



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

July 14, 2010

Governor Brad Henry
212 State Capitol Building
Oklahoma City, OK 73015

Re: Jeffrey David Matthews's Request for Additional Reprieve from Execution.

Dear Mr. Governor:

I am in receipt of a letter dated July 13, 2010, from the Federal Public Defender's Office, requesting a twenty-seven (27) day reprieve for Jeffrey David Matthews's execution. As you know, Mr. Matthews is currently scheduled for execution at 6:00 p.m. on Tuesday, July 20, 2010, at the Oklahoma State Penitentiary. This execution date was set by you after granting a thirty-three (33) day reprieve from Matthews's original execution date set by the Oklahoma Court of Criminal Appeals.

Matthews's request to delay his execution should be denied. Matthews's attorneys write that major case impressions "for two of the four identified suspected have been collected and provided to OSBI" and that "[t]he prints are now in the process of being analyzed."

Actually, as of yesterday, the OSBI lab had possession of only one set of the new print cards obtained by Matthews's lawyers, print cards obtained from Mark Sutton. I know this because at 11:30 a.m. yesterday I personally signed the evidence submittal paperwork required by OSBI protocol so the OSBI lab could intake the print cards. The prints were sent by regular mail to OSBI from a county sheriff's office in Kansas. As of yesterday, OSBI was not in possession of the new print cards the Federal Public Defender says it has collected from Bryan Curry. My understanding is that Curry was fingerprinted by the Cleveland County Sheriff's Office in Norman. I have contacted the Federal Public Defender to arrange to get those prints to OSBI this morning.

Despite the defense's delay in submitting these print cards, the OSBI fingerprint examiners who will be handling this matter told me they believe they could conduct the comparisons of the new print cards with the unmatched latent prints, and generate a report, by Monday, July 19, 2010. For this reason alone the requested reprieve should be denied as OSBI appears capable of completing the requested examination prior to the execution date.

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Matthews argues his execution should be delayed because the Attorney General's Office refused to "assist" him in obtaining major case impressions from the four people he describes as suspects. Specifically, Matthews's counsel cite their June 18, 2010, request that the Attorney General's Office send "a teletype...requesting major case prints from all local law enforcement agencies" and that we "seek the arrest of [Harry] Clary on outstanding warrants." Matthews and his lawyers ignore that OSBI is the state repository for fingerprint records for the State of Oklahoma. OSBI checked its own database, as well as the Interstate Identification Index and the records generated from OSBI's previous work on Matthews's case. There is no evidence that major case impressions were ever taken from the four men Matthews and his lawyers identify as uncharged "suspects" in the Short murder case. Matthews's request for the teletype to law enforcement is nothing more than an invitation for law enforcement to engage in a wild goose chase. I am unapologetic in declining this request.

Matthews complains that Harry Clary must be arrested so major case impressions can be obtained from him. A simple search of the Oklahoma Supreme Court Network computerized docket system reveals that Clary indeed does have an outstanding misdemeanor bogus check warrant filed in Cleveland County District Court which has been pending since July 31, 2008. Matthews also claimed in his June 18th letter to this Office that Clary has an outstanding DUI warrant. This Office does not routinely handle bogus check or DUI cases. That task is left under Oklahoma law to local District Attorney's offices. If Matthews and his attorneys are so concerned about Mr. Clary's arrest on outstanding warrants, they should have used the vast federal resources dedicated to the Federal Public Defender's Office (which includes investigators who previously worked in law enforcement) to accomplish that task well before now in order to obtain the desired fingerprint cards. I am unable to commit this Office to the constitutionally questionable pretext-style arrest envisioned by the defense here considering the potential civil liability that might entail and the history of this case.

Matthews argues that his claims of innocence over the years, the circumstantial nature of the case against him, plus law enforcement's handling of the fingerprint evidence during trial proceedings also counsel in favor of more reprieve time. First, the examination Matthews now seeks could have been conducted, *or at the least requested*, by the defense at the time of trial. Matthews was originally tried in 1995 and then again in 1999. It is undisputed that Matthews did nothing during his trial proceedings to accomplish what he now says is needed. This despite having retained defense fingerprint expert Ron Singer in Fort Worth, Texas, prior to trial to evaluate other evidence in the case. The defense very obviously chose not to pursue the testing Matthews now seeks so defense counsel at both trials could argue that the unmatched prints recovered from inside the victims' home established reasonable doubt of Matthews's guilt.

Having twice failed in his effort to sell this particular argument to a jury, Matthews now uses the desired fingerprint comparison as a means of delaying his execution. Matthews should be held accountable for the litigation strategies he endorsed until 2008, the year he first approached the State about the testing he now seeks.

Second, the testing Matthews seeks does not have the potential to exonerate him. I will tell you exactly what I told the Pardon and Parole Board at Matthews's clemency hearing on this point. Matthews's jury was instructed that it could convict either on first degree felony murder or first degree malice aforethought murder. In other words, the first degree murder count for which Matthews was convicted was pled in the alternative and the first degree murder verdict returned by the jury was a general verdict, i.e., it did not specify whether the jury believed Matthews guilty of first degree malice aforethought murder (requiring a deliberate intent to kill) or first degree felony murder (requiring a showing that the victim was killed during the course of the burglary at the Short residence, regardless of Matthews's actual intent and regardless of whether he was the actual triggerman). The jury was also instructed that it need not agree unanimously on either theory.

The evidence presented at trial shows Matthews was the triggerman. However, under the State's felony murder theory, Matthews could be convicted of first degree murder based solely on his participation in the underlying burglary at the Short residence, regardless of whether he was the triggerman or was even inside the house at the time of the murder. Indeed, Matthews presented in connection with his clemency proceedings an affidavit from Bobby Youngblood stating that Youngblood did not believe Matthews actually shot Earl Short or was even inside the Short residence at the time of the murder. Youngblood wrote that the best evidence presented by the prosecution was a shoe print found on the dirt road near the Short residence which matched to Matthews. *See Attachment 1.*

Youngblood was readily able to convict Matthews and sentence him to death under the State's first degree felony murder theory. Recall that, in addition to the first degree murder conviction, Matthews was convicted in a separate count of conspiracy to commit the first degree burglary at the Short home during the course of which Earl Short was murdered. The evidence showed Matthews and two other accomplices burglarized the Short residence one month earlier, stealing nearly \$10,000 in cash from their cellar. Matthews had a reason to go back for more, knowing that the Shorts kept large sums of cash inside the house. Matthews obtained the fully-loaded murder weapon from Mark Sutton just hours before the murder and never returned it. Matthews was discovered in possession of proceeds from the burglary shortly after the murder, i.e., Minnie Short's Xanax bottle and three \$100 bills. And of course, a shoe print recovered from the county road next to the Short residence matched the shoes worn by Matthews the night of the killing.

These basic facts from the trial record were sufficient to establish Matthews as a principal under Oklahoma law to first degree felony murder. Thus, even if one of the unmatched latent prints found inside the residence could be matched to Christopher Smith, Harry Clary, Bryan Curry or Mark Sutton, that would not exonerate Matthews. Nor would it have a legal impact on his personal culpability for this capital offense. Under U.S. Supreme Court authority, a death sentence may be imposed for felony murder where the State shows, at the least, that the defendant was a major participant in the underlying felony committed and was recklessly indifferent to human life.

Matthews's actions satisfy these requirements, assuming *arguendo* he was not inside the residence at the time of the murder and that some as-of-yet unidentified accomplice was the actual triggerman. Matthews conspired to commit the burglary at the Short residence, obtained the fully loaded murder weapon just hours before the killing and was, at the least, on the county road near the house when the burglary and murder occurred. He was therefore a major participant in the underlying burglary resulting in the felony murder conviction. Sending an accomplice with a loaded firearm inside an occupied dwelling under cover of darkness for the purpose of stealing cash located throughout the house alone represents reckless indifference to human life.

In this sense, the fingerprint testing sought by Matthews does not have the potential to exonerate him. This Office agreed to conduct the reexamination of the fingerprint evidence shortly before Matthews's previous execution date because OSBI was unable to produce the unmatched prints for comparison in 2008 when Matthews initially asked for the new comparison using available print evidence in the state's possession. That was the right decision because of the unfortunate timing of events leading to the last-minute location of the unmatched print evidence. However, I cannot agree to the course now proposed by Matthews's defense attorneys. There are no guarantees the prints recently obtained by Matthews will be of sufficient quality for additional comparison and, again, the requested examination does not have the potential to exonerate Matthews.

Matthews's request for more delay is difficult to accept considering that the defense could have requested all of this testing during previous trial proceedings when the State had the fingerprint evidence in its possession as well as ready access to the original print examiner. Instead, the defense made a strategic decision against that course. Earl Short was murdered on January 27, 1994. The evidence, detailed in my June 15th correspondence to you, shows that Matthews was the triggerman. *See Attachment 2.* In the sixteen (16) years since that fateful morning inside the Short residence, there remains no credible evidence calling into question Matthews's role as the triggerman. That OSBI has been unable to produce a match between any of the "suspects" Matthews identifies and the numerous latent prints recovered from inside the Short residence only bolsters that conclusion.

This is not a case where new technology has the potential to exonerate a death row inmate. Rather, this is a case where old technology, available since well before the murder at issue here, is being offered by a death row inmate to obtain needless delays on the false promise of producing an

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exoneration. There is no good reason for an additional reprieve of any length under these circumstances. The Attorney General therefore respectfully requests that Matthews's request for an additional twenty-seven day reprieve be denied and that his lawful execution be allowed to occur on July 20th as scheduled.

Should you have questions, feel free to call me directly. My office direct line is (405) 522-4410. My cell phone is (405) 209-0720.

Respectfully,

A handwritten signature in black ink, appearing to read "Seth S. Branham". The signature is fluid and cursive, with a long horizontal stroke at the end.

Seth S. Branham

Assistant Attorney General

AFFIDAVIT OF BOBBY YOUNGBLOOD

STATE OF OKLAHOMA)
)
COUNTY OF CLEVELAND) **ss.**

I, Bobby Youngblood, being of legal age and sound mind, do solemnly swear and state as follows:

1. I was a juror in the 1999 capital murder trial of Jeffrey David Matthews.
2. If I had things to do over again, I would not have sentenced Mr. Matthews to death.
3. It concerns me greatly that there was no physical evidence which placed Mr. Matthews inside the Short household or established Mr. Matthews as Mr. Short's killer.
4. The strongest evidence presented against Mr. Matthews was a casting of a shoeprint found on a dirt road very close to the crime scene. I believe this footprint belonged to Mr. Matthews.
5. When we, as a jury, began to deliberate on the question guilt, four or five of us would have found Mr. Matthews not guilty for the crimes charged.
6. The jury spent much time discussing if Mr. Matthews had conspired with Tracy Dyer to burglarize the Short residence. We eventually decided Mr. Matthews was guilty of conspiracy.
7. Once it was decided that Mr. Matthews had, in fact, conspired with Tracy Dyer, then it was automatic that Mr. Matthews was guilty of the other charged offenses. (Essentially, Mr. Matthews was just as guilty as Tracy Dyer for the offenses Dyer completed on his own.
8. Me and some of the other jurors' understanding of the law was that Mr. Matthews was responsible for all of the criminal acts completed during the burglary, including Mr. Short's murder, because we found Mr. Matthew's guilty of conspiracy.
9. I do not believe that Mr. Matthews killed Mr. Short, or was inside the Short

Attachment 1

residence. However, I still believe Mr. Matthews and Tracy Dyer had planned to commit a burglary.

10. I think it is unfair that Mr. Matthews be executed when I do not believe he actually killed Mr. Short.
11. Not all jurors, including myself, were initially in favor of a death sentence. But a big sticking point for us was that the victims were kin to Mr. Matthews, even though we were not told to consider such things when setting punishment.
12. I believe it would be appropriate if Mr. Matthews were granted clemency and his sentence changed to life without the possibility parole.

FURTHER AFFIANT SAYETH NOT.

Bobby Youngblood
Bobby Youngblood

Subscribed and sworn to before me this 28th day of April, 2010.



Julie Gardner
NOTARY PUBLIC # 05008474



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

June 15, 2010

Governor Brad Henry
212 State Capitol Building
Oklahoma City, OK 73015

Re: Jeffrey David Matthews's Request for a Sixty (60) Day Reprieve.

Dear Mr. Governor:

I am in receipt of a letter dated June 14, 2010, from the Federal Public Defender's Office, requesting a sixty (60) day reprieve of Jeffrey David Matthews's execution. As you know, Mr. Matthews is currently scheduled for execution at 6:00 p.m. on June 17th at the Oklahoma State Penitentiary.

A bit of background is necessary to understand Matthews's request for a reprieve so I am going to touch upon the highlights of the evidence presented at trial. Matthews has now been convicted and sentenced to death by two separate juries for the murder of Earl Short and the assault and battery with a deadly weapon of Earl's wife, Minnie Short. Matthews's first trial was reversed on direct appeal by the Oklahoma Court of Criminal Appeals, thus resulting in a second jury trial that again resulted in a conviction and death sentence.

Earl and Minnie Short were attacked in their rural McClain County home just after 6:00 a.m. on January 27, 1994. Minnie survived the attack but Earl was shot and killed in his own living room as he came to Minnie's aid. Minnie testified that there were two attackers, both men: her attacker cut her throat with a knife while the other attacker shot and killed Earl. According to Minnie, the man who shot Earl was wearing brown coveralls. Minnie's prescription bottle of Xanax, \$500 cash and a .32 caliber pistol were stolen after the attackers ransacked the house looking for cash.

The Oklahoma State Bureau of Investigation (OSBI) handled the investigation of the case and quickly established Tracy Dyer as the person who cut Minnie's throat. Dyer made a phone call from the Short residence to his employer while ransacking the house. Also, Dyer's fingerprint was discovered inside the residence when OSBI processed the crime scene. Dyer was arrested within hours of the murder at which time he named Jeffrey David Matthews as his accomplice. Matthews was arrested a short time later and a search warrant was executed at his house where police discovered, amongst other things, a prescription pill bottle for Xanax issued to Minnie Short, three \$100 bills found in the freezer plus a pair of brown coveralls. Matthews was last seen by his girlfriend when he left home with Tracy Dyer in the evening hours of January 26th, the night before the murder and was not seen again until lunchtime the next day. Mark Sutton testified at trial that

he loaned Matthews his fully-loaded .45 caliber semiautomatic just hours before the murder. This weapon, along with the .32 caliber pistol stolen from the Short residence, was discovered buried behind Matthews's house five months later in June 1994. Ballistics examination revealed that a bullet fragment recovered from Earl Short's body was fired from the .45 caliber pistol.

The evidence also showed that Matthews, Tracy Dyer and man named Bryan Curry burglarized the Shorts' cellar in December 1993, just weeks before the murder, at which time they stole close to \$10,000 dollars cash. The Shorts kept their money stashed at their residence, not in a bank. Matthews admitted at his clemency hearing that he committed the December 1993 burglary of the cellar. Also know that Matthews testified at his first trial that he had been planning on stealing the Shorts' money for several months after getting out of prison in August 1993, that he was related to the Shorts and had heard through his family that they kept large quantities of cash stashed at their house. In his testimony he claimed to have discussed the burglary with Dyer and Harry Clary the night before the murder while standing on the county road next to the Short residence. However, he denied having anything to do with the events the next day. In his statement to OSBI, made shortly after his arrest, Matthews admitted being on the side of the county road next to the Short residence with Tracy Dyer and another man named "Johnny" around the time of the murder but denied ever going inside the house. He did, however, admit in that statement to driving Earl Short's stolen pickup the morning of the murder.

One of the main defense themes at both of Matthews's trials centered on several unmatched latent fingerprint lifts recovered by OSBI during the processing of the Short residence. Because no physical evidence at the crime scene matched to Matthews, defense counsel argued at both trials that the unmatched latent lifts from inside the house were left by the real killer (who could not be Matthews) and that various individuals associated with Matthews were possibly the real killers. The testimony established that the OSBI latent examiner compared known fingerprint cards on file for at least two of these people, Harry Clary and Christopher Smith, that there were no matches but major case impressions would be needed to completely exclude these two men.

In February 2008, shortly before Matthews filed his opening brief on appeal with the Tenth Circuit, he requested that the State run all unmatched fingerprints through the Automated Fingerprint Identification System (AFIS) and that an expert retained by the defense be allowed to compare all available fingerprint records for Harry Clary, Christopher Smith, Bryan Curry and Mark Sutton with the unmatched latent lifts recovered from the Short residence. Matthews's request was denied, however, because OSBI could not locate the unmatched latent lifts.

On June 4, 2010, at the request of Matthews's counsel, I contacted the OSBI and requested that they double check to see if the unmatched lifts were in their possession. On that day, Jim Stokes, the OSBI fingerprint lab supervisor, told me that he in fact had located the unmatched prints in the file and that they were available for comparison. I requested that OSBI immediately perform

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the examination requested by the defense in 2008. OSBI has now completed that examination and a written report should be issued today or tomorrow. No matches were found when OSBI compared all available fingerprint records for Clary, Smith, Curry and Sutton with the unmatched prints found at the crime scene. Additionally, those unmatched prints that were of sufficient quality (I believe there are two or three) were run through AFIS, again, with no matches.

It is true that major case impressions for these four individuals would be required in order to completely exclude them as the makers of some of the unmatched prints recovered from inside the Short residence. The bottom line, however, is that all available fingerprint records for these four men in the State's possession have been secured for purposes of OSBI's examination. OSBI searched its fingerprint database as well as the case file for the Matthews case and fingerprint cards were even obtained from the McClain County Sheriff's Office. No major case impressions were ever taken for these four men during the course of OSBI's investigation of the Earl Short murder or at any point thereafter. So, a sixty day stay of Matthews's execution will accomplish nothing.

The Attorney General respectfully requests that Matthews's request for a sixty day stay be denied. The State has done everything possible to put the issue surrounding the unmatched lifts to rest in light of the available fingerprint evidence. The State's actions in this regard were a voluntary measure and not out of any belief that Matthews had a legal right to this testing. Further delay in this case would constitute a miscarriage of justice considering Matthews has been convicted and sentenced to death by two separate juries despite knowing that no physical evidence put Matthews inside the Short residence and knowing about the unmatched prints and OSBI's examination of the fingerprint evidence. Every court to look at this case on appeal has described the circumstantial proof supporting Matthews's murder conviction as strong, yet another reason to deny relief.

I realize there is a legal argument that the governor may not even have the authority to grant a reprieve after the Pardon and Parole Board has denied clemency as in this case. However, because of the short amount of time I have in which to prepare this letter, I will simply rest upon the above arguments discussing the merits of Matthews's substantive claim. I am happy, however, to brief you on any legal prohibition to the granting of a reprieve under these circumstances should the need arise.

Feel free to call me directly if you have any questions about this matter.

Respectfully,



Seth S. Branham
Assistant Attorney General
405-522-4410 (direct line)
405-209-0720 (cell)