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MAR 19 2013

BEFORE THE STATE CLAIMS COMMISSION
Of the State of Arkansas

RECEIVED

☐ Mr.
☐ Mrs.
☐ Ms.
☐ Miss

GYRONNE BUCKLEY, Claimant

vs.

State of Arkansas, Respondent
State of ArkansasClark County Prosecuting Attorney, 9th East
Judicial District

Other (Wrongful Conviction)

COMPLAINT

GYRONNE BUCKLEY, the above named Claimant, of 119 S. PEACE ST., ARKADELPHIA
(Name) (Street or R.F.D. & No.) (City)AR 71998 County of CLARK represented by MARK E. HAMPTON J. THOMAS
(State) (Zip Code) (Daytime Phone No.) (Legal Counsel, if any, for Claim)at SULLIVAN, 1122 W. CAPITOL, LITTLE ROCK, AR (501) 376-6277 (501) 376-6277, says:
(Street and No.) (City) (State) (Zip Code) (Phone No.) (Fax No.)

State agency involved: CLARK COUNTY PROSECUTING ATTY. Amount sought: \$460,000

Month, day, year and place of incident or service: MAY, 1999 TO PRESENT

Explanation: CLAIMANT WAS ARRESTED IN JANUARY, 1999 BY SOUTH CENTRAL TASK FORCE AGENTS KEITH RAY AND UNDA CARD USING A CONFIDENTIAL INFORMANT NAMED LUXEY. RAY & UNDA VIDEOTAPED A PRE-TRIAL INTERVIEW WITH LUXEY IN APRIL, 1999, BUT APPARENTLY NEVER DISCLOSED IT TO THE PROSECUTOR. THE INTERVIEW TAPE CONTAINED EXCULPATORY EVIDENCE - OR MATERIAL IMPEACHMENT. RAY WAS FOUND BY THE US DISTRICT COURT TO HAVE COMMITTED PERJURY IN THE STATE TRIAL OF RODNEY BRAGG FOR DELIVERY OF COCAINE. ALTHOUGH THE PROSECUTOR KNEW RAY WAS UNRELIABLE, HE USED HIM TO TESTIFY AT MY TRIAL. NEVER INFORMING MY TRIAL COUNSEL THAT RAY HAD FILED A FALSE REPORT AGAINST BRAGG. THE TAPED INTERVIEW WITH LUXEY WAS NOT PROVIDED TO MY ATTORNEY, EVEN WHEN IT WAS DISCLOSED BY AGENT CARD DURING CROSS-EXAMINATION. IN MY STATE POST-CONVICTION HEARING IN 2005, PROSECUTOR MORGAN NEVER GAVE A COPY TO MY LAWYERS. WHEN THE US DISTRICT COURT ORDERED IT DISCLOSED, MY LAWYER WAS ABLE TO GET THE ARKANSAS SUPREME COURT TO RE-OPEN THE CASE. SPECIAL PROSECUTOR CARRY JEGUEY NOW PROSECUTED MY CASE AND I WAS RELEASED FROM ADC AFTER 11 AND 1/2 YRS. THE CLAIMS COMMISSION ORDERED \$200,000 FOR RODNEY BRAGG BASED ON THE 5 YRS HE SPENT IN ADC - \$40,000 A YR - MY CONVICTION HAS NOW BEEN EXPLAINED. RAY WAS NEVER PROSECUTED AT ALL.

As parts of this complaint, the claimant makes the statements, and answers the following questions, as indicated: (1) Has claim been presented to any state department or officer thereof?

NO : when? : to whom?
(Yes or No) (Month) (Day) (Year) (Department)

: and that the following action was taken thereon:

and that \$ was paid thereon: (2) Has any third person or corporation an interest in this claim? ATTY'S FEE: if so, state name and address

MARK E. HAMPTON 1122 W. CAPITOL LR AR 72201
(Name) (Street or R.F.D. & No.) (City) (State) (Zip Code)

and that the nature thereof is as follows:

: and was acquired on

, in the following manner:

CONSULT FOR LEGAL REPRESENTATION

THE UNDERSIGNED states on oath that he or she is familiar with the matters and things set forth in the above complaint, and that he or she verily believes that they are true.

J. THOMAS SULLIVAN
(Print Claimant/Representative Name)

Signature of Claimant/Representative

SWORN TO and subscribed before me at

LITTLE ROCK

AR

on this

18

day of

March

2013

(Date)

(Month)

(Year)

Marietta Alpha

(Notary Public)

My Commission Expires:

March

19

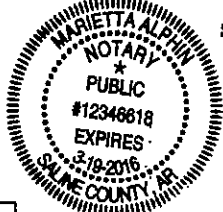
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Gyronne Buckley v. State of Arkansas
Arkansas Claims Commission
March, 2013

*BUCKLEY'S CLAIM BEFORE
THE ARKANSAS CLAIMS COMMISSION*

The extensive procedural history of Mr. Buckley's incarceration on his convictions for two counts of delivery of a controlled substance, cocaine, in his May, 1999, jury trial in Clark County Circuit Court, demonstrates a violation of his right to due process of law secured by the 14th Amendment to the United States Constitution; Article 2, Sections 2, 3, and 8 of the Arkansas Constitution, protecting liberty, equality, and due process of law; and Rule 17.1 of the Arkansas Rules of Criminal Procedure. Mr. Buckley, an African-American citizen of the State of Arkansas, was prosecuted based on an investigation into drug trafficking in controlled substances undertaken by the South Central Drug Task Force, which operated in multiple counties in Southwest Arkansas, including Clark County, during the time of his arrest and prosecution on charges of delivery of cocaine. Mr. Buckley had no prior arrests or convictions for drug-related crimes at the time of his arrest in January, 1999.

The investigation into Mr. Buckley's purported illegal activities was directed by South Central Drug Task Force Agent Keith "Buck" Ray. Agent Ray also conducted the investigation of cocaine trafficking in another case leading to the prosecution, conviction and life sentence imposed upon Rodney Bragg. During the course of Mr. Bragg's federal habeas corpus hearing in the United States District Court after the date of Buckley's conviction in May, 1999, Agent Ray admitted that he falsified evidence in the prosecution of Rodney Bragg, also an African-American citizen of the State of Arkansas had no previous arrests or convictions for drug-related offenses. Like Mr. Bragg, Gyronne Buckley was sentenced to serve life sentences upon his conviction by the jury; his life sentences were ordered to be served consecutively. During the course of the hearing in federal court in the *Bragg* case, Agent Ray admitted that his investigation into drug trafficking activity for the South Central Drug Task Force was directed at African-Americans.

Another individual convicted as a result of Ray's investigation, John Nolen, an African-American citizen of the State of Arkansas, also testified at the evidentiary hearing, regarding the circumstances of his arrest by Agent Ray.

At the conclusion of the federal habeas proceedings brought by Rodney Bragg, the United States District Court ordered him released from state custody based on its finding that Agent Ray had fabricated the evidence against Bragg, concluding that the record demonstrated Bragg's *actual innocence* of the offense on which he was convicted and sentenced to life in prison. *Bragg v. Norris*, 128 F.Supp.2d 587, 603 (E.D. Ark. 2000). The Arkansas Attorney General did not appeal from the district court's decision ordering relief.

Prior to Mr. Buckley's trial, Prosecuting Attorney Henry Morgan and his deputy, Taylor King, were sued by Rodney Bragg for replevin of his automobile that had been forfeited by authorities based upon his arrest by Agent Ray following a second claimed drug transaction which provided the evidentiary basis for the United States District Court's finding that Ray fabricated evidence against Bragg in his Nevada County case. The Clark County charge against Bragg based on Ray's report that was filed by Prosecutor Morgan was dismissed, yet his car was still forfeited. Further, although Morgan and King had actual notice of Ray's misconduct in the Bragg case, misconduct that would have led them to discover his perjury in his trial, they did not disclose that information to Buckley's defense counsel before, during or after his May, 1999, jury trial. Instead, some six weeks later Morgan confronted Ray over the misconduct and precipitated Ray's resignation from the South Central Drug Task Force only after Ray had testified for the prosecution against Buckley in his trial.

Further, South Central Drug Task Force Agents Ray and Linda Card never disclosed the existence of a videotaped interview they conducted with their undercover informant, Corey Livsey, a convicted felon cooperating in return for Arkadelphia Police Department agreement to file an additional felony charge against him and for a cash payment, who participated in the purported undercover purchases of cocaine from Mr. Buckley. The interview was recorded in April, 1999, shortly before the trial, but was not disclosed to trial counsel prior to trial, as required by the United States Constitution or, at a bare minimum, after Livsey had

testified at trial, as required by Arkansas law. Instead, this evidence was suppressed such that Buckley's trial counsel, Austin Porter, Jr., was not privy to the information known by the prosecution until after the time for filing a motion for new trial based upon Ray's perjury in the *Bragg* case had expired.

In fact, the very existence of the videotaped interview with the key prosecution witness, Livsey, was not disclosed until the hearing on Buckley's Rule 37.1 petition conducted by the Clark County Circuit Court on remand by the Arkansas Supreme Court in September, 2005. During that hearing, Agent Card, mentioned the interview and taping during her examination by Patrick Benca, who was serving as Buckley's trial counsel at the hearing. Prosecuting Attorney Morgan explained, on the record, that the Drug Task Force agents had never disclosed the videotape to him—consistent with Agent Card's testimony—and affirmed that he would have provided the tape to counsel pursuant to his obligation to disclose favorable evidence to the defense under the Supreme Court's decision in *Brady v. Maryland*, had he concluded that the taped interview contained impeachment evidence. Because he never had an opportunity to review the tape, he denied any intent on his part to suppress or conceal its existence.

Following the hearing, Morgan's deputy who assisted him in conducting the hearing for the State, Caran Curry, agreed to provide the videotape to Benca, but never produced the tape or provided him with a copy for his review. On appeal from the denial of relief on his post-conviction petition, the Arkansas Supreme Court upheld the circuit court, holding that Buckley had failed to use the proper procedural remedy, the writ of error *coram nobis*, to raise his claims concerning Prosecutor Morgan's failure to inform trial counsel Porter of his knowledge of Agent Ray's perjury in the *Bragg* case, even though the court had remanded the case to the circuit court to conduct a hearing on his claims in June, 2005. Despite Mr. Buckley's subsequent effort to raise the issues through *coram nobis* in the state supreme court and specific request to the court that it order the Attorney General to produce the tape, he was unable to obtain a copy of the suppressed evidence in the state courts.

The United States District Court, however, did order production of the tape in response to his motion in support of his claim urged in his petition for federal

habeas corpus relief. The Attorney General produced the tape pursuant to the order. In finding that Mr. Buckley made a substantial claim that his right to a fair trial had been violated by the suppression of the videotape, the federal court found that Livsey was a key prosecution witness at trial, and noted that he cited "no less than 38 discrepancies between Livsey's statements during his interview and the statements he made at trial and at Petitioner's resentencing." [Exhibit K, at 5]. The District Court ordered Buckley's habeas case held in abeyance to permit him to again raise his claims in the state courts, this time with the benefit of a copy of the tape and references to its actual contents.

Through the state *coram nobis* process Mr. Buckley was released from the custody of Arkansas Department of Correction six months after the decision of the Arkansas Supreme Court rendered on April 1, 2010. Following the appointment of Larry Jegley, Prosecuting Attorney for Pulaski and Perry Counties as Special Prosecutor in the case, the Clark County Circuit Court order his release from prison on November 1, 2010 and granted Mr. Jegley's motion to *nolle prosequi* the case the following month. In 2013, the circuit court granted Mr. Buckley's motion to expunge his conviction and seal the case.

*Buckley's invocation of the jurisdiction of the
Arkansas Claims Commission*

Gyronne Buckley seeks recovery invoking the jurisdiction of the Arkansas Claims Commission based upon the violation of his federally-protected right to due process of law based on the State's failure to comply with the requirement for discovery of favorable evidence to an accused in the possession of the prosecutor or members of the prosecution team. The material impeachment evidence relied upon by the United States District Court in holding his federal habeas corpus action in abeyance to permit him to exhaust the *coram nobis* remedy under Arkansas law through the state courts. This evidence was never made available to his trial counsel prior to the May, 1999, jury trial in which he was convicted and originally sentenced to serve two life sentences, consecutively. His convictions and life sentences were based on allegations that he made two deliveries of cocaine, less than one/quarter of a gram on each claimed occasion, to the convicted felony, Livsey, who was a critical State's witness and whose testimony would have

been impeached by misstatements he made during his videotaped interview with Drug Task Force agents Ray and Card.

Under the doctrine of absolute immunity, Mr. Buckley has no reasonable expectation of recovery of compensable damages in any civil rights action brought under 42 U.S.C. § 1983 against Clark County prosecutors or the State Attorney General. Pursuant to United States Supreme Court decisions, prosecutors are immune from civil liability for actions taken in the course of the performance of their duties in connection with the prosecution of criminal cases. *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *Van der Kamp v. Goldstein*, 555 U.S. 335 (2009); and *Connick v. Thompson*, 131 S.Ct. 1350 (2011). Mr. Buckley has no remedy against prosecutors for the violation of his rights to due process or fair trial resulting from the suppression of evidence that would have impeached Livsey at the trial or resentencing in his case.

Buckley's claim for compensation

Mr. Buckley had been incarcerated for approximately 11 and 1/2 years in the Arkansas Department of Correction following his conviction in May, 1999, and the original imposition of two life sentences despite the fact that he had no prior record of arrests or convictions for drug offenses, later reduced to 28 years on each count, but ordered to be served consecutively. He litigated claims of prosecutorial misconduct throughout his appeal from the resentencing ordered by the state supreme court, through state post-conviction proceedings and appeals in the state courts until he finally obtained relief on his second petition for writ of error *coram nobis* following the action of the United States District Court in ordering the production and disclosure of the taped interview with the undercover informant in the case.

During this 11 and ½ year period of incarceration, Mr. Buckley has experienced illness and physical debilitation, impairment of his relations with his mother, sisters and children, and loss of enjoyment of liberty in his life. His claim should be considered in light of the failure of any agency of the State to take action directed at Agent Ray following the federal court's finding that he had committed

perjury in the state trial of Rodney Bragg, who served five years in ADC before being released on proof of Agent Ray's misconduct in his prosecution.

The Commission awarded Mr. Bragg the sum of \$200,000 in compensation for his wrongful conviction and incarceration in the Arkansas Department of Correction, effectively finding that each year of his illegal confinement warranted compensation in the amount of \$40,000. Applying this standard in consideration of Mr. Buckley's lengthy incarceration and torturous litigation journey—documented fully in the exhibits appended to this claim--to his eventual release from custody, he seeks recovery from the State of \$460,000 as compensation for his loss of liberty.

*SUMMARY OF FACTUAL AND PROCEDURAL HISTORY
OF BUCKLEY'S CLAIM*

This summary is provided in order to afford an overview of the factual and procedural history of the State's prosecution of Claimant Gyronne Buckley. Gyronne Buckley's claim involves his imprisonment for 11 1/2 years in the Arkansas Department of Correction following his trial in the Clark County Circuit Court in May, 1999. References to Exhibits in this summary refer to the exhibits appended to this document. The contents of this summary are, as follows:

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A. Buckley's purported offenses and trial in May, 1999

Mr. Buckley was arrested in January, 1999, on charges that he sold less than one/quarter of a gram of crack cocaine to an undercover informant on the 12th and 13th of that month at his home in Arkadelphia. The informant was working for South Central Drug Task Force agents Keith Ray and Linda Card and Arkadelphia police after he was arrested at WalMart in Arkadelphia for *shoplifting* and being advised by the police that he was arrested for *robbery*. The informant, Livsey, had multiple felony convictions at the time, but was offered \$100 as payment and non-prosecution in return for making a "controlled buy" of drugs from Buckley, who supposedly had been suspected of trafficking in drugs in Clark County for several years. Livsey was given money by Ray after being searched before each of the two purported drug buys and walked to Buckley's residence after being driven nearby and dropped off by Ray. He was wearing a microphone to allow his conversations with Buckley to be taped.

Arkadelphia police officer Roy Bethell and Drug Task Force Agent Card parked in Bethell's patrol car up the street from Buckley's house so that they could supposedly observe the transactions and run the taping system. During the first purported drug buy, on January 12th Livsey walked to Buckley's front door, knocked and had a brief conversation with Mr. Buckley during which he claimed to purchase a small quantity of crack cocaine, using the "buy money" provided by Agent Ray. He then walked back to a location where he met Ray and was searched after turning over the cocaine. Card would later testify at trial that she observed Buckley on the front porch, while talking with Livsey, reach up into the rafters as if he was placing something there.

Livsey testified at trial to similar facts concerning the purported January 13th drug buy, except that he encountered Buckley outside his residence where he was playing ball with neighborhood kids. Based on her claimed observations, Card obtained a search warrant for Mr. Buckley's residence which was executed on the morning of January 14, 1999. The search of the residence turned up no marked money used in the transactions claimed by Livsey, no paraphernalia associated with drug trafficking such as scales, records or packaging materials, no guns, no quantities of controlled substances and no cash. Card claimed, however, to have

recovered a small bottle containing cocaine residue from the rafters area where she also claimed to have seen Buckley reach when he was on the porch with Livsey during the first controlled buy.

Mr. Buckley was tried before an all white jury in Clark County in May, 1999. The sole African-American juror selected for service was removed during the course of trial and replaced with a white juror. He testified at trial and denied that he had committed the offenses alleged by the State, but was convicted and sentenced to life sentences on the two counts of delivery, despite the fact that he had no prior drug convictions. The trial court ordered the sentences stacked at the request of the Prosecuting Attorney. On direct appeal, the Arkansas Supreme Court upheld the convictions, but vacated the sentences on the basis of hearsay offered by Agent Ray concerning Mr. Buckley's purported history of drug trafficking. *See Exhibit A: Buckley v. State*, 341 Ark. 864, 20 S.W.3d 331 (2000).

B. Rodney Bragg's prosecution and federal habeas relief

Mr. Buckley's claim can properly be understood only by discussion of the conviction and release of another Arkansas African-American criminal defendant, Rodney Bragg, who was prosecuted in a Nevada County case in 1996. Mr. Bragg was also charged with delivery of crack cocaine based on South Central Drug Task Force Agent Keith Ray's claim that he personally purchased \$50 worth of crack cocaine from Bragg in 1993 and subsequently identified him in the course of observing another drug transaction involving Bragg in Arkadelphia, Clark County, one year later in 1994. Agent Ray filed a report with the Clark County Prosecuting Attorney leading to Bragg being charged with delivery of cocaine as a result. Agent Ray testified in Bragg's state court jury trial in Nevada County which resulted in his conviction and imposition of a life sentence despite the fact that Bragg had only a conviction for domestic violence and no drug convictions on his record. Bragg's conviction and sentence were upheld by the Arkansas Supreme Court on direct appeal. *Bragg v. State*, 328 Ark. 613, 946 S.W.2d 654 (1997).

Subsequently, the United States District Court granted Bragg's petition for habeas corpus following an evidentiary hearing in which he proved that Agent Ray—and Agent Ray admitted while under oath—that Ray had testified falsely at

Bragg's state trial on the charge of delivery of cocaine. Bragg was ordered released from the Arkansas Department of Correction immediately. See Exhibit B: *Bragg v. Norris*, 128 F.Supp.2d 587 (E.D. Ark. 2000), esp. highlighted paragraphs.

Following his release from ADC, Bragg filed a claim with the Arkansas Claims Commission based on his wrongful imprisonment in the Arkansas Department of Correction for approximately five years as a result of his conviction on the basis Agent Ray's perjury at his state trial. He was awarded \$200,000 plus an additional sum based on the wrongful forfeiture of his automobile by Nevada County authorities and the General Assembly approved payment of the claim.

C. *Bragg's exoneration and Buckley's prosecution in state court*

The significance of the exoneration of Rodney Bragg in his federal habeas action for Mr. Buckley's claim is two-fold: first, it established that South Central Drug Task Force Agent Keith Ray had committed perjury in totally fabricating the case that netted the State a life sentence in Bragg's state trial; and second, the record shows that Clark County Prosecuting Attorney Henry Morgan knew of Ray's perjury in the Bragg case even while prosecuting Buckley, failing to disclose his knowledge of Ray's perjury to the defense while officially disavowing Agent Ray just weeks after Buckley had been convicted and sentenced to serve two life sentences. [Exhibit B, *Bragg v. Norris*, 128 F.Supp.2d at 596-97]. Bragg had filed a replevin action against PA Morgan based on the seizure of his automobile by the Drug Task Force and forfeiture prosecuted by Morgan prior to Buckley's trial in which Bragg provided documentation to prove that Agent Ray's March 1, 1994, offense report in Bragg's Clark County drug case was false. The federal habeas court noted that Morgan, in his testified, admitted that he learned about Agent Ray's misconduct through the replevin action:

Henry Morgan, the Clark County prosecuting attorney and current head of the South Central Drug Task Force, testified at the evidentiary hearing. Mr. Morgan was not involved in the prosecution of Mr. Bragg and testified that he learned of the discrepancies in Agent Ray's reports through the replevin action.

Mr. Morgan testified he was deeply troubled by the fact that Agent Ray's report listed the license plate XOM 157 weeks before the date of the sale of the automobile. Upon learning of the discrepancy, he personally investigated the issue to see if the discrepancy was a mere mistake or something more sinister. He contacted various sources looking for an explanation but could find nothing to explain Agent Ray's erroneous information. Part of his investigation involved contacting the Arkansas Criminal Information Center to see if an officer had called in that license plate or one similar during March 1, 1994. He found no information to put his discomfort to rest.

Mr. Morgan stated that the license tag was "crucial" to the case because it corroborated the sale without testimony from the informant who at the time of trial was a convicted felon. Mr. Morgan reported that the information was "pretty crucial to [him]."

Mr. Morgan further testified he contacted Mr. Rip Wiggins, who was then the supervisor of the South Central Drug Task Force, and asked him to request Agent Ray come to his office. Mr. Morgan asked Ray for an explanation and Agent Ray was not able to provide any credible explanation. Based upon this meeting and his investigation into the matter, Mr. Morgan told Agent Ray that police credibility was essential and he would no longer use Ray's testimony to prosecute cases. This decision ultimately resulted in Agent Ray's resignation. (Patt. 504.10).

Id. The confrontation between PA Morgan and Agent Ray and his supervisor, Wiggins, occurred at the end of June, 1999, within approximately six weeks of the convictions and life sentences imposed at Buckley's trial. Morgan called Ray to testify against Buckley at trial and Ray provided the crucial testimony concerning the undercover drug purchases Livsey had claimed to have made. Significantly, with respect to the testimony Livsey, a convicted felon whose motives to testify against Buckley were his interest in not being prosecuted for "robbery" in the WalMart shoplifting case and the \$100 cash payment promised by Agent Ray, the

Arkansas Supreme Court found that the tape did not provide any corroboration for Livsey's trial testimony:

According to Livsey, he pulled forty dollars from his pocket and asked to buy crack cocaine, using slang terms to ask for the drugs. *The audio tape, however, itself contained no conversation clearly indicating that a drug transaction was taking place.*

Exhibit A, *Buckley v. State*, 20 S.W.3d at 833. (emphasis added).

D. Buckley's re-sentencing proceeding

Following reversal of the life sentences imposed at Mr. Buckley's May, 1999 trial in Clark County Circuit Court, the case was remanded to that court with directions that it conduct a new sentencing proceeding without the introduction of inadmissible evidence. At this proceeding, Buckley objected to being sentenced by the jury, arguing that there was no statutory authority for conducting a proceeding limited to sentencing in non-capital cases under Arkansas law. He also personally informed the trial court that he wanted to call Agent Ray to testify, based on the knowledge he had concerning Ray's perjury in the Rodney Bragg case. However, the record disclosed a strategic disagreement with respect to the conduct of the case with trial counsel, who had succeeded his original counsel at trial. See *Buckley v. State*, 345 Ark. 570, 48 S.W.3d 534 (2001) (directing counsel to comply with process of filing brief with his motion to withdraw); *Buckley v. State*, 346 Ark. 2, 53 S.W.3d 518 (2001); (ordering new briefing calendar); *Buckley v. State*, Not Reported in S.W.3d, 2001 WL 1151281 (Ark.) (dismissing pro se motion for relief from sentence).

Agent Ray was not called to testify by either the State or defense. PA Morgan did call Agent Card, Officer Bethell, and the confidential informant, Livsey, who testified concerning the underlying facts of the convictions. The jury then imposed punishment at 28 years imprisonment in ADC on each count and the trial court, at Morgan's request, ordered these sentences to run consecutively.

On direct appeal, the Arkansas Supreme Court rejected Buckley's arguments, including his argument that he was prejudiced by not being able to call Agent Ray to demonstrate his lack of credibility for the jury empanelled for resentencing based on the federal habeas court's finding that Ray had committed perjury in another case. See Exhibit C: *Buckley v. State*, 349 Ark. 53, 76 S.W.3d 825 (2002), esp. highlighted paragraphs.

E. Buckley's Rule 37 litigation

Following denial of certiorari by the United States Supreme Court, *Buckley v. Arkansas*, 123 S.Ct. 633 (2002), Mr. Buckley filed a petition for post-conviction relief under Rule 37.2 of the Arkansas Rules of Criminal Procedure, alleging misconduct in the failure of PA Morgan to disclose Agent Ray's perjury in the *Bragg* case prior to eliciting his testimony at Buckley's trial and in the State's reliance on false testimony by Officer Bethell and Agent Card. After the trial court dismissed the petition without evidentiary hearing, the Arkansas Supreme Court remanded for the case for hearing on Buckley's misconduct claims, rejecting the State's argument that such claims were not cognizable in Rule 37 proceedings. See [Exhibit D: *Buckley v. State*, Not Reported in S.W.3d, 2005 WL 1411654 (Ark.), esp. highlighted paragraphs].

At the hearing on the Rule 37 claims, Buckley established that Bragg had demonstrated the falsity of Agent Ray's allegations in his replevin action that was served upon Morgan and others prior to Buckley's trial in May, 1999. Morgan denied that he was aware of Ray's false report filed in the Clark County case involving Bragg, however, until after the trial, despite the fact that he and his civil deputy, Taylor King, had filed answers denying the facts in Bragg's replevin action prior to the date of Buckley's trial. Morgan testified that he became aware of the documentary support for Bragg's replevin action, including evidence that showed he could not have been driving the automobile with the Arkansas license plate Ray claimed to have observed in Arkadelphia on March 1, 1994, because he had not purchased the car and obtained the plate from the Revenue department until weeks later. Morgan also claimed that when he learned about this at the hearing on the replevin action, he investigated the case and arrived at the conclusion that Ray had submitted a false report. He then proceeded to confront Ray and his supervisor

with the Drug Task Force, Wiggins, and advised them that Ray's credibility had been compromised and that Morgan would not call him to testify in drug cases in Clark County in the future. Agent Ray thereafter resigned from the Drug Task Force.

Morgan did not inform Buckley or his attorney about his conclusions regarding Agent Ray's credibility or the falsified report in the Rodney Bragg's Clark County case, which he had *nolle prossed* earlier when the confidential informant reporting to Ray had refused to cooperate in the prosecution of Bragg. Instead, he permitted Ray's testimony to go unchallenged while Buckley's case proceeded on direct appeal.

During the evidentiary hearing, Buckley's hearing counsel, Patrick Benca, who had also represented Rodney Bragg, examined Agent Card. She testified that she and Agent Card had interrogated the confidential informant, Livsey, prior to his trial testimony and had videotaped the interview. She explained that this videotape had not been provided to PA Morgan because it did not contain any exculpatory evidence that Buckley's defense counsel would have been entitled to review prior to trial. Morgan then explained that he had never seen the videotape and, consequently, had not been in a position to review the tape to determine whether it had to be disclosed to the defense.

After the hearing, Deputy Prosecuting Attorney Caran Curry, who had assisted PA Morgan in conducting the hearing, advised Benca that she would provide a copy of the videotape to him for his review. As Benca subsequently testified by unchallenged affidavits in the state and federal courts, he was never able to obtain the videotape from Curry.

Following the conclusion of the evidentiary hearing, which was conducted over the course of two days in September, 2007, the trial entered written findings as per the Supreme Court's direction in its remand order and again denied post-conviction relief. Buckley again appealed to the Arkansas Supreme Court. In his brief on appeal, he referenced the factual bases for his claims involving PA Morgan's knowledge of Ray's misconduct in filing a false report leading to Bragg's Clark County arrest and also noted the evidence supporting his claim that

Officer Bethell and Agent Card had testified falsely at his May, 1999, trial and at his resentencing:

At trial Officers Bethell and Card testified that they were positioned to observe controlled drug buys on January 12 and 13, 1999 [AB. 2/T1, 357] without being seen. [AB 9/T1, 485]. Bethell stated that he saw, Livsey, enter Buckley's front door on the 12th through his binoculars, [AB 2/T1, 357], and the same procedure was followed on the 13th. [AB. 23/T, 244]. Bethell and Card reiterated their trial testimony resentencing. [AB. 20/T2, 237; AB. 31/T2, 267]. Card testified specifically that she observed Buckley reach up to the rafters on his front porch on the 12th and withdraw something. [AB 10/T1, 498]. She testified at trial and at resentencing that she recovered the pill bottle from this same area during the January 14th search of his residence, [AB. 8-9/T1, 497; AB. 35-36/T2, 277-78].

At the Rule 37 hearing, Buckley offered the testimony of four attorneys who went to the scene and attempted to duplicate the sightings reported by Bethell and Card. Trial counsel Porter took photographs of the scene admitted as Defense Exhibits 10 and 11 in March, 1999, within forty-five days of the arrest. [AB-138-39; T3, 201-04] and denied that it would have been possible for Bethell and Card to have seen the activity on Buckley's porch that they claimed. [AB-141; T3, 2008-09]. Professor Sullivan concurred, based upon his five visits to the scene, including one trip in January, 2003, to duplicate the time of year when the arrest occurred [AB-101; T3, 118], testifying that it was not possible to observe anything on the front porch from the location where the officers were parked. [AB-102-03; T3, 118-121]. He measured the distance with an electronic rangefinder as being approximately 240 yards [AB-99; T3, 116] and concluded that Agent Card could not have made the observations she testified to with her naked eye. [AB-103; T3, 122]. Malvern attorney Loyd recalled visiting the scene with Sullivan in January, 2003, [AB-152; T3, 242]. Loyd confirmed that he observed the same scene as described by Bethell and Card, [AB-153; T3, 243], and in his opinion,

there was no way Agent Card could have observed the activity on the Buckley front porch to which she testified without binoculars, because he was not able to see Sullivan moving on the front porch even with binoculars. [AB-152-54; T3, 245-49]. Loyd determined the distance to be 250 yards from the Bethell/Card location to a car parked just past the Buckley residence. [AB-154; T3, 248]. Deputy Public Defender Erin Vinett testified that she could not observe any activity on the Buckley front porch from the location testified to by Bethell and Card, based upon her own review of the trial and resentencing transcripts, concluding it was not even a close call. [AB-174-175; T3, 302-304]. On cross, she stated that the elevation difference between the officers' location and Buckley residence, the privacy fence, and distance played much greater roles in obscuring vision of the front porch than vegetation, even given the difference between January and August, when she visited the scene. [AB-177, 179; T3, 309-311, 319].

On appeal, the Court inexplicably held that his claims concerning PA Morgan's failure to disclose his knowledge of Agent Ray's misconduct and the claim that members of the prosecution team, Bethell and Card, testified falsely at trial could not be heard on appeal. The Bethell/Card claim was based on the failure to correct or disclose their false trial testimony, constituting a violation of the duty imposed on prosecutors to correct false testimony at trial by the Due Process Clause of the United States Constitution. *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995); and *Lewis v. State*, 286 Ark. 372, 691 S.W.2d 864 (1985).

Instead, the Arkansas Supreme Court, despite having rejected the State's argument that such claims could not be litigated in Rule 37 when remanding the case for evidentiary hearing in its prior decision, *see* [Exhibit D: *Buckley v. 2005 WL 1411654*, *1-*2], ruled on the appeal from denial of relief on the Rule 37 motion that these claims could only be raised on a writ of error *coram nobis* and were thus, not properly before the Court for review on the merits. Mr. Buckley was denied appellate review on the same claims that he had raised in his Rule 37 petition and that had been litigated pursuant to the Court's earlier order remanding

the case for evidentiary hearing in the trial court. See [Exhibit E: *Buckley v. State*, 2007 WL 1509323 (Ark.), esp. highlighted paragraphs].

F. Buckley's first coram nobis application

Denied appellate review based on the Arkansas Supreme Court's retroactive application of a new rule that *Brady*-based prosecutorial misconduct claims can only be litigated through the *coram nobis* process, Mr. Buckley re-urged his claims by petitioning that court to permit him to proceed using that remedy. He also raised a new claim for the court's consideration based on the failure of Agents Ray and Card to disclose their videotaped interview with their informant, Livsey, to PA Morgan for his own determination as to whether the interview included exculpatory or impeachment evidence that should have been disclosed to the defense prior to Buckley's May, 1999, jury trial. In his application, Buckley conceded that he could not, himself, demonstrate that the tape contained material subject to the Constitutional disclosure duty because he had never been provided with the tape, as promised counsel by Morgan's deputy. He moved the court order the State to produce the tape. See [Exhibit F: *Buckley v. State*, Petition for Writ of Error *Coram Nobis*, esp. highlighted paragraphs].

The Arkansas Supreme Court denied Mr. Buckley's petition that it reconsider the claims it had refused to hear on appeal from the trial court's denial of Rule 37 relief, holding that Buckley did not exercise due diligence in proceeding by *coram nobis* six years earlier when Agent Ray's perjury in the Bragg case had been discovered in Bragg's federal habeas action. The court then rejected the claim involving the newly disclosed existence of the videotaped interview of Livsey by Agents Ray and Card. It held that since Buckley could not demonstrate that the interview included material required to be disclosed to the defense under the federal constitutional cases, it could not determine whether the prosecutor had violated the constitutional duty to disclose favorable evidence to the defense. See [Exhibit G: *Buckley v. State*, 2007 WL 2955980 (Ark.), esp. highlighted paragraphs].

G. *Buckley's federal habeas petition*

After being denied review of his claims in *coram nobis* by the Arkansas Supreme Court, Mr. Buckley petitioned the United States District Court for federal habeas corpus relief in which he raised both his original *Brady*-based claims and the newly-discovered claim that Agents Ray and Card had failed to turn the videotape of their interview with Livsey over to PA Morgan. [Exhibit H: *Buckley v. Norris*, Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, esp. highlighted paragraphs]. Buckley also moved for an order compelling the State, representing ADC Director Norris, to produce and disclose the videotaped interview of Livsey, which was granted. See [Exhibit I: *Buckley v. Norris*, Motion for Production of physical evidence and Order, for production of videotape]. Following the Attorney General's response, the United States Magistrate Judge granted Buckley's motion for discovery and ordered disclosure of the videotape. After reviewing the tape, counsel filed a response, pointing out multiple points for impeachment of Livsey's trial and resentencing testimony that should have been disclosed to trial counsel prior to Buckley's May, 1999, jury trial. [Exhibit J: Motion for Leave to Supplement Federal Habeas Petition].

The United States Magistrate Judge reviewed the videotape and found there was merit in the discovery motion. [Exhibit K: *Buckley v. Norris*, Proposed Findings and Recommended Disposition Instructions, filed by United States Magistrate Judge], and the United States District Court adopted the findings and ordered the federal case held in abeyance pending exhaustion of the *coram nobis* claim in the Arkansas courts. [Exhibit L: *Buckley v. Norris*, Order, adopting findings and recommendation of United States Magistrate Judge].

H. *Buckley's second application for coram nobis relief*

Following the District Court's order holding Mr. Buckley's petition for federal habeas relief in abeyance, counsel filed a motion in the Arkansas Supreme Court setting forth the basis for his claim in *coram nobis* that the State had failed to disclose exculpatory or impeachment evidence. [Exhibit M: *Buckley v. State*, Motion to Re-Invest Trial Court with Jurisdiction to Consider Petition for Writ of Error *Coram Nobis*]. The Supreme Court granted the motion and directed counsel

to file the petition for writ of error *coram nobis* in the Clark County Circuit Court. [Exhibit N: *Buckley v. State*, 2010 Ark. 154, 2010 WL 1255763 (Ark.)].

Buckley then filed his Petition for Writ of Error *Coram Nobis* in the Clark County Circuit Court. [Exhibit O: (Second) Petition for Writ of Error *Coram Nobis*]. On motion of the Clark County Prosecuting Attorney, the Circuit Court appointed the Honorable Larry Jegley, Prosecuting Attorney for Pulaski County to serve as Special Prosecutor in the *coram nobis* action. [Exhibit P: Orders Appointing Special Prosecutor].

Following the review of the *coram nobis* petition and supporting documents, including the videotape of the interview Agents Ray and Card conducted with their informant, Livsey, the Special Prosecutor [Exhibit Q: Motion to *Nolle Prosequi*], and the Circuit Court agreed that Buckley was entitled to relief on his claim that the prosecution had failed to disclose favorable evidence to the defense prior to the May, 1999, trial. [Exhibit R: Order Granting *Nolle Prosequi*]. The Circuit Court first ordered him released from custody of ADC [Exhibit S: ADC Discharge Order], then ordered his convictions on the two counts of delivery of cocaine vacated once it granted the *Nolle Prosequi* motion filed by the Special Prosecutor. Following this action, Buckley moved for dismissal of the pending federal habeas action, which was granted by the United States District Court. [Exhibit T: Order Dismissing Federal Habeas Action]. The Circuit Court subsequently granted Mr. Buckley's order for expungement of his record, sealing the felony cocaine delivery charges upon which he had been convicted in his May, 1999. [Exhibit U: Circuit Court Order Sealing Record].

*LIST OF EXHIBITS APPENDED IN SUPPORT OF
GYRONNE BUCKLEY'S CLAIM BEFORE THE COMMISSION*

EXHIBIT DOUMENT DESCRIPTION

- A: *Buckley v. State*, 341 Ark. 864, 20 S.W.3d 331 (2000).
- B: *Bragg v. Norris*, 128 F.Supp.2d 587 (E.D. Ark. 2000)
- C: *Buckley v. State*, 349 Ark. 53, 76 S.W.3d 825 (2002)
- D: *Buckley v. State*, Not Reported in S.W.3d, 2005 WL 1411654 (Ark.)
- E: *Buckley v. State*, 2007 WL 1509323 (Ark.)
- F: *Buckley v. State*, Petition for Writ of Error *Coram Nobis*
- G: *Buckley v. State*, 2007 WL 2955980 (Ark.)
- H: *Buckley v. Norris*, Petition for Writ of Habeas Corpus Pursuant to
28 U.S.C. § 2254
- I: *Buckley v. Norris*, Motion for Production of Physical Evidence
- J: *Buckley v. Norris*, Motion for Leave to Supplement Federal Habeas
Petition
- K: *Buckley v. Norris*, Proposed Findings and Recommended Disposition
Instructions
- L: *Buckley v. Norris*, Order, adopting findings and recommendation of
United States Magistrate Judge
- M: *Buckley v. State*, Motion to Re-Invest Trial Court with Jurisdiction to
Consider Petition for Writ of Error *Coram Nobis*
- N: *Buckley v. State*, 2010 Ark. 154, 2010 WL 1255763 (Ark)
- O: (Second) Petition for Writ of Error *Coram Nobis*

P: Orders Appointing Special Prosecutor
Q: Motion to *Nolle Prosequi*
R: Order Granting *Nolle Prosequi*
S: ADC Discharge Order
T: Order Dismissing Federal Habeas Action
U: Circuit Court Order Sealing Record

COMMISSION
APR 26 2013

RECEIVED

BEFORE THE STATE CLAIMS COMMISSION
OF THE STATE OF ARKANSAS

GYRONNE BUCKLEY

CLAIMANT

v.

CLAIM NO. 13-0695-CC

STATE OF ARKANSAS;
CLARK COUNTY PROSECUTING ATTORNEY;
AND 9TH EAST JUDICIAL DISTRICT

RESPONDENTS

ANSWER

The Respondents, by and through their attorneys, answer the Claimant's Complaint as follows:

1. Respondents affirmatively state that Claimant was found guilty by a jury of two counts of Delivery of a Controlled Substance in 1999. They admit that, prior to his conviction, he was arrested in January, 1999 by South Central Drug Task Force Agents Linda Card and Keith Ray and that confidential informant Corey Livsey provided some information regarding Claimant's illegal activities.

2. Respondents affirmatively state that, after Claimant's convictions for delivery of a controlled substance were affirmed on appeal, Claimant filed two petitions seeking authority to present a *coram nobis* petition to the trial court. The first was denied whereas the second was granted. Respondents affirmatively state and admit that the Arkansas Supreme Court reinvested limited jurisdiction in trial court to consider Claimant's petition for writ of error *coram nobis* on the sole issue of whether the standards set forth in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963), had been violated.

3. Respondents affirmatively state and admit that Pulaski County Prosecutor Larry Jegley was appointed as a special prosecutor to review the Claimant's criminal case after the trial

court was reinvested with authority to hear Claimant's petition for *coram nobis* and that he elected to *nolle prosequi* the case because Claimant has already served 11 1/2 years of a prison sentence for the convictions of Delivery of a Controlled Substance. Respondents deny any implication that Prosecutor Larry Jegley's decision to *nolle prosequi* reflects on whether there had been sufficient evidence in 1999 to convict Claimant of two counts of delivery of a controlled substance.

4. Respondents admit and affirmatively state that Corey Livsey was videotaped making statements and answering questions regarding his purchases of crack cocaine from Claimant, but presently lack knowledge or information that makes them believe it contains exculpatory or impeaching information, and therefore deny that it does. Respondents affirmatively state that *coram nobis* proceedings are attended by a strong presumption that the judgment of conviction is valid and that, had the proceeding for *coram nobis* proceeded, it would have been Claimant's burden to demonstrate a reasonable probability that the judgment of conviction would not have been rendered, or would have been prevented, had the information from the video been disclosed at trial.

5. Respondents affirmatively state that Claimant's allegations regarding another claimant's case are irrelevant and, to the extent the Claims Commission believes them to be relevant, the records of the Claims Commission speak for themselves and are the best evidence of the allegations Claimant makes with regard to other claimants.

6. Respondents presently lack knowledge or information sufficient to form a belief as to the truth of the remaining material allegations of the Complaint not specifically admitted or denied herein, and therefore deny the same.

Affirmative Defenses

7. The Complainant has failed to state a claim for which relief can be granted.
8. This Commission does not have jurisdiction over the present case.
9. The Complaint is barred by the doctrine of laches.
10. State prosecutors have prosecutorial immunity from suit for acts that they took in their official capacities as prosecutors.
11. The judicial district named as Respondent is not a State entity amenable to suit.
12. No respondent was properly served except for the State of Arkansas.
13. The Commission cannot make any award for this claim because, as a matter of law, it would be dismissed from a court of law or equity for reasons other than sovereign immunity.


WHEREFORE, having fully answered Claimant's Complaint, Respondents pray that said Complaint be dismissed, and for all other relief to which they may be entitled.

Respectfully submitted,

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NOV 07 2013

BEFORE THE STATE CLAIMS COMMISSION
OF THE STATE OF ARKANSAS

GYRONNE BUCKLEY

RECEIVED
CLAIMANT

v. CLAIM NO. 13-0695-CC
STATE OF ARKANSAS;
CLARK COUNTY PROSECUTING ATTORNEY;
AND 9TH EAST JUDICIAL DISTRICT

RESPONDENTS

MOTION FOR SUMMARY JUDGMENT

Respondents, by and through their attorneys, Attorney General Dustin McDaniel, Assistant Attorney General Will Jones and Assistant Attorney General Edward Armstrong, move the Arkansas State Claims Commission ("Commission") to dismiss Claim No. 13-0695-CC of claimant Gyronne Buckley ("Claimant") for the following reasons:

1. Claimant has failed to state a claim for which relief can be granted against the Respondents.
2. Pursuant to A.C.A. § 19-10-103, full-time employees of the State of Arkansas are prohibited from appearing as an attorney or representative for any claimant in the presentation or prosecution of any claim before the Commission.
3. J. Thomas Sullivan, Professor of Law at the University of Arkansas at Little Rock School of Law, filed and presented Claim No. 13-0695-CC to the Commission on behalf of Claimant in violation of the statutory bar of A.C.A. § 19-10-103.
4. Pursuant to A.C.A. § 19-10-204(b)(3)(A)-(B), the Commission does not have statutory authority to make any award for any claim that would be dismissed from a court of law or equity for reasons other than sovereign immunity.

5. As a matter of law, Claimant's purported claim against the Clark County Prosecuting Attorney would be dismissed from a court of general jurisdiction based on the *absolute immunity* of a prosecuting attorney for activities within the scope of the prosecutor's duties in initiating a prosecution and in presenting the State's case.

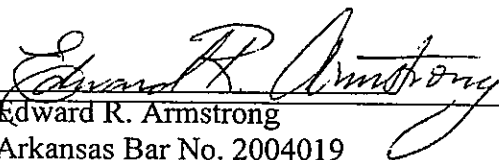
6. Claimant's purported claim against the 9th East Judicial District fails because the 9th East Judicial District is a district and not an agency, department or institution and is therefore not an entity not amenable to suit pursuant to A.C.A. § 19-10-204(a), but merely a political sub-division corresponding to a geographical area.

WHEREFORE, Respondents pray that said Complaint be dismissed, and that they be awarded their costs and for all other relief to which they may be entitled.

Respectfully submitted,

Dustin McDaniel
Attorney General

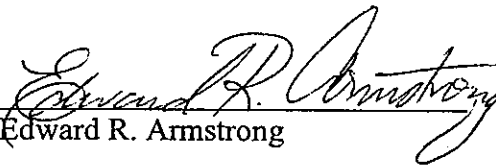
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CERTIFICATE OF SERVICE

I, Assistant Attorney General Edward R. Armstrong, do hereby certify that a copy of the foregoing has been served upon the following via regular U.S. Mail, postage prepaid, on this 7th day of November, 2013.

Mr. Mark Hampton
Mr. J. Thomas Sullivan
1122 West Capitol Avenue
Little Rock, AR 72201


Edward R. Armstrong

NOV 07 2013

BEFORE THE STATE CLAIMS COMMISSION
OF THE STATE OF ARKANSAS

RECEIVED

GYRONNE BUCKLEY

CLAIMANT

v.

CLAIM NO. 13-0695-CC

STATE OF ARKANSAS;

CLARK COUNTY PROSECUTING ATTORNEY;

AND 9TH EAST JUDICIAL DISTRICT

RESPONDENTS

**BRIEF IN SUPPORT OF THE MOTION OF THE STATE OF ARKANSAS
FOR SUMMARY JUDGMENT**

I. INTRODUCTION

J. Thomas Sullivan, Professor of Law at the University of Arkansas at Little Rock School of Law, appearing on behalf of Gyronne Buckley (the "Claimant"), filed and presented the above referenced claim (the "Claim") to the Arkansas Claims Commission (the "Commission") against the State of Arkansas (the "State"), the Clark County Prosecuting Attorney and the 9th East Judicial District.

The Claim must be dismissed because: (1) the Commission has no authority to grant relief on claims that would be dismissed from a court of general jurisdiction as a matter of law for reasons other than sovereign immunity and the Claim against the Clark County Prosecuting Attorney would be dismissed from such a court based on absolute immunity; (2) the 9th East Judicial District is not an entity amenable to suit before the Commission under Ark. Code Ann. § 19-10-204(a); and (3) Ark. Code Ann. § 19-10-103 prohibits full-time employees of the State from presenting claims to the Commission on behalf of claimants. For these reasons and others, set forth more fully below, the State of Arkansas moves for summary judgment.

II. LEGAL AUTHORITY AND ARGUMENT

- A. THE COMMISSION DOES NOT HAVE AUTHORITY TO MAKE ANY AWARD FOR ANY CLAIM THAT WOULD BE DISMISSED FROM A COURT OF GENERAL JURISDICTION FOR REASONS OTHER THAN SOVEREIGN IMMUNITY, OR JURISDICTION OVER POLITICAL SUBDIVISIONS OF THE STATE OTHER THAN AGENCIES, DEPARTMENTS AND INSTITUTIONS, OR AUTHORITY TO HEAR CLAIMS PRESENTED BY FULL-TIME EMPLOYEES OF THE STATE.

The jurisdiction conferred on the Commission is limited to claims against “the State of Arkansas and its several agencies, departments, and institutions[.]” A.C.A. § 19-10-204(a). This jurisdiction does not extend to claims against “any other subdivisions of the [S]tate.” *Id.*

The Commission’s jurisdiction and authority is further limited by other statutory provisions excluding certain specific types of claims from the Commission’s jurisdiction. *See* A.C.A. § 19-10-204(b)(1)-(3); A.C.A. § 19-10-103. For example, under A.C.A. § 19-10-204(b)(2)(A), the jurisdiction of the Commission over claims against State agencies, departments and institutions is limited to “only” those claims that would otherwise be barred from litigation in a court of general jurisdiction “by the doctrine of sovereign immunity.” *Id.* This limit is provided as follows

The commission shall have jurisdiction *only* over those claims which are barred by the doctrine of sovereign immunity from being litigated in a court of general jurisdiction.

A.C.A. 19-10-204(b)(2)(A) (emphasis added). This clearly limits the jurisdiction of the Commission to “only” those claims that would be barred from being litigated in a court of general jurisdiction as a result of the State’s sovereign immunity. However, the authority of the Commission does not extend to all cases that would be barred by sovereign immunity. *See* A.C.A. 19-10-204(b)(3)(A). By statute the Commission does not have the authority to grant relief for any claim that would be dismissed as a matter of law from a court of general

jurisdiction for any reason other than the defense of sovereign immunity. *Id.* Section A.C.A. 19-10-204(b)(3)(A) provides:

The commission shall make no award for any claim which, as a matter of law, would be dismissed from a court of law or equity for reasons other than sovereign immunity.

Id. Taken together, these statutes make clear that the Commission does not have jurisdiction to entertain claims against political subdivisions of the State other than agencies, departments and institutions, nor does it have statutory authority to grant relief for any claim that would be barred by sovereign immunity if there are any other valid defenses that would result in the claim's dismissal from a court of general jurisdiction as a matter of law. These jurisdictional limits are significant for the present case because, as explained in Section B below, the Claim against the Clark County Prosecuting Attorney would be dismissed as a matter of law based on the absolute immunity enjoyed by prosecutors at common law for acts and omissions in prosecuting cases. The Claimant himself concedes his Claim against the Clark County Prosecuting Attorney would be barred by absolute immunity as follows:

Under the doctrine of absolute immunity, Mr. Buckley has no reasonable ~~expectation of recovery of compensable damages in any civil rights action~~ brought under 42 U.S.C. § 1983 against Clark County prosecutors or the State Attorney General. Pursuant to United States Supreme Court decisions, prosecutors are immune from civil liability for actions taken in the course of the performance of their duties in connection with the prosecution of criminal cases. *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *Van der Kamp v. Goldstein*, 555 U.S. 335 (2009); and *Connick v. Thompson*, 131 S.Ct. 1350 (2011). Mr. Buckley has no remedy against prosecutors for the violation of his rights to due process or fair trial resulting from the suppression of evidence that would have impeached Livsey at the trial or resentencing in his case.

Buckley's Claim Before The Arkansas Claims Commission, Page 5, brief attached to the Claim. Because Buckley's Claim against the Clark County Prosecutor would be barred in other courts due to the absolute immunity that prosecutors have from such suits as a matter of law, the

Commission does not have authority under A.C.A. § 19-10-204(b)(3)(A) to award any relief on the Claim.

The Commission's lack of jurisdiction over political subdivisions of the State other than agencies, departments, and institutions is also significant for the present case because the 9th East Judicial District is a *district*, not an agency, department or institution and therefore falls outside of the Commission's limited grant of jurisdiction. *See* A.C.A. § 19-10-204(a). More fundamentally, because it is merely the designation of a political subdivision covering a particular geographic area and is not an entity, it simply is not subject to suit. The law applicable to this aspect of the Claimant's failure to state a Claim is discussed in greater detail in Section C below.

Another significant restriction on the claims that can be brought before the Commission against the State's agencies, departments and institutions is found in A.C.A. § 19-10-103, which provides:

No full-time employee of the State of Arkansas or of its agencies, nor a member of any agency, shall appear before either the Arkansas State Claims Commission or the Workers' Compensation Commission as attorney or representative for any claimant in the presentation or prosecution of any claim filed under this chapter.

A.C.A. § 19-10-103. The "chapter" of the Arkansas Code Annotated in which the statute appears is Chapter 10, CLAIMS AGAINST THE STATE. As more fully discussed in Section D below, the immediate implication of this restriction for the present Claim is that it must be dismissed because it was presented to the Commission by a full-time employee of the State.

B. THE COMMISSION SHOULD DISMISS THE CLAIM AGAINST THE CLARK COUNTY PROSECUTOR BECAUSE IT WOULD BE DISMISSED FROM A COURT OF GENERAL JURISDICTION AS A MATTER OF LAW

The Claim is based on the alleged conduct of the Clark County Prosecutor, whom Claimant accuses of having violated his civil rights. However, as a matter of law Claimant's

purported Claim against the Clark County Prosecutor for the alleged violation of his civil rights, even if true, would be dismissed from a court of general jurisdiction based on the *absolute immunity* of a prosecuting attorney for activities within the scope of the prosecutor's duties in initiating a prosecution and in presenting the State's case. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984 (1976) (holding that a prosecutor enjoys absolute immunity from suit for activities intimately associated with the judicial phase of the criminal process and functions even where the prosecutor knowingly used perjured testimony at the trial, deliberately withheld exculpatory information, or failed to make a full disclosure of all facts casting doubt upon the state's testimony).

The absolute immunity of prosecuting attorneys from liability for their acts and omissions in the prosecution of cases on behalf of the State has long been recognized at common law. *Culpepper v. Smith*, 302 Ark. 558, 571, 792 S.W.2d 293, 300 (1990) ("It has long been held that public policy demands such immunity for the prosecutors and has permitted no diminution or erosion of this defense when the acts complained of are committed within the scope of the duties of the prosecuting attorney's Office."). This immunity, which is distinct from the sovereign immunity of the State, is grounded on the same policy considerations underlying the common-law immunities of judges and jurors acting within the scope of their duties. *Imbler*, 424 U.S. at 422-423, 96 S.Ct. at 991. "These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* The United States Supreme Court further articulated some of the strong policy rationales behind a prosecutor's absolute immunity in the following words:

The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by

those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case. . . . The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded, and we would have moved away from the desired objective of stricter and fairer law enforcement.

Id. at 423-424, 96 S.Ct. at 991-92 (quoting with approval *Pearson v. Reed*, 6 Cal.App.2d 277, 287, 44 P.2d 592, 597 (1935)).

In *Imbler*, a federal district court found that that the prosecutor's conduct amounted "to the culpable use by the prosecution of misleading or false testimony" and the withholding of exculpatory evidence. *Id.* 424 U.S. at 414-15, 96 S.Ct. at 987-988. Ken Imbler subsequently filed an action under 42 U.S.C. § 1983 against the prosecutor and several police officers, alleging that they unlawfully conspired to wrongfully charge and convict him. *Id.* at 415-16, 96 S.Ct. at 988. Despite its prior holding in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963) that the suppression by the prosecution of evidence favorable to an accused is a violation of due process ~~that may entitle a prisoner to habeas relief, the Court held that even in the face of such conduct,~~ prosecutors are absolutely immune from suits for damages arising out of their official duties in initiating and pursuing criminal prosecutions. *Id.* at 420-431, 96 S.Ct. at 990-996. In fact, the Court expressly decided that this immunity is in no way affected by a criminal defendant's victory in a *habeas corpus* action, *id.* at 427 and n. 27. 96 S.Ct. at 994 and n. 27, and applies with full force even if the prosecutor performs his duties maliciously or dishonestly. *Id.* at 427. 96 S.Ct. at 994. In discussing the absolute immunity of prosecutors, the Court noted:

To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would

disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. Moreover, it often would prejudice defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice.

Id. at 427-428, 96 S.Ct. at 993 – 994. In sum, the purpose of this absolute immunity, even in the face of alleged prosecutorial impropriety, is to protect the prosecutor as a key participant in the criminal justice process, recognizing that it is “better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.” *Id.* at 428, 96 S.Ct. at 994 (citing *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949, 70 S.Ct. 803 (1950)).

As conceded by the Claimant,¹ this precedent establishes that the Claimant's Claim against the Clark County Prosecutor would be dismissed from a court of general jurisdiction as a matter of law based on the absolute immunity of the Clark County Prosecutor. *See id.* The absolute immunity of prosecutors recognized in *Imbler* is now a very well and widely established rule of law. *See, e.g., Reid v. State of N.H.*, 56 F.3d 332, 32 Fed. R. Serv. 3d 804 (1st Cir. 1995) (holding prosecutors have absolute personal immunity to civil rights action for knowing

suppression of exculpatory information even if exculpatory information is suppressed in violation of trial court orders or is suppressed long after a defendant's conviction); *Warney v. Monroe County*, 587 F.3d 113, 63 A.L.R.6th 775 (2d Cir. 2009) (holding prosecutors who delayed disclosing exculpatory DNA testing results and fingerprint analysis to the prisoner were

¹ *See Buckley's Claim Before The Arkansas Claims Commission*, Page 5, brief attached to the Claim, which concedes:

Pursuant to United States Supreme Court decisions, prosecutors are immune from civil liability for actions taken in the course of the performance of their duties in connection with the prosecution of criminal cases. *Imbler v. Pac[h]tman*, 424 U.S. 409 (1976); *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993); *Van der Kamp v. Goldstein*, 555 U.S. 335 (2009); and *Connick v. Thompson*, 131 S.Ct. 1350 (2011). Mr. Buckley has no remedy against prosecutors for the violation of his rights to due process or fair trial resulting from the suppression of evidence that would have impeached Livsey at the trial or resentencing in his case.

entitled to absolute immunity from liability); *Yarris v. County of Delaware*, 465 F.3d 129 (3d Cir. 2006) (holding county prosecutors entitled to absolute immunity on § 1983 claim that they withheld exculpatory evidence prior to the accused's trial on charges of kidnapping, rape, and murder); *Smith v. Holtz*, 210 F.3d 186 (3d Cir. 2000) (holding prosecutor, who decided not to disclose evidence to the defendant's counsel, had absolute immunity to liability under § 1983); *Carter v. Burch*, 34 F.3d 257 (4th Cir. 1994) (holding prosecutor was entitled to absolute immunity from § 1983 liability for failure to disclose allegedly material exculpatory evidence, even when the prosecutor learned of the evidence after the trial while he was handling post-conviction motions and initial direct appeal, holding that the prosecutor was acting as an advocate of the State rather than in an investigatory capacity); *Rhodes v. Smithers*, 939 F. Supp. 1256 (S.D. W. Va. 1995), summarily aff'd, 91 F.3d 132 (4th Cir. 1996) (holding absolute immunity applied for acts taken in "the initiation and pursuit of a criminal prosecution, including presentation of the state's case at trial" where there is a prosecutorial decision to withhold materially exculpatory evidence or present false testimony); *Cousin v. Small*, 325 F.3d 627 (5th Cir. 2003) (holding that the prosecutor was immune from liability for failing to disclose that a witness, who identified the defendant as the perpetrator, had poor vision and was not wearing her glasses or contacts at the time of the murder and that, as a result, her subsequent identification of the defendant was suspect and that the prosecutors failed to disclose information linking other potential suspects to the crime, because prosecutors are absolutely immune from liability under § 1983 for their conduct in initiating a prosecution and in presenting the State's case, insofar as that conduct is intimately associated with the judicial phase of the criminal process); *Henzel v. Gerstein*, 608 F.2d 654 (5th Cir. 1979) (holding that the alleged unlawful acts of prosecutors, including filing information without investigation, filing charges without jurisdiction, filing a

baseless detainer, offering perjured testimony, suppressing exculpatory evidence, refusing to investigate complaints about prison system, and threatening the defendant with further criminal prosecutions, were a necessary and integral part of prosecutors' role and fell within prosecutorial immunity from civil suit); *Blake v. County of Livingston*, 257 Fed. Appx. 848 (6th Cir. 2007) (holding that prosecutor's nondisclosure of exculpatory information is entitled to absolute immunity for evidence allegedly withheld from accused before his guilty plea); *Hilliard v. Williams*, 540 F.2d 220 (6th Cir. 1976) (remanding civil rights suit with directions to dismiss as to the state prosecutor, who allegedly withheld an FBI report containing exculpating evidence and had failed to prevent or correct deceptive and misleading testimony given by a police officer, because the prosecuting attorney was not liable in damages under the decision in *Imbler*); *Wolf v. Carey*, 438 F. Supp. 545 (N.D. Ill. 1977), *aff'd* without opinion, 582 F.2d 1282 (7th Cir. 1978) (dismissing plaintiff's complaint alleging that the defendants had unlawfully prosecuted him for the crime of arson after his conviction had been reversed in state court for the failure of the State to prove him guilty beyond a reasonable doubt because the reversal of the plaintiff's conviction on appeal did not affect the applicability of the *Imbler* grant of prosecutorial immunity);

Reasonover v. St. Louis County, Mo., 447 F.3d 569, 579 -580 (8th Cir. 2006) (holding a prosecutor enjoys absolute immunity for acts performed "in initiating a prosecution and in presenting the State's case," which extended to prosecutor's failure to disclose a taped conversation to an accused's defense attorney where he (1) claimed he did not know it was still in existence because police officers told him the conversation had been taped over; and (2) officers told him the tape contained nothing of substance); *Snelling v. Westhoff*, 972 F.2d 199, 200 (8th Cir. 1992) (following *Imbler* in upholding a district court's dismissal of a case based upon prosecutorial immunity when a plaintiff alleged that a prosecuting attorney had conspired

with a witness to give false testimony at his trial); *Broam v. Bogan*, 320 F.3d 1023, 1030 (9th Cir.2003) (prosecutors' violation of *Brady* involves "an exercise of the prosecutorial function and entitles [them] to absolute immunity from a civil suit for damages"); *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675 (9th Cir. 1984) (holding district attorney not liable under 42 U.S.C.A. § 1983 to a prisoner, who alleged that the deputy district attorney destroyed or permitted the destruction of exculpatory evidence related to the prosecution of the prisoner because if the prisoner alleged that the district attorney was directly involved in the decision not to preserve the evidence, he enjoyed absolute prosecutorial immunity); *Esquibel v. Brian Williamson*, 2010 WL 4912310 (10th Cir. 2010) (holding a *pro se* prisoner's claim that a state prosecutor violated 42 U.S.C.A. § 1983 by withholding exculpatory evidence in the criminal prosecution was barred by the doctrine of absolute immunity); *Guttman v. Khalsa*, 446 F.3d 1027, 17 A.D. Cas. (BNA) 1447 (10th Cir. 2006) (holding that the administrative prosecutor for the New Mexico Board of Medical Examiners was entitled to absolute immunity to the physician's due process civil rights claim, which alleged that the prosecutor did not turn over exculpatory evidence, since the prosecutor was acting within the scope of his prosecutorial duties). Because *Imbler* and its progeny establish conclusively that even an intentional and malicious violation of Claimant's right to due process under *Brady* would not strip the Clark County Prosecutor of his absolute immunity, this Claim must be dismissed pursuant to A.C.A. § 19-10-204(b)(3)(A)-(B).

C. THE COMMISSION SHOULD DISMISS THE CLAIM AGAINST THE 9TH EAST JUDICIAL DISTRICT BECAUSE IT WOULD BE DISMISSED FROM A COURT OF GENERAL JURISDICTION AS A MATTER OF LAW

"It goes without saying that suits must be instituted or defended by persons, either artificial or natural." *Fausett & Co. v. Bogard*, 285 Ark. 124, 126 (1985); *See also Pate v.*

Martin, 13 Ark. App. 182, 186-87 (1985) (a partnership is not a legal entity capable of being sued). The 9th East Judicial District is neither a natural nor an artificial person. It is a *district*, which, by definition, is “[a] territorial area into which a country, state, county, municipality, or other political subdivision is divided for judicial, political, electoral, or administrative purposes.” *Black’s Law Dictionary* 489 (Bryan A. Garner ed., 7th ed., West 1999). The 9th East Judicial District is merely the designation given to the geographical area in which the corresponding state district court may exercise jurisdiction and from whence the state district court judge for the 9th East Judicial District is elected. It has no corporate existence. It is merely a political subdivision. In other words, it is not an entity, it’s a string of words that correspond to some lines on a map delineating a territory for judicial, political, electoral and administrative purposes. Accordingly, the Claim against the territorial area that has been designated the 9th East Judicial District would be dismissed as a matter of law from a court of general jurisdiction because it is not a natural or artificial person and, therefore, should be dismissed by the Commission.

Although the fact that the 9th East Judicial District is not an entity provides reason enough for the Commission to dismiss the Claim against it, the Claim should also be dismissed because it falls outside of the Commission’s limited jurisdiction. *See* A.C.A. § 19-10-204(a). The limited grant of jurisdiction that the Generally Assembly has given to the Commission is set forth in A.C.A. § 19-10-204(a), which provides:

Except as otherwise provided by law, the Arkansas State Claims Commission shall have exclusive jurisdiction over all claims against the State of Arkansas and its several agencies, departments, and institutions, but shall have no jurisdiction of claims against municipalities, counties, school districts, or any other political subdivisions of the state.

Giving these words their ordinary and usually accepted meaning in common language, the Commission’s exclusive jurisdiction is limited to claims “against the State of Arkansas and its several agencies, departments, and institutions,” and does *not* extend to “claims against

municipalities, counties, school districts, or any other political sub-divisions of the state.”

A.C.A. § 19-10-204(a) (emphasis added).

By its nature as a district the 9th East Judicial District is a political subdivision. *See Arkansas State Highway Commission v. Clayton*, 226 Ark. 712, 715, 292 S.W.2d 77, 79 (1956) (noting among the defining characteristics of political subdivisions, “That they embrace a certain territory and its inhabitants, organized for the public advantage and not in the interest of particular individuals or classes; that their chief design is the exercise of governmental functions; and that to the electors residing within each is to some extent committed the power of local government, to be wielded either mediately or immediately within their territory for the peculiar benefit of the people there residing.”) (citing *State v. Corker*, 67 N.J.L. 596, 606, 52 A. 362, 365 (N.J.Err. & App.1902); *see also Black’s Law Dictionary* 489.

Furthermore, because the 9th East Judicial District is a district, it is not an agency, department or institution of the State according to the ordinary and usually accepted meaning of those terms as commonly used. *See Dermott Special School Dist. v. Johnson*, 343 Ark. 90, 95, 32 S.W.3d 477, 480 (2000) (holding that districts, specifically school districts and improvement districts, are political subdivisions and are not state agencies); *Hickenbottom v. McCain*, 207 Ark. 485, 494, 181 S.W.2d 226, 230 (1944) (noting that the General Assembly has enacted legislation creating various governmental agencies and departments, which are funded by separate appropriations, “the best known and most important of which are: the Insurance Department, the Oil and Gas Commission, the State Purchasing Agent, the Agricultural and Industrial Commission, State Health Commission, Banking Department, Department of Labor, the Auditorial Department, the State Board of Education, State Forestry Commission, State Geologist, Public Utilities Commission, Bond Refunding Board, Basic Science Board, Arkansas

Corporation Commission, Fish and Game Commission, Flood Control Commission, State Planning Board, Soil Commission, Department of Revenues, and State Police Department.”); *Harris v. Emmerling*, 224 Ark. 40, 44, 271 S.W.2d 618, 620 (1954) (construing the word, institutions to mean various State agencies having charge of buildings and properties for carrying out the purposes for which the State operates such institutions); *see, also, Black’s Law Dictionary* 801 No. 3 (“An established organization, esp. one of a public character, such as a facility for the treatment of mentally disabled persons. – Also termed *public institution*.”).

In sum, because the 9th East Judicial District is a district and not an agency, department or institution, it falls outside of the Commission’s exclusive grant of jurisdiction and falls within the category of political subdivisions that are specifically excluded from the Commission’s jurisdiction. *See* A.C.A. § 19-10-204(a).² Accordingly, the Commission must dismiss the Claim against the 9th East Judicial District for lack of jurisdiction.

D. THE COMMISSION SHOULD DISMISS THE CLAIM BECAUSE IT WAS PRESENTED IN VIOLATION OF ARKANSAS LAW BARRING FULL-TIME EMPLOYEES OF THE STATE FROM PRESENTING CLAIMS TO THE COMMISSION

The Commission is a creature of statute. *See* A.C.A. § 19-10-201. As such, it only has such powers as are conferred upon it by statute. *See Ark. Gas Consumers, Inc. v. Ark. Pub. Serv. Comm’n*, 354 Ark. 37, 118 S.W.3d 109 (2003) (holding that, as a creature of the General Assembly, the power and authority of the Public Service Commission was limited to only that which the General Assembly conferred upon it). Consequently, the Commission only has the power to hear claims in accordance with Arkansas statutes. Section 19-10-103 of the Arkansas Code Annotated provides:

² It is also well-established that a state is not a person subject to suit for purposes of civil rights actions under 42 U.S.C. § 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65-66, 109 S.Ct. 2304, 2309 (1989) (“[A] State is not a ‘person’ within the meaning of § 1983”).

No full-time employee of the State of Arkansas or of its agencies, nor a member of any agency, shall appear before either the Arkansas State Claims Commission or the Workers' Compensation Commission as attorney or representative for any claimant in the presentation or prosecution of any claim filed under this chapter.

A.C.A. § 19-10-103. This language clearly and unambiguously prohibits full-time employees of the State from presenting or prosecuting any claims before the Commission. Professors at State universities are employees of the State. *Monger v. Purdue University*, 953 F. Supp. 260, 116 Ed. Law Rep. 607 (S.D. Ind. 1997); *Regents of University System of Georgia v. Blanton*, 49 Ga. App. 602, 176 S.E. 673 (1934); *Pardue v. Miller*, 306 Ky. 110, 206 S.W.2d 75 (1947); *Meens v. State Bd. of Ed.*, 127 Mont. 515, 267 P.2d 981 (1954); *State ex rel. Phillips v. Ford*, 116 Mont. 190, 151 P.2d 171 (1944).

It is a matter of public record that, at the time he presented the Claim at issue to the Commission, J. Thomas Sullivan ("Sullivan") was a full-time Professor at the University of Arkansas at Little Rock William H. Bowen School of Law. His signature appears at the bottom of the Claim. He has admitted its authorship in at the deposition of the Claimant on November 5, 2013 before the undersigned counsel and attorney Mark Hampton. He filed and presented the Claim to the Commission despite the statutory prohibition in A.C.A. § 19-10-103. Because the Commission can only operate within its statutory power, it must dismiss the Claim presented by Sullivan on behalf of Claimant in violation of A.C.A. § 19-10-103 as a nullity, void *ab initio*, outside of the statutory power of the Commission to hear.

III. CONCLUSION

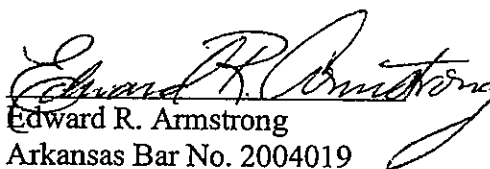
The Commission should dismiss the Claim in recognition that it lacks statutory authority to: (a) hear the Claim presented by Professor Sullivan in violation of A.C.A. § 19-10-103; (b) grant relief on the Claim against the Clark County Prosecuting Attorney in violation of A.C.A. § 19-10-204(b)(3)(A)-(B), which bars claims that would be dismissed for reasons other than

sovereign immunity, such as the absolute immunity of the Clark County Prosecuting Attorney; and (c) hear a Claim against the 9th East Judicial District as it is a political subdivision of the State and not an entity, such as an agency, department or institution, amenable to suit before the Commission under Ark. Code Ann. § 19-10-204(a). For the aforesaid reasons, Respondents pray that the Claim be dismissed, and that they be awarded their costs and for all other relief to which they may be entitled.

Respectfully submitted,

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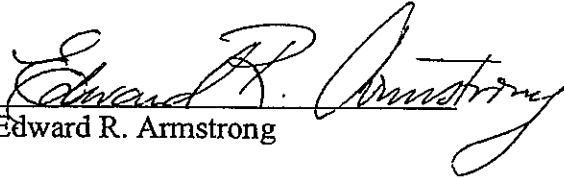
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Attorneys for Respondents

CERTIFICATE OF SERVICE

I, Assistant Attorney General Edward R. Armstrong, do hereby certify that a copy of the foregoing has been served upon the following via regular U.S. Mail, postage prepaid, on this 7th day of November, 2013.

Mr. Mark Hampton
Mr. J. Thomas Sullivan
1122 West Capitol Avenue
Little Rock, AR 72201



Edward R. Armstrong

THE ARKANSAS CLAIMS COMMISSION

GYRONNE BUCKLEY
Claimant

v.

STATE OF ARKANSAS,
SOUTH CENTRAL DRUG
TASK FORCE,
CLARK COUNTY
PROSECUTING ATTORNEY
Respondents.

NO. 13-0695-CC

Arkansas
State Claims Commission

NOV 27 2013

RECEIVED

RESPONSE TO MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE ARKANSAS CLAIMS COMMISSION:

CLAIMANT GYRONNE BUCKLEY, through his counsel of record in this pending proceeding, Mark F. Hampton, responds to the State's Motion for Summary Judgment. The Motion for Summary Judgment was filed on November 7, 2013. This response is timely if filed on or before November 28, 2013. In opposing the motion, Claimant would show the following:

I.

1. The Attorney General first argues that dismissal of Claimant's claim is required based on an alleged violation of Arkansas Code Ann. § 19-10-103, which provides:

No full-time employee of the State of Arkansas or of its agencies, nor a member of any agency, shall appear before either the Arkansas State Claims Commission or the Workers' Compensation Commission as

attorney or representative for any claimant in the presentation or prosecution of any claim filed under this chapter.

2. The Attorney General argues that Claimant's claim should be dismissed because counsel who assisted Claimant in preparing and filing his claim, J. Thomas Sullivan, is a full-time employee of the State of Arkansas and is, therefore, barred from representing Claimant in the presentation and prosecution of any claim filed under this chapter. [Motion for Summary Judgment, at 1, and Brief in Support of the Motion of the State of Arkansas for Summary Judgment (hereinafter "Respondents' Brief), at 1-4 and 13-14].

3. This ground for summary judgment and argument for dismissal of Claimant's claim pending before the Commission is wholly unsupported by legal and factual authority based upon the following:

A. The statutory provision relied upon by the Attorney General provides no basis for dismissal of a pending claim due to the employment status of any "full-time" employee of the State of Arkansas. The Attorney General argues that the Commission has no statutory authority to consider the claim

"Because the Commission can only operate within its statutory power, it must dismiss the Claim presented by Sullivan on behalf of Claimant in violation of A.C.A. § 19-10-103 as a nullity, void *ab initio*, outside the power of the Commission to hear."

[Respondents' Brief, at 14]. The Attorney General cites neither a statutory basis nor legal authority for the proposition that the claim must be considered a nullity,

void *ab initio*. The statute is silent as to the effect of any asserted violation of Subsection 103 with respect to the Commission's jurisdiction over a claim otherwise within the Commission's jurisdiction. Rule 1.2 of the Commission's operating rules requires that the Commission's jurisdiction be construed *liberally* "to secure a simple, just and expeditious method for consideration of claims against the State." The State advances no authority to demonstrate that the Commission's jurisdiction is compromised in any manner based on the preclusion set forth in Section 19-10-103.

B. The Attorney General has failed to support its argument with evidence supporting its conclusory allegation that Sullivan is disqualified under Section 10-10-103. The State argues that Sullivan "was a full-time Professor" at the time he prepared Claimant's claim for filing with the Commission. The statute does not provide a definition of "full-time" employment for purposes of the representation bar. Sullivan, although a professor at the UALR School of Law and an employee of the State of Arkansas, is employed under a ninth-month employment contract. [See Affidavit of J. Thomas Sullivan, appended to this response as Exhibit A.] Consequently, in light of the absence of any statutory definition of "full-time" employee or employment in the statutory provisions governing the Commission's jurisdiction, there is no express prohibition against Sullivan's involvement in this action.

C. Further, the original claim filed on behalf of Claimant by J. Thomas Sullivan expressly provides that representation in this matter will be provided by undersigned counsel, Mark F. Hampton. At all times both the Commission and the Attorney General have recognized that Mark F. Hampton, not Sullivan, is serving as counsel of record in this action, directing filings and Commission rulings to Hampton as counsel of record. [See Sullivan Affidavit, Exhibit A].

D. The State has failed to properly preserve any error based on the application of the prohibition contained in Section 19-10-103 by failing to file a motion to disqualify Sullivan from participation in the prosecution of this claim before the Commission, the logical appropriate remedy for any perceived violation of the statutory bar to representation.

E. Even assuming that the Attorney General has correctly argued that J. Thomas Sullivan was barred by Section 19-10-103 from engaging in representation before the Commission on behalf of Claimant, this objection was waived by the Attorney General in failing to raise the objection at the first opportunity available. The Answer filed by the State on April 26, 2013, includes no objection based upon the prohibition in Section 19-10-103; nor has the Attorney General urged any objection on this ground in previous proceedings, including the deposition of the Claimant conducted by the State, in which Sullivan attended and participated. During the deposition, Assistant Attorney General Will Jones specifically inquired

of Claimant concerning his knowledge that Sullivan was employed as a member of the faculty of the University of Arkansas at Little Rock School of Law. Despite the affirmative response given by Claimant, the State failed to object to Sullivan's presence and subsequent participation in the deposition. The State has waived any objection to the limited representation provided by Sullivan in assisting Claimant in preparing and filing the form with the Commission.

4. The State fails to demonstrate any legal or factual support for its argument that the Commission lacks jurisdiction over Claimant Buckley's claim based on a purported, but unsubstantiated, violation of Section 19-10-103. The argument for dismissal of Buckley's pending claim must fail.

II.

5. The State next advances an argument that the Commission lacks jurisdiction over Buckley's pending claim because its jurisdiction is statutorily limited by Arkansas Code Ann. § 19-10-204, which provides, in pertinent parts:

(a) Except as otherwise provided by law, the Arkansas State Claims Commission shall have exclusive jurisdiction over all claims against the State of Arkansas and its several agencies, departments, and institutions, but shall have no jurisdiction of claims against municipalities, counties, school districts, or any other political subdivisions of the state.

...

(b)(2)(A) The commission shall have jurisdiction only over those claims which are barred by the doctrine of sovereign immunity from being litigated in a court of general jurisdiction.

The State further argues that the Commission's jurisdiction is limited to consideration of claims that would be dismissed on grounds other than sovereign immunity, relying on additional provisions of Section 19-10-204(b):

(3)(A) The commission shall make no award for any claim which, as a matter of law, would be dismissed from a court of law or equity for reasons other than sovereign immunity.

(B) Specifically, if the facts of a given claim would cause the claim to be dismissed as a matter of law from a court of general jurisdiction, then the commission shall make no award on the claim.

[Respondents' Brief, at 2-3].

2. The State then proceeds to argue that the Commission does not have jurisdiction over Buckley's claim based on two different lines of argument: first, that the claim could not be entertained by a court of general jurisdiction based on the application of the doctrine of sovereign immunity, [Respondents' Brief, at 3, 4-10]; and, second, that the "9th East Judicial District" is not an entity over which the Commission has jurisdiction under Section 19-10-204(a).

A. Application of the doctrine of absolute immunity for prosecutors

3. The State notes that Claimant has recognized in his supplemental explanation of the basis for his claim that the doctrine of absolute immunity would insulate both the "Clark County prosecutors" in Buckley's case and the "State Attorney General" from liability for their actions taken in connection with the prosecution of Claimant for the criminal charges brought against him ultimately

leading to his conviction and incarceration in the Arkansas Department of Correction for a period of approximately 11½ years. [Respondents' Brief, at 3].

4. Claimant agrees that in an action brought in Circuit Court, the Arkansas court of general jurisdiction, against the individual prosecutors involved in his prosecution, that court would be obligated to apply the doctrine of absolute immunity in dismissing the claim against the prosecutors personally under state law. *Culpepper v. Smith*, 302 Ark. 558, 570-74, 792 S.W.2d 293, 299-301 (1990). In the instant claim, Buckley does not seek recovery from the individual prosecutors and assistants in the Attorney General's office who were involved in the prosecution and appeal of his case, however.

5. . Instead, the claim before the Commission is styled against the State of Arkansas, Clark County Prosecuting Attorney, 9th East Judicial District." In initially identifying the State agency responsible for the claim, Buckley noted both the "South Central Drug Task Force," and the "Clark County Prosecuting Attorney." [Complaint].

6. The doctrine of absolute immunity, discussed at length by the State in its response, is designed to protect individual prosecutors in the performance of their duties and, in fact, *Imbler v. Pachtman*, 424 U.S. 409, 416 (1976), relied upon by the State in addition to *Culpepper v. Smith*, involved a federal civil rights action brought against the deputy prosecutor, Pachtman, individually. Claimant Buckley

has brought no claim against the prosecutors personally or individually in this action, but was required to identify the "State agency involved" in completing the Commission's authorized form in setting forth his claim.

7. The fact that Claimant did not name Henry Morgan, the Clark County/9th East Judicial District Prosecuting Attorney individually in his complaint does not, moreover, preclude assertion of the Commission's jurisdiction over this claim based on the extended period of confinement imposed upon him in violation of his right to due process of law by the State of Arkansas, the Respondent in this matter. In the prior action before the Commission that resulted in an award for wrongful incarceration on Rodney Bragg's claim, Henry Morgan was a witness before the Commission [Exhibit B, Morgan declaration] who testified concerning the actions of South Central Drug Task Force Agent Keith Ray, the same individual identified by Claimant Buckley in explaining the actions of state officials giving rise to his claim.

8. Respondents cite no authority for the proposition that the doctrine of absolute immunity was intended to shield a prosecutor's office from liability, as opposed to individuals serving within the office, and the doctrine does not extend to actions by individual prosecutors functioning in administrative or other capacities that do not involve the actual conduct of prosecution of criminal cases.

Buckley v. Fitzsimmons, 509 U.S. 259, 277 (1993); *Burns v. Reed*, 500 U.S. 478, 492, 496 (1991); and *Kalina v. Fletcher*, 522 U.S. 118, 126, 132 (1997).

9. Nevertheless, even assuming that the Respondents are correct in arguing that the doctrine of absolute immunity would serve to shield a prosecution office, as opposed to the individual prosecutor, from immunity in a federal civil rights action, Buckley's claim would still survive against the State of Arkansas, as the party responsible for his lengthy incarceration in violation of his federally protected right to due process of law.

B. Commission jurisdiction under Section 19-10-204(a)

10. Similarly, Respondent's argument with respect to the Commission's jurisdiction over the 9th East Judicial District Prosecuting Attorney's Office does not compromise the Commission's jurisdiction over the State of Arkansas in this action, assuming that it is correct. Once again, Claimant identified this entity as a responsible "State agency," as required by the Commission's form complaint.

11. However, Respondents' argument that the 9th East Judicial District is "neither a natural nor an artificial person," [Respondents' Brief, at 10-11], and thus, not amenable to the Commission's jurisdiction is less than persuasive. Respondents argue that it is a "political subdivision," excluded as a responsible entity by the express language of Section 19-10-204(a), because it describes "a certain territory and its inhabitants," rather than a "state agency." Respondents

argue by analogy to other units or entities within the organization of state government, but offer no authority for the proposition that a judicial district is a political subdivision comparable to those specifically excluded from the Commission's jurisdiction: "municipalities, counties, school districts, or any other political subdivisions of the state." Section 19-10-204(a).

12. A judicial district lacks the distinguishing characteristics of municipalities, counties or school districts in several respects. It is not governed by an elected body that legislates policy for the "certain territory and its inhabitants," nor does it have the authority to impose and collect taxes. Despite the fact that the circuit judges and prosecuting attorney are elected officials, their duties are limited by law to carry out the functions designated by the judicial branches and executive branches of state government. *See, State v. D.S.*, 2011 Ark. 45, **5-8, 378 S.W.3d 87, 90-92 (2011) (citing Arkansas Constitution, article 4, Sections 1 and 2 and Amendment 21, Section 1).

13. Respondents do not address the Commission's jurisdiction with respect to the South Central Drug Task Force in their motion for summary judgment, also designated by Claimant as an agency of the State involved in the violation of his right to due process of law in response to the requirement on the Commission's form complaint. Claimant argues that the Drug Task Force is an agency operated by the State of Arkansas and not an independent political subdivision, such that the

Commission has jurisdiction over the actions of its agents, based on *South Central Drug Task Force v. Ray*, 56 Ark. App. 30, 937 S.W.2d 682, 683 (1997) and the holding of the Court of Appeals that Agent Ray—the same individual identified by Claimant in his complaint—was acting as a state employee at the time of an injury he sustained while working as a law enforcement agency and was, thus, covered by the Public Employee Workers' Compensation Act.

C. *Commission jurisdiction over the State of Arkansas*

14. Even assuming, *arguendo*, that Respondents are correct in arguing that the Clark County Prosecuting Attorney and 9th East Judicial District should be dismissed as parties in this proceeding based, respectively, on application of the doctrine of prosecutorial immunity, and limitation imposed on the Commission's jurisdiction under Section 19-10-204(a), Claimant's claim against the State of Arkansas survives summary judgment in favor of those other respondents.

15. The Commission clearly has jurisdiction over any claim for wrongful incarceration that Claimant might bring in a court of general jurisdiction because the circuit court would be obligated to dismiss the claim against the State based on sovereign immunity under Section 19-10-204(b)(2)(A):

The commission shall have jurisdiction only over those claims which are barred by the doctrine of sovereign immunity from being litigated in a court of general jurisdiction.

16. Here, the facts supporting Buckley's due process claim show that South Central Drug Task Force Agents Keith Ray and Linda Card did not disclose videotaped interview they conducted with the confidential informant, Corey Livsey, who subsequently testified for the prosecution at Buckley's trial on delivery of cocaine charges, to Prosecuting Attorney Henry Morgan. Instead, Ray and Card concluded that the interview was not exculpatory or favorable to Buckley and, consequently, did not forward or otherwise provide the tape to prosecutor Morgan. Morgan, therefore, did not discharge his constitutionally-imposed duty to determine whether the interview included evidence favorable to Buckley. Ultimately, both the United States District Court and the Arkansas Supreme Court found that the taped interview included sufficient discrepancies in Livsey's statements and demeanor to warrant the filing of a Petition for Writ of Error *Coram Nobis* in the Circuit Court to determine whether Buckley's right to due process under the 14th Amendment to the United States Constitution had been violated by this flawed disclosure/discovery process.

17. All facts and legal conclusions supporting Claimant's argument that the due process violation had, in fact, occurred, were stipulated to by Special Prosecutor Larry Jegley, as reflected in the Circuit Court's order granting the Writ of Error *Coram Nobis*. [Exhibit C, Order Granting Petition for Writ of Error *Coram Nobis*]. The State, through its special prosecutor, has conceded all supporting

elements of Buckley's due process claim and is now estopped and barred from re-litigating the claim in this proceeding. The Commission expressly recognizes application of principles of res judicata and collateral estoppel with respect to previously-entered civil judgments and consistency in policy supports application of these principles where the facts supporting the claim pending before the Commission have previously been litigated and determined in an action in circuit court. See http://claimscommission.ar.gov/rules_regulations.asp.

18. Buckley's claim against the State of Arkansas is that he was improperly confined for 11½ years based on the fact that he was not afforded use of the videotaped interview to impeach Livsey at his 1999 jury trial in circuit court that result in his convictions and, initially, in imposition of life sentences on two counts of delivery of cocaine ordered to be served consecutively. This claim of wrongful incarceration remains intact regardless of whether the Clark County Prosecuting Attorney's Office and 9th East Judicial District are dismissed from this action.

19. The claim urged by Buckley here, if brought in a civil action in a court of general jurisdiction, would be subject to dismissal upon motion by the State based on the application of the doctrine of sovereign immunity. The Commission has jurisdiction over Buckley's claim against the State of Arkansas for wrongful incarceration under Sections 19-10-204(a) and (b)(2)(A).

CONCLUSION

Based on the foregoing argument and supporting authorities, Claimant urges the Commission deny Respondents' Motion for Summary Judgment. In the event that the Commission finds the Motion meritorious, requiring dismissal of Respondent Clark County Prosecuting Attorney, 9th East Judicial District, Claimant urges the Commission proceed on the merits of his claim against the State of Arkansas.

Respectfully submitted this 27th day of November, 2013.

Mark F. Hampton

Mark F. Hampton
Arkansas Bar No. 85066
1122 West Capitol
Little Rock, AR 72201
501/376-6277
MarkFHampton@AOL.com

CERTIFICATE OF SERVICE

I, Mark F. Hampton, certify that a copy of the foregoing was sent on November 27, 2013, to: Edward R. Armstrong, Assistant Attorney General, 323 Center Street, Suite 200, Little Rock, Arkansas 72201.

Mark F. Hampton

Mark F. Hampton

Exhibit A: Affidavit of J. Thomas Sullivan

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day personally appeared J. Thomas Sullivan, who is known to me and who swore upon his oath and testified as follows:

"My name is J. Thomas Sullivan. I am an attorney licensed to practice in the State of Arkansas and a professor at the University of Arkansas at Little Rock School of Law. I was appointed to represent an indigent petitioner, Gyronne Buckley, by the United States District Court for the Eastern District of Arkansas, in his federal habeas action then pending in that Court. During the course of my representation, the Court ordered his habeas action held in abeyance to permit the exhaustion of state remedies on his claim for relief relating to the suppression of favorable evidence by the State prosecutor and law enforcement agents.

"The Arkansas courts ordered relief from Mr. Buckley's felony convictions based on the stipulation by Special Prosecutor Larry Jegley that the allegations and legal conclusions in the Petition for Writ of Error Coram Nobis were correct, warranting the entry of an order granting the petition by the Clark County Circuit Court. Mr. Jegley subsequently filed a motion to dismiss the pending case which was granted by the Circuit Court and Mr. Buckley's conviction was subsequently ordered expunged and the case was sealed by order of the Circuit Court.

"Thereafter, I assisted Mr. Buckley, as I believed was my ethical duty, in completing the complaint he now brings before the Arkansas Claims Commission. Mr. Buckley expressed concern that he would be unable to complete the claim form without my assistance. I also contacted Mark F. Hampton, concerning his willingness to serve as counsel for Mr. Buckley in this proceeding and he agreed. I referenced his participation as attorney of record in this cause on the claim form which was filed with the Commission. My understanding is that both the Commission and the Attorney General have consistently recognized that Mr. Hampton is the attorney of record representing Mr. Buckley in this action thereafter.

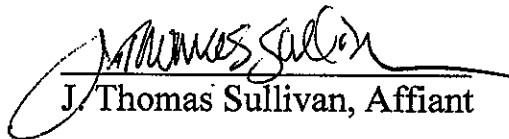
"I have also reviewed the summary judgment motion filed by the Attorney General, representing the State of Arkansas, in this matter, and Arkansas Code Ann. § 19-10-103, cited by the Attorney General in support of its motion for summary disposition. The statutory provision bars representation of any claimant before the Commission by a "full-time" State employee:

No full-time employee of the State of Arkansas or of its agencies, nor a member of any agency, shall appear before either the Arkansas State Claims Commission or the Workers' Compensation Commission as attorney or representative for any claimant in the presentation or prosecution of any claim filed under this chapter.


"I am employed as a faculty member of the UALR Law School on a nine-month contract. I am not employed as a year round, full-time employee, as members of the administration and staff of the Law School are. The statute does not define "full-time" employee to mean *any* person employed by the State of Arkansas or its agencies, nor specifically refer to faculty members employed on nine-month contracts.

"I have assisted Mr. Buckley and Mr. Hampton in the creation of supporting materials drawn from my prior representation of Mr. Buckley over a period of some 12 years and anticipate testifying in Mr. Buckley's behalf before the Claims Commission."

FURTHER AFFIANT SAYETH NOT.


J. Thomas Sullivan, Affiant

SUBSCRIBED AND SWORN TO on this 26th day of November, 2013.


Marietta Alphin, Notary Public

My commission expires:

March 19, 2016



Exhibit B: Declaration of Henry Morgan before Arkansas Claims Commission in
Rodney Bragg v. State of Arkansas

BEFORE THE ARKANSAS STATE CLAIMS COMMISSION

RODNEY BRAGG

CLAIMANT

V.

NO. 04-0054-CC

STATE OF ARKANSAS,

RESPONDENT

DECLARATION OF HENRY MORGAN

I, Henry Morgan, declare the following:

1. My name is Henry Morgan. I am the Prosecuting Attorney for the Ninth Judicial District—East for the State of Arkansas. Clark County is included in this judicial district.
2. In 1994, my office filed a felony information against Rodney Bragg for delivery of a controlled substance. I later filed a motion to *nolle prosequi* the charge, however, when a key witness to the case refused to testify. The witness was Steven Crite, who allegedly had purchased the cocaine from Mr. Bragg while under the supervision of drug task force agent Keith Ray. Prior to the scheduled trial date for this charge, Mr. Crite pleaded guilty to unrelated drug charges and was incarcerated at the Arkansas Department of Correction's Cummins Unit. When I interviewed Mr. Crite following his incarceration in preparation for Mr. Bragg's trial, Mr. Crite recanted his previous account that he had purchased cocaine from Mr. Bragg. The Clark County Circuit Court granted my *nolle prosequi* motion and Mr. Bragg was never tried in Clark County.
3. Long after Mr. Bragg's case was *nolle prossed*, I learned that Agent Ray had falsified his Investigator's Notes that he had given to me to support the case against Mr.

Bragg. I first suspected a problem with Agent Ray's notes on July 6, 1999, when I attended a hearing on Mr. Bragg's replevin action. Specifically, Agent Ray had reported that Mr. Bragg was driving a Mustang on March 1, 1994, which was the date on which Mr. Crite allegedly bought cocaine from Mr. Bragg. Agent Ray included in his report the license plate number of the vehicle that Mr. Bragg was driving on that date. At the replevin hearing, I heard testimony that Mr. Bragg did not own the Mustang on March 1, 1994, but that he had purchased it a few weeks later. I also heard testimony that he had not obtained the license plate listed in the Investigator's Notes until a few weeks after March 1, 1994. Following the replevin hearing, I investigated this matter and confirmed that Mr. Bragg had not been issued the license plate listed in Agent Ray's Investigator's Report until later in the month of March. Until the replevin hearing, I had no reason to suspect that Agent Ray had falsified his Investigator's Notes.

4. At the time that Mr. Bragg's vehicle was seized for forfeiture, I did not handle the forfeiture actions myself but assigned them to my Deputy Prosecuting Attorney Taylor King.

I declare under penalty of perjury under the laws, that the proceeding is true and correct.

Executed this 17 day of December, 2003.

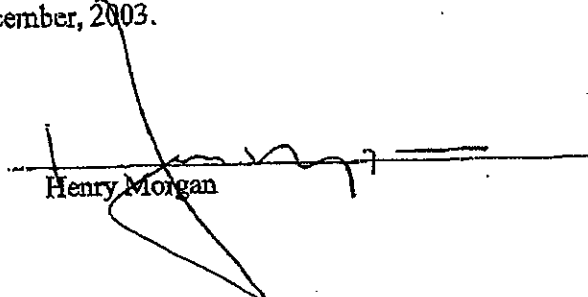

Henry Morgan

Exhibit C: Order Granting Petition for Writ of Error *Coram Nobis* in
Gyronne Buckley v. State of Arkansas

CASE NO. CR 99-13

IN THE CIRCUIT COURT OF CLARK COUNTY, ARKANSAS

GYRONNE BUCKLEY,

Petitioner,

v.

THE STATE OF ARKANSAS,

Respondent.

ORDER GRANTING
PETITION FOR WRIT OF ERROR *CORAM NOBIS*

On this 1st day of November, 2010, came on to be heard the Petition for Writ of Error *Coram Nobis* pursuant to the order of the Arkansas Supreme Court granting Petitioner Gyronne Buckley leave to proceed in this Court. The parties appear through counsel, J. Thomas Sullivan, attorney for the Petitioner, and Larry Jegley, Prosecuting Attorney for the Sixth Judicial District of Arkansas, serving as Special Prosecutor in this case by appointment of the Court.

Counsel for the Petitioner and the State have stipulated to the facts and legal conclusions set forth in the Petition for Writ of Error *Coram Nobis*. Upon consideration of the Petition and stipulation by the parties, the Court finds that the Petition is proper in all respects and that the Petition for Writ of Error *Coram Nobis* should be granted.

Therefore, it is the order of the Court that the Petition for Writ of Error *Coram Nobis* is hereby granted and that the Petitioner is entitled to

66

relief from his convictions on Counts I and II in this case. The convictions on both counts are vacated and the case is restored to the active docket of this Court. Petitioner is ordered released forthwith from the custody of the Arkansas Department of Corrections, and is remanded to the custody of the Clark County Sheriff pending further proceedings in this Court.

Signed and entered this 1st day of November, 2010

File for Record 1st day of Nov, 2010 at 11:43 clock
By Martha J. Smith Circuit Clerk
Martha J. Smith Deputy Clerk

Robert M. Ca
CIRCUIT JUDGE

Approved:

Larry Jegley
Larry Jegley, Special Prosecutor

J. Thomas Sullivan
J. Thomas Sullivan,
Attorney for Petitioner Gyronne Buckley

CERTIFIED COPY
I, Martha J. Smith, Circuit Clerk and Recorder of Clark County, Arkansas do certify this instrument as a true and correct copy appearing in the Records of Clark County. WITNESS my hand and official seal this the 1st day of Nov, 2010
Martha J. Smith
Martha J. Smith, Circuit Clerk & Recorder

DEC 11 2013

RECEIVED

CLAIMANT

BEFORE THE STATE CLAIMS COMMISSION
OF THE STATE OF ARKANSAS

GYRONNE BUCKLEY

v.

CLAIM NO. 13-0695-CC

STATE OF ARKANSAS;

CLARK COUNTY PROSECUTING ATTORNEY;

AND 9TH EAST JUDICIAL DISTRICT

RESPONDENTS

**REPLY OF RESPONDENTS' TO CLAIMANT'S RESPONSE TO
THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT**

It is the law of this State that no full-time employee of the State or member of any State agency may either present or prosecute a claim before the Arkansas State Claims Commission (the "Commission") as the attorney or representative of a claimant. (Ark. Code. Ann. § 19-10-103; Response, ¶ 1). On the basis of said law and others, the Respondents have moved the Commission to dismiss Claim No. 13-0695 (the "Claim") that Professor J. Thomas Sullivan ("Sullivan"), a full-time member of the faculty at the UALR William H. Bowen School of Law, presented to the Commission as an attorney representing Gyronne Buckley ("Claimant"). (See Complaint). Claimant filed a response ("Response") to the Respondents' motion for summary judgment, to which the Respondents reply as follows:

ARGUMENTS IN REPLY

I.

RESPONDENTS ARE ENTITLED TO SUMMARY JUDGMENT BASED ON ARK. CODE ANN. § 19-10-103 BECAUSE: (A) IF THE TERM "FULL-TIME EMPLOYEE" IN THE STATUTORY BAR IN ARK. CODE ANN. § 19-10-103 IS GIVEN ITS ORDINARY MEANING, THEN SULLIVAN IS A FULL-TIME EMPLOYEE OF THE STATE; (B) IF SULLIVAN WAS NOT AUTHORIZED TO PRESENT A CLAIM ON BEHALF OF THE CLAIMANT PURSUANT TO ARK. CODE ANN. § 19-10-103, THEN THE COMPLAINT A NULLITY; (C) CLAIMANT'S ARGUMENT THAT HAMPTON, NOT SULLIVAN, PRESENTED THE PENDING CLAIM IS BELIED BY THE COMPLAINT, WHICH SHOWS

THAT SULLIVAN, NOT HAMPTON, VERIFIED AND FILED THE COMPLAINT PRESENTING THE CLAIM TO THE COMMISSION; (D) CLAIMANT'S ASSERTION THAT ARK. CODE ANN. § 19-10-103 DID NOT BAR SULLIVAN FROM PRESENTING THE CLAIM TO THE COMMISSION BECAUSE THE STATE DID NOT MOVE TO DISQUALIFY SULLIVAN IS NOT SUPPORTED BY THE LANGUAGE OF THE STATUTE AND IS NOT REQUIRED BY ANY RULE OR STATUTE BEFORE ARK. CODE ANN. § 19-10-103 IS AN EFFECTIVE BAR; AND (E) CLAIMANT'S ARGUMENT THAT THE ATTORNEY GENERAL HAS WAIVED THE STATUTORY RESTRICTIONS THAT THE GENERAL ASSEMBLY PUT IN PLACE WHEN THEY ENACTED THE STATUTORY FRAMEWORK GOVERNING WHICH CLAIMS CAN AND CANNOT BE PRESENTED TO THE COMMISSION IGNORES THAT NEITHER THE ATTORNEY GENERAL NOR THE COMMISSION HAVE THE AUTHORITY TO WAIVE OR DISREGARD STATUTORY RESTRICTIONS ON THE COMMISSION THAT THE GENERAL ASSEMBLY HAS ENACTED INTO LAW.

A. The term "full-time employee" used in Ark. Code. Ann. § 19-10-103 has a readily discernable meaning in ordinary language

In his Response, Claimant concedes that Sullivan is a professor at the UALR School of Law and an employee of the State, but he tries to evade the obvious conclusion that Ark. Code Ann. 19-10-103 disqualified Sullivan from presenting the Claim to the Commission on his behalf by quibbling that Sullivan is not a "full-time" employee because the statute does not define what a "full-time" employee is. (Response, ¶ 3. B.) However, the Commission should not be misled by this. The fact that the statute does not define the term "full-time" does not, somehow, render the words meaningless. In determining the meaning of a statute, the first rule is to construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. *Thomas v. Hall*, 2012 Ark. 66, 5, 399 S.W.3d 387, 390 (2012). Courts are to construe statutes so that no word is left void, superfluous, or insignificant; and meaning and effect should be given to every word in the statute if possible. *Id.*

The ordinary and usually accepted meaning of "full-time" as a noun is "the amount of time considered the normal or standard amount for working during a given period," and when used as an adjective describing an employee would denote any employee "working the full

number of hours considered normal or standard.” Merriam-Webster, < <http://www.merriam-webster.com/dictionary/full-time> > (accessed December 4, 2013). It is a matter of public record that, in the UALR system, “[f]ull-time faculty are usually appointed for a nine-month period.” University of Arkansas at Little Rock, *UALR Faculty Resources* < <http://ualr.edu/faculty-7wazt/fac-hand-draft/appointment-and-evaluation/> > (accessed December 4, 2013). Sullivan’s employment for a nine-month period at the UALR School of Law (Response, ¶ 3. B) is, therefore, properly considered full-time as it corresponds to the amount of time considered normal or standard for full-time faculty within the UALR system. The Dean of the Law School that employs Professor Sullivan has confirmed that he is a full-time employee of the law school. (Exhibit A, Affidavit of Jeff Bell, Senior Associate General Counsel for the University of Arkansas). Given the aforesaid, it is beyond genuine dispute that Sullivan is a “full-time” employee of the State within the ordinary and usually accepted meaning of the term, which is the meaning that should be given to the term as it appears in Ark. Code Ann. § 19-10-103. Furthermore, there can be no doubt that Sullivan is a “member” of the faculty at the UALR William H. Bowen School of Law. Members of State agencies, as well as full-time employees of the State, are also barred from appearing before the Commission as either an attorney or representative for any claimant by Ark. Code Ann. § 19-10-103.

B. Complaints filed by a statutory framework created to allow claims not cognizable at common law are a nullity unless they are filed in accordance with the statutory framework allowing them

It is a matter of established law that a complaint filed by an unauthorized representative is a nullity and therefore void *ab initio*. See, e.g., *Brewer v. Poole*, 362 Ark. 1, 13-14, 207 S.W.3d 458, 465 - 466 (2005) (original complaint a nullity and void *ab initio* where it is not properly commenced by authorized representative pursuant to statute authorizing wrongful death claim);

St. Paul Mercury Ins. Co. v. Circuit Court of Craighead County, 348 Ark. 197, 204, 73 S.W.3d 584, 588 (2002) (complaint asserting survival action filed by an unauthorized representative is a nullity because a survival action is a creation of statute and the right to recover under the statute is dependent upon the complaining party bringing himself within the terms of the statute); *Prickett v. Hot Spring County Medical Center*, 2010 Ark. App. 282, 2, 373 S.W.3d 914, 916 (2010) (plaintiff's filings in federal court and in state court on behalf of an estate were nullities because she did not have authority to act on behalf of the estate, thus summary judgment was appropriate); *Fields v. Byrd*, 96 Ark. App. 174, 178, 239 S.W.3d 543, 546 (2006) (complaint was a nullity where plaintiff was not authorized to bring claim). An action initiated by a complaint that was a nullity because the filer lacked standing to file cannot subsequently be cured after the fact by amending the complaint. *See St. Paul Mercury Ins. Co.*, 348 Ark. at 205, 73 S.W.3d at 589.

The plain language of Ark. Code. Ann. § 19-10-103 unambiguously evidences the General Assembly's intent that full-time employees of the State and members of its agencies not be authorized to present or prosecute claims on behalf of a claimant before the Commission. The logically consistent corollary is that the General Assembly did not intend to authorize the Commission to hear claims presented or prosecuted by full-time employees of the State or its members in violation of Ark. Code. Ann. § 19-10-103. This is significant because the Commission is wholly a creature of statute. *See A.C.A. § 19-10-201*. As such, it only has such powers as are conferred upon it by statute. *See Ark. Gas Consumers, Inc. v. Ark. Pub. Serv. Comm'n*, 354 Ark. 37, 118 S.W.3d 109 (2003) (holding that, as a creature of the General Assembly, the power and authority of the Public Service Commission was limited to only that which the General Assembly conferred upon it by statute); *Arkansas County v. Desha*

County, 342 Ark. 135, 140, 27 S.W.3d 379, 383 (2000) (“The Commission is a creature of the legislature whose power and authority is limited to that which the legislature confers upon it.”). Because the General Assembly has, by statute, expressly forbidden presentment or prosecution of claims before the Commission by full-time employees of the State and members of its agencies, such claims are beyond the statutory power of the Commission to entertain and outside of the Commission’s limited, statutorily created jurisdiction.

It would be absurd to construe Ark. Code. Ann. § 19-10-103 as explicitly prohibiting full-time employees of the State from representing claimants before the Commission, while implicitly and simultaneously authorizing the Commission to hear such claims. Such a reading would overturn the explicit prohibition and render it meaningless by allowing attorneys working for the State full-time to evade the clearly intended effect of Ark. Code. Ann. § 19-10-103. Any interpretation of a statute that would render it or part of it meaningless should be avoided whenever possible. *Holt v. Howard*, 206 Ark. 337, 175 S.W.2d 384 (1943). The law favors interpreting statutes so as to reduce opportunities for people to evade their purpose. *Sturdivant, Adm’x v. City of Farmington*, 255 Ark. 415, 418, 500 S.W.2d 769, 771 (1973). After all, the General Assembly does not intend any statutory provisions that it enacts to be disregarded. *Id.*

Because complaints brought by unauthorized representatives are a nullity, *see, e.g., Brewer*, 362 Ark. at 13-14, 207 S.W.3d at 465 – 466, and given that the General Assembly has denied full-time employees of the State any authority to present or prosecute claims before the Commission as either attorneys or representatives of claimants, it follows that any claim presented to the Commission or prosecuted by a full-time employee of the State on behalf of a claimant as an attorney or representative is a nullity and should be dismissed. *See id.* The fact that a statute does not spell out the particular consequences of non-compliance does not mean that

the statute should be disregarded, it simply means that the consequences must be determined judicially. *Sturdivant*, 255 Ark. at 418, 500 S.W.2d at 771.

In cases involving the filing of complaints by persons not authorized by statute to file them, Arkansas courts have already determined that dismissal is a proper consequence. *See Brewer*, 362 Ark. 1, 13-14, 207 S.W.3d 458, 465 - 466 ; *St. Paul Mercury Ins. Co.*, 348 Ark. at 204, 73 S.W.3d at 588; *Prickett*, 2010 Ark. App. 282, 373 S.W.3d at 916; *Fields*, 96 Ark. App. at 178, 239 S.W.3d at 546.

C. Sullivan was representing the Claimant as his attorney and representative when he signed and verified the Complaint

Claimant's assertion that "at all times" both the Commission and the Attorney General have recognized Mark F. Hampton, not Sullivan, as Claimant's counsel of record in this proceeding is both: (1) immaterial to a determination of whether the person who filed the complaint ("Complaint") presenting the Claimant's Claim to the Commission had statutory authority to do so; and (2) unsustainable in light of facts beyond genuine dispute.

It is established beyond genuine dispute that it was Sullivan who assisted Claimant with the preparation of the Complaint. (Affidavit of J. Thomas Sullivan, attached to the Response as Exhibit A). It is also beyond dispute that Sullivan's signature, not Hampton's, is the signature that appears on the face of the Complaint in the spot for the Claimant or his representative to verify the Complaint. (*See id.* and Complaint). The identity and statutory authority of the person signing and filing a complaint advancing a claim that only exists at law by virtue of statute is significant for determining its legal efficacy. *See Brewer*, 362 Ark. 1, 13-14, 207 S.W.3d 458, 465 - 466 ; *St. Paul Mercury Ins. Co.*, 348 Ark. at 204, 73 S.W.3d at 588; *Prickett*, 2010 Ark. App. 282, 373 S.W.3d at 916; *Fields*, 96 Ark. App. at 178, 239 S.W.3d at 546. As noted above,

a complaint that purports to advance a claim pursuant to statutory authority but that is not filed in conformity with the statutes governing how and who may present such claims is a nullity. *See id.*

No claim may be considered and allowed by the Commission unless it has been filed in conformity with the statutes permitting such claims to be heard within the period allowed by the applicable statute of limitation. Ark. Code. Ann. § 19-10-209. By statute, all proceedings to enforce claims before the Commission must be commenced by a properly verified complaint. Ark. Code Ann. § 19-10-208(a)(1). Similarly, the Arkansas Rules of Civil Procedure, which the Commission has adopted except where in conflict with a different rule adopted by the Commission, require all pleadings to be signed by an attorney of record or by the party bringing the suit, if he or she is not represented by counsel. *See Ark. R. Civ. P. 11.*

Sullivan signed and verified the Complaint as the Claimant's representative and attorney. As a full-time employee of the State, he was not and is not a person authorized by statute to present or prosecute a claim before the Commission as the Claimant's attorney or representative. *See Ark. Code. Ann. § 19-10-103.* Accordingly, the unauthorized Complaint that Sullivan presented to the Commission on the Claimant's behalf was a nullity and the Commission does not have the statutory authority to entertain it.

D. The Attorney General does not need to move to disqualify Sullivan in order to bar him from presenting or prosecuting a claim before the Commission because the General Assembly has disqualified him and all other full-time employees working for the State by statute

Claimant asserts that "[t]he State failed to preserve any error based on the prohibition contained in Section 19-10-103 by failing to file a motion to disqualify Sullivan from participation in the prosecution of this claim before the Commission . . ." The naked assertion is not even cloaked with the slightest garb of a legal authority but is a bare *ipse dixit*. No statute or rule requires the State to move to disqualify Sullivan or any other full-time employee of the State

in order to preserve the effect of Section 19-10-103. The statute is already an affirmative bar that disqualifies Sullivan and all other full-time employees of the State from presenting or prosecuting claims before the Commission as attorneys or representatives. The General Assembly has already clarified that claims are not to be presented or prosecuted by full-time employees of the State on behalf of claimants before the Commission that the General Assembly has created to hear claims. Furthermore, the General Assembly has mandated that no claim be considered and allowed by the Commission unless it has been filed in conformity with the statutes permitting such claims to be heard within the period allowed by the applicable statute of limitation. Ark. Code. Ann. § 19-10-209. The Commission does not have authority to disregard the legislature's enactments and decide to hear claims that have been prohibited by statute, nor does the Attorney General have the power to authorize the Commission to hear claims that the General Assembly has prohibited. The Claimant's argument posits that the Attorney General can somehow inadvertently authorize the Commission to hear such claims—despite the statutory prohibition—by moving for summary judgment based on Ark. Code Ann. § 19-10-103 instead of filing a motion to disqualify, which is not required by the statute. Certainly the Attorney General cannot do by accident what it cannot do on purpose, i.e., authorize the Commission to entertain claims statutorily barred by the legislature.

Whatever Claimant's feelings or opinion on the matter, by law it is Claimant's duty to ensure that he brings any claim against the State before the Commission in conformity with the statutes governing the presentation of such claims. *See St. Paul Mercury Ins. Co.*, 348 Ark. at 204, 73 S.W.3d at 588. Claimant did not discharge this duty. He cannot now be heard to complain that the State had some duty to move to disqualify Sullivan based on his status as a full-time employee of the State. The State, by statute equally available to Claimant and his

counsel, had already expressly disqualified Sullivan and all other full-time employees of the State from bringing claims before the Commission on behalf of the Claimant. This is not simply a procedural technicality, it is a substantive and jurisdictional limit on the Commission's power to hear claims, which it can only do in conformity with the statutes that govern its existence and that are the sole source of its authority and jurisdiction. *See Ark. Gas Consumers, Inc.*, 354 Ark. 37, 118 S.W.3d 109 (as a creature of the General Assembly, the power and authority of the Public Service Commission was limited to only that which the General Assembly conferred upon it by statute). *See also St. Paul Mercury Ins. Co.*, 348 Ark. at 204, 73 S.W.3d at 588.

E. The statutory bar in Ar. Code. Ann. § 19-10-103 is not a defense that can be waived by the Attorney General, but a statutory bar put into effect by the General Assembly prohibiting full-time State employees from presenting claims to the Commission

It should be obvious beyond the need for citation that neither the Commission nor the Attorney General have the power to alter the legislatively established statutes governing the procedure for presenting a claim to the Commission. Neither the Commission nor the Attorney General are invested with authority to flout constitutional and legislatively imposed prohibitions. Section 19-10-103 is unequivocal in declaring that:

No full-time employee of the State of Arkansas or of its agencies, nor a member of any agency, shall appear before either the Arkansas State Claims Commission or the Worker's Compensation Commission as attorney or representative for any claimant in the presentation of any claim filed under this chapter.

Ark. Code Ann. § 19-10-103. As noted previously, the Commission is a creature of the General Assembly with its power and authority limited to that which the legislature confers upon it. *See Arkansas County v. Desha County*, 342 Ark. 135, 140, 27 S.W.3d 379, 383 (2000); *Hempstead County Hunting Club, Inc. v. Arkansas Public Service Com'n*, 2009 Ark. App. 511, 7, 324 S.W.3d 697, 702 (2009). Furthermore, the Respondents did assert in their Answer in ordinary

and concise language that this Commission does not have jurisdiction over the present claim and that the Complainant had failed to state a claim for which the Commission could grant relief. Even if they had not, lack of subject-matter jurisdiction is a defense that is never waived and may be raised at any time. *See* Ark. R. Civ. P. 12(h)(2).

II.

RESPONDENTS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE THE COMMISSION DOES NOT HAVE JURISDICTION OVER THE CLAIM.

In Part II of his Response, the Claimant advances an argument that absolute immunity only shields individuals serving as prosecutors from liability under § 1983, but does not shield the office itself. (Response, ¶ 8). Claimant ignores that § 1983 claims do not lie against political offices themselves but against persons who hold them. It should go without saying that lawsuits may only be brought against persons, natural or legal. *Curators of Cent. College v. Bird*, 229 S.W. 730, 730 (1921) (“It goes without saying that suits must be instituted or defended by persons, either natural or artificial.”). Political offices by themselves do not do anything to incur liability because offices do not do anything--it is the people holding offices who may incur liability when they take actions that deprive a citizen of rights, privileges or immunities secured by the Constitution. In keeping with these common sense principles of law, the General Assembly has mandated, by statute, that complaints submitted to the Commission must aver facts “necessary to state a cause of action against a private person or corporation.” Ark. Code Ann. § 19-10-208(b)(5). Furthermore, Claimant has no cause of action that runs against an office and not a person under § 1983 because the language of § 1983 expressly limits its application to “persons.” Section 1983 provides:

Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to

be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42. U.S.C. § 1983 (emphasis added). The Claimant also argues that his § 1983 claim would survive against the State. (Response, ¶ 9). This simply isn't the case as it has long been established, as a matter of law, that a State is not a person for purposes of § 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 77, 109 S.Ct. 2304, 2315 - 2316 (1989).

The Claimant next asserts that the 9th East Judicial District is not a political subdivision, but is an entity and a state agency. (Response, ¶ 10). As noted in Respondent's Brief, at 10-11, a district is not a person, natural or artificial. In contrast to a State agency, department or institution, the 9th East Judicial District is not an entity capable of being sued. It is a territory. It has no governing body, no director, no employees and no statutes making it a corporate entity. In sum, it is not a State agency, department or institution but rather a territorial and political subdivision of the State corresponding to a geographical area and is, therefore, not an entity not amenable to suit pursuant to Ark. Code Ann. § 19-10-204(a).

Claimant next argues that he has a claim against the South Central Drug Task Force ("SCDTF") (Response, ¶ 13), which does not appear as one of the named Respondents in the style of the original complaint, because SCDTF Agent Linda Card and former Agent Keith Ray failed to provide Prosecutor Henry Morgan with a videotape of an interview that they had conducted with confidential informant Corey Livsey in which he implicated Claimant as having sold him crack cocaine, thereby preventing the Prosecuting Attorney from discharging "his constitutionally imposed duty to determine whether the interview included evidence favorable to Buckley (Response, ¶ 16). However, the Commission has no jurisdiction over a civil rights claim based on the conduct of Card and Ray because sovereign immunity would not prevent Claimant

from making such a claim in a court of general jurisdiction. *Grine v. Board of Trustees*, 338 Ark. 791, 799, 2 S.W.3d 54, 59 (1999) ("State officials and employees do not enjoy the constitutional immunity accorded the state but have immunity granted by statute unless they are shown to have acted with malice outside the scope of their employment."). Because sovereign immunity would not prevent such a claim from being heard in a court of general jurisdiction, the Commission, which only has jurisdiction "over those claims which are barred by the doctrine of sovereign immunity from being litigated in a court of general jurisdiction," lacks jurisdiction over it. Ark. Code Ann. § 19-10-204(b)(2)(A).

Lastly, Claimant argues that he has a claim against the State for "wrongful incarceration" that would be dismissed from a court of general jurisdiction because of the State's sovereign immunity. (Response, ¶¶ 18, 19). This statement is incorrect. Arkansas has no statute establishing a cause of action for "wrongful conviction" and Arkansas law recognizes no claim for "wrongful conviction" as a matter of the common law of torts or otherwise. In any event, even if such a legal claim existed in Arkansas law, Claimant would not be able to satisfy the elements of such a claim because the fundamental element of any such claim is that the claimant was actually innocent of the crime, which means that he or she did not commit the charged misconduct.¹ See James L. Buchwalter, J.D., 25 Causes of Action 2d 579 (Westlaw 2007). A

¹ Under law applicable to federal convictions, a wrongfully-imprisoned individual can receive a maximum of \$5,000, total, in compensation after exoneration, no matter how many years was spent unjustly incarcerated. 28 U.S.C.A. § 2513. The claimant must show that the conviction was reversed or set aside on the ground that the claimant was not guilty of the offense of which he was convicted, or that on a new trial or rehearing he was found not guilty of the offense, as appears from the record or certificate of the court setting aside or reversing the conviction, or that he has been pardoned upon the stated ground of innocence and an unjust conviction. 28 U.S.C.A. § 2513(a)(1). Furthermore, the claimant must not have committed any of the acts charged or that the acts or omissions in connection with the charge constituted no offense against the United States, or any state, territory or the District of Columbia, and that the claimant did not bring about his own prosecution through misconduct or neglect. 28 U.S.C.A. § 2513(a)(2).

prima facie case to recover an award for wrongful conviction and incarceration under a state statute allowing such a claim generally requires proof by clear and convincing evidence that:

1. the petitioner was convicted of a criminal offense and was incarcerated for at least some time period;
2. the petitioner received a pardon for the crime or, in some states, had the judgment of conviction reversed or vacated;
3. the petitioner was innocent of the crime;
4. the petitioner did not contribute to bringing about the conviction, for example, by failing to adduce certain witnesses; and
5. in some jurisdictions, the petitioner must show a pecuniary injury resulting from the wrongful imprisonment, while in other states a fixed amount of compensation is awarded.

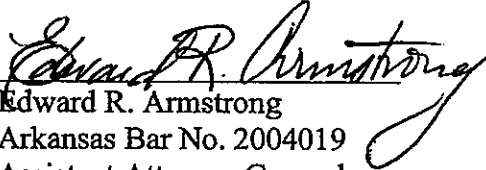
Id. Again, all of this is purely hypothetical and academic, because Arkansas is not one of the 17 states that recognize a cause of action for wrongful conviction, *id.*; and the General Assembly has mandated, by statute, that complaints submitted to the Commission must aver facts “necessary to state a cause of action against a private person or corporation.” Ark. Code Ann. § 19-10-208(b)(5). Any claim Claimant purports to bring for “wrongful conviction” fails to state a cause of action as required by Ark. Code Ann. § 19-10-208(b)(5) and is, therefore, beyond the jurisdiction of the Commission.

WHEREFORE, Respondents pray that said Complaint be dismissed, and that they be awarded all other relief to which they may be entitled.

Respectfully submitted,

Dustin McDaniel
Attorney General

By:


Edward R. Armstrong
Arkansas Bar No. 2004019
Assistant Attorney General
Will Jones
Arkansas Bar No. 01231
Assistant Attorney General
Attorneys for the State of Arkansas
323 Center Street, Suite 200
Little Rock, Arkansas 72201
Telephone: (501) 682-8219
Facsimile: (501) 682-2591
edward.armstrong@arkansasag.gov
will.jones@arkansasag.gov
Attorneys for Respondents

CERTIFICATE OF SERVICE

I, Assistant Attorney General Edward R. Armstrong, do hereby certify that a copy of the foregoing has been served upon the following via regular U.S. Mail, postage prepaid, on this 11th day of December, 2013.

Mr. Mark Hampton
Mr. J. Thomas Sullivan
1122 West Capitol Avenue
Little Rock, AR 72201


Edward R. Armstrong

**BEFORE THE STATE CLAIMS COMMISSION
OF THE STATE OF ARKANSAS**

GYRONNE BUCKLEY

CLAIMANT

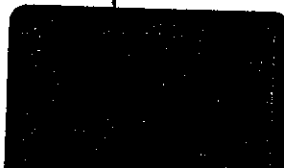
**v. CLAIM NO. 13-0695-CC
STATE OF ARKANSAS;
CLARK COUNTY PROSECUTING ATTORNEY;
AND 9TH EAST JUDICIAL DISTRICT**

RESPONDENTS

AFFIDAVIT OF JEFFREY A. BELL

I, Jeffrey A. Bell, am competent to testify and have personal knowledge regarding the statements contained in this affidavit, and do hereby state and verify the following:

1. I am currently employed as the Senior Associate General Counsel for the University of Arkansas.
2. On Monday December 2, 2013 General Counsel Fred H. Harrison and I spoke by telephone with Assistant Attorney General Edward Armstrong regarding his request for confirmation of the employment status of Professor J. Thomas Sullivan at the UALR William H. Bowen School of Law.
3. The attached email is an accurate copy of the email that Mr. Harrison and I received on Monday, December 2, 2013 from Michael Hunter Schwartz, Dean and Professor of Law at the UALR William H. Bowen School of Law.
4. I declare under penalty of perjury under the laws of the United States of America that the above information is true and correct to the best of my knowledge.



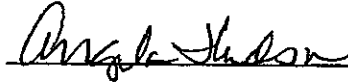
FURTHER AFFIANT SAYETH NOT.


Jeffrey A. Bell

ACKNOWLEDGMENT

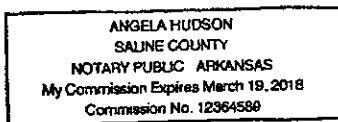
STATE OF ARKANSAS)
COUNTY OF PULASKI) ss

Subscribed and sworn to before me, a Notary Public, on this 11th day of December, 2013.


Notary Public

My Commission Expires:

3-19-2018



Edward Armstrong

From: Fred Harrison <FHARRIS@uasys.edu>
Sent: Monday, December 02, 2013 4:37 PM
To: Edward Armstrong
Subject: FW: Employment Status of Tom Sullivan

I'll call tomorrow to discuss.

Fred H. Harrison
General Counsel
University of Arkansas
2404 North University Avenue
Little Rock, AR 72207
Phone: (501) 686-2515
Fax: (501) 686-2517

From: Michael Hunter Schwartz [<mailto:mhschwartz@ualr.edu>]
Sent: Monday, December 02, 2013 4:16 PM
To: Fred Harrison; Jeff Bell
Cc: Mandy Hull Abernethy
Subject: Employment Status of Tom Sullivan

Gentlemen:

This message confirms that Tom Sullivan works full-time at the law school on a nine-month contract.

--

Michael Hunter Schwartz | Dean and Professor of Law
UALR William H. Bowen School of Law
(o) 501.324.9450 | (f) 501.324.9433
twitter.com/deanmhschwartz | ualr.edu/law

STATE CLAIMS COMMISSION DOCKET
OPINION

Amount of Claim \$ 460,000.00

Claim No. 13-0695-CC

Gyronne Buckley

Claimant

Attorneys

Mark F. Hampton, Attorney

Claimant

State of Arkansas, Clark County
Prosecuting Attorney, 9th East

Judicial District
State of Arkansas

Respondent

Edward Armstrong, Asst. Atty. General

Will Jones, Asst. Atty. General

Respondent

Date Filed March 26, 2013

Type of Claim Other (Wrongful Conviction)

FINDING OF FACTS

This claim was filed for wrongful conviction in the amount of \$460,000.00 against the State of Arkansas, Clark County Prosecuting Attorney, 9th East Judicial District.

Present at a hearing December 12, 2013, was the Claimant, represented by Mark F. Hampton, Attorney and the Respondent, represented by Edward Armstrong, Assistant Attorney General, and Will Jones, Assistant Attorney General.

The Arkansas State Claims Commission unanimously denies and dismisses the Respondent's "Motion for Summary Judgment." The Claimant obtained an order from a circuit court judge on December 6, 2010, which granted Special Prosecutor Larry Jegley's "Motion to Nolle Prosequi." New charges could have been filed against the Claimant until December 6, 2011. The Claimant filed his claim within the three-year statute of limitations from that date of December 6, 2011, after which he could no longer be charged.

The argument that the claim was incorrectly filed due to the signature of a full-time State of Arkansas employee, who signed as the Claimant's "representative", and, thus, invalidated the claim is unanimously rejected. It is clear from the claim form itself that Mark F. Hampton was the Claimant's attorney of record and legal representative. Additionally, since the claim could have immediately been re-filed within the applicable statute of limitations with the Claimant's own signature or that of Mr. Hampton, the issue is not relevant. There is an old equity maxim that states: "The law does not require the doing of a useless act" which is applicable here.

The Respondent's "Motion for Summary Judgment" is unanimously denied and dismissed.

IT IS SO ORDERED.

(See Back of Opinion Form)

CONCLUSION

Upon consideration of all the facts as stated above the Claims Commission hereby unanimously denied and dismissed the Respondent's "Motion for Summary Judgment."

Date of Hearing December 12, 2013

Date of Disposition December 12, 2013

Richard D. May Chairman
Pat Moran Commissioner
Bill Lancaster Commissioner

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STATE CLAIMS COMMISSION DOCKET
OPINION

Amount of Claim \$ 460,000.00

Claim No. 13-0695-CC

Gyronne Buckley

Claimant

Attorneys

Mark F. Hampton, Attorney

Claimant

State of Arkansas, Clark County

Prosecuting Attorney, 9th East

Judicial District
State of Arkansas

Respondent

Edward Armstrong, Asst. Atty. General

Will Jones, Asst. Atty. General Respondent

Date Filed March 26, 2013

Type of Claim Other (Wrongful Conviction)

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This claim was filed for wrongful conviction in the amount of \$460,000.00 against the State of Arkansas, Clark County Prosecuting Attorney, 9th East Judicial District.

Present at a hearing December 12, 2013, was the Claimant, represented by Mark F. Hampton, Attorney and the Respondent, represented by Edward Armstrong, Assistant Attorney General, and Will Jones, Assistant Attorney General.

The Arkansas State Claims Commission unanimously finds liability on the part of the Respondent as there is incontrovertible evidence as to the actions of area Drug Task force staff member Keith Ray, the Respondent's admitted employee. This employee, while at work and using his employer's resources, failed to disclose documents to both the Claimant's legal counsel and the prosecuting attorney. Agent Ray himself gave, and appears to have assisted in the fabrication of, untruthful trial testimony. These lies resulted in the Claimant wrongfully serving eleven and one-half (11.5) years incarcerated for crimes he did not commit. He had been given two life sentences at his trial. Agent Ray appears to have done his work free from any supervision or review by his agency supervisors. This failure of supervision and review by the agency caused, through false documentation and untruthful testimony, the wrongful conviction of the Claimant. Agency and employee incompetence is well documented in this matter.

Agent Ray subsequently admitted that he falsified evidence and gave untruthful testimony in the prosecution of another trial, that of Rodney Bragg, which saw him wrongfully convicted. The Claims Commission previously heard a claim by Mr. Bragg and unanimously awarded him \$200,000.00 for his years (5) of wrongful imprisonment. That award was upheld by the Claims Review Subcommittee and subsequently paid. The current claim is based on the same set of circumstances found in the Bragg claim. Ray's shameful behavior cast a shadow on all the good law enforcement personnel in Arkansas.

In the current claim there was irrefutable evidence that a videotaped interview with an informant was never disclosed to the Claimant's legal counsel before the Claimant's trial and conviction occurred. The existence of the tape was, likewise, never disclosed to the prosecuting attorney. Only an order, well after Claimant's conviction, from the United States District Court resulted in the production of the tape.

The Claimant was finally released from prison six months after the granting of the writ of error "coram nobis" by the Arkansas Supreme Court. The appointment of a Special Prosecutor, Larry Jegley, Prosecuting Attorney for Pulaski and Perry Counties, led to the Clark County Circuit Court order of December 6, 2010, granting Mr. Jegley's "Motion to Nolle Prosequi." Any new charges against the Claimant would have to be filed by December 6, 2011. In 2013, the circuit court granted the Claimant's motion to expunge his conviction and seal the case.

The actions of the Respondent and its employees were reprehensible and caused the Claimant to wrongfully spend eleven and one-half (11.5) years incarcerated. The Arkansas State Claims Commission unanimously awards the Claimant the amount of \$460,000.00 for his wrongful loss of freedom and will include the claim in a claims bill to be submitted to the 89th General Assembly, Arkansas State Legislature 2014 for subsequent approval and payment.

IT IS SO ORDERED.

(See Back of Opinion Form)

CONCLUSION

Upon consideration of all the facts as stated above the Claims Commission hereby finds liability on the part of the Respondent and unanimously awards the Claimant the amount of \$460,000.00 for his wrongful loss of freedom and will include the claim in a claims bill to be submitted to the 89th General Assembly, Arkansas State Legislature 2014 for subsequent approval and payment.

Date of Hearing December 12, 2013

Date of Disposition December 12, 2013

Richard May
Chairman

Patman
Commissioner

Bill Lemaire
Commissioner

**Appeal of any final Claims Commission decision is only to the Arkansas General Assembly as provided by Act #33 of 1997 and as found in Arkansas Code Annotated §19-10-211.

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RECEIVED

BEFORE THE STATE CLAIMS COMMISSION
OF THE STATE OF ARKANSAS

GYRONNE BUCKLEY

CLAIMANT

v. CLAIM NO. 13-0695-CC
STATE OF ARKANSAS,
CLARK COUNTY PROSECUTING ATTORNEY,
9TH EAST JUDICIAL DISTRICT

RESPONDENT

NOTICE OF APPEAL

Pursuant to Ark. Code Ann. § 19-10-211, State of Arkansas, Clark County Prosecuting Attorney, 9th East Judicial District ("Respondent"), by and through its attorneys, Attorney General Dustin McDaniel, Assistant Attorney General Will Jones and Assistant Attorney General Edward Armstrong, gives this notice of appeal to the Arkansas State Claims Commission ("Commission") from this Commission's decision in the above referenced matter signed by the Commission on December 12, 2013.

For the record on appeal, Respondent designates the entire record of the Commission pertaining to Claim No. 13-0695-CC, including any and all pleadings, motions, briefs, evidence, orders, audio recordings of hearings, and notices of appeal. Respondent has ordered the complete audio recording of the hearing held by the Commission on December 12, 2013 so that it may be included in the record on appeal.

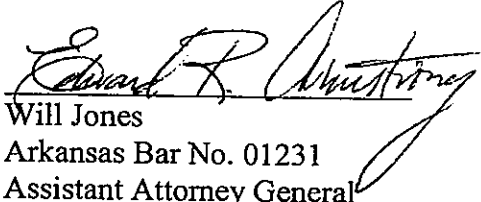
Wherefore, Respondents pray that the Commission notify the Legislative Council or the appropriate committee of the General Assembly and all parties to the claim of the filing of this notice of appeal.

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Respectfully submitted,

Dustin McDaniel
Attorney General

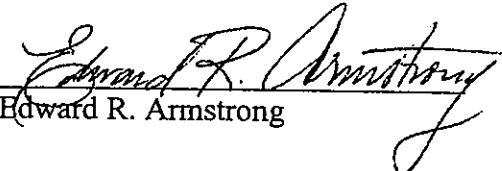
By:


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Assistant Attorney General
Edward R. Armstrong
Arkansas Bar No. 2004019
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will.jones@arkansasag.gov
edward.armstrong@arkansasag.gov
Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Assistant Attorney General Edward R. Armstrong, do hereby certify that a copy of the foregoing has been served upon the following via regular U.S. Mail, postage prepaid, on this 10th day of January, 2014.

Mr. Mark Hampton
Mr. J. Thomas Sullivan
1122 West Capitol Avenue
Little Rock, AR 72201


Edward R. Armstrong