No. _____

In The
Supreme Court of the United States

DONALD CHIMAOBI OKORO,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For A Writ of Certiorari To The Court Of Appeals Of Texas, Thirteenth District

PETITION FOR A WRIT OF CERTIORARI

CLAY S. CONRAD
LOONEY & CONRAD, P.C.
11767 Katy Freeway, Suite 740
Houston, TX 77079
Tel: (281) 597-8818
Fax: (281) 597-8284
CSConrad@looneyconrad.com
www.LOONEYCONRAD.com
Attorney for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Does an Appellate Court fail to provide meaningful appellate review when it adopts a Trial Court's findings of fact when those findings contradict the records and exhibits?

PARTIES TO THE PROCEEDING

1.	Appellant:	Donald Chimaobi Okoro c/o Looney & Conrad, P.C. 11767 Katy Freeway, Ste. 740 Houston, TX 77079
2.	Counsel:	Clay S. Conrad Looney, Smith & Conrad, P.C. 11767 Katy Freeway, Ste. 740 Houston, TX 77079
3.	Appellee:	State of Texas Hope L. Knight Leon County District Attorney 155 N. Cass St., Annex II, 3rd Fl. P.O. Box 1010 Centerville, TX 75833 State Prosecuting Attorney P. O. Box 13046 Austin, Texas 78711-3046
4.	Trial Court:	Hon. Deborah Oakes Evans 87th District Court P.O. Box 39 Centerville, TX 75833

RELATED CASES

- Donald Chimaobi Okoro v. State of Texas
  Cause Numbers 13-18-00587-CR,
  13-18-00593-CR, 13-18-00594-CR
  Unreported
  Judgment Entered April 23, 2020
- Donald Chimaobi Okoro v. State of Texas
  Cause Numbers PD-550-20,
  PD-551-20, PD-552-20
  Unreported
  Petition Refused October 21, 2020

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

INDEX TO APPENDIX

TABLE OF AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Donald Chimaobi Okoro respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals in this case.

OPINIONS BELOW

The opinion below from the Texas Thirteenth Court of Appeals on direct appeal is unreported. (Appendix A). The refusal of the Petition for Discretionary Review filed before the Texas Court of Criminal Appeals is unreported, but notices of the denial are attached (Appendix B).

STATEMENT OF JURISDICTION

On October 21, 2020, the highest court of the State of Texas in criminal cases, the Texas Court of Criminal Appeals, refused a rehearing of their decision, made on February 27, 2019, to deny discretionary review of the opinion of the Thirteenth Court of Appeals, dated April 23, 2020, in this matter.

The denial of review is attached as Appendix B. The decision of the Thirteenth Court of Appeals is attached as Appendix A.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment, United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fourteenth Amendment, Section 1, United States Constitution:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On August 17, 2017, the Petitioner, a black male, was stopped in Leon County, Texas, driving marginally over the speed limit. During the traffic stop, he was removed to the trooper's vehicle, questioned about

numerous extraneous issues, and after roughly 24 minutes, subjected to a K9 inspection of his vehicle, leading to the discovery of controlled substances in his trunk.

Following indictment, a Motion to Suppress was filed alleging an unreasonably prolonged detention in violation of *Rodriguez v. United States*, 135 S.Ct. 1609 (2015) and *Arizona v. Johnson*, 555 U.S. 323 (2009). The trial court denied the motion, signing findings of fact and conclusions of law on October 1, 2018. The petitioner pleaded guilty and appealed that ruling, complaining among other things that the Findings of Fact issued by the trial court judge were contradicted by the record of the Suppression Hearing.

The Texas Thirteenth Court of Appeals affirmed in an unpublished opinion, *Okoro v. State*, on April 23, 2020 (Appendix A), without applying clear error review to the Findings of Fact. A *Motion for Rehearing* was filed on May 8, 2020, and denied on June 4, 2020. (Appendix C) A Petition for Discretionary Review was timely filed before the Texas Court of Criminal Appeals, and refused on October 21, 2020. (Appendix C) This *Petition for Certiorari* will be timely if filed on or before January 19, 2021.

REASONS FOR GRANTING THE PETITION

I. Does an Appellate Court fail to provide meaningful appellate review when it adopts a Trial Court's findings of fact when those findings contradict the records and exhibits?

A. A Need for Meaningful Appellate Review

What is remarkably clear from the record in this case is that the trial court's Findings of Fact lie in stark contradiction to the record, creating clear error that no Texas court addressed, much less rectified, even though it was explicitly raised by the Petitioner at both the intermediate court of appeals, and before the Texas Court of Criminal Appeals.

When clear error is complained of, as it was here, due process can be satisfied by no less than the Court of Appeals carefully examining the record to determine whether it comports with the Findings of Fact issued by the trial court judge. Because that was never done herein, this cause must be reversed and sent back to the Texas 13th Court of Appeals for re-examination in light of the clear errors identified by the Petitioner.

i. Was the Time to Stop Suspicious?

The findings of fact included the claim that the forty-two (42) seconds it took Mr. Okoro to come to a complete stop, on the side of an active highway, was suspicious. However, this was not a finding of a specific, articulable fact: it was the rubber stamping of the visceral response of the officer.

In fact, the Trooper admitted he had no objective basis for his belief that this stop was suspicious. He could give no other standard beyond "you just know it when you see it."

Trooper Smith had no objective measure of when stopping time became suspicious, and couldn't say that taking two minutes to stop was suspicious. He stated that he couldn't "put a basis of time on it," but just "knew it when [I] see it." That someone would roll to a stop on an uneven, unfamiliar surface (as reflected in the video) is meaningless. This, like so much of what the Trooper claimed was suspicious, was a *post hoc ergo propter hoc* rationalization of a *fait accompli*, not an objectively meaningful fact.

ii. Was Reasonable Suspicion Created by the Presence of Multiple Cell Phones?

The Trooper claimed to have seen multiple cell phones in the vehicle, however, he specifically recalled seeing only one phone on the vehicle console, and one in the passenger's hand. Two cell phones, between two adults, is anything but suspicious. The trial court's finding that there were "multiple" cell phones found in the car was disingenuous. Yes, two telephones are in fact "multiple" cell phones, but there was nothing at all suspicious or even relevant about finding two cellular phones in a car with two people.

When asked to specify exactly what he saw, the officer stated:

> A. I believe there was one in the console, I believe or maybe two. There was

> something – there was a phone in the console of the vehicle. (R.R. 2, pg. 30, lines 3-5)

One phone in the console of the vehicle, and one in the passenger's hand. The officer could not swear he saw more cell phones than people in the car. Nor did he find the presence of the telephones relevant enough to include in his report. This is an officer grasping at straws to support a significant drug seizure. No rational finder of fact could have found there was anything suspicious about the number of telephones. It is beyond cavil that this "finding of fact" is clearly erroneous.

Moreover, the claim that one of the phones was a "burner" phone was disingenuous. Every wireless service provider offers a variety of inexpensive "flip" phones, and they are widely used. There is nothing unusual about them, and nothing inherently suspicious about someone using an inexpensive telephone.

Finally, it must be noted that the Trooper did not consider the phones to be suspicious at the time of the stop. He did not discuss them in his report. He did not mention them to the suspects as reasons supporting his suspicion. He simply offered them as *post-hoc* rationalizations for the prolonged detention.

iii. Were the stories told by the Petitioner and his passenger in conflict?

There was no conflict between the recitation of plans the two men gave: the two men just focused on different aspects of their trip. One said they were going to be performing a concert, and the other one said they

were to be recording. Live concerts are frequently recorded – both facts may easily be true. One said he was staying with friends, and the other said he was staying at a hotel. Neither said they were staying at the same place. Neither said where those friends were staying (perhaps a hotel?)

An inconsistency exists not when two individuals describe different plans, but only when the plans described are mutually exclusive. It is not necessary that they both go on a trip for the same purposes, or that they do only one thing on that trip (and do it together). What matters to find a conflict is that what they recite cannot both be true. If one man said they were driving directly to Little Rock, and the other said they were driving directly to Dallas, they could not both be telling the truth. If one said they were both staying at a Courtyard hotel, and the other said they were both staying at a Holiday Inn, there would be a conflict.

Let us posit, for example, that one of the men was going to a medical specialist while in Dallas – in addition to performing at a concert. Let us posit that for him, the medical visit was the most important aspect of the trip. So when asked what he was going to be doing in Dallas, he stated he was going to see a doctor.

Would that have been in conflict with the two men performing a concert? Of course not – both purposes can be accomplished on the same trip, thus no conflict would exist. This "finding of fact" is clearly erroneous to the point of being ludicrous.

Marginal differences in describing plans is an indicia of truthfulness: two people who say the exact

same thing would apparently have likely agreed on what to say. Because nothing the two men said excluded the truth of what the other said, there was no conflict shown. The Trooper asked no questions to determine whether a conflict existed: he took the fact that the two men used different words to describe different parts of their trip and ended his inquiry, without doing what was necessary to determine whether any conflict existed.

iv. Was the Use of a Friend's Car Suspicious?

The next allegedly "suspicious" detail was that the two men were paying to use a friend's car. The claim that this is suspicious fails to hold up to scrutiny. It does nothing to protect the car owner from forfeiture: in fact, it would make the car owner at least potentially a co-conspirator.

While there may be some merit to the idea that a commercial rental could be deemed suspicious as the rental company would not be likely to be deemed a co-conspirator, the same is not true of a private car, belonging to friends and acquaintances of those carrying contraband. Such friends and acquaintances could easily be subpoenaed, forced to give testimony, and could be deemed accomplices, subjecting the car involved to forfeiture. If the owners of the car had any reason to believe that contraband or other illegal activity were motivating the rental, they would lose their innocent owner defense.

Moreover, the use of a rental car, commercial or otherwise, is so common as to provide little to no basis for suspicion. Cars break down. Replacement transportation is arranged.

v. An Absence of Meaningful Review

In spite of the fact that it was clearly raised on appeal that these "findings of fact" were clearly erroneous when compared to the actual record of the hearing, the Court of Appeals failed to consider the issue. At no point did the Court of Appeals consider conflicts between the record of the hearing and the findings of fact made by the Trial Court.

Absent such review, the result of the appeal was a foregone conclusion. Yet the disingenuous nature of the testimony of the officer, and thus of the Findings of Fact issued by the trial court judge, were plain when considered in light of the record of the hearing. The Court of Appeals, by failing to review the record for clear error, simply declined to do its Constitutionally required job. It determined that preserving the conviction was a higher priority than the rule of law – and that is a determination this Most Honorable Court cannot allow to stand.

In fact, this is a case in which the legal system failed at multiple points. The Trooper gave numerous *post hoc ergo propter hoc* responses during his testimony, attempting to find a peg, any peg, to hang his search on. He claimed it was suspicious that two men going to perform and record had no visible musical

equipment with them – in the passenger compartment of a sedan. These two are rappers, i.e., vocalists. There is no equipment a reasonable person would expect them to carry. If the band and crew were traveling with substantial equipment, it would presumptively be transported in a truck, not the back seat of a Toyota. Mr. Okoro was said to be "nervous," because he responded to the unexpected presence of a large dog right behind him. The Officer claimed Houston and Dallas were both "major drug hubs," an appellation that has been attached to every major city in America. It was deemed suspicious by the Trooper that the passenger didn't get off his phone or make eye contact – even though the video recording demonstrates that Mr. Hampton was not speaking on his phone during the traffic stop, and the Trooper agreed Mr. Hampton "just continued going about his affairs in his normal way while [the Trooper] spoke with the driver."

It is beyond dispute that Texas law provides the petitioner with a guarantee of appellate review. TEX.R.APP. P. 25.2. It is beyond dispute that Texas courts are required to examine every issue raised in that appeal. See *Keehn v. State of Texas*, 233 S.W.3d 348 (Tex.Crim.App. 2007), TEX.R.APP. P. 47.1. There was one issue in this case, and by depriving the Petitioner of clear error review of the trial court's findings of facts, it should be beyond dispute that the Petitioner was deprived of his right to meaningful appellate review.

In short, what we have here is a Trooper pulling over two black men for driving five miles over the

speed limit, holding and questioning them about extraneous issues for a prolonged period of time, and throwing everything he can find against the wall – hoping something will stick. This is followed by a trial court judge, faced with a very large drug bust in a very small county, who was willing to grasp at straws to uphold the arrest, and an appellate court willing to act as a rubber stamp for findings of fact that were not supported by the record. In short, we see failures at every step, not just to do justice, but to follow the law.

The Court of Appeals mentioned no less than four times that "we must give almost total deference to the trial court's findings of fact if the record supports them." Yet at no point did the Court of Appeals examine the record to determine whether the Findings of Fact were erroneous or in compliance with the Record. This deprives the Petitioner of any semblance of Due Process of Law. For this reason, the case should be thoroughly examined by this Honorable Court, stricken of clearly erroneous findings of fact, and a reversal should be ordered.

The rule of law does not die because a singular dictator takes over. It dies the death of a thousand cuts. The rule of law dies just like this. An unpopular category of defendant (a black drug defendant) faces a police officer willing to stretch the truth (claiming non-suspicious factors made him suspicious) in order to support an illegal detention. A prosecutor is willing to venture into the absurd to claim that what the officer observed (e.g., no musical equipment in the passenger compartment of a car, two cell phones among two

occupants, etc.) is suspicious. A judge willing to go along with these hollow claims. An appellate court willing to blindly go along with what the trial court judge found, with no further examination into the record.

Yes, trial court findings of fact are entitled to some deference. However, when an appellate court uses this deference as a shield to avoid calling out clear error in spite of evidence that the findings of fact are absolutely not supported and are in many places contradicted by the record, the appellate court deprives the appellant of any sort of meaningful appellate review, and has failed in their singular mission of providing a guarantee that the due process of law will be provided, under the 14th Amendment, to all citizens. It is a total abdication of that due process of law, which requires that clear error of this type not be condoned – no matter how unpopular the litigant is, what sort of crime he stands convicted of, or how unattractive a reversal may be to those jurists. They have one job to do – and in this case, they ducked.

A wink. A nod. An injustice. Going along to get along. And in a flash, the rule of law is made into a doctrine of convenience.

CONCLUSION

What we are left with here is a small town with a large drug case, a Texas State Trooper attempting to rationalize his unreasonable, potentially racially motivated suspicions, disingenuous findings of fact that

explicitly contradict the record, and an appellate court that failed to do its job to rectify those contradictions by applying clear error review. It is clear that justice was not done, the law as laid out by this Honorable Court was not followed, and the resulting conviction was premised on an illegal search that represents a stain on the State of Texas and the United States. Only this Honorable Court can address this matter, and it is necessary for the integrity of the law that it do so.

We are not, at this stage, asking this Honorable Court to rule, but only to accept this case for consideration, at which point it can be thoroughly briefed, with the record available to this Court for examination. Sadly, police officers, judges, and prosecutors all know what language to employ to protect the results they want to see. The only individual capable of being cross examined, the police officer, contradicted himself under questioning. In the words of John Henry Wigmore, cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth." 3 Wigmore, Evidence §1367, p. 27 (2d ed. 1923). And yet, the trial court wholly ignored the testimony of Trooper Smith under cross-examination.

This Honorable Court can issue Certiorari in this matter, and with the record before them, see that no honest broker could have relied on the contradicted statements of this officer. At that point, this Honorable Court can re-examine what level of deference is to be applied to a trial court's findings of fact, and clarify, for the benefit of all, how that deference is to be fairly

applied when it is argued that the trial court has committed clear error, as here.

Respectfully submitted,

CLAY S. CONRAD
LOONEY & CONRAD, P.C.
11767 Katy Freeway, Suite 740
Houston, TX 77079
Tel: (281) 597-8818
Fax: (281) 597-8284
CSConrad@looneyconrad.com

Attorney for Petitioner