No. 22-7834

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

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QUESTIONS PRESENTED

1. Has the State of Oklahoma denied my rights under the Fifth, Sixth and Fourteenth Amendments by refusing to furnish requested discovery, refusing evidentiary hearings to obtain discovery and allowing prejudicial hearsay to prejudice the jury?

2. Can the State of Oklahoma through its prosecutors, agencies and judges refuse to follow their oaths and the Supremacy Clause by assertion of legislative privilege, latches, and/or res judicata?

List of Parties

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

Related Cases

Marshall Henry Ellis v. State of Oklahoma, No. HC-2023-174 Court of Criminal Appeals. Judgement entered March 14, 2023.

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In the Supreme Court of the United States

Petition For Writ of Certiorari

Petitioner respectfully requests that writ of certiorari issue to review the judgement below.

Opinions Below

The opinion of the Court of Criminal Appeals for the State of Oklahoma appears at Appendix -A- to the petition and it is unpublished.

Jurisdiction

The date on which the Court of Criminal Appeals of the State of Oklahoma decided my case was March 14, 2023. A copy of that decision appears at Appendix -A-.

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

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment – No person shall be...deprived of life, liberty, or property, without due process of law.

Sixth Amendment – In all criminal prosecutions, the accused shall enjoy the right to...be confronted with the witnesses against him...

Fourteenth Amendment - Due Process, Equal Protection

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 I 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 of 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 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. Judgment and Sentence was on Marsh 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 Gail 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 U.S.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-97-935. The Federal District Court denied relief in un unpublished opinion, 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 filling 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 26, 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. 2018-1210.

On May 25, 2018, my attorney filed grievances with the Oklahoma Bar Association against the three trial prosecutors and the Oklahoma State Bureau of Investigation (OSBI), Chief Attorney for their continuing refusals to furnish material/forensic discovery evidence. The bar declined to exercise their investigative and/or subpoena power and dismissed the grievances in June, 2018.

On June 29, 2022, my attorney filed complaints with the Oklahoma Council on Judicial Complaints against the four sitting Oklahoma Court of Criminal Appeals judges and the district court post-conviction judge. The Council declined to exercise their investigative or subpoena power, dismissing the complaints on August 30, 2022.

On January 9, 2023, my attorney filed a comprehensive complaint with the Chief

Judge of the Oklahoma Supreme Court pursuant to "1.6. Code of Judiciary Conduct and Oklahoma Rules of Professional Conduct 2017 OK 52, Rule 3.8. The Oklahoma Supreme Court issued its Order of March 6, 2023. Marshall Henry Ellis v. The State of Oklahoma, No. 121,102 transferring this case to the docket of the Court of Criminal Appeals, along with the two volumes of extensive records of exhibits and pleadings, marked "Sensitive and Confidential" (due to attorney/judicial complaints?)

The Court of Criminal Appeal characterized the fourteen (14) page letter of judicial and attorney misconduct (with 161 pages of attachments in Vol. 1 and several hundred pages in Vol. 2 – including a transcript of P-C hearing and all motions) as a petition for a writ of habeas corpus, justifying a two-page Order that my attorney "has not cited any authority which establishes that the confinement is unlawful."

REASONS FOR GRANTING THE PETITION

The two questions presented, while being separate constitutional violations, are so closely related that the same controlling decisions of this Court often apply to each to avoid duplicity the events are set out in chronological order to avoid duplication of citations of authority.

My attorney filed extensive pre-trial discovery motions on my behalf, as did attorney Stephen Jones on behalf of my co-defendant (his client Marcia Boston). The trial judge allowed each attorney to adopt the other attorney's motions on behalf of their respective client.

The trial court's order and all of both defendants' discovery motions are set out in my "APPLICATION FOR RELIEF UNDER THE POST-CONVICTION DNA ACT,

AND/OR ALTERNATIVELY SECOND AND SUBSEQUENT POST-CONVICTION, AND/OR . . . ." VOL. I of the two volumes sent by the Oklahoma Supreme Court to the Oklahoma Court of Criminal Appeals on March 6, 2023.

The trial court's "Order on pre-trial motions", file-stamped 1-10-1986, while sustaining them read " . . . it is not the court's intention to direct the District Attorney to secure these items . . . ."; thus attempting to release the District Attorneys of their duties to inquire, investigate and furnish production, discovery, exculpatory, impeachment evidence pursuant to Brady v. Maryland, 373 U.S. 83, S.Ct. 1194, 10 L.Ed.2d 215 (1963) and its prodigy cases requiring them to seek and produce these items.

Prosecutor Gruber informed the court that he did not want to be perceived by law enforcement as assisting "a cop killer" at the time of the ruling.

My attorney advised the trial court that there would be a problem with the Oklahoma State Bureau of Investigation (OSBI), as their policy was not to even talk with the defense, let alone furnish documents.

The trial judge inquired of the Oklahoma State Bureau of Investigation (OSBI) and their records, and my attorney advised neither they nor the State produced any documentation, pursuant to it. My attorney advised Judge Linder that he did not believe prosecutor Edmondson's statement that the deceased's (Stewart's) blood had been sent by the OSBI to an outside agency for analysis and subsequently lost by that outside agency which had looked everywhere for the blood, however, they couldn't find it and there was no blood of Stewart left to be analyzed, which Prosecutor Gruber confirmed again.

Several weeks later, my attorney was in the Woodward County courthouse when

he was requested to go to the judge's office. The judge and the prosecutors had a second order which he requested my attorney to sign. My attorney inquired as to why a second order and received no response. This order appeared to be a shorter version of the order file-stamped January 10, 1986. My attorney signed it and advised he had still been unable to obtain any records from the OSBI.

The second order reappeared during trial after I had testified and during cross-examination of co-defendant Boston.

Prosecutor Edmondson asked broad, confusing questions trying to set up rebuttal by his yet unnamed "ambush" witness:

> "Have you seen, or read or heard of a specific statement that you were supposed to have made that you have no recollection making, and you don't believe it's true?"

Defense objected to such improper, unanswerable questions stating he was "going into a broad generality, and if we had not been furnished this . . . ". The court interrupting (Tr. 1182 -1183):

> ". . . if it is a specific area, then you need to hone in on that area. If not, we need to move out.", and Mr. Edmondson, you need to furnish that area.

Defense was to learn of the second "snitch/informant" upon the state's calling "rebuttal witness" nurse Janet Fields. Nurse Fields stated that she was employed at Woodward Hospital. Defense approached the bench and advised the court no statements had been furnished of this witness.

Prosecutor Edmondson was still "playing games" with my life when cross-examining Marcia Boston and outsmarted himself when he failed to question her

concerning the alleged specific inconsistent statements made (to whom we were about to learn was Nurse Janet Fields at the Woodward Hospital on May 8, 1985) as well as failed to give Boston the opportunity to admit, deny or explain, as governed by the controlling case of Rogers v. State, 1986 OK CR 96, 721 P.2d 805, 807, 808:

> "¶ 9 Title 12 O.S.1981 §2613 [12-2613] (B) clearly governs this issue:
>
> Extrin[i]sic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon.
>
> This rule requires counsel, normally the cross-examiner, to first ask the witness about the prior inconsistency, and then given the witness the opportunity to deny, affirm, or explain the earlier statement. Also, imposed upon counsel is the duty of identifying the subject matter of the statement, the time and place of its utterance, and the person to whom it was made." (emphasis supplied)

Both state prosecutors took the position they did not have to give defense the name of the rebuttal witness or her prior statements, because it was not covered by the court order (second one).

Defense pointed out the motions and the court's order encompassed statements, admissions against interest made by either Ellis or Boston, as well as adopted Boston's motions – all as set out by this court's original order signed by Prosecutor Gruber and requested statements of this purported witness.

The trial court handed my attorney the court file and told my attorney to show him the order. The original order had been removed and it contained only the second order.

My attorney so advised the court that he had a certified copy at the motel and

requested minutes to retrieve it. Later after it was revealed the surprise witness was Nurse Fields, the original order of January 10, 1986, magically reappeared in the court file.

The court's statement was this would be a violation of his order – The prosecutor went from denial of having to furnish anything – to an innocent mistake – with the court joining the other two prosecutors and declaring it to be an honest, innocent, good faith mistake and ruled her testimony admissible.

The court recessed for the weekend to give defense time to interview the Nurse. The OSBI with the prosecutors and (judge?) approved immediately whisk her away for secrecy/seclusion at an unknown location for her protection, without informing the defense.

Prosecutor Gruber advised the court that Nurse Fields had come to his office expressing "a fear for her life, without any overt threat." Prosecutor Edmondson argued the state had to have Nurse Fields testimony because it was an absolute element necessary to establish murder, whether or not William Ross Stewart announced authority, and his identity as a police officer (Tr. 1356):

> "It goes directly to the question of whether or not we are dealing with premeditated murder, or perhaps a lesser included offense of manslaughter." (or self-defense/defense of another, where you have no announcement by an undercover officer on methamphetamine who runs toward the car with gun drawn and his pistol firing – Boston had 3 or 4 bullet entries).

Edmondson concluded with, "It is a direct element of first degree murder."

The Court now gave its preliminary oral Judge Linder's Prosecutorial Directed Guilty Verdict Instructions and motion to the jury that this was "impeachment evidence and it will be offered to show that the witness' (Boston) testimony is not believable or

truthful." (Tr. 1455-56).

Nurse Fields proceeded to testify over defense objection that Boston said (Tr. 1461):

"I want to tell you the truth, I want to tell you what really happened."

Ellis reached behind the seat and got out a sewed-off shotgun and placed it on his lap. "He always carries gun." (Tr. 1462).

After the girl left the car, a man approached the car and Marshall shot him. Nurse Fields asked why (Tr. 1462):

"And she said I don't know, I don't know, and then she said, the man said he was a cop and we were under arrest. That is when Marshall raised the gun and shot him."

And she also told me that another man, at either the same time the gentleman that was shot had gotten out of the van, another gentleman had burst out of the back of the van. A cop is the words she used again, a cop had burst out of the back of the van, and I said how did you know he was a cop. Her remark was because he got out of the same van the other cop got out of."

Nurse Fields wanted to drive the point home to the jury again and told Boston she don't understand why Marshall shot him:

> "And she said once again, 'because he said he was a cop and we were under arrest, and that's when Marshall raised the gun and shot him.'"

What started out being a Brady, supra, violation was morphed into a hybrid type Bruton v. United States, 391 U.S. 123 (1968) prejudicial directed verdict by the trial judge and two prosecutors.

Shawna Johnson was arrested by undercover agent Stewart and others following a sale of drugs to Stewart. Shawna Johnson agreed to assist the officer in a buy from co-defendant Boston. At trial, Ms. Johnson testified that she heard Agent Stewart say, "Freeze, Police." and gunfire, then a shotgun blast.

According to the two other undercover agents in the rear of the van, Stewart did not tell them the "deal had gone down", but the van rocked and they jumped out with pistols drawn.

Defense counsel obtained an Affidavit from Michelle (Johnson) Brockman on May 10, 2018, that her mother Shawna Johnson told Michelle in a "dying declaration" that she was nervous about the drug deal and van driver (Stewart) furnished her meth and a rig to inject with at the Woodward Police Station before they left to do the drug deal with the defendants. After the exchange, Shawna went back towards the van. She described that the man,

> ". . . jumped out and ran towards Marshall's car and she heard gunfire. That the van driver did not say anything. There was no announcement of authority and no time for an announcement of authority."

Ms. Johnson joined the three civilian witnesses who testified there was "no announcement of authority and purpose" prior to shots being fired.

These bystanders witnessed the shooting. All three testified that they heard no announcement that the men were police officers (Tr. 1043, 1061, 1083). All three also testified that the pistol shots were fired before the shotgun blast was heard (Tr. 1047-48, 107, 1082). These witnesses were Debbie Robertson, who worked at a convenience store across the street from the restaurant (Tr. 1045), Wendall Morrison, who was to relieve

Robertson as store clerk and who was outside straightening up the store's car wash (Tr. 1057-58), and Dana Blocker, a customer at Long John Silvers (Tr. 1050).

Co-defendant Marcia Boston read the trial testimony of Nurse Fields and gave the Affidavit below (Defendant's Application For Relief, Page 11):

> "I have read the preliminary hearing and trial testimony (en camera and before jury), testimony of Nurse Fields. While I do not know the reason for Nurse Fields to testify to motive, announcement of authority or the person who gave her the script, that testimony is pure fiction and false. I did not make a statement to Nurse Fields that the man announced he was a police officer or we were under arrest or that this was the reason Marshall Ellis shot him."

Boston also described Stewart's appearance immediately before she was shot numerous times:

> "The man had a 'maniacal' look on his face. 'Kind of wild-eyed and wicked grin on his face.' 'The look on his face scared me' I thought he was going to kill me, rip me off . . . take the money.' I did not hear any sort of statement from this man. He did not say, 'State Police, you are under arrest.' or ' Freeze.' He did not say, 'Out of the car' or anything of that nature. He said nothing. He was wearing blue jeans and a short-sleeved shirt. He did not have a police uniform or any sort of police insignia, or a badge in his hand. There was nothing about his appearance that made me think he might be a law enforcement officer. I thought he was a man from Oklahoma City that runs prostitutes. He scared me. The gun was drawn and pointed at me as he was bouncing toward me. This all happened in three or four seconds."

It was not until all medical records were obtained through a Writ of Assistance filed in Oklahoma County Court in 2017, that defense counsel learned the state had not been truthful as to the blood evidence.

The two state prosecutors at first claimed the OSBI had misplaced Stewart's blood samples. Their story to the court and defense counsel then changed to the forensic evidence

had been sent by the Oklahoma State Bureau of Investigation (OSBI) to an outside agency for analysis and that agency lost the blood, had looked everywhere for it, that it could not be found and there was no blood evidence to examine. The state declined to name the agency, as did the OSBI.

An OSBI agent picked up from the Oklahoma Board of Medicolegal Investigations, Office of the Chief Medical Examiner, the following forensic evidence (concerning William "Bill" Ross Stewart) for analysis by the Oklahoma State Bureau of Investigation (OSBI) on May 9, 1985:

> Briefs;
> Tape strips from thigh;
> Scalp hair;
> Pubic hair;
> Fingernails, right hand;
> Fingernails, left hand;
> Blood;
> Two (2) shotgun wads and pellets

from the body of William "Bill" Stewart, deceased.

The M.E. Report reveals Stewart's "brain is congested and shows signs of rare perivascular hemorrhage . . . ." which according to Google, the most common drugs or abuse associated with brain hemorrhage, includes amphetamine and methamphetamines, Also on the M.E. Report, "REQUEST FOR LABORARY ANALYSIS" form "SPECIFMENS SUBMITTED FOR ANALYSIS" section marks are "BLOOD", "LIVER", "URINE", and "VITREOUS".

My attorney had received information from a prominent attorney in Eastern Oklahoma, that OBN Agent Stewart had been high on methamphetamine during marijuana

busts in the year of 1985, and was extremely interested in Stewart's blood analysis.

The M.E. Report revealed that Medical Examiner's Office has retained samples of "Blood", "Liver", "Urine", and "Vitreous" until they destroyed them on dates ranging Feb. 08, 1991 to Jul. 23, 1994 (without notice to me or my attorney).

Now we had evidence (other than conjecture/suspicion) that there was or had been blood available for independent analysis until the M.E's destruction of it contrary to the state prosecutor's assurances to the contrary.

The Post-conviction pleadings also contain my Affidavit of Innocence of Murder; Attorney Stephen Jones' Affidavit in support of his motions, my attorney Mac Oyler's Affidavit of discovery and statements of non-compliance by the OSBI/prosecuting attorneys as well as the neglect of their duties by prosecutors. These affidavits stand unrefuted through the Post-conviction filling on May 24, 2018 to date.

All Oklahoma attorneys take the oath, 5 O.S. §2, that they "will support, protect and defend the Constitution of the United States and the Constitution of the State of Oklahoma, that you will do no falsehood or consent that any be done in court, . . ." The judicial oath, oath of office and oath of many agencies all swear " . . . they 'will support, obey, and defend the Constitution of the United States, and the Constitution of the State of Oklahoma. . ."; while Oklahoma Constitution Article XV-2 and:

> ". . . any person refusing to take said oath, or affirmation, shall forfeit his office, and any person who shall have been convicted of having sworn or affirmed falsely, or having violated said oath, or affirmation, shall be guilty of perjury, and shall be disqualified from holding any office of trust or profit within the State. . . ."

The Oklahoma Supreme Court opinion of Oklahoma Coalition for Reproduction

Justice v. Cline, 2019 OK 33, 441 P.3d 1145, 4130, 2019, eloquently describes the interaction of the above principles in conjunction with the controlling principles of supremacy of United States Supreme Court decisions over all Oklahoma judges.

> "¶15. DECISIONS FROM THE UNITED STATES SUPREME COURT ARE BINDING ON THIS COURT WHERE THE UNITED STATES SUPREME COURT HAS SPOKEN, THIS COURT IS BOUND BY ITS PRONOUNCEMENTS.
>
> Decisions from the United States Supreme Court are binding on this Court and require the Legislature to promulgate rules of law consistent with the federal Constitution. Because the United States Supreme Court has spoken, this Court is not free to impose its own view of the law as it pertains to the competing interests involved. Where the United States Supreme Court has spoken, this Court is bound by its pronouncements.
> . . .
> ¶19. In Cooper v. Aaron, 358 U.S. 1, 18, 78 S.Ct. 1401, 1410, __ L.ED._ (1958), the United States Supreme Court unanimously, stated that:
>
> No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. . . ."

The Oklahoma Supreme Court made it clear that they take the Supremacy Clause seriously and that it applies to all judges in Oklahoma under both Constitutions.

Under the facts and controlling United States Supreme Court decisions, both the Post-conviction judge in my case, as well as the Oklahoma Court of Criminal Appeals in relying upon "Latches" despite the controlling authority of Brady, supra, and Banks v. Dretke, 540 U.S. 668, 124 S.Ct. 1266, 157 L.Ed.2d (2000) should have led 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."

Perhaps had the post-conviction judge and/or the Oklahoma Court of Criminal Appeals bothered to read the facts setting forth the violations, along with the citations of authority not only of the Oklahoma Supreme Court and the United States Supreme Court (but also of their own prior authority and controlling statutes), they would have found the initial controlling authority of Marbury v. Madison, 5 U.S. 137 (1803), setting out with specificity that the Constitution of the United States as interpreted by the United States Supreme Court is the law of the land to be followed by all judges and "a law repugnant to the Constitution is void" and not to be followed if in conflict. A judge who refuses to follow his oath of office in applying supremacy is worse than a mockery, making his taking of the oath "equally a crime." 5 U.S. 180 (1803).

Cooper v. Aaron, 158 U.S. 1, 78 S.Ct. 1401, __L.Ed __ (1958), the United States Supreme Court unanimously reaffirmed the Marbury, supra, decision.

The wrongfully convicted murder case of Fontenot v. Allbrough, 402 F.Supp.3d 1110, E.D. Okla. (1019) starting in 1984, is a glimpse of Oklahoma's "skunk works" of the OSBI, OCCA, and unethical prosecutors' prosecutions similar to Petitioner Ellis' by that alliance during the same time frame. Fortunately, Fontenot finally was before a judge who believed in "his oath of office" and followed the Constitution in a seething opinion sustaining the writ of habeas corpus (35 years after the fact).

Despite court orders, State law enforcement failed to disclose documents relevant to Fontenot's case for over twenty-five (25) years in these and post-conviction proceedings,

despite assertions of actual innocence and numerous constitutional violations, including withheld "newly-discovered evidence"; knowingly introducing false testimony; evidence insufficient to convict; state introduced inadmissible evidence from co-defendant's statement; district court knowingly introducing false testimony; evidence insufficient to convict; state introduced inadmissible evidence from co-defendant's statement; district court post-conviction and OCCA denied evidentiary hearing on "latches"; state gave only partial M.E. report; state advised there were no records to be produced; state witness who apparently got rewarded for her testimony and losing/destroying material evidence.

Fontenot held the false evidence violates "rudimentary demands of justice since Mooney v Hologan, 294 U.S. 103, 112 (1935) reaffirmed in Pyle v. Kansas, 317 U.S. 213 (1942) – with the same result when they let it go uncorrected.

Any benefits conferred on a witness for the state, must be disclosed to defense counsel (Nurse Fields, her lodging expenses, meals, lost wages, rewards, etc.) See United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 871 L.Ed.2d. 481 (1985).

Controlling United States Supreme Court supremacy cases are set out in Fontenot. [402 F.Supp.3d 1158] and are applicable in my case:

> "The Due Process Clause of the Fourteenth Amendment requires prosecutors to disclose to the defense all evidence favorable to the accused concerning guilt and penalty. Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963); Giglio v. United States, 405 U.S. 150, 153-56, 92 S.Ct. 763, 31 L.Ed. 2d 104 (1972); United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). This duty extends to, "all stages of the judicial process." Pennsylvania v. Ritchie, 480 U.S. 39, 60, 107 S.Ct. 89, 94 L.Ed.2d 40 (1987); see also Smith v. Roberts, 115 F.3d 818, 820 (10th Cir. 1997)" (emphasis supplied).

". . . Due process also places upon the prosecutor a corresponding duty to correct false or misleading evidence that is harmful to the defendant. Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

A prosecutor has an independent obligation to locate Brady materials within the possession of law enforcement. Smith v. Secretary of N.M. Dep't of Corrections, 50 F.3d 801, 824 (10th Cir. 1995); see also United States v. Buchanan, 891 F.2d 1436, 1442 (10th Cir. 1989) (discussing the failure on the part of law enforcement to disclose Brady materials falls upon the prosecutor).

". . . that prosecutors are obligated to conduct a "thorough inquiry" of police for Brady materials . . . .

. . . The U.S. Supreme Court holds that a prosecutor fails his Brady obligation when he does not obtain exculpatory, impeachment evidence that aids a defense during the pretrial process and disclose to the defense. See U.S. v. Bagley, 473 U.S. 667, 675, 105 S.Ct. 3375, 87 L.Ed.2d481 (1985); see also Kyles v. Whitley, 514 U.S. 419, 437-38,115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); Williams v. Whitley, 940 F.2d 132 (5th Cir 1991); United States v. Brooks, 296 U.S. App. D.C. 219, 966 F.2d 1500, 1500-04 (D.C. Cir. 1992). That a state court rule or law excused a prosecutor from having to disclose any evidence to defense counsel does not supersede that prosecutor's obligations under the United States Constitution. (emphasis supplied)

A prosecutor who adopts an open-file policy of disclosure does not remove his obligations under the Due Process Clause of the Fourteenth Amendment.

Strickler v. Greene, 527 U.S. 263, 283 fn. 23, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); see also Banks v. Dretke, 540 L.Ed. 668, 693, 124 S.Ct. 1256, 157 L.Ed.2d 1166 (2004) (defense counsel may rely on the prosecution's assertion that Brady evidence will be disclosed). Therefore, if a prosecutor utilized an open-file policy, the defense and courts will rely on that assertion as an assurance that all exculpatory, impeachment, and evidence that aids the defense will be within the file. That reliance extends to a defendant's post-

conviction counsel. See Strickler, 527 U.S. at 284, 119 S.Ct. 1936." (emphasis supplied)

Withheld evidence is material whenever it would have affected the course of the defense investigation, or the strategy defense counsel would have employed at trial. See Bagley, 73 U.S. at 683, 105 S.Ct. 3375.

My attorney had absolutely "no access" to anything on Post-Conviction (the lead prosecutor would not even see him or talk to him – let alone furnish evidence or even show up at the court's hearing, instead, sending an assistant who simply referred to his filed pleadings. In fact he did not even furnish statutory mandated information or explain why not – nor did the district judge care or OCCA care).

The State of Oklahoma has been playing a "shell game" with justice and lives in Oklahoma – It is time for the judiciary to be held accountable for its actions or inactions, stonewalling and turning a blind eye to the true facts and evidence.

In my case as in Fontenot [402 F.Supp.3d 1153]:

> "Laches is an equity defense based upon the premise that the undo delay penalizes the state. However, unclean hands negate an assertion of laches as the Respondent's actions contributed to the malfeasance or severe wrongdoing regarding the claims at issue."

Fontenot was told, as was my case, there were "no records" to be produced, (however in my case, there is yet to be a tribunal to allow him to subpoena those "invisible records").

In my case as in Fontenot [402 F.Supp.3d 1168]:

"The more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption. . . **[T]he reviewing court may**

consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case.

Bagley, 473 U.S. at 682-83, 105 S.Ct. 3375."

OSBI, Medical Examiner, and district attorneys contend their records and information are confidential and will not even tell defense if they have records, let alone release them. Agents and attorneys take the same stance and refuse to release or confirm to anyone but the prosecutor in the county of prosecution, even if it falls under exculpatory evidence and the United States Supreme Court's supremacy constitutional opinions. Also, the OSBI now contents they are not subject to Oklahoma's Open Records Act.

In my case, as well as in Fontenot [402 F.Supp.3d 1193]:

". . . Neither counsel for Mr. Fontenot was required to continue to seek such evidence. Banks v. Dretke, 540 U.S. 668, 695, 124 S,Ct, 1256, 157 L.Ed.2d 1166 (2004) (holding that defense counsel is not required to scavenge for evidence the State was obligated to disclose). Instead they are entitled to rely on the prosecution to do its job in meeting its constitutional obligations to disclose such evidence. "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed Brady material when the prosecution represents that all such material has been disclosed. As we observed in Strickler, defense counsel has no 'procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred.'" Id. at 695-696, 124 S.Ct. 1256.

. . .

. . . the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that 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.

Kyles, v. Whitley, 514 U.S. at 437, 115 S.Ct. 1555."

[402 F.Supp.3d 1194]

The United States Court of Appeals For the Tenth Circuit held (in the 190 page

opinion) Fontenot v. Crow, 4 F.4th 982 on July 13, 2021, at Page 982:

> "The State's arguments for reversing that order lack merit. Mr. Fontenot has brought forth new evidence that is sufficient to unlock the actual innocence gateway and to allow his substantive claims to be heard on the merits. And Mr. Fontenot has also established that evidence suppressed by the State prior to his new trial in 1988 led to a violation of his constitutional right to due process. Exercising jurisdiction under 28 U.S.C. §2253(a), we affirm the district court's grant of Mr. Fontenot's petition for habeas relief to prevent the further perpetuation of a fundamental miscarriage of justice."
>
> ("The prosecutor's obligation under Brady is not excused by a defense counsel's failure to exercise diligence with respect to suppressed evidence."); United States v. Tavera, 719 F.3d 705, 712 (6th Cir. 2013). . . "[t]he Brady rule imposes an independent duty to act on the government," Tavera, 719 F.3d at 712. . . ." [1066].

The State petitioned the United States Supreme Court following the Tenth Circuit affirming of the Muskogee Federal District Court, as the predecessor Attorney General was concerned too many defendants would take advantage of the innocence holding. The United States Supreme Court denied the State's Petition for Certiorari on June 6, 2022.

CONCLUSION

So far, the prosecutors, judges, state agencies, and OBA agencies have all taken the position that their oaths as attorneys, oaths as judicial officers, and/or others as OBA and state agency personnel have ignored/refused to follow the Oklahoma Supreme Court's directives, as well as the supremacy of controlling United States Supreme Court decisions as mandates to be followed by thee, but not me.

I know of no exception, nor have the "me's" shown why or how they are exempt from the basic guidelines of supremacy, Due Process or other constitutional controlling authority.

My attorney had requested the Chief Justice and Oklahoma Supreme Court take the Ellis case, appoint counsel and investigators to obtain the discovery refused Ellis and ultimately enter a ruling on the merits similar to that received by co-defendant Boston as I did not feel that the OCCA nor the OSBI would ever honestly review this incident nor apply the supremacy clause of the United States Supreme Court controlling cases cited in detail in the documentation submitted to him.

Instead, the Oklahoma Supreme Court by order in Case Number 121,102 on March 6, 2023, transferred it back to the Court of Criminal Appeals (OCCA) with all justices concurring "as it has exclusive juris over criminal matters.", along with all documentation presented to the Chief Justice under seal as "SENSITIVE AND CONFIDENTIAL."

The OCCA in Case Number HC-2013-174, on March 14, 2023, in a two paragraph "Order Denying Petition For Writ of Habeas Corpus" denied relief in my case, concluding:

> ". . . Based upon the record provided in this matter, Petitioner has failed to show that he is entitled to the relief requested. Petitioner has not cited any authority which establishes that his confinement is unlawful or that he is entitled to immediate release.";

without justifying their bald conclusion nor showing the non-applicability of the numerous controlling Supremacy of any of the United States Supreme Court decisions and the Tenth Circuit cases, including Fontenot, supra.

The records filed with the OCCA Volumes 1 and 2, contain basically the same allegations, sworn statements and authorities contained in this Petition For Writ of Certiorari.

The OCCA was not deterred by the Oklahoma Supreme Court's Opinions of the necessity for all courts to follow their oath and to give access to courts or supremacy of the United States Supreme Court's controlling decisions.

The similarities in Fontenot and the Ellis case are horrifying and should never occur in a free society. Fontenot's co-defendant Ward was granted relief on post-conviction by a district court recently and the OCCA wasted no time in reversing that decision on their judge man-made rule of "latches" and other procedural bars virtually identical to my case.

A brief review of the OCCA's ruling is absolutely essential to understand the gravity of the completely out of control current criminal justice system in Oklahoma, see State v. Ward, No. PC-2021-8, PR-2020-958, filed August 26, 2022.

Ward asserted in his Post-Conviction Application for Relief:

> "(1) newly discovered evidence required the conviction and sentence to be vacated, and (2) because the prosecutor failed to disclose exculpatory evidence and solicited or failed to correct false testimony."

The State asserted "res judicata", waiver and latches barred consideration of Ward's claims.

The Post-conviction trial judge granted relief, holding the State suppressed exculpatory evidence that was material in violation of Brady which required the sentence to be vacated.

The OCCA held the trial judge's decision (in following Brady, oath of office, Oklahoma and United States Supreme Court controlling cases) was an "abuse of discretion" or an "unreasonable or arbitrary action" and unanimously reversed the decision.

The OCCA's Ward decision and their decision in my case are also in direct violation

of the United States Supreme Court's specific admonition in Bosse v. Oklahoma, 137 S.Ct. 1, 196 L.Ed 2d 1 (2016), vacating the OCCA's decision holding a United States Supreme Court Opinion of Booth v. Maryland, 482 U.S. 496 (1987) had been implicitly overruled:

> "It is this Court's prerogative alone to overrule one of its precedents, and until the time it does, the Oklahoma Court of Criminal Appeals remains bound by the United States Supreme Court decisions."

Unfortunately, the United States Supreme Court does not have the time or resources to continually monitor/chastise/overrule the OCCA for its failure to follow the supremacy clause and the OCCA is basically free to modify/ignore/overrule these opinions at well without any consequences whatsoever.

It doesn't matter how strong an opinion, statute, or professional ethics rule is written by the Oklahoma Supreme Court or United States Supreme Court – unless the other courts, prosecutors or authorities have the fortitude to enforce it – the document is no more than an advisory, utopian proclamation. The prosecutors, judges, agencies, law enforcement officers have established that they are incapable of policing themselves.

Oklahoma law enforcement, both prosecutors and judges, have resolved a way to avoid the Brady issue and other controlling Supremacy cases by merely withholding exculpatory evidence/advising that they have nothing exculpatory/falsely advising that it has been lost and then "stonewalling" the defense by refusing to say or do anything.

An even more glaring example of the OCCA's actions are the pending cases before this Court of Glossip, Richard E. v. Oklahoma, Case No. 22A941, Writs of Certiorari Nos. 22-6500 and 22-7466, involving similar actions by the State as were committed in my case by them. I understand the last case had to be filed by Oklahoma Attorney General Gentner

Drummond because of the actions of the OCCA and others.

It doesn't matter how strong an opinion, statute, or professional ethics rule is written by the Oklahoma Supreme Court or United States Supreme Court – unless the other courts, prosecutors or authorities have the fortitude to enforce it – the document is no more than an advisor, utopian proclamation. The prosecutors, judges, agencies, law enforcement officers have established that they are incapable of policing themselves.

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 Ellis

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Date: 06/09/2023

Appendix A