No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

ROBERT DENNIS MARTIN – PETITIONER

vs.

THE STATE OF OKLAHOMA – RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

August7, 2018

Robert Dennis Martin, *pro se*
ODOC-758212-JCCC
216 N. Murray Street
Helena OK 73741-1017

QUESTION PRESENTED

(1) Can Oklahoma adopt a rule of law regarding the waiver of a fundamental constitutional right that does not meet the minimum criteria for such waivers set forth by this Court?

(2) Can a citizen be sentenced to a term of custody in a state penitentiary when the state fails to present evidence proving the crime beyond a reasonable doubt?

LIST OF PARTIES

[X] All parties appear in the caption on the cover page.

[ ] All parties do not appear in the caption on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of the petition is as follows: **Not Applicable**

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; 0r,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; 0r,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[XX] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

[ ] reported at _____; 0r,
[ ] has been designated for publication but is not yet reported; or,
[XX] is unpublished.

The opinion of the Court of Criminal Appeals for the State of Oklahoma in OCCA Case No. F-2017-426 appears at Appendix A to the petition and is

[ ] reported at _____; 0r,
[ ] has been designated for publication but is not yet reported; or,
[XX] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was: N/A

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: N/A, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under **28 U.S.C. § 1254(1)**.

[XX] For cases from **state courts**:

The date on which the highest state court decided my case was May 17, 2018, in Oklahoma Court of Criminal Appeals Case No. F-2017-426. A copy of that decision appears at Appendix A.

[ ] A timely petition for rehearing was thereafter denied on the following date: N/A _____, and a copy of the order denying rehearing appears at Appendix N/A _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including ____N/A____ (date) on _____ (date) in Application No. ____A_____.

The jurisdiction of this Court is invoked under **28 U.S.C. § 1257 (a)**.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

This case involves the Fourth Amendment, the Sixth Amendment and the Fourteenth Amendment of the United States Constitution.

PROCEDURAL HISTORY

Robert Dennis Martin ("Martin") was charged by Felony Information in Caddo County Oklahoma District Court **Case Number CF-2016-27** on January 25, 2016 (O.R. 1) The Information charged Martin with Count 1: Aggravated Trafficking in Methamphetamine in violation of **63 O.S.Supp. 2015 § 2-415(D)**. On August 9, 2016. Mr. Martin was charged by Second amended Information in this cause with Aggravated Trafficking in Methamphetamine After Former Conviction of Two or More Felonies (O.R. 21, 22) Mr. Martin was represented by a state public defender. Mr. Martin's Preliminary Hearing was held on September 15, 2016, before a State District Court Magistrate Judge.

At the end of the preliminary hearing, trial counsel made an oral motion to suppress the evidence, which was denied by the magistrate. (P.H. Tr. 48) Prior to trial, Mr. Martin filed a *pro se* Motion to Suppress, seeking to exclude the evidence obtained during the search of the vehicle. (O.R. 33-42) The Court held that the alleged prior convictions were transactional, and limited the State to proceed with a prosecution alleging only one prior conviction. (P.H. Tr. 50) Mr. Martin was bound over for trial as charged in the Second Amended Information after former conviction (O.R. 89-90; P.H. Tr. 50)

Mr. Martin's Jury Trial was held on February 21-23, 2017, before a State Associate District Court Judge. Preceding *voir dire*, the State informed the trial court that Mr. Martin had filed a *pro se* motion and that it was the State's understanding defense counsel wanted to adopt the motion. (Tr. Tr. I, 5) Trial counsel confirmed this statement (Tr. Tr. I, 4, 5) The parties discussed that a separate hearing would not be held; rather defense counsel would re-urge the motion before the evidence of the narcotics was introduced. (Tr. I, 6)

Accordingly, defense counsel re-urged the motion to suppress prior to the OSBI criminalist's testimony concerning the analysis of the narcotics. (Tr. Tr.. II, 77, 78) Just as the Magistrate denied the motion to suppress at preliminary hearing, (P.H. 48-49) the trial court denied the motion prior to jury selection and a second time prior to the state's forensic expert's testimony. Trial judge also allowed the OSBI criminalist's report to be admitted. (Tr. I, 9; Tr. II, 78)

The jury found Mr. Martin guilty of Aggravated Trafficking in Methamphetamine After Former Conviction of a Felony, and assessed punishment as Life imprisonment and a $500,000.00 Fine. (O.R. 116, 122; Tr. Tr. III, 24,41) Mr. Martin was sentenced on April 19, 2017. Trial Court did not deviate from the jury's assessment and sentenced Mr. Martin to Life Imprisonment[1] and a $500,000.00 Fine. (S. Tr. 7) The trial Court also assessed various court costs and frees. (S. Tr. 7-8)

[1] Martin is required to serve **38.5 actual calendar years** before being eligible for parole consideration. See **Okla.Stat. tit. 21 § 13.1.**

A direct appeal was taken of the trial verdict in Oklahoma Court of Criminal Appeals ("OCCA") **Case Number F-2017-426**. The OCCA entered a *Summary Opinion*, affirming the trial verdict on May 17, 2018. (**Appendix A**)

REASONS FOR GRANTING THE PETITION

I.) THIS COURT SHOULD EXCLUDE ALL EVIDENCE ACQUIRED THROUGH POLICE WILLFUL AND UNREASONABLE VIOLATION OF THE FOURTH AMENDMENT AND ITS PROGENY.

a.) The Traffic Stop

The Fourth Amendment protects the "right of the people to be secure in the persons, houses, papers and effects, against unreasonable searches and seizure." **U.S. Const. Amend. IV**; *see also,* ***Mapp v Ohio*, 367 U.S. 643, 655-56 (1961)** (incorporating the Fourth Amendments provisions against the states through the Fourteenth Amendment). The Oklahoma Constitution offers similar protections. **Okla. Const. Art 2, § 30**.

A traffic stop, however brief, constitutes a seizure within the meaning of the Fourth Amendment and is therefore only constitutional if it is 'reasonable'. ***Delaware v Prouse*, 440 U.S. 648, 653 (1979)** Because traffic stops are more analogous to an investigative detention that a custodial arrest, this Court has directed that they be analyzed under the principles set forth in ***Terry v Ohio*, 392 U.S. 1, 20 (1968)**

Terry directs a Court to analyze the reasonableness of a traffic stop by enquiring under a two-prong analysis. Such 'litmus' test asks:

1) Did the police have a valid reason for initiating the stop? and,

2) Did the stop extend beyond a reasonable period of time as to the scope and the purpose of the initial cause for the stop?

1.) The reason for initiating the stop.

On January 25, 2016, an Oklahoma Highway Patrol ("OHP") Trooper ("Trooper #1") on patrol came into contact with Martin. (Tr. Tr. II, 25, 57) The Trooper #1 testified that Martin was observed traveling over the fog line for approximately three (3) seconds, that he activated his lights and that Martin immediately pulled over. (Tr. Tr. II 25)

Trooper #1 testified that he asked Martin to accompany him to the OHP Cruiser where he ran a check on Martin's driver's license and engaged Martin in conversation. (Tr. Tr. II 28) While Martin was in the cruiser, Trooper #1 left him to go to the vehicle and ask the occupant for an insurance verification which was provided. When all documents were determined to be valid, Trooper #1 issued a warning for the traffic violation, returned Martin's identification and told him that he was free to go. (Tr. Tr. II 35)

For all intents and purposes, the investigative detention permitted under this Court's clearly established law had concluded. Martin should have been allowed to leave.

2.) The stop extended beyond a reasonable period of time as to the scope and the purpose of the initial cause for the stop.

When Martin exited the cruiser, Trooper #1 began to question him as he stood outside with the door open. Trooper #1 asked Martin if he could search the vehicle. Martin responded that he would prefer to get back on the road, (Tr. Tr. II,

35; State's Ex. 5) but commented that the Trooper could run his dog, then in the back seat of the cruiser, because he had nothing to hide. Trooper #1 continued to press the question as to whether or not he could have permission to search the vehicle and Martin replied "no".

At that time, a second OHP Trooper (Trooper #2) arrived on the scene, lights blazing. Martin was told by the Trooper #1 that he was not free to leave the scene and that a drug dog would be run around the vehicle. (Tr. Tr. II 35) The dog scanned the outside of the vehicle but did not alert before jumping through the open passenger window. (Tr. Tr. II 36)

The dog went to the back of the vehicle and 'showed interest', rather than alerted. (Tr. Tr. II 36) Trooper #1 then patted Martin down for weapons. Troopers #1 and #2 then pulled luggage and other items from the vehicle and searched the interior cabin. No controlled dangerous substances were found, only a package of zigzag rolling papers.

Trooper #1 testified that if he finds nothing after searching a vehicle, that he always then searches the spare tire. (Tr. Tr. II 37) Trooper #1 testified that he crawled underneath the vehicle and noticed fingerprints on the inner well of the spare tire, as well as hearing a thud sound when he hit the spare tire. (Tr. Tr. II 37, 38) To Trooper #1, this indicated that the tire had recently been dropped. (Tr. Tr. II 38) Trooper #1 dropped the spare tire and he and Trooper #2 cut open the tire and found a taped band of white crystal substance in the inner portion of the tire. (Tr.

Tr. II 38, 39) The item later tested positive for Schedule II, methamphetamine. (Tr. Tr. II 78)

2.) a). Petitioner did not consent to waiver of Fourth Amendment protection.

The most common exception to the warrant requirement is the consent of the individual to be searched. Law enforcement officials wanting to conduct an immediate search of a person, vehicle, or premises, typically request consent. For that reason, consent is either granted or denied with the contemporaneous request to search. The question whether a consent to search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all circumstances ***Schneckloth v Bustamente*, 412 U.S. 218, 227 (1973)**

Since the decision in ***Johnson v Zerbst***[2] was decided in 1938, much ink has been spilled regarding the issue that a valid 'consent', be it oral consent or by voluntary waiver, to a warrantless search constitutes a waiver of the Fourth Amendment protections. Thus, the consenting individual must understand what he is doing, the consent must be free from coercion, and the decision to consent must be knowingly and intelligently made. It is clear that a waiver of Fourth Amendment rights can only be made if the individual knows the rights he is relinquishing. *Arguendo*, a challenge to a warrantless search pursuant to a waiver of rights must be able to stand scrutiny, and the litmus test must clearly conclude that the individual did, in fact, know what rights he was waiving and that he was clearly and unambiguously informed of such conditions. ***See: Wren v U.S.*, 352 F.2d 617,**

[2] **304 U.S. 458 (1938)**

618 (10th Cir. 1965), ***cert. denied*, 384 U.S. 944 (1966)** (noting that a consenting individual must understand what he is doing, that the consent must be free from coercion and that the decision to consent must be knowingly and intelligently made. ***Id.*, 352 F.2d at 618)**

The issue presented in Ground One goes to the very heart of our system of criminal procedure. This Court has long held that an essential element of a waiver of a constitutional right is whether the individual knew he was relinquishing such rights. Without such knowledge, the individual could not be deemed to have made the meaningful, knowing and voluntary decision to forego his constitutional protections. Oklahoma has sought to establish a rule to the effect that inquiry into whether knowledge of the Constitutional right was present and being waived is irrelevant when an individual 'consents' to a warrantless search, as the OCCA determined had happened (**See: Appendix A at 2**) thereby relinquishing his Fourth Amendment right to resist the search. This 'rule' established by the OCCA is contrary to the fundamental constitutional criteria announced time and again by this Court to which all other courts must adhere. Accordingly, the search at issue here must be deemed to be unconstitutional, as Mr. Martin did not consent to the search of the vehicle and the length and duration of the stop exceeded the scope of what this Court has deemed to be 'reasonable' under relevant Fourth Amendment case law.

The question here is clear: can Oklahoma adopt a rule of law regarding the waiver of fundamental constitutional right that does not meet the minimum criteria for such waivers set forth by this Court?

II. TRIAL COURT ERRED BY ACCEPTING THE JURY VERDICT OF GUILT BECAUSE THE STATE FAILED TO PROVE THE CRIME OF AGGRAVATED TRAFFICKING BEYOND A REASONABLE DOUBT.

The elements for proving a conviction in Oklahoma for the offense of *Aggravated Trafficking in Illegal Drugs* (Methamphetamine) as enumerated under **Okla. Stat. tit. 63, 2015, § 2-415 (D)** are deceptively simple. As the trial Court instructed the Jury, the State is required to prove beyond a reasonable doubt that a defendant first: "Knowingly"; second "possessed"; third; "450 grams or more of a mixture or substance containing a detectable amount of cocaine". ***see also* OUJI-CR 6-13**. Based on the facts as presented at trial, the State failed in its Constitutional and statutory obligation to prove each element of a violation under **§ 2-415 (D).** Such error can be seen to be 'plain' on its face, as discussed below.

a.) This issue constitutes Plain Error

This Court has established that an error is plain if it "is clear at the time of the appeal." ***United States v Iverson*, 818 F.3d 1015, 1023 (CA 10) *cert. denied* ___ U.S. ___, 137 S.Ct. 217 (2016)**. It is enough that an error be 'plain' at the time of appellate consideration, ***Johnson v United States*, 520 U.S. 461, 468 (1997)**, especially where it can be shown that the 'error' affects a defendant's substantial due process rights such that the reliability of the trial verdict is in doubt. *see:* ***Barnard v State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764**

Even where it is determined that error occurred warranting relief, the 'harmless error' standard applies, as enunciated in ***Brecht v Abrahamson*, 507 U.S. 619, 623 (1993)**. (Requiring that relief can only be had where an Appellant `demonstrates that such error had a "substantial and injurious effect on determining the jury's verdict". *Id.*, **507 U.S. at 623).** Thus, it is incumbent upon a Court to weigh the merits of such plain error, *de novo*, even if such has not been preserved for appeal by timely objection of counsel at trial. ***see*: *Hunter v State*, 2009 OK CR 17, ¶ 9, 208 P.3d 931, 933.**[3]

b.) The State's expert did not articulate sufficient information to prove the crime beyond a reasonable doubt.

As it's "scientific expert", the State called a criminalist from the Oklahoma State Bureau of Investigation ("OSBI") Michella Carter ("Carter"). Carter testified she received a "taped band' for testing. (Tr. II 74-75, 78) Carter concluded the substance contained within was a Schedule II drug, methamphetamine, which weighed 7,575.5 grams, or 16.72 pounds. (Tr. II 78, 87) The testimony given by Carter was general in nature, and made only a *prima facie* showing as to the third element necessary to sustain a conviction for aggravated trafficking.

Trial Counsel's cross-examination of Carter was characterized by his failure to *voir dire* or otherwise effectively engage in any questioning regarding the basis

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[3] As this Court repeatedly observed, the "layman defendant "requires the guiding hand of counsel at every step in the proceedings against him." ***Kimmelman v Morrison*, 477 U.S. 365, 380, 106 S.Ct. 2571, 2586, n. 5 (1986) citing *Powell v Alabama*, 287 U.S. 45, 69 (1932)** This Court has further elaborated that even a single, serious error may support a claim of ineffective assistance of counsel. ***Kimmelman*, 477 U.S. at 383** Martin has articulated specific claims demonstrating numerous errors on the part of trial counsel, such that it is evident that Martin was deprived of his Sixth Amendment right to effective assistance of counsel at trial.

for the conclusions made, or the reliability and veracity of the testing mechanisms used to analyze the 'taped band' in determining that a Schedule II drug was present. Nor did Counsel require Carter to specify precisely 'what' was weighed to arrive at the figure "16.72 lbs", what type of scales were used or any other qualities of the method employed by the State's expert to come to this definitive conclusion.

Much ink has been spilled regarding the event describing how the alleged CDS was found, how it was packaged, and how it was concealed within a tire that a state Trooper opened with a cutting device on the side of the road.[4] Yet, the record is silent as to just **what**, in fact, was actually weighed to arrive at the "16.72 lb" total.[5]. Oddly, the record is void of any information as to what, beyond the 'taped band', was weighed in arriving at a total gross weight elevating this offense to its enhanced penalty status.

There is a very real likelihood, based on the evidence presented to the jury, that the 'total weight' Carter testified to included the gross weight of the packaging material or even parts of the tire itself. Neither trial Counsel nor the trial Court Judge examined the State's expert as to this point.

Failure to establish the veracity and reliability of the testing means and mechanism violates the principles articulated by this Court in ***Daubert v Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993)**, as expanded under ***Kumho Tire v***

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[4] The legality of the warrantless, suspicionless search of Martin by the OHP Trooper's was argued in *Appellant's Brief* at 6.

[5] Such weight can be seen as designed to 'shock' the Jury by the sheer amount and monetary value of the contraband allegedly seized.

Carmichael*, 526 U.S. 137 (1999).** In ***Daubert, this Court held that the ***Federal Rules of Evidence*** **Rule 702** imposes a special obligation upon a trial judge to ensure that any and all scientific testimony be not only relevant, but reliable. ***Id.*, 509 U.S. at 589.** As such, the trial Court Judge failed in his duty to address the obvious failure of the State in meeting its statutory burden.[6]

But judges, like other government officers, cannot always be trusted to safeguard the rights of the people. ***Crawford v Washington*, 541 U.S. 36, 68 (2004)** As such, ***Daubert's*** reliability standard enquiry, **509 U.S. at 592-94**, extends to a defendant at trial through examination of the State's expert as to the basis for the scientific conclusions. ***Kumho Tire*, 526 U.S. at 149-50** Trial counsel's ineffectiveness in failing to verify the actual weight of the Schedule II Methamphetamine, or to address the reliability of the scientific methods used by the State to establish the elements necessary to convict was prejudicial such that the outcome of the proceedings are now in question.

c.) Analysis

Martin has demonstrated: 1) that there is the existence of an error that has not been intentionally relinquished or abandoned; 2) that the error is plain, that is, it is clear and obvious; and, 3) that the error has affected Martin's substantial rights and was "prejudicial such that it affected the outcome of the proceedings". ***see Hogan v State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923** Relief is required where,

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6 The elements necessary to prove a violation of *Aggravated Trafficking in Illegal Drugs (Methamphetamine)* under **Okla.Stat. tit. 63 § 2-415 (D) (2015)** are that a defendant 1) Knowingly; 2) Possessed; 3) 450 grams or more of a mixture containing a detectable mount of methamphetamine. *see* **OUJI-CR 6-13**

as a has been shown in this case, it is apparent that such error seriously affected the fairness, integrity, or public reputation of judicial the proceedings. ***see Simpson v State*, 1994 OK CR 40, ¶ 30, 876 P.2d 690, 701**

The ineffectiveness of trial counsel in not challenging the state's failure to prove each element of the crime was clearly "substantial and injurious" in the effect on determining the jury's verdict". ***Douglas v Workman*, 560 F.3d 1160, 1171 (CA 10 2009); *Brecht*, 507 U.S. at 623**. Such error cannot now be seen to be "harmless" because "there is a reasonable possibility that the [lack of] evidence complained of might have contributed to the conviction." ***Harris v New York*, 401 U.S. 222, 229 n.2 (1971), Brennan, Douglas, Marshall & Black, *dissenting*,** (citing ***Fahy v Connecticut*, 375 U.S. 85, 86-87 (1963)**)

There is no denying the 'substantial and injurious effect" of trial Court in abandoning its Constitutional gate-keeping duties under ***Daubert/KumhoTire***. In light of trial counsel's gross ineffectiveness in failing to contest the State's 'scientific' evidence, and the prejudicial affect this had on the outcome of trial, this Honorable Court should now hold at least "grave doubt" about the effect of such error on the jury's verdict. ***Douglas v Workman*, 560 F.3d 1160, 1171 (CA 120 2009) (citing *O'Neal v McAninch*, 513 U.S. 432, 436 (1995).)**

The conviction of Martin and sentence to Life imprisonment for a crime that has not been proven was not, and is not, 'harmless beyond a reasonable doubt'. ***Chapman v California*, 386 U.S. 18, 24 (1967)**. This, in and of itself, constitutes error well understood and comprehended in existing law beyond any possibility for

fair-minded disagreement such that no fair-minded jurist can now conclude otherwise. ***see: Woods v Etherton,*** **___ U.S. ___, ___, 136 S.Ct. 1149, 1151 (2016) citing *White v Woodall,* ___ U.S. ___, ___, 134 S.Ct. 1697, 1702 (2014); *see also, Harrington v Richter,* 582 U.S. 86, 101, 102, 131 S.Ct. 770 (2011)**

d.) Conclusion.

The *Due Process Clause* requires the State to prove beyond a reasonable doubt all of the elements included in the definition of the offense in which the defendant is charged. ***Patterson v New York,* 432 U.S. 197, 210 (1977)** (quoting ***In re Winship* 397 U.S. 358, 364 (1970))** The ***Winship*** 'reasonable doubt' standard applies to both federal and state prosecutions. ***Sullivan v La,* 508 U.S. 275, 278 (1993)**

The *Due Process Clause* further protects the accused against conviction except by proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. ***Apprendi v New Jersey,* 120 S. Ct 2348, 2355, 530 U.S. 466, 483 (2000)** (emphasizing that any trial finding that subjects a defendant to an additional loss of liberty must be made beyond a reasonable doubt, ***Id.***). The Constitutional protections afforded under the *Due Process Clause* ". . . like those other constitutional provisions – [are] is binding and we may not disregard it at our convenience." ***Melendez-Diaz v Mass.*, 129 S.Ct. 2527, 2540 (2009)**

"Substantial and injurious effect" exists where a Petitioner demonstrates error such that a "Court holds at least "grave doubt" about the effect of such error on the jury's verdict", ***Douglas v Workman,* 560 F.3d at 1171 (citing *O'Neal v***

McAninch, **513 U.S. 432, 436 (1995))**, such that this, in and of itself, constitutes error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement such that no fair-minded jurist can now conclude otherwise.

CONCLUSION

For the reasons stated, respectfully requests this Court to reverse and remand his conviction.

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Robert F. Martin

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