19-7390

No._____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

MARSHALL HENRY ELLIS - PETITIONER

vs.

STATE OF OKLAHOMA - RESPONDENT(S)

ON PETITION FOR WRIT OF CERTIORARI TO

COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

PETITION FOR WRIT OF CERTIORARI

Marshall Henry Ellis #151865
LCC Unit 4D
P.O. Box 260
Lexington, OK 73051

QUESTION PRESENTED

1. Is a defendant serving Life for Murder I entitled to newly discovered exculpatory material when that material would make it more likely that the defendant would have been charged with a lesser offense.

   (a) Did the State Court's procedural bar violate the Fifth and Sixth Amendment to the Constitution of the United States?

2. Does a state waiver doctrine violate U. S. Constitutional due process rights when it precludes a defendant from arguing issues that are newly discovered?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page

RELATED CASES

Marshall Henry Ellis v. State, No. CRF-85-59, District Court of Woodward County, State of Oklahoma. Judgment entered November 1, 2018.

Marshall Henry Ellis v. State, No. PC-2018-1210, Oklahoma Court of Criminal Appeals. Judgment entered August 21, 2019.

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OTHER AUTHORITIES:

OSBI Evidence Collection Manual -- 2011, 1st Ed.

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals for the State of Oklahoma appears at Appendix -A- to the petition and its publication status is unknown.

The opinion of the District Court of Woodward Count appears at Appendix -B- to the petition and its publication status is unknown.

JURISDICTION

The date on which the Court of Criminal Appeals of the State of Oklahoma decided my case was August 21, 2019. A copy of that decision appears at Appendix -A-.

A extension of time to file the petition for a writ of certiorari was granted to and including January 21, 2020 on November 13, 2019 in Application No. 19-506.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS:

Fifth Amendment to the Constitution of the United States
No person shall be...deprived of life, liberty, or property, without due process of law...

Sixth Amendment to the Constitution of the United States
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have neen committed which district shall have been previously ascertained by law, and to be informed of the nature and case of the accusation; to be confronted with the witnesses against him; to have compusory process for obtaininig witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATUTORY PROVISIONS:

5 O.S. Ch. 1, App. 3-A
Rule 3.3 -- Candor toward the tribunal
Rule 3.4 (a), (b)-- Fairness to opposing party and counsel

Post-Conviction DNA Act 22 O.S. §1371, §1372

STATEMENT OF THE CASE

Petitioner, along with Marcia Gail Boston, was charged by Information in the District Court of Woodward County, Case Number CRF-85-59, on May 9, 1985, with the crimes in Count 1 of Murder in the First Degree (William "Bill" Ross Stewart), in violation of 21 O.S. §701.7; Count 2 of Shooting with Intent to Kill (Mark A. Chumley), in violation of 21 O.S. §652; Count 3 of Assault with Intent to Kill (Jim Dempewolf), in violation 21 O.S. §652; Count 4 of Unlawful Delivery of a Controlled Drug in violation of 63 O.S. 2-401 (B)(2) with an Amended Information adding Count 5 of Possession of a Sawed-Off Shotgun in violation of 21 O.S. §1289.18, all to have occurred on May 8, 1985.

Petitioner entered a plea of guilty on Counts 4 and 5 to Unlawful Delivery of a Controlled Drug and Possession of a Sawed-Off Shotgun. Petitioner was sentenced to two (2) years on each count to run concurrently.

The jury returned verdicts of guilty on Counts 1 and 2 Murder (21 O.S. §701.7) and Shooting with Intent to Kill (21 O.S. §652), recommending Life and Fifty (50) years, respectively. The jury acquitted on Count 3. Judgement and Sentence was on March 28, 1986, at Life on Count 1 and fifty (50) years on Count 2. The Court ordered the sentences to run concurrent with each other and consecutive to the sentences imposed on Counts 4 and 5.

Marcia Gale Boston plead to Information in Case Number CRF-86-57 charging in Count 1, Murder in the Second Degree and Count 2, Unlawful Delivery of CDS. Boston was sentenced to terms of thirty (30) years and five (5) years to run concurrently.

Petitioner appealed to the Oklahoma Court of Criminal Appeals (OCCA) which affirmed in an unpublished opinion, Case No. F-86-676.

Petition For Writ of Certiorari to the US.S.Ct. was filed. This Court granted certiorari and remanded to OCCA in Case No. 90-5375, Ellis v. Oklahoma, 498 U.S. 977, 111 S. Ct. 504, 118 L.Ed.2d 517 (1990). OCCA denied relief in Ellis v. State

1992 OK CR 35, 834 P.2d 985. Certiorari was denied by this Court, unpublished, Case No. 92-5902, Ellis v. Oklahoma.

Application For Post-Conviction relief was filed in Woodward County in April, 1997 Case no. CRF-85-59, which denied relief. OCCA denied relief in an unpublished opinion, Ellis v. State, Case No. PC-97-635. The Federal District Court denied relief in an unpublished decision, Ellis v. Hargett, Case No. 97-1274-R. The 10th Circuit denied relief in a published opinion, Ellis v. Hargett, 302-F.3d 1182 (10th Cir. 2002). This court denied relief in an unpublished certiorari, Case No. 02-8254.

Petitioner sought further review or relief through the filing of an Application For Writ of Assistance in January, 2017 (Marshall Henry Ellis v. Office of the Chief Medical Examiner), Case no. CV 2017-89, seeking the evidence log and tracking records involving forensic and autopsy of William R. Stewart. This was granted on January 20, 2017.

Petitioner filed his Application for Relief Under the Post-Conviction DNA Act, and/or Alternatively Second and Subsequent Post-Conviction, and/or Alternatively Enforcement of the Oklahoma Open Records Act, and/or Alternatively Enforcement of the Court's Original Order Sustaining Defendant Ellis' and Co-defendant Boston's Discovery Motions and Exculpatory Evidence Motions of 11-9-1985 and file-stamped 1-10-1986, along with his Memorandum Brief in Support.

Petitioner filed his Motion of Evidentiary Hearing on June 11, 2018. The State filed its Responses on June 26, 2018 and moved for Summary Disposition.

Petitioner filed his Reply and moved for Discovery and Evidentiary hearing on July 16, 2018. A "status hearing" was held on October 25, 2018.

Petitioner Ellis requested an Order for State's compliance, inventory of evidence and custodian of evidence on October 25, 2018.

The District Court held a hearing on October 25, 2018 and entered a Minute Order denying Petitioner's pleadings. Formal written Order Denying was filed on November 1, 2018.

Petitioner sought relief from OCCA and was denied in Ellis v. State, Case No. PC-2018-1210.

SUMMARY OF THE ISSUES

The Oklahoma Court of Criminal Appeals issued a ruling this Petitioner's arguments are **procedurally barred** from further review under *res judicata*; or could have been previously raised but were not and are **waived for further review**". Petitioner respectfully asserts the State of Oklahoma is estopped from asserting *res judicata* or laches where its failure to review will result in the prejudice to a defendant resulting in a fundamental miscarriage of justice caused by the wrongful withholding of key exculpatory evidence that is material to the Petitioner's actual innocence of the charge for which Petitioner was convicted.

The State has violated the Petitioner's Fifth and Sixth Amendments to the Constitution of the United States. I, the Petitioner, a *pro se* litigant and a layman of the law urge this Court to consider or adopt (in full or in part) all arguments made by Petitioner's pro se counsel in this his second Post Conviction proceedings. (See Appendix C.)

The State's claim to have complied fully to the Petitioner's pretrial discovery requests for production of exculpatory evidence is completely false. Petitioner was denied a fair and balanced trial, in part, due to the misrepresentation and withholding of a host of material evidence and fact(s) by the Prosecution's claim of key probative biological material evidence being "lost" and "...not any biological material available to be tested..." as well as perjured Prosecution witness testimony of Ms. Shawna Johnson.

Through Writ of Assistance, these "lost" materials were discovered to exist and remain in the possession of the Oklahoma State Bureau of Investigation. These materials and chain of evidence and other requested materials that should have been discovered by the Prosecution and made available to Petitioner prior to trial by jury are once again/still being denied to the Petitioner by the State's use of procedural bar. The State's use of *res judicata* doctrine in this legal proceeding also violates the Oklahoma's own Post-Conviction DNA Act.

REASONS FOR GRANTING THE PETITION

SPECIFIC QUESTIONS PRESENTED FOR THIS COURT

QUESTION ONE

1. Is a defendant serving Life for Murder I entitled to newly discovered exculpatory material when that material would make it more likely that the defendant would have been charged with a lesser offense.

(a) Did the State Court's procedural bar violate the Fifth and Sixth Amendment to the Constitution of the United States?

Standard of Review:

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963):

When evidence is withheld from a defendant and "there is a reasonable probability that, had that evidence been disclosed to the defense, the result of the trial would have been different..." reversal is required.

Kyles v. Whitley, 514 U.S. 419, 437:

"... The individual prosecutor has a duty to learn any favorable evidence known to the others acting on the government's behalf in the case, including the police.

U.S. v. Augers, 427 U.S. 103:

"A conviction obtained by knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."

State v. Munson, 1994 OK CR 77, 886 P.2d 999

Right of defendant to evidence favorable to defense upon request from prosecution is violated when prosecution suppresses evidence favorable to defendant and material to guilt or punishment.

Argument:

Withholding of Exculpatory Evidence of State's Cooperating Witness, Shawna Johnson.

(See Proposition #1, #6, #7 and #8, Appendix "C")

Under the threat of losing her children and with a plea deal in place State's witness, Ms. Shawna Johnson, under oath, gave rehearsed testimony at Petitioner's state trial that the undercover officers "announced their authority and purpose" immediately prior to the shooting. Michelle (Johnson) Brockman (the daughter of Ms. Shawna Johnson) gave her affidavit on May 1, 2018, relating that her mother had been seriously ill in her final days and passed away on April 28, 2007. Her mother knew that she was dying and confided to Michelle Brockman the truth of the events surrounding the shooting in Woodward on the evening of May 8, 1985.

Ms. Johnson made a declaration that the officers, in fact, **did not** make any announcement of authority and that there was no time for officers to announce authority and no announcement was ever made confirming Petitioner and the four defense witnesses' testimony as to the events.

State v. Munson, 1994 OK CR 77, 886 P.2d 999 (as in Ellis) alleged "the murder was committed to avoid lawful arrest or prosecution." Munson filed an application for post-conviction relief urging he should be granted a new trial because the State had failed to produce certain exculpatory evidence in violation of a court order and due process. Despite the district court's orders and the prosecutor's assurances that the State had complied with these orders, a significant amount of evidence, including police reports and photographs were not turned over to Munson. Some were not given until eight (8) years later. The district court concluded the State's suppression deprived Munson of his right to a fair trial. The OCCA concluded the State willfully, deliberately and improperly withheld evidence and affirmed the new trial, granting:

> In Brady v. Maryland, the United States Supreme Court held "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is

> material either to guilt of to punishment, irrespective of the good faith of bad faith of the prosecution." This well-known rule is violated when the prosecution suppresses evidence favorable to the accused and material to guilt or punishment. Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability sufficient to undermine confidence in the outcome."

Petitioner submits it does not matter whether it was the officers or the prosecutors who coached Ms. Johnson to commit perjury, as in United States v. Agurs, 427, U.S. 103:

> "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."

If the police did not identify themselves or if it was not known to Petitioner that they were police officers, the State's theory of the case and the aggravating circumstances are defeated and self-defense or a reasonable apprehension of a threat of harm to himself by others at the scene is further established.

District Attorney Drew Edmondson confirmed this in his statement in the trial court preceeding while urging Nurse Field's testimony below (Tr. 1438):

> "...whether or not William Ross Stewart announced his identity as a police officer...goes directly to the question of whether or not we are dealing with premeditated murder or perhaps a lessor included offense of manslaughter."

The absense of a "statement of authority or purpose" was confirmed by State's witness Ms. Shawna Johnson's dying declaration, through her daughter, Michelle (Johnson) Brockman. The Petitioner submits that **there is nothing** more material to this case. This is the heart of the State's theory of prosecution and its absence permeates the instructions and invalidates the conviction.

Furthermore, Ms. Johnson also admitted to have been in a relationship with one of the officers and while in state custody for her role in selling amphetamine to undercover agents earlier in the day he allowed her to shoot up methamphetamine at the Woodward Police Station. Petitioner submits the affidavit is admissible under 12 O.S. §2804. Hearsay Exception; Declarant Unavailable as a Witness, which includes "a statement which was at the time of its making contrary to the declarant's pecuniary or proprietary interest, or which tended to subject him to civil or criminal liability...and which a reasonable man in his position would not have made unless he believed it to be true." 12 O.S. 2001, §2804(B)(3). See Subsection 5, the "residual exception" to the hearsay rule, ... 12 O.S. 2001, §2804(B)(5). See also Summers v. State, 2010 OK CR 5, 231 P.3d 125.

Aside from the offense of distributing methamphetamine to a State's witness while in custody, the jury, the court, and Petitioner were entitled to know under the Discovery Order that any witnesses' ability was impaired for purposes of impeachment. The officers had a duty to report this to the prosecutor and the prosecutor had a duty to investigate this. There is no question the officers/agents were subject to reporting to the Prosecutors Drew Edmondson, Tom Gruber and Carl Hart. These actions must definitely fall under Discovery and Failure to Produce as a material violation. See Logan v. State, 2013 OK CR 2, 293 P.3d 969.

As Ms. Johnson was in lawful custody, the methamphetamine she had sold them earlier in the day would have been in the possession of the officers or booked into the Woodward Police Department or County Evidence Room, as well as any syringes. The officers would have had to have furnish not only the drugs but the means with which to use the drugs. The officers should have reported this and the State should have been aware of this criminal act and informed defense counsel. Had the Petitioner been aware of the acts they could have subpoenaed the jail records to see if there was any evidence checked out, missing or removed and by whom.

In Baker v. State, 2010 OK CR 19, 238 P.3d 10, the OCCA held the appellant was denied a fair trial and Due Process of law by the failure of the State to disclose

impeachment evidence, stating the failure to disclose was contrary to Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963):

> "Reversal is required because there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the trial would have been different. United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3382, 87 L.Ed.2d 481 (1985). Evidence of a witnesses bias, credibility and motivation for testifying is relevant. Warner v. State, 2006 OK CR 40, ¶ 30, 144 P.3d 838... Prior to trial, Appellant filed a very specific Motion for Discovery aimed at these purposes. The State attempted to keep relevant information from Appellant through the use of semantics or a play on words... This Court has repeatedly held that a criminal trial is not a game of hide and seek. Sadler v. State, 1993 OK CR 2, ¶ 17, 846 P.2d 377, 383. Gamesmanship in discovery will not be condoned, Id. The responsibility of a prosecutor as an officer of the court is to treat matters of this type with the seriousness that they deserve. An attorney representing the State is expected to fully comply with requests for discovery..."

Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 held, "...the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."

The materiality of the exculpatory/impeachment evidence cannot be understated and **was unavailable for the direct appeal or post-conviction proceedings until 2018.** At the very least is a factual issue justifying a new trial.

CONCLUSION OF QUESTION ONE

Question #1 goes to the heart of the Prosecution's case. The evidence withheld is a gross violation of Petitioner's due process rights, denying Petitioner the critical information that could have been used in the impeachment of key State's witnesses, and ultimately, **to prove actual innocence of the crime of which Petitioner was convicted**. Had the Prosecution fully complied with the Petitioner's sustained pre-trial discovery motion, the jury could/would have had the opportunity to deliberate fully informed as to the Petitioner's actions if Petitioner's counsel had known of the withheld evidence and had the opportunity to present it to the jury at trial.

Federal law requires that the Prosecution provide material exculpatory evidence to the defendant or defendant's counsel in any criminal proceeding. Violations of this basic right of the accused is reversible error. Cone v. Bell, 556 U.S. 449, 129 S.Ct. 1769, 173 L.Ed.2d 201 (2009) put to rest many of the Prosecution's bald contentions:

> "Although the State is obliged to "prosecute with earnestness and vigor," it is as much [its] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger, 295 U.S., at 88. Accordingly, we have held that when the State withholds from a criminal defendant evidence that is material to his guilt or punishment, it violates his right to due process of law in violation of the Fourteenth Amendment. See Brady, 373 U.S., at 87. In United State v. Bagley, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.), we explained that evidence is "material" within the meaning of Brady when there is a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different. In other words, favorable evidence is subject to constitutionally mandated disclosure when it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley , 514 U.S. 41, 435

(1995); accord, Banks v. Dretke, 540 U.S. 668, 698-699 (2004); Strickler v. Greene, 527 U.S. 2623, 290 (1999). *fn 15."

Wearry v. Cain, 129 U.S. 1769, 136 S.Ct. 1002, 1006, 194 L.Ed.2d 78 (2016) held the prosecutor's failure to disclose material evidence violated Wearry's due process rights under Brady v. Maryland, 373 U.S. 83, 83, S.Ct. 1194, 10 L.Ed.2d 215 (1963) stating:

> "Evidence qualifies as material when there is "'any reasonable likelihood'" it could [1194 L.Ed.2d 84] have ""affected the judgment of the jury.'" Giglio, supra, at 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (quoting Napue v. Illinios 360 U.S. 264, 271, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). To prevail on his Brady claim, Wearry need not show that he "more likely than not" would have been acquitted had the new evidence been admitted. Smith v. Cain, 565 U.S. 3, __-__, 132 S.Ct. 627, 630, 181 L.Ed.2d 571, 574 (2012) (internal quotation marks and brackets omitted). He must show only that the new evidence is sufficient to "undermine confidence" in the verdict. Ibid.
>
> Beyond doubt, the newly revealed evidence suffices to undermine confidence in Wearry's conviction. The State's trial evidence resembles a house of cards, built on the jury crediting Scott's account rather than Wearry's alibi.

Petitioner submits that the State Procecutors have lacked diligence in their duty to discover evidence of a exculpatory nature favorable to Petitioner or have intentionally withheld evidence for more that three decades in violation of federal and state law that would undermine their case against the Petitioner. The lack of a favorable ruling of the law in this case would be contrary and therefore detrimental to the established precedent set forth in the above cited cases.

QUESTION TWO

2. Did the State Court's procedural bar violate the Fifth and Sixth Amendment to the Constitution of the United States?

Argument:
The OCCA Ruling Directly Violates Petitioner's Right To Exculpatory Evidence (Newly Discovered Evidence) Not Subject To Previous Post Conviction Challenges

Standard of Review
Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)
DNA Forensic Testing Act, 22 O.S. §1371
Post-Conviction DNA Act, 22 O.S. §1372
Flowers v. State 2016 OK CR 22, 387 P.3d 947

The Court held that first motion for Post-Conviction DNA testing was not subject to procedural bar.

(See Appendix "C", Proposition #1, #2, #4, #5, #7 and #8)

It was not until Petitioner's counsel was able to obtain a chain of custody from the Chief Medical Examiner through a Writ of Assistance in 2017, that Petitioner discovered the falsity of the Prosecutor's statement made to Petitioner's trial counsel concerning evidence requested through the Petitioner's sustained trial court Motion for Discovery. The Prosecutor told Petitioner's counsel that exculpatory evidence gathered by the Oklahoma State Bureau of Investigation concerning the requested biological material of William Ross Stewart had been sent to an outside agency for analysis and that agency had lost or misplaced the blood, looked everywhere but could not find it and "there was no blood left to be analyzed."

The Medical Examiner's file finally obtained through the aforementioned Writ of Assistance revealed otherwise.

Petitioner's requested this information pre-trial but was not given the chain of custody or details. He did receive a copy of the toxicology report performed by the Medical Examiner's Office along with a copy of the autopsy showing no alcohol in the deceased's system.

Petitioner could not have raised this issue on direct appeal because the Prosecutor for the State had related to counsel for the defense that the blood had been lost and there was no blood to be analyzed. Same results on the Post-Conviction. United States v. Bagley, 473 U.S. 667, 165 S.Ct. 3375, 87 L.Ed.2d 481.

In addition, most of the legislation, Writ of Assistance, 63 O.S. §939; Post-Conviction DNA Act, 22 O.S. §1373 were not in existence then. The Amendment to Rules of Professional Conduct, 5 O.S. Ch. 1, App. 3-A, 2017 OK 52, regarding actual innocence became effective June 19, 2017.

Had the Petitioner known the biological evidence existed, the Petitioner would have immediately sought an order for forensic analysis of Stewart's blood for drugs. Still not known is what tests were conducted on the blood by the OSBI or other "outside agency" or if in fact they lost the blood that the OSBI agent picked up from the ME's office on the date of the autopsy.

22 O.S. §1371 (eff. Nov. 2, 2013) sets forth the statutory "Definitions", as used in the Post-Conviction DNA Act, in pertinent part:

> 1. "Biological material" means...any item that contains or includes blood, semen, hair, saliva, skin tissue, fingernail scrapings of parings, bone, bodily fluids or other identifiable biological material that was collected as part of the criminal investigation **or** may reasonably be used to incriminate or exculpate any person for an offense **and** that may be suitable for forensic DNA testing..." (Emphasis supplied)
>
> 22 O.S. §1373.2 provides in pertinent part:
> "A. Notwithstanding any other provision of law concerning post conviction relief, a person convicted of a violent felony crime or who has received a sentence of twenty-five (25) years or more and who asserts that he or she did not commit such crime may file a motion in the sentencing court requesting forensic DNA testing of any biological material secured in the investigation eligible for testing shall include any and all of the following:
> 1. Persons currently incarcerated...;
> 2. Persons convicted on a plea of not guilty...;

> C. The motion requesting DNA testing shall be accompanied by an affidavit sworn to by the convicted person containing statements of fact in support of the motion..
>
> D. Forensic DNA testing the sentencing court shall provide a copy of the motion to the attorney representing the state and require the attorney for the state to file a response...The response shall include an inventory of all the evidence related to the case, including the custodian of such evidence. (emphasis supplied)

The State has two specific duties, he shall include in his response an inventory of all the evidence to the case, including the custodian of such evidence and if he conducted any DNA analysis or *other biological evidence testing* in his response. The State's response included neither of these mandatory important directives.

The State attached an affidavit from a OSBI Criminalist Supervisor who "is unaware of any DNA testing for the purposes toxicological analysis."

The DNA Act defines the "biological material as any item of "identifiable biological material that was collected as a part of a criminal investigation **or** may reasonably be used to incriminate or exculpate any person for an offense **and** that may be suitable for forensic testing." (emphasis supplied)

No question the evidence collected (blood, nail clippings, hair) are biological material; no question it was collected as part of a criminal investigation; no question that the biological material **may be** suitable for biological testing. All as per the controlling statutory elements required by the Post-Conviction DNA Act.

Should the material test positive for drugs in Stewart or Chumley, it may be reasonably used to exonerate the Petitioner and goes directly to the impeachment/reliability of the entire bust - including the lack of announcement of identity and authority.

If in fact the biological material received by the OSBI is available (for analysis), the denial by the OCCA of the Petitioner's request for and enforcement of the evidence is a violation of his Due Process rights. See Kyles supra, at 514 U.S. 454,

where the case was summarily reversed due to the "prosecutors' blatant and repeated violations of well-settled constitutional obligations," denying Petitioner a fair trial.

A starting point in every case involving construction of a statute is the language itself. It has been and is the law as set forth in Case v. Pinnick, 1039 OK 58, 186 Okla. 217, 218:

> "A statute should be given a construction which renders every word and sentence operative rather than one that renders some words or sentences idle and nugatory."

Rewis v. United States, 401 U.S. 808, 91 S.Ct. 1056, 401 L.Ed.2d 808 (1971) was struck by what the statute did not say, holding:

> "Ambiguity concerning the ambit of criminal statistics should be in favor of lenity."

These concepts were solidified in Newlun v. State, 2015 OK CR 7, 348 P.3d 209.

Further intent of the Post-Conviction DNA Act can be gleaned from the predecessor DNA Forensic Testing Act, 22 O.S. §1371 "DNA Forensic Testing Act". This provided procedures for felony incarcerated inmates who were "factually innocent," "including but not limited to: 1. The opportunity for conclusive proof that the person is factually innocent by reason of scientific evidence: 22 O.S. §1372 required a criminal justice agency to retain and preserve the biological evidence "for such period of time as any individual convicted of that crime remains incarcerated.", added by Laws 2000, C. 52, 1, operative July 1, 2001.

Petitioner submits the DNA statutes allow for **(or at least does not prohibit)** drug analysis of the biological material to establish the law officer(s) were under the influence of drugs, establish the misconduct of the Prosecutor in withholding the sample initially and falsely stating the blood was no longer in existence and there was no blood to be examined, as well as other exculpatory evidence wrongly withheld.

Nor does the State's asserted "Doctrine of Latches" apply.

First, it was not possible to raise these issues in the prior proceedings, as the Post-Conviction DNA Act was not passed until 2013 and became effective, November 1, 2013.

Second, "a Post Conviction motion requesting DNA testing may be filed and heard regardless of the persons previous challenges to his or her conviction or sentence taken prior to the effective date of Post Conviction DNA act." Flowers v. State, 2016 OK CR22, 387 P.3d 947, Watson v. State, 2015 OK CR 3, 343 P.1283, and thus impossible to have raised it in direct appeal.

Third, Petitioner learned through his Writ of Assistance against the Medical Examiner's office (granted on January 20, 2017) that biological sample evidence (including blood) were indeed released to the OSBI, but also that the Medical Examiner had kept other biological evidence until their ultimate disposal (without Due Process notice to Petitioner or Petitioner's counsel) later on, thus the Prosecutor's assertion that the blood had been lost and there was no blood to be examined was false.

Fourth, the State has two specific duties, he shall include in his response an inventory of all the evidence related to the case, including the custodian of such evidence and if he conducted any DNA analysis or *other* biological evidence testing in his response. The State's response included neither of these mandatory directives.

Petitioner respectfully asserts the State is estopped from asserting *res judicata* or latches doctrine where it is caused by the wrongful withholding of evidence by the State. Banks v. Dretke, 540 U.S. 668, 124 S.Ct. 1266, 157 L.Ed.2d 166 (2004) should have laid this issue to rest:

> "The State here nevertheless urges, in effect, that "the prosecution can lie and conceal and the prisoner still has the burden to... discover the evidence, "tr. Of Oral Arg. 35, so long as the potential existence" of a prosecutorial misconduct claim might have been detected, id., at 36. A rule thus declaring "prosecutor may hide, defendant must

> seek," is not tenable in a system constitutionally bound to accord defendant due process."

In remanding the case for further consideration, the Court emphasized the "materiality" for the purpose of the Brady doctrine does not require a demonstration that, with the undisclosed evidence the defendant would have prevailed, but only a showing of reasonable probability that, with the evidence the outcome would have been different. Brady v. Maryland 373 U. S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

What Petitioner does know through obtaining the 2017 Writ of Assistance is the autopsy was performed on Stewart on May 9, 1985, and OSBI Agent Bruce R. Spence signed for and received biological evidence which included "scalp hair", "pubic hair", fingernails-right", "fingernails-left", and "blood" on the same day. A second "RECEIPT for MECICOLOGICAL MATERIAL" was released to OSBI Agent James L. Looney on May 13, 1985, which included pellets and waddings. In addition, OSBI Evidence Collection Manual -- 2011, 1st Ed., states at page 95:

> "EVIDENCE NOT NEEDING ANALYSIS - If evidence is collected that does not need to be analyzed at the present time, it will not be accepted by the OSBI laboratory...
>
> ANALYSIS NOT PROVIDED BY THE OSBI - If evidence needs to be analyzed but the analysis is not able to be performed by the OSBI, the evidence will not be accepted..."

We also know that the Medical Examiner's file contains a note dated May 13, mentioning "...drug screening of his blood." yet there was no drug screening of Stewart's blood by the Medical Examiner, that office testing only for alcohol.

Petitioner does not believe Respondent's assertion "...There is not any biological material available to be tested of Agent Stewart" and that the testing of the samples of Stewart's blood was so devastating to the State's version of the offense it has and continues to go to great lengths to keep Petitioner from discovery.

The Medical Examiner's Logs reflect that their office kept other biological evidence until its destruction by them (without any notice to Petitioner or Petitioner's counsel) on dates from 5-4-89 to 7-23-94.

What Petitioner does not know is what tests were performed on the biological materials (nails, hair, pellets, etc., by whom, or the results of these testing's. Despite Petitioner's pre-trial and post-trial requests (and the trial Court sustaining Petitioner's discovery motions) no information was forthcoming on a number of items. Recent requests of the current prosecutors and OSBI results in more "stonewalling." United States v. Bagley, 473 U.S. 667, 165 S.Ct. 3375, 87 L.Ed.2d 481 (1985) noted at 473 U.S. 682, 683:

> "...an incomplete response to a specific request not only deprives the defense of certain evidence, but also hasthe effect of representing to the defense that the evidence does not exist." and "we think that there is a significant likelihood that the prosecutor's sresponses to respondent's discovery motion misleadingly induced defense counsel..."

Petitioner respectfully submits that it is absolutely necessary to obtain an evidence log and/or inventory of the materials given the OSBI agents, the names of the individuals who signed for the "lost blood" evidence, as well as all the dates of the events, copies of any test(s) performed, and by whom, copies of the results of any test(s) performed.

Petitioner submits a detailed OSBI evidence log, including a chain of evidence and inventory of the contents of all biological materials is absolutely necessary to comport with Due Process and fair play in this case, and an evidentiary hearing is critically necessary to compel the State/Prosecutors, under oath.

CONCLUSION OF QUESTION TWO

The Oklahoma Court of Criminal Appeals ruled that Petitioner's arguments are **procedurally barred** from further review under *res judicata*; or could have been previously raised but were not and are **waived for further review**". The Oklahoma Criminal Court of Appeals' bar continues to deny the Petitioner his right to material evidence and facts discovered through Writ of Assistance and Oklahoma's Post-Conviction DNA Act (which were not enacted into law prior to Petitioners previous legal challenges and therefore unavailable to Petitioner before the current legal proceedings) that would tend, through impeachment of State's witnesses, to exonerate him of Murder I had they been known to Petitioner's counsel at the time of Petitioner's trial and heard by the jury. Furthermore, prior Oklahoma Rules of Professional Conduct and the Oklahoma Supreme Court's Amended Rules of Professional Conduct (2017) are clear, the agent(s) of the State of Oklahoma violate their oath of office every day that Petitioner's requests for production of exculpatory evidence are denied him. In addition, the Oklahoma Post-Conviction DNA Act statute can not be barred where no previous Post-Conviction DNA challenge or proceeding has been made.

Respectfully, Petitioner submits the State of Oklahoma is estopped from asserting *res judicata* or laches where the agent(s) reporting to the State are the cause of the withholding of evidence that is key to the Petitioner's actual innocence of the charge for which he was wrongfully convicted and is now serving time.

Petitioner respectfully submits the legal precedents stated above stand basically unrefuted by OCCA decision, entitling Petitioner to the requested review of this Court.

Using a State's waiver doctrine to deny any U.S. citizen or Petitioner's Federal and State granted legal right is a direct violation of the Fifth and Sixth Amendment and deprives any defendant of his or her rights guaranteed by the Constitution of the United States.

CONCLUSION

The Petitioner has been unable to find and be granted justice and asks this court to issue a Writ of Certiorari upon a review of Petitioner's stated legal precedents.

The petition for writ of certiorari should be granted

Respectfully submitted,

Marshall H. Ellis

Marshall Henry Ellis

Date: 01-10-20