

22-7749
No.

IN THE

Supreme Court, U.S.
FILED

MAY 17 2023

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

Allen Dean O'Bryant - PETITIONER
(Your Name)

VS.

State of Oklahoma — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Oklahoma Court of Criminal Appeals

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Alen Dean O'Bryant # 791183
(Your Name)

(Your Name)

J.C.C.C. 216 N. Murray Street
(Address)

(Address)

Helena, Oklahoma 73741

(City, State, Zip Code)

(Phone Number)

QUESTIONS PRESENTED FOR REVIEW

1. Did former Judge Henderson's secret extramarital affair with a prosecutor in the same county in which he presided as judge create an "unconstitutional potential for bias" sufficient to warrant disclosure of the relationship and/or his recusal as Petitioner's trial judge, even though that prosecutor did not participate in Petitioner's trial?
2. Did the State of Oklahoma deny Petitioner core Due Process and a meaningful hearing under the Fourteenth Amendment when both state courts failed to acknowledge or consider important evidence contained in affidavits?
3. Did the State of Oklahoma deny Petitioner core Due Process and a meaningful hearing in violation of the Fourteenth Amendment when the OCCA mislabeled Petitioner's recusal claim, and then decided the wrong claim?

LIST OF PARTIES

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

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

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE.....	5
REASONS FOR GRANTING THE WRIT.....	8
CONCLUSION.....	17
Questions Presented	4

INDEX TO APPENDICES

APPENDIX A Order denying Post conviction Relief

APPENDIX B Judge Henderson and Kelly Collins stipulations

APPENDIX C State's response to post conviction

APPENDIX D Affidavits from Petitioner's parents

APPENDIX E OCCA's order Affirming Denying denial of PCR

APPENDIX F Attorney David Smith's Affidavit

APPENDIX G Application for post-conviction Relief

APPENDIX H Motion to Supplement the Record on Appeal

APPENDIX I Appeal Brief to OCCA

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
O'Bryant v. Oklahoma, 140 S.Ct. 1110	5
Hoshagen v. State, E-2021-203	7
Henderson v. Bridges, W.D. Ok, 2022WL17976797	7
Fort v. State, 516 P.3d 690 (Okla.C.A. 2022)	7
MARTIN v. Hunter Lessee, 14 U.S. 304 (1816)	8
Heard v. Sullivan, 280 P.2d 708 (Okla.C.A. 1955)	9
Williams v. Pennsylvania, 579 U.S. 1136	9
Matthews v. Eldridge, 472 U.S. 319 (1976)	13
Armstrong v. Manzo, 380 U.S. 545, 552	13
Jackson v. Oklahoma Dept. of Corr, 18 Fed. Appx. 678 (10th Cir.)	15
Turner v. State of La. 379 U.S. 466 (1965)	15
O'Brien v. U.S., 242 F.3d 382 (9th Cir. 2000)	17
 STATUTES AND RULES	
Title 5 O.S. 1981, Ch. 1 App. 4, Cannon 3(c)(1)(a)	9
 OTHER	

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

[] For cases from federal courts:

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

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

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

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

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

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____

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: _____, 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).

For cases from **state courts**:

The date on which the highest state court decided my case was 3-22-23.
A copy of that decision appears at Appendix A E.

A timely petition for rehearing was thereafter denied on the following date: _____, 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. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

14th Amendment to the U.S. Constitution.

STATEMENT OF THE CASE

Petitioner was charged with four counts of child sex abuse in Oklahoma County District Court, and was found guilty by a jury on January 25, 2018, in case number CF-2015-7659, before Judge Timothy R. Henderson. Under Oklahoma law, the jury recommends a sentence, which in this case was a life sentence and a \$500.00 fine for each count. Judge Henderson imposed these sentences on March 6, 2018, and ordered them to be served consecutively. Petitioner's convictions were subsequently affirmed by the Oklahoma Court of Criminal Appeals ("OCCA" hereinafter) on August 29, 2019, in case number F-2018-294 (Unpublished). Petitioner sought Certiorari review in this Court, which was also denied on February 24, 2020 in *O'Bryant v. Oklahoma, 140 S.Ct. 1110; 206 L.Ed.2d 181*. Through private counsel, Petitioner filed for habeas relief in the United States District Court for the Western District of Oklahoma, and was denied relief in an Order and Judgment dated May 2022 *O'Bryant v. Nunn, 2022WL1599709 (W.D. Okla. May 2022)(Unpublished)*. After exhausting his federal remedies, Petitioner sought post conviction relief in the Oklahoma County District Court, and was denied relief in order dated November 21st, 2022. (Appendix A) A request for a Certificate of Appealability was later denied by the Tenth Circuit of Appeals in *O'Bryant v. Nunn, 2022WL17724698 (10th Cir. Dec, 2022) (Unpublished)*. Petitioner now appears *pro se* and requests that this Honorable Court Grant a Writ of Certiorari to review the decision of the OCCA denying his request for post conviction relief.

STATEMENT OF FACTS

After Petitioner's convictions became final on direct appeal, an investigation was conducted which revealed that Petitioner's trial judge, Timothy R. Henderson, was having secret extramarital affairs with two assistant district attorneys in the Oklahoma County District Attorney's Office - the same county in which he presided as judge. Judge Henderson and Assistant District Attorney Kelly Collins ("ADA Collins" hereinafter) each made written stipulations wherein they admitted that they engaged in a secret sexual relationship between the dates of April 2016 and August 2018 (Appendix B). During post conviction proceedings, the state conceded that Judge Henderson's relationship with ADA Kelly Collins was ongoing during Petitioner's trial. (Appendix C, State's Response to Petitioner's Application for PCR) Judge Henderson never disclosed his secret relationship with ADA Collins to Petitioner or his trial attorney. According to his written stipulation, Judge Henderson presided over 103 trials during his tenure as district judge. His sexual affair with ADA Collins began in April of 2016, and ended in August of 2018. (Appendix B) It is estimated that Judge Henderson presided over approximately 23 jury trials during his affair with ADA Collins.

ADA Collins did not participate in the prosecution of Petitioner's trial. However, ADA Collins may have been present and observing Petitioner's jury trial from the gallery. Both of Petitioner's parents state that they observed who they believed were other female prosecutors observing Petitioner's trial. According to their sworn affidavits, the other female prosecutors were sitting behind the prosecution in the gallery. (Appendix D)

Petitioner presented the affidavits from his parents to the OCCA however, the Oklahoma the OCCA refused to acknowledge or address them. (Appendix E)

After Petitioner initiated his post conviction appeal in the OCCA, he received a sworn affidavit from his lead trial attorney, David D. Smith. In his sworn affidavit Mr. Smith states, “[h]ad I known of Judge Henderson’s relations with some of the Oklahoma County Assistant District Attorneys at that time, I would have had grave doubts about Judge Henderson’s ability to be a fair and impartial judge, and I most certainly would have insisted that he recuse himself from the trial of that case”. (Appendix F) Petitioner asked the OCCA to supplement the record on appeal with this affidavit from his trial attorney. (Appendix H) However, the OCCA declined to consider the affidavit from Mr. Smith. (Appendix E)

At least three criminal defendants have succeeded in having their convictions reversed on the basis of Judge Henderson’s inappropriate relationships with Oklahoma County prosecutors. *Hashagen v. State, Case No. F-2021-203 (Dec. 2021) (Unpublished); Henderson v. Bridges, W.D. Oklahoma, 2022WL17976797 Dec, 28, 2022; Fort v. State, 516 P.3d 690 (Okl.Cr.2022).*

Other facts will be referenced as they become relevant to the propositions herein.

REASONS FOR GRANTING THE PETITION

PROPOSITION ONE

BECAUSE PETITIONER'S TRIAL JUDGE WAS HAVING A SECRET EXTRA MARITAL AFFAIR WITH A PROSECUTOR IN THE SAME COUNTY IN WHICH HE PRESIDED AS JUDGE, IT CREATED AN UNCONSTITUTIONAL POTENTIAL FOR BIAS AND MANDATED DISCLOSURE OF THE RELATIONSHIP AND THE JUDGE'S RECUSAL.

The concept of judicial impartiality has existed from the inception of our country. The first recorded instance of a judge recusing himself to ensure impartiality was in 1816, when Justice John Marshall removed himself from a case involving a dispute over land which he and his brother were attempting to purchase.¹ The historical view held that a trial judge was required to remain on the case unless it was clearly improper to do so. Referred to as the "duty to sit" doctrine, it required that there be a demonstrated and existing factual basis for recusal of the judge before disqualification could occur.

The modern view, which began to emerge in the 1970's, is that a judge should recuse even if the appearance of impartiality exists. This change in perspective was a dramatic shift from disqualification based upon a *subjective assessment of actual influence*, to an objective evaluation of the *potential for influence* from the perspective of a reasonable observer. This change in perspective was embodied in a code of judicial conduct approved by the American Bar Association in 1972, which the State of Oklahoma adopted in 1988.

¹ *Martin v. hunter Lessee*, 14 U.S. 304 (1816)

Under Oklahoma's ethical cannons and the ABA Standards for Criminal Justice, where there are circumstances of such a nature to cause doubts as to a judge's impartiality, *such as personal relationships*, it is the judge's duty to disclose the relationship and/or to disqualify himself, notwithstanding the fact that he personally believes himself to be unbiased and impartial. *Heard v. Sullivan*, 280 P.2d 708, (Okl. 1955). *See also*, 5 O.S. 1981, Ch. 1, App. 4, Canon 3(C)(1)(a), “[a] judge should disqualify in a proceeding in which his impartiality might reasonably be questioned—“. *See also, ABA Standards for Criminal Justice, Cannon 2A*. On a question of recusal, a reviewing court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an “unconstitutional potential for bias.” *Williams v. Pennsylvania*, 579 U.S. 1136 S.Ct. 1899.

Judge Tim Henderson violated Mr. O'Bryant's Fourteenth Amendment right to a fair and impartial trial judge, as well as his right to seek the judge's recusal. More specifically, at the time of Petitioner's trial, the presiding Judge, Tim Henderson, was having a secret extra marital affair with Kelly Collins, an Assistant District Attorney in Oklahoma County. Judge Henderson did not disclose his relationship with ADA Collins to Petitioner or his trial lawyer. In fact, at Petitioner's peril, Judge Henderson continued to

keep his sexual relationship with ADA Collins a secret until well after Petitioner's conviction became final on direct appeal.²

Title 5, Ch.1, App. 4, Rule 1.2 of Oklahoma's Judicial Cannons provides as follows:

"A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and avoid impropriety and the appearance of impropriety." (5) [a]ctual improprieties includes violations of law, court rules, or other specific provisions of this Code--. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."

Former Judge Henderson violated this code because he was secretly committing the crime of adultery during Petitioner's trial, which is a felony offense in the State of Oklahoma. Such behavior alone created a serious potential for bias because to a reasonable person looking in, a dishonest judge is not likely to follow the law if the judge himself is a criminal. Since former Judge Henderson's *secret mistress* was a prosecutor in the same county in which he presided as judge, only adds to the already serious ethical violation that occurred when he committed the crime of adultery.

² It should be noted that Judge Henderson kept his affair with Ms. Collins a secret not only because he was married, but also because he knew that by sleeping with a prosecutor, his impartiality could be questioned in every criminal matter that came before him, regardless of whether or not ADA Collins was a party in the case.

Clearly, under Oklahoma's judicial canons (discussed above) and *Williams v. Pennsylvania, supra.*, Judge Henderson had a duty to disclose his sexual relationship with ADA Collins and recuse himself as Petitioner's trial judge. It did not matter whether or not Judge Henderson harbored *actual bias*, especially in a case such as this, where the judge chose to sleep with a prosecutor – the worse of all people he could have chosen in the judiciary, such also manifested the *worse* projection of potential bias that a criminal trial judge could possibly create.

In state court Petitioner argued that Judge Henderson was likely biased toward all the prosecutors in Oklahoma County because he feared that if he did not treat all of the prosecutors favorably, ADA Collins might disclose their secret sexual affair. Petitioner also argued that Judge Henderson likely assumed that other prosecutors knew about his relationship with ADA Collins, and for that reason, he had motive to treat all of the Oklahoma County prosecutors with some degree of favoritism.³ (See Appendix G) Despite Petitioner's clear demonstration of potential bias, the Oklahoma state courts denied post conviction relief on the basis that "Petitioner has presented no evidence indicating an improper relationship between the trial judge and the prosecutors in his case." (Appendix E).

It was not Petitioner's burden to prove that Judge Henderson was sleeping with one of the prosecutors in his case. Rather, Petitioner's burden was to prove whether the average

³. Judge Henderson made several pretrial rulings on important evidentiary matters which were also likely influenced by his inappropriate relationship with ADA Collins. Also, although ADA Collins did not participate in Petitioner's trial, she may have had conversations with Judge Henderson about the case. (Appendix C, State's Response, Ex. #1,, page 7)

judge in Henderson's position is likely to be neutral, or whether Judge Henderson's relationship with ADA Collins created an "unconstitutional potential for bias." *Williams v. Pennsylvania, 579 U.S. 1136 S.Ct. 1899.* The OCCA clearly employed an unconstitutional standard of review when it required Petitioner to demonstrate that his trial judge was having an inappropriate relationship with the prosecutors in his case. Just because ADA Collins was not present in the courtroom did not absolve Judge Henderson from his duty to disclose his sexual relationship with ADA Collins to Petitioner and his trial attorney. Common sense dictates that an objective person looking in would question the judge's impartiality, regardless of whether or not ADA Collins was one of the parties in the case.

Petitioner's arguments above are supported by the affidavit from his trial attorney, David Smith. In his sworn affidavit Mr. Smith states, "[h]ad I known of Judge Henderson's relations with some of the Oklahoma County Assistant District Attorneys at that time, I would have had grave doubts about Judge Henderson's ability to be a fair and impartial judge, and I most certainly would have insisted that he recuse himself from the trial of that case". (Appendix F) Being an officer of the court and an experienced trial attorney, Mr. Smith was in the best position to know whether Judge Henderson's impartiality could be questioned. Unfortunately, because Henderson chose to keep his sexual affair with ADA Collins a secret and not disclose their relationship, Petitioner unconstitutionally deprived of his right to seek Judge Henderson's recusal.

It is respectfully submitted that the State of Oklahoma departed from clearly established Supreme Court law when it denied Petitioner post conviction relief on his

recusal claim. *Williams v. Pennsylvania, Supra; U.S. Const. Amend. 14.* Petitioner prays that this Court should not allow the State of Oklahoma to condone a criminal trial judge's decision to keep his extra marital affair with a prosecutor a secret and not disclose such a relationship to a defense attorney appearing before him. Accordingly, the only appropriate remedy would be to vacate Petitioner's conviction and remand his case for a new trial, "[a]n unconstitutional failure to recuse constitutes structural error that is not amenable to harmless-error review—". *Id.* Intervention by this Court is therefore warranted to bring the State of Oklahoma in compliance with federal law requirements regarding a judge's duty to disclose inappropriate relationships, and also to restore the integrity of the criminal justice system in Oklahoma County.

PROPOSITION TWO

THIS COURT SHOULD GRANT REVIEW BECAUSE THE STATE OF OKLAHOMA DENIED PETITIONER CORE DUE PROCESS WHEN THE OCCA GROSSLY MISCHARACTERIZED HIS RECUSAL CLAIM, AND THEN ADJUDICATED THE WRONG CLAIM.

As a general matter, the fundamental requirement of federal Due Process is "the opportunity to be heard at a meaningful time and in a meaningful manner." *Matthews v. Eldridge, 472 U.S. 319 (1976), quoting, Armstrong v. Manzo, 380 U.S. 545, 552 (1965).* In this case Petitioner was denied core Due Process when both state courts mischaracterized his recusal claim, and then decided the wrong claim. In the order affirming the denial of

post conviction relief, the OCCA cited its previous decision in *Fort v. State, supra.* and gave the following conclusion regarding Petitioner's recusal claim:

"Petitioner has presented no evidence indicating an improper relationship between the trial judge and the prosecutors in his case." (Appendix "E").

But Petitioner never claimed that former Judge Henderson was biased because he was sleeping with the prosecutors in his case. Rather, Petitioner argued that Henderson's sexual relationship with ADA Collins mandated his recusal, even though ADA Collins did not participate in the case. Petitioner argued:

"Although it is unknown whether or not one of these female prosecutors was present during Mr. O'Bryant's trial (Motion to Stay Proceedings), Judge Henderson's recusal was mandatory, regardless which prosecutor was present." And, "[i]n the case at bar, because Judge Henderson had an intimate relationship with two female prosecutors, any reasonable criminal defendant would believe that he harbored a sense of bias toward all prosecutors in the Oklahoma County District Attorney's Office."

(Appendix G, page 2-3 of supporting brief, & fn. 1 & 2).

Furthermore, on appeal to the OCCA Petitioner advanced specific arguments acknowledging the distinguishing factors between his recusal claim and the recusal claim raised in the Fort case. (Appendix I) Notwithstanding, the OCCA construed Petitioner's recusal claim as one where he alleged that Judge Henderson was having an affair with the

attorneys prosecuting his case. That was simply not the claim that Petitioner raised. Rather, Petitioner's claimed that Judge Henderson had a duty to recuse, even though ADA Collins did not participate in the prosecution of his case. *Id.* Given the OOCA's gross mischaracterization of Petitioner's claim, it must be assumed that the court decided the wrong claim.

It is respectfully submitted that Due Process is not provided in case where a reviewing court misstates the claim raised by the Petitioner, and then decides the wrong claim.⁴ *U.S. Const. Amend. 14.* Premises considered, it is Prayed that this Court will conduct its own *de novo* review of Petitioner's recusal claim or, alternatively, remand his case back to the State of Oklahoma for proper consideration of his recusal claim.

PROPOSITION THREE

THIS COURT SHOULD GRANT REVIEW BECAUSE THE STATE OF OKLAHOMA DENIED PETITIONER CORE DUE PROCESS UNDER THE FOURTEENTH AMENDMENT BY REFUSING TO ACKNOWLEDGE OR ADDRESS IMPORTANT EVIDENCE CONTAINED IN AFFIDAVITS.

This Court has held that the failure to afford a hearing violates even minimal standards of Due Process. *Turner v. State of La.*, 379 U.S. 466, (9165). Pursuant to this authority and the authority presented in proposition Two, Petitioner alleges the OCCA denied him

⁴ This writer found one published case where a petitioner was able to overcome the AEDPA's highly deferential review standard because the Oklahoma Court of Criminal Appeals mislabeled his claim. *Jackson v. Oklahoma Department of Corrections* 18 Fed. Appx. 678, 683 (10th Cir.2001).

core due process by refusing to acknowledge or address important evidence presented in affidavits. ***U.S. Const. Amend., 14.*** In their sworn affidavits both of Petitioner's parents state that they believe that other female prosecutors came into the courtroom and observed the jury trial from gallery. According to their affidavits, these female prosecutors were sitting in the gallery, but behind the prosecution. (Appendix D)

Additionally, after Petitioner initiated his appeal to the OCCA, he received the sworn affidavit from his trial attorney, Mr. Smith. Petitioner immediately presented the affidavit to the OCCA with a Motion to Supplement the Record on Appeal. (Appendix J) However, the OCCA declined to consider the affidavit from Petitioner's trial attorney and failed to consider the affidavits from Petitioner's parents.⁵ (Appendix E)

The affidavits from Petitioner's parents were highly material to Petitioner's recusal claim, because if ADA Collins was present in the courtroom during Petitioner trial, she may have been asserting her influence to ensure that Judge Henderson would treat the attorneys prosecuting Petitioner's case favorably. Likewise, the affidavit from Petitioner's trial attorney, wherein he stated that he would have sought Judge Henderson's recusal had he known about his inappropriate relationship, was material to the inquiry of Judge Henderson's potential bias. It is hard to fathom how a fair adjudication could be provided without any consideration of important evidence in affidavits which is material to a Petitioner's claim.

⁵ Furthermore, the hurried manner in which the Oklahoma County District Court disposed of Petitioner's post conviction (approximately 30 days) also supports a conclusion that Petitioner was denied a fair hearing and an opportunity to produce additional evidence supporting his recusal claim.

Accordingly, it is respectfully submitted that a reviewing court fails to provide Due Process when it fails to acknowledge and consider important evidence in affidavits supporting the Petitioner's claim. *See Obrien v. U.S., 242 F.3d 382 (9th Cir. 2000)* (vacated and remanded because court failed to consider affidavit from the petitioner's trial attorney). Premises considered, it is Prayed that this Court will conduct its own *de novo* review of Petitioner's recusal claim or, alternatively, remand his case back to the State of Oklahoma for proper consideration of the evidence supporting Petitioner's recusal claim.

CONCLUSION

For the reasons presented herein, Petitioner Prays that the Writ of Certiorari will issue to review the decision of the Oklahoma Court of Criminal Appeals.

Respectfully Submitted,



Alen Dean O'Bryant #791183
J.C.C.C Unit #3
216 North Murray Street
Helena, Oklahoma 73741