IN THE DISTRICT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. CF-2020-2889**
	)	
DAVID ANTHONY WARE.	)	**Judge William D Lafortune**
	)	
Defendants.	)	

MOTION TO DECLARE OKLAHOMA'S CONFLICT DEATH PENALTY COMPENSATION SCHEME AND COURT FUNDING MODEL UNCONSTITUTIONAL WITH BRIEF IN SUPPORT

Comes now David Ware, by and through counsel of record Kevin D. Adams and Robert D. Gifford and moves this court to declare the statutes identified below to be unconstitutional. Counsel also re-urges[1] the motions incorporated by reference into this motion. In support of this motion counsel show the Court the following:

OKLAHOMA'S IMMORAL COURT FUNDING MODEL

> "Tulsa County District Attorney **Steve Kunzweiler** said that **model**, for the government to **fund** its core functions **on the backs of defendants**, is **unsustainable, counter to common sense and immoral**."
>
> (See Exhibit F, of David Ware's Written Request to Take Judicial Notice, filed March 2, 2022, (Emphasis Added))

> "(Oklahoma Supreme Court justices) are concerned that we have reached the limit of being able to ask any more of our judges and just **cannot in good conscience** go any farther in trying to do more with the **court system run primarily on collections of fines and costs**," Askins said.

[1] It was counsel's intention to seek extraordinary relief on Judge Musseman's previous denial. However, since Judge Musseman is no longer the trail judge it seems appropriate to give this court an opportunity to reconsider those motion as well. Furthermore, in the previous motions counsel did not ask to have the statutes found unconstitutional.

(See Exhibit F, of David Ware's Written Request to Take Judicial Notice, filed March 2, 2022, (Emphasis Added))

Corbin Brewster, chief Tulsa County public defender, said his office doesn't hesitate to advocate for clients and assert their rights in hearings on an indigent defendant's ability to pay fines and fees. But the situation is "**inherently awkward,**" because **court collections are predominantly how his office is funded**, he said. "**The more successful we are in court to reduce our clients' fines and fees, the less money there is for our office budget**," Brewster said.

(See Exhibit F, of David Ware's Written Request to Take Judicial Notice, filed March 2, 2022, (Emphasis Added))

"The costs imposed on a criminal defendant to run the ordinary, customary obligations of government **is just not a good way to do business**," said Bill Kellough, a former Tulsa County District Court judge. ……**He described the Legislature's view of a defendant about to plead out as that of a captor lording over a subservient person**……."'**We've got them in our grasp, so let's see what we can extract from this person while they're here,**' " Kellough said. "It just keeps growing and growing and growing. You're talking about a very compliant taxpayer at that point."

(See Exhibit F, of David Ware's Written Request to Take Judicial Notice, filed March 2, 2022, (Emphasis Added))

"For a person who may be justice-involved and on the lower socioeconomic scale, the punitive consequences for the inability to pay these fees and fines lends itself to additional involvement in the criminal justice system," said Kris Steele[2], executive director of Oklahomans for Criminal Justice Reform. "And **we reach a point where we begin to criminalize poverty. And that should be unconscionable for any Oklahoman.**"

(See Exhibit F, of David Ware's Written Request to Take Judicial Notice, filed March 2, 2022, (Emphasis Added))

"About 84[3] percent of district court funding is based on collections of costs in the court system, civil and criminal," the former lieutenant governor said.

---

[2] Kris Steele served in the Oklahoma House of Representatives and as the Speaker of the House.

[3] In Exhibit E, of of David Ware's Written Request to Take Judicial Notice, filed March 2, 2022, Number 6 of the 2013 Board on Judicial Compensation Final Report, it says "Over 80% of the operating funds necessary to operate the district courts are collected from fines, fees and other assessments;"

"So as that money fluctuates, and with criminal justice reform I think it has gone down the last three years (...) we need to find a more stable revenue source."

(See Exhibit D, of David Ware's Written Request to Take Judicial Notice, filed March 2, 2022,)

Overview of the Problem

On July 24, 1990 the Oklahoma Supreme Court issued the decision of *State v. Lynch*, 796 P.2d 1150 (1990). In that decision the Oklahoma Supreme Court wrote:

> The Okla. Const. art. 2, § 7 provides that "No person shall be deprived of life, liberty, or property without due process of law." The lawyers contend that under this constitutional provision mandatory representation without just compensation is unconstitutional. The **Okla. Const. art. 2, § 20 also requires that competent counsel be provided for indigent defendants. Under art. 2, § 20 , a criminal defendant has a fundamental right to the reasonably effective assistance of counsel, regardless of whether counsel is appointed or retained.** This means a lawyer must render the same obligations of loyalty, confidentiality, and competence to a court-appointed client as a retained client would receive. Oklahoma has fulfilled the constitutional requirement of competent counsel by utilizing public defender's offices, voluntary pools, and court-appointments. In order for the system to work, a balance must be maintained between the lawyer's oath of office, an indigent's fundamental right to counsel, and the avoidance of state action tantamount to confiscation of a lawyer's practice.
>
> *State v. Lynch*, 1990 OK 82, 796 P.2d 1150, 1156 (1990)

In footnote four (4) of the *Lynch* decision the Oklahoma Supreme Court calculated the "average hourly overhead rate" (also referred to as Indirect/Overhead Costs) of each lawyer involved in the *Lynch* case, that rate at $48.00 for Rob Pyron and $50.88 for Mattingly & Snow.

In footnote five (5) of the *Lynch* decision the Oklahoma Supreme Court noted:

> Had the attorneys received the same hourly pay as district attorneys i.e., $29.26 an hour, Mattingly would contribute $70.67 per hour with Pyron contributing a total of $62.65 per hour to the indigent's defense. These figures include both the overhead and an hourly rate of compensation. A construction of the statute under which each of the appointed lawyers would be paid statutory maximum fee would result in Mattingly receiving $18.93 per hour, and Pyron $29.21 - **with the accompanying net losses of $61.21 and $48.05 per hour**. See discussion infra.

Both lawyers in the *Lynch* decision were paid their "average hourly overhead expenses" plus an hourly rate of $29.26 per hour, the then equivalent hourly rate of a District Attorney. Currently District Attorneys are paid an average rate of $68.00[4] per hour.

In the *Lynch* decision the Oklahoma Supreme Court found Oklahoma's then compensation statute unconstitutional.

> After reaching the conclusion that the provision of counsel fees for Lynch under 21 O.S.Supp. 1985 § 701.14 , was constitutionally infirm, our duty is unmistakable. Under the unusual circumstances presented here, and **because of this Court's direct and inherent constitutional power to regulate the practice of law in Oklahoma,** we conclude that "weighty counterveiling policies" and considerations of judicial economy are best served by addressing the merits in both Cause No. 74,259 and Cause No. 74,319. This treatment will avoid confusion and disorder, and it will negate endless litigation on case by case basis.
>
> *State v. Lynch*, 1990 OK 82, 796 P.2d 1150, 1162 (1990) emphasis added.

After striking down Oklahoma's compensation statute for lawyers representing indigents as unconstitutional the Oklahoma Supreme Court wrote the following:

> However, as we noted above, the provision of counsel for indigent defendants, and the compensation of such counsel also lie within the Legislative sphere, and its consideration of the myriad problems presented is invited. This is an important area, which the Legislature should act to address. Nevertheless, until such time as the Legislature considers these matters, pursuant to the constitutional power granted by art. 7, §§ 4 and 6 of the Oklahoma Constitution, these guidelines shall become effective in all cases in which the State of Oklahoma is required to provide assistance of counsel insofar as the appointment of counsel and the implementation of post-appointment show cause hearings are concerned upon the issuance of the mandate herein[5]. The computation of fees in all capital cases shall also be calculated according to the promulgated guidelines after the issuance of the mandate.
>
> *State v. Lynch*, 1990 OK 82, 796 P.2d 1150, 1164 (1990)

---

[4] Calculated by multiplying $145,567 (Title 20 O.S. § 92.1A) multiplying by .98 and then dividing by 2080 hours in a year and then rounding down.

[5] Counsel interprets this to say that if this Court were to find the current conflict statute unconstitutional that the Oklahoma Supreme Court has provided a solution for the problem.

The next legislative session the Oklahoma state legislature ignored the directives of the Oklahoma Supreme Court and passed the current conflict capital compensation scheme. In July of 1991, Oklahoma's current pay scale for conflict capital counsel counsel was made into law. ($20,000 for lead counsel and $5,000 for co-counsel)[6] Oklahoma has been killing defendants represented by lawyers compensated under that 1991 statute every since[7].

The legislature **ignored** the Oklahoma Supreme Court's directives in *Lynch.* Oklahoma's present day statute makes no attempt to compensate private attorneys in accordance with the mandates of *State v Lynch*, despite clear directive from the Oklahoma Supreme Court. Oklahoma's present conflict capital compensation statute does not compensate capital lawyers at the equivalent hourly rate of the District Attorney and makes no adjustment for "average hourly overhead expenses", yet the death penalty and the execution of defendants represented by lawyers under this unconstitutional conflict compensation scheme marches on. Oklahoma's present conflict capital compensation statute contained no adjustment for inflation, treats conflict defendants much differently than non-conflict defendants and creates a conflict between the defense lawyers and the clients. Furthermore, when combined with the other major Due Process problem our legislature has created in our judiciary, the way they have chosen to make the judiciary "Sing for Your Supper", it raises serious concerns that any defendant receiving a sentence of death under such a flawed system may have another shot coming.

It seems to counsel that it is long past due that someone should fix these problems. And while it may seem counterintuitive to fix the system on a case such as this, counsel believes that a case such as

---

[6] See Title 22 O.S. §1355.13 "...total compensation for non-System attorneys who serve as lead counsel in capital cases shall not exceed Twenty Thousand Dollars ($20,000.00) per case. Total compensation for a non-System attorney who is co-counsel with a System or non-System attorney in a capital case shall not exceed Five Thousand Dollars ($5,000.00) per case."

[7] If a federal court were to step in at some point, there is no telling how many cases would have to be re-tried. It makes sense for everyone involved to stop building error into the record of capital cases.

this would generate enough political will to actually get something done. Regardless, counsel for Mr. Ware will rest assured knowing that their client has the record that he needs, in case things go terribly wrong from his perspective. Counsel believes other lawyers will follow suit.

Death penalty law was a lot different back in 1991, the state could still execute people with "mental retardation" and for crimes they committed before they turned eighteen years of age[8]. And 1991 was more than a decade before the United States Supreme Court issued its landmark decision in *Wiggins v. Smith* spelling out standards for "effectiveness" in death penalty cases. Oklahoma's legislature took no action in response to the *Wiggins* decision.

Oklahoma's thirty (30) year old law for compensation of conflict capital counsel has only gotten more and more unconstitutional over the years.

In 2017 elder leaders of our state tried in vain to correct problems with the Oklahoma death penalty system as reflected in the in The Report of the Oklahoma Death Penalty Review Commission[9], but the recommendations of that commission fell on deaf ears in the legislature.

Oklahoma's more than thirty year old pay structure for conflict capital counsel is unconstitutional and as troubling as that is, there is another larger problem. As reflected by the quotes that began this brief, the reliance the Oklahoma legislature to fund our judicial system on a "court collection agency model" has also grown. Oklahoma's reliance on court collections to fund our judicial system has grown into a full blown addiction with about eight-four (84%)[10] percent of the money funding our judicial system coming from the collection of fines, fees and assessments.

---

[8] Oklahoma earned the distinction of being the last state to execute someone for a crime that committed before they were old enough to vote or legally purchase tobacco products, when it executed Sean Sellers on February 4, 1999.

[9] The Report of the Oklahoma Death Penalty Review Commission was filed into this record on December 11, 2020

[10] According to former Lt. Governor and current Administrative Director of the Courts Jari Askins.

It is no longer a question of whether or not court collections make up a substantial[11] portion of the judiciary's budget, it is now a question of whether or not non-court collections make up a substantial portion of the judiciary's budget.

The statutory structure in which the Oklahoma State Legislature has chosen to fund our judicial system through has created such a due process problem[12], that a vacuum may exists where there is no "adequate state forum", to correct the problems inherent in our judicial funding and funding of conflict capital counsel. Oklahoma is so addicted to funding our court system "on the backs of defendants" that our system has become "unsustainable" and "immoral" and it might require federal intervention to save us from our legislature.

Oklahoma's Problem is Obvious

This is a complex constitution issue which has serious implications for our entire criminal justice system. Oklahoma's flawed manner of funding our judicial system has attracted the attention of civil rights organizations from Washington D.C. and New York City.

One of those organizations is *The Lawyers' Committee for Civil Rights Under Law*[13], a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity.[14] The Lawyers' Committee for Civil Rights Under Law along with lawyers from Latham

---

[11] This is relevant to the *Tumey* and *Ward* analysis.

[12] "In the midst of every crisis, lies great opportunity."—Albert Einstein

[13] The former president for **The Lawyers' Committee for Civil Rights Under Law** was Kristen Clarke before Ms. Clarke was appointed to head the Civil Rights Division of the Department of Justice (See https://en.wikipedia.org/wiki/Kristen_Clarke)

[14] https://www.lawyerscommittee.org

& Watkins, LLP[15] filed a civil rights case in *Feenstra v. Sigler, 19-cv-00234-GKF-FHM*[16] challenging the manner in which Oklahoma's "Court Fund" system collects money from indigent defendants.

Another organization is the *Institute for Constitutional Advocacy and Protection* (ICAP's), "A non-partisan institute within Georgetown University Law Center, ICAP's experienced attorneys use novel litigation tools, strategic policy development, and the constitutional scholarship of Georgetown to vindicate individuals' rights and protect our democratic processes."[17] Lawyers from Georgetown Law School's Institute for Constitutional Advocacy and Protection are prosecuting *Graff v. Aberdeen Enterprizes II, Inc.*, Northern District of Oklahoma case No. 17-cv-606-TCK-JFK, a "Civil Rico" claim alleging an class action "extortionate scheme is a criminal legal system that depends on revenue collected from the poor." This lawsuit has also named Tulsa and Rogers county as defendants.

Also involved in prosecuting the G*raff v. Aberdeen Enterprizes II, Inc.*, Northern District of Oklahoma case No. 17-cv-606-TCK-JFK[18], is the *Civil Rights Corps*, which was explained to counsel as "a group of mostly Harvard law school graduates and civil rights lawyers". The *Civil Rights Corps* slogan is "Poverty should not be a crime."

This problem is not going away on its own, if this court does not fix it, the problem will be left to some other court to do so. We know we have a problem with how Oklahoma funds its court system, civil rights organizations outside of Oklahoma know we have a problem with the way Oklahoma funds our court system and apparently until some court somewhere has the courage to say it in an opinion, the people that created the problem (the Oklahoma Legislature), are not going to do anything about it.

---

[15] Latham & Watkins LLP is an American multinational law firm founded in 1934 and is the second largest lawfirm in the world by revenue. (See https://www.lw.com)

[16] See Exhibit D, REPLY TO STATES RESPONSE TO MOTION TO DISMISS BILL OF PARTICULARS FOR STRUCTURAL STATUTORY ERROR, filed February 22, 2022

[17] https://www.law.georgetown.edu/icap/

[18] See Exhibit C, REPLY TO STATES RESPONSE TO MOTION TO DISMISS BILL OF PARTICULARS FOR STRUCTURAL STATUTORY ERROR, filed February 22, 2022

Ignoring the problem is only making it worse and these organizations pursuing the collection side of this problem are well educated, well funded and highly motivated; and do not appear likely to go away any time soon.

The Indigent Defense Side of The Problem

The lawsuits referenced above are addressing the "collection" part of Oklahoma's "court funding problem". Counsel for Mr. Ware is raising the "refusal to adequately fund conflict capital counsel" side of the problem. The lawsuits mentioned above and the issue raised by counsel are two sides of the same coin which is the statutorily structurally flawed[19] manner in which the legislature has chosen to fund our judiciary and indigent defense.

ARGUMENTS AND AUTHORITIES

1. OKLAHOMA'S CONFLICT CAPITAL COMPENSATION SCHEME AND THE TULSA COUNTY LOCAL RULE CR 10 (4) ARE UNCONSTITUTIONAL VIOLATIONS OF DUE PROCESS BECAUSE THEY VIOLATE THE FUNDAMENTAL FAIRNESS, EQUAL PROTECTION AND ARBITRARY DOCTRINES (SHOCKS THE CONSCIENCE) OF THE DUE PROCESS CLAUSE

2. OKLAHOMA'S COURT FUNDING MODEL IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE DUE PROCESS PRINCIPLES DESCRIBE IN *TUMEY* AND *WARD*[20] AND THEIR PROGENY

Oklahoma and Tulsa County's conflict capital compensation scheme is fundamentally unfair because indigent defendants are forced to face prosecution and the prospect of being sentenced to death

---

[19] No courts, prosecution agency or public defender agency should be funded by the fines and fees they collect from criminal defendants and the judiciary, prosecutors and indigent defendants should not be competing for the same resources. The courts, prosecuting agencies and defendants have to be independently funded and finding a defendant indigent or fining a defendant should never have any effect on judicial salary, retirement, budget of the judiciary, prosecution or public defender. To do otherwise is inviting disaster.

[20] *Tumey v. Ohio, 273 U.S. 510 (1927) and Ward v. Village of Monroeville, 409 U.S. 57 (1972)*

while being represented by lawyers that are not earning money for defending them, lawyers literally loose money while representing them.

While prosecutors are being paid a salary of $50 to $68 per hour plus benefits, have overhead provided and all the resources that comes with representing the state, the defendant is represented by a lawyer that could earn more money working as a barista[21], if office overhead was not a factor, and is actually loosing money when office overhead is considered.

If a defendant is to have any hope of avoiding a sentence of death he or she must hope for a death qualified trial lawyer that is either independently wealthy, has another other source of income or is willing to flirt with financial ruin to save the life of a defendant that is generally the subject of great public scorn. Not only must the death qualified lawyer withstand the public scrutiny inherent with representing someone facing the death penalty, they must actually pay for the privilege of doing so. Defendants must hope the lawyers assigned to them ignore the conflict of interest that is inherently created by this system and turn away opportunities to earn a living, so they will have a chance to avoid dying the the state's execution chamber.

Defendants that are represented by lawyers paid under this conflict capital compensation scheme are treated differently than defendants represented by lawyers who are being employed by the state public defender agencies (either the Tulsa County Public Defender's Office, the Oklahoma County Public Defender's Office or the Oklahoma Indigent Defense System's Capital Trial Team). Lawyers being employed by one of the state public defender agencies are paid salaries equivalent to those of a district attorney, do not have office overhead, have a support staff and do not have the conflict of interest

[21] In Exhibit E, of of David Ware's Written Request to Take Judicial Notice, filed March 2, 2022, on the 2nd page of the 2017 Board on Judicial Compensation Final Report, it says "This Board finds the 2013 report and recommendation to be accurate and valid and further finds that additional compensation to reach the regional average remains necessary to attract and retain the best and brightest legal minds to the Oklahoma Judiciary. " Counsel agrees with the sentiments expressed by Chairman Pitts. Counsel points this out in the record to make the point that adequate pay of conflict capital counsel is necessary to achieve consistent adequate representation.

of passing on an opportunity to earn a living in their attempt to save their client's life. Lawyers represented by he state public defender agencies actually earn a living while trying to save their lives.

When a defendant's lawyer does challenge the unfairness of the system, based upon Oklahoma Supreme Court decisions like *State v. Lynch* and United States Supreme Court decisions like *Wiggins v Smith* they are forced to argue the matter in front of a judge with an actual financial motive to deny such challenges. The judge the defendant's lawyer must argue the case in front of has an actual bias, because their salary, judicial retirement and the entire court system depends on the same court fund that finances the conflict capital lawyer . While the defendant wants his lawyer to fight for him or her, the defendant must also be concerned that since what the lawyer is arguing could potentially threaten the judge's salary and retirement that the defendant must be concerned their assigned lawyer will alienate the very judge that will conduct their trial.

Even if a defendant is lucky enough to be assigned a judge with enough courage to grant the motion, that judge knows that by doing so that will open up the door for all of the other defendants represented by lawyers who are paid out the same "conflict capital compensation scheme", which could mean millions of dollars a year drained out of the "court fund". Not only would that judge risk becoming an outcast with his fellow judges, that judge risks the consequences a decision like that could have on all the other defendants that have received sentences of death already.

Such a system is fundamentally unfair, violates equal protection and should "shock the conscience" of any court.

> The Due Process Clause of the Fourteenth Amendment has long been recognized as assuring "**fundamental fairness**" in state criminal proceedings. See, e.g., *Lisenba v. California*, 314 U.S. 219, 236 (1941); *Moore v. Dempsey*, 261 U.S. 86, 90-91 (1923). Throughout the history of the Clause we have generally considered the question of fairness on a case-by-case basis, reflecting the fact that the elements of fairness vary with the circumstances of particular proceedings. As the Court observed in *Snyder v. Massachusetts*, 291 U.S. 97, 116-117 (1934):

"Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. . . . What is fair in one set of circumstances may be an act of tyranny in others."

See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Spencer v. Texas,* 385 U.S. 554 (1967); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Cupp v. Naughten*, 414 U.S. 141 (1973).

However in some instances the Court has engaged in a process of "specific incorporation," whereby certain provisions of the Bill of Rights have been applied against the States. See the cases cited ante, at 857 n. 7. **In making the decision whether or not a particular provision relating to the conduct of a trial should be incorporated, we have been guided by whether the right in question may be deemed essential to fundamental fairness — an analytical approach which is compelled if we are to remain true to the basic orientation of the Due Process Clause.** See, e.g., *In re Oliver*, 333 U.S. 257, 270-271 (1948) (public trial); *Duncan v. Louisiana*, 391 U.S. 145, 155-158 (1968) (jury trial); *Pointer v. Texas*, 380 U.S. 400, 403-404 (1965) (confrontation); *Washington v. Texas*, 388 U.S. 14, 17-19 (1967) (compulsory process); *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (appointed counsel). **But once we have determined that a particular right should be incorporated against the States, we have abandoned case-by-case considerations of fairness. Incorporation, in effect, results in the establishment of a strict prophylactic rule, one which is to be generally observed in every case regardless of its particular circumstances. It is a judgment on the part of this Court that the probability of unfairness in the absence of a particular right is so great that denigration of the right will not be countenanced under any circumstances. These judgments by this Court reflect similar judgments made by the Constitution's Framers with regard to the Federal Government.**

Herring v. New York, 422 U.S. 853, 866-68 (1975)

The right to counsel by an indigent defendant facing capital murder was deemed to have been essential to "fundament fairness" ninety (90) years ago in the case commonly known as "The Scottsboro Boys". ("A rule adopted with such unanimous accord reflects, if it does not establish, the inherent right to have counsel appointed, at least in cases like the present, and lends convincing support to the conclusion we have reached as to the **fundamental nature of that right.**" *Powell v. Alabama*, 287 U.S. 45, 73 (1932))

This is an **important** point. It is very important to this case because one cannot office defend the unconstitutional and immoral conflict capital compensation scheme by arguing that a particular

defendant received competent representation. That is not the legal test. This may be good strategy but is poor policy.

In the February 25, 2022 hearing[22] Stephen Lee was asked the following questions:

Q. And I just want to make sure I'm clear on your testimony. You feel like you performed up to what you would believe to be your standard of performance in that trial, correct?

A. I do.

Q. You felt satisfied with the work that you did?

A. I did.

(Tr. Page 22 lines 14-20)

As stated by the United States Supreme Court in *Herring,* "It is a judgment on the part of this Court that the probability of unfairness in the absence of a particular right is so great that denigration of the right **will not be countenanced under any circumstances.** These judgments by this Court reflect similar judgments made by the Constitution's Framers with regard to the Federal Government. *Herring v. New York*, 422 U.S. 853, 68 (1975)

This rule makes a lot of since, especially in the present context, because a defendant with a lawyer competent enough to raise the issue is probably competent enough to for the court to find his client is not receiving ineffective assistance of counsel under the first prong of the *Strickland* test. This creates a "capable of repetition, yet evading review" scenario when it comes to ineffective assistance of counsel in capital conflict cases.

It would be fundamentally unfair to allow the prosecution to deny the citizen they are attempting to execute properly funded conflict counsel, making their goal of killing the defendant that much easier.

[22] ORIGINAL TRANSCRIPT OF HEARING ON FEBRUARY 25, 2022 (With Defendant's Exhibit 1), filed February 28, 2022.

Prosecutors have a duty to seek justice not preclude it. (See *Connick v. Thompson*, 563 U.S. 51, 65-66 (2011) ("Prosecutors have a special "duty to seek justice , not merely to convict."")

The questions at issue with the first proposition are simple and the answers are obvious.

Does Oklahoma's thirty (30) year old conflict lawyer capital compensation scheme of $20,000 for lead counsel and $5,000 provide indigent defendants with "a fair opportunity to present" their defense? Counsel for Mr. Ware say, "**no it does not**".

Does Oklahoma's thirty (30) year old conflict lawyer capital compensation scheme of $20,000 for lead counsel and $5,000, treat some defendants some defendants differently with no rational basis for the different treatment? Counsel for Mr. Ware say, "**yes it does**".

Does Oklahoma's thirty (30) year old conflict lawyer capital compensation scheme of $20,000 for lead counsel and $5,000, "shock the conscience of the Court" ? Counsel for Mr. Ware say, "**It certainly should**".

DUE PROCESS OF LAW

> This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a **fair opportunity to present his defense**. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of **fundamental fairness**, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.

Ake v. Oklahoma, 470 U.S. 68, 76 (1985)

Above Justice Thurgood Marshall is describing what every fair minded person instinctively knows, "a defendant" must be given "the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake", even when they are poor. A system of justice in which a defendant is "innocent until they run out of money" is no system of justice at all.

Mr. Ware, as most every defendant facing the death penalty, is poor and therefore completely reliant upon the Oklahoma court system to provide him with an adequate defense and a fair opportunity to participate in our justice system.

The presence of private members of the bar whom are willing to sacrifice to ensure that an unpopular indigent defendant has a fighting chance avoiding being killed by their own government, does not mean that the sovereign has lived up to "**the Fourteenth Amendment's due process guarantee of fundamental fairness**" and equal justice under law "**to participate meaningfully in a judicial proceeding in which his liberty**" and life are "at stake".

An unpopular indigent defendant's opportunity to participate meaningfully in the justice system cannot be dependent on a qualified trial lawyer's willingness to make a financial sacrifice on the alter of equal justice.

A criminal justice system that depends on the willingness of qualified members of the criminal defense bar to sacrifice their financial well-being to give unpopular indigent defendants a fighting chance, is just as **immoral, unsustainable** and **counter to common sense** as one that seeks to fund its core functions on the backs of defendants.

In the dissenting opinion of *Leis v. Flynt,* a case that went to the United States Supreme Court over the issue of whether Larry Flint would be represented by the lawyers of his choice (Herald Fahringer and Paul Cambria) Justice Stephens while joined by Justice Brennan and Justice Marshall wrote:

> Often, as in the case of Andrew Hamilton, Darrow, Bryan and Thurgood Marshall, a lawyer participates in a case out of a sense of justice. He may feel a sense of duty to defend an unpopular defendant and in this way to give expression to his own moral sense. These are important values, both for lawyers and clients,....
>
> *Leis v. Flynt*, 439 U.S. 438, 451 (1979)

Oklahoma has been exploiting the "sense of justice" and "sense of duty to defend an unpopular defendant(s)" of the members of the criminal defense bar for decades. What about the defendants who were represented by lawyers motivated by something other than a "sense of justice"?

During the February 25, 2022 hearing in this case local criminal defense lawyer Stephen Lee described the financial burden placed upon him and his family that resulted from his representation of capital defendant Darren Price.

Mr. Lee "...forewent other cases, forewent fees, and focused on that case because that's what I felt I had to do at the time, but it did cause a financial hardship."[23]

The presence of lawyers in private practice that like Mr. Lee that "...forewent other cases, forewent fees, and focused on that case because that's what I felt I had to do at the time..." does not relieve the state of Oklahoma of its duty an obligation to provide indigent defendants with an opportunity "to participate meaningfully in a judicial proceeding" in which their life is at stake.

These lawyers like the late Rob Nigh, the late Art Fleak, the late James Rowan, Creekmore Wallace, John Echols, Jack Gordon Jr., Robert Stubblefield, Stan Monroe, Debbie Maddox, Mark Matheson, Steve Hightower, Shena Burgess, Beverly Atteberry, Brian Aspan, Carla Stinnett, Stephen Lee, Mark Cagle, Michael Manning and others are to be commended to their service to our system of justice and the principles we hold dear.

But their sacrifice does not excuse the state of Oklahoma's evasion of its responsibility to "the Fourteenth Amendment's due process guarantee of fundamental fairness".

Oklahoma's "Conflict Capital Compensation Scheme" can be found at Title 22 O.S. § 1355.13 which reads:

---

[23] (See pages 20 through 21 of ORIGINAL TRANSCRIPT OF HEARING ON FEBRUARY 25, 2022 (With Defendant's Exhibit 1), filed February 28, 2022.)

A. In every case in which the defendant is subject to the death penalty and an attorney or attorneys other than an attorney or attorneys employed by the Indigent Defense System are assigned to the case by the System to provide representation, an attorney must submit a claim in accordance with the provisions of the Indigent Defense Act in such detail as required by the System. Except as provided in subsection B of this section, total compensation for non-System attorneys who serve as lead counsel in capital cases shall not exceed Twenty Thousand Dollars ($20,000.00) per case. Total compensation for a non-System attorney who is co-counsel with a System or non-System attorney in a capital case shall not exceed Five Thousand Dollars ($5,000.00) per case.

B. The maximum statutory fee established in this section may be exceeded only upon a determination made by the Executive Director and approved by the Board that the case is an exceptional one which requires an extraordinary amount of time to litigate, and that the request for extraordinary attorney fees is reasonable.

The "Historical Data", (as listed on OSCN.net) for this statute is a s follows:

Laws 1991, HB 1612, c. 238, § 14, emerg. eff. July 1, 1991; Amended by Laws 1992, HB 1364, c. 303, § 10, emerg. eff. July 1, 1992; Amended by Laws 1992, HB 1601, c. 357, § 6, emerg. eff. July 1, 1992; Amended by Laws 1998, HB 3159, c. 201, § 3, emerg. eff. May 11, 1998 (superseded document available); Amended by Laws 2001, HB 1804, c. 210, § 11, emerg. eff. July 1, 2001 (superseded document available).

(See https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=71063)

Tulsa County Local Rule CR 10 (4) reads as follows:

Total compensation for lead counsel shall not exceed twenty thousand dollars ($20,000) in capital cases. Total compensation for co-counsel shall not exceed five thousand dollars ($5,000) in capital cases.

(See http://www.tulsacountydistrictcourt.org/files/TCDC-LocalRulesCriminal-Current12072021.pdf)

Neither Title 22 O.S. § 1355.13 or Tulsa County's Local Rule Cr 10 (4) make provisions for "average hourly overhead rate" as described in the *State v Lynch* case, ensure that capital conflict counsel are compensated at the equivalent hourly rate of a district attorney, or make any provision for adjustments for inflation. The extraordinary fee provision of Title 22 O.S. § 1355.13 does not apply to

conflict capital counsel in Tulsa County and Tulsa County's court rule does not even have a provision to exceed the limit of an extraordinary fee.

Defendants are intentionally treated differently depending on whether or not the receive a lawyer from one of the state public defender agencies or a lawyer who is conflict capital compensated lawyer.

> Our cases have recognized successful equal protection claims brought by a "class of one ," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. See *Sioux City Bridge Co . v. Dakota County* , 260 U.S. 441 (1923) ; *Allegheny Pittsburgh Coal Co . v. Commission of Webster Cty.*, 488 U.S. 336 (1989) . In so doing , we have explained that "`[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination , whether occasioned by express terms of a statute or by its improper execution through duly constituted agents .'"
>
> *Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000)

Defendants that are represented by lawyers paid under this conflict capital compensation scheme are treated differently than defendants represented by lawyers who are being employed by either the Tulsa County Public Defender's Office, the Oklahoma County Public Defender's Office or the Oklahoma Indigent Defense System's Capital Trial Team. Lawyers being employed by one of the state public defender agencies are being paid salaries equivalent to those of a district attorney, do not have office overhead, have a support staff and do not have the conflict of interest of passing on an opportunity to earn a living to save their client's life. In fact lawyers represented by either the public defenders office or OIDS actually earn a living while trying to save their lives.

Oklahoma's Conflict Capital Compensation Scheme and Tulsa County's Local Rule Cr 10 (4) are both unconstitutionally inflexible.

> We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government, *Dent v. West Virginia*, 129 U.S. 114, 123 (1889).
>
> .....We have often repeated that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria*

Workers v. McElroy, 367 U.S., at 895. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Ibid.; *Morrissey*, 408 U.S., at 481.

Wolff v. McDonnell, 418 U.S. 539, 558, 560 (1974)

Oklahoma's Conflict Capital Compensation Scheme and Tulsa County's Local Rule Cr 10 (4) should both shock the conscious of the Court.

We have emphasized time and again that "[t]he touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), whether the fault lies in a denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"), or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective, see, e.g., *Daniels v. Williams*, 474 U.S., at 331 (the substantive due process guarantee protects against government power arbitrarily and oppressively exercised). While due process protection in the substantive sense limits what the government may do in both its legislative, see, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965), and its executive capacities, see, e.g., *Rochin v. California*, 342 U.S. 165 (1952), criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue.

Our cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be "arbitrary in the constitutional sense," *Collins v. Harker Heights*, 503 U.S., at 129, thereby recognizing the point made in different circumstances by Chief Justice Marshall, "`that it is a constitution we are expounding,'" *Daniels v. Williams*, supra, at 332 (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 407 (1819) (emphasis in original)). Thus, in *Collins v. Harker Heights*, for example, we said that the Due Process Clause was intended to prevent government officials "'"from abusing [their] power, or employing it as an instrument of oppression."'" 503 U.S., at 126 (quoting *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S., at 196, in turn quoting *Davidson v. Cannon*, 474 U.S., at 348).

To this end, for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience. We first put the test this way in *Rochin v. California*, supra, at 172-173, where we found the forced pumping of a suspect's stomach enough to offend due process as conduct "that shocks the conscience" and violates the "decencies of civilized conduct." In the intervening years we have repeatedly adhered to *Rochin's* benchmark. See, e.g., *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957) (reiterating that conduct that "`shocked the conscience' and was so `brutal' and `offensive' that it did not comport with traditional ideas of fair play and decency" would violate substantive due process); *Whitley v. Albers*, 475 U.S. 312, 327 (1986)

(same); *United States v. Salerno,* 481 U.S. 739, 746 (1987) ("**So-called `substantive due process' prevents the government from engaging in conduct that `shocks the conscience,' . . . or interferes with rights `implicit in the concept of ordered liberty'**") (quoting *Rochin v. California*, supra, at 172, and *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937)). Most recently, in *Collins v. Harker Heights*, supra, at 128, we said again that the substantive component of the Due Process Clause is violated by executive action only when it "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." While the measure of what is conscience shocking is no calibrated yard stick, it does, as Judge Friendly put it, "poin[t] the way." *Johnson v. Glick*, 481 F.2d 1028, 1033 (CA2), cert. denied, 414 U.S. 1033 (1973).

County of Sacramento v. Lewis, 523 U.S. 833, 846-47 (1998)

It is shocking that in capital cases, the most serious cases in our criminal justice system, when the state is seeking to take the life of a citizen, the cases that require the most skilled advocates to successfully defend; that Oklahoma has a conflict capital lawyer compensation scheme that pays the lawyer less than they could make more working at Ben & Jerry's, Best Buy, **Starbucks** and Costco.[24]

In *State of Oklahoma v Darren Price*, Tulsa County Case No. CF-2011-3734, Mr. Lee filed a "Motion for Attorney's Fees"[25] in which he only listed a portion of the hours that he had worked[26] and he figured his hourly rate at $10.05 per hour. If Mr. Lee would have included the hundreds of hours he worked in the three years leading up to trial he would have earned less than current minimum wage of $7.25 per hours. A conflict capital trial lawyer earning less than minimum wage is shocking.

The dirty little secret of conflict capital compensation is that the lawyers are not compensated at all. In reality the lawyers pay for the privilege of trying to save the lives of unpopular defendants.

---

[24] (See Costco, Amazon and 16 Other Companies That Raised Their Minimum Wage to $15 (or More), Some major companies now offer a minimum wage of $20/hour., by Gabrielle Olya, https://www.gobankingrates.com/money/jobs/18-companies-raised-minimum-wage-to-15-or-more/)

[25] See Exhibit H, REPLY TO STATES RESPONSE TO MOTION TO DISMISS BILL OF PARTICULARS FOR STRUCTURAL STATUTORY ERROR, filed February 22, 2022

[26](See February 25, 2022 Hearing Transcript, pg. 18 line 12-16, "And that doesn't include the hundreds of hours I put into the case prior to it ever getting to trial because I believe it took us approximately three years to get that case to a jury.")

In his motion Mr. Lee cited *State v Lynch*, to address the issue of overhead expenses for maintaining an office:

> The State also has an obligation to pay appointed lawyers sums which will fairly compensate the lawyer, not at the top rate which a lawyer might charge, but at a rate which is not confiscatory, after considering overhead and expenses.

(*State v Lynch*, 1990 OK 82, 796 P.2d 1150, 1160)

In Mr. Lee's motion he addressed the overhead rate paid to lawyers in other states and that the presumptive overhead rate in Alabama is $30.00 per hour and in Mississippi the presumptive per hour rate for overhead and expenses is $25.00 per hour.

However, the analysis that Mr. Lee did in regards to his office overhead was very generous to the state. (As noted in footnote number 4 and 5 of the *State v Lynch,* 1990 OK 82, 796 P.2d 1150 (1990)) For the 248.8 hours that Mr. Lee submitted on the Darren Price case he lost money on overhead an expenses and earned no money for his skillful legal effort that helped save the life of his client, Darren Price. That is shocking.

Mr. Lee described himself as being "in a lucky boat where I had a wife that worked that could help things out, but if I had not, I wouldn't have been able to pay my bills." When asked whether he came "close to bankruptcy," Mr. Lee responded that "If not for her, yes, it would have." (February 25, 2022, Tr. pg. 20, Lines 6-11)

As Tulsa County District Attorney Steve Kunzweiler is quoted at the beginning of this pleading as saying "that model, for the government to fund its core functions on the backs of defendants, is unsustainable, counter to common sense and immoral," so is a system that funds its conflict capital representation on the backs of its criminal defense lawyers.

As Mr. Lee testified to on February 25, 2020 why he declined representation of David Ware. "I had some personal issues going on, and, quite honestly, it is an exorbitant cost on me and my practice to

represent somebody in a death penalty case." (Tr. pg 17, line 19-21) How many Mr. Lees are out there to represent the David Ware's of the world? And how long will they be willing to keep doing so?

The commentary of the ABA guidelines addresses this issue:

> In order to fulfill its constitutional obligation to provide effective legal representation for poor people charged with crimes, "[g]overnment has the responsibility to fund the full cost of quality legal representation." This means that it must "**firmly and unhesitatingly resolve any conflicts between the treasury and the fundamental constitutional rights in favor of the latter.**" (See ABA Guidelines, Commentary to Guideline 9.1—Funding and Compensation, emphasis added)

The commentary goes on to describe Mr. Lee's dilemma:

> Low fees make it economically unattractive for competent attorneys to seek assignments and to expend the time and effort a case may require. A 1993 study of capital representation in Texas, for example, showed that "more and more experienced private criminal attorneys are refusing to accept court appointments in capital cases because of the time involved, the substantial infringement on their private practices, the lack of compensation for counsel fees and experts/expenses and the enormous pressure that they feel in handling these cases." Similarly, a survey of Mississippi attorneys appointed to represent indigent defendants in capital cases found that eighty-two percent would either refuse or be very reluctant to accept another appointment because of financial considerations. A 1998 study of federal death penalty cases reported that "[a]lthough the hourly rates of compensation in federal capital cases are higher than those paid in non-capital federal criminal cases, they are quite low in comparison to hourly rates for lawyers generally, and to the imputed hourly cost of office overhead." (See ABA Guidelines, Commentary to Guideline 9.1—Funding and Compensation)

The opinion expressed above is not just the opinion of the drafters of the ABA Guidelines it is the opinion of several Justices of the United States Supreme Court:

> Indeed, problems with the quality of defense representation in death penalty cases have been so profound and pervasive that several Supreme Court Justices have openly expressed concern. Justice Ginsburg told a public audience that she had "yet to see a death case among the dozens coming to the Supreme Court on eve-of -execution stay applications in which the defendant was well represented at trial" and that "people who are well represented at trial do not get the death penalty." Similarly, Justice O'Connor expressed concern that the system "may well be allowing some innocent defendants to be executed" and suggested that "[p]erhaps it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used." As Justice Breyer has said, "the inadequacy of representation in capital

> cases" is "a fact that aggravates the other failings" of the death penalty system as a whole. (See ABA Guidelines, Commentary to Guideline 9.1—Funding and Compensation)

The opinion reached by the Oklahoma Death Penalty Review Commission, a Bi-Partisan commission Co-chaired by former Governor Brad Henry, Andy Lester (former member of Ronald Reagan's transition team, former federal magistrate, adjunct professor and an Oklahoma State Regent) and Judge Reta Strubhar (the first woman to sit on the Oklahoma Court of Criminal Appeals). In *The Report of the Oklahoma Death Penalty Review Commission,* released in March of 2017 the commission recommended:

> Adequate compensation should be provided to conflict counsel in capital cases, and the existing compensation cap should be lifted. (See Recommendation 4 pg. Vii, of *The Report of the Oklahoma Death Penalty Review Commission;* filed into this record on December 11, 2020)

Seasoned trial and capital defense attorney John Echols also testified during the February 25, 2022 hearing. Mr. Echols has been licensed since 1978, maintained an active criminal practice, including capital litigation and has handled hundreds of first degree murder cases. (Tr. pg 46-47) In 1990 Mr. Echols and the late Ron Mook were given the job of creating a team of capital defense lawyers who would be able to take on death penalty litigation in the 75 counties not having public defenders offices. (Tr. pg 47) Mr. Echols has also worked for the Oklahoma Indigent Defense System's capital trials division and has done handled appointments of conflict homicide cases through various courts. (Tr. 47)

Mr. Echols gave his opinion that in the overwhelming majority of cases that the $20,000 cap creates a level of expectation that is completely at odds with what is expected of a "capital litigation defense lawyer" and that the guidelines give the attorney's tremendous responsibility and that litigation necessarily exceeds the $20,000 cap. (TR. pg 48 line 22—page 49 line 5)

Mr. Echols testified the $20,000 fee on a capital case "..it's wholly inadequate in, I would think, all cases. At any reasonable hourly rate an attorney would be expected to -- to bill through that $20,000 early in the litigation". (Tr. 48 6-9)

Mr. Echols testified "...any lawyer who operates under that limit who is not, let's say, independently funded, it just can't be done. You can't -- you can't -- you cannot receive fair compensation when the compensation is $20,000 for litigation of a capital case." (Tr. 49, line 6-10

In Debbie Maddox's conditional entry of appearance filed in the *State v. Jeremy Williams*[27] case filed on July 20, 2004 she gave her opinion that most capital cases require 500 to 750 hours of attorney time. Using Ms. Maddox's math that would mean that conflict capital lawyers are compensated anywhere between $27 dollars to $40[28] worth of time.

Tulsa County Local Criminal Rule 10 (5) reads "In all cases described above, the hourly is $60 for time out of court and $80 for time in court."

Using Ms. Maddox's estimates of "most capital cases require 500 to 750 hours of attorney time" that would mean between $30,000 and $45,000[29] even using just the lower out of court rate. Ms. Maddox gave an estimate of 500 to 750 hours of time and the $60 "out of court" time for non-capital work, it is clear that the $20,000 is an arbitrary number with no connection to the realities of defending a capital murder case. These figures do not even include cost for overhead expenses.

Counsel would argue that Ms. Maddox's estimate that is almost twenty (20) years old, is low especially considering the increased volumes of discovery lawyers are see in a digital age.

---

[27] See Exhibit G, REPLY TO STATES RESPONSE TO MOTION TO DISMISS BILL OF PARTICULARS FOR STRUCTURAL STATUTORY ERROR, filed February 22, 2022

[28] Not taking into account any overhead expenses which are not paid.

[29] Using the lowest overhead rate of ($25.00 per hour) cited by Mr. Lee and Ms. Maddox's estimation of hours, that would add an additional $12,500 to $18,500 to the costs of defending a capital trial. That would put the total costs of defending a conflict capital trial at $42,250 to $63,750 using the $60 rate. And paying at the equivalent hourly rate of the elected District Attorney would raise the total costs to between $46,250 and $69,750.

Capital trial lawyers require more experiences, more skill, more responsibility and substantially more stress, yet they are paid less than non-capital conflict lawyers. Why would any lawyer take an appointment as a conflict capital trial lawyer? It is not the money. The system is exploiting the more experienced lawyer's "sense of duty to defend an unpopular defendant" to avoid paying for the costs of an adequate defense.

Conflict capital trial lawyers are compensated so poorly that they flirt with financial ruin, but Oklahoma's conflict capital compensation scheme is morally bankrupt and that should shock the conscious of the court.

Reason and common sense tells us that what was acceptable regarding the death penalty thirty (30) years ago has changed. Title 22 O.S. §1355.13 does not even account for inflation[30].

Not only is the compensation from thirty (30) years ago inadequate because it is not adjusted for inflation, it is grossly inadequate because what is expected from death penalty counsel has significantly increased in the intervening 30 years.

Counsel for Mr. Ware believes the simplest and most elegant solution for the problem is for this Court to find that because Title 22 O.S. §1355.13 and the Local Tulsa County Rule 10(4) falls so short of the standards expressed in the *Wiggins v. Smith*, 539 U.S. 510, 524-526 (2003) its progeny (and what is clearly established federal law on regarding the prevailing professional standards for death penalty counsel) that they are an unconstitutional violation of due process.

---

[30] 25,000 in 1991 is equivalent in purchasing power to about $51,605.73 today, an increase of $26,605.73 over 31 years. The dollar had an average inflation rate of 2.37% per year between 1991 and today, producing a cumulative price increase of 106.42%. This means that today's prices are 2.06 times higher than average prices since 1991, according to the Bureau of Labor Statistics consumer price index. A dollar today only buys 48.44% of what it could buy back then.
https://www.in2013dollars.com/us/inflation/1991?amount=25000

THE JUDICIAL BIAS PART OF THE PROBLEM[31]

Almost 100 years ago the United States Supreme Court issued a decision in *Tumey v Ohio*, 273 U.S. 510 (1927) . It is remarkable just how similar the statutory scheme in *Tumey* is to the one the legislature has chosen for the Oklahoma courts.

> The question in this case is whether certain statutes of Ohio, in providing for the trial by the mayor of a village of one accused of violating the Prohibition Act of the State, deprive the accused of due process of law and violate the Fourteenth Amendment to the Federal Constitution, because of the pecuniary and other interest which those statutes give the mayor in the result of the trial.
>
> *Tumey v. Ohio*, 273 U.S. 510, 514-15 (1927)

In *Tumey* the issue was the "pecuniary and other interest which those statutes give the mayor in the result of the trial". In Mr. Ware's case the issue is " interest which those statutes give the" court in spending as little as possible on Mr. Ware's defense because that money funds judicial salaries and judicial retirement and funds the Oklahoma State Judicial System.

As described by the United States Supreme Court in *Ward v. Village of Monroeville:*

> ...the test is whether the mayor's situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused . . . ." *Id.*, at 532. Plainly that "possible temptation" may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court. This, too, is a "situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, [and] necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him."
>
> *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)

Counsel is arguing that Mr. Ware can not receive a fair hearing on his challenge of Oklahoma's conflict death penalty compensation scheme being unconstitutional, because every judge in the state of Oklahoma has a pecuniary interest in denying his constitutional challenge because the money for the

---

[31] Counsel recognizes that the judiciary did not create this problem that the legislature did. Counsel recognizes that this problem worsened year after year as politicians evaded their responsibility to make difficult decisions.

conflict death penalty pay comes out of the "Court Fund" which funds a substantial portion of the salaries and the retirement of the Oklahoma Judiciary and a substantial portion of the entire operations of the Oklahoma Judicial System.

In *Ward v. Monroeville*, 409 U.S. 57 (1972), a mayor's court in which fines paid by convicted defendants went to the village was determined to violate due process. Although the mayor in Ward did not receive compensation for convictions like the mayor in *Tumey*, the mayor in Ward was the chief executive for the village. As the chief executive, the mayor in Ward had a direct interest in convictions, because the fines generated by convictions contributed to the economic viability of the village for which the mayor was solely responsible.

> Conceding that "the revenue produced from a mayor's court provides a substantial portion of a municipality's funds," the Supreme Court of Ohio held nonetheless that "such fact does not mean that a mayor's impartiality is so diminished thereby that he cannot act in a disinterested fashion in a judicial capacity." 27 Ohio St.2d, at 185, 271 N.E.2d, at 761. We disagree with that conclusion.
>
> *Ward v. Village of Monroeville*, 409 U.S. 57, 59 (1972)

This area of law does not end with Tumey *v. Ohio* and *Ward v. Village of Monroeville* the law goes on and on, with examples of Courts striking down unconstitutional and immoral court funding models, most of which are far less egregious than Oklahoma's own. This area of law not only protects the rights of the accused and the integrity of our justice system, this area of law protects the respect for the law.

> Indeed, "justice must satisfy the appearance of justice," *Offutt v. United States*, 348 U.S. 11, 14 (1954), and this "stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," *In re Murchison*, 349 U.S. 133, 136 (1955). See also *Taylor v. Hayes*, 418 U.S. 488 (1974).
>
> *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243 (1980)

Judges should be neutral, detached and fair magistrates in every aspect of their decisions. Particularly in matters concerning the statutory and constitutional rights of a citizen, particularly when their liberty is at stake and especially when their very life is at stake.

> Due process does "not permit any procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused." *Marshall*, 446 U.S. at 242, 100 S.Ct. 1610. .....*Ward v. Village of Monroeville*, 409 U.S. at 60, 93 S.Ct. 80. "It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes." *Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973). See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986).
>
> *Harjo v. City of Albuquerque*, 326 F. Supp. 3d 1145, 1184 (D.N.M. 2018)

The principles in *Tumey* and *Ward* have been applied in a variety of contexts as demonstrated below, and certainly is applicable to the factual scenario in this case.

> The justice is not salaried. He is paid, so far as search warrants are concerned, by receipt of the fee prescribed by statute for his issuance of the warrant, and he receives nothing for his denial of the warrant. His financial welfare, therefore, is enhanced by positive action and is not enhanced by negative action. The situation, again, is one which offers "a possible temptation to the average man as a judge . . . or which might lead him not to hold the balance nice, clear and true between the State and the accused." It is, in other words, another situation where the defendant is subjected to what surely is judicial action by an officer of a court who has "a direct, personal, substantial, pecuniary interest" in his conclusion to issue or to deny the warrant.
>
> ....We therefore hold that the issuance of the search warrant by the justice of the peace in Connally's case effected a violation of the protections afforded him by the Fourth and Fourteenth Amendments of the United States Constitution. The judgment of the Supreme Court of Georgia is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.
>
> *Connally v. Georgia*, 429 U.S. 245, 250, 251 (1977)

Counsel refers the Court the Supreme Court of Mississippi as persuasive authority:

> If [the Legislature] fails to fulfill a constitutional obligation to enable the judicial branch to operate independently and effectively, then it has violated its Constitutional mandate,

> and the Judicial branch has the authority as well as the duty to see that courts do not atrophy. No court created by the Constitution is required to accept conditions which prevent it operating independently and effectively. Such court also has the duty under our governmental system to protect its own integrity. It likewise has the inherent authority as part of a separate and co-equal branch to make such orders to insure that independence and integrity.
>
> *Hosford v. State*, 525 So. 2d 789, 798 (Miss. 1988)

Oklahoma is not alone. Other states have struggled with similar issues in regards to capital cases. Counsel refers the Court to the Mississippi Supreme Court opinion in *Jackson v State*:

> This Court has previously denied all motions in other capital cases requesting similar relief. *See Lockett v. State* ,614 So.2d 888 (Miss. 1992). Over the years, it has become apparent that the system is flawed. Valuable time and resources are being wasted in finding representation for death row inmates seeking post-conviction relief, especially since all remedies available under the UPCCRA must be exhausted before federal habeas relief may be sought. We find at this time that recognition of the nature of death penalty litigation in the courts of this state, coupled with the ultimate penalty the State seeks to impose, requires that the motion be granted, that counsel be appointed, and that reasonable expenses of litigation be allowed.
>
> *Jackson v. State*, 732 So. 2d 187, 188 (Miss. 1999) (Emphasis Added)

THE FUNDING OF THE STATE JUDICIAL SALARIES, JUDICIAL RETIREMENT AND THE JUDICIARY AS A WHOLE

The Oklahoma Legislature has created the following process to provide for the retirement of the judges and justices of our state. The funding of the "The State Judicial Retirement Fund" begins with "The Court Fund" (Title 20 O.S. Section 1301) where "All fees, fines, costs and forfeitures shall, when collected by the court clerk…" (Title 20 O.S. Section 1301) and are first deposited in "The Court Fund". Next the money is moved "for deposit in the State Judicial Revolving Fund" (Title 20 O.S. §1308) and from there it moves into "clearing account and thence transferred to the proper fund" (Title 20 O.S. §1309) when "the Administrative Director of the Courts…..shall transfer monthly amounts for deposit in the State Judicial Retirement Fund as set out in Section 1309 of this title" (Title 20 O.S. §1103.1)

Title 20 O.S. §1103.1 explains just how much money the judges receive for their retirement from the "fees, fines, costs and forfeitures" paid by the criminal defendants. The contribution to the State Judicial Revolving Fund has gone up exponentially over the years. In January 1, 2001 the judges received a two (2%) contribution "of the monthly total actual paid gross salaries of the members of the Uniform Retirement System for Justices and Judges." (See Title 20 O.S. §1103.1 (A)) By June 30, 2019 and after "the monthly total actual paid gross salaries of the members of the Uniform Retirement System for Justices and Judges" had grown to twenty-two (22%) percent. (See Title 20 O.S. §1103.1 (A)). The contributions to the Uniform Retirement System for Justices and Judges originates largely from "All fees, fines, costs and forfeitures shall, when collected by the court clerk…" (Title 20 O.S. Section 1301) of each of the court funds seventy-seven counties.

The judges contribute eight (8%) of their salary to the State Judicial Revolving Fund "Effective September 1, 2005, each Justice or judge who is a member of The Uniform Retirement System for Justices and Judges shall have eight percent (8%) of his or her current monthly salary withheld by the State of Oklahoma and deposited in a fund in the State Treasury which is hereby created and shall be known as the Oklahoma Judicial Retirement Fund." (See Title 20 O.S. §1103) So the money for the Court Fund, made up largely of the "fees, fines and costs" paid by criminal defendants, pays in almost three (3) times as much as the judge's own contributions towards the judge's retirement. The legislature has chosen to make the judges and justices of the Oklahoma State Judiciary extract the money for their own salaries and retirement from the litigants that participate in Oklahoma's court system.

Despite Title 20 O.S. § 1103.1 (B) mandating "The State Judicial Retirement Fund <u>should have a funded ratio at or near ninety percent (90%)</u>", according to the 2021 Actuarial for the Uniform Retirement System For Judges and Justices has a "Funded Ratio" of 111.3%[32].

[32] See Exhibit B, REPLY TO STATES RESPONSE TO MOTION TO DISMISS BILL OF PARTICULARS FOR STRUCTURAL STATUTORY ERROR, filed February 22, 2022-page 4 of Exhibit B, page 72 of 2021 Comprehensive Annual Finance Report

Because money for conflict death penalty,"Attorney fees for indigents in the trial court" (See Title 20 O.S. § 1304(B)(9)), comes out of the same court fund that provides for judicial retirement (and salaries) an impermissible conflict of interest exist and that to allow the same state responsible for creating the deprivation of counsel to proceed with its pursuit of the death penalty against Mr. Ware would be unconstitutional deprivation of his right to due process and sixth amendment right to counsel.

INCORPORATION OF OTHER MOTIONS

To ensure that the record is clear and complete, counsel incorporates (into the arguments in this motion) by reference the following previously filed into this record:

1. MOTION TO DISMISS BILL OF PARTICULARS FOR STRUCTURAL STATUTORY ERROR, filed February 15, 2022.
2. STATE'S RESPONSE TO DEFENDANT'S MOTION REQUESTING THAT THE COURT DISMISS THE BILL OF PARTICULARS FOR STRUCTURAL STATUTORY ERROR, filed February 18, 2022.
3. REPLY TO STATES RESPONSE TO MOTION TO DISMISS BILL OF PARTICULARS FOR STRUCTURAL STATUTORY ERROR, filed February 22, 2022.
4. ORIGINAL TRANSCRIPT OF HEARING ON FEBRUARY 25, 2022 (With Defendant's Exhibit 1), filed February 28, 2022.
5. WRITTEN REQUEST TO TAKE JUDICIAL NOTICE, filed March 2, 2022.
6. ORDER DENYING MOTION TO DISMISS BILL OF PARTICULARS, signed by The Honorable William Musseman on March 4, 2022.

A Modern Day Civil Rights Issue

In conclusion counsel would remind the court what former Judge William Kellough said:

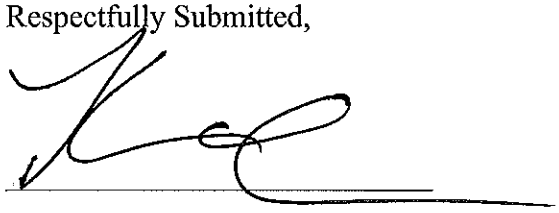
> "The costs imposed on a criminal defendant to run the ordinary, customary obligations of government is just not a good way to do business," said Bill Kellough, a former Tulsa County District Court judge. .....He described the Legislature's view of a defendant about to plead out as that of a captor lording over a subservient person....."'We've got them in our grasp, so let's see what we can extract from this person while they're here,' " Kellough said. "It just keeps growing and growing and growing. You're talking about a very compliant taxpayer at that point."

This is one of the great civil rights issues of our time. Our system is out of control and has evolved into something our founding fathers feared.

The freedom riders are coming. They are filing suits in federal court. The system can continue to blockade justice, but the modern day equivalent of President Kennedy's order to federalize the Alabama National Guard will someday arrive. Which side of history do we want to be on?

Counsel hopes the system will face its problems and willingly begin the process of change.

Respectfully Submitted,

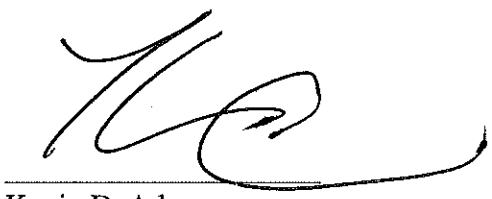


Kevin D. Adams, OBA# 18914
36 East Cameron Street, #16
Tulsa, OK 74103
(918) 582-1313
kadams@lawyer.com

CERTIFICATE OF HAND DELIVERY

I hear by certify that a copy of the foregoing instrument was mailed on March 8, 2022 to the following:

Steve Kunzweiler
Tulsa County District Attorney
Tulsa County Courthouse
500 S. Denver
Tulsa, OK 74103



Kevin D. Adams