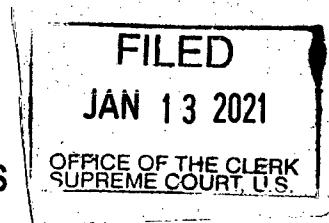


ORIGINAL
CASE No. 20-1124

IN THE
SUPREME COURT OF THE UNITED STATES



MICHAEL DON LEATHERWOOD, Petitioner

vs.

JEORLD BRAGGS, JR., Warden, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
TENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Michael D. Leatherwood
Petitioner, *Pro se*
DOC No. 595058
P.O. Box 260
Lexington, OK 73051

Date: January 8, 2021

QUESTIONS PRESENTED FOR REVIEW

QUESTION ONE:

Was Petitioner subject to the release conditions of probation while he was *in* prison?

QUESTION TWO:

Does the statute which defines probation as “a procedure by which a defendant found guilty of a crime ... is *released* by the court subject to conditions imposed by the court and subject to supervision” provide Petitioner fair warning that he would be subject to probation conditions while he was *in* prison?

QUESTION THREE:

Was the state court’s novel construction of the probation statute that Petitioner was subject to “probation” while he was *in* prison a violation of due process?

QUESTION FOUR:

Was it reasonably foreseeable to Petitioner that he would be subject to the release conditions of probation while he was *in* prison?

QUESTION FIVE:

Was defense counsel ineffective when counsel stipulated to the law cited by the State that Petitioner was subject to the conditions of probation while he was *in* prison, which the State later conceded was incorrect.

QUESTION SIX:

Was the district court and the appeal court incorrect when they found that Petitioner was warned by the state judge that he would be subject to the release conditions of probation while he was *in* prison when the judge (Judge Kenneth Watson) has issued an Affidavit which flatly contradicts such finding and states that he did not issue any such warning?

LIST OF PARTIES

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

RELATED CASES

May 18, 2009: Petitioner entered guilty pleas and was received 20-years suspended sentences. *Oklahoma County District Court* case no. CF-07-4162.

January 8, 2010: Revocation of 5-years of the suspended sentences. *Oklahoma County District Court* case no. CF-07-4162.

August 3, 2010: Revocation of 15-years of the suspended sentences. *Oklahoma County District Court* case no. CF-07-4162.

January 13, 2012: Oklahoma Court of Criminal Appeals affirmed the revocation of the August 3, 2010, revocation of 15-years. *Oklahoma Court of Criminal Appeals* case no. RE-10-780.

June 18, 2012: Oklahoma County District Court denied application for post conviction relief. *Oklahoma County District Court* case no. CF-07-4162.

May 15, 2013: Oklahoma Court of Criminal Appeals affirmed denial of application for post conviction relief. *Oklahoma Court of Criminal Appeals* case no. PC-12-638.

July 25, 2016: District Court for the Western District of Oklahoma denied Petition for Writ of Habeas Corpus. *Western Dist. of Oklahoma* case no. CIV-13-1149-HE.

June 27, 2017: Tenth Circuit Court of Appeals affirmed the denial of Petition for Writ of Habeas Corpus. *Leatherwood v. Allbaugh*, 861 F.3d 1034 (10th Cir. 2017).

October 6, 2017: Payne County District Court dismissed application for writ of habeas corpus. (Filed in Payne Co. pursuant to 12 O.S. § 1331) *Payne County* case no. CJ-17-381.

November 29, 2018: Oklahoma County District Court denied Second Amended Application for Post Conviction Relief. *Oklahoma County District Court* case no. CF-07-4162.

June 12, 2019: Oklahoma Court of Criminal Appeals affirmed the denial of Second Amended Application for Post Conviction Relief. *Oklahoma Court of Criminal Appeals* case no. PC-2019-52.

December 6, 2019: The instant § 2241 petition was filed in the Western District of Oklahoma. *Western Dist. of Oklahoma case no. CIV-19-1140-HE.*

March 31, 2020: District Court for the Western District of Oklahoma denied Petition for Writ of Habeas Corpus. *Western Dist. of Oklahoma case no. CIV-19-1140-HE.*

October 6, 2020: Tenth Circuit Court of Appeals affirmed the denial of Petition for Writ of Habeas Corpus. *Leatherwood v. Braggs*, 829 Fed.Appx. 363 (10th Cir. 2020).

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Appendix D: Transcript of oral argument in the first habeas proceedings

Appendix E: *Leatherwood v. Allbaugh*, 861 F.3d 1034 (10th Cir. 2017)

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SUPREME COURT OF THE UNITED STATES

MICHAEL D. LEATHERWOOD,)
Petitioner,)
v.)
JEORLORD BRAGGS, JR., Warden,)
Respondent.)
Case: _____
(Case. No. 20-6106, Tenth Circuit
Court of Appeals)

PETITION FOR WRIT OF CERTIORARI

COMES NOW, Petitioner, Michael D. Leatherwood, filing *pro se*, and hereby submits a Petition for Writ of Certiorari. Petitioner respectfully prays that a writ of certiorari issue to review the judgment below. In support Petitioner states as follows.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit appears at Appendix A to the petition and is reported at Leatherwood v. Braggs, 829 Fed.Appx. 363 (10th Cir. 2020).

JURISDICTION

The date on which the United States Court of Appeals decided the case was October 6, 2020.

A timely petition for rehearing was denied by the United States Court of Appeals on November 30, 2020, and a copy of the order denying rehearing appears at Appendix B.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process Clause of the Fourteenth Amendment to the Constitution of the United States of America. Sixth Amendment to the Constitution of the United States of America.

PROCEDURAL HISTORY

After concluding state appeals Mr. Leatherwood proceeded to federal court filing a 28 U.S.C. § 2241 petition for writ of habeas corpus. During the proceedings in federal court Mr. Leatherwood received new evidence (the Affidavits of trial judge Kenneth Watson and Director of Oklahoma Department of Corrections Justin Jones) which support his claims.¹ After the conclusion of the proceedings related to the first habeas petition Mr. Leatherwood returned to state court, exhausted state court appeals related to the new evidence, and returned to federal court by filing a second § 2241 habeas petition. The district court found that Mr. Leatherwood's instant second § 2241 petition was untimely and that no tolling was warranted. He filed an unsuccessful Rule 60(b) motion. He appealed and argued that his petition was clearly timely and that, if it was not timely, that extraordinary circumstances existed warranting tolling. On appeal the Tenth Circuit affirmed but did not address the timeliness issue and instead ruled on the merits of the second petition and stated: "We deny Mr. Leatherwood's request for a COA, *although our reasons do not precisely track those of the district court.*" The court then stated: "In light of our ruling on the merits of the § 2241 application, the denial of the Rule 60(b) motion was also correct."

¹ Mr. Leatherwood filed a 28 U.S.C. § 2241 habeas petition in the district court (CIV-13-1149-HE) which was denied. The district court granted a COA and Mr. Leatherwood proceeded to the Tenth Circuit (*Leatherwood v. Allbaugh*, 861 F.3d 1034) which affirmed. However, during the pendency of these proceedings Mr. Leatherwood obtained the Affidavits of the state trial judge and the Director of the Oklahoma Department of Corrections which formed the basis to the instant § 2241 petition at issue.

STATEMENT OF THE CASE

The statutory definition of "probation" in Oklahoma is set forth at *Okla. Stat. tit. 22 § 991a(E)* which states:

E. Probation, for the purposes of subsection A of this section, is a procedure by which a defendant found guilty of a crime, whether upon a verdict or plea of guilty or upon a plea of *nolo contendere*, is **released by the court** subject to conditions imposed by the court and subject to the supervision of the Department of Corrections. Such supervision shall be initiated upon an order of probation from the court, and shall not exceed two (2) years, except as otherwise provided by law. In the case of a person convicted of a sex offense, supervision shall begin immediately upon **release from incarceration** or if parole is granted and shall not be limited to two (2) years.

But while Mr. Leatherwood was in prison serving five years, to be followed by fifteen years suspended, the state court found that he was simultaneously subject to the release conditions of probation.² ³ Based on an alleged violation of a *non-criminal* probation condition, alleged to have occurred while he was in prison, the court revoked the remaining fifteen years of the sentences and Mr. Leatherwood remains incarcerated to this day.

Mr. Leatherwood is incarcerated by the State of Oklahoma pursuant to the revocation of suspended sentences. His conviction and sentences, and revocation of his suspended sentences, were rendered in Oklahoma County case no. CF-2007-4162. On August 25, 2008, an Amended Information was filed charging Mr. Leatherwood with two counts of Rape in the First Degree, and four counts of Rape in the First Degree by Instrumentation, against his spouse. On May 18, 2009, he entered a blind plea of guilty before Judge Kenneth Waston to all six counts, after no prior felony convictions. He was sentenced the same day to:

² The common terminology for this type of sentence *i.e.*, a sentence requiring part of the sentence to be served in custody with the remainder suspended, is a "split-sentence".

³ The terms "suspended" and "probation" as used in the Oklahoma statute are not synonymous and are not interchangeable. The distinction in these terms is highly relevant to the issue of this case.

Twenty (20) years suspended sentences, except the first ninety (90) days to be served in the Oklahoma County Jail, on all counts, with all counts to run concurrently, \$1000.00 fine on each count, Victim Compensation Assessment of \$100.00 on each count.

The terms of the sentences provided:

Suspended as to the first 90 days to be served in the Oklahoma County Jail, the remainder of the sentence(s) to be **suspended under the terms set forth in the probation guidelines.**

The 90-days in jail were to begin on January 8, 2010, and Mr. Leatherwood remained free in society until the 90-days were to begin. The Judgment and Sentence was filed on May 18, 2009.

The "Special Probation Conditions For Sex Offenders" were made a part of the Summary of Facts.

Numerous conditions of probation were contained therein, including Rules 16 and 17.

Rule 16 provided that Mr. Leatherwood shall:

"Not reside, have direct or indirect contact, or attempt to establish contact with a child under the age of eighteen (18) years, *if this case involved a victim under the age of eighteen (18) years.*"

Rule 17 provided that Mr. Leatherwood shall:

"Not date, socialize, or enter into a romantic or sexual relationship with any person who has children under the age of eighteen (18) years present in their residence or custody at any time."

Mr. Leatherwood's case did not involve a minor under the age of 18 years.

Background of the Revocation of Suspended Sentences

The Prior January 8, 2010, Revocation of 5-years.

Mr. Leatherwood's petition is related to the August 3, 2010, revocation of 15-years of his suspended sentences. But prior to the August revocation, on January 8, 2010, 5-years of the suspended sentences had been revoked and he was immediately incarcerated.

Mr. Leatherwood was serving the suspended sentences, with probation, provided in Okla. Stat. tit. 22 § 991a(A)&(E), and the State filed its first application to revoke alleging violation of probation conditions. One of the probation conditions allegedly violated was Rule 17 due to his being in a dating relationship with Ms. Regina Woods (who had two children under the age of 18 years) occurring while he was not in prison but was serving the suspended sentences subject to probation.⁴ A revocation hearing on that application to revoke was held on January 8, 2010, before Judge Watson. Mr. Leatherwood stipulated to five of the alleged violations of probation conditions, including Rule 17, and Judge Watson revoked 5-years of the suspended sentences, leaving 15-years still suspended, with probation. He began serving the 5-years in prison.

The claims raised in this petition involve *only* the August 3, 2010, revocation of 15-years. The January 8, 2010, revocation of 5-years is relevant because Mr. Leatherwood was then incarcerated and no longer subject to probation. But equally important is the fact that the State alleged, and the district court and Tenth Circuit found, that at the January 8, 2010, revocation hearing the trial judge had put Mr. Leatherwood on notice that he would be subject to probation while he was in prison. But, Judge Kenneth Watson has provided an Affidavit which very clearly states that Mr. Leatherwood was not subject to probation conditions while he was in prison. Even more importantly Judge Watson states in the Affidavit that he did *not* warn Mr. Leatherwood that he would be subject to probation while he was in prison. The judge's statement that he did not warn Mr. Leatherwood that he would be subject to probation conditions while he was in prison specifically and unambiguously contradicts the district court and Tenth Circuit's findings.

⁴ Mr. Leatherwood and Ms. Woods had been in a social and romantic relationship for a number of years prior to his sentencing in May 2009.

The August 3, 2010 Revocation of 15-years (the subject of this petition)

On April 14, 2010, *while Mr. Leatherwood was in prison serving the 5-years which had previously been revoked*, the State filed another application to revoke alleging violation of the rules of probation. The application specifically and exclusively alleged that he violated a condition of “probation” while he was in prison. The application specifically alleged that he violated Rule # 17 of the probation conditions by continuing his relationship with Ms. Woods. Specifically the application alleged that Mr. Leatherwood violated the probation rule because Ms. Woods visited him at the prison and they talked on the telephone.⁵

A hearing was held on August 3, 2010. At the revocation hearing the State's Attorney stated: “I attached case law to my response, Judge that clearly says you can violate your conditions of your suspended sentence while you're incarcerated. That's well established law.” The court then states: **“He can violate while he's in the penitentiary. What's the case law? You need to put that on.”** (Appendix C, Transcript of August 3, 2010, revocation hearing at p. 30, 16-23) The State then cited two cases. Defense counsel stipulated that the law cited by the State was correct. The court revoked the remaining 15-years of the suspended sentences based on the allegation that Mr. Leatherwood violated the probation condition while he was in prison. But no such *hybrid* sentence (allowing for imprisonment and probation simultaneously) exist in Oklahoma law. At oral argument in the Tenth Circuit the State conceded, *for the first time*, that Oklahoma courts have never squarely held that a probation rule can be applicable to someone who is incarcerated. (Appendix D, Transcript of oral argument in Tenth Circuit at p. 15, 22-25, p. 16, 1-5) This was revolutionary because the State had consistently argued that Mr. Leatherwood would

⁵ At no time were Ms. Woods' minor children present when she visited Mr. Leatherwood at the prison.

be subject to probation while he was in prison and there was case law to support it. However, in the opinion affirming the denial the first § 2241 petition the Tenth Circuit stated:

To the extent the foregoing presents a potentially viable due process argument, it lacks merit. The Oklahoma probation statute does not tell the whole story. As noted previously, after conviction, a defendant's **sentence can include probation, a suspended sentence, or both**. Okla. Stat. tit. 22 § 991a(A)(1).
(Appendix E at Opinion *Leatherwood v. Albaugh*, 861 F.3d 1034, 1048 ¶29

But this is flatly incorrect. Okla. Stat. tit. 22 § 991a(A) states that "when a defendant is convicted of a crime ... the court shall *either*" (1) suspend the execution of the sentence in whole or in part, **with or without probation**; (2) impose a fine; or (3) commit such person for confinement. Probation cannot happen independent of the suspension of a sentence. Notably the statute does **not** state that the court shall "commit such person for confinement" with or without probation.

Mr. Leatherwood did not receive any notice that he would be subject to probation conditions while he was in prison for 5-years. While Mr. Leatherwood was in prison serving the 5-years he had no contact whatsoever with any probation officer and received no notice that he was required to meet with a probation officer while he was in prison. Furthermore he received no notice that he was required to pay the probation fee that he had been required to pay while he was released on probation. The August 3, 2010, revocation is the subject of this petition.

Affidavit of state trial judge Kenneth Watson

During the pendency of his first § 2241 petition Mr. Leatherwood obtained an Affidavit from Judge Watson who accepted his original guilty pleas, sentenced him to suspended sentences, and revoked the 5-years. In the Affidavit Judge Watson stated his position that Mr. Leatherwood was not subject to probation while he was in prison serving the 5-years. Mr. Leatherwood attempted to supplement the petition with this Affidavit but was refused by the district court because the Affidavit

had not first been presented to the state courts. On July 25, 2016, the district court denied the habeas petition. Incredibly the district court found that Judge Watson had warned Mr. Leatherwood that he would be subject to probation while he was in prison. In direct response to the district court's finding Judge Watson provided a second Affidavit, dated October 24, 2016, which specifically and unambiguously states that he did not make any such warning. This factual statement is uncontroverted by the record. Mr. Leatherwood returned to state court to include the Affidavits on the record and exhausted state court proceedings. He then filed the instant second § 2241 petition. (Appendix No. F, Affidavit of Judge Kenneth Watson)

Affidavit of Oklahoma Department of Corrections Director Justin Jones

Also during the pendency of the first § 2241 petition Mr. Leatherwood obtained the Affidavit of Justin Jones who was the Director of the Oklahoma Department of Corrections during his suspended sentences and both revocations. Mr. Leatherwood attempted to supplement the habeas petition with this Affidavit but was refused by the district court. In the Affidavit Mr. Jones states that Mr. Leatherwood was not subject to the release conditions of probation while he was in prison. (Appendix No. G, Affidavit of Justin Jones)

EVIDENTIARY HEARING

Mr. Leatherwood has never received an evidentiary hearing in any state or federal court which would allow Judge Kenneth Watson and Justin Jones to testify consistent with their Affidavits.

ARGUMENT AND AUTHORITY

Mr. Leatherwood was entitled to fair warning that he would be subject to probation conditions while he was in prison. This Court has held that "due process bars courts from applying

a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed. 2d 432 (1997).

Okl. Stat. tit. 22 § 991a(A) states that "when a defendant is convicted of a crime ... the court shall either" (1) suspend the execution of the sentence in whole or in part, *with or without probation*; (2) impose a fine; or (3) commit such person for confinement.⁶ The statutory definition of "probation" in Oklahoma is set forth at *Okl. Stat. tit. 22 § 991a(E)* which states:

E. Probation, for the purposes of subsection A of this section, is a procedure by which a defendant found guilty of a crime, whether upon a verdict or plea of guilty or upon a plea of nolo contendere, is released by the court subject to conditions imposed by the court and subject to the supervision of the Department of Corrections. Such supervision shall be initiated upon an order of probation from the court, and shall not exceed two (2) years, except as otherwise provided by law. In the case of a person convicted of a sex offense, supervision shall begin immediately upon release from incarceration or if parole is granted and shall not be limited to two (2) years.

Probation has also been defined as "[a] court-imposed sentence that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to jail or prison." Black's Law Dictionary (9th ed. 2009), probation. (Emphasis added)

This Court has defined the word "release" within the context of imprisonment in the case of *United States v. Johnson*, 529 U.S. 53, 56, 120 U.S. 53, 146 L.Ed.2d 39 (2000):

It means "[t]o loosen or destroy the force of; to remove the obligation or effect of; hence to alleviate or remove; ... [t]o let loose again; to set free from restraint, confinement, or servitude; to set at liberty; to let go. Webster's New International Dictionary 2103 (2d ed. 1949). As these definitions illustrate, the ordinary commonsense meaning of release is to be freed from confinement.

⁶ As noted above "probation" does not occur independent of the suspension of a sentence and the statute does not state that the court can commit such person for confinement subject to probation.

To say Respondent was released while still imprisoned diminishes the concept the word intends to convey.

Surely the word "release" as used in the Oklahoma statute cannot have any different meaning than that defined by this Court. In *Johnson*, this Court states: "The statute's direction is clear and precise. Release takes place on the day the prisoner in fact is freed from confinement." *Id.* at 58. The Oklahoma statute at issue here is just as clear and precise that "probation" occurs when a defendant "is *released* by the court" and that in the case of someone convicted of a sex offense "supervision shall begin immediately upon *release* from incarceration." This Court held that while the "prison term and the release term are related" the "terms are not interchangeable." *Id.* at 59. The same logic applies here. Further, this Court held: "Supervised release fulfills rehabilitative ends, distinct from those served by incarceration." *Id.* at 59. Based on the clear and precise language of the Oklahoma statute this same principle would apply to "probation."

No where in Oklahoma law is there a provision authorizing a *hybrid* sentence committing a person to imprisonment subject to probation – it simply does not exist. At oral argument in the Tenth Circuit the State of Oklahoma conceded there is no prior case law which holds that someone in prison is subject to probation conditions. In the case of *Douglas v. Buder*, 412 U.S. 430, 93 S.Ct. 2199, 37 L.Ed. 2d 52 (1973) the petitioner was serving a suspended sentence which was subject to probation. One of the conditions of probation was that he report all arrests to his probation officer without delay. The petitioner received a traffic citation which he reported to his probation officer. The court revoked his probation because he received the traffic citation which the court interpreted as an "arrest." This Court found:

The record before us discloses absolutely no evidence that petitioner was subject to an 'actual restraint' or taken into 'custody' at the scene or elsewhere. Consequently,

we conclude that the finding that petitioner had violated the conditions of his probation by failing to report 'all arrest ... without delay' was so **totally devoid of evidentiary support as to be invalid under the Due Process Clause of the Fourteenth Amendment.** *Id.* 412 U.S. 432

This Court also states:

Moreover, even if it were clear that respondent had declared Missouri law to be that a traffic citation is the equivalent of an arrest, we would have to conclude that under the rational of *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed. 2d 894 (1964), the **unforeseeable application** of that interpretation in the case before us deprived petitioner of due process. *Id.* 412 U.S. 432

In the instant case Mr. Leatherwood was in prison when the State alleged that he was simultaneously subject to probation conditions. The State alleged that he violated a non-criminal probation condition. The state court revoked 15-years of his suspended sentences based exclusively on the allegation. However, the plain language of the statute which defines "probation" fails to notify Mr. Leatherwood that he would be subject to probation while he was in prison for 5-years. Furthermore, the State argues that the trial judge at the first revocation hearing notified Mr. Leatherwood that he would be subject to probation while he was in prison – but Judge Kenneth Watson adamantly denies this in the Affidavit. However, even if the judge had warned him of this the "unforeseeable application of that interpretation," as this Court states in *Bouie v. City of Columbia*, would deprive him of due process because no statute nor any prior judicial decision, as this Court states in *United States v. Lanier*, would put him on notice. The State has conceded there is no case law which holds that probation applies to someone who is in prison and the novel construction of the statute by the state court deprived Mr. Leatherwood of due process.⁷

⁷ In *Burns v. U.S.*, 287 U.S. 216, 53 S. Ct. 154 (1932) this Court found that the "case has the peculiar feature that the probationer was actually serving a jail sentence while on probation with respect to another sentence" and that "even in jail he was subject to conditions of probation." The instant case is distinguishable because Mr. Leatherwood was at

At the August 3, 2010, hearing the State's Attorney argued that probation applied to Mr. Leatherwood while he was in prison and stated: "I attached case law to my response, Judge that clearly says you can violate your conditions of your suspended sentence while you're incarcerated. That's well established law." The judge asked the prosecutor: "**He can violate while he's in the penitentiary. What's the case law? You need to put that on.**" Defense counsel stipulated to the prosecutor's argument on the law and stated "**I will stipulate to that's what the law is.**" Appendix C, at p. 30, 16-23) But as the State has now conceded, and as Judge Watson and Justin Jones state in their Affidavits, this was not correct. There is no prior ruling from any court that states that Mr. Leatherwood would be subject to probation while he was in prison for 5-years.

At the oral argument in the Tenth Circuit Judge Hartz asked: "And this is different. I mean has there been any case before this one that actually held squarely that you can violate a **probation condition while incarcerated?**" The State's attorney responded: "**I don't have any case law squarely with that issue.**" (Appendix D at p. 15, 22-25, p. 16, 1-5) Defense counsel was ineffective for stipulating to the State's position on the law that was clearly incorrect – which the State has now conceded. It was not a reasonable strategic decision by counsel to stipulate to law which does not exist. Mr. Leatherwood was prejudiced by this because when defense counsel stipulated the court accepted the law to be as stated by the State. Had counsel objected the court would have been required to verify the status of the law on its own and would have discovered that the State's position was incorrect and the outcome of the case would have been different. By stipulating to the incorrect law defense counsel's representation fell below an objective standard of

all times serving the same sentences on the same case and he was imprisoned after the revocation of his suspended sentences.

reasonableness and there is a reasonable probability that, but for counsel's unprofessional error the result of the proceeding would have been different. Defense counsel's failure to object resulted in a fundamentally unfair hearing. *Strickland v. Washington*, 466 U.S. 688, 694 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984).

Mr. Leatherwood was entitled to fair warning that he would be subject to probation conditions while he was serving 5-years in prison. But neither the statute, case law, nor the court notified him of this depriving him of due process. He was also entitled to the effective assistance of defense counsel. But counsel was ineffective, and Mr. Leatherwood was prejudiced, when he stipulated to law which does not exist.

REASONS FOR GRANTING THE WRIT

Petitioner was denied due process because he had no notice whatsoever, from any source (statute, case law, judge), that he would be subject to the release conditions of probation while he was *in* prison serving five years. That Mr. Leatherwood would be subject to probation conditions pursuant to *Okla. Stat. tit. 22 § 991a(E)* while he was *in* prison for 5-years was wholly unforeseeable, and the revocation based specifically and exclusively on an alleged violation of a probation condition while he was in prison is so totally devoid of evidentiary support as to be invalid under the Due Process Clause of the Fourteenth Amendment. The Tenth Circuit Court of Appeals did not reasonably apply this Court's established precedent as set forth in *Douglas v. Buder*, 412 U.S. 430, 93 S.Ct. 2199, 37 L.Ed. 2d 52 (1973) or *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed. 2d 894 (1964). It was objectively unreasonable pursuant to *United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed. 2d 432 (1997) for the state court and the Tenth Circuit to grant a novel construction to *Okla. Stat. tit. 22 § 991a(E)* that neither the statute

nor any prior judicial decision had done. That Mr. Leatherwood was subject to probation conditions while he was in prison is so lacking in justification that it violates the fair warning doctrine. Additionally it was wholly unreasonable for the Tenth Circuit to find that the trial judge, Judge Kenneth Waston, warned Mr. Leatherwood that he would be on probation for 5-years while he was in prison when the trial judge has issued an Affidavit which flatly contradicts such finding. The judge's Affidavit is consistent with the record.

Furthermore it was ineffective assistance of counsel for defense counsel to stipulate to the State's position on the law which was completely incorrect and which even the State now concedes was incorrect. Had defense counsel objected to the incorrect law put forth by the State the outcome of the case would have been different. *Strickland v. Washington*, 466 U.S. 688, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). Absent this Court's intervention Mr. Leatherwood will remain incarcerated in violation of the Constitution of the United States and the State of Oklahoma will continue to arbitrarily enforce probation conditions pursuant to *Okla. Stat. tit. 22 § 991a(E)* on unsuspecting prisoners.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that his petition be granted.

PRO SE STATEMENT

Petitioner is acting *pro se* and is not a licensed attorney and is not skilled or educated in the law. He requests a liberal review of this pleading pursuant to *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) and *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972).

Respectfully submitted,



MICHAEL D. LEATHERWOOD
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Date: Jan. 8, 2021