

Case No. 17-6872

TERRY D. LOMACK - PETITIONER

-Vs-

JIM FARRIS - RESPONDENT

ON PETITION FOR A REHEARING OF THE WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR FOR A REHEARING WRIT OF CERTIORARI

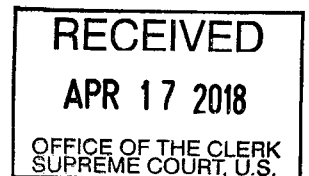
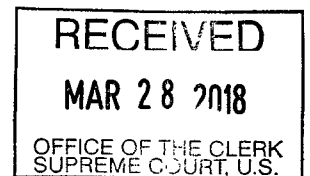
TERRY D. LOMACK

LEXINGTON CORRECTIONAL CENTER

P.O. Box 260

Lexington, Oklahoma 73501

Phone # "None"



INTRODUCTION:

Terry D. Lomax the Petitioner is a layman in law appearing and proceeding pro se and pursuant to S.Ct Rule 44 (2) to Petition For Rehearing of His Writ Of Certiorari Petition the Court denied on February 20th 2018.

The Petitioner Lomack is a Oklahoma State prisoner convicted in 2001 by a Oklahoma State District Court Jury trial of Kidnapping, Felonious Pointing Of Firearm and and Felon in possession of a Firearm After Former Conviction of two Felonies against the alleged victim Darrell Ray Shavers the State's crucial Star witness. Petitioner was sentenced to 200 years imprisonment.

Petitioner represented by counsel timely filed for discovery materials from the State prior to the jury trial and the State alleged it complied with the defense discovery request.

Petitioner was represented by counsel on direct appeal of the conviction and the appellate court denied the appeal.

Petitioner pro se filed in the State Courts 5 Post-Conviction relief applications and counsel filed a post-conviction relief application. The State court granted a evidentiary hearing on the application filed by counsel and the State courts denied all applications and affirmed the denials on appeal.

Petitioner federal habeas Petition was denied by the W.D. Oklahoma U.S. district Court and the Tenth Circuit Court of appeals construed the Petitioner's Rule 60 (b) Motion into a unauthorized Second and Successive Habeas Application

The Petitioner Lomack appeared and proceeded Pro se in the U.S. Tenth circuit Court of Appeals and filed an Application For Authorization To File In the U.S. Western District Of Oklahoma A Second and Successive Habeas Application.

The Petitioner exercising of reasonable due dilligence discovered new evidence in 20 of:

- (1) the alleged victim State witness Shaver recantation of his 1st and 2nd probable cause statements to police officers Atchely and Capra, and recantation of both his preliminary hearing and jury trial testimony and failures to disclose to the defense;
- (2) the State withholding, concealing and suppressing of exculpatory and impeachment evidence of the victim shavers handwritten Affidavit (denying knowing the identities of the 4 alleged perpretrators of the false crimes the alleged victim Shaver reported and submitted to the crime reporting police officer Atchely ;
- (3) the fabricated probable cause affidavit of the reporting Officer Atchely;
- (4) The Judge declining to issue an arrest warrant for the Petitioner based on the officer Acthley fabricated probable cause affidavit and the Affidavit of the alleged victim Shaver; and
- (5) a prosecution leniency deal it made with the State's critical witness the alleged victim Shaver in exchange for his perjured trial testimony;

Petitioner represented by counsel filed a Post-conviction relief Application in the State trial court asserting a insufficient evidence to sustain the guilty verdict 14th Amend Due Process claim and a Brady violation 14th Amend due process claim and based both claims on the newly discovered evidence above.

The trial court conducted a evidentiary on the two claims receiving testimony from:

- (1) the alleged victim Shaver recanting his probable cause statement, testiomony at the preliminary hearing and at the jury trial and therein disclosing the

prosecution leniency deals between Shaver and the State in exchange for his 2nd perjured probable cause statements, his perjured preliminary hearing and jury trial testimony and further disclosing the newly discovered evidence that the State solicited the 2nd perjured (i) probable cause statements, (ii) preliminary and (iii) jury trial testimony from Shaver and allowed those known perjured probable cause statements and testimony to go uncorrected and relied upon them to obtain the wrongful convictions of the Petitioner Lomack.

(2) The State D.A. Slabosky denying a prosecution leniency deal made with the alleged victim State witness Shaver in exchange for his testimony;

(3) Investigating Officer Capra denying a prosecution leniency deal made with the alleged victim State witness Shavers in exchange for the 2nd probable cause statements, and testimony at preliminary hearing and jury trial.

The trial court after the evidentiary hearing denied the Petitioner's Application for Post conviction relief on the grounds the recantation testimony of the alleged victim State witness Shaver was not credible or reliable. The OCCA affirmed the trial court denial on appeal.

The Petitioner Pro se filed a subsequent Post-conviction relief application in the trial court asserting a 14th U.S.C.A. Due Process Claim under Naupe on the sufficient cause reasons the underlying material facts never heard by the court or jury was unavailable until it disclosed during the post-conviction evidentiary hearing testimony.

The Trial court denied the application on procedural bar grounds and the Petitioner appealed pro se to the OCCA and the OCCA affirmed the trial court denial.

Pro se the Petitioner Lomack filed in the Tenth circuit an application for authorization to file in the Western District Of Oklahoma, U.S. District court the proposed second and successive state prisoner habeas Corpus writ Petition. The Application and proposed Petition both asserted 3 separate and distinct 14th Amend Due process claims that: (1) The Evidence Was Insufficient To Sustain The Verdicts; (2) The State Withheld From the Requesting Defense Exculpatory and

Impeachment Evidence-Brady; (3) The State Solicited Perjured Testimony From The State's Star Witness the alleged Victim-Napue;

The appellate court authorized the Petitioner Lomack to file the proposed habeas petition in the district court on the Napue claim of error.

The district court's judge Cautheron, without an application for appointment of counsel or a *informa pauperis* affidavit from the Petitioner Lomack, conducted a *ex parte* meeting with the chief federal public defender Susan Otto and appointed Otto as habeas counsel for the Petitioner.

Appointed defense counsel Otto filed a different from the authorized proposed second or Successive Habeas Petition and asserted the unauthorized by the appellate court for filing, Brady 14th Amend Due process claim of error and failed to attach to the Petition or otherwise present the application for authorization, the proposed second or successive habeas Petition and the authorization order of the appellate court.

The U.S. magistrate R & R, found that the second or successive habeas Petition filed asserts a Brady 14th Amend Due Process Claim, that is not the same and different from the Napue 14th Amend claim the petitioner presented and relied on in the appellate court to obtain the authorization order, in addition to the Petition failed to present the application for authorization, the authorization order or the alleged victim State Witness Shaver recantation affidavit or testimony (factual predicate and actual innocence evidence) and attempted to present new evidence of a co-defendant affidavit. Further the U.S. Magistrate on the merits of the Brady recommended it be dismissed.

Pro se the Petitioner filed in the District court an objection to the R & R and his complaints against the court appointed counsel Otto sabotage of the Petitioner's second and successive authorization and the judge Cautheron unauthorized appointment of counsel Otto to the case.

Judge Cautheron granted counsel Otto withdrawal motion and adopted in full the R & and further judge Cautheron denied the Petitioner's Pro se Rule 52, 59 and 60 Motion.

Petitioner appealed the district court denials to the appellate court and the court declined to issue a COA on the Brady 14th claim on the grounds and for the reasons the Napue and Brady claims both 14th Amend Due Process of Law grounds of error and denied the Petitioner's challenges to the unauthorized ex parte appointment of counsel Otto on the grounds and for the reasons that judge Cautheron sua sponte appointment of counsel Otto was not an abuse of discretion.

The appellate court denied the Petitioner Motion for A Rehearing and the Petitioner Pro se filed in the U.S. Supreme Court a Certiorari and the Supreme Court on Feb. 20th 2018 denied Certiorari and the Petitioner now files for a Rehearing.

PETITIONER REQUEST A REHEARING ON THE CLAIMS THAT THE DISTRICT COURTS ARE WITHOUT SUBJECT-MATTER JURISDICTION TO CONSIDER OR ADJUDICATE CLAIMS THE APPELLATE COURT ORDER AUTHORIZING A FILING OF A SECOND OR SUCCESSIVE PETITION DECLINED TO AUTHORIZE.

The Petitioner's appellate court application for authorization to file in the district court the proposed and attached thereto Habeas Petition asserted 3 separate and distinct 14th amend Due Process ground of error claims that (i) the evidence was insufficient (ii) Brady and (iii) Napue and of those 3 claims the appellate court authorized for filing in the district court the Napue 14th amend claim.

In the District Court court appointed counsel Otto filed a different from the application for authorization and the proposed second or successive habeas petition, second or successive Habeas Petition asserting the unauthorized by the appellate court Brady claim. The U.S. Magistrate R & R identified the Brady claim was not the same as the Napue claim the appellate court authorized the Petitioner Lomack to file and the Petitioner agreed with that portion of the R & R in his District Court Objections to the R & R, and the District Court adopted in full the R & R. The Ninth circuit in identified this type of switching of an appellate court

authorized claim with that of a unauthorized by appellate claim filing in the district court, as a bait and switch activity of the Petitioner in that the Petitioner baits the appellate court with one claim to obtain its authorization to file in the District Court an entire second and successive habeas petition and with that authorization the Petitioner then files in the district court a second or successive habeas petition asserting a claim that the appellate court did not authorized for filing in the District court.

The appellate Court to evade the jurisdictional quigmore created by court appointed counsel and the district Court affirmance of the R & R, devised a contrary to and objectively unreasonable application of the controlling and governing 14th Amend Due Process of law in Smith v N. M. Secy of DOC, 50 F.3d 801, 822- 828 nn. 32-35 (10th Cir. 1995) (demonstrating the Brady claims although similar to a Napue/Pyle claim is the same in facts, elements or law) findings and conclusions that the Brady claim that court appointed counsel Otto asserted in the second or successive habeas petition was one and the same as the Napue claim the appellate court authorized the Petitioner to file in the District Court.

According to the Tenth Circuit court of appeals, its the authorization of the Napue , claim, authorized the Petitioner to file in the District court at the second gate the entire application for authorization i.e. 3 due process claims and/or the attached to the application proposed habeas Petition and containing the 3 due process claims and that it is § 2244(b) that vests the district court with subject-matter jurisdiction to dismiss any of the claims contained in the application for authorization and/or in the proposed second or successive Habeas Petition, regardless of whether those claims have been authorized for filing in the district court by the appllate court.

The Petitioner's COA in the appellate court raised and challenged the district court lacked subject-matter jurisdiction to adjudicate at the second gate the unauthorized by the appellate court, the Brady claim asserted by court appointed counsel Otto and identified the plain and unambigious language of 2244(b)(3) stated the District Court has authority to dismiss any claim that the appellate

court had authorized to be filed in the district court in a Second and Successive Habeas Petition.

In the Petitioner's case the second and successive habeas petition filed by court appointed counsel Otto did not even contain the appellate court authorized **Napue** claim and asserted a **Brady** claim that the appellate court declined to authorize for filing in the federal district court.

The R & R confirmed the claims were different and that R & R was adopted in whole by the District Court and the appellate court itself engaged in a bait and switch tactic to deny relief Petitioner appellate relief on the ground of error claims.

The resolution of this issue by the nations highest authoritative court as to this dispositive question of whether the Napue 14th Amend Due process claim is one and the same as or a different from, a Brady 14th Amend due process claim is one of a great importance to criminally convicted defendants in the State and Federal courts alike.

Additionally, this Court was put on notice that the The Federal district and appellate court alike are in conflict as to whether the appellate court authorization of to file one of several claims in the proposed second and successive Habeas Petition authorizes the prisoner to file the whole proposed petition and vests the district court with jurisdiction to consider and adjudicate whether the authorized and unauthorized claims asserted in the proposed Habeas Petition meets the second or successive statutory criteria to proceed to an adjudication on the underlying merits of the claims. See, the decisions of the federal courts id. create a inter circuit split with tenth circuit's decisions in **In Re Cline** and **Case** and creates a split with the tenth circuit's lower federal district court in the N.D. Oklahoma, in **U.S. v. Copland** 2017 WL 4819108 as well as creates a split with 4th, 5th, and 9th Circuits' decisions in **Winstock v. U.S.** 340 F.3d 200, 205 (4th Cir 2003) **Swearington**, S.D. Tex 2009 WL 276757 **1-2; **In Re Swearington**, 556 F.3d 344, 346 and n 3 (5th cir. 2009) **Nevius v. McDaniel**, 104 F. 3d 1120 (9th Cir. 1996); and **Cooper v. Woodford** 358 F.3d 1117, 1123 (9th Cir. 2004)(en banc) holding the the court of appeals order authorizes the proposed,

not different amended or new second or successive habeas application and claim filing in the federal district court and the federal district court's second or successive subject-matter jurisdiction is limited and restricted to a merit adjudication of the authorized by the court of appeals second or successive habeas application and claim, having only a lack of subject matter jurisdiction dismissal of any unauthorized second or second habeas application or claim filed in the federal district court.

It is this Court's calling to resolve this jurisdictional conflict between the federal appellate circuits and district courts. This is an issue of grave importance as to which second or successive claims authorized by the appellate court that the Statute vests the district court with subject-matter jurisdiction to adjudicate at the second-gate.

Your Petitioner adamantly argues and claims under the statutory provisions of **28 U.S.C. § 2244**, regardless of whether the appellate court order authorization of one of several claims, authorizes the Petitioner to file the entire application for authorization or its proposed second or successive Habeas Petition, the plain language of Statute vests the district court with subject matter jurisdiction only to adjudicate the claim that the appellate court authorized for a filing in the district court and to dismiss the claim that the appellate court authorized for filing in the district court, if that claim does not meet the second or successive statutory criteria for an adjudication on the merits by the district court.

Nowhere in the Second or successive statutes is there any language or provision inferring that congress intended to or did vest to the district courts the subject-matter jurisdiction to consider and adjudicate any claim not certified by the appellate court, to determine whether it meets the statutory criteria for a second or successive habeas Petition

The Appellate court's interpretation of AEDPA §2244(b) renders null and void Congress plain and unambiguous language that the district court is to dismiss any claim authorized by the appellate court that fails to satisfy the statutory criteria as a second or successive habeas claim for an adjudication on the underlying merits.

For the above reasons the Petitioner moions this honorable for a Rehearing on the claim.

WHETHER THE DISTRICT COURT WAS VESTED WITH AND HAD A ABSOLUTE DISCRETION TO SUA SPONTE APPOINT HABEAS COUNSEL TO THE PETITIONER FOR THE AUTHORIZED SECOND OR SUCCESSIVE HABEAS CASE IN THE DISTRICT COURT.

The Petitioner's Certiorari Appeal asserted the claim of whether the District Court has statutory authority to appoint counsel to a habeas petitioner in the absence of a pauper affidavit establishing the Petitioner to be indigent as required by 18 U.S.C. § 3006.A

The Facts surrounding the appointment showed that the chief public defender for the U.S. District court W.D. of Oklahoma during a ex parte meeting with the federal district court judge Cautheron, was appointed as counsel for the Petitioner in the absence of a pauperis affidavit or appointment of counsel motion being filed. To conceal the unauthorized appointment of counsel the Judge falsely recorded in the appointment order that it was based on a pauperis affidavit filed by the Petitioner Lomack in the District Court. The Petitioner attached to his objection to the R & R and COA application a copy of Habeas Corpus counsel Otto correspondence verifying the appointment the result of an ex parte meeting between Otto and the Judge and the appointment irregular.

The Judge Cautheron has yet to deny that no pauper was filed in the court by the Petitioner, nor has the Judge, court or any of the officers of the court produced the pauper the judge claims the Petitioner to have filed in the court that the judge purportedly relied upon for appointing Otto as habeas counsel. Nor has anyone with the exception of the appellate court denied the appointment was ex parte. The Appellate court despite the Otto correspondence being prima facie evidence of the exparte appointment, termed the appointment of Otto by the Judge was sua sponte.

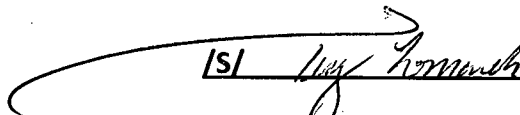
There exist no factual basis in the record supporting the appellate court findings or conclusions the appointment of Otto by Judge Cautheron was sua sponte and even if it was and was not , the appointment remained unauthorized under 28 U.S.C. § 3006.A. in the absence of the pauper affidavit establishing the Petitioner without sufficient funds to acquire Habeas counsel in this case.

Appointed counsel Otto sabotaged the Petitioner's second or successive authorization to file in the District Court his Napue 14th Amend Due Process claim and as of this filing the Petitioner has not been afforded the opportunity to file and litigate that Napue claim in the district or appellate courts.

PRAYER FOR RELIEF

For the reasons above the Petitioner respectfully requests this Honorable Court grant him a Rehearing on this claim and remand this matter to the Appellate court for appropriate relief reinstating the Napue claim for filing in the District Court Pro se .

It Is So Prayed on this 15th day of March 2018 and respectfully submitted by the undersigned Pro se Petitioner Terry D. Lomack,

 ISI Terry Lomack Petitioner
Terry Lomack, ODOC #276883

Lexington Correctional Center (LCC)

P.O. Box 260

Lexington, Oklahoma

73051

I Petitioner Terry Lomack, states, certifies, and verifies under the penalty of perjury laws 18 U.S.C. §1746; 28 U.S.C. § 1621 that above facts and information here-in are true and correct and based on the Petitioner Lomack's personal knowledge.

Executed by the above signed Petitioner on this 15th day of March 2018, at Lexington Correctional Center (LCC) located in Lexington, Oklahoma 73051

CERTIFICATION OF UNREPRESENTED BY COUNSEL PETITIONER:

Petitioner Terry Lomack, appearing Pro se certifies that the above grounds in the Rehearing limited to other substantial grounds not previously presented are as specified in S. Ct. Rule 44(2) and this Rehearing Petition is presented in good faith and not for delay.

/s/ Terry Lomack, Terry Lomack Pro se Petitioner.

CERTIFICATE OF SERVICE

I, Terry Lomack, the undersigned mailer hereby certify under penalty of perjury laws id that on this 16th day of Mar. 2018 I have in 1st class prepaid postage mailed true and correct originals to the U.S. Supreme Court and true and correct copies to the Attorney general addressed as set forth below:

United States Supreme Court

1 1st St. N.E.

Washington, D.C. 20543-0001

Oklahoma State Attorney General's Office

Thomas L. Tucker, Asst Atty Gen. OBA # 20874

313 N.E. 21st Street

Depositing the same in the prison legal mail system at the Lexington Correctional Center for administrative processing and depositing with the U.S. Postal Services for delivery to the addressee above.

(mailer)

/s/ Terry Lomack