to serve the remaining part of the term for which he was elected. Such official shall not be entitled to any pay or allowances for a period of time after the term of office would otherwise have expired and he shall not be entitled to reinstatement in office after the expiration of the term for which he was elected. Whenever any Justice of the Supreme Court or Judge of the Court of Criminal Appeals is suspended by reasons of this section, the Governor shall be authorized to appoint a temporary Justice or Judge to serve during the period of such suspension and such temporary Justice or Judge shall be paid for his services the compensation allowed for such regular Justice or Judge.

Respondent is not suggesting impeachment. Respondent simply notes that the Oklahoma Constitution exhibits a concern about intoxication. In this case, there is a concern about any potential effect on utility cases and proceedings at the Commission.

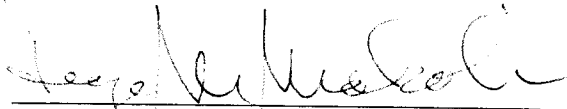
CONCLUSION

There are three elements required to be shown for the issuance of a writ of prohibition:

- 1) the exercise or potential exercise of judicial power
- 2) such exercise is unlawful
- 3) injury resulting from such exercise, for which there is no other adequate remedy.

All three elements must be shown to exist. Otherwise, the writ must be denied. The Petitioner failed to address these elements in his Application and his Brief. The Petitioner has failed to demonstrate that any of these elements exist. Respondent requests that this Court deny Petitioner's Application.

Respectfully submitted,



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CERTIFICATE OF MAILING TO PARTIES

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