UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DEC 13, 2004

391 F.3d 1155 (10th Cir. 2004)

GREENWOOD SURVIVORS
Representing two hundred plaintiffs: Charles J. Ogletree Jr., Harvard Law School; Johnnie L. Cochran Jr., Cochran, Cherry, Givens & Smith, New York; more. (See appendix for the 18 attorneys of record)

v.

STATE OF OKLAHOMA
CITY OF TULSA
THE TULSA POLICE DEPARTMENT

ORDER

The petition for rehearing is GRANTED.

The suggestion for rehearing *en banc* was transmitted to all judges in regular active service. A poll was requested and a majority voted to grant rehearing. Participants that voted to deny have declined to file a dissent.

SUMMARY

Before us today is a matter that must suffice the Rule 35 standard of presenting a "question of exceptional importance" to merit the attention of the entire court. This case speaks back to the standard with exhausted outrage and incredulity. Is the foundational racism of this country even a question? What must one do to prove the "exceptional importance" remedying the generational legacy of our original sin? Perhaps there will come a day when all this is moot. How we actually get to that better day is at the heart of this case. For this reason alone, we can't in good conscience deny a request for rehearing.

To the credit of all, the facts presented by plaintiffs — drawn from *Final Report of the Oklahoma Commission to Study the 1921 Tulsa Massacre* (February 28, 2001) — have never been in dispute by the defendants, the court, or anyone. They've only been willfully forgotten. We recall them again now, so that they might be internalized in our conceptualization of who we are and where we came from.

From May 31 to June 1, 1921, in one of the most shameful events in our shared history, between one hundred and three hundred African Americans were slaughtered, and the most prosperous and vibrant African-American community in the United States, a section of Tulsa known as Greenwood, was burned and obliterated by means of ground and air assault in an uncontrolled attack perpetrated by white citizens. The loss of property is boggling. Forty-two square blocks and one thousand two hundred and fifty six homes, plus churches, schools, businesses, a hospital and a library — all destroyed, in many cases, after first being looted. The estimated damage per the most recent assessment: $16,752,600 in 1999

dollars. That we cannot be as precise in measuring the loss of life is beyond appalling. It is inconceivable that a government investigation of the incident of November 2, 1985 would have failed to count and identify, to best of human ability, every person who perished. Yet it is telling of the attitude in 1921 that no effort was made to account for those who died.

Neglecting their responsibility to preserve order and to protect people or property, no government agency offered resistance, if any at all, to the sacking of "Black Wall Street" (among whites, Greenwood was known more disparagingly as "Little Africa"). Indeed, official government action by the city of Tulsa and the state of Oklahoma fueled this carnage by deputizing and arming the mob, effectively creating a vigilante police force. Official government action is also responsible for authorizing the National Guard to illegally detain the victims while whites razed Greenwood to the ground. Neither city nor state contributed in any significant way to Greenwood's rebuilding; in fact, municipal authorities worked initially to impede it. The restoration of Greenwood was left to its surviving residents.

The inciting incidents — a dubious allegation of sexual assault by a man of color against a white woman; an effort by armed African American citizens to protect the accused from lynching — are pertinent inasmuch as they represent a two things: a narrative of white society to rationalize supremacist attitudes and genocidal behaviors; and the justifiable fear of African Americans that the rule of law could not be trusted. (In Oklahoma specifically, there were twenty three lynchings in 1921, up from one from 1911.) The root causes of the Tulsa Massacre are found in the degrading structure of Jim Crow-era white supremacy that subverted African American agency and permitted wanton violence against black bodies and property, from lynchings of individuals to purges of communities to militia wars against governments. It flowed out of a World War I-era surge in white resentments (including the "Red Summer" of 1919) stoked by an assortment of social factors and perceived or real provocations, from the activism of the National Association for the Advancement of Colored People, which launched in 1909, to the inflammatory phenomenon of *The Birth of a Nation* (1915), an inflammatory piece of white supremacist propaganda that romanticized the Ku Klux Klan as masked vigilante heroes.

The acts committed during the Tulsa Massacre were, and are, certifiably criminal. Yet not one was then, or has ever been, prosecuted or punished by government at any level, municipal, county, state, or federal. All claims raised by the victims fell upon deaf ears of the courts at the time. Most languished without even a cursory glance at the merits. None of the over one hundred lawsuits filed were successful. In a perversion of justice, a grand jury commissioned by the state exonerated the city and state, and more, blamed the victims for the atrocity. Since then, our language about the Tulsa Massacre helped perpetuate an egregious conceptual misunderstanding. Until the Oklahoma Commission report, historians referred to the Massacre (if they recalled it at all) as "The Tulsa Race Riot of 1921," a choice of words that obfuscated responsibility (which "race" was rioting?) and risked cultivating a perception that the violence was an African American uprising.

This history alone raises a "question of exceptional importance" and we must confront it. But exceptional importance alone is not the sole Rule 35 basis which requires *en banc* review. Victims of the Massacre, who were children at the time of the incident, and descendants of victims constitute the plaintiffs in this case. They seek equitable tolling of the statute of limitations. While the district court correctly concluded that the plaintiffs had been deprived of an impartial forum adequate to vindicate their rights, they incorrectly found that equitable tolling had lifted at some unspecified point in the past.

The *Final Report* is compelling on this matter. The Commission outlined the evidence it developed, which included "records and papers long presumed lost, if their existence had been known at all." These reports led the Commission to state that "[w]hat happened in Tulsa stays as important and remains as unresolved today as in 1921. What happened there still exerts its power over people who never lived in Tulsa at all," and that the "Commission's work and the documentary record it leaves behind shines upon [the Massacre] a light too bright to ignore."

In describing the attitudes that prevailed at the time, the Commission concluded:

"The intent was to intimidate one community. . . . These are the qualities that place what happened in Tulsa outside the realm of the law — and not just in Tulsa, either. Lexington, Sapulpa, Norman, Shawnee, Lawton, Claremore, Perry; Waurika, Dewey, and Marshall — earlier purges in every one had targeted entire black communities, marking every child, woman, and man for exile. . . . [A] collective body — acting as one body — had coldly and deliberately and systematically assaulted one victim, a whole community, intending to eliminate it as a community. If other black communities heard about it and learned their lessons, too, so much the better; a little intimidation went a long way. . . . Here were discrete acts — one act, one town — each consciously calculated to have a collective effect not against a person but against a people. . . . [T]he one purpose was to keep one race 'in its place.'"

The Commission asked:

"Who sent the message? Not one person but many acting as one. Not a "mob;" it took forms too calculated and rational for that word. . . . [I]t really was not 'Oklahoma' either. At least, it was not all of Oklahoma. It was just one Oklahoma, one Oklahoma that is distinguishable from another Oklahoma partly by purpose. This Oklahoma had the purpose of keeping the other Oklahoma in its place, and that place was subordinate. That, after all, was the object of suffrage requirements and segregation laws. No less was it the intent behind attacks and lynchings, too. One Oklahoma was putting the other Oklahoma in its place. . . . Government was never the essence of that Oklahoma. Government was, however, always its potential instrument. Having access to government, however employed, if employed at all — just having it — defined this Oklahoma and was the essence of its power."

And:

"Perhaps the most repugnant fact regarding the history of the Tulsa Massacre is that it was virtually forgotten, with the notable exception of those who witnessed it on both sides, for seventy-five (75) years. This 'conspiracy of silence' served the dominant interests of the state during that period which found the riot a 'public relations nightmare' that was 'best to be forgotten, something to be swept well beneath history's carpet' for a community which attempted to attract new businesses and settlers."

In describing the various assaults on the African-American community, and in a resounding denunciation of the system that prevailed in the aftermath of the Massacre, the Commission stated "[i]n some, government participated in the deed. In some, government performed the deed. In none did government prevent the deed. In none did government punish the deed."

SUMMARY CONCLUSION

We commend the district court for thoughtfully grappling with the legal premises of the case and dilgently vetting arguments for and against them. Among them: the question of standing; the political question doctrine, which is to say, whether this matter should be addressed by the representative branch, not adjudicated by the courts; the consideration of immunity; and the statue of limitations. In ruling to deny the plaintiffs reparation for indisputable damages, the district court found one condition mattered above all others: the proper time for litigating these injures had long passed.

> **"There is no comfort or satisfaction in this result, and there should be none to Defendants. That Plaintiffs' claims are barred by the statute of limitations is strictly a legal conclusion, and does not speak to the tragedy of the Massacre or the terrible devastation it caused."**

With respect to the district court and the panel which upheld the lower court's conclusion, the Tenth Circuit wonders if this matter might be served by more conversation and analysis of specific premises that involves a more diverse set of qualified perspectives, even if the end result is to corroborate their conclusions. Consider, for example, the question of standing, and its implicit link to the statue of limitations. In district court, the City argued that:

> **"[T]he descendant plaintiffs do not have standing to sue. Relying principally on In Re African American Slave Descendants Litigation, the City argues that a genealogical relationship between a descendant and someone who actually suffered harm is insufficient to confer standing. To have standing, (1) plaintiffs must have suffered an injury in fact, (2) there must be causal connection between the injury and conduct complained of, and (3) it must be likely that the injury will be redressed by a favorable decision."**

If there was ever a case that begs for a more robust understanding of concepts like standing or statute of limitations — or at least a conversation about the need for a more robust view of these concepts — it is this one. For the survivors of the Massacre and their descendants — and more, for the country — the Massacre is not something confined to a span of hours over a period of two days from decades ago. This was a crime that has carried forward in time, its traumas and consequences compounding and defining the conditions of their existence across generations unto this very minute. But it was also a singular crime that flowed out of countless injustices before it. And so this evil exists on an active and unbroken continuum of history, its degrading effects felt at all points at once. By rehearing this case, we create for ourselves an opportunity to begin asking if adjudicating matters such as these asks us to reconsider linear constructs of time (an obsolete notion that informs almost all of our laws) and adopt a quantum perpsective on justice. Beholding the destruction of Greenwood with such gaze, we glimpse a different truth. This is not a crime that ended in June of 1921, for as long as the victims of that horrific event and their direct decendents still suffer from the immense loss of property and life, the crime is still ongoing and must therefore be subject to the most strictest adherance of the law.

Elaborations will now follow.

This document was adapted and edited from the dissent in Alexander v. State of Oklahoma, December 13, 2004.