Capital Case

Case No. _____

In the Supreme Court of the United States

RAYMOND EUGENE JOHNSON,
Petitioner,
v.

STATE OF OKLAHOMA,
Respondent.

On Petition for Writ of Certiorari to the
Court of Criminal Appeals of Oklahoma

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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Dated this 5th of March, 2021

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INDEX OF APPENDICES

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

RAYMOND EUGENE JOHNSON,	)	
	)	
Petitioner,	)	**NOT FOR PUBLICATION**
	)	
-vs-	)	**No. PCD-2018-718**
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

OPINION DENYING THIRD APPLICATION FOR POST-CONVICTION RELIEF AND RELATED MOTION FOR EVIDENTIARY HEARING

HUDSON, JUDGE:

Petitioner Raymond Eugene Johnson was tried by jury in the District Court of Tulsa County, Case No. CF-2007-3514, and convicted of two counts of First Degree Felony Murder (Counts 1 and 2), in violation of 21 O.S.Supp.2006, § 701.7(B); and First Degree Arson, After Former Conviction of Two or More Felonies (Count 3), in violation of 21 O.S.Supp.2001, § 1401. The jury recommended the death penalty on Counts 1 and 2 after finding the existence of four aggravating circumstances[1] and life

[1] The jury found: (1) the defendant was previously convicted of a felony involving the use or threat of violence to the person; (2) the defendant knowingly created a great risk of death to more than one person; (3) the

imprisonment on Count 3. The Honorable Dana L. Kuehn, Associate District Judge, presided over the trial and pronounced judgment and sentence in accordance with the jury's recommendation. Since then Johnson has unsuccessfully challenged his Judgment and Sentence on direct appeal[2] and in collateral proceedings in this Court.[3] Johnson too has unsuccessfully challenged his convictions and death sentence in federal habeas proceedings.[4] Johnson now submits his third application for post-conviction relief and related motion for evidentiary hearing.

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murder was especially heinous, atrocious, or cruel; and (4) there exists a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. 21 O.S.2001, §§ 701.12(1), (2), (4) and (7).

[2] On March 2, 2012, this Court affirmed Johnson's Judgment and Sentence. *Johnson v. State,* 2012 OK CR 5, 272 P.3d 720. On October 1, 2012, the United States Supreme Court denied Johnson's petition for certiorari review in *Johnson v. Oklahoma*, 568 U.S. 822 (2012).

[3] This Court denied Johnson's original and second applications for post-conviction relief in unpublished opinions. *See Johnson v. State,* Case No. PCD-2009-1025 (Okl.Cr., Dec. 14, 2012) (unpublished); *Johnson v. State,* Case No. PCD-2014-123 (Okl.Cr., May 21, 2014) (unpublished).

[4] The United States District Court denied a petition for writ of habeas corpus in *Johnson v. Royal,* No. 13-CV-0016-CVE-FHM, 2016 WL 5921081 (N.D.Okla. 2016) (unpublished).

"Post-Conviction review is not intended to provide a second appeal." *Stevens v. State*, 2018 OK CR 11, ¶ 14, 422 P.3d 741, 745. This Court may not consider a subsequent application for capital post-conviction relief unless its claims "have not been and could not have been presented previously in a timely original application or in a previously considered application . . . because [the factual] or legal basis was unavailable[.]" 22 O.S.2011, § 1089(D)(8); Rule 9.7(G)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020). Such an application must be filed within sixty (60) days "from the date the previously unavailable legal or factual basis serving as the basis for a new issue is announced or discovered." Rule 9.7(G)(3). Moreover, a subsequent application rooted on new law is only deemed unavailable and thus subject to collateral review if the legal basis:

> (a) was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date; or
>
> (b) is a new rule of constitutional law that was given retroactive effect by the United States Supreme Court or

> a court of appellate jurisdiction of this state and had not been announced on or before that date.

22 O.S.2011, § 1089(D)(9).

Johnson claims here that his fundamental right of autonomy, as established in *McCoy v. Louisiana*, 584 U.S. ___, 138 S. Ct. 1500, (2018), was infringed by his attorney during opening statements when his trial counsel admitted, without Johnson's consent, that Johnson killed Brooke Whitaker and her daughter, Kya. Pet. Br. at 14, 17. Johnson raised a similar issue on direct appeal as part of an ineffective assistance of counsel claim pursuant to *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Johnson*, 2012 OK CR 5, ¶¶ 36-38, 272 P.3d at 732. Applying *Jackson v. State*, where this Court held that "a complete concession of guilt is a serious strategic decision that must only be made after consulting with the client and after receiving the client's consent or acquiescence[,]" 2001 OK CR 37, ¶ 25, 41 P.3d 395, 400, this Court rejected Johnson's ineffectiveness claim finding defense counsel did not "expressly concede guilt." *Johnson,* 2012 OK CR 5, ¶ 37, 272 P.3d at 732. The Court concluded that counsel's "entire argument taken in

context supports the conclusion that defense counsel's argument was neither an overt nor a complete concession of guilt and thus, Appellant's consent was not required." *Id.*

Johnson asserts the present claim of client autonomy is based on new law and therefore subject to collateral review. Citing Justice Alito's dissent, 138 S. Ct. at 1512, Johnson argues *McCoy* sets forth a "newly discovered fundamental right" within the Sixth Amendment that provides a new legal basis for relief. Because Johnson's autonomy is at issue, not defense counsel's effectiveness, Johnson contends neither *Strickland* nor *United States v. Cronic*, 466 U.S. 648 (1984) are applicable. *McCoy*, 138 S. Ct. at 1510-11 ("Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence[.]"). He therefore asserts the present claim has not been resolved by this Court and is not barred by *res judicata.*

The question therefore is whether *McCoy* created a new legal basis, i.e., new law, for purposes of 22 O.S.2011, § 1089(D)(9). If it is not new law, it cannot serve to excuse Johnson's failure to raise

the issue on direct appeal. *Coddington v. State*, 2011 OK CR 21, ¶ 2, 259 P.3d 833, 835 (claim that was raised, or could have been raised, in a direct appeal will be barred from post-conviction review by the doctrines of *res judicata* and waiver). In *McCoy*, the defendant's counsel conceded that his client committed three murders during the guilt phase of his capital trial. Counsel's concession came despite the defendant "vociferously insist[ing] that he did not engage in the charged acts and adamantly object[ing] to any admission of guilt." *McCoy*, 138 S. Ct. at 1505. The Supreme Court held that criminal defendants have a Sixth Amendment right "to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." *Id.* Thus, "counsel may not admit [his or her] client's guilt of a charged crime over the client's intransigent [and unambiguous] objection to that admission." *Id.* at 1510. The Court further held that such a concession amounts to structural error violating the defendant's Sixth Amendment right to autonomy in deciding the objectives of his or her defense. *Id.* at 1508-09, 1511 ("When a client expressly

asserts that the objective of '*his* defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt.") (quoting U.S. Const. amend. VI)) (emphasis in original).

Johnson argues here that he, similar to McCoy, "expressly insisted that counsel fully contest his guilt [at trial], yet counsel made concessions [during opening statement] anyway without his consent." Pet. Br. at 18. He argues trial counsel's concessions amounted to structural error requiring a new trial. *McCoy*, 138 S. Ct. at 1511. We reject Johnson's argument on multiple grounds.

First, *McCoy* is not new law subject to collateral review. At the time of Johnson's direct appeal, the leading cases were *Florida v. Nixon*, 543 U.S. 175 (2004), and *Jackson, supra*. *Nixon* considered whether the Constitution bars defense counsel from conceding a capital defendant's guilt at trial "when [the] defendant, informed by counsel, neither consents nor objects." *Id.*, 543 U.S. at 178. In addressing this issue, the Supreme Court established the parameters of a claim of ineffective assistance of counsel where counsel makes a strategic decision to concede guilt and the

defendant "was generally unresponsive" during discussions of trial strategy, and "never verbally approved or protested" counsel's proposed approach. *Id.* at 181. In *McCoy*, the Supreme Court, drawing a conclusion clearly implied in or anticipated by *Nixon*, extended the rule of *Nixon* by clarifying the boundary of trial counsel's strategic decision making authority to concede his or her client's guilt.[5] The Court's ruling in *McCoy* was thus foreshadowed by *Nixon* and is not new law. Therefore, the legal basis of Johnson's claim here could have been reasonably formulated from *Nixon* and raised on direct appeal. Johnson's claim is thus barred by the doctrines of *res judicata* and waiver. 22 O.S.2011, § 1089(C), (D)(9)(a); *Coddington*, 2011 OK CR 21, ¶ 2, 259 P.3d at 835.

Second, *McCoy* is not a new rule of constitutional law that has been given retroactive effect by either the United States Supreme Court or this Court. 22 O.S.2011, § 1089(D)(9)(b). This Court looks to *Teague v. Lane,* 489 U.S. 288, 301 (1989), to determine whether a new constitutional rule satisfies an exception to the

[5] The Supreme Court expressly noted that *Nixon* "is not to the contrary" of its decision in *McCoy*. *McCoy*, 138 S. Ct. at 1509.

general prohibition against the retroactive application of new rules to cases on collateral review. *Ferrell,* 1995 OK CR 54, ¶ 5, 902 P.2d at 1114. *Teague* sets forth two exceptions[6] to this general rule that "new" criminal procedure decisions will not be applied retroactively—(1) substantive rules placing "conduct beyond the power of the [government] to proscribe[;]" and (2) watershed rules of criminal procedure "implicat[ing] the fundamental fairness of the trial." *Teague,* 489 U.S. at 311–312.

The Supreme Court has not specifically declared *McCoy* has retroactive effect on final state convictions. And, upon review, we find *McCoy* did not establish a new substantive rule of

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[6] As this Court explained in *Ferrell*:

> [T]he limited exceptions are based upon the purposes for collateral review and the concept of finality. Application of new constitutional rules to final cases, whose trials and appeals conformed to then-existing constitutional standards, would seriously undermine the principle of finality, without which the criminal law is deprived of much of its deterrent effect. Moreover, the purposes of collateral review would not be served, and no one affected by the criminal justice system would be benefited, if a final criminal conviction were subjected to fresh litigation tomorrow and every day thereafter.

1995 OK CR 54, ¶ 7, 902 P.2d at 1115 (internal citations omitted).

constitutional law in the *Teague* sense.[7] Nor is *McCoy's* holding a new "watershed" rule of criminal procedure.[8] Moreover, Johnson's reliance on *McCoy's* ruling that conceding guilt over client objection is a structural error does not make it retroactive, as he appears to assert. While structural error is not subject to harmless error analysis, *see Brecht v. Abrahamson*, 507 U.S. 619, 629-30 (1993), the recognition of a new type of structural error does not *per se* cause such error to be retroactively applicable on collateral review. *Tyler v. Cain*, 533 U.S. 656, 666-67 n.7 (2001) ("The standard for determining whether an error [requires automatic reversal] is not coextensive" with a determination that the error involves a watershed rule of criminal procedure (citation omitted)). Because

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[7] Substantive rules "set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose." *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718, 729 (2016).

[8] "Watershed" rules of criminal procedure are extremely narrow. *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004). "That a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of an accurate conviction is *seriously* diminished.'" *Id.* (quoting *Teague*, 489 U.S. at 313). As the *Schriro* Court observed "it is unlikely that any . . . 'has yet to emerge.'" *Id.* (quoting *Tyler*, 533 U.S. at 667 n.7, which in turn quotes *Sawyer v. Smith*, 497 U.S. 227, 243 (1990)).

McCoy is not retroactive, Johnson's claim is not subject to collateral review. 22 O.S.2011, § 1089(D)(9)(b).

Finally, regardless of whether *McCoy* constitutes a new rule of constitutional law, *McCoy* is inapposite to Johnson's case. This Court found on direct appeal that Johnson's counsel did not make an overt or a complete concession of guilt to the jury. *Johnson*, 2012 OK CR 5, ¶ 37. Johnson's argument here seeks to impermissibly broaden the scope of the rule enunciated in *McCoy* to give complete autonomy to a defendant with respect to any defense or decision making, including strategic concessions. *McCoy*, however, is limited to situations whereby trial counsel made a clear concession of guilt over a defendant's desire to maintain innocence. *Knapper v. State*, 2020 OK CR 16, ¶ 79, ___ P.3d ___. No such concession occurred in Johnson's case. Thus, unlike *McCoy* and *Jackson*, "defense counsel was not required to obtain [Johnson's] permission before proceeding with the challenged argument." *Id.* Under these circumstances, *McCoy* is inapplicable.

Therefore, for the foregoing reasons, we find Johnson's claim is barred from review.

DECISION

Johnson's Third Application for Post-Conviction Relief and related motion for an evidentiary hearing are **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

APPEARANCES ON APPEAL

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NO RESPONSE FROM THE STATE

OPINION BY: HUDSON, J.
LEWIS, P.J.: CONCUR IN RESULT
KUEHN, V.P.J.: RECUSE
LUMPKIN, J.: CONCUR
ROWLAND, J.: CONCUR IN RESULT

LEWIS, P.J., CONCURRING IN RESULT:

I concur in the denial of post-conviction relief. As pertinent here, review of an issue contained in a subsequent application for capital post-conviction relief is procedurally barred unless the claim has not been, and could not have been, presented earlier because its legal basis was "unavailable." 22 O.S.2011, § 1089(D)(8)(a). A legally unavailable claim is one that was not recognized by, or could not have been reasonably formulated from, a final decision of the state or federal appellate courts of this jurisdiction; or one based on a new rule of constitutional law that "*was given* retroactive effect" by either the United States Supreme Court or an Oklahoma appellate court within the sixty days prior to the filing of the subsequent application. 22 O.S.2011, § 1089(D)(9)(a), (b) (emphasis added); Rule 9.7(G)(3), *Rules of the Court of Criminal Appeals,* Title 22, Ch. 18, App. (2020); *Slaughter v. State*, 2005 OK CR 2, ¶ 6, 105 P.3d 832, 834.

Petitioner's claim of an unauthorized concession of guilt was reasonably formulated and presented to this Court, and decided against him, on direct appeal. Further, the constitutional rule set down in *McCoy v. Louisiana* is not a rule that "*was given* retroactive

effect" by one of the specified appellate courts within the sixty days prior to the filing of this petition. The legal basis of Petitioner's claim was, therefore, not previously "unavailable" as strictly defined by the statute. The claim is *res judicata* and procedurally barred. Most importantly, since "defense counsel's argument was neither an overt nor a complete concession of guilt and thus, Appellant's consent was not required," *Johnson*, 2012 OK CR 5, ¶ 37, 272 P.3d at 732, Petitioner can prove no set of facts that would entitle him to relief under *McCoy*, new rule or not.

Finally, I respectfully question the wisdom and propriety of addressing the retroactivity of *McCoy v. Louisiana* in a case where one of our Members has recused, and where the Court's *determination* of retroactivity (as distinct from the mere *historical* statutory inquiry whether a rule "*was given* retroactive effect" by a specified court within sixty days prior to filing of the instant application) is not essential to our resolution of this case. I therefore concur in the denial of relief, but would defer any precedential statement about retroactivity to a proper case with a full Court.

¶ 15 While an attorney failing to fulfill her obligation as counsel and missing court dates is not to be taken lightly, it is clear that the Ms. Cowley did not willfully defraud or intentionally harm her clients in any way. Indeed, if the original charges against the her had proceeded through disciplinary proceedings, it is doubtful the punishment would have risen to the level of disbarment. *State ex rel. Oklahoma Bar Association v. Whitebook,* 2010 OK 72, 242 P.3d 517 and *State ex rel. Oklahoma Bar Association v. Beasley,* 2006 OK 49, 142 P.3d 410.

¶ 16 The evidence proves that Ms. Cowley used sound judgment in her activities following resignation. She exercised caution in avoiding situations that could have been perceived as the unauthorized practice of law. She has also worked to remain current in her knowledge of the law, earning 62.5 CLE credits since 2005. Ms. Cowley's youth and lack of experience in balancing a law practice appear to have contributed greatly to the factors leading to her resignation. Her work in the areas of legal research and writing illustrate Ms. Cowley's present legal competence.

CONCLUSION

¶ 17 Ms. Cowley has met her burden of proof, showing by clear and convincing evidence that she has fully complied with the requirements of Rule 11, RGDP. Petition for reinstatement is granted. The Bar has filed an application for the costs of this proceeding as allowed by Rule 11.1(c), RGDP, in the amount of $1,160.31. The Petitioner is ordered to pay these costs within ninety days of the date of this opinion.

PETITION FOR REINSTATEMENT GRANTED; COSTS ASSESSED.

CONCUR: COLBERT, V.C.J., KAUGER, WATT, WINCHESTER, EDMONDSON, REIF, GURICH, JJ.

DISSENT: TAYLOR, C.J., COMBS, J.

2012 OK CR 5

Raymond Eugene JOHNSON, Appellant,

v.

The STATE of Oklahoma, Appellee.

No. D–2009–702.

Court of Criminal Appeals of Oklahoma.

March 2, 2012.

Background: Defendant was convicted by jury in the District Court, Tulsa County, Dana L. Kuehn, J., of two counts of first degree murder, first degree arson, after former conviction of two or more felonies. Defendant appealed.

Holdings: The Court of Criminal Appeals, C. Johnson, J., held that:

(1) city police officers had jurisdiction to arrest defendant in neighboring city;

(2) defendant's confession was voluntary;

(3) defendant was not denied due process by trial court's refusal to give his proffered instruction defining "life without the possibility of parole;"

(4) trial court did not abuse its discretion in denying defendant's request for individual, sequestered voir dire;

(5) trial court did not abuse its discretion in declining defense counsel's request to further voir dire prospective juror or in excusing juror for cause; and

(6) counsel's comments during opening statement did not constitute ineffective assistance.

Affirmed.

Lumpkin, J., concurred in result.

1. Criminal Law ⇦1153.6

When reviewing the denial of a motion to suppress evidence, the appellate court reviews the trial court's ruling for an abuse of discretion.

2. Criminal Law ⇐1139

Appellate court, on review of denial of motion to suppress evidence, reviews de novo the trial court's legal conclusion that the facts fail to establish a constitutional violation.

3. Automobiles ⇐349(13)

Any pretext on part of officers who arrested capital murder defendant on outstanding traffic warrants was irrelevant and did render arrest unlawful, though officers suspected he was involved in murder and arson, as officers arrested defendant on the warrants, which were valid and issued before the murders occurred. U.S.C.A. Const.Amend. 4.

4. Arrest ⇐57.1

If police have a valid right to arrest an individual for one crime, it does not matter if their subjective intent is in reality to collect information concerning another crime. U.S.C.A. Const.Amend. 4.

5. Arrest ⇐63.4(2)

Whether a Fourth Amendment violation has occurred with respect to an arrest turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time, and not on the officer's actual state of mind at the time the challenged action was taken. U.S.C.A. Const.Amend. 4.

6. Arrest ⇐57.1

If the alleged pretextual arrest could have taken place absent police suspicion of defendant's involvement in another crime, then the arrest is lawful. U.S.C.A. Const. Amend. 4.

7. Automobiles ⇐349(13)

City police officers had jurisdiction to arrest capital murder defendant in neighboring city on any of four outstanding traffic warrants against him, two of which were issued by district court for failure to appear for state traffic warrants and two were issued by the municipal court for failure to appear for tickets for violations of municipal ordinances, as officers had authority to arrest defendant under statutes providing that warrants, except those issued for violation of city ordinances, may be served by any peace officer to whom they may be directed or delivered, and that a law enforcement officer of the municipality or a county sheriff may serve an arrest warrant issued by the municipality any place within the state. 11 Okl.St. Ann. § 28–121; 22 Okl.St.Ann. § 175.

8. Criminal Law ⇐410.77

A suspect's statement to police is voluntary, and thus admissible in evidence, only when it is the product of an essentially free and unconstrained choice by its maker.

9. Criminal Law ⇐410.77

Whether a suspect's statements to police are voluntary in the legal sense, as necessary to be admissible in evidence, depends on an evaluation of all the surrounding circumstances, including the characteristics of the accused and the details of the interrogation.

10. Criminal Law ⇐413.43

When the admissibility of a confession is challenged at trial, the state must establish the voluntariness of the confession by a preponderance of the evidence.

11. Criminal Law ⇐1158.13

On appeal of trial court's ruling that a confession was voluntary, and, thus, admissible in evidence, the appellate court, considers whether the district court's ruling is supported by competent evidence of the voluntary nature of the statement.

12. Criminal Law ⇐410.80, 410.89, 411.96

Capital murder defendant's confession was voluntary; police officer who interviewed defendant at police station read defendant his rights and asked defendant if he understood them, defendant indicated that he understood his rights and he agreed to talk with officer defendant did not request an attorney, he did not appear to be under the influence of any type of intoxicants, and despite defendant's claim that officers who transported him to police station had hit him, interviewing officer testified that did not appear to have any injuries indicating that he had been assaulted, and videotape of interview corroborated interviewing officer's testimony.

13. Criminal Law ⚿1152.21(1)

Trial court's decision to give or refuse a requested jury instruction is reviewed on appeal for an abuse of discretion.

14. Sentencing and Punishment ⚿1780(3)

A capital murder defendant is not entitled to an instruction during the penalty phase requiring jury to find that the aggravating circumstances outweigh the mitigating circumstances; state law requires only that jurors unanimously find any aggravating circumstance beyond a reasonable doubt. U.S.C.A. Const.Amend. 6.

15. Constitutional Law ⚿4745

Sentencing and Punishment ⚿1780(3)

Capital murder defendant was not denied due process by trial court's refusal to give his proffered instruction defining "life without the possibility of parole," though defendant's future dangerousness was at issue as an aggravating circumstance, where jury was instructed on the three punishment options of life imprisonment, life imprisonment without the possibility of parole, and death, by which jury was informed that defendant was parole ineligible. U.S.C.A. Const. Amend. 14.

16. Criminal Law ⚿1152.2(2)

Appellate court reviews the manner and extent of a trial court's voir dire under an abuse of discretion standard.

17. Jury ⚿131(13)

Capital murder defendant has no automatic right to individual voir dire.

18. Jury ⚿131(1, 3)

Purpose of voir dire is to determine whether there are grounds to challenge prospective jurors for either actual or implied bias and to facilitate the intelligent exercise of peremptory challenges.

19. Jury ⚿131(13)

The crux of the issue of whether capital murder defendant is entitled to sequestered, individualized voir dire is whether he can receive a fair trial with fair and impartial jurors.

20. Jury ⚿131(13)

Trial court did not abuse its discretion in denying capital murder defendant's request for individual, sequestered voir dire, as defendant did not allege that his case received extensive pre-trial media coverage or that jurors were not candid in their responses about the death penalty or provided responses tailored to avoid jury service, while trial court did not grant defense counsel's request, it did use jury questionnaires, it advised attorneys that the request could be reurged and reconsidered if required and trial court did allow some potential jurors to be questioned individually and outside the presence of the prospective jury panel when such was deemed necessary.

21. Jury ⚿108

The proper standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.

22. Constitutional Law ⚿4754

Due process of law requires that a prospective juror be willing to consider all the penalties provided by law and not be irrevocably committed to a particular punishment before the trial begins. U.S.C.A. Const. Amend. 14.

23. Criminal Law ⚿1158.17

On appellate review of trial judge's decision as to whether to excuse a prospective juror for cause, deference must be paid to the trial judge who sees and hears the jurors, because the trial judge is in a position to personally observe the panelists, and take into account a number of non-verbal factors that cannot be observed from a transcript.

24. Jury ⚿108

Trial court did not abuse its discretion in declining defense counsel's request to further voir dire prospective juror or in excusing juror for cause, as while juror initially told trial court that she could consider all three punishment options and that she could impose the death penalty in the "proper case," she later expounded upon this clarifying that

the only circumstance under which she could consider imposing the death penalty would be if the case involved someone she knew or her children, such that her last recorded response indicated that she was not able to follow the law and consider the death penalty.

25. Sentencing and Punishment ⚿1648

Relief from death penalty was not warranted for capital murder defendant on the basis of race, where defendant could not prove that jurors in his particular case acted with a discriminatory purpose.

26. Criminal Law ⚿1881

Defendant asserting ineffective assistance of counsel is required to show: (1) that counsel's performance was constitutionally deficient, and (2) that counsel's performance prejudiced the defense, depriving him of a fair trial with a reliable result. U.S.C.A. Const.Amend. 6.

27. Criminal Law ⚿1883

For purposes of the prejudice prong of a claim of ineffective assistance of counsel, it is not enough to show that counsel's failure had some conceivable effect on the outcome of the proceeding; rather, defendant must show that there is a "reasonable probability," i.e., a probability sufficient to undermine confidence in the outcome, that, but for counsel's unprofessional error, the result of the proceeding would have been different. U.S.C.A. Const.Amend. 6.

See publication Words and Phrases for other judicial constructions and definitions.

28. Criminal Law ⚿1942

Defense counsel's comments during his opening statement that might have suggested that capital murder defendant set his girlfriend on fire was a reasonable trial strategy, and, thus, was not ineffective assistance, in light of defendant's confession to intentionally murdering girlfriend and his denial of intentionally harming his infant daughter; counsel, in order to diffuse the impact of this evidence indicating that defendant intentionally set his daughter on fire, offered to jury alternative explanation that evidence indicated that when girlfriend was set on fire, she ran to get infant, who was her daughter, and when she did this, she transferred gasoline to infant before dropping infant to the floor in her failed attempt to save them both. U.S.C.A. Const.Amend. 6.

29. Sentencing and Punishment ⚿1647

Defendant's death sentences on his convictions for murdering his girlfriend and infant daughter were not imposed under the influence of passion, prejudice, or any other arbitrary factor. 21 Okl.St.Ann. § 701.13.

30. Sentencing and Punishment ⚿1679, 1684, 1705, 1720

Evidence supported jury's findings in support of its assessment of death sentences on defendant for murdering his girlfriend and infant daughter of aggravating circumstances that defendant had been previously convicted of a felony involving the use or threat of violence, knowingly created a great risk of death to more than one person, that the murders were especially heinous, atrocious, or cruel, and that there existed a probability that he would commit criminal acts of violence that would constitute a continuing threat to society. 21 Okl.St.Ann. § 701.13.

An Appeal from the District Court of Tulsa County; the Honorable Dana L. Kuehn, District Judge.

Doug Drummond, First Asst. District Attorney, Julie Doss, William Musseman, Assistant District Attorneys, Tulsa, OK, attorneys for the State at trial.

Pete Silva, Chief Public Defender, Gregg Graves, Assistant Public Defender, Tulsa, OK, attorneys for the defendant at trial.

Curtis M. Allen, Assistant Public Defender, Tulsa, OK, attorney for appellant on appeal.

E. Scott Pruitt, Attorney General of Oklahoma, Jennifer L. Strickland, Assistant Attorney General, Oklahoma City, OK, attorneys for State on appeal.

OPINION

C. JOHNSON, Judge.

¶ 1 Appellant, Raymond Eugene Johnson, was tried by a jury and convicted of First Degree Murder (Counts I and II) and First Degree Arson, After Former Conviction of Two or More Felonies (Count III) in the District Court of Tulsa County, Case No. CF 2007–3514. The State filed a Bill of Particulars alleging four aggravating circumstances: (1) the defendant was previously convicted of a felony involving the use or threat of violence; (2) the defendant knowingly created a great risk of death to more than one person; (3) the murder was especially heinous, atrocious, or cruel; and (4) the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.[1] The jury found Appellant guilty on each count charged and found the existence of all alleged aggravating circumstances as to each of Counts I and II. It assessed punishment at death on Counts I and II and at life imprisonment on Count III. The trial court sentenced Appellant accordingly ordering the sentences to be served consecutively. From this Judgment and Sentence Appellant has appealed.[2]

I. FACTS

¶ 2 Brooke Whitaker lived in a house on East Newton Street in Tulsa with her four children, the youngest of which, Kya, was fathered by Appellant. Around February of 2007, Appellant moved in with Brooke and her children. By April of that year, Brooke and Appellant were having problems. Brooke told her mother that Appellant had threatened to kill her. Because she was frightened, Brooke and her children moved in with her mother for two weeks. During this two week period, Appellant called Brooke's mother and told her that he was going to kill Brooke. Around the first of May, Brooke and Appellant got back together and Appellant moved back in with Brooke.

¶ 3 While Appellant was living with Brooke he was also involved in a relationship with Jennifer Walton who became pregnant by him. Around the first or second week of June 2007, Appellant wanted to move out of Brooke's house and Jennifer arranged for him to stay with a friend of hers, Laura Hendrix. On June 22, 2007, Appellant called Jennifer and asked her to give him a ride. She picked him up from Laura's house at around 10:30 that evening. They drove past the place where Brooke worked to make sure she was at work and they drove past her house to make sure that nobody was there. Jennifer dropped Appellant off on a side street near Brooke's house so that Appellant could walk to the house and retrieve some of his clothes. She left him and drove back to her mother's house. Appellant was going to call another friend to give him a ride to Jennifer's mother's house when he was finished getting his clothes.

¶ 4 At about 1:00 a.m. on June 23, 2007, Appellant called Jennifer and told her that he was at Denny's eating while waiting for Brooke to get home. He called again around 5:00 a.m. to let her know that a friend would bring him home shortly. Appellant called Jennifer two more times around 10:00 a.m. that morning. During these calls he told her that Brooke was dead and that a friend had shot her. Appellant wanted Jennifer to pick him up at a school near Brooke's house. The next time he called he told her that the friend who had killed Brooke was thinking about burning down the house. While Jennifer was waiting for Appellant at the school, Appellant called her again and asked her to pick him up on the street behind the street where Brooke lived. When she arrived at this location, Appellant walked to her car from the driveway of a vacant house. He was carrying two garbage bags which he put in the trunk. When Appellant got into the front passenger seat of Jennifer's car, she noticed that he smelled like gasoline and had blood on his clothes. As she drove away, Jennifer saw flames pouring out the front window of Brooke's house.

1. 21 O.S.2001, § 701.12(1)(2)(4)(7).

2. Appellant's Petition in Error was filed December 18, 2009. Appellant's Brief in Chief was filed October 18, 2010. Appellee's Brief was filed February 15, 2011. This matter was submitted to this Court on February 23, 2011. Oral Argument was held on October 25, 2011.

¶ 5 Appellant instructed Jennifer to drive to Laura's house where he retrieved the garbage bags from the trunk of the car before they went inside. Appellant placed the bags on the living room floor and started taking things out of them, including money that had blood on it. He washed the blood off of the money and took a shower. When Jennifer asked more questions about what had happened, Appellant told her that his friend had hit Brooke with a hammer. After Appellant got out of the shower he said that he needed to go back to Brooke's house to look for her cell phone because he had used the phone to call Jennifer and he was concerned that his fingerprints would be on it. When they arrived, the street where Brooke's house was located was blocked off and ambulance, fire trucks and police cars were present. Appellant drove to the street behind Brooke's house and looked to see if he had dropped the phone on the driveway of the vacant house he had walked by earlier. He did not find the phone. Appellant next drove to Warehouse Market so that he could put some money on a prepaid credit card. Then they went to the parking lot across the street where Appellant threw his clothes in the dumpster. After stopping at McDonalds and Quiktrip, they went back to Laura's house where Jennifer stayed with Appellant a while before she left him there and went to her mother's house.

¶ 6 Firefighters were called to Brooke's house on east Newton Street at 11:11 a.m. on June 23, 2007. When they arrived and made entry into the house, the inside was pitch black with smoke. After they ventilated the house and cleared some of the smoke they found Kya's burned body inside the front door on the living room floor behind the couch. The infant was dead. In a room off the living room, firefighters found Brooke Whitaker on the floor partially underneath a bunk bed. She had extensive burns on her body, was unconscious without a pulse and was not breathing. Paramedics initiated resuscitation efforts and a pulse was reestablished. On the way to the hospital paramedics noticed a lot of blood pooling around her head. When they looked closer, they observed large depressions, indentations and fractures on her head. Brooke was pronounced dead shortly after she arrived at the hospital and was later determined to have died from blunt trauma to the head and smoke inhalation. Seven month old Kya was determined to have died from thermal injury, the effect of heat and flames.

¶ 7 Investigation of the crime scene revealed numerous items of evidence. A burned gasoline can was recovered from the front yard of the residence and samples of charred debris were collected from the house. The debris was tested and some of it was confirmed to contain gasoline. Additionally, investigators noted blood smears and blood soaked items in numerous places throughout the house. Brooke's cell phone was found on the living room floor and investigators discovered that two calls had been made from this phone to Jennifer Walton shortly before the fire was reported.

¶ 8 Walton was located and interviewed by the police later that same day. She told police about Appellant's involvement in the homicide and she told them that she had taken Appellant to a trash dumpster when he returned from Brooke's house after the fire. When the police went to the dumpster they recovered a white trash bag that contained boots, bloody clothing, Brooke Whitaker's wallet with her driver's license inside and a claw hammer. They also found blood on the passenger side door handle inside Walton's car.

¶ 9 Pursuant to information given to them by Walton, the police went to Laura Hendrix's house in Catoosa to look for Appellant. They set up surveillance and observed him exit the house and walk down the street at around 6:00 p.m. on June 23, 2007. He was arrested at that time on outstanding warrants and was taken to the Tulsa Police Station where he waived his Miranda rights and gave a statement to the police.

¶ 10 Appellant told the police that Jennifer Walton had taken him to Brooke's house to get his stuff the evening of June 22, 2007. When Brook came home in the early morning hours of June 23, 2007, they talked and started arguing with each other. During the argument, Brooke pushed him, called him names and got a knife to stab him. He

grabbed a hammer and hit her on the head. Brooke fell to the floor and asked Appellant to call 911. Appellant hit her about five more times on the head with the hammer. Despite her injuries, Brooke was conscious and talking. She said that her head hurt and felt like it was going to fall off. Brooke begged Appellant to get help and told him that she wouldn't tell the police what had happened but he wouldn't do it because he didn't want to go to jail. Instead, Appellant went to the shed and got a gasoline can. He doused Brooke and the house, including the room where the baby was, with gasoline. He set Brooke on fire and went out the back door. Appellant admitted that he was trying to kill Brooke.

II. ARREST

[1, 2] ¶ 11 Appellant complains in his first proposition that the use of traffic warrants to arrest him was pretextual and the officers who arrested him were acting outside of their jurisdiction. Thus, he claims, his arrest was illegal and the statements he made to the police shortly after his arrest should have been suppressed. Prior to trial Appellant filed a motion to suppress the evidence based upon this ground. A hearing was held and Appellant's motion to suppress was subsequently overruled. Appellant argues on appeal that this ruling was in error. When reviewing the denial of a motion to suppress, we review the trial court's ruling for an abuse of discretion. *See Nilsen v. State,* 2009 OK CR 6, ¶ 5, 203 P.3d 189, 191; *Seabolt v. State,* 2006 OK CR 50, ¶ 5, 152 P.3d 235, 237. We review *de novo* the trial court's legal conclusion that the facts fail to establish a constitutional violation. *Burton v. State,* 2009 OK CR 10, ¶ 9, 204 P.3d 772, 775.

[3–6] ¶ 12 Appellant first asserts that his arrest on outstanding warrants was illegal because it was solely a pretext to hold him for questioning about the homicides. However, if police have a valid right to arrest an individual for one crime, it does not matter if their subjective intent is in reality to collect information concerning another crime. *Bland v. State,* 2000 OK CR 11, ¶ 48, 4 P.3d 702, 718. "Whether a Fourth Amendment violation has occurred, 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time, . . . and not on the officer's actual state of mind at the time the challenged action was taken.' " *Maryland v. Macon,* 472 U.S. 463, 470–71, 105 S.Ct. 2778, 2783, 86 L.Ed.2d 370 (1985) quoting *Scott v. United States,* 436 U.S. 128, 136–39 n. 13, 98 S.Ct. 1717, 1722, 1724 n. 13, 56 L.Ed.2d 168 (1978). *See also Whren v. United States,* 517 U.S. 806, 812–13, 116 S.Ct. 1769, 1774, 135 L.Ed.2d 89, 98 (1996) (Supreme Court reiterated its position that it was unwilling to entertain Fourth Amendment challenges based upon the actual motivations of individual officers); *Phillips v. State,* 1999 OK CR 38, ¶ 41, 989 P.2d 1017, 1031. If the police action could have been taken against an individual "even absent the 'underlying intent or motivation,' there is no *conduct* which ought to have been deterred and thus no reason to bring the Fourth Amendment exclusionary rule into play for purposes of deterrence." *See* 1 Wayne R. LaFave, *Search and Seizure* § 1.4(e) (4th ed. 2004). In other words, if the alleged pretextual arrest could have taken place absent police suspicion of Appellant's involvement in another crime, then the arrest is lawful. In the present case, Appellant was arrested on outstanding warrants which were issued before the murders occurred. The officers legally executed the valid arrest warrants and their subjective intent does not make this otherwise lawful conduct illegal or unconstitutional.

[7] ¶ 13 Appellant also complains that his arrest was unlawful because the Tulsa police officers who arrested him were acting outside of their jurisdiction when they arrested him in Catoosa. The record reflects that Appellant had four outstanding warrants at the time of his arrest—two were misdemeanor warrants issued by the Tulsa County District Court for failure to appear for state traffic warrants and two were issued by the Tulsa Municipal Court for failure to appear for tickets for violations of municipal ordinances. As the State points out, Tulsa police officers had jurisdiction under 22 O.S.2001, § 175 to arrest Appellant anywhere in the state on the warrants issued by the district court for failure to appear on state traffic warrants.

Section 175 provides, "All warrants, except those issued for violation of city ordinances, may be served by any peace officer to whom they may be directed or delivered." Further, Tulsa police officers had the authority under 11 O.S.2001, § 28–121 to arrest Appellant anywhere in the state on the warrants issued for violation of municipal ordinances by the Tulsa County Municipal Court. Section 28–121 provides that "[a] law enforcement officer of the municipality or a county sheriff may serve an arrest warrant issued by the municipality any place within this state." Thus, it is clear that the Tulsa police officers had jurisdiction to arrest Appellant in Catoosa on any of the four outstanding bench warrants. Accordingly, the trial court did not abuse its discretion in denying Appellant's motion to suppress based upon his argument that his arrest was unlawful.

III. STATEMENT

[8–10] ¶ 14 In Proposition II, Appellant argues that his statement should have been suppressed because it was not voluntarily made. A statement is voluntary, and thus admissible in evidence, only when it is "the product of an essentially free and unconstrained choice by its maker." *Culombe v. Connecticut,* 367 U.S. 568, 602, 81 S.Ct. 1860, 1879, 6 L.Ed.2d 1037 (1961). "Whether a suspect's statements to police are voluntary in the legal sense depends on an evaluation of all the surrounding circumstances, including the characteristics of the accused and the details of the interrogation." *Underwood v. State,* 2011 OK CR 12, ¶ 33, 252 P.3d 221, 238, *citing Schneckloth v. Bustamonte,* 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973). When the admissibility of a confession is challenged at trial, the State must establish voluntariness by a preponderance of the evidence. *Young v. State,* 2008 OK CR 25, ¶ 19, 191 P.3d 601, 607.

[11] ¶ 15 In the present case, the district court heard evidence regarding the voluntariness of Appellant's statement at an *in camera* hearing pursuant to *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), and ruled the statement was admissible. On appeal, we consider whether the district court's ruling "is supported by competent evidence of the voluntary nature of the statement." *Davis v. State,* 2004 OK CR 36, ¶ 34, 103 P.3d 70, 80. Again, we review the trial court's ruling on a motion to suppress for an abuse of discretion. *See Nilsen,* 2009 OK CR 6, ¶ 5, 203 P.3d at 191.

[12] ¶ 16 Appellant testified at the *Jackson v. Denno* hearing that after his arrest, he was placed in the front passenger seat of a police car. When the officer got into the driver's seat, he said to Appellant, "Well, let me get this out of the way. I don't want the fine citizens of Tulsa to see the police kicking your ass." The officer started to drive and asked Appellant if he knew why he was under arrest. Appellant responded that he did not. The officer who was driving then hit Appellant on the left side of his face. The officer asked if they needed to "refresh" Appellant's memory and he asked the officer in the backseat of the car to pass him a telephone book. The officer in the backseat passed the telephone book to the officer who was driving and then used leg irons to choke Appellant from behind. During the drive, the officer in the front seat hit Appellant in the face a couple of times with the telephone book. The officers showed Appellant a picture of his daughter, Kya, and asked him if it refreshed his memory. Appellant started crying and the officers told him to work with them and tell them what happened. Appellant told the officers that he wanted an attorney and they told him that there would be no lawyers and that he would not waste their time. Appellant said that he made statements to the officers in the car during the transport because he was "kind of scared" and knew that they would continue to harm him.

¶ 17 Appellant testified at the *Jackson v. Denno* hearing that at the police station, he was placed in a room where he waited alone for about five minutes before he was joined by Detective Regalado who read him his rights. When Appellant said that he wanted a lawyer, Regalado stopped the tape recorder and left the room. When Regalado returned, he was accompanied by the two officers who had transported Appellant to the police station. They started hitting Appellant and giving him body blows. They beat

him and told him that there would be no lawyers. They coerced him into cooperating with them by threatening to charge Jennifer Walton with accessory to murder. When they were finished, they put him back into his chair and left the room again. A few minutes later Regalado began the interview again and Appellant cooperated and gave his video recorded statement. When the interview was finished, Appellant was escorted by the police to a car in which he was transported to the David L. Moss correctional facility. As he was walking to that car, news reporters took photographs of him. He claimed in the hearing that these photos showed injuries and swelling on his face from the beatings he had endured prior to giving his statement.[3]

¶ 18 Tulsa Police detective Victor Regalado also testified at the *Jackson v. Denno* hearing. He testified that before the interview began, he directed another officer to remove Appellant's handcuffs from behind him and move them to the front. Regalado introduced himself, and asked Appellant preliminary questions about the spelling of his name and his education. Then Regalado read Appellant his rights and asked Appellant if he understood them. Appellant indicated that he understood his rights and he agreed to talk with the officer. Appellant did not request an attorney. Regalado testified that Appellant did not appear to be under the influence of any type of intoxicants. Appellant appeared to understand what Regalado was saying to him and he gave coherent answers, articulating well and appearing to be focused. Regalado denied making any threats or promises to Appellant or seeing others make threats or promises to him. Regalado denied kicking, hitting or punching Appellant and testified that he did not see anyone do these things to Appellant. Regalado testified that Appellant did not appear to have any injuries indicating that he had been assaulted by the victim or anyone else. When asked, Appellant referred only to one slight injury he had received about two weeks earlier during an argument with Brooke Whitaker. Appellant did not ask to stop questioning or request an attorney during the interview.[4]

¶ 19 Tulsa Police Officer Philip Forbrich testified for the State in rebuttal. He was one of the officers who transported Appellant from Catoosa to the police station in Tulsa. Forbrich testified that Detective Sokoloski drove and Appellant was placed in the front passenger seat of the car while he sat in the back seat. The ride to the police station took about thirty minutes during which there was very little conversation. Forbrich testified Appellant was not hit or threatened during the transport.

¶ 20 Despite Appellant's testimony at the suppression hearing, the record strongly supports the conclusion that his statement and waiver of his rights was the product of a free and deliberate choice rather than intimidation or coercion. We find from the totality of the circumstances, there is competent evidence supporting the trial court's decision denying Appellant's motion to suppress his statements.

IV. ISSUES RELATING TO JURY INSTRUCTIONS

[13] ¶ 21 In his third proposition Appellant argues that the trial court erred in denying defense counsel's request that the jury be instructed that they had to find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. The trial court's decision to give or refuse a requested jury instruction is reviewed on appeal for an abuse of discretion. *Soriano v. State*, 2011 OK CR 9, ¶ 10, 248 P.3d 381, 387.

[14] ¶ 22 Appellant acknowledges that this Court has held that the State is not required to prove beyond a reasonable doubt

3. Photos taken of Appellant as he left the police station were admitted into evidence. These were not good quality photos and do not clearly depict injuries to Appellant's face.

4. The video tape of Appellant's interview with Detective Regalado was admitted into evidence during the hearing. This recording corroborated Regalado's testimony about the content of the interview as well as Appellant's demeanor and appearance during the interview. The video recording does not depict the injuries Appellant claims were inflicted prior to the interview.

that the alleged aggravating circumstances outweigh the mitigating factors. *Harris v. State,* 2004 OK CR 1, ¶ 66, 84 P.3d 731, 754–55. However, he urges this Court to reconsider this position in light of the recently decided Supreme Court authority. We have already done so. In *Glossip v. State,* 2007 OK CR 12, ¶ 118, 157 P.3d 143, 161, we rejected the argument that failure to give this instruction resulted in a death sentence that is unconstitutional and unreliable under *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Further, we have consistently rejected this claim in more recent cases. *See Cuesta–Rodriguez v. State,* 2010 OK CR 23, ¶ 103, 241 P.3d 214, 245; *Mitchell v. State,* 2010 OK CR 14, ¶ 127, 235 P.3d 640, 665; *Rojem v. State,* 2009 OK CR 15, ¶ 27, 207 P.3d 385, 396; *Torres v. State,* 2002 OK CR 35, ¶¶ 5–7, 58 P.3d 214, 216. We are not persuaded to revisit the issue here and we continue to hold that no such instruction is necessary, as Oklahoma law requires only that jurors unanimously find any aggravating circumstance beyond a reasonable doubt. *Harris,* 2004 OK CR 1, ¶ 66, 84 P.3d at 754–55. The trial court did not abuse its discretion in declining this requested instruction.

[15] ¶ 23 Defense counsel also requested an instruction defining "life without the possibility of parole." The trial court declined to give the requested instruction finding that the meaning of this phrase is self-evident. Appellant argues in his fourth proposition that this ruling was in error. Again, the trial court's decision to give or refuse a requested jury instruction is reviewed on appeal for an abuse of discretion. *Soriano,* 2011 OK CR 9, ¶ 10, 248 P.3d at 387. Appellant notes that this Court has never required a trial court to give this type of instruction but he asks us to reconsider this issue in the case at bar.

¶ 24 This Court has long held that the meaning of life without parole is self-explanatory and an instruction on its meaning is not required. *Warner v. State,* 2006 OK CR 40, ¶ 158, 144 P.3d 838, 885. *See also Murphy v. State,* 2002 OK CR 24, ¶ 52, 47 P.3d 876, 886; *Young v. State,* 2000 OK CR 17, ¶ 102, 12 P.3d 20, 46. However, Appellant argues that this line of cases is outdated. In support of his argument Appellant cites to several cases where the jury asked questions about the punishment of life without parole although in the present case, the jury asked no questions indicating confusion about the punishment of life without the possibility of parole. Appellant also cites to *Simmons v. South Carolina,* 512 U.S. 154, 156, 114 S.Ct. 2187, 2190, 129 L.Ed.2d 133 (1994), wherein the Supreme Court held that "where the [capital] defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." However, where the jury is instructed on the three punishment options of life, life without the possibility of parole and death, this Court has held that the three-way choice fulfills the *Simmons* requirement that a jury be notified if the defendant is parole ineligible. *Wood v. State,* 2007 OK CR 17, ¶ 18, 158 P.3d 467, 475 ("[I]nstructing a capital sentencing jury on the three statutory punishment options, with their obvious distinctions, is sufficient to satisfy the due process concerns addressed in *Simmons.*").

¶ 25 Appellant's argument regarding the necessity of an instruction defining the punishment option of life without the possibility of parole falls short. If there is a case which calls for the reconsideration of this issue, it is not the case before us. We find Appellant was not denied due process or a fundamentally fair trial when the trial judge declined to provide the jury more information on this issue than is currently required.

V. ISSUES RELATING TO VOIR DIRE

[16] ¶ 26 Appellant argues in his fifth proposition that he was denied his constitutional right to an adequate voir dire by the trial court's denial of his request for sequestered, individualized voir dire. This Court reviews the manner and extent of a trial court's voir dire under an abuse of discretion standard. *Williams v. State,* 2008 OK CR 19, ¶ 27, 188 P.3d 208, 217.

[17–19] ¶ 27 Appellant acknowledges that this Court has never found that individual, sequestered voir dire is required in all capital

cases. Indeed, "[w]e have left the decision for individual voir dire to the discretion of the district court and have rejected requests for a mandatory rule requiring the use of individual sequestered voir dire in capital cases." *Harmon v. State,* 2011 OK CR 6, ¶ 13, 248 P.3d 918, 929, *citing Jones v. State,* 2006 OK CR 17, ¶ 16, 134 P.3d 150, 156.[5] Although a defendant has no automatic right to individual voir dire, he has the right to request such as individual voir dire has been deemed appropriate in certain cases. *See Harmon,* 2011 OK CR 6, ¶ 13, 248 P.3d at 929 (individual voir dire appropriate in cases that have been the subject of extensive pre-trial news coverage); *Cuesta–Rodriguez,* 2010 OK CR 23, ¶ 57, 241 P.3d at 233 ("Individual voir dire is appropriate where the record shows jurors were not candid in their responses about the death penalty, or that responses were tailored to avoid jury service."). Because the purpose of voir dire is to determine whether there are grounds to challenge prospective jurors for either actual or implied bias and to facilitate the intelligent exercise of peremptory challenges, the crux of the issue is whether the defendant can receive a fair trial with fair and impartial jurors. *Harmon,* 2011 OK CR 6, ¶ 13, 248 P.3d at 929; *Mitchell v. State,* 2010 OK CR 14, ¶ 11, 235 P.3d 640, 646.

[20] ¶ 28 Appellant does not allege that this case received extensive pre-trial media coverage or that jurors were not candid in their responses about the death penalty or provided responses tailored to avoid jury service. Rather, he argues generally that the denial of individualized, sequestered voir dire adversely affected his right to the effective assistance of counsel and due process. The record does not support his argument. As the State points out, although the trial court did not grant defense counsel's request for individualized voir dire, the court did utilize jury questionnaires. Additionally, the trial court advised the attorneys that the motion for individualized voir dire could be reurged and reconsidered if required and the trial court did, in fact, allow some potential jurors to be questioned individually and outside the presence of the prospective jury panel when such was deemed necessary. There is no evidence that full sequestered, individualized voir dire was necessary or that Appellant did not receive a fair trial with fair and impartial jurors. The district court did not abuse its discretion in denying defense counsel's request.

¶ 29 Appellant argues in his Sixth Proposition that the jury selection process violated his constitutional rights because the trial court improperly dismissed potential jurors who revealed in voir dire that they would 'automatically' exclude the death penalty as an option due to their personal beliefs, without giving defense counsel the opportunity to further question and rehabilitate them. Appellant complains that the trial court's excusal of these prospective jurors for cause left him with a group of potential jurors composed of death penalty advocates. Again, the manner and extent of a trial court's voir dire is reviewed on appeal under an abuse of discretion standard. *Williams,* 2008 OK CR 19, ¶ 27, 188 P.3d at 217.

[21–23] ¶ 30 "The proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Williams v. State,* 2001 OK CR 9, ¶ 10, 22 P.3d 702, 709, *quoting Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985). "Due process of law requires that a prospective juror be willing to consider all the penalties provided by law and not be irrevocably committed to a particular punishment before the trial begins." *Sanchez v. State,* 2009 OK CR 31, ¶ 44, 223 P.3d 980, 997. Deference must be paid to the trial judge who sees and hears the jurors because the trial judge is in a position to personally observe the panelists, and take into account a number of non-verbal factors that cannot be observed from a transcript. *Harmon,* 2011 OK CR 6, ¶ 18, 248 P.3d at

5. This Court in *Jones* declined to adopt a mandatory rule requiring the use of individual sequestered voir dire in capital cases but did urge trial courts to use a juror questionnaire and conduct individual sequestered voir dire in capital cases. *Jones,* 2006 OK CR 17, ¶ 16, 134 P.3d at 156.

929–30; *Grant v. State,* 2009 OK CR 11, ¶ 17, 205 P.3d 1, 11. Further, where, as in the present case, the trial court used the questions set forth in Oklahoma Uniform Jury Instruction (OUJI–CR 2d) 1–5, and the last-recorded answers of these prospective jurors indicated that they were not able to consider the death penalty, this Court held that the trial court did not abuse its discretion in striking the prospective jurors for cause without allowing defense counsel an opportunity to further question them. *Jones v. State,* 2009 OK CR 1, ¶ 17, 201 P.3d 869, 877.

[24] ¶ 31 Although Appellant makes a broad claim of error regarding the trial court's excusal of prospective jurors for cause without allowing defense counsel an opportunity to rehabilitate the jurors, he only complains specifically about the dismissal of one prospective juror. The record reflects that Juror R. initially told the trial court that she could consider all three punishment options and that she could impose the death penalty in the "proper case." However, she later expounded upon this clarifying that the only circumstance under which she could consider imposing the death penalty would be if the case involved someone she knew or her children. When the prosecution moved to have Juror R. removed for cause, defense counsel objected arguing that her inability to consider the death penalty as an option was not clear and he requested the opportunity to question her further. The trial court noted that Juror R.'s response was quite unequivocal about her inability to consider the death penalty in cases in which her children had not been murdered. The court denied defense counsel's request and excused Juror R. for cause. We find on this record that the trial court did not abuse its discretion in declining defense counsel's request to further voir dire this prospective juror and in excusing her for cause after she had been asked the appropriate clarifying questions regarding her willingness to consider the death penalty, and her last recorded response indicated that she was not able to follow the law and consider the death penalty.

¶ 32 We also note that the record clearly does not support Appellant's broad assertion that the trial court excused all prospective jurors who were conscientiously opposed to the death penalty leaving him only with a group of potential jurors composed of death penalty advocates. As the State points out, the trial court denied the prosecution's motion to dismiss for cause one prospective juror who initially indicated that she could never return a verdict which assessed the death penalty but later stated that she could consider the death penalty under certain circumstances, but that she did not support it generally as she considered it to be a "violation of our basic human rights." This prospective juror, although personally opposed to the death penalty, stated that she could consider it as an option and was not removed from the panel for cause. The trial court did not improperly dismiss potential jurors leaving Appellant with a group of potential jurors composed of death penalty advocates. The jurors who served on this case indicated they could consider all three penalties provided by law. There was no abuse of discretion in the manner and extent of the trial court's voir dire. This proposition is denied.

VI. CONSTITUTIONALITY OF THE DEATH PENALTY

¶ 33 Appellant contends in his seventh proposition that his death sentence must be reversed because capital punishment is unconstitutional as applied. Appellant's argument, that capital punishment is unworkable and ultimately unconstitutional, is based largely upon the position of the American Law Institute that the death penalty cannot be adequately administered. This argument is not unlike earlier arguments urging this Court to adopt the resolution of the American Bar Association recommending a moratorium on the imposition of death penalty. We have consistently rejected this position. *See Martinez v. State,* 1999 OK CR 47, ¶ 27, 992 P.2d 426, 432; *Alverson v. State,* 1999 OK CR 21, ¶ 58, 983 P.2d 498, 517; *Patton v. State,* 1998 OK CR 66, ¶ 115, 973 P.2d 270, 300.

[25] ¶ 34 In the present case, Appellant notes several obstacles to providing adequate capital justice including the politicization of the capital process, racial discrimination, inadequacy of court regulation, inadequacy of

resources of capital defense services and the lack of meaningful independent federal review of capital conviction. Most of these arguments are policy arguments which are best left to the legislature. *Hogan v. State,* 2006 OK CR 19, ¶ 82, 139 P.3d 907, 934 (policy matters fall within the purview of the legislature and not the courts). Further, although issue of race as a factor in the imposition of the death penalty is not a policy argument, Appellant acknowledges that he cannot prove that his sentence of death was racially motivated. Absent such a showing, relief is not warranted on this claim. *Alverson,* 1999 OK CR 21, ¶ 58 n. 79, 983 P.2d at 517 n. 79, *citing McCleskey v. Kemp,* 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987)(relief will not be granted on the basis of discrimination unless the Appellant can show the jurors in his particular case acted with discriminatory purpose).

¶ 35 As in earlier cases, Appellant has failed to offer authority showing that his execution would be violative of the constitution. We decline to consider this issue further.

VII. EFFECTIVE ASSISTANCE OF COUNSEL

[26, 27] ¶ 36 In his eighth proposition, Appellant argues that he was denied his Sixth Amendment right to the effective assistance of counsel because his attorney conceded in his opening statement, without Appellant's consent, that Appellant had set Brooke Whitaker on fire. This Court reviews claims of ineffective assistance of counsel under the two-part *Strickland* test that requires an appellant to show: (1) that counsel's performance was constitutionally deficient; and (2) that counsel's performance prejudiced the defense, depriving the appellant of a fair trial with a reliable result. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Davis v. State,* 2005 OK CR 21, ¶ 7, 123 P.3d 243, 246. It is not enough to show that counsel's failure had some conceivable effect on the outcome of the proceeding. Rather, an appellant must show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Head v. State,* 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

[28] ¶ 37 In support of his position, Appellant cites to *Jackson v. State,* 2001 OK CR 37, ¶ 25, 41 P.3d 395, 400, where this Court stated, "a complete concession of guilt is a serious strategic decision that must only be made after consulting with the client and after receiving the client's consent or acquiescence." However, the record before this Court reveals that defense counsel in the present case did not expressly concede guilt. Rather, in opening argument, defense counsel stated that he anticipated the jury would hear evidence from the Fire Marshall indicating that Kya's body was found at the point of ignition. In order to diffuse the impact of this evidence indicating that Appellant intentionally set Kya on fire, defense counsel offered another explanation. He suggested to the jury that this evidence "indicat[ed] that when Brooke was set on fire," she ran to get Kya and when she did this, Brooke transferred gasoline to Kya before dropping the child to the floor in her failed attempt to save them both. While this argument may have suggested that the evidence would show that Appellant set Brooke on fire, this was not an unreasonable trial strategy in light of Appellant's confession to intentionally murdering Brooke and his denial of intentionally harming Kya. The entire argument taken in context supports the conclusion that defense counsel's argument was neither an overt nor a complete concession of guilt and thus, Appellant's consent was not required. *See Lott v. State,* 2004 OK CR 27, ¶ 51, 98 P.3d 318, 337.

¶ 38 Appellant has failed to show his counsel's representation fell below an objective standard of reasonableness or that any errors by counsel were so serious as to deprive him of a fair trial with a reliable result. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. Appellant was not denied his Sixth Amendment right to the effective assistance of counsel.

VIII. CUMULATIVE ERROR

¶ 39 Finally, Appellant claims that trial errors, when considered cumulatively, deprived him of a fair sentencing determination. This Court has recognized that concession when there are "numerous irregularities during the course of [a] trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors was to deny the defendant a fair trial." *DeRosa v. State,* 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157, *quoting Lewis v. State,* 1998 OK CR 24, ¶ 63, 970 P.2d 1158, 1176. Upon review of Appellant's claims for relief and the record in this case we conclude that although his trial was not error free, any errors and irregularities, even when considered in the aggregate, do not require relief because they did not render his trial fundamentally unfair, taint the jury's verdict, or render sentencing unreliable. Any errors were harmless beyond a reasonable doubt, individually and cumulatively.

IX. MANDATORY SENTENCE REVIEW

¶ 40 Title 21 O.S.2001, § 701.13 requires this Court to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance." After conducting this review, this Court may order any corrective relief that is warranted or affirm the sentence. 21 O.S.2001, § 701.13(E).

[29] ¶ 41 We have reviewed the record in this case in conjunction with Appellant's claims for relief and have found that his conviction and death sentence were not the result of the introduction of improper evidence, improper witness testimony, prosecutorial misconduct or trial court error. We therefore find Appellant's death sentence was not imposed because of any arbitrary factor, passion or prejudice.

[30] ¶ 42 The jury's finding that Appellant had been previously convicted of a felony involving the use or threat of violence, knowingly created a great risk of death to more than one person, that the murders were especially heinous, atrocious, or cruel and that there existed a probability that he would commit criminal acts of violence that would constitute a continuing threat to society is amply supported by the evidence. Appellant's jury did not consider any improper aggravating evidence in deciding punishment. Weighing the aggravating circumstances and evidence against the mitigating evidence, we find, as did the jury below, that the aggravating circumstances outweigh the mitigating circumstances. The Judgment and Sentence of the district court is **AFFIRMED.**

DECISION

¶ 43 The Judgment and Sentence of the district court is **AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch.18, App. (2012), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

A. JOHNSON, P.J., LEWIS, V.P.J., and SMITH, J.: concur.

LUMPKIN, J.: concur in result.

2012 OK CIV APP 19

Donald Joseph CABER, Jr., Petitioner/Appellant,

v.

Kendra L. DAHLE, Respondent/Appellee.

No. 108,421.

Released for Publication by Order of the Court of Civil Appeals of Oklahoma, Division No. 2.

Court of Civil Appeals of Oklahoma, Division No. 2.

Jan. 30, 2012.

Background: Father of out of wedlock child filed a motion that sought sole custody of child, a finding that mother was in contempt of court, and permission to relocate out of state with child. The District

AFFIDAVIT OF RAYMOND JOHNSON

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

Before me, the undersigned notary, personally appeared Raymond Eugene Johnson, known to me of lawful age, who being by me first duly sworn, upon his oath, deposes and says:

1. I was represented by Tulsa County Public Defender Pete Silva and Assistant Public Defender Gregg Graves in my capital trial in Tulsa County Case Number CF-2007-3514.

2. Mr. Silva was my primary attorney, and handled the first stage of trial. He and I never saw eye to eye, and we did not get along from the start. I barely saw him at all, maybe three or four times altogether during the entire course of his representation of me.

3. I saw Gregg Graves more often, but he was in charge of the sentencing stage of trial.

4. I always told my lawyers that I did not kill Brooke and Kya. Once it became clear a deal could not be made to avoid trial, I insisted on going forward and fully contesting guilt.

5. I was shocked when Mr. Silva in his opening argument basically flat-out admitted I killed Brooke and Kya Whitaker in his discussion of Kya's death. I absolutely did not agree to anything like that, and Mr. Silva never talked to me about it beforehand. Mr. Silva hardly ever spoke to me at all.

6. I vividly remember during his opening statement that when Mr. Silva said I did not *intend* to kill Kya that I looked over at Gregg Graves in shock, and Gregg looked just as surprised as I did, as if he did not know either.

7. My lawyers strongly warned me against any outbursts or emotion at trial. And once it was out of Mr. Silva's mouth, I thought nothing could be done. After my trial was over, I discovered there was a sidebar conversation (that I could not hear) between Mr. Silva and the judge. The judge was worried about what Mr. Silva said and asked him about getting my acquiescence on the record. He talked her out of it, but if the judge had asked me, I would have told her we had not talked about it, and that I strongly object to it.

FURTHER AFFIANT SAYETH NOT.

Raymond E J
Raymond Eugene Johnson

Subscribed and sworn to before me this 11th day of July, 2018.

JULIE GARDNER NOTARY # 05008474 EXP. 09/12/21 PUBLIC STATE OF OKLAHOMA

Julie Gardner
Notary Public # 05008474

AFFIDAVIT OF GREGG L. GRAVES

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

Before me, the undersigned notary, personally appeared Gregg L. Graves, known to me of lawful age, who being by me first duly sworn, upon his oath, deposes and says:

1. My name is Gregg Graves. I was co-counsel with Tulsa County Public Defender Pete Silva for Raymond Johnson's capital trial in Tulsa County Case Number CF-2007-3514.

2. Mr. Silva's primary responsibility was the first stage of trial, and my primary responsibility was the second stage of trial.

3. Mr. Johnson adamantly insisted to me he did not commit the crimes he was charged with.

4. I was not aware Mr. Silva would, in his opening argument, effectively concede Mr. Johnson killed Brooke and Kya Whitaker. To my recollection, Mr. Silva had never said anything to me about making such a concession.

5. To my knowledge, Mr. Silva did not secure Mr. Johnson's consent for the concession. This would not be the first time Mr. Silva made a concession without client consent.

FURTHER AFFIANT SAYETH NOT.

Gregg L. Graves

Subscribed and sworn to before me this 6 day of July, 2018.

STEVE LEEDY NOTARY # 00005804 EXP. 05/05/20 PUBLIC STATE OF OKLAHOMA