



IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

DEMARCHOE CARPENTER)
MALCOLM SCOTT)
)
 Petitioners,)
)
 vs.)
)
 STATE OF OKLAHOMA)
)
 Respondent.)

Case No.: CF-1994-4356
Judge Sharon K. Holmes

DISTRICT COURT
FILED
MAY 13 2016

SALLY HOWE SMITH, COURT CLERK
STATE OF OKLA. TULSA COUNTY

ORDER GRANTING POST-CONVICTION RELIEF

This matter came on before the Court on the 29th day of January, 2016, for an evidentiary pursuant to Applications for Post Conviction Relief filed on behalf of the above-named Petitioners. Petitioner Demarchoe Carpenter was present and represented by attorneys Vicki Zemp Behenna and Ken Sue Doerfel; Petitioner Malcolm Scott was represented by attorneys Christina Green and Josh Lee. The State of Oklahoma was represented by James Dunn, John David Luton and Stephanie Collingwood.

Witnesses were sworn, testimony taken in open court and by affidavit; stipulations were made and exhibits were received. Additionally, the Court reviewed the entire court file in this case, as well as docket sheets for several of the witnesses. After the evidentiary hearing the parties were granted until March 1, 2016 to file Proposed Findings of Fact and Conclusions of law.

PROCEDURAL HISTORY

Demarchoe Montez Carpenter and Malcolm Nigel Scott ("Petitioners") were tried by jury in Tulsa County District Court, Case number CF-1994-4356, and convicted of one count of Murder in the First Degree, in violation of 21 O.S. §701.1 (1991); two (2) counts of Shooting

with Intent to Kill, in violation of 21 O.S. §652(A) (1992); and one (1) count of Use of a Vehicle to Facilitate Discharge of a Weapon in violation of 21 O.S. §652(B) (1992). Pursuant to the jury's recommendation, the Honorable Ned Turnbull sentenced the Petitioners to Life imprisonment; seventy-five (75) years imprisonment; seventy-five (75) years imprisonment; and twenty (20) years imprisonment, respectively, with all counts running consecutively to one another.

Petitioner Carpenter appealed his conviction to the Oklahoma Court of Criminal Appeals ("OCCA"), raising the following four (4) propositions of error:

- I. Mr. Carpenter was denied a fair trial by the jury's consideration of Michael Wilson's testimony as substantive evidence, and by the district court's comments on Mr. Wilson's credibility and failure to properly admonish and limit the jury's consideration of Mr. Wilson's testimony;
- II. Mr. Carpenter was denied a fair trial by the jury's consideration of Ernestine Truewell's testimony defining the profiles of "associate" and "certified" gang members, along with other witnesses' testimony that he was a gang member as substantive evidence of guilt;
- III. Mr. Carpenter was subject to double jeopardy in violation of 21 O.S. §11 (1991), by being convicted of first degree murder, two counts of assault with intent to kill and use of a vehicle to facilitate discharge of a weapon; and
- IV. Mr. Carpenter's sentence is excessive and should be modified.

After thorough consideration of the entire record on appeal, the OCCA found that neither reversal nor modification was required and as a result Carpenter's conviction was affirmed. The mandate was ordered filed and spread of record on May 26, 1997 and affirmed on June 4, 1997.

On March 11, 2014, Demarchoe Carpenter filed an Application for Post-Conviction Relief, raising the following propositions in support of the application:

- I. Newly Discovered Evidence of Actual Innocence Requires this Court to grant Mr. Carpenter Post-Conviction Relief;
- II. Mr. Scot's (sic) Fourteenth Amendment Rights were Violated because the State of Oklahoma Failed to Fully Disclose all Exculpatory Evidence;
- III. Mr. Carpenter's Fourteenth Amendment Rights were Violated because the State of Oklahoma allowed Key Witnesses to Give Testimony the State knew to be False;
- IV. Mr. Carpenter's Sixth Amendment Right to Effective Trial Counsel was Violated because his counsel Failed to Investigate Obvious Exculpatory Elements of the Case, Failed to Adequately Prepare for trial by Investigating Witnesses, Failed to Request a Daubert Hearing, Failed to Present an Expert Witness and Failed to Request Forensic Reports; and
- V. Mr. Carpenter's Sixth Amendment Right to Effective Appellate Counsel was Violated because Petitioner's Appellate Counsel Failed to Present a Claim of Ineffectiveness of Counsel for Trial Counsel's Failure to Investigate Mr. Wilson's True Involvement in the Crime, Failure to Investigate Potential Witnesses, Failed to Investigate the State's Key Witnesses, Failure to Request a Daubert Hearing, Failure to Present an Expert Witness on Direct Appeal and Failure to Request Exculpatory Forensic Reports.

Petitioner Scott appealed his conviction to the Oklahoma Court of Criminal Appeals (OCCA), raising the following three (3) propositions of error:

- I. Mr. Scott was denied a fair trial by the jury's consideration of Michael Wilson's testimony as substantive evidence, and by the district court's comments on Mr. Wilson's credibility and failure to properly admonish and limit the jury's consideration of Mr. Wilson's testimony;
- II. Mr. Scott was subject to double jeopardy in violation of 21 O.S. §11 (1991), by being convicted of first degree murder; two (2) counts of shooting with intent to kill and use of a vehicle to facilitate discharge of a weapon; and
- III. Mr. Scott's sentence is excessive and should be modified.

After thorough consideration of the entire record on appeal, the OCCA found that neither reversal nor modification was required and Malcolm Scott's conviction was affirmed. The mandate was ordered filed and spread of record on May 26, 1997 and affirmed on June 4, 1997.

On March 19, 1998, Petitioner Scott filed his initial Application for Post-conviction Relief in case number CF-1994-4356, raising the following propositions for relief:

- I. The Petitioner was denied his Sixth Amendment Right to the effective assistance of trial counsel prior to and during the trial of the case where counsel failed to investigate and pursue alibi defense;
- II. The Petitioner was denied his Sixth Amendment right to the effective assistance of counsel prior to and during the trial where counsel failed to consider a viable theory, develop evidence to support the theory and present the theory in defenses of Petitioner.
- III. Petitioner was denied the effective assistance of appellate counsel where his appellate counsel failed to raise the issue of trial counsel's ineffectiveness on direct appeal as trial counsel "...was ineffective failing to develop a viable theory that others committed the offense."

The Order denying the initial Application for Post-Conviction Relief was entered on May 14, 1998.

December 28, 1998, Petitioner Scott filed a subsequent Application for Post-Conviction Relief, in an effort to appeal the district court's denial of his initial application. On June 14, 1999, the Oklahoma Court of Criminal Appeals denied the Petitioner's request for an appeal-out-of-time, finding that Petitioner Scott had not demonstrated that he was denied such an appeal through no fault of his own.

Next, in 1999, Petitioner Scott filed an Application for a Writ of Habeas Corpus in the United States District Court for the Northern District of Oklahoma. The Application was dismissed on the basis of being untimely.

On February 21, 2014, Petitioner Scott's second Application for Post-Conviction Relief was filed. The following propositions were stated as grounds for relief:

- I. Newly Discovered Evidence of Actual Innocence requires this Court to Grant Mr. Scott Post-Conviction Relief;
- II. Mr. Scott's Fourteenth Amendment Rights were Violated because the State of Oklahoma Failed to Fully Disclose all Exculpatory Evidence;
- III. Mr. Scott's Fourteenth Amendment Rights were Violated because the State of Oklahoma Allowed Key Witnesses to Give Testimony the State Knew to be False;
- IV. Mr. Scott's Sixth Amendment Right to Effective Trial Counsel was Violated because his Counsel Failed to Investigate Obvious Exculpatory Elements of the Case, Failed to Adequately Prepare for Trial by Investigating Witnesses, Failed to Request a Daubert Hearing, Failed to Present an Expert Witness, and Failed to Request Forensic Reports.
- V. Mr. Scott's Sixth Amendment Right to Effective Appellate Counsel was Violated because Petitioner's Appellate Counsel Failed to Present a Claim of Ineffectiveness of Counsel for Trial Counsel's Failure to Investigate Mr. Wilson's true Involvement in the crime, Failure to Investigate Potential Witnesses, Failed to Investigate the State's Key Witnesses, Failure to Request a Daubert Hearing, Failure to Present an Expert Witness on Direct Appeal and Failure to Request Exculpatory Forensic Reports; and
- VI. Petitioner is Entitled to Have His Propositions Considered in This Court and Relief Granted pursuant to 22 O.S. §§1080(d) and 1086, because He Can Demonstrate "Sufficient Reason" For not Previously Asserting His Above Stated Propositions.

Ultimately, after several docket settings, on January 29, 2016, an evidentiary hearing was held based on the Applications for Post-Conviction Relief of Petitioners Carpenter and Scott.

MATERIALS REVIEWED BY THE DISTRICT COURT

This Court has reviewed the following materials in reaching its decision in this matter:

1. Transcript of the Preliminary Hearing in Case No. CF-1994-4356, State of Oklahoma vs. Malcolm Nigel Scott and Demarco (sic) Carpenter, held on December 19, 1994;
2. Transcript of the plea proceedings in CF-1995-90, State of Oklahoma vs. Michael L. Wilson, held on November 23, 1994 and filed in this case on March 14, 1995;
3. Transcripts of the Jury Trial held in this matter from November 9, 1995 through November 13-1995;
4. Petitioner Carpenter's Application for Post-Conviction Relief; Brief in Support of Application for Post-Conviction Relief filed on February 21, 2014, as well as Petitioner's Amended Brief in Support of Application for Post-Conviction Relief filed on February 13, 2015;
5. The State of Oklahoma's response to Petitioner Carpenter's Application for Post-Conviction Relief;
6. Petitioner Scott's first Application for Post-Conviction Relief filed on March 19, 1998;

7. Petitioner Scott's second Application for Post-Conviction Relief seeking an appeal out-of-time referencing the district court's "Order Denying Petitioner's Application for Post-Conviction Relief" filed on May 14, 1998;
8. Petitioner Scott's Application for Post-Conviction Relief and Brief in Support of Application for Post Conviction Relief filed on February 21, 2014 as well as Petitioner Scott's Amended Brief in Support of Application for Post-Conviction Relief filed on February 13, 2015;
9. The State of Oklahoma's response to Petitioner Scott's Application for Post-Conviction Relief filed on July 22, 2015;
10. Transcript of the evidentiary hearing in this matter held on January 29, 2016, as well as the following exhibits admitted by the court during the course of the hearing:
 - a. Petitioners' Ex. 1-Affidavit of Michael Wilson;
 - b. Petitioners' Ex. 2-Letter from Michael Wilson;
 - c. Petitioners' Ex. 3- Video Interview of Michael Wilson;
 - d. Petitioners' Ex. 4- Transcript of Michael Wilson Interview;
 - e. Petitioners' Ex. 6- Map of Neighborhood Where Crime Occurred;
 - f. Petitioners' Ex. 7- Affidavit of Richard Harjo (10/29/14)
 - g. Petitioners' Ex. 8- Ltr. From Billy Alverson to Demarchoe Carpenter (2/27/10);
 - h. Petitioners' Ex. 9- Affidavit of Rashun Williams;
 - i. Petitioners' Ex. 10- Affidavit of Ken Price (6/2/10);
 - j. Petitioners' Ex. 14- Enterprise Rental Agreement;

- k. Petitioners' Ex. 15- Tulsa Police Department Lab Request;
- l. Petitioners' Ex. 16- Tulsa Police Department Forensic Lab Report;
- m. Petitioners' Ex. 19- Tulsa police Department transcript of Michael Wilson interview with Det. Gary Meek
- n. Petitioners' Ex. 20-Tulsa Police Department Arrest and Booking sheet for Malcolm Scott (9/11/94)
- o. Petitioners' Ex. 21- Arrest and Booking sheet for Demarchoe Carpenter (9/11/94);
- p. Petitioners' Ex. 22- Affidavit of Robert Payden, attorney for Michael Wilson on Wilson's amended charge of Accessory After the Fact.

NOW, before the Court on this _____ day of May, 2016, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On September 10, 1994, in the early morning hours, a house party was in progress at approximately 226 E. 29th Street North in Tulsa, Oklahoma. The party was largely attended by members of the "Crips" street gang. A group of young people were congregated outside the house. At some point, a burgundy/maroon-colored vehicle drove by the party and someone in the back passenger seat on the driver's side fired shots at individuals who were standing outside.
2. Nineteen-year-old Karen Summers was shot in the back and killed; Kenneth Price was shot in the buttocks and Alonzo Johnson was also injured.
3. The weapon used was determined to be a .380 caliber weapon.

4. Michael Wilson, a member of the "Bloods" street gang was interviewed at his residence by Detective Mike Huff on September 11, 1994. When Det. Huff arrived at Wilson's residence, he saw a burgundy/maroon Ford Taurus parked in the driveway. Subsequent evidence discovered by the Tulsa Police Department showed that Wilson had rented the vehicle on September 7, 1994.
5. Wilson was asked to accompany Det. Huff to the police department for questioning. Wilson agreed and asked that he be allowed to change his shoes and call his mother. Det. Huff followed Wilson to a bedroom and while Wilson was seated on the bed changing his shoes, Huff noticed that Wilson was trying to remove "something" from under his shirt, attempting to conceal it from Huff by hiding the item in the bedding. The detective retrieved the item, which was a *Lorcin* .380, semi-automatic pistol.
6. During Michael Wilson's interview with Tulsa Police Department Det. Gary Meek, Wilson admitted to driving the burgundy/maroon car found in his driveway; claimed the *Lorcin* .380 as his own weapon; stated that he had not loaned the burgundy/maroon vehicle to anyone; and stated that he had not loaned his weapon to anyone.
7. On September 13, 1994, the weapon seized from Michael Wilson was subjected to ballistics testing and it was determined that the bullet extracted from Karen Summers' body was fired from the weapon seized from Michael Wilson.
8. Michael Wilson admitted his guilt to Danny Ogans on two occasions: on September 10, 1994 and again in 1995 when both men were housed in the Tulsa County Jail.

9. Private Investigator, Eric Cullen interviewed Wilson in July 2007, at which time Wilson told Cullen that the Petitioners were not responsible for the murder of Karen Summers. Wilson also told Cullen that he knew who was responsible for the murder.
10. On December 31, 2013, Michael Wilson asked his attorney to draft an affidavit for him, wherein he admits to shooting "Ken Price and "Lil Seven" (Alonzo Johnson), and to killing Karen Summers.
11. Michael Wilson was sentenced to death in an unrelated case, and in a video-recorded interview, just two (2) days before he was executed, Wilson admitted to killing Karen Summers. He stated that he was in the burgundy vehicle with Billy Alverson and Richard Harjo. Billy Alverson had been the driver and Harjo had been the front seat passenger. Wilson stated that he had been in the passenger seat behind the driver and that he fired the shots that killed Karen Summers and injured Alonzo Johnson and Kenneth Price.
12. Wilson stated that he fired the shots, because just three (3) days prior to Ms. Summers' death he had been shot at by whom he suspected were "Crips". Wilson also stated that the Petitioners were not with him and the other two (2) men when the shooting occurred. Wilson admitted to the gun and the car being in his possession and he even expressed disbelief at the fact that the police had "let him go".
13. Wilson also stated in the video that although he knew Petitioners did not commit the crime they are charged with, he kept quiet in order to protect his "homeboys", presumably Billy Alverson and Richard Harjo.
14. In a letter written in 2010 to the Petitioners, Billy Alverson, one of Michael Wilson's co-defendants, confessed to having driven the rented burgundy Ford Taurus during

the commission of the offense herein at issue. He wrote that Wilson and Harjo were passengers in the car and that they drove by the party on 29th Street North, at which time Wilson believed he saw some of the individuals who had shot at him approximately three (3) days prior to this incident. Alverson also wrote that as he drove past a crowd of people at the party, Wilson began firing from the passenger position behind the driver's seat. Alverson reported that he was never called to testify—he states he would have told the Court that the Petitioners were not involved in the murder. Billy Alverson was executed by the State of Oklahoma on January 6, 2011.

15. Richard Harjo, testified on January 29, 2016 at the evidentiary hearing on Petitioners' Applications for Post Conviction Relief. Harjo related that he is currently seeking a commutation in an unrelated murder case (for which he is serving life without parole) and that he was testifying without having the benefit of his counsel at the Petitioners' evidentiary hearing. Harjo stated that he had consulted with his attorney regarding his testimony at the Petitioners' hearing, and was aware that he could be subjecting himself to prosecution on the same charges as are at issue for the Petitioners. Harjo also stated that despite the potential for his prosecution in this matter, he was ready/willing to testify.
16. The Court finds Michael Wilson's video-taped confession credible and that it is corroborated by the following evidence:
 - a. The Tulsa Police Department's forensic lab report which indicated that the weapon taken from Michael Wilson on September 11, 1994 was the weapon used to kill Karen Summers;

- b. The investigation by the Tulsa Police Department revealed that Michael Wilson had rented a burgundy Ford Taurus on September 7, 1994 and that the vehicle was in his possession on September 10, 1994;
- c. the Testimony of Danny Ogans;
- d. the testimony of Eric Cullen;
- e. the testimony of Richard Harjo;
- f. the affidavit of Billy Alverson;
- g. the affidavit of Michael Wilson;
- h. Michael Wilson's original statement to police that the weapon and car were his and that Petitioners never possessed either of them. Additionally, there was no evidence adduced at preliminary hearing, trial or at the evidentiary hearing that Petitioners were ever seen in or were in possession of a burgundy vehicle of any type.
- i. the testimony of Robert Payden, Michael Wilson's attorney at the time. Mr. Payden's testimony corroborates Michael Wilson's statement that Michael Wilson was in the burgundy vehicle at the time of the shooting. Mr. Payden states that he was retained to defend Wilson against being in the car at the time of the shooting.

17. Kenneth Price was one of two purported eye-witnesses who testified at the Petitioners' trial in 1995. He identified Petitioners as being in the burgundy vehicle on September 10, 1994 from which Karen Summers was shot.

18. Price recanted his trial testimony in an affidavit dated June 2, 2010. In the affidavit, Price stated he had been coerced and pressured by the police to identify the Petitioners as being in the burgundy vehicle and being involved in the drive-by shooting where Karen Summers was killed. Price also stated that he could not have seen the car's occupants because

his back was turned away from the vehicle. The affidavit and testimony before this court are consistent with the statement of Rashun Williams.

19. Rashun Williams (now deceased) claimed to have been another eyewitness to the shooting. His testimony at trial placed the Petitioners in the vehicle from which the shots were fired. Williams later recanted his trial testimony in an affidavit dated June 2, 2010 wherein he stated that he had also been coerced and pressured to identify the Petitioners as occupying the burgundy vehicle.

20. The Petitioners have been incarcerated since September 11, 1994 and were unable to properly investigate and pursue their claims of innocence. They lacked financial resources to hire investigators or lawyers. Additionally the revelation of the new evidence was fragmented and evolved over a period of time, coming from different sources in different locations, further hindering any efforts Petitioners might make to have their causes heard.

The Court, having considered the totality of the evidence presented and available finds that there is clear and convincing evidence that the Petitioners did not commit these crimes. Each witness who inculpated the Petitioners at trial has recanted their testimony; Michael Wilson's confession is corroborated by two eyewitnesses who were actually in the vehicle with Wilson when Karen Summers was killed; Wilson was found in possession of the murder weapon, the car that was used to facilitate the shooting; he actually rented the vehicle used in the shooting; and there is absolutely no physical evidence linking the Petitioners to this crime. The Petitioner's have always maintained their innocence.

CONCLUSIONS OF LAW

Petitioner Demarchoe Carpenter presented five propositions under the *Uniform Post-Conviction Procedure Act* for the court's consideration. The Court finds Propositions II, III and IV to be procedurally barred under the doctrine of waiver. In *Logan v. State*, 2013 OK CR 2, 293 P.3d 969, 973 as corrected (Feb. 28, 2013), the Oklahoma Court of Criminal Appeals reiterated that post-conviction review provides Petitioners with very limited grounds upon which to base a collateral attack on their judgments, as "[p]ost-conviction review was neither designed nor intended to provide applicants with another direct appeal." *Cf. Coddington v. State*, 2011 OK CR 21, 259 P.3d 833, 835 ("The Post-Conviction process is not a second appeal."). Further the *Logan* court re-affirmed its previous holdings that "[i]ssues that were previously raised and ruled upon by this Court are procedurally barred from further review under the doctrine of *res judicata*; and issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review." *Citing* 22 O.S. 2001§1086; *King v. State*, 2001 OK CR 22, 29 P.3d 1089, 1090; *Webb v. State*, 1992 OK CR 38, 835 P.2d 115,116, *overruled on other grounds*, *Neill v. State*, 1997 OK CR 41, 943 P.2d 145, 148.

Petitioner Carpenter, in his second proposition, alleges that his "...Fourteenth Amendment Rights were violated because the State of Oklahoma failed to fully disclose all exculpatory evidence." In support of his third proposition, Mr. Carpenter claims the "...States key witnesses gave varying statements that did not implicate Mr. Carpenter and gave false testimony at Mr. Carpenter's trial after the Tulsa Police Department coerced them to do so and Mr. Carpenter's attorney was not informed of the statements or the coercion." Additionally, Petitioner Carpenter claims that the "...State failed to inform defense counsel that no forensic reports linked Mr. Carpenter to the crime" Lastly, Petitioner Carpenter claims that his trial was prejudiced because of the State's failure to produce exculpatory material.

This Court finds that the issues in Propositions II, III and IV of Petitioner Carpenter's Application for Post-Conviction could have been raised on direct appeal, but were not, and are therefore waived.

In his fifth proposition, Petitioner Carpenter asserts that his appellate counsel was ineffective. The court was not provided any evidence concerning this proposition; therefore it will not be considered. Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), in the first prong of its test for ineffective assistance of counsel, "a defendant must establish 'that counsel made errors so serious that [he] was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. Since no information was provided to the court on this issue, no determination could be made as to ineffectiveness of appellate counsel.

The court does find that Proposition I of Petitioner Carpenter's Application for Post-Conviction has merit. This proposition will be discussed in conjunction with Propositions I and VI of Petitioner Scott's Application for Post-Conviction Relief.

Petitioner Malcolm Scott presented six propositions under the *Post-Conviction Procedure Act* for the Court's consideration. The Court finds Propositions II and III to be barred under the doctrine of waiver, because these issues could have been raised on direct appeal. The Court also finds that Propositions IV and V are procedurally barred, as these issues were raised in Petitioner Scott's Application for Post-Conviction Relief filed on March 19, 1998.

With regard to Propositions I and VI in Petitioner Scott's Application for Post-Conviction Relief, the Court finds that these propositions have merit.

The *Uniform Post-Conviction Procedure Act* governs post-conviction practice in the State of Oklahoma, 22 O.S. §1080 *et seq.* A Petitioner may seek relief under this act if there is a

claim that “ there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;...” 22 O.S. §1080(d).

The Oklahoma Court of Criminal Appeals has interpreted the aforementioned language to mean; (1) that the evidence must have been undiscoverable at trial or during the original appeal, despite the exercise of due diligence (*Romano v. State*, 917 P.2d 12 (Okla. Crim. App. 1996)), and (2) that there is a reasonable probability that if the evidence had been introduced , different results would have been reached (*Woodruff v. State*, 910 P.2d 348, 351 (Okla. Crim. App. 1996)).

The *Uniform Post-Conviction Procedure Act* also establishes a procedural bar to subsequent applications for Post-Conviction Relief. 22 O.S. §1086 provides that “all grounds for relief available to an applicant under this act must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for subsequent application, unless the court finds a ground for relief asserted, which for sufficient reason was not asserted or was inadequately raised in the prior application.”

In *McQuiggen v. Perkins*, 133 S. Ct. 1924 (2013), the United States Supreme Court recognized an exception to any procedural bar that would preclude petitioners seeking federal habeas corpus relief, from having their claims considered. The Court stated that if an individual seeking such relief “makes a proper showing of actual innocence”, such a claim may be pursued on the merits if a credible showing of actual innocence is made “notwithstanding the existence of a procedural bar to relief.” The Court stated that actual innocence is a “gateway” through which an individual may avoid any procedural bar, if a proper showing is made. This rule, known as the “**fundamental miscarriage of justice exception**” (emphasis added) is based on “the

equitable discretion of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons.” *Id.* at 1931. The Court has also held that this exception “applies to state court procedural rules.” *Id.* at 1932. The Court has further stated that this exception is limited to cases where the “factual predicate for a claim could not have been discovered previously through the exercise of due diligence and the petitioner can establish that no reasonable fact finder would have found [him] guilty of the underlying offense[-es] by clear and convincing evidence.” *McQuiggen* at 1933.

“The gatekeeper role of the court is to determine whether the petitioner had made a prima facie case of innocence. The requirement of ‘clear and convincing’ evidence at this stage is not a burden of proof, but is the measure of the prima facie case.” *Courtney v. State* 2013 OK 64; 307 P.3d 337. The post-conviction relief court must view the evidence in the light most favorable to the petitioner when assessing the prima facie case, particularly if the evidence is exonerating evidence. *Id.*

The Petitioners in this case have asserted that relief should be granted based on “newly discovered evidence”. In order for evidence to meet the standard of “newly discovered evidence” sufficient to overturn a conviction, the evidence must satisfy four requirements:

1. The evidence must be material;
 2. The evidence could not have been discovered before trial exercising ‘due diligence’;
 3. The evidence cannot be cumulative; and
 4. The evidence must create a reasonable probability that had the newly discovered evidence been introduced at the original trial, it would have changed the outcome.
- Hunter v. State*, 1992 OK CR 19, ¶15, 829 P.2d 64, 67.

The court finds that the “fundamental miscarriage of justice” exception applies in this case. The court also finds that the Petitioners are entitled to relief pursuant to 22 O.S. §1080(d), which reads:

“Any person who has been convicted of, of sentenced for, a crime and who

claims: (d) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice; may institute a proceeding under this act in the court in which the judgment and sentence on conviction was imposed to secure the appropriate relief.”

The court finds that the Petitioners in this case are entitled to relief under *The Uniform Post-Conviction Procedure Act*. Clearly, there are material facts which were not presented nor heard at trial which require vacation of the Petitioners’ convictions in the interest of justice. Those facts are: (1) Michael Wilson confessed to shooting Karen Summers; (2) evidence linked to the shooting was found in Michael Wilson’s possession—the vehicle; the weapon, which was linked to the shooting through ballistics testing; a rental receipt, confirming that Michael Wilson had rented the vehicle; there is no physical evidence linking the Petitioners to the crime; and the recantations of purported eyewitnesses to the crime. Even more compelling is the testimony of Richard Harjo, who confesses to being with Michael Wilson and Billy Alverson when the shooting occurred. Mr. Harjo is currently seeking a commutation of another sentence he is serving and he is aware that his testimony in this matter could subject him to prosecution. The court finds that those factors enhance his credibility.

The court also finds that the evidence was undiscoverable at trial, due mainly to the fact that witnesses were uncooperative or were being pressured into giving certain testimony. There would have been no way to determine exactly when the true perpetrators were ready to “come clean”. The court also finds that had the abovementioned evidence been introduced, different results would have been reached, i.e., the Petitioners would have been acquitted.

The court further finds that the “fundamental miscarriage of justice exception” applies in this instance. This exception is limited to cases ‘where the factual predicate for a claim could not have been discovered previously through the exercise of due diligence and the petitioner can

establish that no reasonable fact finder would have found [him] guilty of the underlying offense[-es] by clear and convincing evidence. The court finds that this standard has been met in this case. Again, there is no way of knowing when the actual perpetrators of the crime would come forward to confess. Additionally, in this case, the information regarding the Petitioners' actual innocence was revealed over time in fragments. To clarify, several different people were giving and receiving information at various times. Most of the individuals were incarcerated and did not have the means or the know-how to get the information into the proper venues, so that Petitioners could seek relief. The court also notes that once an investigator became involved in this situation, there was no question that due diligence was exercised. Finally, the court finds that there is clear and convincing evidence of the Petitioners' innocence which establishes that no reasonable fact finder would have found them guilty of the crimes charged.

The court finds that the evidence meets the criteria for "newly discovered evidence" sufficient to overturn a conviction for the reasons mentioned *supra*, relating to requirements 1, 2 and 4 (materiality; evidence undiscoverable before trial exercising 'due diligence'; and introduction of the evidence would have changed the outcome of the trial). The court finds that the third requirement is also met—that the evidence cannot be cumulative. In this instance, the court finds that the testimony received through the evidentiary hearing was not cumulative, but corroborative, again because the exculpatory information came from different sources at different times.

The Petitioners have presented new evidence of material facts not previously presented or heard by a court, such that this court finds that in the interest of justice their convictions should be vacated. The Court also finds that the Petitioners' claims of actual innocence are not

procedurally barred and that this court can rule on such claims pursuant to 22 O.S. §1080 and §1086.

The Petitioners' claims may be ruled upon on the merits, in line with the federal actual innocence and fundamental miscarriage of justice exceptions which are grounded upon the finding that constitutional errors should not result in the incarceration of innocent persons. This miscarriage of justice exception has been applied to cases such as Petitioner Scott's where grounds for relief were previously presented but rejected, and cases such as both Petitioners' where grounds for relief were presented in a subsequent application for relief, but were not included in the initial application for post-conviction relief or on direct appeal. See *McQuiggen v. Perkins*, 133 S.Ct. 1924, 1928, 185 L. Ed. 2d 1019 (2013); *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986); *McClesky v. Zant*, 499 U.S. 467-495.

There is a reasonable probability, if not near certainty, that had the evidence produced at the evidentiary hearing been produced at trial, the outcome would have been different. No reasonable jury having heard Michael Wilson's confession, having reviewed Billy Alverson's affidavit and having heard the testimony of Richard Harjo could convict the Petitioners of the murder of Karen Summers and the other attendant crimes.


The evidence presented at the evidentiary hearing supports the court's conclusion that the Petitioners are actually innocent of the murder of Karen Summers and the other attendant offenses for which they were convicted.

CONCLUSION

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, based on the foregoing, that Petitioners' *Applications for Post-Conviction Relief* filed on February 21, 2014

(Petitioner Scott) and March 11, 2014 (Petitioner Carpenter) should be and are hereby
GRANTED.

IT IS SO ORDERED, this 13th day of May, 2016.



SHARON K. HOLMES
JUDGE OF THE DISTRICT COURT