

No. 25-5997

IN THE
Supreme Court of the United States

TREMANE WOOD,

Petitioner,

v.

OKLAHOMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF OKLAHOMA

**BRIEF OF ETHICS EXPERTS,
BRUCE A. GREEN, LAWRENCE K. HELLMAN,
PETER A. JOY, W. BRADLEY WENDEL, AND
ELLEN C. YAROSHEFSKY AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI*¹

Amici are five legal ethics scholars whose scholarship, teaching and professional service focus on legal ethics and professional responsibility, including the professional norms of prosecutors and judges in the criminal justice system. Over the course of their careers, *Amici* have published well-respected and widely cited scholarship on legal ethics. Collectively, *Amici* have contributed to the enactment of the ABA Rules of Professional Conduct, the ABA Standards for the Prosecution Function, the ABA Model Code of Judicial Conduct, and the Oklahoma Rules of Professional Conduct. *Amici* also regularly offer their perspectives to courts, judiciary committees, and other public bodies on this topic. They are uniquely well-suited to consider the professional conduct of prosecutors and judges, and to address the intersection of legal and judicial ethics. A full list of *Amici* appears as an Appendix to this brief. *Amici* submit this brief in their individual capacities.

SUMMARY OF ARGUMENT

“One of the most fundamental social interests is that law shall be uniform and impartial. There must be

1. No counsel for a party authored this brief, in whole or in part, and no entity or person, other than *amici*, their members and counsel made a monetary contribution to fund the preparation or submission of this brief. This brief is filed earlier than ten days prior to its due date.

nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness.”² Unauthorized *ex parte* communication between judges and parties, especially about matters of substance, violates the foundational principles that have long governed the legal profession and threatens the essential elements of due process of law.

Petitioner, Tremane Wood, asserts that the State of Oklahoma committed multiple due process violations against him at his capital trial. While his appeal addressing those claims remained pending before the Oklahoma Court of Criminal Appeals (OCCA), the Attorney General of Oklahoma and the Presiding Judge of the OCCA exchanged a series of *ex parte* emails about the State’s ongoing efforts to marshal new evidence against Wood for the State’s opposition to his request for executive clemency. Once these events came to light, the Presiding Judge declined to recuse himself from the underlying case, summarily denied a motion to sanction the Attorney General, and authored the opinion denying relief on the merits of Wood’s appeal. This brief addresses the serious ethical breaches involved in these events.

STATEMENT OF FACTS

On November 5, 2024, Wood filed a successive application for postconviction relief alleging he had obtained newly discovered evidence that entitled him to both guilt- and sentencing-phase relief under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959). (App. 84a). The OCCA found Wood’s proffered evidence sufficiently compelling to satisfy

2. Cardozo, *The Nature of the Judicial Process*, p.112 (1921).

Oklahoma’s procedural requirements for successive petitions and ordered the district court to hold an evidentiary hearing.³ (App. 146a). District judge Susan Stallings heard testimony from twelve witnesses over a period of three days in April 2025. Just four days after receiving proposed orders, Judge Stallings signed an order denying relief. (App. 24a). It is undisputed that she adopted her factual findings and conclusions of law verbatim from the State’s proposed order, including typos and other errors. (App. 268a). Indeed, on Friday, October 31, 2025—after Wood’s Petition for Writ of Certiorari was docketed with this Court—the State produced an email from Judge Stallings, dated May 7, 2025, in which she forwarded her opinion to prosecutor Fern Smith and stated she “can’t take credit” for the analysis because “[i]t’s the proposed Findings from the AG’s office. They did do an outstanding job.”⁴

Wood appealed to the OCCA, and both parties filed simultaneous briefs on May 20, 2025. (App. 265a). Shortly thereafter, the State filed a “Notice Regarding Execution of Death Warrant,” asking the OCCA to schedule Wood’s execution for September 11, 2025. Wood opposed this

3. Because they were implicated by Wood’s prosecutorial misconduct claims, two members of the OCCA were replaced by justices of the Oklahoma Supreme Court by assignment. *See* 20 OK Stat § 1402(C) (2024) (describing the procedure for assignment of substitute judges).

4. Judge Stallings’ email is attached to this brief as Appendix B. This email surfaced during a hearing regarding whether Judge Stallings should recuse herself from Richard Glossip’s retrial due to her close ties to Fern Smith, who prosecuted Glossip. The State produced the email with acknowledgement that it refers to Judge Stallings’ order denying relief to Wood.

request, arguing that the court should refrain from setting a date while his appeal on the merits of his *Brady* and *Napue* claims remained pending. In response, the State—represented by Oklahoma Attorney General Gentner Drummond—maintained its request for a September 11 execution date, asserting that the OCCA had a “mandatory” and “nondiscretionary duty” to schedule the execution, and claiming there was no valid, legal basis for delay.⁵

On July 15, 2025, while both Wood’s appeal and the State’s opposed request for an execution date remained pending before the OCCA, Drummond sent an *ex parte* email to Presiding Judge Gary Lumpkin asking that the OCCA *not* set an execution date for September 11 because the State was investigating “ongoing and extensive criminal activity” on the part of Wood while in prison awaiting execution. (App. 292a). Drummond listed his allegations against Wood, as follows:

5. In addition, the State argued that Wood’s pending appeal had no likelihood of success on the merits because Judge Stallings had rejected his claims following a “thorough and meticulous review” of the evidence. Although this brief focuses on the impropriety of *ex parte* communications, it is worth noting that verbatim adoption of party-drafted orders likewise smacks of bias and has been widely condemned. *See e.g., Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 572 (1985) (criticizing “courts for their verbatim adoption of findings of fact prepared by prevailing parties”); *Hamm v. Commissioner, Ala. Dep’t of Corr.*, 620 Fed. App’x 752, 756 n.3 (11th Cir. 2015) (denouncing “the practice of trial courts’ uncritical wholesale adoption of the proposed orders or opinions submitted by a prevailing party.”); *State v. Roberts*, 850 N.E.2d 1168, 1189 (Ohio 2006) (“The scales of justice may not be weighted even slightly by one with an interest in the ultimate outcome.”)

1. [The Department of Corrections (DOC)] has recovered three cell phones from Wood while on H-Unit, from which he has ordered one “hit” on a prisoner, engaged in illegal texting with his public defender and a county judge’s clerk, contains videos of drug use while in DOC, contains photographs of Wood holding numerous \$100 bills, and records drug transactions outside the prison system.
2. To accomplish these acts, it is more likely than not that Wood is working in collusion with prison personnel.

Id. Drummond told Lumpkin the State wanted to delay the execution to allow sufficient time to complete an investigation before presenting an objection to clemency to the Pardon and Parole Board at the upcoming mandatory, pre-execution hearing. Drummond’s email concluded:

To this end, I ask that we not set Wood’s execution for September 11, 2025. I am happy to drop by to discuss this request in person tomorrow or to discuss telephonically. Thank you in advance for your indulgence in this request.

Id. Judge Lumpkin responded later that evening:

General: We are scheduled to discuss setting execution dates at our conference on 23 July. We are all attending summer judicial conference this week. I will need to share this email with

other judges to have a discussion on 23 July. Is that timing OK or is this something that will need attention prior to that time? Please let me know. As you are aware Woods [*sic*] attorney has filed an objection to setting execution date and that is reason [*sic*] we need to discuss at conference. I will await your response prior to discussing with other judges so I will know if the 23 July discussion with them will be soon enough or if the situation requires earlier discussion.

Id. Drummond answered the following day, “[w]e do not need the Court to consider setting the date before your July 23 conference.” (App. 291a).

Judge Lumpkin responded at 7:50 p.m. that evening, “I need to clarify that the Court cannot take any action or make any decisions based on proffered ex parte communications.” *Id.* He stated the purpose of his previous email was “merely to determine if something was going to formally be presented to the Court.” *Id.* Lumpkin advised Drummond that the court could entertain any “formal, properly filed request presented, even a request to file a matter under seal.” *Id.*

The next morning, Drummond thanked Judge Lumpkin for his “prompt reply,” but stated he would not be filing any formal pleadings because he did not want to “tip off Mr. Wood.” (App. 310a). He explained that the State “would rather have a September 11 execution date than compromise the investigation through providing Mr. Wood notice of the investigation.” *Id.*

It appears that Judge Lumpkin did, in fact, share the *ex parte* communications he received from Drummond with his colleagues because on July 29, 2025, fourteen days after Drummond's initial *ex parte* email to Judge Lumpkin, the OCCA issued an order to show cause, stating Presiding Judge Lumpkin received "an *ex parte* email communication from the State of Oklahoma requesting this Court instead set execution approximately thirty days further out than the originally requested September 11, 2025." (App. 280a-281a). The order was signed by Judge Lumpkin, two OCCA judges, and two justices of the Oklahoma Supreme Court who had been assigned to replace two recused OCCA judges for consideration of Wood's *Brady/Napue* appeal. The Order did not disclose the contents of Drummond's *ex parte* communications but stated they were governed by Oklahoma Code of Judicial Conduct Rule 2.9 and would be disclosed within ten days "unless good cause is shown that a later date would be necessary due to an ongoing emergency." (App. 281a).

Drummond filed a response under seal reiterating his allegations against Wood and asking that his email exchanges with Judge Lumpkin remain *ex parte* so as not to compromise the investigation. (App. 296a-301a). On August 7, 2025, the OCCA ordered that the emails be disclosed to Wood's counsel under seal and instructed Wood to file any response within ten days. (App. 288-289a). Wood's counsel obtained a copy the next day.

Now apprised of the *ex parte* communications that occurred 24 days earlier, Wood's counsel moved to recuse Judge Lumpkin and sought sanctions against Drummond. (App. 317a). With Judge Lumpkin presiding, the same five judges denied both motions in a single order. (App.

331a). The court concluded recusal of Judge Lumpkin was not warranted because the *ex parte* communications “concerned only matters of scheduling.” (App. 335a). The opinion offered no reasoning for its denial of sanctions against Drummond, stating only “[b]ased on our review, the motion is denied.” (App. 337a). Two business days later, the same court issued an order, authored by Judge Lumpkin, denying the merits of Wood’s *Brady* and *Napue* claims. Lumpkin concluded that Judge Stallings’ findings were “fully supported by the record.” (App. 12a). He did not address Wood’s objection that the State drafted Stallings’ order.

ARGUMENT

I. Rules of Professional Ethics Prohibit *Ex Parte* Contact Between Judges and Litigants.

With but narrow exceptions, *ex parte* communications between counsel for one party and a judge regarding pending matters are impermissible in the American judicial system. This proposition has been articulated in codes of conduct for lawyers since 1908⁶ and for judges since 1924.⁷ Today, virtually every state, including Oklahoma, maintains enforceable rules prohibiting *both judges and*

6. ABA: Canons of Professional Ethics (1908) at Canon 2 (“A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor.”)

7. ABA: Canons of Judicial Ethics (1924) at ¶¶ 16-17 (“Ordinarily all communications of counsel to the judge, intended or calculated to influence action should be made known to opposing counsel.”)

lawyers from engaging in such communications—whether by statutory restriction, custom, codes of conduct, or some combination thereof. The reasons for such uniform condemnation are obvious:

Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side’s case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments.⁸

In addition, “[e]ven if a judge has correctly decided a case, judicial exposure to *ex parte* communications creates the appearance of impropriety, which undermines public confidence in the judicial system.”⁹

Oklahoma law prohibits lawyers from communicating *ex parte* with a judge, regardless of the purpose of the communication, but certainly when the *ex parte*

8. *Rose v. State*, 601 So.2d 1181, 1183 (Fla. 1992).

9. Leslie W. Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, 37 HOUS. L. REV. 1343, 1356 (2000).

communication seeks to influence a judge regarding a pending matter. Oklahoma Rule of Professional Conduct 3.5 provides:

A lawyer shall not: (a) seek to influence a judge . . . by means prohibited by law; [or] (b) communicate *ex parte* with such a person during the proceeding unless authorized to do so by law or court order.¹⁰

Further, Oklahoma Rule of Professional Conduct 8.4(f) establishes that a lawyer commits professional misconduct when knowingly assisting a judge to violate rules of judicial conduct.¹¹

Correspondingly, judges have an affirmative obligation not to permit or participate in improper *ex parte* communications initiated by lawyers or others. Oklahoma Code of Judicial Conduct (CJC) Rule 2.9 provides: “A judge shall not initiate, permit, or consider *ex parte* communications . . . concerning a pending or impending matter.”¹² This rule allows for some exceptions, including

10. Oklahoma Rules of Professional Conduct (ORPC) Rule 3.5, Title 5, O.S. Ch. 1, App. 3-A; *see also*, Rule 4.10(a), Okla. Bar Ass’n Standards of Professionalism (“ . . . we will avoid *ex parte* communications involving the substance of a pending matter with an assigned judge”); ABA Criminal Justice Standards—Prosecution Function, Standard 3-2.8 (“prosecutor should not engage in unauthorized *ex parte* discussions with or submission of material to a judge relating to a particular case which is or may come before the judge.”)

11. ORPC Rule 8.4(f) (“It is professional misconduct for a lawyer to knowingly assist a judge . . . in conduct that is a violation of applicable rules of judicial conduct or other law.”)

12. CJC Rule 2.9(A), O.S. Title 5, Ch. 1, App. 4.

for communications related to “scheduling,” but only under a narrow set of circumstances, as follows:

- (1) *When circumstances require* it, ex parte communication for scheduling, administrative, or emergency purposes, *which does not address substantive matters*, is permitted, *provided*:
 - a. the judge reasonably believes that no party will gain a procedural, substantive, or *tactical* advantage as a result of the ex parte communication; *and*
 - b. the judge makes provision *promptly to notify* all other parties of the substance of the ex parte communication, *and* gives the parties an opportunity to respond.¹³

Oklahoma CJC Rule 2.4 is also implicated by improper *ex parte* contacts because it prohibits judges from “convey[ing] or permit[ting] others to convey the

13. CJC Rule 2.9(A)(1) (emphasis added). Note that besides prohibiting judges from initiating or participating in *ex parte* communications, Rule 2.9(A) also directs judges not to “permit” them either. This means they must be alert to the possibility that persons may seek to communicate with them *ex parte* and be prepared to take immediate measures to ameliorate the damage to the adversary process that *ex parte* communications can cause. *Id.*; see also, CJC Rule 2.9(B) (“If a judge inadvertently receives an unauthorized ex parte communication bearing on the substance of the matter, the judge shall make provision **promptly** to notify the parties of the substance and provide the parties with an opportunity to respond.”) (emphasis added).

impression that any person or organization is in a position to influence the judge.”¹⁴

When *ex parte* communication between counsel for one side in a dispute takes place, serious distortions to a court’s fact-finding and legal analysis can occur. It is a “dangerous procedure” when a defendant’s principal adversary has “private access to the ear of the court.”¹⁵ Unchecked, a prosecutor can relate sordid, uncorroborated, and inadmissible information about the defendant, as the Attorney General did here, that defense counsel has no opportunity to contest. One of the most compelling reasons for the rule against *ex parte* contacts is that the accused should have an opportunity to confront any allegations against him and to deny or explain them with his own arguments and proof. A judge’s receipt of information through a one-sided communication, without notification to the accused or a chance to respond, violates both the CJC and the due process right to a fair hearing.¹⁶

14. CJC Rule 2.4, Title 5, Ch.1, App.4.

15. *Haller v. Robbins*, 409 F.2d 857 (1st Cir. 1969).

16. *State ex rel. Vahlberg v. Crismore*, 213 P.2d 293, 295 (Okla. Crim. App. 1949) (“Every person accused of crime is entitled to nothing less than the cold neutrality of an impartial judge, and where the circumstances are of such a nature as to cause doubts as to the impartiality of a judge, the error, if any, should be made in favor of the disqualification rather than against it, for the reason that the state has an interest in the standing, integrity, and reputation of its courts.”); *Jones v. State*, 668 P.2d 1170, 1171 (Okla. Crim. App. 1983) (holding *ex parte* communications in which the trial judge suggested “various procedures to the prosecution” resulted in denial of “a fair and impartial trial as guaranteed by the Oklahoma and United States Constitutions.”).

Additionally, the mere fact that the prosecutor “got his pitch in first” can seriously prejudice a defendant’s rights.¹⁷ Judges may acquire, even unconsciously, bias in favor of the party engaging in *ex parte* communication. The mere existence of such contact undermines the appearance of impartiality of any judicial proceeding, creating the appearance or reality of bias or favoritism. It is for this reason that disqualification is warranted, even if actual bias cannot be shown:

Where there are circumstances of such a nature as to cause doubt as to a judge’s partiality, it is the judge’s duty to disqualify notwithstanding the judge’s personal belief that the judge is unprejudiced, unbiased, and impartial. When such circumstances exist, the error, if any, should be made in favor of the disqualification rather than against it.¹⁸

Ex parte contact diminishes a judge’s ability to remain neutral and impartial and erodes public confidence in the fairness of the administration of justice. Other jurisdictions dealing with similar questions have not hesitated to condemn the type of improper communications that occurred in this case.¹⁹

17. *Haller*, 409 F.2d at 859-60.

18. *Miller Dollarhide, P.C. v. Tal*, 163 P.3d 548, 554 (Okla. 2007).

19. See e.g., *State v. Valencia*, 602 P.2d 807 (Ariz. 1979) (holding, in circumstances in which a homicide victim’s brother privately asked the judge to consider imposing the death penalty, “the fundamental rights of the defendant to a fair hearing have been impinged, and the spirit and letter of the statute . . . have

II. Attorney General Drummond’s Email Communications Were Improper.

In his initial email to Judge Lumpkin on July 15, 2025, Attorney General Drummond intentionally interjected prejudicial factual allegations, which had not been tested through an adversarial process, under circumstances in which Wood had no opportunity to respond. (App. 292a). Drummond did so while two proceedings were pending—Wood’s *Brady/Napue* appeal to the OCCA and the State’s contested request that the OCCA set Wood’s execution date for September 11. Drummond explicitly stated that he wanted to communicate *ex parte* with Judge Lumpkin about the State’s pending request for an execution date so that he could secretly amass evidence to use against Wood in opposition to clemency. *Id.* By communicating *ex parte* with Judge Lumpkin and asking him to keep the communication secret from Wood’s counsel, which Lumpkin did for 24 days, Drummond violated ORPC Rule 3.5 and assisted Judge Lumpkin’s violation of Rule 2.9 of the Oklahoma CJC.

not been followed”); *State v. Romano*, 662 P.2d 406 (Wash. App. 1983) (holding judge’s *ex parte* communication with consultants regarding defendant’s case violated due process by creating the appearance of unfairness notwithstanding the lack of any showing the judge was affected by the communication); *People v. Webster*, 192 Cal.Rptr. 86 (Cal. 1983) (sentence vacated due to *ex parte* communications between the judge and Youth Authority officials even though the communications were favorable to the defendant); *Bowlin v. State*, 643 P.2d 1 (Alaska App. 1982) (sentence overturned because the nonlegal advocate of victim sent a letter to judge discussing defendant’s history); *In re Johnson*, 658 N.E.2d 589 (Ind. 1995) (finding it improper for a judge to listen to prosecutor’s *ex parte* request to reset a hearing date after the defendant’s lawyer had rescheduled the hearing).

In addition, Drummond knew or reasonably should have known that the information he conveyed to Judge Lumpkin stood to taint the court’s consideration of the merits of the pending prosecutorial misconduct claims. This is especially true given that the subject line of Drummond’s email listed Wood’s appellate case number (PCD-2024-879), rather than the case number for the State’s request for an execution date (D-2005-171). (App. 292a). In *State ex rel. Oklahoma Bar Ass’n v. Hine*, the Supreme Court of Oklahoma sanctioned an attorney who did not represent any parties in the case but nevertheless sent a letter to the trial judge hearing a child custody matter.²⁰ The court explained, “as a licensed lawyer Hine had to appreciate the reasonable likelihood of prejudice to the administration of justice which her acts would wreak.”²¹ Moreover, as “an *officer of the court*, Hine was duty bound to avoid interjecting facts—which she knew had not been tested by the adversarial process—into a pending adjudicative proceeding.”²²

The same is true here. As a rule of fairness, improper *ex parte* communications include any information that a judge or attorney knows or should know would be of interest to adversary counsel.²³ Drummond alleged that Wood was engaged in ongoing, serious criminal activity, along with prison personnel, a public defender, and a county clerk. He asserted that Wood had ordered the killing of another prisoner and participated in drug trafficking.

20. 937 P.2d 996 (Okla. 1997).

21. *Id.* at 1000-1001.

22. *Id.* at 1001 (emphasis in original).

23. Abrahmson, *supra* note 9, at 1354.

There can be no doubt that such untested assertions would be “of interest” to Wood’s defense counsel. This is evident from Drummond’s own statement that he did not plan to file a formal pleading, despite Judge Lumpkin’s invitation to do so, because even a filing under seal might “tip off” Wood and his attorneys. (App. 310a).

When called upon by the OCCA to demonstrate good cause justifying his *ex parte* communications, Attorney General Drummond asserted that secret communications were necessary to prevent the State’s open investigation from being compromised. (App. 296a-301a). Even if Drummond had a legitimate interest of this nature, there were other, proper methods he could have used to address such a concern. The easiest and most transparent option would have been to file a supplemental response to the State’s pending motion that amended the State’s request without publicly disclosing the State’s specific reasons. Even an *ex parte* communication that simply stated, “for reasons we are unable to disclose, the State wishes to amend its requested date,” would have been permissible.

III. Judge Lumpkin’s Response Was Also Improper.

Contrary to the requirements of Oklahoma CJC Rule 2.9, Judge Lumpkin not only permitted the *ex parte* communications initiated by Drummond, he also *initiated further communication* by sharing inside information about the court’s schedule, telling Drummond that the court planned to discuss the State’s pending motion on July 23, 2025. (App. 292a). Lumpkin explained that such discussion was necessary because “[a]s you are aware Woods [*sic*] attorney has filed an objection.” *Id.* He then stated his intent to share Drummond’s allegations with

the other judges assigned to Wood’s case, and sought Drummond’s approval, asking “[i]s that timing OK?” *Id.* Judge Lumpkin appeared to support Drummond’s desire to conceal his allegations from Wood and his counsel, promising to “await [Drummond’s] response” prior to taking further action. *Id.* The nature of these communications created, at a minimum, an appearance that Lumpkin was willing to give undue deference to the State.

Both Drummond and Lumpkin used an informal and conspiratorial tone, which served to heighten the perception of bias. Whereas the State’s public pleadings regarding the requested execution date stated the OCCA had a “mandatory duty” to set a date, Drummond’s initial email asked “that *we* not set” an execution date and suggested Drummond could “drop by” or call for further *ex parte* contact with Judge Lumpkin. (App. 292a). Instead of cautioning against or condemning such improper contact, Lumpkin fully participated and furthered the improper exchange by sharing information about the court’s inner workings and asking for Drummond’s approval of his next steps. *Id.* In doing so, Lumpkin violated, *inter alia*, Oklahoma’s CJC Rule 2.4(C): “A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.”²⁴

Drummond’s emails did not merely address a routine, ministerial matter of scheduling. Rather, Drummond addressed the merits of the contested matter of whether, and if so, when Wood’s execution date would be set. He was plainly seeking a tactical advantage over Wood with

24. CJC Rule 2.4, Title 5, Ch. 1, App.4.

respect to the merits of that legal question. Moreover, Drummond’s factual assertions regarding Wood’s alleged conduct on death row unquestionably concern a substantive matter and likely biased Judge Lumpkin with respect to Wood’s pending appeal of Judge Stallings’ denial of his *Brady* and *Napue* claims. Because it is clear that both Drummond and Judge Lumpkin perceived the information that was communicated between them *ex parte* “would be of interest” to Wood’s counsel, those communications do not fall within the scheduling/administrative exception.²⁵

Even if the subject of the emails could fairly be characterized as solely about scheduling, the exception does not exist unless the judge receiving the communication: (a) “reasonably believes that no party will gain a procedural, substantive, or tactical advantage”; (b) “makes provision to promptly notify all other parties of the substance of the *ex parte* communication”; and (c) “gives the [other] parties an opportunity to respond.”²⁶ Judge Lumpkin’s handling of Drummond’s emails failed each of the three conditions that are necessary to bring such a communication within the zone of protection for the scheduling exception. It was obvious that the State stood to gain a tactical advantage from their *ex parte* communications, both

25. The attorney rule against *ex parte* communications contains no exception for scheduling or administrative matters but generally prohibits *ex parte* contact “unless authorized to do so by law or court order.” Rule 3.5, Title 5, O.S. Ch. 1, App. 3-A. The record is clear that no court order authorized Drummond’s communications in this case. Whether “authorized . . . by law” incorporates the judicial rule’s scheduling exception is of no moment because, as discussed below, the scheduling exception did not apply for multiple reasons.

26. Rule 2.9, Title 5, Ch. 1, App. 4.

by gaining additional time to investigate new evidence against Wood and by sharing prejudicial information with the Presiding Judge of the court poised to rule on the merits of Wood’s prosecutorial misconduct claims.²⁷ Lumpkin did not “promptly” notify opposing counsel of Drummond’s allegations and provide an opportunity to respond.²⁸ Instead, he shared the allegations with his colleagues on the same court assigned to address both pending proceedings, thereby extending potential bias and the appearance of bias to the entire court.²⁹

Wood and his counsel were unaware of the specific content of Drummond’s emails for nearly a month after Judge Lumpkin received them, and they had no opportunity to respond to Drummond’s allegations of criminal conduct before Lumpkin shared that information with the rest of the court. There was no legal basis for Judge Lumpkin to contaminate his colleagues by sharing

27. See Abrahamson, *supra* note 9, at 1363 (“counsel is likely to be as concerned about procedural issues as he or she is to be about the substance of the contested claims”); Samuel K. Benham, *Judicial Purgatory: Strategies for Lawyers*, 58 DRAKE L. REV. 585, 612 (2010) (“Certainly, a discussion on the procedural posture of a case might grant one party an advantage at the expense of the other.”).

28. See *In re anonymous*, 729 N.E.2d 566 (Ind. 2000) (holding a judge who fails to fully comply with the requirement of prompt notice to opposing counsel engages in impermissible *ex parte* communications).

29. Ronald D. Rotunda and John S. Dzienkowski, LEGAL ETHICS—THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 10.2-2.9(f) (2024-2025 ed.) (explaining that “[i]t obviously defeats the purpose of disqualification” if a substitute judge is permitted to “confer with his disqualified colleague.”).

the *ex parte* information he had received from Drummond. Lumpkin should have recused himself without disclosing the contents of the *ex parte* communication. If Judge Lumpkin felt he needed advice about how to proceed, he could have done so confidentially by conferring with an ethics expert. Additionally, Judge Lumpkin could have appointed a special master to review and consider redacting the emails before disclosing them to the rest of the court.

Wood ultimately sought recusal of Judge Lumpkin and sanctions against Drummond, but Lumpkin refused to recuse himself and remained as presiding judge over the OCCA's decision to deny both motions. (App. 331a). Lumpkin's continued participation in the case ran afoul of Oklahoma CJC Rule 2.11 (A), which instructs that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned."³⁰ In keeping with the appearance of partiality, the OCCA's order denying sanctions against Drummond was perfunctory, stating only "[b]ased on our review, the motion is denied." (App. 337a).

The following week, on September 2, 2025, Lumpkin authored the OCCA's order denying Wood's *Brady* and *Napue* claims. (App. 1a). At no time, in either the order denying recusal and sanctions or the order denying the

30. Oklahoma CJC Rule 2.11(A). As explained in the commentary to Rule 2.11, the rule applies "*whenever* the judge's impartiality might reasonably be questioned, regardless of whether any of the specific [enumerated] provisions" apply. *Id.* at Comment 1 (emphasis added); *see also, Tal*, 163 P.3d at 555 (holding a trial judge's continuing participation in a case while motions to disqualify are pending results in a deprivation of due process).

merits of Wood’s prosecutorial misconduct claims, did Lumpkin state that he would not consider the allegations made by Drummond or that his exposure to such information would not affect his decisions.³¹ Further, Judge Lumpkin’s order adopted the same State-drafted factual findings and conclusions of law that Judge Stallings accepted wholesale.³² These circumstances exacerbated the already improper appearance that Lumpkin was aligned with the State, and they created an unacceptable risk of bias for all five judges who decided the merits of Wood’s claims.

CONCLUSION

The OCCA’s handling of the flagrant disregard for the prohibition against *ex parte* communication that occurred in this case undermines the rules of conduct governing all lawyers and judges. Respect for the regime of legal and judicial regulation is critical to retaining public trust

31. See, e.g., *Belton v. United States*, 581 A.2d 1205, 1213-14 (D.C. 1990) (reasoning that, without a judicial disclaimer, the manner in which the judge obtained information created concern about whether the judge relied upon the information); *Bell v. State*, 655 N.E.2d 129, 132 (Ind. Ct. App. 1995) (judge made no effort to reassure the defendant he was unaffected by improperly conveyed information which increased the appearance of impartiality). In any event, any such statement would not have cured Lumpkin’s violations of Oklahoma’s CJC because it would not eliminate the appearance of partiality his conduct created, nor would it remove the potential for Drummond’s improper communications to have triggered in Judge Lumpkin an unconscious bias against Wood.

32. See Appendix B, in which Judge Stallings told her prosecutor friend that she could not “take credit for” the reasoning in her opinion—“It’s the proposed Findings from the AG’s office.”

and confidence in our nation's criminal justice system and the rule of law. This Court should uphold the policies underlying the rules of professional legal and judicial conduct, as well as the policies underlying *Brady* and *Napue*, by setting aside the OCCA's decision and either granting Wood the relief he seeks, for the reasons set forth in his petition, or remanding the case for consideration by an untainted tribunal.

Respectfully submitted,

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APPENDIX

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APPENDIX A — LIST OF *AMICI CURIAE*¹

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Director, Stein Center for Law and Ethics
Fordham University School of Law

Lawrence K. Hellman

Professor Emeritus and Dean Emeritus
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1. Institutional affiliations are provided for identification purposes only. The views expressed in this brief do not reflect the views of the institutions with which *amici* are affiliated.

APPENDIX B — EMAIL FROM JUDGE STALLINGS

Stallings, Susan

From: Stallings, Susan
Sent: Wednesday, May 7, 2025 12:23 PM
To: Smith, Fern
Subject: Re: [EXTERNAL]: RE: Order

Which I can't take credit for. It's the proposed Findings from the AG's office. They did do an outstanding job.

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From: Smith, Fern <fern.smith@dac.state.ok.us>
Sent: Wednesday, May 7, 2025 12:20:07 PM
To: Stallings, Susan <Susan.Stallings@oscn.net>
Subject: [EXTERNAL]: RE: Order

Thank you so much!! Amazing!! I don't know when I have seen a more thorough analysis and well - reasoned opinion.

From: Stallings, Susan <Susan.Stallings@oscn.net>
Sent: Wednesday, May 7, 2025 10:17 AM
To: Smith, Fern <fern.smith@dac.state.ok.us>
Subject: Order

You don't often get email from susan.stallings@oscn.net.
[Learn why this is important](#)

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Appendix B

This message has originated from an **External Source**. Please use proper judgment and caution when opening attachments, clicking links, or responding to this email. Please forward to ITSupport@dac.state.ok.us if you believe this e-mail to be suspicious.

I thought you would like to see the order (unfiled version).

Susan C. Stallings

District Judge

Seventh Judicial District, State of Oklahoma

Oklahoma County Courthouse

321 Park Avenue, Room 800

Oklahoma City, Oklahoma 73102

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[SEAL]