



IN THE COURT OF CRIMINAL APPEALS  
STATE OF OKLAHOMA

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STATE OF OKLAHOMA

OCT - 6 2012

THE STATE OF OKLAHOMA, )  
*ex rel. E. SCOTT PRUITT,* )  
Attorney General, State of Oklahoma, )  
*Petitioner,* )

MICHAEL S. NICHIE  
CLERK

vs. )

No.

THE HONORABLE WILLIAM KELLOUGH, )  
DISTRICT JUDGE, FOURTEENTH )  
JUDICIAL DISTRICT, )  
*Respondent.* )

Tulsa Co. Dist. Ct. Nos.CF-2012-3841

DISTRICT COURT  
**FILED**

COMBINED APPLICATION TO ASSUME ORIGINAL JURISDICTION  
AND PETITION FOR A WRIT OF PROHIBITION

OCT 23 2012

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

COMES NOW the State of Oklahoma, on the relation of E. Scott Pruitt, Attorney General

of Oklahoma, by and through Charles S. Rogers, Assistant Attorney General, and Megan B. Tilly, Assistant Attorney General, and respectfully states as follows:

1. This is a combined *Application to Assume Original Jurisdiction* and *Petition for a Writ of Prohibition* by the Petitioner, State of Oklahoma, to the Honorable Respondent, the Honorable William Kellough, District Judge, Fourteenth Judicial District (Tulsa County), regarding the case of State of Oklahoma v. Windstream Corporation, Tulsa County Case No. CF-2012-3841, to prohibit the enforcement of an *Order* to the extent it requires the grand jury's Court Reporters to produce for the Defendant transcripts of certain witnesses appearing before the Thirteenth Oklahoma Multicounty Grand Jury together with grand jury exhibits and designates the Honorable Respondent the judicial officer to make the relevancy review of said transcripts. Said *Order* was orally announced by the aforesaid Respondent on September 28, 2012,<sup>1</sup> and is contrary to and without

<sup>1</sup> A certified copy of the Honorable Respondent's journal entry of the *Order*, approved upon October 5, 2012, but filed on October 10, 2012, thereby entering the Court's ruling on

authority of law, *see* Rules 10.1(A) and 10.6(A), *Rules of the Court of Criminal Appeals*, 22 O.S. Ch. 18., App. [providing that this Court may issue writs of prohibition in aid of its appellate jurisdiction to prevent the unlawful application of judicial force].<sup>2</sup> The State opposed the action of the Honorable Respondent regarding *Ordering* the transcription of grand jury testimony but was overruled.

2. On January 24, 2011, the Honorable Barbara G. Swinton, District Judge, was designated by *Order* of the Supreme Court of Oklahoma to serve as Presiding Judge of the Thirteenth Oklahoma Multicounty Grand Jury, providing:

3. The Honorable Barbara Swinton is hereby designated and assigned as presiding judge over the multicounty grand jury. ***All applications and motions relating to the work of the multicounty grand jury shall be presented to the presiding judge.***

4. ***IT IS FURTHER ORDERED, with respect to investigations, indictments, reports, and all other proper activities of the multicounty grand jury, that the Honorable Barbara Swinton, as presiding judge, shall have judicial authority and jurisdiction in any and all seventy-seven (77) counties of the State of Oklahoma.***<sup>3</sup>

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September 28, 2012, is attached hereto as **State's Exhibit 1**. A certified transcript of proceedings held before the Honorable Respondent on September 28, 2012, is included as part of the designated *Certified Original Record* to be filed in this case.

<sup>2</sup> *See also English v. District Court of Adair County*, 1972 OK CR 1, 492 P.2d 1125 [setting forth the procedure for legally obtaining grand jury proceedings] and *In re Proceedings of Multicounty Grand Jury*, 1993 OK CR 12, 847 P.2d 812; 22 O.S. 2012, § 340(B) [providing who may seek to obtain grand jury transcripts, 22 O.S. 2012, § 350 [providing general grand jury procedures apply when not in conflict with the Multicounty Grand Jury Act]; and 22 O.S. 2012, §524 [providing a statutory procedure for a Defendant to demand a preliminary examination upon an *Indictment*].

<sup>3</sup> (Emphasis added by bold italic typeface). A certified copy of this *Order* is attached hereto as **State's Exhibit 2**. A copy of the Order was also before the Honorable Respondent in the case below and has been designated for inclusion in the *Certified Original Record*. The Supreme Court's *Order* is completely consistent with the applicable statute defining the authority

3. The foregoing *Order* of the Supreme Court of Oklahoma is fully consistent with the authority directed to be conferred upon the grand jury's Presiding Judge by State statute, providing in relevant part:

B. An order granting the convening of a multicounty grand jury issued under subsection A of this section shall:

1. . . .

2. Designate a district court judge to be the presiding judge over such multicounty grand jury and provide that ***such judge shall, with respect to investigations, indictments, reports, and all other proper activities of said multicounty grand jury, have jurisdiction over all counties in the jurisdiction of said multicounty grand jury;*** and . . . .<sup>4</sup>

4. The Defendant below in Tulsa County District Court Case Number CF-2012-3841, Windstream Corporation, is charged by *Indictment* with one (1) count of *Conspiracy Against the State*, 21 O.S. 2001, § 424, and one (1) count of *Bribery*, 21 O.S. 2001, § 381.<sup>5</sup>

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of the multicounty grand jury's Presiding Judge, 22 O.S. 2012, § 351 (B)(2) [providing "B. An order granting the convening of a multicounty grand jury issued under subsection A of this section shall: . . . 2. Designate a district court judge to be the presiding judge over such multicounty grand jury and provide that such judge shall, with respect to investigations, indictments, reports, and all other proper activities of said multicounty grand jury, have jurisdiction over all counties in the jurisdiction of said multicounty grand jury."]

<sup>4</sup> (Emphasis added by bold italic typeface) 22 O.S. 2012, § 351(B)(2).

<sup>5</sup> The Defendant was accused in the *Indictment* with essentially identical charges arising under the same facts as alleged in another *Indictment* filed the same date in Tulsa County, Case Number CF-2012-3842 against a natural person named James David Sisney. Copies of these *Indictments* have been designated for inclusion in the *Certified Original Record*. The defendants were charged in separate *Indictments* due to the dictates of 22 O.S. 2012, §§ 385 and 21 O.S. 2012, §582, that prohibit the contents of an *Indictment* being revealed prior to the defendant being taken into custody. A motion has been filed and is pending to consolidate the cases for further proceedings. Defendant Sisney has properly presented his *Application* for grand jury transcripts and exhibits to the grand jury's Presiding Judge, the Honorable Barbara G. Swinton, District Judge, per the procedure set forth in English v. District Court of Adair County, *supra*, but Defendant Windstream has no lawful access to these proceedings when provided to the other

5. These felony charges are currently pending upon an *Indictment* found and returned by the Thirteenth Oklahoma Multicounty Grand Jury charging Defendant with the aforesaid crimes. The undersigned attorneys are designated legal advisors to the Thirteenth Oklahoma Multicounty Grand Jury and are prosecuting the case pursuant to 22 O.S. 2012, § 357.

6. The case was brought to the Honorable Respondent pursuant to the *Order*<sup>6</sup> of the grand jury's Presiding Judge, the Honorable Barbara G. Swinton, District Judge, who had determined proper venue for the *Indictment* to be Tulsa County and had directed the *Indictment* be sealed and transmitted to Tulsa County where it could be unsealed for the purpose of issuing legal process for the Defendant. The *Order* did not direct the appointment of a preliminary hearing magistrate in the case, nor did it delegate the Presiding Judge's legal authority to assign a magistrate to the case, *See* 22 O.S. 2012, § 524. The grand jury's Presiding Judge has not acted to designate a preliminary hearing magistrate, nor has she delegated the responsibility of reviewing *Applications* for grand jury proceedings to any other judge. In directing the *Ordering* of the transcription of grand jury

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defendant, 22 O.S. 2012, § 340(B), providing in part: "Any person who obtains a copy of a transcript shall not reproduce the transcript in whole or in part or otherwise disclose its contents to any person other than his or her attorney without leave of the court. Violation of this provision shall be punishable as contempt. Provided, nothing in this section shall prohibit the attorney for the accused, the district attorney or assistant district attorney from reproducing in whole or in part the transcribed testimony of a witness he or she anticipates calling to testify at trial and providing same to said witness for the sole purpose of preparing for trial."

<sup>6</sup> Being more fully entitled, *Order Determining Venue, Sealing Indictment, Requiring Transmittal of Indictment to County of Venue, and Authorizing District Court to Open for Purpose of Issuance of Warrant*. A certified copy of this *Order*, filed in *State v. Windstream*, *supra*, is attached hereto as **State's Exhibit 3**. An identical *Order*, certified copy attached hereto as **State's Exhibit 4**, was filed in *State v. James David Sisney*, *supra*. The *Orders* were issued by the grand jury's Presiding Judge pursuant to 22 O.S. 2012, §358(A) and 22 O.S. 2012, § 385. These *Orders* do not delegate to any other Court the authority to entertain *Applications* for Multicounty Grand Jury proceedings, nor do they designate any other judge to serve as Magistrate in these matters.

proceedings, the Honorable Respondent stated he was not acting as magistrate in the cases for which he has been assigned as trial judge.

7. A motion to stay execution of the District Court's *Order* during the pendency of proceedings before this Honorable Court was considered by the Honorable Respondent on October 16, 2012, and the same was **granted** insofar as it pertained to the transcription of grand jury proceedings **for a period of Thirty (30) days or until November 19, 2012, unless further extended by the District Court or this Honorable Court.**<sup>7</sup> A Preliminary Examination before the magistrate appointed by the Honorable Respondent is currently scheduled to commence on November 29, 2012.<sup>8</sup>

8. The Honorable Respondent, having acted without legal authority by *Ordering* the production of grand jury transcripts and exhibits contrary to the Statutes of the State of Oklahoma and the precedent of this Honorable Court, the State of Oklahoma has suffered an injury for which the State is without an adequate remedy at law.

9. The filing of this Original Action is not in conflict with this Court's *Ten-Day Rule*, Rule 10.2, *Rules of the Court of Criminal Appeals, supra*, the preliminary hearing date currently scheduled is more than ten (10) days hence; November 29, 2012.<sup>9</sup> This Original Action is properly commenced

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<sup>7</sup> In acting upon the State's *Application for Stay of Execution* of the Order, the Honorable Respondent stated that he would not enter an open ended stay.

<sup>8</sup> Defendant Windstream Corporation, upon proper application, is entitled to access to the grand jury proceedings prior to the preliminary examination, English v. District Court of Adair County, supra. The date for the Preliminary Examination in the case was continued from November 8, 2012, to November 29, 2012 at the State's request founded upon a scheduling conflict and by agreement of the parties.

<sup>9</sup> A defendant has the right to grand jury proceedings before the commencement of a preliminary hearing, English v. District Court of Adair County, supra. While proceedings are scheduled before the Honorable Respondent for October 30, 2012, upon a *Motion to Dismiss*

within thirty (30) days of the entry of the *Order* by the Honorable Respondent, Rule 10.1(C), *Rules of the Court of Criminal Appeals, supra*.

11. Accordingly, as shown above, the Honorable Respondent has exercised judicial power, the exercise of that power is unauthorized by law, and the exercise of that unauthorized judicial power has resulted in an injury to the State of Oklahoma for which the State is without an adequate remedy at law. This Court may grant the State relief from this unlawful *Order* by granting a *Stay of Proceedings* and thereafter issuing its *Writ of Prohibition*, Rules 10.1(A) and 10.6(A), *Rules of the Court of Criminal Appeals, supra*.

#### CONCLUSION AND PRAYER FOR RELIEF

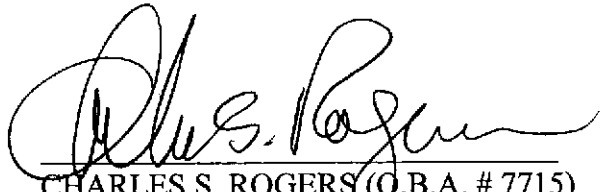
**WHEREFORE**, premises considered and for good, legal and sufficient cause shown, your Petitioner respectfully prays to this Honorable Court to issue its *Writ of Prohibition* to the Honorable William Kellough, District Judge, Tulsa County, to prohibit enforcement of Judge Kellough's *Order* insofar as it pertains to the production of grand jury transcripts and exhibits, directing that the same be set aside and held for naught, and that the case thereafter proceed according to law.

Respectfully submitted,

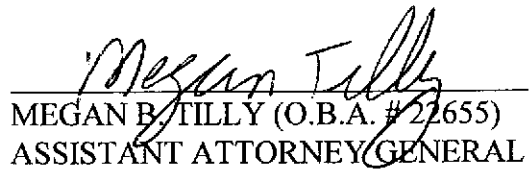
E. SCOTT PRUITT  
ATTORNEY GENERAL OF OKLAHOMA

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filed by the Defendant, the legal issues involved in that motion do not involve any of the legal issues Petitioner seeks to present in this case, Petitioner expects to prevail on said motion, and even a favorable ruling on said motion for the Defendant, being in the nature of an unverified *Motion to Quash*, will not moot this matter since such a ruling would not bar the State from re-initiating the case through another *Indictment* or *Information*. The Defendant would still have the right to obtain grand jury proceedings in this case, English v. District Court of Adair County, *supra*.



CHARLES S. ROGERS (O.B.A. # 7715)  
ASSISTANT ATTORNEY GENERAL  
CHIEF, MULTICOUNTY GRAND JURY UNIT



MEGAN B. TILLY (O.B.A. # 22655)  
ASSISTANT ATTORNEY GENERAL  
313 N.E. 21<sup>st</sup> Street  
Oklahoma City, OK 73105  
(405) 521-4274 [voice]  
(405) 522-2795 [fax]  
ATTORNEYS FOR THE PETITIONER  
STATE OF OKLAHOMA

## CERTIFICATE OF SERVICE

I, Charles S. Rogers, Assistant Attorney General, do hereby certify that a true, exact and complete copy of the foregoing document was mailed, to the following persons at the indicated address this 18<sup>th</sup> day of October, 2012:

The Honorable William Kellough  
District Judge, Fourteenth Judicial District  
Tulsa County Courthouse, Room 408  
Tulsa, OK 74103  
RESPONDENT

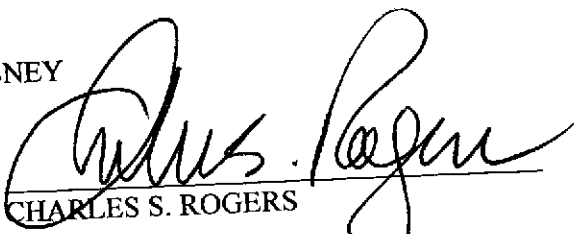
The Honorable Barbara G. Swinton  
District Judge, Seventh Judicial District  
Oklahoma County Courthouse, Room 359  
321 Park Avenue  
Oklahoma City, OK 73102  
PRESIDING JUDGE, MULTICOUNTY GRAND JURY

I hereby further certify that additional true, exact and complete copies of the foregoing document were mailed the same date to the following attorneys:

John D. Russell, Esq.  
Fellers, Snider, Blankenship, Bailey & Tippins, P.C.  
800 Kennedy Building  
321 S. Boston Ave.  
Tulsa, OK 74103  
and

Warren F. Bickford, Esq.  
Fellers, Snider, Blankenship, Bailey & Tippins, P.C.  
100 N. Broadway, Suite 1700  
Oklahoma City, OK 73102  
ATTORNEYS FOR DEFENDANT WINDSTREAM CORPORATION

Joel L. Wohlgemuth, Esq.  
John E. Dowdell, Esq.  
Ryan Ray, Esq.  
Norman Wohlgemuth Chandler & Dowdell  
2900 Mid-Continent Tower  
401 S. Boston Avenue  
Tulsa, OK 74103  
ATTORNEYS FOR DEFENDANT JAMES DAVID SISNEY

  
CHARLES S. ROGERS





IN THE DISTRICT COURT OF TULSA COUNTY  
STATE OF OKLAHOMA

**FILED**

STATE OF OKLAHOMA,

OCT 10 2012

Plaintiff,

Case No. CF-2012-3841

SALLY HOWE SMITH, COURT CLERK Judge William C. Kellough  
STATE OF OKLA. TULSA COUNTY

v.

WINDSTREAM CORPORATION,

a Delaware Corporation,

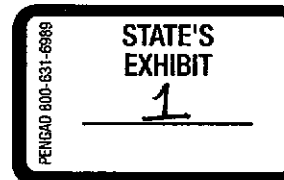
Defendant.

**ORDER**

NOW on this 28th day of September, 2012, this matter comes on for hearing before the Presiding Judge of the District Court, upon the application of Windstream Corporation for release of Grand Jury transcripts for use as provided by law upon Indictments issued by the grand jury. The Court, having reviewed the Application and being fully advised in the premises, finds that said Application should be and is here by ordered sustained.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Court Reporter(s) of the Oklahoma Multicounty Grand Jury shall prepare an official shorthand reporter's transcript of the following witnesses appearing before the Thirteenth Oklahoma Multicounty Grand Jury:

1. **Ed Bryson**, 83 Front Street, Sekiu, Washington;
2. **Ryan Chevront**, VIP Sports Marketing, Inc., 811 W. Evergreen Ave., Suite 305, Chicago, Illinois;
3. **Wesley Edens**, Office of State Auditor and Inspector, 100 State Capitol Building, Oklahoma City, Oklahoma;
4. **Maryanne Flippo**, 7209 South Date Avenue, Broken Arrow, Oklahoma;



5. **Gary Gerber**, C/o Mark Jennings, Esq., Brewster & DeAngelis, PLLC, 2617 E. 21<sup>st</sup> Street, Tulsa, Oklahoma;
6. **Jackie Johnson**, Chief Investigator, Oklahoma Attorney General, 313 N.E. 21<sup>st</sup> Street, Oklahoma City, Oklahoma;
7. **Cheryl Krueger**, Windstream Communications, 401 S. 21<sup>st</sup> Street, Suite 100, Lincoln, Nebraska;
8. **Michael O'Bryan**, Windstream Communications, 5506 Walsh Lane, Little Rock, Arkansas;
9. **Joy Plested**, Director of Accounting, Broken Arrow Public Schools, 701 South Main Street, Broken Arrow, Oklahoma;
10. **Kristin Rankin**, Windstream Communications, 4001 Rodney Parham, Little Rock, Arkansas;
11. **Daniel D. Rice**, Windstream Communications, 14206 S. Toledo Avenue, Bixby, Oklahoma;
12. **Wes Smithwick**, Broken Arrow Chamber of Commerce, 210 N Main, Street, Suite C, Broken Arrow, Oklahoma;
13. **Deborah Sovereign**, Kellogg & Sovereign Consulting, LLC, 1101 Stadium Drive, Ada, Oklahoma;
14. **Terry Lynn Stover**, 4706 S. 199<sup>th</sup> Avenue, Broken Arrow, Oklahoma;
15. **Dwayne Thompson**, Chief Administrative Officer, Broken Arrow Public Schools, 701 South Main Street, Broken Arrow, Oklahoma;
16. **Stephanie Jean Updike**, 8676 S. Murphree Drive, Broken Arrow, Oklahoma;
17. **Phyllis Walta**, Walta & Walta, 120 East Oklahoma, Hennessey, Oklahoma;
18. **Matt Watson**, Windstream Communications, 4001 Rodney Parham, Little Rock, Arkansas;
19. **Sharon Whelpley**, 10308 S. 197<sup>th</sup> Avenue, Broken Arrow, Oklahoma;
20. **Don Wilborne**, 5 Noyant Court, Little Rock, Arkansas;
21. **Sharolyn (Shari) Wilkins**, 2705 N. 14<sup>th</sup> Street, Broken Arrow, Oklahoma;

22. **Louis Wood**, 300 West Birmingham Street, Broken Arrow, Oklahoma.

23. **Dr. James Sisney**, 18 Diamond Blvd., Newkirk, OK 74647

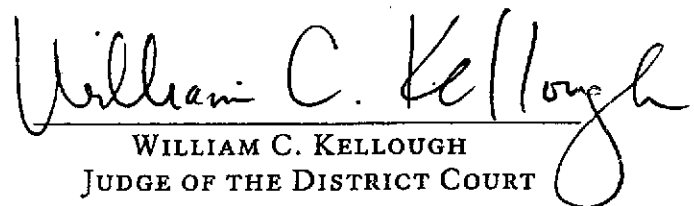
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Court Reporter shall provide such transcripts to the undersigned District Judge for relevancy review pursuant to *In Re. Proceedings of Multicounty Grand Jury*, 1993 OK CR 12, 847 P.2d 812, 815, *English v. District Court of Adair County*, 1972 OK CR 1, 492 P.2d 1125, 1127.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon completion of said transcript, the same is to be made available to John D. Russell, Warren F. Bickford and Sofia R. Nagda upon payment of the expense for such transcription, and the true, full and complete copies of all relevant exhibits provided to the grand jury also be provided to counsel for Defendant. Use of said transcripts by the Defendant shall be as provided by 22 Okla. Stat. § 340(B).

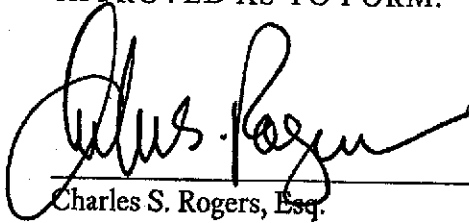
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Honorable William C. Kellough is the designated District Judge for the captioned case and that the Honorable Clifford Smith is the designated magistrate for the captioned case.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the State of Oklahoma's objections to this Court's jurisdiction to order transcription and production of the foregoing grand jury transcripts are overruled.

Dated: October 5, 2012.

  
WILLIAM C. KELLOUGH  
JUDGE OF THE DISTRICT COURT

APPROVED AS TO FORM:



Charles S. Rogers, Esq.  
Assistant Attorney General  
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**COUNSEL FOR PLAINTIFF**



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[wbickford@fellerssnider.com](mailto:wbickford@fellerssnider.com)

**COUNSEL FOR DEFENDANT  
WINDSTREAM CORPORATION**

88938#18588.2

Notary Public for Oklahoma  
I, \_\_\_\_\_, County of \_\_\_\_\_, State of Oklahoma, do hereby certify that the foregoing is a true and correct copy of the instrument the same as it appears on record in the Court Clerk's Office of Tulsa County, Oklahoma, this

OCT 1 2012

