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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT (JULY 13, 2021)

PUBLISH
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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KARL FONTENOT,

Petitioner-Appellee,

v.

SCOTT CROW, Interim Director,

Respondent-Appellant.

No. 19-7045

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 6:16-CV-00069-JHP)

Before: McHUGH, EBEL, and EID, Circuit Judges.

McHUGH, Circuit Judge.

Karl Allen Fontenot was twice tried and found guilty of the 1984 kidnapping, robbery, and murder of Donna Denice Haraway in Ada, Oklahoma. Almost no evidence connected him to the crime other than

his own videotaped confession, a confession that rang false in almost every particular. Nearly thirty years after his second conviction, Mr. Fontenot brought a petition for habeas corpus in federal district court, arguing the actual innocence gateway allowed for his constitutional claims to be heard on the merits. The district court agreed, and granted relief on all of Mr. Fontenot's claims, including his assertion that the prosecution suppressed material evidence prior to his trial. The district court ordered the State of Oklahoma to release Mr. Fontenot or to grant him a new trial.

The State's arguments for reversing that order lack merit. Mr. Fontenot has brought forth new evidence that is sufficient to unlock the actual innocence gateway and to allow his substantive claims to be heard on the merits. And Mr. Fontenot has also established that evidence suppressed by the State prior to his new trial in 1988 led to a violation of his constitutional right to due process. Exercising jurisdiction under 28 U.S.C. § 2253(a), we affirm the district court's grant of Mr. Fontenot's petition for habeas relief to prevent the further perpetuation of a fundamental miscarriage of justice.

[* * *]

This opinion proceeds in four main parts. Because of the fact-intensive nature of Mr. Fontenot's argument that he suffered a fundamental miscarriage of justice, we discuss the history of the 1984 crime and its investigation at length in Part I. Part II traces the procedural history of Mr. Fontenot's direct appeals and postconviction challenges in state and federal court. Part III concerns the threshold issues that must be addressed before reaching the merits of Mr. Fontenot's habeas petition: exhaustion, procedural default, and timeliness.

Finally, Part IV addresses the State's argument that it did not receive an adequate opportunity in the district court to contest the substance of Mr. Fontenot's constitutional claims, before proceeding to the merits of the alleged *Brady* violation.

I. Factual and Investigative History[1]

A. Ms. Haraway's Abduction

1. McAnally's

On Saturday, April 28, 1984, at approximately 8:45 p.m., 24-year-old Donna Denice Haraway was abducted from the McAnally's gas station and convenience store at 2727 Arlington Street, on the eastern edge of Ada, Oklahoma. At the time of her abduction, she was the sole employee working the McAnally's night shift.

Gene Whelchel and his nephews, Lenny and David Timmons, stopped at McAnally's around 8:45 p.m. that evening, or a few minutes before. Mr. Whelchel, in one car, and the Timmons brothers, in another, needed change for a Saturday night poker game at Mr. Whelchel's house. They parked on the west side of the store, which sat on the south side of Arlington. Mr. Whelchel and David Timmons stayed in their vehicles, while Lenny, David's older brother, got out and headed toward the entrance.

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[1] We use the following abbreviations to cite to documents in this voluminous record: SAP = second amended petition; Ex. = second amended petition exhibit number (1–103); Vol. = Record Volume number; P/H = 1985 joint Fontenot/Ward preliminary hearing transcript; J/T = 1985 joint Fontenot/Ward trial transcript; N/T = 1988 Fontenot new trial transcript.

Just as Lenny Timmons walked into McAnally's, a man and a woman walked out of the store together. In interviews with the police several days later, Mr. Whelchel described the man as neatly dressed, in his early 20's, around 5'8 and 150 pounds, with blond, possibly ear-length hair. David Timmons described him as short and stocky, with dishwater blond hair slightly shorter than earlobe length. Lenny described him as around 5'8, medium build, with blond hair cut to mid-ear. Lenny described the woman as approximately the same height as the man, with blond, curly, shoulder-length hair. Mr. Whelchel also thought she was around the same height as the man, and that she possibly fit the description of Ms. Haraway, whom he had seen before. David agreed that the woman he saw looked similar to a picture of Ms. Haraway, who was 5'5 with brown eyes and long, sandy brown hair. David believed the man might have had his arm around the woman's waist as they walked out of the store.

The unidentified man and the woman—whom Mr. Whelchel later identified as Ms. Haraway—walked directly to a pickup truck parked in front of the store. The pickup was parked facing east, parallel to the gas pumps and the front door, taking up several spaces. David and Lenny Timmons observed the man and woman both get in on the passenger side, the door closer to the store. The woman got in first, followed by the man. According to David, the woman did not appear afraid or apprehensive, and nothing stood out as unusual. The pickup then immediately pulled out of the McAnally's lot and headed east on Arlington, a four-lane highway.

None of the three eyewitnesses noticed anyone else inside or outside of the pickup truck before the man and woman got in, and none noticed who drove the truck away from McAnally's. But all three were able to describe the vehicle. Mr. Whelchel said it was a light-colored, full-sized pickup, possibly an early 70's model. He was pretty sure it was not a narrow-bed style. David Timmons thought it might have been a 1972 Chevy, possibly a dull dark blue, with gray primer spots and a conventional straight side bed. Lenny Timmons described it as an older model pickup truck, late '60s or early '70s.

No one was in the store or behind the counter when Lenny Timmons entered McAnally's. He noticed the cash register drawer was open and that most of the cash was gone, except for the ones and the change. A cigarette was still burning in an ashtray on the counter. The ashtray was positioned such that the person who placed the cigarette there must have been standing behind the counter.[2] Lenny spent about five minutes trying to locate the clerk, checking the restroom and freezer and opening the front door again to sound the notification bell, before heading back outside. Lenny and Mr. Whelchel then called the Ada Police Department ("APD"). Mr. Whelchel found a number for the McAnally's store manager, Monroe Atkeson, and called him as well.

The call to the APD went out at 8:50 p.m. Officer Harvey Phillips arrived at McAnally's around ten minutes later, where he found Mr. Whelchel, Lenny Timmons, and two other unidentified men. Officer Phillips observed the empty cash register and a purse

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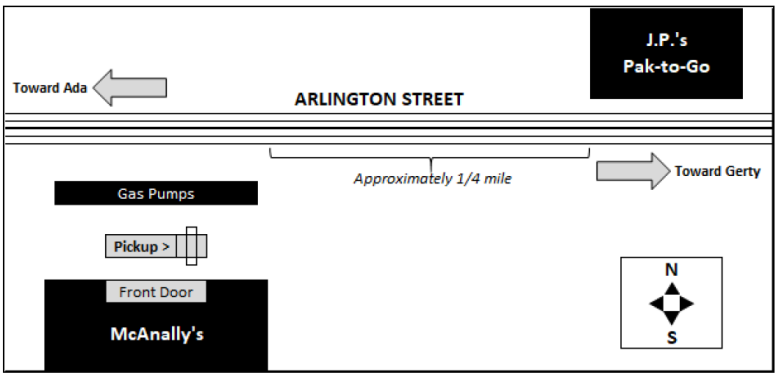
[2] Ms. Haraway did not smoke.

and keys behind the counter. Inside the purse was an Oklahoma driver's license for Donna Denice Haraway. Ms. Haraway's schoolbooks lay open on the counter and her car was parked on the side of the store.

Mr. Atkeson, the store manager, arrived a few minutes after Officer Phillips. He compared the cash register tape to the money in the machine and determined that about $167 was missing. The last sale registered was for seventy-five cents; the only item that sold for that amount was a tallboy beer. After looking around McAnally's and speaking with the police, Mr. Atkeson began the process of closing the store. Officer Phillips failed to secure the scene to preserve evidence. By the time an APD detective arrived, roughly an hour after Ms. Haraway's disappearance, multiple people had been in and out of the store, and it had been cleaned and prepared for opening the next day. The cigarette butt still burning in the ashtray when Lenny Timmons first entered was tossed away, and no fingerprints were taken.

2. J.P.'s Pak-to-Go

J.P.'s Pak-to-Go, another convenience store, sat approximately a quarter mile east of McAnally's on Arlington.



Karen Wise was working the 3-to-11 p.m. shift at J.P.'s on the Saturday evening of April 28, 1984. At around 4 p.m., Ms. Wise noticed two men in the store who made her nervous. They bought beer and a half gallon of wine. These men left for a time, then returned to J.P.'s at around 7 p.m., proceeding to shoot pool in the store's back game room for around an hour and a half. Ms. Wise described one of the men as 5'7" to 5'8" and 130 to 145 pounds, in his early twenties, with light-colored eyes, dishwater blond hair in a neat, feathered cut, and possible acne scars on his cheek bones. She described the other man as around 6'0", in his early twenties, with sandy brown collar-length hair, a slender build, and a protruding Adam's apple. Ms. Wise thought this man might have had blue eyes and some facial hair on his upper lip. The two men drove a pickup that roughly matched the description of the truck seen at McAnally's: an older step-side, short-bed model with a jacked up back that was coated with primer, mostly red with some gray spots.

Jack Paschal, a local resident who often helped out at J.P.'s, came by the store shortly before 8 p.m.

on April 28.[3] Ms. Wise told Mr. Paschal she was nervous about two young men in the back pool room area. While Ms. Wise and Mr. Paschal were talking, one of these men came to the front counter to get quarters for the pool table. Mr. Paschal described him as a slender 5'10" to 5'11", with brown hair that came just below the ear, and a slim, hollow-cheeked face. He described this man's companion as a husky 5'9" to 5'11", with sandy blond hair and a ruddy complexion. Around ten minutes after

Mr. Paschal arrived, these two men exited J.P.'s and headed west, back in the direction of town and McAnally's. Mr. Paschal saw them leave. He described the pickup they drove as a mid '60s to early '70s Chevy with primer paint. Mr. Paschal did not notice the truck's color, but something about the tailgate stuck out to him: it was either missing or badly bent.

The official investigation into Ms. Haraway's disappearance centered almost immediately on the two suspicious men who had been shooting pool at J.P.'s earlier that evening.[4] The APD interviewed Ms. Wise that night, and developed profiles of the two suspects believed to be involved in Ms. Haraway's abduction from McAnally's based on Ms. Wise's descriptions of the men she saw at J.P.'s. Two days later—after the

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[3] Ms. Wise placed the time of Mr. Paschal's arrival significantly later, at around 8:30 p.m.

[4] In her 2009 affidavit, Ms. Wise stated that she called the police earlier in the day on April 28 "because some young men in the store were making [her] nervous." Ex. 13, Vol. 2 at 61. But contemporaneous police reports do not note any call from Ms. Wise on April 28, nor is such a call documented in APD radio logs. Ms. Wise also testified at the preliminary hearing that she did not call the police at any point that night.

Oklahoma State Bureau of Investigation ("OSBI") was brought in to investigate—an OSBI agent created composite sketches of the two suspects based on Ms. Wise's recollection. Suspect #1 was described as a slenderly built white male in his early twenties, 6'0" to 6'2", with slightly wavy, shoulder-length sandy brown hair; blue or green eyes; a fair complexion; and noticeable arm hair. Suspect #2 was described as a white male in his early twenties, around 5'8", with a medium athletic build; light, collar-length, straight blond hair; a fair complexion; and slight acne scars. The pickup they drove was described as possibly a late '60s or early '70s Chevy, in rough condition, with light color gray primer spots.

3. McAnally's Customers

In the first few days after Ms. Haraway's disappearance, several men who were in McAnally's on that Saturday evening contacted the APD.

James Boardman, an employee of an Ada newspaper, told police that he observed two men who looked suspicious inside McAnally's between 5 and 6 p.m. on April 28. One of the men had brown hair and one was blond, and Mr. Boardman thought they were driving an old, light-colored pickup, a Chevy or a Ford.

James Moyer told police that he was in McAnally's on April 28 around 7:30 p.m. He saw a pickup pull in between the door and the ice machine, which appeared to be a '67-69 Chevy, light gray and rough-looking. About a minute before he left the store, a dark-haired man entered, followed by a blond-haired man. Mr. Moyer didn't get a good look at the dark-haired man, who was at the back of the store.

APD Officer Richard Holkum stopped at McAnally's on his way home after finishing his shift, arriving sometime between 7:30 and 7:45 p.m. While at the counter talking to Ms. Haraway, he saw two vehicles parked parallel to each other near the gas pumps at the eastern edge of the store—one a green Ford Torino or Mercury Montego, the other a Chevy or GMC pickup painted primer gray. Their drivers appeared to be conversing. The two vehicles were still parked next to each other when Mr. Holkum left shortly thereafter.

John McKinnis stopped at McAnally's between 7:50 and 8 p.m. on the night of April 28. He saw only one vehicle parked in front of the store when he arrived: a late '70s Chevy pickup, light-colored, with a short, conventional bed and gray primer spots. While paying for his items, he noticed a man standing behind the counter a few feet from Ms. Haraway. This man appeared to be someone Ms. Haraway knew, and he looked unhappy or concerned, although Ms. Haraway did not seem upset.

Gary Haney told police he was in McAnally's shortly after 8 p.m. on April 28 with his son. They were there for around 10 minutes, during which time no other customers were in the store. Mr. Haney spoke with Ms. Haraway, who seemed to be her normal, happy, polite self.

Guy Keys told police he was in the store with his wife and children shortly before 8:30 p.m. He, too, saw no one else besides Ms. Haraway and noticed nothing out of the ordinary.

4. Obscene Phone Calls

In April 1984, Ms. Haraway had been working at McAnally's for about a year. The previous August, she had married Steve Haraway, the son of a local dentist. At the time she disappeared, Ms. Haraway was days away from obtaining her undergraduate teaching degree from Ada's East Central University. She had finished her classroom work at East Central and was student-teaching a second-grade class during the day. The weekend night shifts at McAnally's—she worked Thursdays 2:30 to 10 p.m., Fridays and Saturdays 2:30 to 11 p.m., and Sundays 2:30 to 9 p.m.—provided Ms. Haraway a temporary income while she prepared for her future career as a schoolteacher.

Ms. Haraway was uncomfortable working at McAnally's late at night. She told her younger sister, Janet Weldon, that she hated working at the convenience store because it had no alarm and a lot of "weirdos" came in and out. Ex. 43, Vol. 4 at 294. Ms. Haraway also told her sister that she was going to look for another job because she felt "uneasy" working at McAnally's alone at night. *Id.* The day before her disappearance, April 27, 1984, Ms. Haraway spoke with Darlene Adams, a customer who often stopped by McAnally's on her way to work the night shift at the Solo Cup factory in Ada.

Ms. Adams remembered that when she was in the store that Friday night, Ms. Haraway told her the same thing she told her sister: that working in McAnally's alone late at night made her "uneasy." Ex. 1, Vol. 2 at 25.

Ms. Haraway did not tell Ms. Adams the specific source of her concern, but she did confide in her

sister. Ms. Weldon called Ms. Haraway sometime between 6:30 and 7:30 p.m. on the night of April 28, 1984. Ms. Weldon was working at a convenience store that evening in Shawnee, some 50 miles north of Ada. The sisters frequently chatted over the phone when both were working. Ms. Haraway told Ms. Weldon—in either this conversation or one that took place a day or two earlier[5]—"that the phone calls had started again." Vol. 4 at 294. Ms. Weldon explained to the police that Ms. Haraway "had been receiving some calls at work from a man [who] said he was going to come out to the store some night and wait outside while she was working." *Id*. Ms. Weldon said that Ms. Haraway was upset because she had asked for that Saturday night off, but a coworker refused to fill in, and so she had to take her regularly scheduled shift. The April 28 phone call ended when Ms. Haraway told Ms. Weldon she had to go because she was getting busy but would call back in twenty minutes. Ms. Haraway never returned the call.

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[5] A summary of the police interview with Janet Weldon, included in the "prosecutorial" transmitted from the OSBI to the Pontotoc County District Attorney's Office (but not disclosed until 1992), does not clarify whether Ms. Haraway conveyed this information to her sister during their phone conversation on the night of April 28 or in some earlier call. While the report seems to indicate that this information was indeed conveyed by Ms. Haraway in the call on the night of April 28, Ms. Weldon testified at trial that her sister gave no indication during that phone call that anything was wrong. It is possible this information was conveyed in an earlier call, even in a prior call on April 28, during which Ms. Haraway cancelled plans to shop that Saturday with Ms. Weldon because Ms. Haraway had to work at McAnally's. Ms. Weldon then decided "to come down on Monday April 30th to spend the week with [Ms. Haraway]." Ex. 43, Vol. 4 at 294.

In addition to her sister, Ms. Haraway also spoke on the phone with her husband shortly before she disappeared. Sometime between 6:30 and 7:30 p.m., Steve Haraway received a call from Ms. Haraway, who was studying for her teacher's examination during slow periods at McAnally's and wanted him to look up a word in the dictionary. The call lasted five or ten minutes, and Ms. Haraway gave no indication anything was wrong. In an interview on April 30, Mr. Haraway told police he was not aware of anyone causing his wife problems, but that Ms. Haraway had received two to three "obscene" phone calls at the store, the last occurring two or three weeks prior. Ex. 44, Vol. 8 at 24. In another April 30 interview conducted by the police, Mr. Atkeson confirmed that Mr. Haraway had previously told him that Ms. Haraway had received several "obscene" telephone calls at work. Ex. 44, Vol. 5 at 26.

Ms. Haraway also told a McAnally's coworker about these troubling phone calls. James David Watts worked the shift immediately prior to Ms. Haraway on April 28, 1984, ending at 2:30 p.m. The APD, however, did not question Mr. Watts, and it was not until summer 1985 that Loyd Bond, an investigator from the Pontotoc County District Attorney's Office, interviewed him. Mr. Watts informed Investigator Bond that Ms. Haraway told Mr. Watts of some "obscene" phone calls she received at the store that upset her "a great deal." Ex. 62, Vol. 26 at 207. The specific description of the calls as "obscene" was Ms. Haraway's. Ex. 15, Vol. 2 at 72. Ms. Haraway told Mr. Watts that she could not recognize the voice of the man over the phone. According to Mr. Watts, the

calls to Ms. Haraway stopped about a month before she disappeared.

Ms. Haraway told at least one McAnally's customer about these calls, too. In 1988, a man named Anthony Johnson recounted a conversation he had with Ms. Haraway a week before she disappeared. Mr. Johnson had been in McAnally's on several occasions while wearing a holstered handgun in plain view, and on the occasion in question, Ms. Haraway asked him where she could buy a gun. When Mr. Johnson asked why she needed one, Ms. Haraway cited "some funny phone calls she had recently been receiving," where "the caller never really said anything, just did some heavy breathing." Ex. 22, Vol. 2 at 260. When Mr. Johnson asked Ms. Haraway whether she had any ex-boyfriends who could be making the calls, she gave him a blank stare in response. Mr. Johnson got the impression Ms. Haraway knew who was making the calls.

Neither the APD nor OSBI ever investigated the obscene phone calls.

B. Fontenot and Ward

1. Suspects

The APD requested help from the public to locate the two men in the composite drawings of the suspects seen at J.P.'s on April 28. In the first few days after the abduction, the police fielded a number of calls from locals who said that Suspect #2, the shorter individual with blond hair, resembled an Ada man named Tommy Ward. Mr. Ward, 23 years old at the time of the crime, was described as 5'8" and 145

pounds, with blond hair and blue eyes.[6] On May 1, working off these phone tips, APD Detective Dennis Smith spoke with Mr. Ward, who said that on that past Saturday he was fishing all day with a friend of his, Karl Fontenot. Mr. Ward said that afterward, he and

Mr. Fontenot went to a party next door to Janette Roberts's apartment. He mentioned that the police had shown up at this party later that night. According to Mr. Ward, he and Mr. Fontenot both spent the night at Ms. Roberts's apartment.

Mr. Fontenot, who had known Mr. Ward for six or seven years, was 19 years old at the time of the crime. He was described as having diminished cognitive and emotional skills.[7] Police reports described him as 5'8" to 5'9" and 120 to 132 pounds, with dark brown or black hair, green eyes, and tattoos on both

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[6] The OSBI "Descriptive Data" sheet on Mr. Ward contained in the prosecutorial lists his hair color as brown.

[7] In his 2017 deposition, Mr. Fontenot's defense counsel, George Butner, described Mr. Fontenot as follows:

> [Mr. Fontenot] is not or was not, I believe, able to recall and remember too much of anything.
>
> . . . I mean, specifics to Mr. Fontenot, a specific was not in his vocabulary. He was a young person . . . and what happened two days ago in Karl's life he, in all probability, could not remember or could not recall. . . . Karl was difficult to prove where he was two weeks before. . . .
>
> . . . I'm not sure Karl grasped at that time the gravity . . . and the issues because he was—he was a little quiet. . . .

Ex. 81, Vol. 28 at 128.

his right and left arms.[8] In April 1984, he was living at the home of Janette and Mike Roberts and their children, at 509 1/2 South Townsend in Ada.[9]

The APD first contacted Mr. Fontenot on May 1, after Mr. Ward told police that he and Mr. Fontenot were together on April 28. Two APD detectives confronted Mr. Fontenot outside the Roberts residence and said they "wanted to talk to him about what h[e] and Tommy [Ward] had done the day of the 28th." P/H, Vol. 32 at 552. Mr. Fontenot told the police he was heading to work but could come in to talk to them later. Mr. Fontenot never came by the station, and the police did not follow up with him at the time.

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[8] Mr. Fontenot's hair was described at trial as black.

[9] Mr. Fontenot was essentially without a home prior to being taken in by the Roberts family in September 1983. His father abandoned the family when Mr. Fontenot was 12, and his mother was struck by a car and killed in October 1982 while attempting to cross a highway after the vehicle she and Mr. Fontenot were riding in broke down. Mr. Fontenot blamed himself for his mother's death. After interviewing him in May 1988, a psychiatrist employed by the defense reported that because of guilt associated with his mother's death, Mr. Fontenot "believes in his own mind in some talion law . . . that even though he never met Denise Haraway . . . he was willing to take the rap for her murder." Ex. 64, Vol. 26 at 214. In a June 1985 letter to Mr. Butner (which Mr. Butner never received and which was first disclosed in 2019), Mr. Fontenot wrote: "I have been thinking of dying ever since I seen my mother die and I was the only one ever to see her die in my whole family believe me George it really hurt my mind, memory, and me." Ex. 95, Vol. 30 at 533.

2. Confessions

Months later, working off information provided by a man named Jeff Miller, the police turned their focus back to Mr. Ward. On October 12, 1984, APD Detectives Mike Baskin and Dennis Smith questioned Mr. Ward in Norman, Oklahoma. Mr. Ward denied kidnapping Ms. Haraway. But his explanation of his April 28 whereabouts changed from what he initially told police on May 1—rather than fishing with Mr. Fontenot, he claimed he had spent most of that Saturday working on his mother's plumbing with his brother-in-law. Mr. Ward's account of where he was that Saturday night remained the same. Sometime after 9 p.m. he had walked over to Ms. Roberts's apartment at 509 1/2 South Townsend in Ada and had then gone to the keg party of her neighbor, Gordon Calhoun. Mr. Ward again asserted that the police had been called out to the party on a noise complaint, because Mr. Calhoun was playing the drums and a "guy from Konawa" was playing the guitar. J/T, Vol. 41 at 49. Mr. Ward said he spent the night at the party and never left. He agreed to take a polygraph test the following week.

On October 18, 1984, the police gave Mr. Ward a polygraph at OSBI headquarters in Oklahoma City. OSBI polygraph examiner Rusty Featherstone began questioning Mr. Ward around 10:30 a.m. Agent Featherstone brought up the inconsistency between the May 1 and October 12 statements regarding what Mr. Ward was doing on the afternoon of April 28. Agent Featherstone stated that he had "the impression that [Mr. Ward] had some type of burden that he needed to get rid of." J/T, Vol. 41 at 664. At that point, Mr. Ward told Agent Featherstone that while

he had nothing to do with the abduction, he had dreamed he was involved after the police questioned him six days before. Per Agent Featherstone's account, Mr. Ward had dreamed that he (Mr. Ward) was riding with Mr. Fontenot and a man named Odell Titsworth in a pickup. They drove to McAnally's, left the store with Ms. Haraway, and then drove to a power plant on the west side of Ada, where Mr. Titsworth threatened to rape Ms. Haraway. At this point, in his dream, Mr. Ward went home. Agent Featherstone told Mr. Ward that some of the facts from his dream matched previously undisclosed facts about the crime. According to Agent Featherstone, Mr. Ward then admitted "that he only had wished it was a dream, but that it had been, in fact, the truthful events." *Id.* at 665.

What began that morning as a polygraph examination of Mr. Ward turned into an interrogation at around 1 p.m. At 6:58 p.m., roughly eight and a half hours after Mr. Ward arrived at OSBI headquarters, Agents Featherstone and Gary Rogers of the OSBI and Detective Smith of the APD turned on a videotape to record his statement. In this recording, which lasted until 7:29 p.m., Mr. Ward confessed to the kidnapping, rape, and murder of Ms. Haraway, while implicating Mr. Fontenot and Mr. Titsworth as his accomplices. *See* P/H, Vol. 32. at 637–78.

On October 19, 1984, the day after Mr. Ward inculpated him, the APD arrested Mr. Fontenot and brought him in for questioning. This was the first contact between Mr. Fontenot and the police since the fruitless May 1 encounter. Mr. Fontenot had since moved out of the Roberts's apartment in Ada and was living with a different couple, Joyce and Robert

Cavens, in Hominy, Oklahoma. Following his arrest in Hominy, OSBI Agent Rogers and APD Detective Smith interrogated Mr. Fontenot at the Ada police station.

Agent Rogers began interrogating Mr. Fontenot at 1:30 p.m. on October 19, 1984. Agent Rogers stated that Mr. Ward had already confessed and implicated Mr. Fontenot, and that the police knew Mr. Fontenot was involved. For the first ten minutes, Mr. Fontenot repeatedly denied knowing anything about Ms. Haraway's abduction. At that point, Agent Rogers told Mr. Fontenot that they knew he, Mr. Ward, and Mr. Titsworth were at a party on South Townsend, knew they had left the party, and knew where they had gone. This was the first time the name of Mr. Titsworth had been mentioned. Mr. Fontenot then agreed with the law enforcement agents that he had been involved in the crime.

An hour and forty-five minutes after the questioning began, at 3:15 p.m., Mr. Fontenot gave a videotaped statement confessing to the kidnapping, rape, and murder of Ms. Haraway on April 28, 1984. *See* J/T, Vol. 41 at 780–816. In his confession, which lasted until 3:50, Mr. Fontenot stated that he, Mr. Ward, and Mr. Titsworth left a party in the early evening of April 28 in Mr. Titsworth's Chevy pickup. They abducted Ms. Haraway from McAnally's, drove to the Ada power plant, and raped her at knifepoint in the back of the truck. Next, they drove to an abandoned house near the plant, where Mr. Titsworth stabbed Ms. Haraway to death. They then placed her body in a rotten spot in the floor of the abandoned house, doused it with gasoline, and lit a fire, burning down the house with Ms. Haraway inside.

In confessing to Ms. Haraway's kidnapping and murder, both Mr. Ward and Mr. Fontenot gave a detailed description of the blouse she was wearing on the night of April 28. Mr. Ward said it was a white button-up with blue roses and "little fringe deals around her collar." P/H, Vol. 32 at 671. Mr. Fontenot described it as a short-sleeve button-up with elastic in the sleeves and "ruffles around the collar." J/T, Vol. 41 at 788.

Two days after Mr. Fontenot's confession, on October 21, 1984, the OSBI gave him a polygraph exam at the Pontotoc County jail. In a pre-test interview with Agent Featherstone, Mr. Fontenot recanted his confession from two days earlier, denied any involvement in the crime, and "adamantly stated that none of the statement he gave to the agent involving him in the crime is true and that he also lied when the video confession was taped." Ex. 44, Vol. 16 at 43. He told Agent Featherstone that "he only gave the statement to the agent because the agent told him the story he was supposed to have been involved in and he simply agreed to it." *Id*. He said he had never been in McAnally's and had never seen Ms. Haraway.

In his October 21 statement, Mr. Fontenot told Agent Featherstone that on the night of April 28, he went to a party at the apartment of Gordon Calhoun on South Townsend, next door to where he was then living with the Roberts family. Mr. Fontenot stated he arrived at Mr. Calhoun's apartment around dark, "or shortly after the kegs arrived." *Id.* at 42. He said he drank and smoked marijuana at the party, then returned to the Roberts's apartment around 11:30 p.m. or midnight. Mr. Fontenot indicated that Mr.

Ward was also at the party and that he also spent the night at the Roberts's apartment.

Mr. Fontenot stated there were around 25 people at the Calhoun keg party. Besides Mr. Ward, Mr. Calhoun, and Ms. Roberts, he identified several other attendees: Bruce and Johnny, last names unknown, both from Konawa, Oklahoma, and Michael Shane Lindsay, Ms. Roberts's son. He recalled someone at the party playing the drums. Mr. Fontenot said he did not leave the party at any point. He also stated that he had never met Mr. Titsworth and that he did not see anyone at the party who even looked like Mr. Titsworth.

During the polygraph test itself, Mr. Fontenot denied stabbing Ms. Haraway, having sex with her, or helping dispose of her body. Agent Featherstone found his responses inconclusive but bordering on deceptive. At Agent Rogers's request, Agent Featherstone also administered a "peak of tension" polygraph test to Mr. Fontenot in an attempt to determine if he knew the location of Ms. Haraway's remains. *Id.* at 45. Agent Featherstone asked whether Ms. Haraway's body was in a field, a creek, a well, a building, or a vehicle, and whether it was burned or buried. Agent Featherstone determined "that there was no definitive pattern indicating knowledge on behalf of the subject as to the exact whereabouts of the body of Donna Denice Haraway." *Id.*

During a post-test interview, Mr. Fontenot once more admitted to being involved, but then reversed course again, stating "that he was only telling the examiner these statements as he felt that's what everyone wanted to hear." *Id.* at 44–45. "Ultimately," according to the police report summarizing the

polygraph exam, Mr. Fontenot "stuck with his adamant denial of having anything whatsoever to do with the crime at hand." *Id.* at 45.

On the evening of October 21, following the polygraph, Detective Smith returned to the county jail to speak further with Mr. Fontenot. Mr. Fontenot could not pick Mr. Titsworth out of a photo lineup, and Detective Smith determined that Mr. Fontenot did not know Mr. Titsworth. Mr. Fontenot again told Detective Smith that his confession was a lie and that he was not involved in the crime.

On November 7, 1984, nineteen days after Mr. Fontenot's arrest, he and Mr. Ward were charged with the kidnapping, rape, and murder of Ms. Haraway. No charges were brought against Mr. Titsworth, who refused to confess and who presented proof that he was not involved. Specifically, on April 26, 1984, Mr. Titsworth broke his arm in an altercation with the police, putting him in a cast for weeks and thus making him unable to participate in an abduction, rape, and murder on April 28. The police also examined a pickup truck owned by Mr. Titsworth's mother, finding no evidence it had been used in the crime.

On December 11, 1984, the police showed Ms. Wise, Mr. Paschal, and Mr. Moyer each a seven-man lineup containing Mr. Fontenot. Neither Ms. Wise nor Mr. Paschal identified Mr. Fontenot as one of the men in J.P.'s on April 28. *See* Ex. 43, Vol. 4 at 320 (Ms. Wise: "I can't tell anyone of them."); *id.* at 321 (Mr. Paschal: "Sorry, I don't think I can be any help."). Mr. Moyer said he would "still have to go with number five" in the lineup, which was Mr. Fontenot. *Id.* at 188.

3. Search

Based on the confessions, authorities mobilized a search at the Ada power plant on October 19, 1984. Ms. Haraway's body was not found. They conducted another extensive search on November 1. Although the searchers located a burned-down house on the property, it had burned in 1983, the year prior to Ms. Haraway's disappearance.

At some point in late October, Detectives Smith and Baskin brought a sack of bones obtained from East Central University to the county jail, including a human skull and various unidentified animal bones. The detectives showed the skull and bones to both Mr. Fontenot and Mr. Ward, in an effort "to find out if what they had previously told about the body was the truth." P/H, Vol. 32 at 557.

Mr. Ward and Mr. Fontenot gave police a number of locations to look for Ms. Haraway's body, none of which led to its discovery. Despite repeated, extensive searching in and around Ada, Ms. Haraway remained missing. The state tried Mr. Ward and Mr. Fontenot together in September 1985, while Ms. Haraway remained missing. The jury convicted them both of murder. *See infra* Part II.A.

On January 20, 1986, almost twenty-one months after Ms. Haraway disappeared, a trapper named Alan Tatum came across human skeletal remains in hilly, rough brushland several miles southwest of Gerty, Oklahoma. Gerty, in Hughes County, is roughly 30 miles east of Ada, in Pontotoc County. A comparison of dental records revealed the remains to be those of Ms. Haraway. Her skull showed "an entry gunshot wound to the left occiput and an exit GSW to the

right temporal region." Ex. 46, Vol. 23 at 37. The probable cause of death was therefore determined by the Oklahoma Office of the Chief Medical Examiner ("OCME") to be a single gunshot wound to the head. Several markings on a rib bone were initially deemed consistent with having been made by a knife. However, a reassessment of these markings led OCME to determine they were caused by animal activity "to a 98% degree of certainty." *Id.* at 61, 71–72, 75. There was no evidence Ms. Haraway's body had been burned.

Found near Ms. Haraway's remains were a gold and red earring, decomposing items of clothing, and the soles and partial uppers of a pair of white tennis shoes. Mr. Tatum also found a small piece of clothing material he characterized as multi-colored gingham or calico.[10] No material with a lace or floral print design was discovered.

C. Confessions vs. Facts

By the time investigators located Ms. Haraway's body, it was apparent that many of the details provided in the confessions of Mr. Ward and Mr. Fontenot were false. Below is a comparison between those confessions and the actual facts:

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[10] In May 1984, Detective Smith told law enforcement officers in Texas who were assisting with the case that Ms. Haraway was wearing "a red and blue plaid cotton shirt, that looked like flannel" on the night she was abducted. Ex. 44, Vol. 19 at 37. This information came from a tip the police received on April 29 from a man who said he was in McAnally's the night before and thought Ms. Haraway had been wearing a plaid shirt. The missing person report on Ms. Haraway also stated that she may have been wearing a plaid shirt on April 28.

Both Mr. Ward and Mr. Fontenot were unfamiliar with Mr. Titsworth. Mr. Ward misstated Odell Titsworth's last name as Titsdale six times during his confession, and could not recall Mr. Titsworth's first name until Detective Smith provided it. In his confession, Mr. Fontenot was unable to accurately describe Mr. Titsworth. Mr. Fontenot stated that Mr. Titsworth's hair fell "a little below his ears," and when asked whether Mr. Titsworth had any marks or tattoos, responded that he "didn't see any of that." P/H, Vol. 32 at 709. In fact, in April 1984, Mr. Titsworth had hair down to the middle of his waist and numerous tattoos up and down both arms. Several days after his confession, Mr. Fontenot was unable to pick Mr. Titsworth out of a photo lineup and also failed to recognize Mr. Titsworth when he was presented at Mr. Fontenot's jail cell.

Mr. Ward's description of what happened inside McAnally's did not comport with the evidence. According to Mr. Ward, Mr. Titsworth entered McAnally's and began throwing "potato chips and stuff that was on the aisle, the side aisle right when you go in the door" on the floor. *Id.* at 650–51. Mr. Ward explained that Ms. Haraway came "out from behind the counter and [Mr. Titsworth] grabbed her and pushed her over to me." *Id.* at 648. But neither Mr. Whelchel nor Lenny Timmons, the first two people in McAnally's after Ms. Haraway's abduction, mentioned anything about the store being disorderly or about seeing any items strewn on the floor near the entrance, and the police reported that "[n]o sign of struggle was found at the scene." Ex. 44, Vol. 17 at 46.

Mr. Ward and Mr. Fontenot did correctly identify the approximate amount of money stolen from McAnally's. Mr. Ward indicated in his confession that "it was more than a hundred dollars. . . . I knew that just by looking at [it]." P/H, Vol. 32 at 667. Mr. Fontenot described the amount as "[c]lose to a hundred and fifty or maybe a little over. It was around in there." *Id.* at 704. These descriptions were roughly accurate; the perpetrators took $167 from the McAnally's cash register. Although the knowledge of this amount might otherwise be inculpatory, it was less so here because the exact amount taken was published in Ada's Daily Evening News on April 30, 1984, well before Mr. Ward's and Mr. Fontenot's confessions.

Mr. Fontenot's description of who walked Ms. Haraway out of McAnally's conflicts with the accounts of Mr. Ward and the eyewitnesses. In his confession, Mr. Fontenot stated that Mr. Titsworth walked Ms. Haraway out of McAnally's to the waiting pickup truck. In contrast, Mr. Ward stated that he walked Ms. Haraway out of the convenience store. The eyewitnesses, Mr. Whelchel and the Timmons brothers, described a blond man roughly similar in appearance to Mr. Ward walk out with Ms. Haraway.

Mr. Fontenot's and Mr. Ward's accounts of how Ms. Haraway entered the pickup truck are also inconsistent with the other testimony. Mr. Fontenot reported that when Mr. Titsworth took Ms. Haraway from the store, he and Mr. Ward were standing between the pickup and the gas pumps, "by the passenger door." P/H, Vol. 32 at 683. But the pickup was seen parked parallel to the store and the gas pumps, facing east, so that standing between the

pickup and the gas pumps would mean standing by the *driver-side* door. Additionally, Mr. Whelchel and the Timmons brothers saw no one standing near the pickup prior to when the blond man exited the store with Ms. Haraway.

Mr. Fontenot further stated that "[Mr. Titsworth] forced [Ms. Haraway] around to the other side—or . . . forced her into our side. She got in, then me and [Mr. Ward] got in." P/H, Vol. 32 at 683. Mr. Ward stated that he brought Ms. Haraway out of McAnally's, and that Mr. Titsworth then "grabbed her from me, and they walked around. And I got in the pickup and Karl Fontenot got in the back of the pickup. And she was sitting in the middle." *Id.* at 649. According to Mr. Whelchel and the Timmons brothers, after exiting McAnally's the blond man and Ms. Haraway walked straight to the pickup's passenger side door—the door closest to the store—and entered the truck that way. The eyewitnesses saw no one walk "to the other side" of the pickup or "walk[] around" it. Moreover, Mr. Whelchel and the Timmons brothers saw no one in the back of the pickup, nor anyone inside it other than the blond man and Ms. Haraway before the truck drove away.

Mr. Fontenot's confession is also inaccurate about the ownership of the pickup truck. Mr. Fontenot stated that they were in Mr. Titsworth's pickup when they abducted Ms. Haraway. But the police conducted a forensic examination of a Chevy pickup used by Mr. Titsworth, but owned by his mother, and determined it was not involved in the crime.

No evidence was found to indicate the power plant identified by both Mr. Fontenot and Mr. Ward was the location of the crime. Mr. Fontenot and Mr.

Ward both confessed they drove from McAnally's to a power plant off the Richardson Loop bypass on Reeves Road, on Ada's western edge. Both men stated they parked at the power plant, then proceeded to rape Ms. Haraway before she was stabbed to death. But despite thorough searches, the authorities found no evidence of the crime at the power plant. *See* N/T, Vol. 36 at 334 ("Q [Defense counsel]: Did you at any time find any evidence at the power plant that this incident had taken place there? A [Detective Smith]: No physical evidence.").

Mr. Ward's and Mr. Fontenot's descriptions of the alleged rape were inconsistent. Mr. Ward confessed that "I was so drunk, that when I did try to rape [Ms. Haraway], that I couldn't rape her." P/H, Vol. 32 at 656. But Mr. Fontenot confessed that "me and [Mr. Titsworth] stood there and holded her while [Mr. Ward] raped her. . . . He raped her while me and [Mr. Titsworth] was holding her." *Id.* at 693–94. Eventually, the State dropped the rape charges due to the lack of independent evidence corroborating the confessions. *See Fontenot v. State* [*Fontenot II*], 881 P.2d 69, 82 n.17 (Okla. Crim. App. 1994).

Mr. Fontenot also provided information about the use of a knife on Ms. Haraway that is contrary to both the evidence and Mr. Ward's confession. Mr. Ward admitted that he used a knife on Ms. Haraway, stating: "I cut her a little bit on the side and across her arm." P/H, Vol. 32 at 660. But Mr. Fontenot made it clear that only Mr. Titsworth stabbed Ms. Haraway: "[Mr. Titsworth] was the only one that had the knife at the time. Me or [Mr. Ward] never handled the knife." *Id.* at 696. And when asked directly, "at any point in time, did you stab her?," Mr. Fontenot replied,

"No, I did not, nor did [Mr. Ward]. [Mr. Titsworth] done all the stabbing. . . . " *Id.* at 707.

The police concluded shortly after Mr. Fontenot's arrest that Mr. Titsworth was not involved in the crime. On April 26, 1984, the police broke Mr. Titsworth's arm during a "scuffle," and it was in a cast at the time of Ms. Haraway's disappearance two days later. *Id.* at 727. As a result, the APD had cleared Mr. Titsworth as a suspect by October 22, 1984, three days after Mr. Fontenot's confession. *Id.* at 728, 824; *see Fontenot v. State* [*Fontenot I*], 742 P.2d 31, 32 (Okla. Crim. App. 1987).

Mr. Ward and Mr. Fontenot incorrectly specified the location of Ms. Haraway's body. Both men inaccurately stated that Ms. Haraway's body was left in a house by the power plant. Mr. Ward said that when it came time to find "a good place to get rid of her," he told his accomplices about a house that was a quarter mile to the west. P/H, Vol. 32 at 664. Likewise, Mr. Fontenot confessed that Mr. Titsworth carried Ms. Haraway "to the house out behind the plant." *Id.* at 696. Extensive searches of the remains of this house near the power plant, however, failed to turn up a body. Ms. Haraway's body was eventually found around 30 miles east of Ada in rough, hilly brushland near the town of Gerty, in Hughes County.

Mr. Fontenot's story about burning the house down with the body in it is also patently false. He stated:

> And then [Mr. Titsworth] put [Ms. Haraway] off in the rotten place in the floor. . . . He placed her down in there, we put the gas on her. And after that, . . . somewhere around in the morning time, we burned her. And

> then we come back and burned the house. . . . We lit the house. We lit the gas and burned the house and her.

P/H, Vol. 32 at 697–99. The house near the power plant referenced in the confessions burned down in 1983, the year before the crime. And when Ms. Haraway's remains were found, there was no evidence her body had been burned. *Fontenot I*, 742 P.2d at 32.

Neither Mr. Ward nor Mr. Fontenot accurately described the cause of death. Agent Featherstone asked Mr. Ward, "[W]ere there any other weapons that you know of[,] of any type, like guns or clubs?" Mr. Ward responded, "No, just the knife." P/H, Vol. 32 at 670. And Mr. Ward indicated that Ms. Haraway died of the stab wounds. During his confession, Mr. Fontenot never described any weapon other than a knife. After the body was found, the medical examiner concluded that Ms. Haraway's cause of death was a single gunshot wound to the head. There was no evidence she was stabbed. *Fontenot I*, 742 P.2d at 32.

Mr. Fontenot's description of what was done with Ms. Haraway's clothes was also contrary to the evidence. According to Mr. Fontenot's confession, he and Mr. Ward "went and got [Ms. Haraway's clothes] and brought them back to the house, put them in the hole with her and burned them." P/H, Vol. 32 at 706–07. He also stated they burned her shoes and all of her belongings. But when Ms. Haraway's remains were discovered 30 miles from the power plant, there was no evidence her body or her clothes had been burned. Decayed remnants of clothing, including shoes, socks, and jeans, were found with her remains.

Mr. Ward and Mr. Fontenot each gave a relatively detailed description of Ms. Haraway's blouse. Mr. Ward testified:

Q: Can you tell me what her blouse looked like that she was wearing?

A: . . . [I]t was white with little blue roses on it, I think, blue roses.

Q: It had roses on it?

A: . . . I believe that's what it was, little roses.

Q: So it was a white blouse. Button-up or slip-on?

A: It's button-up.

Q: Did it have buttons on the collar?

A: Uh-huh.

Q: Or would it be just a regular collar?

A: It had buttons on the collar and then it had little fringe deals around her collar and around the end of her arm, end of the sleeves.

Q: By little fringe, do you mean a lace kind of deal?

A: Yeah, uh-huh.

Q: So it had lace on the sleeves, and lace on the collar?

A: Collar.

Q: And it was a floral-type pattern, flowers on her shirt.

A: Yeah.

P/H, Vol. 32 at 671–72.

Mr. Fontenot provided a similar description of Ms. Haraway's blouse in response to questioning:

> Q: What kind of shirt did she have on? Was it a pullover type or button-up type, Karl?
>
> A: Button-up.
>
> Q: Did it have anything that you noticed about it, as far as any designs or—
>
> A: Just the ruffles around the buttons and sleeves. The sleeves had elastic like in them.
>
> Q: Was it a short-sleeved shirt?
>
> A: Yes, it was short-sleeved.
>
> Q: Did it have any lace around the collar?
>
> A: Yes, it had ruffles around the collar like the front.

Id. at 689.

On April 29, 1984, the day after Ms. Haraway disappeared, Mr. Holkum told Detectives Smith and Baskin that when he stopped at McAnally's the night prior, she was wearing "a light colored lavender or light blue" blouse "with small print or design on it" and "a lace design around the collar." N/T, Vol. 36 at 160, 162. In August 1984, prior to the confessions, Ms. Weldon told the APD that a blouse matching this description appeared to be missing from Ms. Haraway's closet: a button-up light lavender blouse with blue flowers, lace around the collar, and elastic around the sleeves.

Although Mr. Ward and Mr. Fontenot provided descriptions of the blouse that matched those provided

to the police, no lace-collared floral blouse was found near Ms. Haraway's remains. Instead, Alan Tatum found "[b]its and pieces of clothing material" near Ms. Haraway's body that he described as "gingham cloth, multi-colored as in calico cat." Ex. 17, Vol. 1 at 236.

II. Procedural History

A. Joint Trial (1985)

The Pontotoc County District Court appointed George Butner to represent Karl Fontenot.

A joint preliminary hearing to determine whether probable cause existed to bind Mr. Fontenot and Mr. Ward over for trial on the charges of robbery, kidnapping, and murder was conducted over a two-week span in January and February 1985. At this hearing, Karen Wise failed to identify Mr. Fontenot as being in J.P.'s on the night of April 28, 1984, other than to state the second man in the store "[g]enerally looked like" him. P/H, Vol. 32 at 166–67, 169. The record reflected that although Ms. Wise recognized Mr. Fontenot, she could not definitively state he was in J.P.'s that night. Jack Paschal also failed to identify Mr. Fontenot as being the second man he saw in J.P.'s when he stopped at the store shortly before 8 p.m. that night. Mr. Paschal admitted that he had no idea who this second man was. Both Ms. Wise and Mr. Paschal identified Mr. Ward as being the blond-haired man they saw in J.P.'s.

Mr. Moyer did identify Mr. Fontenot as being one of the men he saw in McAnally's at around 7:30 p.m. on April 28, 1984. He was the only witness who placed Mr. Fontenot in McAnally's on the evening of

Ms. Haraway's abduction. He further testified that the dark-haired man in the store whom he identified as Mr. Fontenot was wearing boots, and was taller than his companion, the light-haired man, whom Mr. Moyer identified as Mr. Ward.

On January 14, 1985, the videotaped confessions of both Mr. Fontenot and Mr. Ward were played for the court.

On January 16, the State called Terri McCartney to the stand. Ms. McCartney was an inmate at the Pontotoc County Jail on October 19, 1984, the date Mr. Fontenot was first placed in custody. She testified that Mr. Fontenot confessed his involvement in the crime shortly after arriving at the jail. According to Ms. McCartney, Mr. Fontenot said that he, Mr. Titsworth, and Mr. Ward took Ms. Haraway out to an old house by the power plant and raped her there, after abducting her from McAnally's. Mr. Titsworth then stabbed Ms. Haraway to death, and the three men put her "in a rotty part of the floor and poured gasoline on her and burned her." *Id.* at 910.

On February 4, the last day of the preliminary hearing, the defense called Ms. Wise back to the stand. Ms. Wise testified that right around the time of her initial hearing testimony, she called the police to her home at around midnight because she was frightened by a man watching her apartment from a nearby alley. This man, who had on cowboy boots and a cowboy hat, was described by Ms. Wise as of medium build and tall, with sandy brown hair. Ms. Wise testified that "he looked like the man I saw that night at J.P.'s with Ward." She told this to the APD at the time she called them about the man in the alley. She also testified that the second man she saw

in J.P.'s on the night of April 28 had lighter-colored hair than Mr. Fontenot and was taller.

At no point during the preliminary hearing was any testimony elicited that mentioned the obscene phone calls Ms. Haraway received while working at McAnally's in the weeks leading up to her disappearance.

At the conclusion of the hearing, the trial court bound both Mr. Ward and Mr. Fontenot over for trial on the charges of robbery, kidnapping, and murder.

On February 20, 1985, Mr. Fontenot filed a comprehensive discovery motion which requested, among other things: written statements or oral statements reduced to writing of any witness; all written or recorded statements made by Mr. Fontenot, and summaries or memoranda of any of his oral or written statements; any and all tape recordings and stenographic transcription of admissions, confessions, or statements by Mr. Fontenot; and "[a]ll information of whatever form, source or nature, which tends to exculpate the Defendant either through an indication of his innocence or through the potential impeachment of any state witness." Ex. 75, Vol. 26 at 309–10.

The joint trial of Mr. Ward and Mr. Fontenot took place September 9–25, 1985. *See* Vols. 40–43. The videotaped confessions of both Mr. Ward and Mr. Fontenot were introduced and played for the jury. Both men were found guilty of kidnapping and first-degree murder, and both were sentenced to death.

B. First Appeal (1985–87)

Mr. Fontenot was represented on appeal by Terry Hull of the Oklahoma Appellate Public Defender's

Office (now known as the Oklahoma Indigent Defense System, or "OIDS").

On October 21, 1985, Ms. Hull filed a motion for new trial based primarily on insufficiency of the evidence. Ms. Haraway's remains were found while this motion was pending. Ms. Hull then filed a motion to disclose and produce in state district court, requesting, among other things, any information in possession of the State connected with the discovery of Ms. Haraway's remains, and "[a]ll material or information known by any agent or member of any Federal, State, County, or Municipal governmental agency which is exculpatory in nature or favorable to the Defendant, or may lead to the discovery of exculpatory or favorable material, or may be used to impeach prosecution witnesses presented at Defendant's trial." Ex. 57, Vol. 25 at 94.

On March 3, 1986, the state district court granted this motion as to all requested categories except for oral statements never reduced to writing. In response, the D.A.'s office produced a total of five pages, all related to the discovery of Ms. Haraway's remains: three pages of the medical examiner's report, and two pages of an OSBI criminalistics examination of the scene of Ms. Haraway's remains, identifying seventeen items found near her body.

On August 7, 1986, based on the mismatch between the evidence found at the scene of Ms. Haraway's remains and Mr. Fontenot's confession, Ms. Hull filed a motion in the Oklahoma Court of Criminal Appeals ("OCCA") for a new trial on newly discovered evidence. Meanwhile, on August 25, 1986, Ms. Hull filed Mr. Fontenot's brief on direct appeal.

On August 11, 1987, the OCCA reversed Mr. Fontenot's conviction and remanded for a new trial. *See Fontenot I*, 742 P.2d at 33. It concluded that the trial court's admission of Mr. Ward's confession at the joint trial, where Mr. Ward did not testify, violated Mr. Fontenot's Sixth Amendment right to confront witnesses. *Id.* at 32 (citing *Cruz v. New York*, 481 U.S. 186 (1987), and *Bruton v. United States*, 391 U.S. 123 (1968)). The OCCA further determined that Mr. Ward's statement lacked sufficient indicia of reliability to allow for its direct admission against Mr. Fontenot. *Id.* (citing *Lee v. Illinois*, 476 U.S. 530 (1986)).

In reaching this holding, the OCCA set forth the facts as follows:

> The evidence at trial revealed that two men, one of whom was positively identified as Tommy Ward, played pool at J.P.'s convenience store in Ada, Oklahoma, from about 7:00 p.m. until about 8:30 p.m. the evening of April 28, 1984. Around 8:30 p.m., the two men left the store. Shortly thereafter, Tommy Ward was seen leaving with Haraway from the convenience store where she worked which was across the road and a quarter of a mile away from J.P.'s. Fontenot was said to resemble the man with Ward at J.P.'s, but could not be identified by the people who saw Ward there. In fact, the second man was described as having sandy brown hair and being six foot to six foot two inches tall. Fontenot had dark brown hair and was several inches shorter than the description given. One witness went so far as to tell a

> detective and a private investigator, and attempted to tell the District Attorney, without success, that Fontenot was not the man he saw in J.P.'s.[11] *Other than the statements given by Ward and Fontenot, there was no other evidence linking appellant to the crimes.*

Id. (emphasis added). The OCCA also noted that when Ms. Haraway's remains were discovered in Hughes County, "there was no evidence of charring or of stab wounds, and there was a single bullet wound to the skull." *Id.*

C. New Trial (1988)

After Mr. Ward's conviction was overturned on identical legal grounds,[12] the State retried both men separately. Mr. Fontenot's new trial came first, in June 1988, after a change of venue from Pontotoc to Hughes County. Mr. Butner again represented him.

On December 2, 1987, Mr. Butner filed a comprehensive Motion to Disclose and Produce in state district court. In preparation for Mr. Fontenot's new trial, this motion requested forty categories of evidence, including: any information related to the discovery of Ms. Haraway's remains; any information that is exculpatory or favorable, or that may lead to discovery of the same; "[a]ll written or recorded statements and summaries of memoranda of any oral or written statements" of Mr. Fontenot; "[w]ritten or

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11 The witness referenced here is James Moyer. The mention of J.P.'s is in error—Mr. Moyer was in McAnally's on April 28, 1984, not J.P.'s. *See infra* Part III.C.3.c.

12 *See Ward v. State*, 755 P.2d 123 (Okla. Crim. App. 1988).

oral statements reduced to writing of any witness to the alleged crime"; "[t]ypewritten records in the manner and mode of conducting the lineup"; "[a]ll information that could be used to impeach any witness for the State"; and "[a]ny inconsistent statements of any witnesses or information of misidentification of [Mr. Fontenot] by any source or witness." Ex. 72, Vol. 26 at 297–301.

Mr. Butner also moved for an order "requiring the prosecution to produce for inspection by the Court any and all materials and information that the Prosecutor contends to be 'work product' of the prosecutor." *Id.* at 301. Mr. Butner requested the court "to inspect all of any such material and information and to make a judicial determination as to what material and information is, in fact, 'work product' and which is not, and what portion of said material and information should be furnished to Defendant" so as not to violate his constitutional rights. *Id.*; *see infra* Part IV.C.1.a.

On May 27, 1988, around ten days prior to the start of the new trial, Mr. Butner met with Dr. Larry Balding, an OCME forensic pathologist, regarding Ms. Haraway's remains. Dr. Balding's contemporaneous notes state "Mr. Butner here to discuss case representing Mr. Fontenot as court appt. defense. I showed him our file & we discussed my findings. I told him it was possible she was stabbed but was no evidence of it on skeletal remains." Ex. 46, Vol. 23 at 54.

Mr. Fontenot's separate new trial took place June 7–14, 1988. *See* Vols. 35–37. Among the key State's witnesses were Gordon Calhoun, Karen Wise, and James Moyer. As at the preliminary hearing, no mention was made of the obscene phone calls received

by Ms. Haraway at McAnally's prior to her abduction. Mr. Butner presented no alibi defense. The State again played Mr. Fontenot's videotaped confession for the jury, and the jury again found Mr. Fontenot guilty of first-degree murder and sentenced him to death.[13]

D. Second Appeal (1988–94)

1. OSBI Disclosures

Ms. Hull remained Mr. Fontenot's attorney for the initial stages of his second direct appeal, but she left OIDS in the summer of 1992, prior to the filing of Mr. Fontenot's appellate brief. His representation was assumed by Cindy Brown Danner, who filed the "Brief-in-Chief challenging Mr. Fontenot's convictions and sentences" on October 6, 1992. Vol. 31 at 601.

After filing Mr. Fontenot's brief-in-chief, Ms. Danner filed a separate Motion to Produce Documents and Things in the Possession, Custody, or Control of the Oklahoma State Bureau of Investigation. The OCCA granted this motion on December 1, 1992, calling for the OSBI to turn over all responsive documents and things for copying by OIDS "on December 17, 1992 . . . or at a mutually agreed upon time." Ex. 38, Vol. 4 at 155–56. In response, the OSBI disclosed 860 pages of reports related to the Haraway case.[14] Ms. Danner explained the limited effect this

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[13] The following year, Mr. Ward was also again convicted of Ms. Haraway's murder. He was sentenced to life imprisonment without the possibility of parole.

[14] It is unclear whether the OSBI turned these documents over on December 17, 1992—the date indicated in the OCCA order—or at some later point. As the exact timing does not affect our

disclosure had on Mr. Fontenot's direct appeal in an affidavit submitted with his 2013 state application for postconviction relief:

> At the time these additional records were requested and received, Mr. Fontenot's direct appeal brief had already been filed and the case was pending before the OCCA. Under my understanding of the OCCA rules at that time, my belief was that any evidence discovered through the gathering of these records could be used by lawyers handling the post conviction application for Mr. Fontenot if his conviction and death sentence were affirmed. I am not presently aware of any Rule or proceeding that would have permitted use of these records in the direct appeal process after the filing of the Brief in Chief.

Vol. 31 at 601. The State does not contest this characterization of the OCCA's rules.

Mr. Butner attested that during his trial representation of Mr. Fontenot, he was never provided with the material in the 1992 disclosure. *See* Ex. 16, Vol. 1 at 232 ("I did not receive any of the OSBI Reports from the Pontotoc District Attorney's Office or from OSBI prior to either of Mr. Fontenot's trials."). Likewise, Ms. Hull attested to never having seen the 860 pages of OSBI material during her appellate representation. *See* Ex. 11, Vol. 1 at 208 ("After I reviewed these documents, I confirmed . . . that I do not recall

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analysis, we use 1992 as a shorthand for the actual disclosure date.

ever having seen them before."). These 860 pages disclosed in 1992 included:

- The Fontenot/Ward "Prosecutorial": The OSBI compiled a 160-page summary of the Haraway investigation, with a focus on the involvement of Mr. Fontenot and Mr. Ward. This was transmitted to the Pontotoc County District Attorney's Office on December 31, 1984, to serve as the prosecution's main roadmap for trying the two men. Included in this prosecutorial document is the following information:
    - Summaries of police interviews conducted between April 30 and May 1, 1984 of Officer Harvey Phillips, Gene Whelchel, Lenny Timmons, David Timmons, Steve Haraway, Monroe Atkeson, and Karen Wise.
    - A summary of Janet Weldon's account of phone conversations with her sister that took place on April 28 and in the days just prior.
    - An August 1984 summary of information provided by Ms. Weldon regarding a blue floral blouse that was missing from Ms. Haraway's wardrobe.
    - A summary of the May 1, 1984 interview of Mr. Ward, and a subsequent interview of Mr. Ward on October 31, 1984.
    - Summaries of the in-person lineups conducted of Mr. Ward and Mr. Fontenot in November and December 1984, respectively,

for James Moyer, Karen Wise, and Jack Paschal.

- A summary of a November 1984 interview of Jack Paschal.
- Summaries of two interviews of Gordon Calhoun by a Pontotoc County D.A. investigator, in November and December 1984.
- A summary of an October 1984 interview of Janette Roberts.
- A summary of a November 1984 interview of David Yockey, containing information about a gray-primered pickup truck owned by an Ada man named Brian Cox.
- A summary of an undated interview with an Ada man named Jim Bob Howard, containing further information about Mr. Cox's pickup.
- Summaries of the pre-polygraph interviews conducted with Mr. Ward, on October 18, 1984, and Mr. Fontenot and Mr. Titsworth, both on October 21, 1984.

- Floyd DeGraw information: Approximately 75 pages of the OSBI materials concerned an alternate person of interest, Floyd DeGraw, who emerged as a suspect early in the investigation into Ms. Haraway's disappearance. *See infra* Part IV.C.2.c.
- Bruce DePrater interview: Mr. DePrater, who attended the keg party at Mr. Calhoun's apartment on April 28, 1984, was interviewed

by the OSBI in October 1984. *See infra* Parts IV.C.3.a, V.C.2.a.

- Steve Bevel interview: In September 1984, an OSBI agent and a D.A. investigator interviewed Steve Bevel, the man whom both James Moyer and Karen Wise later recognized at the preliminary hearing as looking similar to one of the two men they saw on the night of April 28.
- Polygraph information: The OSBI materials contained reports on the polygraph examinations and attendant interviews of Mr. Ward (on October 18, 1984), Mr. Titsworth and Mr. Fontenot (on October 21), and Mr. Cox (on December 14).
- Hypnosis information: The OSBI materials contained summaries of hypnosis sessions conducted at the request of Agent Rogers with Lenny and David Timmons in May 1984.

2. The OCCA's Decision

On June 8, 1994, the OCCA issued its decision in Mr. Fontenot's second direct appeal.[15] *See Fontenot II*, 881 P.2d 69. It affirmed Mr. Fontenot's convictions for first-degree murder, kidnapping, and robbery.

Mr. Fontenot raised ten trial errors on appeal, including that his confession was rendered involuntary by improper police tactics; that the evidence was insufficient to convict; that his right to confront

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[15] Why it took nearly six years to adjudicate Mr. Fontenot's appeal is unclear.

witnesses was violated; that prosecutorial misconduct denied him a fair trial; and that his trial counsel was ineffective. *See id.* at 74 n.1. With regard to his insufficiency claim, Mr. Fontenot argued there was no independent evidence to corroborate his confession, rendering it untrustworthy and not reliable enough to support his conviction. *Id.* at 77. In rejecting this argument, the OCCA found Mr. Fontenot's confession corroborated in nine separate ways:

1. Additional inculpatory statements: Gordon Calhoun testified that Mr. Fontenot mentioned he knew the identity of the perpetrator of the Haraway abduction. Additionally, Leonard Martin, an inmate at the Pontotoc County Jail, overheard Mr. Fontenot say "I knew we'd get caught" while awaiting trial. *Fontenot II*, 881 P.2d at 78.

2. Method of abduction: David Timmons, Lenny Timmons, and Gene Whelchel saw a man take Ms. Haraway out of McAnally's to an old, gray-primered Chevy pickup, and saw Ms. Haraway enter from the passenger side with the man following, as Mr. Fontenot described. *Id.*

3. Access to pickup: An insurance agent testified that he insured a truck for Mr. Ward's brother matching the description of the pickup used in the abduction. *Id.* J.T. McConnell, who knew both Mr. Ward and Mr. Fontenot, testified that the two were friends and that he had seen them riding together in a gray-primered Chevy pickup. *Id.*

4. James Moyer testimony: Mr. Moyer entered McAnally's just prior to the abduction. He testified to seeing two men "generally matching Fontenot's and Ward's descriptions inside the store," that these two men were driving an old, gray-primered pickup, and that one of the men acted in a hostile manner. *Id.*

5. Karen Wise testimony: Ms. Wise testified to seeing "two men meeting Ward's and Fontenot's descriptions" in J.P.'s on the evening of Ms. Haraway's abduction. The two men were watching Ms. Wise and making her uncomfortable. When they left at 8:30 or 9 p.m., they headed toward McAnally's in a red-and gray-primered truck. *Id.*

6. Amount of money: The amount taken from the McAnally's register was $167, and Mr. Fontenot stated that around $150 was taken in the robbery. *Id.* at 79.

7. Ms. Haraway's blouse: Ms. Haraway was wearing a button-up blouse with lace around the collar and cuffs, and Mr. Fontenot said that she had worn a blouse with "ruffles" around the sleeves and collar. *Id.*

8. Ms. Haraway's shoes: Soft-soled, canvas shoes were found with the remains of Ms. Haraway, and Mr. Fontenot described Ms. Haraway's shoes as soft-soled. *Id.*

9. Abduction: "[M]ost generally," Mr. Fontenot's statement that Ms. Haraway was abducted, and did not leave McAnally's voluntarily, was corroborated by trial testimony establishing

> that Ms. Haraway was happy and content with her life. *Id.*

The OCCA acknowledged the "by no means inconsequential" inconsistencies between Mr. Fontenot's confession and the evidence, including the method of killing, the location of the body, the fact the body was not burned, and the complete lack of Odell Titsworth's involvement. *Id.* "Unless inconsistencies between the confession and the other evidence so overwhelm the similarities that the confession is rendered untrustworthy," however, "it remains within the province of the jury to determine whether the confession is credible." *Id.* The OCCA found the inconsistencies did not rise to such level, and that the evidence presented independent of the confession was sufficiently corroborative to render it trustworthy. *Id.* at 80–81. As a result, the evidence was sufficient to support the conviction—that is, "[a] rational trier of fact faced with this evidence could have found Fontenot guilty beyond a reasonable doubt of the crimes charged." *Id.* at 80.

Finding error in the lack of a jury instruction on the potential for life without parole, the OCCA vacated Mr. Fontenot's death sentence and remanded for resentencing. *Id.* at 74. Mr. Fontenot's petition for rehearing was denied on September 30, 1994. *Id.* at 87–88. After remand, Mr. Fontenot entered a negotiated settlement with the State, whereby he received a sentence of life imprisonment without the possibility of parole.

E. State Postconviction (2013–14)

1. Mr. Fontenot's application

In 2013, nineteen years after his second conviction was affirmed on direct appeal, Mr. Fontenot filed an application for postconviction relief in Pontotoc County District Court and moved for additional discovery. On September 16, 2013, the state district court granted this motion and ordered the APD, the Pontotoc County Sheriff's Office, and the OSBI to "provide a complete inventory of the records and evidence, relating to their investigations of the murder of Donna Denice Haraway, to this Court on or before December 31, 2013." Vol. 29 at 818.

After receiving this additional discovery, Mr. Fontenot filed an amended application for postconviction relief on April 18, 2014. He argued that newly discovered evidence of actual innocence required the state court to grant relief, and he presented five substantive claims: that his trial counsel was ineffective; and that his due process rights were violated by (a) the State's suppression of material evidence within the meaning of *Brady v. Maryland*; (b) police misconduct in coercing a false confession; (c) prosecutorial misconduct in knowingly introducing a false confession; and (d) police misconduct that permeated the Haraway investigation.

Mr. Fontenot presented two categories of newly discovered evidence: that which was not previously in the State's possession and that which was. The former largely consisted of affidavits from witnesses to various events pertinent to Ms. Haraway's abduction; some of these witnesses testified at Mr. Fontenot's trial and some did not. The latter consisted primarily

of the 860 pages disclosed by the OSBI in 1992. Additionally, Mr. Fontenot's petition referenced the following items of evidence disclosed through the 2013 discovery agreement with the Pontotoc County D.A.'s Office:

- Photos of the McAnally's cash register tape from the night of April 28, 1984, showing handwritten notes made by the police or the prosecution connecting customers to the time of their purchases.
- A summary of a July 1985 interview of James David Watts by D.A. investigator Loyd Bond, in which Mr. Watts, Ms. Haraway's McAnally's coworker, stated that Ms. Haraway told him she received obscene calls at the store.
- Forty-six pages of OCME documents regarding Ms. Haraway's remains, at least two of which Mr. Fontenot claimed had not previously been disclosed: a report decrying various ways in which law enforcement botched the processing of Ms. Haraway's remains, and a report stating that marks on Ms. Haraway's pelvic bone indicated she had given birth to at least one child.

a. Actual innocence

Mr. Fontenot argued that five categories of newly discovered evidence established his actual innocence:

1. Evidence showing that Ms. Haraway was being harassed and stalked by an unknown man while working at McAnally's in the weeks prior to her abduction.

2. Evidence from the OCME report showing the investigation at the scene of Ms. Haraway's remains was botched and indicating Ms. Haraway may have borne a child before her death.

3. Evidence tending to establish Mr. Fontenot's alibi of being at the keg party at Gordon Calhoun's apartment on the night of Saturday, April 28, 1984.

4. An affidavit from James Moyer, the one eyewitness who placed Mr. Fontenot in McAnally's, recanting his identification.

5. An affidavit from J.P.'s clerk Karen Wise, stating she was pressured by police to conform her testimony to their theory of the case and to not disclose all she knew, and asserting that there were actually four men rather than two in J.P.'s on April 28, 1984.

b. *Brady* claim

Mr. Fontenot claimed the Pontotoc County D.A.'s Office, as a matter of policy, did not receive all exculpatory or impeachment evidence from law enforcement. Rather, law enforcement provided only a subset of their investigatory work—the prosecutorial—containing evidence relevant to the suspect(s) believed to be involved. *Id.* This policy "resulted in exculpatory, impeachment, and other valuable evidence not only being withheld from the district attorney . . . , but ultimately from the defense as well," leading to a systemic due process violation. *Id.* at 358–59. Mr. Fontenot alleged that the Pontotoc County District Attorney during both of his trials, Bill

Peterson, failed to comprehend the full scope of his duties under *Brady*, and that both the APD and the OSBI were improperly trained on those duties.

Turning to the specific impact on Mr. Fontenot's trial, Mr. Fontenot claimed that five categories of suppressed evidence contained in the 1992 OSBI disclosures were favorable and material: (1) police reports pertaining to Mr. Fontenot's alibi; (2) the identity of four McAnally's customers on the night of April 28; (3) the OSBI investigation into alternate suspect Floyd DeGraw; (4) interview reports and taped statements of Jeff Miller and Terri McCartney; and (5) interviews with Ms. Haraway's sister and husband indicating that she was being harassed at work by obscene calls from an unknown male in the weeks leading up to her abduction. Mr. Fontenot produced an affidavit from Mr. Butner swearing that he did not receive any of the 860 pages prior to either of the trials.

In addition to the OSBI material, Mr. Fontenot also claimed the D.A.'s office violated *Brady* by failing to turn over a summary of its 1985 interview with Ms. Haraway's coworker James David Watts that referenced the obscene calls.

2. State Court Rulings

On December 31, 2014, in a two-page order, the state district court denied Mr. Fontenot's application for postconviction relief on the ground of laches. *See* Vol. 31 at 674–75. The court found that Mr. Fontenot had been in possession of the 860 pages of OSBI documents since 1992 and the OCME report on Ms. Haraway's remains since 1986, and thus could have submitted his claims of actual innocence, ineffective assistance of counsel, prosecutorial misconduct, and

Brady violations much earlier. Citing *Thomas v. State*, 902 P.2d 328 (Okla. Crim. App. 1995), the court found that "[s]imply, too much time has elapsed due to Petitioner's own inaction." *Id.* at 675.

Mr. Fontenot appealed to the OCCA. Regarding the finding of laches, Mr. Fontenot argued he was not at fault for any delay. He was personally unaware of the 860 pages of OSBI materials transmitted to OIDS in 1992, as they arrived following briefing in his second appeal. Without knowing these documents existed, and without the assistance of counsel after resentencing, "Mr. Fontenot was unable to review, investigate, and litigate the subsequent constitutional claims arising from these documents." Vol. 31 at 689. Furthermore, Mr. Fontenot asserted that in 2003, a lawyer who "held himself out as counsel for both Mr. Ward and Mr. Fontenot" took custody of all of Mr. Fontenot's files without authorization. *Id.* at 690. According to Mr. Fontenot, this attorney held these files between 2003 and 2013 without filing a petition, despite there being a conflict of interest in representing both Mr. Fontenot and Mr. Ward. Mr. Fontenot argued that this negated the assertion of laches, because it was not until 2013 that conflict-free counsel gained access to the information underlying his actual innocence plea.

On October 29, 2015, the OCCA affirmed the district court's finding that laches barred any relief for Mr. Fontenot. *See* Vol. 31 at 711–14. The OCCA determined that the doctrine of laches "may prohibit the consideration of an application for post-conviction relief where petitioner has forfeited the right through his own inaction," while also noting that in Oklahoma, the State is not required to show it was prejudiced by

the delay in filing. *Id.* at 714 (quoting *Thomas*, 903 P.2d at 332). The OCCA held Mr. Fontenot had not shown that the district court erred in its application of laches to his claims.

F. Federal Habeas (2016–present)

1. Initial Proceedings

On February 24, 2016, Mr. Fontenot filed a 28 U.S.C. § 2254 petition for habeas corpus in federal district court for the Eastern District of Oklahoma, with seventy-seven evidentiary exhibits attached. The district court subsequently allowed Mr. Fontenot to conduct additional discovery and serve federal subpoenas on the Pontotoc County D.A.'s Office, the APD, and the OSBI. *See* Rules Governing § 2254 Cases in the United States District Courts, Rule 6 (providing that a judge may authorize discovery "for good cause"); *see also Bracy v. Gramley*, 520 U.S. 899, 909 (1997) ("Rule 6(a) makes it clear that the scope and extent of such discovery is a matter confided to the discretion of the District Court."). On August 18, 2017, after deposing Pontotoc County prosecutors Bill Peterson and Chris Ross, defense attorney George Butner, and OSBI Agent Gary Rogers, reviewing files in possession of the D.A., and receiving an additional cache of law enforcement reports on the Haraway case, Mr. Fontenot filed an amended petition for habeas corpus with an additional fourteen exhibits. The State filed a response on December 8, 2017, styled as a motion to dismiss.

After receiving Mr. Fontenot's reply to the State's motion to dismiss his amended petition, the district court ordered the State to file an additional brief

"specifically address[ing] Petitioner's alleged Brady violations and the newly discovered evidence outlined" by Mr. Fontenot. Dist. Ct. ECF No. 108. The State filed a 35-page brief with supporting exhibits on October 17, 2018. *See* Dist. Ct. ECF No. 109 ("Okla. *Brady* Br.").

On January 31, 2019, before the district court ruled on the amended petition, Mr. Fontenot's counsel discovered that the APD had sent previously undisclosed police reports on the Haraway investigation to counsel for Mr. Ward. These documents were released pursuant to subpoenas served in Mr. Ward's state postconviction proceeding without contacting Mr. Fontenot, despite Mr. Fontenot having served federal subpoenas on the APD in February 2017. In response to the 2017 subpoenas, Mr. Fontenot's counsel received a letter from the Ada City Attorney on March 7, 2017, stating the APD "no longer has any of the documents requested." Vol. 29 at 801, 820. On February 6, 2019, Mr. Fontenot's counsel received the new materials from the Ada City Attorney, who explained the delayed production in an email:

> I responded in March, 2017 to a subpoena in the above referenced Fontenot case that the Ada police department informed me they no longer had documents/evidence regarding Mr. Fontenot's case. Recently, the City of Ada received another subpoena regarding Mr. Ward. I again inquired of the Ada Police Department and after searching, some reports/evidence were located. I am now supplementing my response and forwarding the email with attached reports/evidence in the possession of the Ada Police Depart-

> ment which I previously sent to [Mr. Ward's counsel]. . . .

Id. at 835. The APD records newly disclosed in February 2019 included:

- A summary of information provided "a few days" after April 28 by James Boardman, who saw two suspicious individuals in McAnally's between 5 and 6 p.m. whom he thought were driving a light-colored pickup. Ex. 93, Vol. 30 at 516; Vol. 30 at 381. Mr. Boardman failed to identify Mr. Fontenot in a photo lineup conducted around November 1, 1984.
- Notes of April 29, 1984 phone calls from two men, Guy Keys and John McKinnis, who told police they were in McAnally's between 8 and 8:30 p.m. the prior evening. These notes indicated that Mr. McKinnis saw an unknown man standing behind the counter with Ms. Haraway around 8 p.m.
- Handwritten 1985 letters from Mr. Fontenot to his trial attorney, Mr. Butner, which were never delivered and which Mr. Butner had never before seen. Among other matters, the letters detailed Mr. Fontenot's alibi defense and listed various individuals who were at the Calhoun keg party.
- A police report from April 30, 1984 containing Gene Whelchel's detailed description of the man he saw leaving the store with Ms. Haraway.

- A summary of a November 1984 interview of Duney Alford, who recalled seeing a dark-haired man standing at the front of McAnally's on April 28 and a chalky gray colored pickup parked outside.
- Summaries of interviews from April and November 1984 of James Moyer regarding his recollection of seeing two men in McAnally's on April 28, one dark-haired and one light-haired, and a gray pickup outside. In the November interview, Mr. Moyer stated he "did not get a very good look at" the dark-haired man. Ex. 102, Vol. 30 at 552.

2. Second Amended Petition

Based on these newly disclosed documents, Mr. Fontenot received the district court's permission to amend his petition a second time. The State did not oppose this request. *See* Appellant Br. at 5. Filed on March 15, 2019, the second amended petition added 12 exhibits, bringing the total to 103. It also added a new claim: violation of the Sixth Amendment right to counsel via interference with the attorney-client relationship, stemming from the APD's possession of undelivered 1985 letters that Mr. Fontenot wrote to Mr. Butner while awaiting trial at the county jail.

Mr. Fontenot presented a gateway assertion of actual innocence, based on newly discovered evidence that (a) he was at the Calhoun keg party all night on April 28; (b) Ms. Haraway was being harassed at work by an unknown man; (c) Mr. Moyer recanted his identification of Mr. Fontenot; (d) the police pressured Ms. Wise to alter her account; (e) inconsistent statements were made regarding the gray-primered

pickup; (f) the crime scene of Ms. Haraway's remains was botched, and analysis of those remains revealed she may have given birth prior to her death.

Mr. Fontenot then laid out nine substantive constitutional claims. Three had been first presented to the OCCA on direct appeal: that (1) the evidence at trial was insufficient to convict, (2) Mr. Fontenot's right to confront witnesses was violated by the injection of inadmissible hearsay, and (3) Mr. Fontenot's due process rights were violated by police misconduct during his interrogation. Four had been first presented to the OCCA on appeal of Mr. Fontenot's state application for postconviction relief: that (1) his trial counsel was ineffective, and that his due process rights were violated by (2) the suppression of material evidence under *Brady*, (3) the prosecution's knowing admission of a false confession, and (4) police misconduct throughout the Haraway investigation. Finally, two claims were new, having not previously been presented to the OCCA either on direct appeal or in postconviction proceedings: (1) a violation of the right to counsel based on interference with the attorney-client relationship, and (2) a violation of the right to effective assistance of appellate counsel.

# Constitutional Claim	
1. Sufficiency of Evidence	
Brought in State Direct Appeal	Yes
Brought in State Postconviction	No
2. Confrontation Clause	
Brought in State Direct Appeal	Yes
Brought in State Postconviction	No
3. Due Process – Interrogation	
Brought in State Direct Appeal	Yes
Brought in State Postconviction	Yes
4. Ineffective Assistance (Trial)	
Brought in State Direct Appeal	No*
Brought in State Postconviction	Yes*
5. Due Process – *Brady*	
Brought in State Direct Appeal	No
Brought in State Postconviction	Yes
6. Due Process – False Evidence	
Brought in State Direct Appeal	No
Brought in State Postconviction	Yes
7. Due Process – False Investigation	
Brought in State Direct Appeal	No
Brought in State Postconviction	Yes
8. Attorney-Client Relationship	
Brought in State Direct Appeal	No
Brought in State Postconviction	No
9. Ineffective Assistance (Appellate)	
Brought in State Direct Appeal	No
Brought in State Postconviction	No

** Mr. Fontenot did bring a claim for ineffective trial assistance on direct appeal, but its factual basis was distinct from the claim brought in state postconviction/ federal habeas.*

The State filed a response to the second amended petition on April 29, 2019, again in the form of a procedural motion to dismiss. It first argued that the petition was time-barred by the one-year statute of limitations established by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d)(1), as well as procedurally barred by the state court's application of laches to deny postconviction relief. It next argued that Mr. Fontenot had sufficiently demonstrated neither cause and prejudice for the procedural default nor his actual innocence, as would allow a federal court to entertain the claims on the merits. Lastly, the State asserted that Mr. Fontenot presented two unexhausted claims—ineffective appellate counsel and interference with the attorney-client relationship—which rendered the petition "mixed" and required its dismissal.

3. District Court Order

The federal district court granted Mr. Fontenot's second amended petition on August 21, 2019. *See Fontenot v. Allbaugh* [*Fontenot III*], 402 F. Supp. 3d 1110 (E.D. Okla. 2019). It excused all threshold procedural barriers to entertaining Mr. Fontenot's claims on the merits, and then found all his substantive constitutional claims meritorious.

The district court found that Mr. Fontenot's state court procedural default on grounds of laches and his failure to abide by AEDPA's time bar were both excused by passing through the actual innocence

gateway. *Id.* Mr. Fontenot's probable innocence was established by the six categories of newly discovered evidence advanced in his petition, according to the court, which made it evident that "more likely than not, no reasonable juror would have convicted him." *Id.* at 1132 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

The district court acknowledged that Mr. Fontenot's petition was "mixed," containing unexhausted as well as exhausted claims, but found it could "be reviewed on the merits due to the futility of exhaustion." *Id.* at 1149. "[I]t is futile for a petitioner to return to state post-conviction when state courts fail to provide substantive review of constitutional claims," as occurs when "a state routinely imposes a procedural bar on those claims which are being exhausted." *Id.* at 1150. The district court determined that "Oklahoma's successor state post-conviction process is ineffective in providing any hope of substantive review of Mr. Fontenot's constitutional claims," and that the claims the State argued were unexhausted "would be procedurally barred in a successor application" based on "a consistent pattern and practice of the" OCCA. *Id.*

Turning to the merits, the district court found that five categories of material evidence were suppressed by the State in violation of *Brady*: (1) alibi evidence helping establish Mr. Fontenot's presence at the Calhoun keg party on the night of April 28; (2) police reports relaying information from customers who were in McAnally's that evening; (3) the investigation into alternate suspect Floyd DeGraw; (4) two recorded interviews of Jeff Miller and one of Terri McCartney; and (5) evidence that Ms. Haraway was

receiving obscene phone calls at work in the weeks leading up to her abduction. According to the court, "[t]he impact this evidence would have had on either of Mr. Fontenot's trials or how Mr. Butner would have utilized such evidence is incalculable," *id.* at 1191, and "would have certainly affected the jury's judgment of guilt on all the charges," *id.* at 1160. The court deemed it evident Mr. Fontenot did not receive a fair trial in the absence of such evidence, as the cumulative assessment required under *Brady* "places clear doubt on an already weak case against Mr. Fontenot." *Id.* at 1193.

The district court proceeded to find all of Mr. Fontenot's remaining claims meritorious. It then concluded that no independent evidence corroborated Mr. Fontenot's confession, and that "no rational juror who was able to set aside the tragedy of Ms. Haraway's death could find beyond a reasonable doubt that Mr. Fontenot should be convicted based solely on his unsubstantiated confession." *Id.* at 1240. Mr. Fontenot's writ of habeas corpus was granted and ordered to issue unless the State either granted him a new trial or ordered his permanent release from custody within 120 days. *Id.*

4. Federal Appeal

The State timely filed a notice of appeal, then moved in this court to stay the district court's grant of habeas relief pending appeal to prevent Mr. Fontenot's immediate retrial or permanent release. On November 4, 2019, we granted a stay of the new trial order but denied the request to stay Mr. Fontenot's release. As a result, Mr. Fontenot was released from custody on December 19, 2019, 120 days after the

district court's order, and 35 years after he was first arrested and jailed for the murder of Ms. Haraway. He agreed to be subject to conditions of release pending this appeal.

III. Threshold Issues

We must first address whether the district court erred in finding that Mr. Fontenot overcame the threshold barriers to the evaluation of his constitutional claims on the merits—specifically, the requirement to exhaust all claims in state court before presenting them in federal habeas, an adequate and independent state procedural default, and AEDPA's statute of limitations. The district court's legal conclusions regarding these threshold issues are reviewed de novo, while its factual findings are reviewed for clear error. *See Richie v. Mullin*, 417 F.3d 1117, 1120 (10th Cir. 2005).

Any factual findings by the state courts that bear upon these threshold issues are presumed correct, unless rebutted by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). "The presumption of correctness also applies to factual findings made by a state court of review based on the trial record." *Al-Yousif v. Trani*, 779 F.3d 1173, 1181 (10th Cir. 2015) (quoting *Morgan v. Hardy*, 662 F.3d 790, 797–98 (7th Cir. 2011)). "Clear and convincing" is "an intermediate standard of proof," *Santosky v. Kramer*, 455 U.S. 745, 756 (1982), satisfied by evidence that would "place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are 'highly probable,'" *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (quoting C. McCormick, Law of Evidence § 320, p. 679 (1954)). In the § 2254(e)(1) context, this standard

"is demanding but not insatiable." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).

A. Exhaustion

"A threshold question that must be addressed in every habeas case is that of exhaustion." *Harris v. Champion*, 15 F.3d 1538, 1554 (10th Cir. 1994). "A state prisoner generally must exhaust available state-court remedies before a federal court can consider a habeas corpus petition." *Bland v. Sirmons*, 459 F.3d 999, 1011 (10th Cir. 2006). This doctrine began as a judicially created prudential principle based on federal-state comity before its 1948 codification in the habeas statutes. *Rose v. Lundy*, 455 U.S. 509, 515–16 (1982); *see* 28 U.S.C. § 2254(b)(1). "Although the exhaustion rule is not jurisdictional, it creates a 'strong presumption in favor of requiring the prisoner to pursue his available state remedies.'" *Bear v. Boone*, 173 F.3d 782, 784 (10th Cir. 1999) (quoting *Granberry v. Greer*, 481 U.S. 129, 131 (1987)). "The exhaustion requirement is designed to avoid the unseemly result of a federal court upsetting a state court conviction without first according the state courts an opportunity to correct a constitutional violation." *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017) (internal quotation marks omitted) (quoting *Rose*, 455 U.S. at 518).

"To exhaust a claim, a state prisoner must pursue it through 'one complete round of the State's established appellate review process,' giving the state courts a 'full and fair opportunity' to correct alleged constitutional errors." *Selsor v. Workman*, 644 F.3d 984, 1026 (10th Cir. 2011) (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)). "A claim has been exhausted when it has been 'fairly presented' to the

state court." *Bland*, 459 F.3d at 1011 (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971)); *see generally Grant v. Royal*, 886 F.3d 874, 890–92 (10th Cir. 2018) (analyzing what amounts to "fair presentation"). "[T]he crucial inquiry is whether the 'substance' of the petitioner's claim has been presented to the state courts in a manner sufficient to put the courts on notice of the federal constitutional claim." *Prendergast v. Clements*, 699 F.3d 1182, 1184 (10th Cir. 2012) (quoting *Picard*, 404 U.S. at 278).

If a federal constitutional claim has been fairly presented to the state courts, the lack of a merits adjudication does not preclude that claim from being deemed exhausted: "A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him." *Coleman v. Thompson*, 501 U.S. 722, 732 (1991) (quoting 28 U.S.C. § 2254(b)).

A habeas petition is "mixed" if it includes both exhausted and unexhausted claims. In *Rose v. Lundy*, the Supreme Court held "that a district court must dismiss such 'mixed petitions,' leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims." 455 U.S. at 510. But "[t]he rule in *Rose* is not absolute." *Harris v. Champion*, 48 F.3d 1127, 1131 n.3 (10th Cir. 1995). "If a federal court that is faced with a mixed petition determines that the petitioner's unexhausted claims would now be procedurally barred in state court, 'there is a procedural default for purposes of federal habeas.'" *Id.* (quoting *Coleman*, 501 U.S. at 735 n.1). "Therefore, instead of dismissing the entire petition,

the court can deem the unexhausted claims procedurally barred and address the properly exhausted claims." *Id.* That is, in appropriate circumstances the court can apply an "anticipatory procedural bar" to functionally transform unexhausted claims into exhausted ones, thus obviating the need to dismiss a mixed petition. *See Anderson v. Sirmons*, 476 F.3d 1131, 1139 n.7 (10th Cir. 2007) ("Anticipatory procedural bar occurs when the federal courts apply procedural bar to an unexhausted claim that would be procedurally barred under state law if the petitioner returned to state court to exhaust it." (internal quotation marks omitted)).

The exhaustion requirement is also excused if returning to state court to present any unexhausted claims "would have been futile because either 'there is an absence of available State corrective process' or 'circumstances exist that render such process ineffective to protect the rights of the applicant.'" *Selsor*, 644 F.3d at 1026 (quoting 28 U.S.C. § 2254(b)(1)(B)(i), (ii)). The petitioner bears the burden of proving either that state remedies were exhausted or that exhaustion would have been futile. *Id.*

Here, Mr. Fontenot had two procedural avenues to exhaust his claims in state court: his direct appeals, decided in 1987 and 1994, and his application for postconviction relief, decided in 2014. We must "carefully parse" the nine substantive claims presented in Mr. Fontenot's second amended petition "to determine whether any of them ha[ve] not been properly exhausted." *Moore v. Schoeman*, 288 F.3d 1231, 1234 (10th Cir. 2002). Exhaustion is a question of law we review de novo. *Allen v. Zavares*, 568 F.3d 1197, 1200 n.4 (10th Cir. 2009).

1. Exhausted Claims

Six of Mr. Fontenot's nine claims were fairly presented to the OCCA on direct appeal, in state postconviction proceedings, or both, rendering them exhausted:

- Ineffective assistance of trial counsel: In his state postconviction application, Mr. Fontenot argued that Mr. Butner was ineffective for failing to 1) introduce a prior sworn statement by Mr. Ward; 2) investigate the harassing phone calls received by Ms. Haraway; and 3) investigate the McAnally's cash register tape to develop potentially exculpatory witness testimony. *See* Vol. 31 at 394–403. He makes the same three arguments in his second amended petition. *See* SAP, Vol. 30 at 125–36.
- Due process—interrogation: On both direct appeal and in his postconviction application, Mr. Fontenot argued that the police violated his due process rights through improper interrogation tactics, leading to a false confession. *Fontenot II*, 881 P.2d at 75–77; Vol. 31 at 403–414. He makes the same argument in his second amended petition. *See* SAP, Vol. 30 at 137–49.
- Due process—false evidence: In his post-conviction application, Mr. Fontenot argued that the prosecution violated his due process rights by knowingly admitting his false confession into evidence. *See* Vol. 31 at 414–17. He makes the same argument in his

second amended petition. *See* SAP, Vol. 30 at 149–51.

- Sufficiency of evidence: On direct appeal, Mr. Fontenot argued that the evidence was insufficient to convict because the State failed to establish the corpus delicti of the crimes independent of his confession, and that his confession was unreliable and untrustworthy because the State failed to present independent corroborating evidence. *See Fontenot II*, 881 P.2d at 77. He makes these same arguments in his second amended petition. *See* SAP, Vol. 30 at 151–65.
- Confrontation Clause: On direct appeal, Mr. Fontenot argued that various references to Mr. Ward's confession in the testimony of Detective Smith and Agent Rogers violated his Sixth Amendment right to confront his accusers. *See Fontenot II*, 881 P.2d at 81–82. Mr. Fontenot makes the same argument in his second amended petition based on the same trial testimony. *See* SAP, Vol. 30 at 165–74.
- Due process—investigation: In his post-conviction application, Mr. Fontenot argued that his "due process rights were violated due to the police misconduct that permeated the [Haraway] investigation." Vol. 31 at 417. Mr. Fontenot makes the same argument in his second amended petition. *See* SAP, Vol. 30 at 174–88.

2. Exhaustion of *Brady*

Mr. Fontenot brought a *Brady* claim in his state postconviction application, then supplemented that claim with additional allegations of material violations of the duty to disclose in his federal petition. This supplementation arguably rendered the claim "new," and thus unexhausted. *See Fairchild v. Workman*, 579 F.3d 1134, 1148–49 (10th Cir. 2009). We need not enter the thorny "new claim" thicket, however, because the State waived any argument that Mr. Fontenot's substantive *Brady* claim is unexhausted.

Under AEDPA, "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3). The State did so here by expressly conceding at oral argument before this court, through counsel, that Mr. Fontenot's substantive *Brady* claim is exhausted. *See* Oral Arg. at 40:00–41:00; *see also Eichwedel v. Chandler*, 696 F.3d 660, 671 (7th Cir. 2012) ("[A] State expressly waives exhaustion for purposes of § 2254(b)(3) where . . . it concedes clearly and expressly that the claim has been exhausted, regardless of whether that concession is correct."); *Sharrieff v. Cathel*, 574 F.3d 225, 229 (3d Cir. 2009) (holding that where a state "clearly, explicitly, and unambiguously relinquished and abandoned its right to assert the nonexhaustion defense" with respect to a claim, "[t]he fact that the State based its concession on a flawed legal conclusion is of no consequence").[16]

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16 We note that even had the State not waived exhaustion with respect to Mr. Fontenot's substantive *Brady* claim, it forfeited

Although the State concedes Mr. Fontenot's underlying *Brady* claim is exhausted, it asserts that "the question of whether Petitioner ever properly exhausted *Brady* as his 'cause' to overcome the procedural bars in state court is problematic." Appellant Br. at 22. According to the State, the fact that Mr. Fontenot "relied on a different 'cause' to overcome procedural

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the argument by failing to raise it in its briefing before the district court or on appeal. *See* Vol. 31 at 254 (State's argument before the district court that the recently produced APD documents "do[] not substantially alter the *gravamen* of Petitioner's *Brady* claims."); *id.* at 310 (State's argument before the district court that Mr. Fontenot merely "added bits and pieces of argument to his *Brady* and actual innocence claims based upon the recently produced Ada police reports"); *cf. Jones v. Hess*, 681 F.2d 688, 694 (10th Cir. 1982) ("'[B]its of evidence' which were not before the state courts will not render a claim unexhausted." (quoting *Nelson v. Moore*, 470 F.2d 1192, 1197 (1st Cir. 1972))). In *Granberry v. Greer*, 481 U.S. 129, 133 (1987), the Supreme Court held that when a state respondent fails to argue exhaustion, a federal appellate court has discretion to raise the issue on its own. But "[t]he appellate court is not required to dismiss for nonexhaustion notwithstanding the State's failure to raise it." *Id.*; *see Odum v. Boone*, 62 F.3d 327, 332 n.2 (10th Cir. 1995) (after *Granberry*, if the state fails to assert a nonexhaustion defense, "a federal court may, but need not (in the sense of a jurisdictional issue) raise the defense *sua sponte*"). Rather, if the state "fails . . . to raise an arguably meritorious nonexhaustion defense," it is "appropriate for the court of appeals to take a fresh look at the issue." *Granberry*, 481 U.S. at 134. "The court should determine whether the interests of comity and federalism will be better served by addressing the merits forthwith or by requiring a series of additional state and district court proceedings. . . . " *Id.* In *Wood v. Milyard*, the Court clarified that a federal appeals court should exercise this discretion to consider an overlooked nonexhaustion argument only in "exceptional cases," bearing the interests of federal-state comity in mind. 566 U.S. 463, 471 (2012) (quoting *Granberry*, 481 U.S. at 132).

bars in federal court"—a *Brady* violation—than in state court—a conflict of interest with postconviction counsel—is a notable "exhaustion problem." Appellant Reply at 8–9; *see also* Vol. 31 at 302–09 (State's motion to dismiss).

This contention conflates federal gateways with substantive claims. "'Cause' . . . is not synonymous with 'a ground for relief.'" *Martinez v. Ryan*, 566 U.S. 1, 17 (2012) (quoting 28 U.S.C. § 2254(i)). That is, "[a] finding of cause and prejudice does not entitle the prisoner to habeas relief," but "merely allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted." *Id.* Federal courts apply the doctrine of procedural default out of respect for state procedural rules. *See, e.g.*, *McCleskey v. Zant*, 499 U.S. 467, 493 (1991). And "[w]hether to apply procedural default doctrine out of respect for state rules is a *federal* question that state court decisions do not control." *Wood v. Milyard*, 721 F.3d 1190, 1194 (10th Cir. 2013). As a result, "[t]he question whether there is cause for a procedural default does not pose any occasion for applying the exhaustion doctrine when the federal habeas court can adjudicate the question of cause—a question of federal law—without deciding an independent and unexhausted constitutional claim on the merits." *Murray v. Carrier*, 477 U.S. 478, 489 (1986). Put another way, a petitioner's "cause" argument does not itself need to be exhausted before being presented to a federal habeas court, provided such argument does not depend on an unexhausted constitutional claim for substantive relief. But if a petitioner's excuse for a procedural default is also a constitutional claim in its own right, *Murray v. Carrier* held

that it "generally" must "be presented to the state courts as an independent claim before it may be used to establish cause." *Id.*

Here, Mr. Fontenot's "cause" argument (to the extent he makes one, *see infra* Part III.B.3) depends on his alleged substantive *Brady* violation. And, as established above, the State waived any argument that Mr. Fontenot's substantive *Brady* claim was not adequately presented to the Oklahoma courts in his postconviction application. Thus, no exhaustion problem is presented in connection with the issue of cause and prejudice.

3. Unexhausted Claims

In its motion to dismiss the second amended petition, the State argued that both Mr. Fontenot's attorney-client relationship and ineffective assistance of appellate counsel claims are unexhausted. Mr. Fontenot concedes that his petition is mixed.

The Sixth Amendment attorney-client claim, derived from the 2019 disclosure of several 1985 letters written by Mr. Fontenot to Mr. Butner and found in possession of the APD, is clearly unexhausted, having never been presented to the OCCA in any form.[17]

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[17] While maintaining that "exhaustion in state court would be the most appropriate course" for Mr. Fontenot's attorney-client claim, the State acknowledged in briefing before the district court that, "given the procedural history of the case," "this is a situation where the circumstances might warrant a determination on the merits rather than dismissal pending exhaustion." Vol. 31 at 310; *id*. at 315 ("Respondent asserts that this claim, though unexhausted, might be more readily denied on the merits.").

The district court found that Mr. Fontenot's ineffective assistance of appellate counsel claim was fairly presented to the state courts in his postconviction application and is thus exhausted, a finding the State challenges. *See Fontenot III*, 402 F. Supp. 3d at 1149 n.11; Appellant Br. at 18. The sole reference to the ineffectiveness of appellate counsel in Mr. Fontenot's postconviction application is at the end of a discussion of trial counsel's failure to develop witness evidence from the McAnally's cash register tape. *See* Vol. 31 at 402 ("[A]ppellate counsel, likewise, should have pursued this evidence in building a defense for Mr. Fontenot."). This statement is found under a subheading referring solely to trial counsel's ineffectiveness, which is in turn nested under a section heading referring solely to trial counsel. Such a cursory reference, embedded within briefing that concerns only the failures of trial counsel, is insufficient to constitute "fair presentation" of the claim. *See Bland*, 459 F.3d at 1011; *cf. Cannon v. Gibson*, 259 F.3d 1253, 1262 n.8 (10th Cir. 2001) ("[Petitioner's] conclusory assertion that counsel was ineffective . . . is simply not sufficient to preserve this claim.").

Section 2254 contemplates denial on the merits as an alternative to exhaustion, but "it is the entire petition, rather than individual claims, that must be dismissed on the merits." *Moore v. Schoeman*, 288 F.3d 1231, 1234 (10th Cir. 2002); *see* 28 U.S.C. § 2254(b)(2) ("*An application* for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." (emphasis added)). Where a petition mixes unmeritorious, unexhausted claims with meritorious, exhausted ones, there is no authority for evading the rule in *Rose* by denying the unexhausted claims on the merits while granting relief on the exhausted ones.

Because Mr. Fontenot's petition contains two unexhausted claims, we must assess whether any exceptions to "[t]he rule in *Rose*" are applicable. *Harris*, 48 F.3d at 1131 n.3.

4. Anticipatory Procedural Bar

Two state procedural bars are at play: Oklahoma's Uniform Post-Conviction Procedure Act, Okla. Stat. Ann. tit. 22, §§ 1080–89, and its state-law doctrine of laches. We analyze both to determine whether "the petitioner's unexhausted claims would now be procedurally barred in state court." *Harris*, 48 F.3d at 1131 n.3. Only if the state procedural rule is both independent of federal law and adequate to support the judgment—that is, "strictly or regularly followed and applied evenhandedly to all similar claims," *Smallwood v. Gibson*, 191 F.3d 1257, 1268 (10th Cir. 1999) (internal quotation marks omitted)—can it serve as the basis for an anticipatory procedural bar. *See Grant*, 886 F.3d at 892 ("[D]ismissal without prejudice for failure to exhaust state remedies is not appropriate if the state court would now find the claims procedurally barred on independent and adequate state procedural grounds." (quotation marks omitted)).

a. Post-Conviction Procedure Act

The OCCA has "repeatedly stated that Oklahoma's Post-Conviction Procedure

Act is not an opportunity to raise new issues, resubmit claims already adjudicated, or assert claims that could have been raised on direct appeal." *Rojem v. State* [*Rojem IV*], 925 P.2d 70, 72–73 (Okla. Crim. App. 1996) (footnote omitted). In other words, the

Post-Conviction Procedure Act "provides petitioners with very limited grounds upon which to base a collateral attack on their judgments." *Stevens v. State*, 422 P.3d 741, 745 (Okla. Crim. App. 2018).

"There are even fewer grounds available to a petitioner to assert in a subsequent application for post-conviction relief." *Id.* at 746. "Subsequent applications for post-conviction relief can only be filed under certain, limited circumstances," *Rojem v. State* [*Rojem III*], 888 P.2d 528, 530 n.6 (Okla. Crim. App. 1995), which are laid out in § 1086 of the Act:

> All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.

Okla. Stat. Ann. tit. 22, § 1086.

This rule is "rooted solely in Oklahoma state law," *Smallwood*, 191 F.3d at 1268, and is "regularly and even-handedly applied by the state courts," *id.* at 1268 n.8; *see also Moore v. Reynolds*, 153 F.3d 1086, 1097 (10th Cir. 1998), making it both independent and adequate. And because the factual basis for Mr. Fontenot's ineffective assistance of appellate counsel claim was available in 2013, when Mr. Fontenot filed

his postconviction application in state court, the OCCA would apply § 1086 and decline to entertain that claim on the merits if brought in any subsequent application. *See Cummings v. Sirmons*, 506 F.3d 1211, 1222–23 (10th Cir. 2007) ("Although the claim is technically unexhausted, it is beyond dispute that, were [the petitioner] to attempt to now present the claim to the Oklahoma state courts in a second application for post-conviction relief, it would be deemed procedurally barred."). Mr. Fontenot's ineffective assistance of appellate counsel claim is therefore subject to an anticipatory procedural bar and, as a result, is procedurally defaulted (and exhausted) for purposes of federal habeas review.

His attorney-client claim is not necessarily subject to the same treatment. Because it is based on evidence newly disclosed after the filing of Mr. Fontenot's postconviction application—specifically, the jailhouse letters turned over for the first time in 2019—the exception in § 1086 allowing prisoners to bring a subsequent application when sufficient reason exists for not asserting the claim in the prior application could, in theory, be applied by the OCCA to entertain Mr. Fontenot's attorney-client claim on the merits.

The State seizes upon this statutory exception, arguing the district court, in deeming as futile a return to state court to pursue any unexhausted claims, "ignored the fact that the OCCA allows claims to be presented on a second post-conviction application when there is good cause shown." Appellant Br. at 19. In support, the State cites to one case, *Jones v. State*, 704 P.2d 1138, 1140 (Okla. Crim. App. 1985). While *Jones* notes the statutory possibility that for "sufficient reason" the OCCA could entertain a new claim

in a second postconviction application, it does not apply that exception. Thus, the State has failed to highlight any occasion where the OCCA actually adjudicated a new constitutional claim on the merits in a subsequent application for postconviction relief.

At least one such occasion exists. In *Rojem IV*, 925 P.2d 70, the OCCA entertained a *Brady* claim based on newly discovered evidence in a subsequent postconviction application. The petitioner in *Rojem* was convicted of kidnapping, rape, and murder in 1988, and filed an initial application for postconviction relief that same year. *Id.* at 72. The state district court denied the application, and the OCCA affirmed in March 1992. *Rojem v. State* [*Rojem II*], 829 P.2d 683 (Okla. Crim. App. 1992). Less than two years later, the petitioner filed a second postconviction application, alleging the State suppressed exculpatory evidence which he had only recently discovered. *Rojem III*, 888 P.2d at 529. The district court dismissed on timeliness grounds, but the OCCA reversed that decision, holding that § 1086 of the Post-Conviction Act does not impose a time limit for filing subsequent applications. *Id.* at 530. On remand, the district court denied the claims in petitioner's subsequent application on the merits. *Rojem IV*, 925 P.2d at 72. The OCCA affirmed, agreeing that two OSBI reports not disclosed before trial did not amount to material evidence. *Id.* at 74. *See also Van Woudenberg v. State*, 942 P.2d 224 (Okla. Crim. App. 1997) (adjudicating merits of successor petition based on withheld evidence).

Thus, because § 1086 of the Post-Conviction Act contains an exception that could allow for Mr. Fontenot's attorney-client claim to be heard on the merits

in state court, and because that exception does not appear to be a complete dead letter, an anticipatory procedural bar cannot be applied to the attorney-client claim based on that statute. Nor is there a complete "absence of available State corrective process," 28 U.S.C. § 2254(b)(1)(B)(i), so as to remove Mr. Fontenot's obligation to return to state court.

b. Laches

However, the Post-Conviction Procedure Act is not the only state procedural bar at play. The state court applied laches to deny the claims in Mr. Fontenot's postconviction application from being adjudicated on the merits, finding that "[s]imply, too much time has elapsed due to Petitioner's own inaction," Vol. 31 at 675, a decision the OCCA affirmed. The State repeatedly refers to this application of laches as a procedural bar. *See, e.g.*, Appellant Br. at 7. Reasoning from the state court's summary dismissal of Mr. Fontenot's claims on this procedural ground—which dispensed with over 250 pages of postconviction briefing from the parties in a two-page order—the district court found that "if Mr. Fontenot returned to state post conviction on a successor action to exhaust his claims, those claims would be procedurally barred based upon a consistent pattern and practice of the [OCCA]." *Fontenot III*, 402 F. Supp. 3d at 1150.

The OCCA does consistently apply laches to bar applications for postconviction relief brought after decades have elapsed since trial. *See, e.g.*, *Paxton v. State*, 903 P.2d 325, 326 (Okla. Crim. App. 1995) (thirty years between trial and application for relief); *Thomas v. State*, 903 P.2d 328, 330 (Okla. Crim. App. 1995) (fifteen years); *Berryhill v. Page*, 391 P.2d 909,

910 (Okla. Crim. App. 1964) (twenty-four years); *see also McLaurin v. State*, No. 2017–583, at *8 (Okla. Crim. App. Aug. 1, 2017) (unpublished) (twenty-one years). As the State asserted in its motion to dismiss, "for at least seventy years, the OCCA has applied the doctrine of laches to deny relief numerous times, even when the delay was shorter than in Petitioner's case, and continues to do so up to the present day." Vol. 31 at 237–38. Additionally, we have previously held (albeit in an unpublished opinion) that an OCCA decision denying postconviction relief based on laches rested on a ground both independent, because laches is an exclusively state-law doctrine, and adequate, because the doctrine of laches "is both firmly established and regularly followed by the OCCA." *Smith v. Addison*, 373 F. App'x 886, 888 (10th Cir. 2010);[18] *see also Doe v. Jones*, 762 F.3d 1174, 1183 (10th Cir. 2014) (referencing "the possibility that a laches determination [by the OCCA] could be a procedural bar as an adequate and independent state ground for dismissal of the post-conviction application"). We thus accept the State's uncontested assertion that "Oklahoma has regularly and even-handedly followed this rule," Vol. 31 at 238, and determine Oklahoma's laches doctrine to be an independent and adequate state procedural bar that can be applied functionally to exhaust claims brought in federal habeas through an anticipatory procedural default.

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[18] "Unpublished decisions are not precedential, but may be cited for their persuasive value." 10th Cir. R. 32.1(A); *see Noreja v. Comm'r, SSA*, 952 F.3d 1172, 1176 (10th Cir. 2020) ("[I]n appropriate circumstances [we look] to an unpublished opinion if its rationale is persuasive and apposite to the issue presented.").

The OCCA has explained in the following terms its rationale for applying laches to turn away petitioners who long delay presenting their claims:

> [I]t has repeatedly been held that where petition for release by habeas corpus is delayed for a period of time so long that minds of the trial judge and court attendants may have become clouded by time and uncertain as to what happened, and the possibility of dislocation of witnesses and loss of records and rights sought to be asserted have become mere matters of speculation, based upon faulty recollections or figments of imagination, justice may require the denial of the writ under the doctrine of laches.

Berryhill, 391 P.2d at 910; *see also Paxton*, 903 P.2d at 327 ("[T]he doctrine of laches has been and continues to be applicable, in appropriate cases, to collateral attacks upon convictions" "where a petitioner has forfeited that right through his own inaction."); Okla. *Brady* Br. at 12 ("[T]he OCCA has evenhandedly treated the same all petitioners who wait too long to litigate their stale claims.").

After denying Mr. Fontenot's first postconviction application on this ground, there is no indication the OCCA would deviate from these principles should Mr. Fontenot present his attorney-client claim in a subsequent application more than 30 years after his 1988 conviction, notwithstanding the existence of a theoretical vehicle for such a claim in § 1086 of the Post-Conviction Procedure Act. This is especially so because, as the State noted in its briefing below, the recent discovery of Mr. Fontenot's 1985 letters to Mr.

Butner in the APD's files "is a symptom of the laches problem," Vol. 31 at 313—that is, a predictable result of the long delayed presentation of Mr. Fontenot's claims. "Ultimately," the State asserted, due to the passage of time, "it is impossible to tell how this letter came to be placed with the Ada Police reports, or when that even happened." *Id.* And "[t]here is likely nobody who can explain how this grouping of letters ever came to be stored by the Ada Police Department." *Id.*

We determine the Oklahoma courts would agree with this reasoning, given their use of laches in post-conviction cases, and again apply the doctrine to bar Mr. Fontenot's attorney-client claim were it brought as part of any subsequent application. To be sure, Mr. Fontenot did not obtain these letters until 2019. But under the laches logic applied by Oklahoma courts, if he had initiated the postconviction process in, say, 1995 rather than 2013, the letters could have come to light at a time when the question of their provenance might still be answerable. *See, e.g.*, *Application of Smith*, 339 P.2d 796, 799 (Okla. Crim. App. 1959) ("One cannot sit by and wait until lapse of time handicaps or makes impossible the determination of the truth of a matter, before asserting his rights. This is in accordance with the uniform holding of this Court over a long period of years."); *Ex parte Motley*, 193 P.2d 613, 617 (Okla. Crim. App. 1948) ("The right to relief by habeas courts may be lost by laches, when . . . due to dislocation of witnesses. . . and the loss of records, the rights sought to be asserted have become mere matters of speculation."). Additionally, under the atypical formulation of Oklahoma's laches doctrine, the State need not make any showing of prejudice

from the delay. *See Thomas*, 903 P.2d at 332. Thus, "we have no doubt the OCCA would apply its procedural bar to [Mr. Fontenot's attorney-client claim] based on the same argument[ ]" it used to dispense with his claims on state postconviction, *see Cannon v. Gibson*, 259 F.3d 1253, 1269 (10th Cir. 2001)—that "too much time has elapsed due to Petitioner's own inaction," Vol. 31 at 675.

Further support is supplied by *Smith v. State*, No. 2006–707 (Okla. Crim. App. Aug. 25, 2006) (unpublished), a case cited by the State in its briefing before the district court. In *Smith*, a state prisoner convicted of murder in 1979 brought a postconviction application eighteen years later, in 1997, claiming *Brady* violations. The state district court rejected the application on laches grounds due to the petitioner's inaction. While the petitioner "argue[d] that he was not afforded proper discovery and that he did not receive exculpatory evidence," the court found that "his failure to timely raise these issues[] has made it difficult, if not impossible, to determine exactly what he received at or prior to trial." *Id.* at *2. The OCCA affirmed, stating in the process that "Petitioner's contention that he was unable to discover evidence that allegedly had been suppressed until the year 1993 . . . is not sufficient reason to overcome the doctrine of laches." *Id.* at *3. Per this logic, Mr. Fontenot's assertion that he was unable to discover evidence suppressed until 2019 would be insufficient to overcome laches, because his failure to timely raise these issues has made it impossible to determine how his letters came into the APD's possession.

To apply an anticipatory procedural bar, absolute certainty is not required regarding "how another court

will resolve an unexhausted claim under its own procedural rules." *Williams v. Trammell*, 782 F.3d 1184, 1213 (10th Cir. 2015). Rather, "it is enough if, looking to the state's treatment of its procedural bar, the likelihood of default *in the petitioner's case* is beyond debate or dispute." *Id.* (emphasis added). "The OCCA has consistently and evenhandedly applied laches to petitioners, like this one, who come to court very late with their claims." Okla. *Brady* Br. at 13. Consequently, we determine it beyond debate or dispute that the Oklahoma courts would once more apply laches to bar adjudication of Mr. Fontenot's attorney-client claim on the merits, because thirty-five years have elapsed since Mr. Fontenot wrote the letters in question, making it virtually impossible to determine how they came to be in possession of the APD. We thus hold Mr. Fontenot's attorney-client claim to be anticipatorily barred on the procedural ground of laches, in addition to holding his appellate counsel claim anticipatorily barred by the Post-Conviction Procedure Act.

[* * *]

In summary, seven of Mr. Fontenot's nine claims are exhausted through either fair presentation or the State's waiver. His remaining two claims are subject to an anticipatory procedural bar based on the operation of state law, rendering them procedurally defaulted and effectively exhausted. Functionally, then, Mr. Fontenot presents a fully exhausted petition, rather than a mixed petition requiring procedural remand. We therefore proceed to evaluate the remaining threshold barriers to a merits adjudication of his constitutional claims.

B. Procedural Barriers

There are two procedural barriers at issue—Mr. Fontenot's state court procedural default on laches grounds and AEDPA's statute of limitations for federal habeas claims.

1. Procedural Default

"[A]n important 'corollary' to the exhaustion requirement" is that "a federal court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule." *Davila*, 137 S. Ct. at 2064 (quoting *Dretke v. Haley*, 541 U.S. 386, 392 (2004)). "A state procedural default is independent if it relies on state law, rather than federal law," and is "adequate if it is firmly established and regularly followed." *Smith v. Workman*, 550 F.3d 1258, 1274 (10th Cir. 2008) (internal quotation marks omitted).

The Oklahoma courts barred the claims presented in Mr. Fontenot's application for postconviction relief based on the state law doctrine of laches. Mr. Fontenot has contested neither the independence nor adequacy of this doctrine. And as discussed in connection with exhaustion, *supra* Part III.A.4, we determine Oklahoma's laches doctrine to be a state-law based procedural rule that is both firmly established in the postconviction setting and regularly followed by the OCCA. Thus, those claims Mr. Fontenot presented for the first time in state postconviction proceedings—including his *Brady* claim—are subject to a state court procedural default.

2. Statute of Limitations

AEDPA erects a one-year statute of limitations for a state prisoner to bring a writ of habeas corpus in federal court, running from the latest of, for these purposes, "the date on which the [state-court] judgment became final." 28 U.S.C. § 2244(d)(1)(A). Mr. Fontenot's second conviction became final prior to AEDPA's effective date. In such case, "the one year limitation period for a federal habeas petition starts on AEDPA's effective date, April 24, 1996." *Fisher v. Gibson*, 262 F.3d 1135, 1142 (10th Cir. 2001). As Mr. Fontenot did not file on or before April 24, 1997, *see United States v. Hurst*, 322 F.3d 1256, 1261 (10th Cir. 2003), all his claims are time barred under federal law.

3. Exceptions

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman, 501 U.S. at 750.

Mr. Fontenot defaulted his *Brady* claim pursuant to an independent and adequate state procedural rule. He must therefore pass through one of these two procedural gateways—cause and prejudice or the fundamental miscarriage of justice exception (commonly known as a showing of actual innocence)—to

facilitate federal habeas review. And to have his *Brady* claim heard on the merits in federal court, Mr. Fontenot must also find a way around the expiration of AEDPA's statute of limitations.

While a showing of "cause" can help excuse a procedural default, it is not the right vehicle for a bid to overcome AEDPA's time bar. Rather, an assertion that extraordinary circumstances prevented timely filing is properly brought as a claim for equitable tolling. While analogous, these two doctrines remain analytically distinct. *Compare Amadeo v. Zant*, 486 U.S. 214, 221 (1988) (noting the Supreme Court has "not attempted to establish conclusively the contours of the [cause] standard") *and Carrier*, 477 U.S. at 488 ("[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.") *with Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) ("[A] litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way."). On the other hand, a credible showing of actual innocence lets a petitioner overcome both a procedural default and AEDPA's limitations period. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013).

In *Dretke v. Haley*, the Supreme Court stated that when faced with an actual innocence allegation, a federal court "must first address all nondefaulted claims for comparable relief and other grounds for cause to excuse the procedural default." 541 U.S. at 393–94. But *Haley* concerned the proper protocol only with respect to state court procedural default. Here

we are faced not just with that issue, but also with a failure to comply with the federal limitations period.

For multiple reasons, we invert the standard order of operations to address Mr. Fontenot's actual innocence plea at the outset. First, Mr. Fontenot dedicated the bulk of his habeas petition to establishing actual innocence, while making only a fleeting reference to the issue of cause.[19] Second, he made no equitable tolling argument. And third, as mentioned, while actual innocence can excuse both a state court procedural default *and* the expiration of AEDPA's time bar, a showing of cause and prejudice, standing alone, addresses only the former issue. As a result, were we to reserve actual innocence, we would need to first analyze both an issue that received negligible briefing ("cause") and another that was forfeited (equitable tolling), an unpaved path we can avoid setting upon in the event of a meritorious showing of innocence. In these circumstances, *Haley*'s "avoidance principle" lacks its typical purchase. 541 U.S. at 394.

In the interests of both judicial economy and adequate presentation of the issues before us, "[w]e thus limit ourselves to answering whether the actual innocence exception applies." *McKay v. United States*, 657 F.3d 1190, 1196 (11th Cir. 2011).

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[19] The extent of the cause and prejudice argument Mr. Fontenot presented in his petition was to assert that "the elements of [a] substantive [*Brady*] claim itself mirror the cause and prejudice inquiry and proof of one is necessarily proof of the other." SAP, Vol. 30 at 32. The district court credited this assertion without conducting any independent analysis. *See Fontenot III*, 402 F. Supp. 3d at 1129.

C. Actual Innocence

"[A] credible showing of actual innocence may allow a prisoner to pursue his constitutional claims . . . on the merits notwithstanding the existence of a procedural bar to relief." *Perkins*, 569 U.S. at 392. "This rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera v. Collins*, 506 U.S. 390, 404 (1993) (quoting *McCleskey*, 499 U.S. at 502). When used to overcome procedural issues, "a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* While Congress limited the operation of this gateway in the AEDPA provisions dealing with second-or-successive petitions, *see* § 2244(b)(2)(B), and the holding of evidentiary hearings in federal court, *see* § 2254(e)(2), "[n]either provision addresses the type of petition at issue here—a first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence." *House v. Bell*, 547 U.S. 518, 539 (2006). And "[i]n a case not governed by those provisions, *i.e.*, a first petition for federal habeas relief, the miscarriage of justice exception survived AEDPA's passage intact and unrestricted." *Perkins*, 569 U.S. at 397.

The Supreme Court has "consistently reaffirmed the existence and importance of the exception for fundamental miscarriages of justice." *Schlup*, 513 U.S. at 321. It has been applied to overcome various procedural defaults, including those stemming from successive petitions, "abusive" petitions, failure to

develop facts in state court, and failure to observe state procedural rules. *Perkins*, 569 U.S. at 393. Most recently, in *McQuiggin v. Perkins*, the Court recognized it as an available equitable exception to AEDPA's time bar for first petitions, holding that actual innocence "serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup* and *House*, or, as in this case, expiration of the statute of limitations." *Id.* at 386. Accordingly, a credible showing of actual innocence will allow Mr. Fontenot to overcome both his state court procedural default and his failure to abide by the federal statute of limitations in order to have his *Brady* claim heard on the merits.

"[P]risoners asserting innocence as a gateway to defaulted claims must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *House*, 547 U.S. at 537–38 (quoting *Schlup*, 513 U.S. at 327).

> It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do. Thus, a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.

Schlup, 513 U.S. at 329.

Removing the double negative, a petitioner's burden at the gateway stage is to demonstrate "that more likely than not any reasonable juror would have reasonable doubt." *House*, 547 U.S. at 538. As this formulation makes clear, "actual innocence" is something of a misnomer, because "the *Schlup* standard does not require absolute certainty about the petitioner's guilt or innocence"—that is, a petitioner need not make "a case of conclusive exoneration." *Id.* at 538, 553; *see also Schlup*, 513 U.S. at 327 ("[T]he showing of 'more likely than not' imposes a lower burden of proof than the 'clear and convincing' standard."). Thus, a "petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict." *Id.* at 331; *see House*, 547 U.S. at 553–54 (granting a gateway innocence claim despite acknowledging that "[s]ome aspects of the State's evidence. . . still support an inference of guilt"); *Cleveland v. Bradshaw*, 693 F.3d 626, 633 (6th Cir. 2012) (noting that the actual innocence standard "is less strict than the insufficient evidence standard").

At the same time, however, "it is by no means easy for a petitioner to meet the *Schlup* standard." *Case v. Hatch*, 731 F.3d 1015, 1036 (10th Cir. 2013). The Court has stressed that the standard is "demanding," *Perkins*, 569 U.S. at 401, and "that tenable actual-innocence gateway pleas are rare," *id.* at 386, arising only "in an extraordinary case," *Murray*, 477 U.S. at 496. "The gateway should open only when a petition presents 'evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.'"

Perkins, 569 U.S. at 401 (quoting *Schlup*, 513 U.S. at 316). The actual innocence standard is designed to "ensure[] that petitioner's case is truly 'extraordinary' while still providing [a] petitioner a meaningful avenue by which to avoid a manifest injustice." *Schlup*, 513 U.S. at 327 (quoting *McCleskey*, 499 U.S. at 494).[20]

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[20] The dissent agrees with our articulation of the relevant actual-innocence standard but asserts we fail to faithfully apply it to the facts of this case. But in our view, it is the dissent that misstates and misapplies the relevant standard. The dissent suggests Mr. Fontenot must show he could not have committed the charged crimes. Dissent at 3–4 (criticizing the majority opinion for purportedly failing to consider "that a reasonable juror could conclude that [Mr.] Fontenot could have . . . committed the crimes," notwithstanding his alibi). That is not a proper recitation of the standard. Rather, Mr. Fontenot's burden under the actual-innocence standard is to demonstrate "that *more likely than not* any reasonable juror would have *reasonable doubt*." *House v. Bell*, 547 U.S. 518, 538 (2006) (emphasis added). He need not make "a case of conclusive exoneration." *Id.* at 553.

Next, when applying the actual-innocence standard, the dissent cherry-picks one piece of inculpatory evidence—Mr. Fontenot's confession—while dismissing six important categories of new exculpatory evidence as "peripheral, cumulative, or remote in time." Dissent at 5. The dissent does not seriously contest that Mr. Fontenot's confession was highly problematic. *See id.* (acknowledging our description that Mr. Fontenot's "'confession was [(1)] shot through with clear falsehoods and inconsistencies, [(2)] produced no independently verifiable information, . . . [(3)] provided the police no new facts about the crime[,] . . . [and (4)] Mr. Fontenot fully recanted just two days later,'" and then stating "[a] reasonable juror would take these factors . . . into account when considering the confession" (quoting Maj. Op. at 120)). The dissent nonetheless asserts a reasonable jury would "give substantial weight to" it. *Id.* Even if we assume a reasonable jury would give substantial weight to Mr. Fontenot's problematic confession, however, that merely shows that "[s]ome

1. New Evidence

To be credible, a claim of actual innocence requires a petitioner to present "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324. In assessing the adequacy of a petitioner's showing, "the habeas court must consider 'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial,'" *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 327–28). Put another way, the innocence inquiry "requires a holistic judgment about 'all the evidence,' and its likely effect on reasonable jurors applying the reasonable-doubt standard." *Id.* at 539 (quoting *Schlup*, 513 U.S. at 328).

The *Schlup* Court did not precisely define what it meant by "new reliable evidence . . . that was not presented at trial." 513 U.S. at 324. As a result, "[t]here is a circuit split about whether the 'new' evidence required under *Schlup* includes only newly discovered evidence that was *not available* at the time of trial, or broadly encompasses all evidence that was *not presented* to the fact-finder during the trial, *i.e.*, newly presented evidence." *Cleveland*, 693 F.3d at 633 (emphasis added); *see also Reeves v. Fayette SCI*,

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aspects of the State's evidence . . . still support an inference of guilt." *House*, 547 U.S. at 553–54. As discussed, such evidence does not block a defendant's passage through the actual-innocence gateway. *Id.*; *see also Schlup v. Delo*, 513 U.S. 298, 331 (1995) ("[A] petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict.").

897 F.3d 154, 161 (3d Cir. 2018) ("[C]ircuit courts are split on whether the evidence must be newly discovered or whether it is sufficient that the evidence was not presented to the fact-finder at trial.").

"The Seventh and Ninth Circuits have interpreted this phrase to mean evidence is 'new' for purposes of a *Schlup* analysis so long as it was 'not presented' at trial." *Kidd v. Norman*, 651 F.3d 947, 952 (8th Cir. 2011) (citing *Gomez v. Jaimet*, 350 F.3d 673, 679– 80 (7th Cir. 2003), and *Griffin v. Johnson*, 350 F.3d 956, 962–63 (9th Cir. 2003)). The Second and Sixth Circuits also agree with this "newly presented" view. *See Rivas v. Fischer*, 687 F.3d 514, 543 (2d Cir. 2012) (defining "new evidence" as "evidence not heard by the jury"); *Souter v. Jones*, 395 F.3d 577, 595 n.9 (6th Cir. 2005) ("[E]ven if the photographs of the bloody clothes were available in 1992, there is no evidence in the record that they were ever presented to the jury and therefore, are new evidence in support of [petitioner's] actual innocence claim under *Schlup*.").

On the other hand, the Third and Eighth Circuits have held "that evidence is 'new' only if it was not available at the time of trial through the exercise of due diligence." *Kidd*, 651 F.3d at 952 (citing *Hubbard v. Pinchak*, 378 F.3d 333, 341 (3d Cir. 2004)). While nominally declining to weigh in, the Fifth Circuit also appears to endorse this "newly discovered" view, having held that "[e]vidence does not qualify as 'new' under the *Schlup* actual-innocence standard if 'it was always within the reach of [a petitioner's] personal knowledge or reasonable investigation.'" *Hancock v. Davis*, 906 F.3d 387, 389– 90 (5th Cir. 2018) (quoting *Moore v. Quarterman*, 534 F.3d 454, 465 (5th Cir. 2008)).

This case requires us to pick a side. We adopt the "newly presented" view of *Schlup* evidence over the "newly discovered through diligence" view for two reasons.

First, actual innocence works to remove procedural obstacles to habeas relief in a manner that does not depend on satisfying requirements for standard equitable exceptions to those obstacles, which typically involve some excuse for the delayed presentation of a claim. In particular, as confirmed by *Perkins*, a petitioner who establishes actual innocence need not make a showing of diligence in order to get his otherwise time-barred substantive claims heard. *See* 569 U.S. at 399. Those courts that categorically reject actual-innocence claims unless the petitioner shows he could not have discovered the new evidence through the exercise of diligence prior to trial seem to be in conflict with *Perkins*, at least in the time-bar context—and there does not appear to be any reason to treat the procedural-bar context differently in this regard.

Support for this conclusion is also found in the Supreme Court's various pronouncements that the actual innocence exception operates independently from the "cause" requirement. The miscarriage of justice principle is an "exception" to the "general rule" that "claims forfeited under state law may support federal habeas relief only if the prisoner demonstrates cause for the default and prejudice from the asserted error." *House*, 547 U.S. at 536. That is, "'[i]n appropriate cases' the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.'" *Carrier*, 477 U.S. at 495 (alter-

ation in original) (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)). The actual innocence exception thus serves as an unconditional safety net to ensure that constitutional claims receive consideration in the "extraordinary" case. Disallowing new evidence from being used in support of a *Schlup* claim if that evidence could have been discovered before trial "through the exercise of due diligence," *Kidd*, 651 F.3d at 952, or if it was "always within the reach of [a petitioner's] personal knowledge or reasonable investigation," *Hancock*, 906 F.3d at 390, would hinder "the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons," *Herrera*, 506 U.S. at 404, by erecting a "cause" barrier where the Court has made clear that one does not belong.

Second, adding diligence to the new evidence requirement does nothing to further its purpose. The aim is to lend "credibility" to the claim of innocence by showing it is not based solely on evidence a jury has already found sufficient to convict the petitioner. *See Schlup*, 513 U.S. at 324 ("To be credible," an actual innocence claim "requires petitioner to support his allegations of constitutional error with new reliable evidence . . . that was not presented at trial."). Whether the petitioner's jury could have heard the new evidence if he (or, as it were, his counsel) had been diligent in developing and presenting it is beside the principal point of avoiding a manifest injustice. Further, the fact that new reliable evidence of innocence "is obviously unavailable in the vast majority of cases," such that "claims of actual innocence are rarely successful," *id.*, mitigates any concern that the "newly presented" view will lead to a multiplication of unmeritorious claims.

We thus hold that any reliable evidence not presented to the jury at Mr. Fontenot's 1988 new trial can be factored into our assessment of his actual innocence gateway claim.

Although a lack of diligence in developing evidence does not disqualify the use of that evidence in support of a *Schlup* showing, the assessment of diligence does still factor into the holistic innocence inquiry, at least with regard to overcoming AEDPA's time bar. In *Perkins*, the Court clarified that while not "an absolute barrier to relief" or "an unyielding ground for dismissal," a habeas petitioner's unjustifiable delay in presenting new evidence is "a factor in determining whether actual innocence has been reliably shown." 569 U.S. at 387, 401. That is, untimeliness "does bear on the credibility of evidence proffered to show actual innocence." *Id.* at 401. "Considering a petitioner's diligence, not discretely, but as part of the assessment whether actual innocence has been convincingly shown, attends to the State's concern that it will be prejudiced by a prisoner's untoward delay in proffering new evidence." *Id.* at 399.

2. Standard of Review

The district court determined that "Mr. Fontenot's actual innocence can equitably toll the AEDPA's statute of limitations," *Fontenot III*, 402 F. Supp. 3d at 1129, and the State likewise described the district court as having "applied equitable tolling to reach the merits" of Mr. Fontenot's claims, Appellant Br. at 55. Equitable tolling, however, does not provide the proper framework for a claim that actual innocence overrides a time bar. In *Perkins*, the Court specified that a petitioner who "maintains that a plea of actual

innocence can overcome AEDPA's one-year statute of limitations" "seeks an equitable *exception* to § 2244 (d)(1), not an extension of the time statutorily prescribed." 569 U.S. at 392. In support, it cited a Second Circuit opinion that distinguished "a plea to override the statute of limitations when actual innocence is shown" from equitable tolling. *Id.* (citing *Rivas*, 687 F.3d at 547 n.42). Thus, the abuse of discretion standard applicable to tolling does not apply to our review of the district court's actual innocence finding.

We have not directly addressed what standard of review applies to claims of actual innocence, but our sister circuits generally agree that the determination is a mixed question of fact and law. *See Doe v. Menefee*, 391 F.3d 147, 163 (2d Cir. 2004); *U.S. ex rel. Bell v. Pierson*, 267 F.3d 544, 551–52 (7th Cir. 2001). "A determination of a mixed question of fact and law carries no presumption of correctness and is to be reviewed de novo on federal habeas review." *Maes v. Thomas*, 46 F.3d 979, 988 (10th Cir. 1995).

That de novo review is the appropriate standard under which to assess the district court's fundamental miscarriage of justice determination is reinforced by the reasoning of *House v. Bell*. There, the Court rejected a requirement to show "clear error as to . . . specific determinations" in order to upset a district court's finding, as that standard would "overstate" the effect of the habeas court's ruling on actual innocence. 547 U.S. at 539.

> Deference is given to a trial court's assessment of evidence presented to it in the first instance. Yet the *Schlup* inquiry, we repeat, requires a holistic judgment about "all the

> evidence," and its likely effect on reasonable jurors applying the reasonable-doubt standard. As a general rule, the inquiry does not turn on discrete findings regarding disputed points of fact, and "[i]t is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses."

Id. at 539–40 (quoting *Schlup*, 513 U.S. at 328, 329). This reasoning indicates that little to no deference should be given to the application by federal habeas courts of "*Schlup*'s predictive standard regarding whether reasonable jurors would have reasonable doubt." *Id.* at 540.

Nor do we defer to state court adjudications in this sphere: AEDPA's deferential standard of review for claims decided on the merits by a state court, found in § 2254(d), has no application to a gateway innocence assertion, which is an exception to federal procedural obstacles to relief rather than a substantive claim. *See Blackmon v. Williams*, 823 F.3d 1088, 1101 n.2 (7th Cir. 2016); *Sharpe v. Bell*, 593 F.3d 372, 378 (4th Cir. 2010). But the presumption of correctness applied to state court factfinding under § 2254(e)(1) does still apply. Therefore, "when a state court has made a factual determination bearing on the resolution of a *Schlup* issue, the petitioner bears the burden of rebutting this presumption by 'clear and convincing evidence.'" *Teleguz v. Pearson*, 689 F.3d 322, 331 (4th Cir. 2012) (quoting *Sharpe*, 593 F.3d at 378); *cf. Klein v. Neal*, 45 F.3d 1395, 1400 (10th Cir. 1995) (state court factfinding entitled to presumption of correctness in fundamental miscarriage of justice inquiry).

3. Analysis

Adopting the "newly presented" view of *Schlup* evidence instead of the "newly discovered" view means that even if some evidence not presented at trial was, as the State claims, "available to the defense since the 1980s," Appellant Br. at 30, such evidence is factored into the holistic evaluation of Mr. Fontenot's actual innocence plea nonetheless. Additionally, the State's contention that Mr. Fontenot's petitions "lacked a unifying theory for why this [c]ourt or anyone should believe that some other individual committed the crime" is not dispositive. Appellant Br. at 41; *see also id.* at 46 (referencing Mr. Fontenot's "contradictory" theories of the case). As discussed, the *Schlup* standard does not demand conclusive proof of exoneration; rather, it involves a probabilistic determination that, in light of all the evidence—"old and new; admissible and inadmissible," *Case*, 731 F.3d at 1036—"more likely than not any reasonable juror would have reasonable doubt," *House*, 547 U.S. at 538. Of course, reasonable doubt "does not require [the defense] to prove to [the jury] who did these things." N/T, Vol. 37 at 306 (Mr. Butner's closing argument). And neither is it our "function . . . to make an independent factual determination about what likely occurred." *House*, 547 U.S. at 538.

Mr. Fontenot presents six categories of new evidence in support of his actual innocence gateway assertion, all of which the district court credited. SAP, Vol. 30 at 32– 62; *Fontenot III*, 402 F. Supp. 3d at 1129–49. We analyze each category in turn, contrasting the evidence put on at the 1988 new trial with that which is newly presented.

a. Alibi evidence

At Mr. Fontenot's new trial, Gordon Calhoun testified for the State that he threw a keg party at his apartment on April 28, 1984, but that neither Mr. Fontenot nor Mr. Ward attended. Mr. Butner failed to impeach him on this point, and put on no defense regarding Mr. Fontenot's presence at the party.

During his pre-polygraph interview on October 21, Mr. Fontenot recalled several people at the Calhoun keg party on April 28, including Mr. Calhoun, "Bruce" from Konawa, Janette Roberts, Mr. Ward, and Michael Shane Lindsay. He also recalled that someone at the party was playing the drums. In a letter written to Mr. Butner in June 1985, which Mr. Butner never received, Mr. Fontenot again stated that "Bruce" from Konawa "was at the keg party Gordon Calhoun was throwing," while listing Ms. Roberts as another alibi witness. Ex. 95, Vol. 30 at 523, 529.

The police interviewed Ms. Roberts on October 19, 1984, the day Mr. Fontenot confessed. She stated that on a Saturday night the previous spring, Mr. Calhoun threw a keg party at his apartment next door to hers on South Townsend. Mr. Calhoun had gone to Texas to buy the kegs, according to Ms. Roberts, which she knew because she had split the cost with him.[21] Ms. Roberts said the party started sometime between 7 and 9 p.m., that she "was in and out most of the time the party was going on," that both Mr. Fontenot and Mr. Ward were there, and that she never saw either leave after the party started. Ex. 44, Vol. 6 at 37. Ms. Roberts also identified sever-

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[21] At the time, Texas beer had a higher alcoholic content than beer sold in Oklahoma, making it more desirable.

al individuals from Konawa as being in attendance, including someone named "Bruce." She stated that neither Mr. Fontenot nor Mr. Ward had transportation at that time and that they both lived in her apartment.[22]

The "Bruce" from Konawa referenced by both Mr. Fontenot and Ms. Roberts in their October 1984 statements is Bruce DePrater, who was good friends with Mr. Calhoun. In a 2013 affidavit provided in support of Mr. Fontenot's petition, Mr. DePrater stated that he remembered a keg party at Mr. Calhoun's apartment sometime in the spring of 1984. He and Mr. Calhoun had gone to Texas to purchase the kegs for this party, confirming what Ms. Roberts told police in 1984. Mr. DePrater played the guitar at this party while Mr. Calhoun played the drums, corroborating a detail from Mr. Fontenot's October 21 statement. Mr. DePrater recalled seeing Mr. Fontenot three times throughout the night, the last being when he followed Mr. Fontenot into a passageway between the Calhoun and Roberts apartments to hide from police responding to a noise complaint about the party late that night.

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[22] Ms. Roberts also told police that Mr. Ward was at her apartment earlier that Saturday, but left to put plumbing in for his mother, before returning for the party at around 9 p.m. This confirmed a key detail of the story Mr. Ward gave police a week earlier, on October 12. *See* P/H, Vol. 32 at 512 (Detective Baskin's testimony that "[Mr. Ward] said they got back and started around 10:30 or 11:00 Saturday morning and worked all day on the plumbing. He said he got through somewhere around 9:00 p.m. He said he then took a shower and walked over to Janette Roberts' house at 509 1/2 South Townsend. He said that Gordon Calhoun was having a keg party there. And [he] said that he spent the night at Gordon's and never left the party.").

In his affidavit, Mr. DePrater identified a man named Eric Thompson as also being at the party. Mr. Thompson confirmed via his own 2013 affidavit that he traveled from Konawa to Ada with his brother Chris for Mr. Calhoun's keg party on April 28, 1984, and that he saw Mr. Fontenot there. Mr. Thompson specifically remembered Mr. Fontenot joking about repeatedly filling the same beer can at the keg.

Stacy Shelton, Mr. DePrater's sister, provided another affidavit in support of Mr. Fontenot's petition. She confirmed various details about the Calhoun keg party: that it was on April 28, 1984; that Mr. DePrater, the Thompson brothers, and Ms. Roberts all attended; that Mr. Calhoun was playing the drums; and that the APD was called out to the party on a noise complaint.[23] In her affidavit, Ms. Shelton recounted that the police ignored her when she tried to tell them neither Mr. Fontenot nor Mr. Ward could have committed the murder because both were at the party, and that when she testified for the defense about this party at Mr. Ward's 1989 new trial, District Attorney Bill Peterson pressured her (unsuccessfully) to get back on the stand and recant.

These affidavits are corroborated by Mr. Ward's 1984 statements to police. The prosecutorial contains a summary of the APD's initial encounter with Mr. Ward, on May 1, 1984, when Mr. Ward told Detective Smith he went to a party on the night of April 28

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[23] Additionally, Ms. Shelton testified at Mr. Ward's new trial in 1989 that there were 20 to 25 people at the Calhoun party when she arrived around midnight. This corroborates Mr. Fontenot's statement from October 21, 1984: "He does recall there were approximately twenty-five people at the party." Ex. 43, Vol. 4 at 324.

next door to Mr. Fontenot's apartment, at which the police showed up later that night. During Mr. Ward's interrogation in Norman on October 12, 1984, a recording of which was played at the joint trial, he stated that Mr. Calhoun threw a keg party on that Saturday night, and that the police showed up at the party because Mr. Calhoun was playing the drums and "[t]he other guy from Konawa was playing the guitar, and it was kind of loud, so they came out and told us to quiet it down." J/T, Vol. 41 at 49. Mr. Ward identified Ms. Roberts, Mr. Calhoun, Mr. Fontenot, and the "[g]uys from Konawa" as being in attendance. *Id.* at 50.

Contemporaneous police documents also corroborate key details of Mr. Fontenot's alibi. The APD radio log from the early morning hours of April 29, 1984, contains an entry at 12:40 a.m. stating: "rep loud drummer at 515 S. Townsend," Ex. 42, Vol. 4 at 168, which was Mr. Calhoun's address. The report of a "loud drummer" confirms the statements of Mr. Fontenot, Mr. DePrater, Ms. Shelton, and Mr. Ward that someone was playing the drums. A police report regarding this noise complaint noted that on April 29 at 12:40 a.m., "[a]n upstairs apt on the north side of the alley at 519 S. Townsend rented by Gordon Calhoun was having a party. They advised they would quieten down." Ex. 89, Vol. 28 at 332. The timing of this complaint meshes with the recollections of both Mr. DePrater and Mr. Ward that the police came later that night in response to loud music being played by Mr. DePrater and Mr. Calhoun, and also meshes with Mr. DePrater's statement that he and Mr. Fontenot ran off to hide in a passageway between the neighboring apartments until the police departed.

If all of this information had been presented at Mr. Fontenot's trial, "[his] alibi [defense] would have been viewed in a different light." *Bowen v. Maynard*, 799 F.2d 593, 612–13 (10th Cir. 1986). In his October 21 statement, Mr. Fontenot gave information about the Calhoun keg party that was corroborated by various other sources—including the key detail of the drummer, which precipitated the late-night noise complaint. Given that Mr. Fontenot was seen by multiple people at the party at multiple points on the night of April 28, 1984, that the party began between 7 and 9 p.m., and that Ms. Haraway was abducted at around 8:45 p.m., a reasonable juror would have questioned whether Mr. Fontenot could have participated in her murder—particularly since Ms. Haraway's body was found in rough hilly brushland some 30 miles from Ada. *See* N/T, Vol. 37 at 345 (prosecution's argument in closing that "the only reasonable interpretation" of the confessions was that Mr. Ward and Mr. Fontenot drove Ms. Haraway's body to Hughes County and dumped it near Gerty on the night of April 28 after murdering her at the Ada power plant).

However, the reliability of at least one of the affidavits that support Mr. Fontenot's alibi defense is weakened by several documents in the record. First, Mr. DePrater's statement that he traveled with Mr. Calhoun to buy the beer in Texas is contradicted by Mr. Calhoun's December 11, 1984, statement that he made this trip with a friend named Brad from East Central University. Second, and more damaging, is a summary of an interview with Mr. DePrater conducted by the OSBI on October 25, 1984, in which he said that he did not know Mr. Fontenot. In light of this contemporaneous contradictory information, we must

discount to some degree the credibility of the information in Mr. DePrater's alibi affidavit, which Mr. Fontenot presented more than two decades after his new trial.[24]

b. Obscene phone calls

At Mr. Fontenot's new trial, no mention was made of the obscene phone calls Ms. Haraway received while working at McAnally's shortly before her abduction. *See supra* Part I.A.4. This can be primarily attributed to the State's failure to disclose the police reports documenting such calls.

Most prominent among these reports was the summary of information provided by Ms. Haraway's sister, Janet Weldon. But the State also had several other reports referencing the troubling calls: from the McAnally's manager, Monroe Atkeson; from Ms.

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[24] The dissent notes that, notwithstanding all of this new alibi evidence, "[Mr.] Fontenot could have attended the party *and* committed the crimes," and it criticizes our analysis for purportedly ignoring this possibility. Dissent at 3–4 (emphasis in original). The dissent misunderstands our analysis and the relevant standard. We do not fail to consider that it would have been possible for Mr. Fontenot to attend the party and commit the charged crimes. In fact, we agree with the dissent that the new alibi evidence does not completely negate that possibility. But the reasonable-doubt standard does not, as the dissent suggests, dictate that a jury must convict if there is a possibility that Mr. Fontenot *could* be guilty; rather, a jury must acquit if there is "a real possibility" he is *not*. *See United States v. Petty*, 856 F.3d 1306, 1310 (10th Cir. 2017). Because the new alibi evidence helps show there is "a real possibility that he is not guilty," *id.*, it properly informs our conclusion, under the appropriate actual-innocence standard, "that more likely than not any reasonable juror would have reasonable doubt" as to his guilt, *House*, 547 U.S. at 538.

Haraway's husband, Steve; and from her coworker James David Watts, who told a D.A. investigator in 1985 that Ms. Haraway had specifically described these phone calls to him as "obscene." Ex. 62, Vol. 26 at 207; Ex. 15, Vol. 2 at 72. Additionally, a defense investigator uncovered a McAnally's customer, Anthony Johnson, who said that Ms. Haraway told him about these disturbing calls when he was in the store a week prior to her abduction, and was concerned enough about them to ask Mr. Johnson where she could buy a gun.

"From beginning to end th[is] case is about who committed the crime. When identity is in question, motive is key." *House*, 547 U.S. at 540. The evidence of these obscene phone calls, had it been presented to the jury, would have revealed a viable alternate suspect—the unknown man (or men) who made these harassing calls. This unidentified caller obviously knew that Ms. Haraway worked at McAnally's and knew when she worked. *See* Ex. 15, Vol. 2 at 72 (Mr. Watts's statement that Ms. Haraway only got the calls when working at the store, and not at home). This indicates that he may have been a regular customer.[25]

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[25] In what may only be a disturbing coincidence, Karen Wise, the J.P.'s clerk, testified at the preliminary hearing that she had "gotten several phone calls since this whole mess started," which she described as "[h]ang-up calls." P/H, Vol. 32 at 1085. She further stated that "I've gotten some breathers, of course, and then some that I've had two whisperers, and then one day a girl called me at work. That was like a threat in a sense, because of the way it was worded. . . . It was more like a warning." *Id.* at 1086. Ms. Wise relayed this information in the context of her testimony about calling the police several weeks prior because a man was watching her apartment late at night from a nearby alley, who resembled the taller man she saw in J.P.'s on April 28, 1984. Specifically, she relayed this information about

See Ex. 15, Vol. 2 at 72 (Mr. Watts's speculation that the caller was probably a regular McAnally's customer); *see also* Ex. 22, Vol. 2 at 260 (Mr. Johnson's speculation "that she knew who was making the calls but did not seem to want to indicate who it was"). These calls at least hint at a motive for the abduction, which is entirely lacking with respect to the potential involvement of Mr. Fontenot, given that no evidence was presented that he had ever been in McAnally's or had ever even seen Ms. Haraway before the evening of the crime.

Additionally, the timing of these calls should have implicated whoever made them as a prime suspect in Ms. Haraway's murder. Mr. Watts stated that the last of the obscene calls occurred about a month before her disappearance. Steve Haraway moved the timeline forward, telling police the last call his wife received was around two or three weeks before she disappeared. The statement of Mr. Johnson, meanwhile, indicates that Ms. Haraway expressed significant concern about these calls just one week prior to her disappearance. And in a conversation with her sister that likely occurred only a day or two before the abduction, Ms. Haraway said that "the phone calls had started again," and indicated that

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the phone calls when asked what made her think the man watching her apartment "was causing [her] some possible harm." *Id.* at 1085. If Janet Weldon's report about the phone calls Ms. Haraway received prior to her disappearance had been disclosed to the defense, this additional set of strange phone calls received by Ms. Wise—who, like Ms. Haraway, was a female convenience store clerk working night shifts alone in Ada, at a store just a quarter mile down the road from McAnally's—might have proven ripe for follow-up inquiry. But no such follow-up was made.

she was particularly upset about having to go in to work on the very Saturday night she went missing. Ex. 43, Vol. 4 at 294. It thus appears that Ms. Haraway was being harassed by the unknown caller while at McAnally's in the period just before she was abducted from the store, harassment that caused her to feel "uneasy" while working the night shift alone. *See* Ex. 1, Vol. 2 at 25 (affidavit of Darlene Adams); Ex. 43, Vol. 4 at 294 (statement of Janet Weldon).

The evidence of these calls, combined with other circumstantial evidence derived from customers at McAnally's shortly before Ms. Haraway disappeared, would have led a reasonable juror to question whether this unknown male caller participated in Ms. Haraway's abduction. Specifically, Ms. Weldon's statement that the caller told Ms. Haraway "he was going to come out to the store some night and wait outside while she was working," Ex. 43, Vol. 4 at 294, fits with the observation of several witnesses that the gray-primered pickup was parked outside McAnally's for an hour or so before she disappeared. *See* Ex. 102, Vol. 30 at 551–52 (James Moyer's statements that a rough-looking gray Chevy pickup pulled into McAnally's shortly after he arrived at 7:30); Ex. 6, Vol. 2 at 39 (Richard Holkum's statement that he saw a gray Chevy or GMC pickup in the parking lot when he stopped at McAnally's between 7:30 and 7:45); Ex. 5, Vol. 2 at 35 (John McKinnis's statement that he saw a light-colored Chevy pickup with primer spots in the parking lot when he arrived shortly before 8 p.m.).

In sum, "[t]his is not a situation where only one person made a comment about a few suspicious telephone calls. Instead, numerous people including [Ms. Haraway's] husband, manager, co-worker, customers,

and [sister] were aware of this conduct and recognized its obvious relevance to the case." *Fontenot III*, 402 F. Supp. 3d at 1139. This evidence of an alternate suspect who was targeting Ms. Haraway while she worked the night shift at McAnally's in the weeks leading up to her disappearance, if presented at trial, would most likely have planted seeds of reasonable doubt in the mind of a reasonable juror regarding whether Mr. Fontenot was involved in her murder.[26]

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[26] The dissent states a reasonable juror "would most likely deem the calls irrelevant" or "infer that [Mr. Fontenot] was the caller." Dissent at 4. We remain convinced it is more likely that a reasonable juror would find that harassing phone calls made to Ms. Haraway in the period immediately before her abduction—calls from a man who said he was going to come to the store some night and wait outside while she was working, calls that concerned her enough that she asked Mr. Johnson about obtaining a gun, and calls that made her particularly upset about having to go to work on the very night she went missing—were highly relevant. Indeed, the district court described these calls as having "*obvious relevance* to the case," *Fontenot III*, 402 F. Supp. 3d at 1139 (emphasis added).

As for the possibility that Mr. Fontenot made the calls himself, the dissent does not explain why a reasonable juror would reach this conclusion in the absence of any evidence supporting it. The more reasonable inference to be drawn from the evidence is that Mr. Fontenot did *not* make the calls, given that the caller clearly knew Ms. Haraway worked at McAnally's and knew when she worked, and no evidence shows Mr. Fontenot had ever been in McAnally's or had ever even seen Ms. Haraway before the evening of the crime. In any event, the absence of conclusive evidence that Mr. Fontenot did not make the phone calls does not mean the calls do not contribute to reasonable doubt.

c. James Moyer's affidavit

At the 1988 new trial, James Moyer testified that he saw two men walk into McAnally's seconds apart at around 7:30 p.m. on the night of April 28, 1984: "[a] dark haired person first and then a blond haired person." N/T, Vol. 36 at 25–26. The dark-haired man immediately walked toward the back aisles. He was wearing jeans and "hard soled boots, you could hear them when he walked." *Id.* at 37. Whenever Mr. Moyer glanced behind him toward the back of the store, he saw this man staring at him. The blond-haired man, meanwhile, stayed up near the counter, where Mr. Moyer was talking to Ms. Haraway. Mr. Moyer identified the blond-haired man as Mr. Ward.

Mr. Moyer's identification of the dark-haired man, whom he observed only in "glances," *id.* at 39, was far more equivocal. On direct examination, he testified that Mr. Fontenot was the person he "first identified": "At the time that was my perception, it has been a while and I get confused on it." *Id.* at 32–33. He stated that he grew confused about this identification after testifying at the preliminary hearing, when he saw a man sitting in the back of the courtroom—Steve Bevel—who was staring at him the same way the dark-haired man in the back of the store stared at him on the night of April 28.

On cross-examination, Mr. Moyer stated that the dark-haired man he saw in McAnally's was taller than his own height of 5′10". And Mr. Moyer agreed that Mr. Fontenot was "two to three inches shorter than" his own height, based on his observation from standing next to him at the preliminary hearing. *Id.* at 41. Mr. Moyer therefore conceded that for Mr. Fontenot to appear taller than him, "he would have

to have heels on his boots about three to four inches tall." *Id.* at 41–42. Mr. Moyer again stated that he became "confused" about his identification of Mr. Fontenot after the preliminary hearing—confused enough to repeatedly attempt to contact the Pontotoc County District Attorney's office during the summer of 1985 to inform the prosecution that Mr. Fontenot was not the dark-haired man he saw in McAnally's. *Id.* at 42.

Mr. Moyer revealed on cross-examination that he contacted the D.A.'s office because he believed there was someone sitting in the back of the courtroom during the preliminary hearing who looked more like the dark-haired man he saw in McAnally's on April 28. This man was wearing boots at the preliminary hearing, like the man he saw in McAnally's that night. He also had longer hair and was "much taller" than Mr. Fontenot. *Id.* at 43. At the hearing, Mr. Moyer saw this taller man, Mr. Bevel, say something to Mr. Ward as he was taken to the restroom. Mr. Moyer stated that during a break at the hearing, he asked Karen Wise whether there was someone in the courtroom who "looked more familiar" than Mr. Fontenot, to which she replied, "yes." *Id.* at 45. Mr. Moyer closed his cross-examination testimony by admitting he was "not sure" whether Mr. Fontenot was in McAnally's on April 28, 1984. *Id.* at 47.

On redirect, the State elicited the fact that Mr. Moyer did previously identify Mr. Fontenot as being the dark-haired man he saw in McAnally's at both a live lineup in December 1984 and at the preliminary hearing in January 1985.

Mr. Fontenot points to two items of new evidence not presented at trial regarding Mr. Moyer's identi-

fication. First, the police failed to turn over summaries of two 1984 interviews with Mr. Moyer, from April 30 and November 6. In the November 6 interview, Mr. Moyer stated that he did not get a very good look at the dark-haired man in the store. Second, Mr. Fontenot presents Mr. Moyer's 2012 affidavit, in which Mr. Moyer asserts he is "confid[e]nt that Karl Fontenot was not the man I saw at McAnally's," who "was definitely taller than Karl Fontenot and had a much more intimidating look about him." Ex. 14, Vol. 2 at 69. Mr. Moyer swears that he is now "about 95% sure that it was Steve Bevel, not Karl Fontenot, that I saw in McAnally's on April 28, 1984." *Id.* at 69. Mr. Moyer's affidavit also states that when he called the D.A.'s office in the summer of 1985 to express concern regarding his identification of Mr. Fontenot, he was told that "[i]t was not him (Bevel)." *Id.* at 68.

The State argues that Mr. Moyer's recantation is not new evidence because the "'uncertainty' in his identification of Petitioner was on full display at the 1988 trial," given that Mr. Moyer admitted to being "confused" about the second man. Appellant Br. at 32. But the uncertainty and confusion Mr. Moyer exhibited at trial has now turned to confidence that Mr. Fontenot was *not* the dark-haired man in McAnally's that night. The affidavit thus qualifies as new evidence for *Schlup* purposes because the new trial jury did not hear Mr. Moyer definitively recant his uncertain identification of Mr. Fontenot in favor of a near-certain identification of Mr. Bevel. *See, e.g.*, N/T, Vol. 36 at 43 ("Q [Mr. Butner]: And, in fact, you became convinced that [Mr. Bevel] was, in fact, the second man, didn't you? A [Mr. Moyer]: Well, I don't know if I was convinced about it.").

Additionally, Mr. Moyer's recantation counts as new evidence because it serves to refute, via clear and convincing evidence, that "he had seen two men generally matching Fontenot's and Ward's descriptions inside the store," *Fontenot II*, 881 P.2d at 78, one of nine facts the OCCA found to be corroborative of Mr. Fontenot's confession in upholding his second conviction. The State advances this finding as a key OCCA-determined fact entitled to a presumption of correctness under § 2254(e)(1). *See* Appellant Br. at 34–35. It cannot then simultaneously argue that a recantation of Mr. Moyer's shaky trial identification is cumulative. If Mr. Moyer's assertion that he is now convinced he did not see Mr. Fontenot in the store does not meaningfully differ from his trial testimony, then the corroborative value of the OCCA's finding of "general resemblance" between the man Mr. Moyer saw in McAnally's and Mr. Fontenot would be essentially nil, a dead-letter from the start. *Cf.* Ex. 14, Vol. 2 at 69 ("The man I saw at McAnally's was definitely taller than Karl Fontenot and had a much more intimidating look about him.").

The State also cites *Case v. Hatch*, 731 F.3d at 1044, for the proposition that "recanted testimony is notoriously unreliable." *See* Appellant Br. at 32. This is doubtless true in the mine-run case. Here, however, the reliability of Mr. Moyer's recantation is greatly enhanced by the fact that it matches a statement he gave to a defense investigator in 1985, prior to both trials—a statement Mr. Fontenot's new trial jury never heard.[27]

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[27] The dissent cites *Case v. Hatch* for the same proposition as the State cites it—*i.e.*, recanted testimony is unreliable. In this section we explain why, although true as a general matter, this

During the September 1985 joint trial, the defense introduced the tape of a conversation between Mr. Moyer and private investigator Richard Kerner that occurred on August 28, 1985. On the tape, Mr. Moyer states that Mr. Bevel, not Mr. Fontenot, was the man he saw in McAnally's with Mr. Ward:

> Mr. Kerner: And the tall one that was in the convenience store, then, is not the one that's in jail at the present time—not Fontenot?
>
> Mr. Moyer: Not the one I saw. I was about—Bill Peterson is hard to get a hold of. I was going to let him know that I was changing my mind on this. . . .
>
> Mr. Kerner: So, at least at the upcoming trial, you're going to—you're going to be saying, then, that the tall guy which is Karl Fontenot, is not the one you saw in the store that night the girl disappeared?
>
> Mr. Moyer: Right.

J/T, Vol. 40 at 1074–75.

> Mr. Kerner: And the guy at the Preliminary Hearing, you're pretty reasonably sure that the guy at the Preliminary Hearing with the Bevel on his belt[28] was the second

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proposition does not carry the same force with respect to Mr. Moyer's testimony.

28 Mr. Bevel wore a wide leather cowboy belt at the preliminary hearing with the letters B-E-V-E-L engraved on the back. He also wore boots and "a long-sleeved shirt, like snaps on the shirt like cowboys wear, western style." J/T, Vol. 40 at 1080. He was, in short, dressed "[l]ike a cowboy." N/T, Vol. 40 at 990.

> man, and he knows Tommy [Ward] and spoke to him at the Preliminary Hearing?
>
> Mr. Moyer: Right.

Id. at 1079.

> Mr. Kerner: But you're going to say the same things that you told me; you're going to say the same things at the trial?
>
> Mr. Moyer: Yeah, that's why I've been trying to get a hold of Bill Peterson, let him know I changed my mind.
>
> . . .
>
> Mr. Kerner: He won't be too happy one of his witnesses backed out on one of the two guys in jail, but I mean, you've got to tell the truth. Hell, whoever it helps or hurts, you couldn't—
>
> Mr. Moyer: Well, I don't want the wrong person being convicted.

Id. at 1080–81. This tape was played for the jury at the 1985 joint trial (but not the 1988 new trial) to impeach statements made by Mr. Moyer. And when cross-examined by Mr. Butner at the joint trial, Mr. Moyer agreed that Mr. Bevel, the man he saw at the preliminary hearing, looked more familiar to him as being in McAnally's on the night of April 28 than Mr. Fontenot, because Mr. Bevel was taller and had longer hair.

Thus, this is not a situation where an eyewitness who was sure of his identification thirty years ago now suddenly reverses course to claim he saw someone else entirely. Not only was Mr. Moyer uncertain of

his identification at trial, but his current affidavit aligns with candid statements he made *prior to both trials*.[29] Furthermore, there was no reason for Mr. Moyer to lie to the defense investigator. In fact, he said during the taped interview with Mr. Kerner that by speaking to him, he "might be helping the wrong people"—that is, the defense instead of the prosecution—but that he was doing so because he "d[idn't] want the wrong person being convicted." J/T, Vol. 40 at 1080–81.

Additionally, Mr. Moyer offers plausible explanations for his failure to recant his identification at trial. He felt betrayed by the fact Mr. Kerner taped their conversation without his consent, which led him to feel conflicted about his testimony. And when he spoke with someone at the D.A.'s office in the summer of 1985, he was told that "it was not [Mr. Bevel]," which made him afraid to change his story.

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[29] That Mr. Bevel was much taller than Mr. Fontenot, had longer, shoulder-length hair, and was wearing boots at the preliminary hearing provide discrete details that better align with the description given by Mr. Moyer at both trials of the man he saw in McAnally's (tall with shoulder-length hair and wearing boots) and the description of Composite Suspect #1. *See* N/T, Vol. 36 at 43; J/T, Vol. 40 at 1098; *see also* Vol. 11 at 27 (describing Suspect #1 as 6'0" to 6'2" with shoulder-length hair). Additionally, when police interviewed Mr. Bevel on September 19, 1985, during the joint trial, he admitted to knowing Mr. Ward "for about ten years." Ex. 44, Vol. 7 at 19. This association, combined with circumstantial evidence derived from Mr. Bevel's presence at the preliminary hearing and Ms. Wise's midnight sighting of the tall, slim, cowboy-like man in the alley, further increase the reliability of Mr. Moyer's recantation. *Cf. House*, 547 U.S. at 551 (the reliability of a statement made well after the crime is enhanced when "the record includes at least some independent support for th[at] statement[ ]").

Ex. 14, Vol. 2 at 68. Mr. Moyer's allegation of inappropriate prosecutorial influence is bolstered by sworn statements from other witnesses recounting pressure from the D.A.'s office to conform their recollection to an official narrative of Mr. Fontenot's and Mr. Ward's guilt. *See* Ex. 12, Vol. 2 at 57 (Stacey Shelton affidavit); Ex. 13, Vol. 2 at 62 (Karen Wise affidavit).

The importance of Mr. Moyer's testimony to Mr. Fontenot's prosecution also counsels in favor of factoring this evidence into the *Schlup* inquiry. As the district court stated, Mr. Moyer was the only witness who placed Mr. Fontenot in McAnally's the night of Ms. Haraway's disappearance. *See Fontenot III*, 402 F. Supp. 3d at 1139. And while Mr. Moyer's testimony at the new trial was equivocal, the jury did hear he had twice before identified Mr. Fontenot as the dark-haired man in McAnally's: at a live lineup and at the preliminary hearing. Furthermore, in closing argument, the prosecution repeatedly emphasized the fact that Mr. Moyer identified Mr. Fontenot at the preliminary hearing. *See* N/T, Vol. 37 at 270; *id* at 319 (arguing in closing that Mr. Moyer previously identified Mr. Fontenot "in Court, under oath"). The assertion by Mr. Moyer that he is now confident his original identification of Mr. Fontenot was wrong would undermine the residual power of those prior statements of identification and serve to cast additional doubt in the mind of a reasonable juror regarding whether Mr. Fontenot was ever at McAnally's on the night of April 28.[30]

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[30] We disagree with the dissent's assessment that Mr. Moyer's affidavit "barely state[s] anything of value." *See* Dissent at 3. For the reasons discussed above, Mr. Moyers's affidavit—in which he avers he is confident he misidentified Mr. Fontenot as

Lastly, the State argues that before crediting Mr. Moyer's recantation, the district court "should have at least subjected Moyer's claims to the rigors of cross-examination rather than relying on affidavits produced by defense investigators," and that "[w]ithout taking that step, the OCCA's finding that Moyer's testimony represented one of nine points of corroboration was not overcome by clear and convincing evidence." Appellant Br. at 35 (citing, *inter alia*, 28 U.S.C. § 2254(e)(1)). Affidavits, however, are a common source of new evidence presented in support of *Schlup* showings: in *Schlup* itself, "[t]he petition was supported by numerous affidavits from inmates attesting to Schlup's innocence," 513 U.S. at 307, two of which were described by the Court as "particularly relevant" new evidence, *id.* at 316–17. Furthermore, although an evidentiary hearing may be an advisable method for testing actual innocence assertions,[31] here the interlocking nature of the statements in Mr. Moyer's affidavit and his statements to Mr. Kerner in the summer of 1985, combined with Mr. Moyer's uncertainty at trial regarding the identity of the dark-haired man, provides the clear and convincing evidence needed under § 2254(e)(1) to overcome the OCCA's finding that Mr. Moyer's trial testimony corroborated Mr. Fontenot's confession to any meaningful extent.

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the man he saw in McAnally's on the night Ms. Haraway disappeared—is of significant evidentiary value.

[31] "In cases where an applicant for federal habeas relief is not barred from obtaining an evidentiary hearing by 28 U.S.C. § 2254(e)(2), the decision to grant such a hearing rests in the discretion of the district court." *Schriro v. Landrigan*, 550 U.S. 465, 468 (2007).

d. Karen Wise's affidavit

Karen Wise, the J.P.'s clerk, was a key witness at Mr. Fontenot's new trial. She testified that two suspicious men were first in her store at around 4 p.m. on April 28, 1984, then later returned at around 7 p.m. One of them wore boots[32] and one wore tennis shoes, but Ms. Wise could not recall who had on what. One of these men was watching Ms. Wise, which made her nervous. *See* N/T, Vol. 35 at 547 ("It was a look in his eyes, I don't know how to describe it."[33]). Every time she looked up, he would be staring at her.[34]

Ms. Wise identified one of these men—blond and around 5'8—as Mr. Ward. She indicated that the other man—taller and with darker hair—looked similar to Mr. Fontenot. She also testified that Mr. Fontenot looked familiar to her, as perhaps someone she had seen in the store before. But she could not recall

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[32] At the preliminary hearing, Ms. Wise testified that one of the men "had on shoes I could hear . . . heavier shoes, [that] walked heavier." P/H, Vol. 32 at 183. *Cf.* N/T, Vol. 36 at 37 (Mr. Moyer's trial testimony that the taller, dark-haired man in McAnally's had on "hard soled boots, you could hear them when he walked").

[33] *Cf.* Moyer affidavit, Ex. 14, Vol. 2 at 69 ("The man I saw at McAnally's was definitely taller than Karl Fontenot and had a much more intimidating look about him.").

[34] *Cf.* Moyer testimony, N/T, Vol. 36 at 33–34 ("While I was standing up at the counter, this person was walking the back aisles, I would look in back of me and he would be staring at me. . . . I glanced up again and this person was staring at me again, directly in back of me, on the back aisle."); Wise testimony, P/H, Vol. 32 at 1098 ("But when I looked out—went to another window [of my apartment] and looked out again, there he was, you know, looking right back up again.").

when she had seen Mr. Fontenot and could not identify him as one of the men in J.P.'s on April 28, 1984. *See id.* at 579 ("I cannot say for sure he was in that night."). And she admitted that she also failed to identify Mr. Fontenot at a live lineup conducted in December 1984.

On cross-examination, Mr. Butner brought out the night in January 1985, following her initial preliminary hearing testimony, when Ms. Wise called the police because a man resembling the tall, slim man she saw in J.P.'s on April 28 was staring up at her apartment from an alley.[35] Mr. Butner also elicited testimony that Ms. Wise recognized someone in the back of the courtroom at the preliminary hearing who resembled the person in J.P.'s that night—Mr. Bevel—and that Mr. Bevel stared at Ms. Wise in the hallway outside the preliminary hearing, which concerned her and caused her to step back out of view. Ms. Wise stated she knew Mr. Bevel and had seen him in J.P.'s several times. But on redirect, she denied that Mr. Bevel was the second man in J.P.'s on April 28.

Ms. Wise also testified that the "two boys that are in question here, they were not the only boys in the game room during that whole time." *Id.* at 579. And in response to a question from Mr. Butner as to whether she was "sure that the State of Oklahoma

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35 This man "was dressed cowboy-like." J/T, Vol. 40 at 1006; *see id.* at 1015 (Mr. Butner's cross-examination of Ms. Wise: "[Y]ou heard some boots [in J.P.'s]; you saw someone with a cowboy belt in this courtroom at [the] Preliminary Hearing sitting on the back row; and you identified a cowboy outside your apartment. Cowboy boots, cowboy belt, cowboy hat. . . . ").

has the second man in this case," she replied, "I'm not sure that two is all there were." *Id.* at 585.

Mr. Butner did not follow up on this comment, as he had no information regarding any other individuals in J.P.'s that night. But in a 2009 affidavit, Ms. Wise asserted that when the police interviewed her on the night of April 28, she told them there were two other men in J.P.'s earlier that evening—that is, there were four men total—but that the police insisted there were only two. She said the two men who ended up in the composite drawings, later identified as Mr. Fontenot (Suspect #1) and Mr. Ward (Suspect #2), "were not aggressive in any way," and that she "was particularly nervous because of two *other* men in the store that evening" who were there "during approximately the same time as the men who were later reported to be Tommy Ward and Karl Fontenot." Ex. 13, Vol. 2 at 61 (emphasis added).

Ms. Wise knew these two other men. She identified them in her affidavit as Jim Bob Howard and Bubba Daggs. Prior to her joint trial testimony, Ms. Wise claims she told Mr. Peterson that Mr. Howard and Mr. Daggs were in J.P.'s at the same time as the men in the composites, and that they made her afraid because of how they were behaving in the store. According to Ms. Wise, Mr. Peterson responded that he already had the "ones who did it," and further stated that Mr. Howard "couldn't have committed the murder because he 'didn't have the I.Q. of a grub worm.'" *Id.* Mr. Peterson also allegedly told Ms. Wise that she couldn't mention in court that Mr. Howard and Mr. Daggs were with the other two men in J.P.'s because it wasn't relevant. Due to Mr. Peterson's instructions—which allegedly included characterizing the defense

as "the enemy"—Ms. Wise "testified at times as though there were only two young men hanging around JP's together when in fact there were four who were together at the store and [] stayed for a long time."[36] *Id.* at 62.

Ms. Wise's affidavit presents new reliable evidence of innocence. Her assertion that there were actually four young men at J.P.'s throughout the evening of April 28—and that the two previously unknown men, not the two alleged to be Mr. Ward and Mr. Fontenot, were the ones who made Ms. Wise nervous—leads to the inference that these two other men may have been involved in the crime. This information, and Ms. Wise's frustration in failing to get the police and prosecution to credit it, would lead a reasonable juror to question both Mr. Fontenot's involvement in the crime and the State's motivation for ignoring the other two men in J.P.'s that night.

[* * *]

As we now explain, the support Ms. Wise's affidavit provides for Mr. Fontenot's actual innocence claim is significantly enhanced by her identification of Jim Bob Howard as one of the four young men who were hanging out together at J.P.'s that night.

During their investigation, the police identified a pickup owned by an Ada man named Brian Cox that matched the description of the truck seen at McAnally's. Mr. Cox's pickup was a 1969 Chevy or GMC with a coat of gray primer and rough spots

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[36] In her affidavit, Ms. Wise also stated that she "cannot be certain now that the young man I previously identified as Tommy Ward" was not actually a different man. Ex. 13, Vol. 2 at 62.

under the doors. In a November 14, 1984 interview, David Yockey—an associate of Mr. Ward, Mr. Cox, and Mr. Howard—told police that Mr. Cox painted his pickup red after Ms. Haraway's abduction to keep from getting pulled over. On December 14, 1984, the police gave a polygraph to Mr. Cox, who knew both Mr. Ward and Mr. Fontenot. While he denied loaning out his pickup, police records showed that just four or five days before the abduction, three men—Billy Shelton, Joe Lyda, and Mr. Howard—were arrested while riding in Mr. Cox's truck.

The APD interviewed Mr. Howard on November 16, 1984, a month prior to Mr. Cox's polygraph. He stated he had known Mr. Ward for around a year and a half and had "gone riding around with" him before, and that he (Mr. Howard) and Mr. Cox were good friends. Ex. 43, Vol. 4 at 247. Mr. Howard told the police he had ridden in Mr. Cox's gray pickup several times, and admitted that he, Mr. Shelton, Mr. Lyda, and Mr. Cox were stopped by police in that truck the previous spring. Mr. Howard provided no alibi for April 28, 1984. He also said he had been in McAnally's several times before, mainly at night, as well as in J.P.'s. Detective Smith's handwritten notes from this interview state that Mr. Howard "appeared to withhold certain details in his statement but was fairly cooperative." Vol. 30 at 435. Mr. Howard was 20 years old at the time of the crime, and according to police reports was a skinny 6'0" to 6'2" and 145 to 155 pounds, with brown hair and blue eyes.[37]

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[37] *Cf.* Ex. 44, Vol. 5 at 110 (Suspect #1 described as in his early twenties, 6'0" to 6'2", slender build, sandy brown hair, blue or green eyes).

Mr. Howard was a State's witness at the preliminary hearing, testifying to the fact that he had previously seen Mr. Ward with a knife. He identified Mr. Ward, but said he did not know Mr. Fontenot. Mr. Howard testified that he "didn't even know who [Mr. Fontenot] was until I just seen him." P/H, Vol. 32 at 119. When asked to point out Mr. Ward and Mr. Fontenot in court, he said, "Tom Ward's in white. I think that guy right there's Karl Fontenot, I guess. I don't know." *Id.* On cross-examination, Mr. Howard stated that he had seen Mr. Fontenot at several Ada house parties, but had never seen him anywhere else, and had never even spoken to him, because "I don't talk to people I don't know." *Id.* at 144. Mr. Howard further stated that he "never had known [Mr. Fontenot's] name" until the preliminary hearing and admitted to having no independent knowledge of who he was.[38] *Id.* at 145–46.

In light of the 1984 police interviews of Mr. Yockey, Mr. Cox, and Mr. Howard—which were not disclosed to the defense—and Mr. Howard's hearing testimony, Ms. Wise's 2009 identification of Mr. Howard as one of the four men in J.P.'s on April 28, 1984, is strong new evidence of Mr. Fontenot's innocence, for two reasons. The first is that Ms. Wise's identification places a man in J.P.'s on the night of the abduction who had previously been seen in a pickup—Mr. Cox's truck—similar to the pickup seen at McAnally's on April 28, 1984. The fact that Mr. Howard was a passenger in Mr. Cox's late '60s gray-primered pickup less than a week prior to Ms. Har-

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[38] None of Mr. Howard's testimony at the 1985 joint trial referenced Mr. Fontenot. *See* J/T, Vol. 40 at 797–815. Mr. Howard did not testify at Mr. Fontenot's new trial.

away's disappearance, and was also seen in J.P.'s on the night of the crime, is evidence that would lead a reasonable juror to question whether a different man than Mr. Fontenot was in the gray-primered pickup at McAnally's.

The second, more significant reason relates to Mr. Howard's unfamiliarity with Mr. Fontenot. Ms. Wise's affidavit is clear that the four men she saw in J.P.'s throughout the night of April 28 were there at the same time. And importantly, these four men were *hanging out together*. *See* Ex. 13, Vol. 2 at 61 ("[T]here were four men hanging out around the store for an extended period of time, instead of two."); *id.* at 62 ("[I]n fact there were four who were together at the store and [who] stayed for a long time."); *id.* (referencing "the additional persons who were with the two suspects"). It follows that these four men hanging out at J.P.'s for an extended period that Saturday afternoon and evening were friends, or at least acquaintances—or, at the very least, that they knew each other's names. But as detailed above, Mr. Howard testified he did not know Mr. Fontenot and had never talked to him; indeed, Mr. Howard did not even know Mr. Fontenot's name before the preliminary hearing. Taking this testimony as true (and, given that Mr. Howard was a State's witness who identified Mr. Ward, there seems no good reason why he would lie about his knowledge of Mr. Fontenot), Ms. Wise's sworn statement that Mr. Howard was one of the four men hanging out at J.P.'s on the night of April 28, 1984, leads to the conclusion that Mr. Fontenot was not one of the remaining three.

[* * *]

The State objects to Ms. Wise's affidavit being treated as new evidence, because the affidavit presents evidence "substantially the same" as her trial testimony that "she was not sure whom she saw while working at J.P.'s, and could not make any positive identification." Appellant Br. at 37. But the evidentiary value of Ms. Wise's affidavit flows not from any recantation of her highly equivocal trial testimony that Mr. Fontenot may have resembled the second man in J.P.'s—in fact, her affidavit makes no reference to Suspect #1, the taller, dark-haired man. Rather, it derives from her definitive statement that there were four men hanging out together in J.P.'s during the relevant timeframe, not two. And it is important that it was the other two, previously unknown men who made her nervous, one of whom was Jim Bob Howard. This information would have led a reasonable juror to harbor a reasonable doubt regarding Mr. Fontenot's involvement, particularly since it would have allowed the defense to establish, by cross-reference to Mr. Howard's prior testimony, that Mr. Fontenot could not logically have been one of the four men present in J.P.'s that night because Mr. Howard did not know him.

Further, the evidentiary value of the affidavit derives from Ms. Wise's statement that the police ignored her description of the four men, instead zeroing in on just two of them, and from her allegation that Mr. Peterson pressured her to avoid bringing up the other two men because it was not relevant and because the State already had the "ones who did it." Ex. 13, Vol. 2 at 61. This would lead a reasonable juror

to question whether police and prosecutorial misconduct led to the conviction of an innocent man.[39]

The State also attacks the reliability of Ms. Wise's affidavit, which came over twenty years after her 1988 testimony. The timing of her affidavit does impact its evidentiary value under *Perkins*, but its credibility is enhanced by four factors. One, Ms. Wise made several allusions at trial to there being more than two men in J.P.'s that night, *see* N/T, Vol. 35 at 579, 585, and also alluded to a third man at several points of her preliminary hearing testimony, *see* P/H, Vol. 32 at 1087–88 ("Someone else came in when they were playing pool."); *id.* at 1094 ("He could have been one of the boys that came in while they were playing pool."); *id.* at 1095 ("There was someone else."). Two, Ms. Wise asserts that these facts are not being revealed for the first time some twenty-five years after the crime, but that she informed the police and prosecution in 1984, who proceeded to ignore the details that did not match their theory. Three, Ms. Wise offers a plausible explanation for failing to testify to these facts at trial: that Mr. Peterson told her they were irrelevant, that she could not mention them in court, and that the defense was the enemy, allegations of prosecutorial misconduct that are echoed by other witnesses. And four, the description of Ms. Wise's fear of being intimately involved in the case, which led to her reluctance to sign an affidavit naming

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[39] The dissent echoes the State's assertion that Ms. Wise's affidavit has little evidentiary value because it "does not directly recant anything about [Mr.] Fontenot." Dissent at 3. We agree that the evidentiary value of Ms. Wise's affidavit is not that it recants her previous testimony; rather, it provides support for Mr. Fontenot's actual innocence claim for the reasons discussed above.

Mr. Howard and Mr. Daggs, seems genuine, especially in light of her experience with the unknown man staring up at her apartment in January 1985 and her receipt of ominous phone calls following Ms. Haraway's abduction. *See* J/T, Vol. 40 at 972 ("Q: [S]ince the arrest of Mr. Ward and Mr. Fontenot, you've had some rather frightening experiences; have you not? A: Some.").

That is, Ms. Wise "did attempt to explain [her] delay coming forward." *House*, 547 U.S. at 551. While Ms. Wise's delay affects the assessment of her credibility, her affidavit counts as newly discovered evidence that we include in our "holistic judgment." *Id.* at 539.

e. Pickup descriptions

Mr. Fontenot highlights inconsistencies in descriptions of the primered pickup seen at McAnally's and J.P.'s on April 28, and argues that undisclosed police interviews constitute new evidence of innocence because they would have allowed the defense to probe whether the pickup seen at the two stores was in fact two different vehicles.

Mr. Fontenot is correct that there were notable discrepancies in the descriptions of the pickup seen at J.P.'s and at McAnally's. The former was reported to have spots of red and gray primer paint and an abnormal tailgate, while the latter was reported to have solid gray primer and a normal tailgate. *Compare* N/T, Vol. 35 at 545 (Ms. Wise's testimony that the pickup at J.P.'s was spotted with both red and gray primer) *and id.* at 598 (Mr. Paschal's testimony that something caught his attention about the tailgate of the pickup at J.P.'s, which may have been missing) *with* N/T, Vol. 36 at 33, 44–45 (Mr. Moyer's testimony

that the pickup that pulled into McAnally's at 7:30 p.m. was a solid gray primer, and that nothing stood out about its tailgate),[40] *id.* at 57–58, 60 (Lenny Timmons's testimony that the pickup Ms. Haraway entered was a greenish gray primer color, and that he could not recall anything unusual about the tailgate), *and id.* at 64, 70 (David Timmons's testimony that this pickup was light gray or blue, and that he remembered nothing about its tailgate). These conflicting accounts opened a line of attack for the defense, as the State's timeline depended on the pickups at McAnally's and J.P.'s being the same. *See, e.g.*, N/T, Vol. 37 at 342 (prosecution's closing argument that "[Mr.] Ward and a man closely resembling Mr. Fontenot were in J.P.'s on April the 28th . . . in a primer colored pickup . . . [which] left and within moments thereof arrived at McAnally's where Mr. Moyer was"). But because Mr. Fontenot's new trial jury heard these differing descriptions, they do not count as new evidence under *Schlup*.

Several police reports mentioning the pickup were not disclosed to the defense and thus do amount to new evidence. In an interview on April 30, 1984, Ms. Wise told the OSBI that the red and gray-primered pickup she saw at J.P.'s between 7 and 8:30 p.m. on April 28 was possibly a "step-side" truck with a "short bed." Vol. 8 at 29. Meanwhile, in an interview also conducted April 30, Mr. Whelchel told police that the "light colored" pickup in the McAnally's parking lot which Ms. Haraway entered was "full size," and, he thought, "not the narrow bed type," *id.*

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[40] At the preliminary hearing, Mr. Moyer testified that the tailgate on the pickup he saw was not missing, nor was it painted a different color. P/H, Vol. 32 at 246.

at 20, while David Timmons said in an interview the following day that this pickup had a "conventional side type bed," *id.* at 23. These descriptions were given just days after the crime, making them more reliable than those provided at a trial more than four years later.

A "step-side" pickup bed style differs from a "conventional side type bed" that is "not the narrow bed type," and a "short bed" pickup differs from one that is "full size." *See* J/T, Vol. 40 at 1006 ("Basically, you've got two styles of beds."); *id.* at 1030 (cross-examination contrasting a "wide-type bed truck, straight line" with a "narrow bed [truck] with the extended bumpers"). The holistic judgment of all the evidence required by *Schlup* thus reveals a more significant contrast in the trucks seen at the two stores than was presented at the new trial: one, a step-side, short-bed pickup with red and gray primer and an irregular tailgate (at J.P.'s); the other, a conventional-side, full-size pickup with solid gray primer and a normal tailgate (at McAnally's).

It is possible that the pickup descriptions in these April 30 and May 1 reports would have created additional doubt in a reasonable juror's mind about whether the witnesses at J.P.'s and those at McAnally's were describing the same truck, thereby further damaging the State's timeline of the two suspects' movements leading up to the abduction. But since they add only marginal value to the discrepancies aired at trial, we assign this category of newly presented evidence minimal weight in the overall *Schlup* assessment.

f. Medical Examiner report

Lastly, Mr. Fontenot points to two pieces of evidence from the medical examiner's report on Ms. Haraway's skeletal remains that were not presented to Mr. Fontenot's jury.

The first is a supplemental report from OCME's Board of Medicolegal Investigations detailing problems with the recovery and documentation efforts at the Gerty crime scene site. In this report, an unidentified OCME official expressed frustration with law enforcement's handling of Ms. Haraway's remains after speaking with Mr. Peterson on January 21, a day after the discovery:

> No [Medical Examiner] was notified. . . . OSBI lab people out of OKC did photo[ ] the scene & they just had a field day picking up bones, no diagrams. . . . Mr. Peterson believes that the bones are enroute to OKC but didn't know for sure. The sheriff didn't know where the bones were but thought that the OSBI had them. Notified the OSBI in OKC and spoke with Rick Spense—he didn't have the bones but thought that the lab man David Dixon had them. . . . Finally the OSBI found them in their lab. . . .

Ex. 46, Vol. 23 at 46. This official then documented "several problems with this case," including that "no one notified a county medical examiner," and that "no one seems to give a 'shit' & provide OCME with any information on Ms. Harriway [sic]." *Id.*

The district court found the "[i]ncompetence in processing and handling the Gerty crime scene" documented by this report to be "a critical failure by law

enforcement given that very little physical evidence was found besides the skeletal remains." *Fontenot III*, 402 F. Supp. 3d at 1147. Due to this improper processing, "it cannot be determined if Mrs. Haraway was murdered at this location, or her body was taken there." *Id*.

After seeing this report, a reasonable juror's confidence in the competence of the investigation into Ms. Haraway's murder would decrease, which would in turn decrease confidence that law enforcement identified the right culprits. But the value of this new evidence is minimal, given that the jury was presented with the major details from the scene of Ms. Haraway's remains that differed completely from Mr. Fontenot's confession—that her body was found in a different county; that she died from a gunshot wound, not from stabbing; that there was no evidence she was either stabbed or burned; and that there was no evidence of a floral blouse with a lace collar.[41]

The second piece of evidence from the medical examiner's report is a letter, dated January 23, 1986, from Dr. Richard McWilliams, a forensic anthropologist and OCME consultant, to Dr. Larry Balding, a forensic pathologist with the office's Board of Medicolegal Investigations. In the letter, Dr. McWilliams informs Dr. Balding that he has examined Ms. Haraway's remains, and that "[m]arks on the pelvis indicated

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41 The dissent claims we "[o]veremphasiz[e] peripheral evidence" by assuming this supplemental report "would undermine a juror's confidence in the *entire* police investigation." Dissent at 3 (emphasis in original). Far from "overemphasizing" this supplemental report, we agree that "the value of this new evidence is minimal." The letter from Dr. McWilliams, discussed *infra*, is the more significant piece of new evidence from the medical examiner's report.

she had given birth to at least one child." Ex. 46, Vol. 23 at 48.

The district court determined this report to be newly discovered evidence of innocence. *Fontenot III*, 402 F. Supp. 3d at 1148. If Ms. Haraway gave birth to a child before her death, then she must have been killed some months after April 28, given that there was no indication she was pregnant at that time.[42] *Id.* Due to his incarceration from late October 1984 onward, this would make Mr. Fontenot's involvement in the crime highly improbable, and "undermine[] the state's entire theory as to the motive of Mrs. Haraway's kidnapping and what happened to her in the months leading up to her death." *Id.*

The State argues that without any corroboration, the conclusion in Dr. McWilliams's report amounts to highly unreliable support for a "particularly outlandish" actual innocence rationale. Appellant Br. at 27–28. Yet, Dr. McWilliams's report—which bore the indicia of expert opinion—would nonetheless raise the level of reasonable doubt in the mind of a reasonable juror regarding the State's theory of the case and Mr. Fontenot's guilt.

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[42] Mr. Fontenot presents a 2013 affidavit from a woman named Vickey Jenkins, in which Ms. Jenkins asserts that Karen Wise told her in 1984 that Ms. Haraway "had told [Ms. Wise] right before [Ms.] Haraway disappeared[] that [Ms. Haraway] was 3 months pregnant." Ex. 2, Vol. 2 at 28. While this account would be compelling evidence if true, we give no credence to a hearsay-within-hearsay statement recounting a 29-year-old conversation.

4. Total Record

In comparison to the evidence presented at trial, the strongest new evidence of innocence brought forth by Mr. Fontenot is laid out below:

Alibi:

- **Trial evidence:**
  - No alibi defense mounted; Mr. Calhoun testified that neither Mr. Fontenot nor Mr. Ward was at the keg party thrown at his apartment on April 28, 1984.
- **New evidence:**
  - Statements from three people at the April 28 Calhoun keg party who remember seeing Mr. Fontenot there at different points throughout the night.
  - Corroboration by other attendees of Mr. Fontenot's own statement, given two days after his confession, listing details of the Calhoun keg party, including the number and identity of those in attendance and the fact someone was playing the drums.
  - Mr. Ward's 1984 statements, which corroborate accounts that the police were called out to the Calhoun keg party because of loud guitar and drum music.
  - Police reports that establish the Calhoun keg party as occurring the night of April 28, confirm the APD was called out to the party on a noise complaint, and verify Mr. Fontenot's recollection of someone playing the drums.

Alternate Suspect:

- **Trial evidence:**
  - The jury heard nothing about the obscene phone calls received by Ms. Haraway while on duty at McAnally's shortly before her disappearance.
  - The jury did not see the complete medical report about Ms. Haraway's remains.
- **New evidence:**
  - Reports from five people—Ms. Haraway's sister and husband, as well as a McAnally's manager, coworker, and customer—documenting that Ms. Haraway was receiving obscene, harassing calls at the store, which had resumed shortly before she disappeared and which reportedly made her feel uneasy while working the night shift.
  - The conclusion of a forensic anthropologist who analyzed Ms. Haraway's remains that she may have given birth to a child.

Eyewitness statements:

- **Trial evidence:**
  - Mr. Moyer testified he saw someone who generally resembled Mr. Fontenot in McAnally's at around 7:30 p.m. but could not be sure who it was.
  - Ms. Wise testified she saw two men in J.P.'s between 7 and 8:30 p.m. who made her nervous, one of whom looked similar to Mr. Fontenot.

- **New evidence:**
  - An affidavit from Mr. Moyer stating he is confident Mr. Fontenot was not the man he saw in McAnally's and is "95% sure" it was instead Mr. Bevel, which coincides with a statement he gave to a defense investigator in 1985.
  - An affidavit from Ms. Wise stating there were actually four young men hanging out together in J.P.'s that night, not two; that it was these additional two men who made her nervous; and that one of them was Mr. Howard—a man who testified to never having spoken to or associated with Mr. Fontenot, and who was seen in a gray-primered pickup several days before the crime.

[* * *]

While a gateway innocence claim requires "new reliable evidence" to be credible, "the habeas court's analysis is not limited to such evidence." *House*, 547 U.S. at 537. Rather, "the habeas court must consider 'all the evidence,' old and new, incriminating and exculpatory," and thereby base its "'probabilistic determination about what reasonable, properly instructed jurors would do'" on the "total record." *Id.* at 538 (quoting *Schlup*, 513 U.S. at 328, 329).

Here, the total record—even before its augmentation with this newly presented evidence—reveals an extremely weak case against Mr. Fontenot. The State lacked a plausible motive and had no physical evidence linking Mr. Fontenot to the crime. Its two key eyewitnesses testified only that they saw a man

in and around McAnally's on the night of April 28 who "generally match[ed]" Mr. Fontenot's description or who "resembled" him. *Fontenot II*, 881 P.2d at 78. In Mr. Fontenot's first appeal, the OCCA went so far as to find that "[o]ther than the statements given by Ward and Fontenot, there was no other evidence linking appellant to the crimes." *Fontenot I*, 742 P.2d at 32.

The State, of course, did have the statement given by Mr. Fontenot.[43] But Mr. Fontenot's confession was shot through with clear falsehoods and inconsistencies, produced no independently verifiable information, and provided the police no new facts about the crime. *See supra* Part I.C; *cf. Pavatt v. State*, 159 P.3d 272, 289 (Okla. Crim. App. 2007) ("A confession tends to be more trustworthy if it provides hitherto-unknown facts which are not only verifiable, but also consistent with known facts."). What is more, Mr. Fontenot fully recanted just two days later, accusing the police of feeding him a false narrative of his own involvement—a narrative that matched the confession they had previously obtained from Mr. Ward. Almost right after that recantation, the investigators discredited a critical element of Mr. Fontenot's confession when they concluded Mr. Titsworth was physically incapable of having been involved. Any evidentiary value of Mr. Fontenot's confession was further diminished by the discovery of Ms. Haraway's remains between Mr. Fontenot's first and second trials, which disproved what he told police about the location and disposal of Ms. Haraway's body and the cause of her death.

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[43] The OCCA disallowed use of Mr. Ward's confession against Mr. Fontenot at Mr. Fontenot's new trial. *See Fontenot I*, 742 P.2d at 32–33.

The State's picture of the events at McAnally's and J.P.'s on April 28 also contained major holes. The prosecution argued in closing at the new trial that "[Mr.] Ward and a man closely resembling Mr. Fontenot were in J.P.'s on April the 28th . . . in a primer colored pickup," which "left and within moments thereof arrived at McAnally's where Mr. Moyer was." N/T, Vol. 37 at 342. Mr. Moyer was in McAnally's around 7:30 p.m. But Ms. Wise testified at the preliminary hearing that the two men came back to J.P.'s. around 7 p.m. and were there "[a]bout a[n] hour and a half." P/H, Vol. 32 at 167. When Mr. Peterson questioned Ms. Wise whether it was possible these two men left for a time during that period before later returning—clearly anticipating the issue of fitting Mr. Moyer's 7:30 sighting at McAnally's into her timeline—Ms. Wise replied that she did not believe so. *Id.* at 172. The State's explanation of the two sightings at the two stores was in direct contradiction to the testimony of a key witness.[44]

A second major discrepancy in the State's case stems from the physical details Ms. Wise gave regarding the second man in J.P.'s. She originally described Suspect #1 as a white male in his early twenties, of slender build, approximately 6'0" to 6'2", with sandy brown hair. Mr. Fontenot, however, is 5'8" to 5'9" with black or dark brown hair.

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44 The OCCA made a factual finding, after the joint trial, "that two men . . . played pool at J.P.'s . . . from about 7:00 p.m. until about 8:30 p.m. on the evening of April 28, 1984," then left around 8:30 p.m. *Fontenot I*, 742 P.2d at 32. This fact is presumptively correct under § 2254(e)(1), and no clear and convincing evidence rebuts it.

Yet another piece of "old" evidence that looms large is the testimony of Mr. Paschal, the only witness other than Ms. Wise who saw the two men in J.P.'s. He had an excellent chance to observe both men, because he "was standing right by the door" when they exited. P/H, Vol. 32 at 213–14. He also saw the two men get into a primered pickup and drive away. At both the preliminary hearing and the new trial, Mr. Paschal gave a description of the man the State asserted to be Mr. Fontenot. Yet at no point did he identify Mr. Fontenot as being this "brownish hair[ed]" man of "slender build" who was with the other man "of stockier build [and] sandier complexion," despite viewing a live lineup that included Mr. Fontenot. P/H, Vol. 32 at 213, 215; N/T, Vol. 35 at 610. Mr. Paschal admitted to having no idea who this brown-haired man was.

And finally, returning to McAnally's, of the three eyewitnesses present when Ms. Haraway was led to the primered pickup, none saw a second man beside the blond-haired man who took her from the store (the man who resembled Mr. Ward), either inside or outside the truck.

Our assessment of Mr. Fontenot's actual innocence assertion combines these weaknesses in the State's case with his newly presented evidence. In doing so, we derive the following picture of events at McAnally's and J.P.'s on the night of April 28, 1984:

J.P.'s 4:00 p.m.
Ms. Wise testifies that she first sees the two men in J.P.' s. They buy beer and wine and then depart at some point thereafter. She does not see them leave.

McAnally's 5:00 p.m. - 6:00 p.m.
Mr. Boardman sees two suspicious men in McAnally's—one blond, one with brown hair—driving an old, light-colored Chevy or Ford pickup. He fails to identify Mr. Fontenot from a photo lineup

J.P.'s 7:00 p.m. - 8:30 p.m.
Ms. Wise testifies that the two suspicious men return to the store and shoot pool in the back room. She does not believe they left at any point during this hour-and-a half window. She now swears there were four men hanging out together in the store throughout the evening, and that one of them was Mr. Howard, who testified at the preliminary hearing to not knowing Mr. Fontenot.

McAnally's 7:30 p.m.
Mr. Moyer sees two men pull up in a gray-primered pickup; a dark-haired man enters first, followed by a blond-haired man. Mr. Moyer told an investigator in 1985 that the dark-haired man was not Mr. Fontenot, and now similarly swears he is "95%" confident this man was Mr. Fontenot.

McAnally's 7:30 p.m. - 7:45 p.m.
Mr. Holkum sees a gray-primered pickup with a conventional bed parked outside the store.

McAnally's 7:50 p.m. - 8:00 p.m.
Mr. McKinnis sees a light-colored Chevy pickup with gray primer spots parked outside the store, and an unknown man standing behind the counter with Ms. Haraway.

J.P.'s 8:00 p.m.
Mr. Paschal arrives at J.P.'s and speaks with Ms. Wise. He sees a primered pickup in the lot; something about the tailgate stands out to him.

J.P.'s 8:10 p.m. - 8:20 p.m.
The two men in J.P.'s leave. Mr. Paschal. standing by the door, gets a good look at both. He fails to identify Mr. Fontenot as the slender, brown-haired man he sees leaving the store.

McAnally's 8:40 p.m. - 8:45 p.m.
The Timmons brothers and Mr. Whelchel see a blond-haired man leading Ms. Haraway to a gray-primered pickup. None of the three see a second man, either inside or outside the pickup.

Pickup Descriptions

McAnally's
A conventional-side, full-size pickup with solid gray (or greenish gray, or blue) primer paint and a normal tailgate.

J.P.'s
A step-side, short-bed pickup with spotted red and gray primer paint down the driver's side and an irregular tailgate.

Fontenot v. Suspect #1:

Fontenot:
5'8"–5'9", black or dark brown hair,
19 years old.

Suspect #1:
6'0"–6'2", sandy brown hair, early 20s.

If presented with this picture, no reasonable juror would lack reasonable doubt that Mr. Fontenot was involved in the abduction and murder of Ms. Haraway. Specifically, a reasonable juror would be led to doubt whether the two men seen in McAnally's by Mr. Moyer were the same two men seen in J.P.'s by Ms. Wise and Mr. Paschal, whether the pickups seen in each location were the same truck, and, most critically, whether Mr. Fontenot ever set foot in either store that night. Newly presented evidence of the phone calls Ms. Haraway received at the store, the forensic pathologist's report on her remains, and Mr.

Fontenot's presence at the Calhoun keg party would further enhance that doubt, suggesting that someone else had a motive for the crime and that Mr. Fontenot could not have committed it. When combined with the plethora of inconsistencies and inaccuracies strewn throughout Mr. Fontenot's confession, the holistic judgment about all the evidence required by *Schlup* would erode the credibility of that confession beyond repair. *See Fontenot III*, 402 F. Supp. 3d at 1220 (characterizing the discrepancies "between Mr. Fontenot's confession and the known facts of the case" as a "chasm").

In crediting Mr. Fontenot's showing of actual innocence, we do not eschew *Perkins*'s teaching on the role of diligence. Mr. Fontenot waited two decades from the State's disclosure of the OSBI material in 1992 to first bring his claims in state court, which cuts against allowing the innocence gateway to open. The items of new evidence particularly susceptible to being discounted on diligence grounds are the affidavits from witnesses procured nearly thirty years after the events in question. *See Schlup*, 513 U.S. at 332 ("[T]he court may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence.").

Were such late-arriving affidavits the sole evidence presented in support of Mr. Fontenot's innocence, this lack of diligence might devalue the credibility of his submission enough to bar provision of procedural relief. But they are instead supplemented with a significant amount of contemporaneous documentary evidence. Additionally, the two most important statements—those of Mr. Moyer and Ms. Wise—draw their evidentiary strength primarily from how they interlock

with statements made at or prior to Mr. Fontenot's new trial. Given this corroboration, we deem the Moyer and Wise affidavits to be "trustworthy eyewitness accounts," *Schlup*, 513 U.S. at 324, notwithstanding their procurement decades after the crime. *See id.* at 330 ("[T]he habeas court may have to make some credibility assessments."). While there may be some questions about the credibility of Mr. DePrater's affidavit, the sworn statements from the partygoers are consistent in corroborating the description of the party provided by Mr. Fontenot both before his polygraph and in his undelivered letters to counsel. And even were we to discount the partygoers' affidavits, we would nevertheless determine there to be ample evidence of actual innocence outside of that material, especially in light of the manifest weaknesses in the case the State presented against Mr. Fontenot in 1988.

In sum, the district court was correct in finding this to be "the rare case where—had the jury heard all the conflicting testimony—it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt." *House*, 547 U.S. at 554; *cf. Floyd v. Vannoy*, 894 F.3d 143 (5th Cir. 2018) (opening the actual innocence gateway based on newly discovered evidence that would lead a reasonable juror to doubt the credibility of petitioner's confession to murder). While this may not be "a case of conclusive exoneration," *House*, 547 U.S. at 553—a virtual impossibility given the lack of any physical evidence—Mr. Fontenot has nevertheless presented "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of

nonharmless constitutional error," *Schlup*, 513 U.S. at 316.

We therefore proceed to assess whether Mr. Fontenot's new trial was free of nonharmless constitutional error.

IV. Merits

We need reach only one of Mr. Fontenot's constitutional claims to resolve this appeal—that the State suppressed favorable, material evidence in violation of *Brady v. Maryland*.[45] Before turning to that issue, we address the State's contention that it was denied an opportunity to address the merits of Mr. Fontenot's claims before the district court and that we should

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[45] The State appeals the district court's conditional grant of habeas relief, which was ordered to issue unless Mr. Fontenot is granted a new trial or, in the alternative, is permanently released from custody. Since the standard remedy for a *Brady* violation mirrors this grant of relief, *see Giglio v. United States*, 405 U.S. 150, 154 (1972), *infra* Part IV.D, our resolution of the *Brady* claim in Mr. Fontenot's favor doubles as a resolution of the State's appeal. This is also the remedy sought by Mr. Fontenot: In briefing before this court, he urges affirmance of the conditional habeas relief granted by the district court, *see* Appellee Br. at 38, without requesting any additional relief on appeal—such as direction of a judgment of acquittal, the proper remedy for a determination that the evidence at trial was insufficient to convict. *See McDaniel v. Brown*, 558 U.S. 120, 131 (2010); *Burks v. United States*, 437 U.S. 1, 16–17 (1978). To be clear, we do not hold that Mr. Fontenot has waived or forfeited the right to such additional relief. *See Burks*, 437 U.S. at 17–18. We do, however, exercise our discretion to address only Mr. Fontenot's *Brady* claim, without reaching his insufficiency claim or any other constitutional assertion, based on our determination that the standard remedy for a *Brady* violation is also the remedy that is "just under the circumstances." *Burks*, 437 U.S. at 17–18 (quoting 28 U.S.C. § 2106). *See also infra* note 50.

therefore remand with instructions to afford it that opportunity.

A. Chance to Address Merits

The State argues it was not given an opportunity to respond to the merits of Mr. Fontenot's second amended petition after filing its procedural motion to dismiss. It claims that by proceeding to rule on the merits of the petition after rejecting the State's procedural arguments, without first directing the State to file an answer specifically addressing the substance of Mr. Fontenot's constitutional claims, the district court deviated from "established habeas corpus procedure." Appellant Br. at 47.

Under the Rules Governing Section 2254 Cases in the United States District Courts, the district court has "ample discretionary authority to tailor the proceedings." *Lonchar v. Thomas*, 517 U.S. 314, 325 (1996). Specifically, if the court determines that a § 2254 petition is not plainly meritless, Rule 4 provides that "the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order." As originally promulgated, Rule 4 spoke in terms of "an answer or other pleading." *See, e.g.*, *O'Blasney v. Solem*, 774 F.2d 925, 926 (8th Cir. 1985). In 2004, the word "motion" was added, and "response" was substituted for "pleading," in order "to reflect the view of some commentators that it is common practice in some districts for the government to file a pre-answer motion to dismiss."[46] Rules Governing § 2254

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46 An answer is a pleading, but a motion is not. *See* Fed. R. Civ. P. 7(a) ("Pleadings"); 7(b) ("Motions and Other Papers"). Thus, use of the phrase "or other pleading" as a referent to "answer

Cases, Rule 4, advisory committee's note to 1976 adoption. The Committee Notes further clarify that the discretion to order a motion

> is designed to afford the judge flexibility in a case where either dismissal or an order to answer may be inappropriate. For example, the judge may want to authorize the respondent to make a motion to dismiss. . . . on procedural grounds, which may avoid burdening the respondent with the necessity of filing an answer on the substantive merits of the petition.

Id.; *see also White v. Lewis*, 874 F.2d 599, 602 (9th Cir. 1989) (reading Rule 4 to convey "the intention that the judge be given 'flexibility' in dealing with habeas petitions").

Rule 5 of the Rules Governing Section 2254 Cases concerns "The Answer" to a habeas petition filed by a prisoner in state custody, as well as the petitioner's reply. Per Rule 5(a), the state "is not required to answer the petition unless a judge so orders." But if a judge so orders, Rule 5(b) states that "[t]he answer must address the allegations in the petition. In addition, it must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations." Rule 5(b) thus clearly differentiates between

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[and] motion" would technically be incorrect. "Response" is presumably a more inclusive term, covering both pleadings (*e.g.*, an answer) and motions, such that the phrase "or other response" is a proper referent to "answer [and] motion." That is, a judge can order some "other response," whether that be a specific type of pleading or motion.

the merits of a habeas petition and any potentially applicable procedural defenses, and mandates that a state *must* address both in its answer. However, the Rule 5 Committee Notes also "address the practice in some districts" of having "the respondent file[ ] a pre-answer motion to dismiss the petition," and point out that "revised Rule 4 permits that practice and reflects the view that if the court does not dismiss the petition, it may require (or permit) the respondent to file a motion." Rules Governing § 2254 Cases, Rule 5, advisory committee's note to 2004 amendments.

Here, the district court did not "authorize" the State to file a motion to dismiss instead of an answer in response to Mr. Fontenot's second amended petition, or to address only procedural issues. Rule 4, advisory committee's note to 1976 adoption. Nor did it expressly "require (or permit) the respondent to file a motion." Rule 5, advisory committee's note to 2004 amendments. Rather, the court simply directed the State to "file a response." Vol. 29 at 896. This order was somewhat ambiguous, as it reflected the generic "other response" language of Rule 4 rather than more specifically ordering either a pleading or a motion. *See Ebert v. Clarke*, 320 F. Supp. 2d 902, 910 (D. Neb. 2004) (stating that the Rule 4 Committee Note "does not indicate what types of 'other responses' might be appropriate"). Reading Rules 4 and 5 together, however, the district court's general directive should have put the State on notice that it must, per Rule 5, "address the allegations in the petition." *See Fontenot III*, 402 F. Supp. 3d at 1119 n.1 ("Once the Respondent was ordered to respond, the Respondent was required to address all allegations in the Second Amended Petition.").

Instead of seeking clarification of the district court's order to "file a response," adopting a conservative approach by "address[ing] the allegations in the petition" in its response, *see* Rule 5, or requesting an opportunity to submit additional briefing, the State elected to omit a comprehensive response to the merits of Mr. Fontenot's claims and focus exclusively on arguing that he failed to overcome various procedural bars to relief. The State must live with the consequences of that decision. That the district court had discretion to either order an initial motion to dismiss on procedural grounds or request an additional merits brief after rejecting the State's procedural motion to dismiss, does not mean it was required to do either. Rather, the plain language of Rules 4 and 5, as well as their Committee Notes and interpretive caselaw, indicate that the district court was entitled to rule on the merits of Mr. Fontenot's petition after giving the State an open-ended chance for "response."

In its opening brief, the State points to an unpublished case from the Eastern District of Oklahoma where the district court granted the State's motion to dismiss a habeas petition "for failure to state a cognizable federal habeas corpus claim." *Lowe v. Bear*, No. CIV-17-406, 2019 WL 1756283, at *3 (E.D. Okla. Apr. 19, 2019). But in *Lowe*, the state was expressly given the option to file a motion to dismiss "[a]s an alternative to filing a Rule 5 answer." No. CIV-17-406, Dist. Ct. ECF No. 5. Likewise, in *Bryant v. Dowling*, also cited by the State in its opening brief, the court directed that the "respondent may file a motion to dismiss," based on alleged procedural defects, "[i]n the alternative" to an answer. No. 17-CV-468, 2019 WL 3304812 (N.D. Okla. July 23, 2019)

(unpublished), Dist. Ct. ECF No. 11, at *2. Here, the State was given no such alternative option.[47] Furthermore, nothing in the Eastern District's local rules speaks to "established procedure" regarding Rules 4 and 5—while Local Civil Rule 9.2(e) does address "Responses to Petitions for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254," it concerns only the

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[47] In its reply brief, the State cites another unpublished case from the Eastern District of Oklahoma, but there, too, the respondent was expressly given the option of filing a motion to dismiss "[a]s an alternative to filing a Rule 5 answer." *Sutton v. Dep't of Corr.*, No. 08-CV-134, 2008 WL 5155657 (E.D. Okla. Dec. 8, 2008), Dist. Ct. ECF No. 5. The same goes for seven of the eight other cases cited by the State in its reply brief from the Northern and Western Districts of Oklahoma. Of the eleven cases cited by the State across its two briefs in support of this procedural argument, in only one was the State allowed to file an answer on the merits after its motion to dismiss was denied without also having received express authorization to file that motion in the first instance. *See Robinson v. Patton*, No. 14-CV-548, 2014 WL 3865388 (W.D. Okla. Aug. 5, 2014) (unpublished), Dist. Ct. ECF No. 7. By responding to an order to answer the petition with an unauthorized motion to dismiss, without addressing the "allegations" of the petition, the State in *Robinson* contravened Rule 5, and therefore the court's subsequent allowance for the filing of an additional merits brief was discretionary. Regardless, one unpublished case from the Western District of Oklahoma does not demonstrate "established procedure" in the Eastern District.

The dissent's contention that "Oklahoma district courts routinely allow habeas respondents . . . to file answers after denying their pre-answer motions to dismiss" is similarly unpersuasive. Dissent at 7. Further, the dissent's assertion that "the district court judge in this case has often benefited from the efficiency of pre-answer motions to dismiss" is beside the point. *Id.* at 8. The question before us is whether the district court was required to request an additional merits brief after rejecting the State's procedural motion to dismiss. It was not.

electronic filing of court records by the respondent. *See* E.D. Okla. Civ. R. 9.2(e), available at http://www.oked.uscourts.gov/sites/oked/files/Local_Civil_Rules.pdf.

We thus reject the State's argument that the district court did not provide it with a sufficient opportunity to address the merits of Mr. Fontenot's claims, in violation of established procedure in the Eastern District of Oklahoma. Although the district court could, and perhaps should, have crafted a more specific Rule 4 directive by expressly calling for an "answer," it did not abuse its considerable discretion to tailor § 2254 proceedings. *See Lonchar*, 517 U.S. at 325.[48] Unless a district court expressly authorizes a

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[48] The dissent agrees that, "as a general matter[,] it was in the [district] court's ultimate discretion whether to allow a merits response after denying the State's motion to dismiss." Dissent at 9; *see also id.* at 11 (conceding the district court's "considerable discretion"). It would hold, however, that the district court abused this discretion because the "complexity" of this case called for additional briefing. *Id.* at 9–11.

We note as an initial matter that the State does not make this argument. The State argues only that the district court abused its discretion because it "ignor[ed] the routine practice in the federal courts of Oklahoma" of allowing such briefing. Oral Arg. at 5:22-6:27. This court "ordinarily consider[s] only the grounds presented by the appellant, wary of searching out our own reasons to reverse when the ground is not presented by the appellant." *United States v. Tee*, 881 F.3d 1258, 1269 (10th Cir. 2018); *see also Greenlaw v. United States*, 554 U.S. 237, 243–44 (2008) (noting courts generally "follow the principle of party presentation").

And there are good reasons the State did not make the argument. First, the dissent fails to cite any decision from this circuit in support of its contention. Moreover, none of the out-of-circuit decisions the dissent relies upon address analogous cir-

respondent to file a specific motion of some type, the respondent should interpret any ambiguous Rule 4 order—such as a directive to file only a "response" to a petition—as calling for the full-blown answer contemplated by Rule 5.[49]

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cumstances. *See* Dissent at 10 (citing *Hall v. Quarterman*, 534 F.3d 365, 366–72 (5th Cir. 2008) (holding district court abused its discretion in not holding an evidentiary hearing on the issue of whether a prisoner was intellectually disabled and therefore ineligible for death penalty); *Ameritox, Ltd. v. Millennium Lab'ys, Inc.*, 803 F.3d 518, 541 (11th Cir. 2015) (holding district court's decision to retain supplemental jurisdiction over state-law claims was an abuse of discretion because "it resulted in the needless creation of new law for nine states and permitted parties that were either ignorant of the law or disingenuous to waste scarce judicial resources"); *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 254 (9th Cir. 1992) (holding district court abused its discretion in imposing sanctions because district court incorrectly deemed plaintiff's claims frivolous); *United States v. Badwan*, 624 F.2d 1228, 1231–32 (4th Cir. 1980) (holding district court did *not* abuse its discretion in denying a defense continuance motion that was based on the asserted complexity of the case—a criminal tax case—which was set for trial about three weeks after arraignment). In short, it appears no appellate court has found an abuse of discretion in these or similar circumstances.

Finally, even if "complexity" may afford a proper ground on which to find a district court has abused its discretion, we would not find that standard satisfied here. There are many complex aspects of Mr. Fontenot's case, but the merits of the *Brady* claim that is the subject of the additional-briefing issue is not one of them. As discussed in Part IV. C, *infra*, we have little trouble concluding, based on well-established precedent, that the State violated *Brady* by suppressing numerous pieces of material evidence with exculpatory and impeachment value.

[49] Even if we determined the district court had erred, such error would be harmless given our resolution of this appeal. After a full round of briefing was completed in the district court

B. Standard of Review

While a successful gateway claim can override both a procedural default and AEDPA's limitations period, it does not alter the standard of review applied to a petitioner's underlying constitutional claims. "[T]he correct standard of review under AEDPA is not waivable. It is, unlike exhaustion, an unavoidable legal question we must ask, and answer, in every case." *Gardner v. Galetka*, 568 F.3d 862, 879 (10th Cir. 2009).

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on Mr. Fontenot's first amended petition—consisting of the petition, the State's motion to dismiss, and Mr. Fontenot's reply—the court, in an October 2, 2018, minute order, directed the State to file an additional response "specifically address[ing] Petitioner's alleged Brady violations and the newly discovered evidence outlined" by Mr. Fontenot. Dist. Ct. ECF No. 108. The State did so, submitting a 35-page brief with supporting exhibits on October 17, 2018. *See* Okla. *Brady* Br. The dissent notes this 35 page brief was filed in response to Mr. Fontenot's first amended petition that was later mooted by his second amended petition. At oral argument before this court, however, when asked whether the State would have said anything further about *Brady* if given the opportunity, counsel for the State conceded that "[t]he *Brady* issue was thoroughly briefed." Oral Arg. at 7:55–8:30. Mr. Fontenot's *Brady* claim is the most significant of his constitutional assertions, and it is the only substantive claim we reach. Thus, the State was expressly granted an additional opportunity to address the dispositive claim in this appeal, which it concedes was sufficient.

Moreover, according to the State, the main error flowing from the district court's decision to rule on the merits without additional briefing from the State was its failure to accord AEDPA deference to the OCCA's resolution of the claims Mr. Fontenot brought on direct appeal. *See* Appellant Br. at 47–48; Appellant Reply at 13. Our decision to reach only Mr. Fontenot's *Brady* claim moots this concern, because the *Brady* claim was not adjudicated on the merits by the OCCA.

"[O]ur review of the claims in this appeal [is] governed by AEDPA's standards to the extent that the claims were adjudicated on the merits by an Oklahoma state court." *Douglas v. Workman*, 560 F.3d 1156, 1170 (10th Cir. 2009); *see* 28 U.S.C. § 2254 (d) (directing that for claims adjudicated on the merits in state court, relief may be granted only if that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," § 2254(d)(1), or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2)).[50] But "[t]he § 2254(d) standard does not apply to issues not decided on the merits by the state court." *Bland*, 459 F.3d at 1010. "If the state courts have not heard the claim on its merits, we review the district court's legal conclusions de novo and its factual findings, if any, for clear error." *Smallwood*, 191 F.3d at 1264. "However, if the district court based its factual findings entirely on the state court record, we review that record independently." *Bland*, 459 F.3d at 1010.

Claims to which the state court applied a procedural bar were not decided on the merits. *See, e.g.*,

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[50] Because our disposition of the *Brady* issue resolves this appeal, we do not reach the district court's analysis regarding any of Mr. Fontenot's remaining constitutional claims. We note, however, that regarding several of those claims, the district court failed to accord proper AEDPA deference under § 2254(d) and (e) to the various state court decisions in this matter. Nothing in this opinion, or in our decision to affirm the grant of habeas relief, should be construed as affirmation or approval of the district court's approach to and resolution of any of those remaining constitutional claims.

Brecheen v. Reynolds, 41 F.3d 1343, 1354 (10th Cir. 1994). Thus, because the OCCA applied laches to deny Mr. Fontenot's application for postconviction relief, we are not bound by § 2254(d) deference regarding those claims Mr. Fontenot presented for the first time in that application, including his *Brady* claim. *See* Appellant Br. at 7 (referencing "the state's procedural bar of *laches*"); *see also Smith v. Addison*, No. 06–468, 2009 WL 3075650, at *4 (N.D. Okla. Sept. 21, 2009) (unpublished) (finding that by affirming the denial of postconviction relief based on laches, "the OCCA did not adjudicate the merits of the post-conviction claims, including the *Brady* claim raised in the instant habeas corpus petition"); *cf. Fairchild*, 579 F.3d at 1148 n.6 ("To dispose of a claim without considering the facts supporting it is not a decision on the merits." (quotation marks omitted)).

"When we are not bound by AEDPA deference, we review de novo the existence of a *Brady* violation. The subsidiary question of whether suppressed evidence is material is a mixed question of law and fact which we also review de novo." *Douglas*, 560 F.3d at 1172 (citations omitted). Even when reviewing a habeas claim de novo rather than under § 2254(d), state-court factfinding still receives the benefit of doubt under § 2254(e)(1): that is, "[a]ny state-court findings of fact that bear upon the claim are entitled to a presumption of correctness rebuttable only by 'clear and convincing evidence.'" *Hooks v. Workman*, 689 F.3d 1148, 1164 (10th Cir. 2012) (quoting 28 U.S.C. § 2254 (e)(1)).

C. *Brady* Claim

In *Brady v. Maryland*, the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). The Court subsequently clarified that the duty to disclose favorable evidence in the hands of the state arises regardless of whether a request for such evidence has been made by the defense. *See United States v. Agurs*, 427 U.S. 97, 107 (1976); *see also Douglas*, 560 F.3d at 1172 ("The government's obligation to disclose exculpatory evidence does not turn on an accused's request."). "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). "The defense needs to establish these elements by a preponderance of the evidence." *United States v. Durham*, 902 F.3d 1180, 1221 (10th Cir. 2018).

1. Suppressed by the State

Evidence is "suppressed by the State, either willfully or inadvertently," when it is "known to the [State] but not disclosed to trial counsel." *Strickler*, 527 U.S. at 282. Evidence suppressed by the state includes "evidence known only to police investigators and not to the prosecutor." *Kyles v. Whitley*, 514 U.S. 419, 438 (1995); *see also Strickler*, 527 U.S. at 281 ("[T]he individual prosecutor has a duty to learn of

any favorable evidence known to the others acting on the government's behalf . . . , including the police.'" (quoting *Kyles*, 514 U.S. at 437)). Thus, this element is satisfied when the "evidence was known by police investigators—and by inference the prosecution—before [the petitioner's] trial but was nevertheless not given to [the petitioner]." *Scott v. Mullin*, 303 F.3d 1222, 1230 (10th Cir. 2002) (citation omitted).

a. Known but not disclosed

The State does not dispute that the "additional documents . . . released by the OSBI and the [APD] in the time since Petitioner initiated his collateral proceedings" were not turned over prior to trial, nor does it contest suppression with respect to most of the 860 pages disclosed by the OSBI in 1992. *See* Appellant Br. at 14–15. However, it does contest whether the "prosecutorial" file prepared by the OSBI for use by the Pontotoc County D.A. in the prosecution of Mr. Fontenot and Mr. Ward was known but not disclosed. *Compare* Appellant Br. at 25 (claiming that the prosecutorial "was always available to the defense, even prior to trial") *with* SAP, Vol. 30 at 68 ("Even more egregious was the pattern of not disclosing the prosecutorial or any other discovery to defense counsel.").[51] The prosecutorial comprises around 160

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[51] The parties also dispute whether Mr. Fontenot had pretrial possession of the two OCME files discussed *supra* Part III.C.3.f—Dr. McWilliams's analysis of Ms. Haraway's remains and the report of mishandling of the Gerty site. The State's position is bolstered by the postconviction court's finding that Mr. Fontenot had access to the medical examiner report since 1986. It also draws record support from notes by Dr. Balding documenting meetings with Ms. Hull in July 1986, *see* Ex. 46, Vol. 23 at 76 (reporting that Ms. Hull "looked thru the case, took some

of the 860 pages of material turned over by the OSBI in 1992. *See* Ex. 44 (860 pages of 1992 OSBI disclosure); Vol. 7 at 63 through Vol. 10 at 33 (Prosecutorial; OSBI Bates-stamped documents 225–385 of 860).

In its 2014 postconviction order, the state district court found that Mr. Fontenot "has had possession of the 860 pages of OSBI material *since 1992*." Vol. 31 at 675 (emphasis added). This factual finding is presumed correct under § 2254(e)(1). And implicit in this finding is its inverse corollary: that Mr. Fontenot did *not* have access to any of those 860 pages of material—which included the prosecutorial—*before* 1992. Thus, a determination that any of the investigative reports and interview summaries found in the prosecutorial were disclosed to Mr. Butner prior to Mr. Fontenot's 1988 new trial would require rebutting the state court's finding via clear and convincing evidence.

The State has not produced such evidence. In his 2017 deposition, Mr. Peterson stated that the Pontotoc County D.A. had an "open file policy," which he defined to mean that "if we have it in our files [defense attorneys] have access to it, everything but our work product. They would be entitled to come in

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notes"), and Mr. Butner in May 1988, *see id.* at 54 (reporting that "I showed [Mr. Butner] our file & we discussed my findings"). Mr. Fontenot's position is supported by affidavits from both Ms. Hull and Mr. Butner stating that they did not see the full medical examiner's report. *See* Ex. 11, Vol. 1 at 210; Ex. 16, Vol. 2 at 76. It is also corroborated by circumstantial evidence—namely, that none of the information contained in the two reports was presented at the 1988 new trial. We need not resolve this dispute, however, for Mr. Fontenot does not advance these two reports in support of his *Brady* claim.

and look through the files and make copies of whatever they wanted to." Ex. 78, Vol. 27 at 33–34; *see Strickler*, 527 U.S. at 283 n.23 ("[I]f a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*."). But in response to a question whether it "was the policy that a defense attorney had access to the entirety of the prosecutorial," Mr. Peterson responded, "He would not have access to my prosecutorial report. That's my work product. I make notes in it. I make research in it." Ex. 78, Vol. 27 at 34; *see also id.* at 56 ("Q: Well, you couldn't tell us if they had access to the prosecutorial? A: No, they did not, not the one I had."); *id.* at 68 ("As a matter of policy I wouldn't give [defense attorneys] my prosecutorial report."). And in response to a follow-up question inquiring whether he had a policy to give the defense access to the prosecutorial before claiming work product privilege, Mr. Peterson responded, "No, I did not." *Id.* at 34. Furthermore, Mr. Peterson said he was not aware of "any other documents in [his] file *other* than the prosecutorial." *Id.* at 57 (emphasis added). Thus, the "open file" on Mr. Fontenot's case was essentially empty. *See Fontenot III*, 402 F. Supp. 3d at 1163; Ex. 81, Vol. 28 at 84 (Mr. Butner's deposition testimony that he "came to realize that [the Pontotoc County D.A.'s] open file policy meant absolutely nothing").

At the time of Mr. Fontenot's trials, Oklahoma law viewed unsworn statements of prosecution witnesses and police investigative reports to fall within the work-product privilege, making them non-discoverable. *Nauni v. State*, 670 P.2d 126, 133 (Okla.

Crim. App. 1983); *see also Moore v. State*, 740 P.2d 731, 736 (Okla. Crim. App. 1987). Consistent with this authority, the prosecution referenced non-discoverable law enforcement work product on several occasions at the preliminary hearing. *See* P/H, Vol. 32 at 521–22, 784–85. That the prosecutorial is composed almost exclusively of unsworn witness statements and police investigative reports helps to explain why Mr. Peterson viewed the prosecutorial as his office's "work product," and thus why he "d[idn't] think it's discoverable." Ex. 78, Vol. 27 at 68. But of course, regardless of the designation of various reports as work product, Oklahoma courts still recognized that "the work-product privilege may not be applied in derogation of a criminal defendant's constitutional rights to disclosure of evidence favorable to the defendant." *Nauni*, 670 P.2d at 133.

There is also no indication that the prosecutorial was turned over on any voluntary basis. When pressed at the deposition about his office's policy on the timing of voluntary disclosures, Mr. Peterson's response indicated that, effectively, it had none: "normally a defense attorney files his motion under Brady, *gets a court order. . . . to divulge exculpatory evidence*." Ex. 78, Vol. 27 at 35–36 (emphasis added); *see id.* at 73 ("Q: [P]olicy wise, how do you know what materials from your file were provided to the defense? A: I don't know that there was a policy. . . . I don't have a general policy."). This fundamental misunderstanding of the prosecution's obligation under *Brady*—which requires the State to disclose material exculpatory and impeachment evidence regardless of whether a motion compelling such disclosure is filed or granted—is consistent with Mr. Peterson's statement during

the preliminary hearing that the prosecution "would object to any discovery prior to a trial judge's order on discovery, if there is to be any at all." P/H, Vol. 32 at 786; *see also id.* at 518 ("Counsel is saying that he has a right to discovery at preliminary hearing, that's not the law. Preliminary hearing is for the purpose of putting on sufficient evidence, has nothing to do with discovery."[52]). In short, as the preliminary hearing transcript makes clear, Pontotoc County prosecutors repeatedly "stonewalled against providing any evidence" to Mr. Fontenot's defense. *Fontenot III*, 402 F. Supp. 3d at 1167; *see, e.g.*, P/H, Vol. 32 at 784, 927 (consistently responding to defense requests for the production of relevant information with a directive to file motions for discovery).

Far from revealing clear and convincing evidence that the prosecutorial was turned over by the State before trial, the record "strongly suggests and supports a contrary finding, namely, that the report was not disclosed." *Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 829 (10th Cir. 1995). In a 2013 affidavit,

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[52] *Contra Beaird v. Ramey*, 456 P.2d 587, 589 (Okla. Crim. App. 1969):

> [The preliminary hearing] is a procedure whereby defendant may discover what testimony is to be used against him at the trial, as he may examine witnesses in detail and be prepared to cope with their testimony at the time of trial in case defendant is bound over.
>
> Since the hearing is conducted for benefit of an accused, he should be given broad latitude in the cross-examination of State's witnesses and in producing evidence that would tend to obtain defendant's release, or that which would be material or relevant.

Mr. Butner concluded, after a review of the 860 pages of OSBI disclosures, that he "did not receive any of the OSBI Reports from the Pontotoc County District Attorney's Office or from OSBI prior to either of Mr. Fontenot's trials." Ex. 16, Vol. 2 at 76. Specifically, Mr. Butner swore he had not seen key material in the prosecutorial relating to Mr. Fontenot's alibi, including the interviews of Ms. Roberts and Mr. Calhoun, the police report on the Calhoun party noise complaint, and Mr. Fontenot's October 21 statement asserting his presence at the party and recanting his confession. Ex. 16, Vol. 2 at 77; *see also* Ex. 81, Vol. 28 at 109 (Mr. Butner's deposition statement that he could not recall ever seeing the police report on the Calhoun party). He also swore to having never seen statements from Monroe Atkeson, Janet Weldon, and James David Watts documenting the obscene calls received by Ms. Haraway. Ex. 16, Vol. 2 at 77; *see also* Ex. 81, Vol. 28 at 103–04 (Mr. Butner's deposition testimony that he did not recall being aware "that there had been threatening or obscene phone calls to Ms. Haraway while she was working at McAnally's").

Mr. Butner's statements are supported by circumstantial evidence—chiefly, the fact that he presented no alibi defense at trial nor any evidence of the harassing phone calls. *Cf. Smith*, 50 F.3d at 829 ("[P]erhaps the most highly probative evidence relating to the disclosure *vel non* of this report is the conspicuous absence of any cross-examination . . . on the matters contained in [the] report, matters that were extremely relevant to [the] defense."). And he lacked this evidence despite filing detailed pretrial discovery motions on December 20, 1984, *see* Ex. 74,

Vol. 26 at 306 (motion for the discovery of seven categories of information filed in preparation for the preliminary hearing); February 13, 1985, *see* Ex. 73, Vol. 26 at 304 (motion for the discovery of "all police and sheriff's reports regarding this case," filed in preparation for the joint trial); February 20, 1985, *see* Ex. 75, Vol. 26 at 309 (comprehensive discovery motion filed in preparation for the joint trial, requesting 15 categories of information); and December 2, 1987, *see* Ex. 72, Vol. 26 at 297 (comprehensive discovery motion filed in preparation for the new trial, requesting 40 categories of information, and moving for a judicial determination of any information asserted to be work product); *see also* Ex. 81, Vol. 28 at 85 (Mr. Butner's deposition testimony that "I tried to cover my posterior with motions that would make them give me anything and everything"). While the defense is not required to file such motions to ensure the disclosure of favorable, material evidence, *see Agurs*, 427 U.S. at 107, it was clear in 1988 that "[t]he prosecution violates the *Brady* rule if after a request by the defense it suppresses evidence which is both favorable to the defense and material to guilt or punishment," *Bowen*, 799 F.2d at 602; *see Agurs*, 427 U.S. at 106 ("When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.").

We thus determine that the investigative reports contained in the prosecutorial, in addition to the rest of the 860 pages of 1992 OSBI disclosure, were "known to the [State] but not disclosed to trial counsel." *Strickler*, 527 U.S. at 282.

b. Knew or should have known

The State argues that evidence in its possession regarding Mr. Fontenot's alibi was not suppressed "because evidence of Petitioner's alibi would have been within [his] own knowledge," Appellant Br. at 23, and thus "information from the prosecution has never been required to investigate or substantiate [that alibi]," Okla. *Brady* Br. at 20. The State also argues it did not suppress evidence of the harassing phone calls, because Mr. Butner was notified of these calls via Mr. Kerner's investigative report, delivered several weeks before the new trial, which summarized the conversation in McAnally's between Ms. Haraway and Mr. Johnson. *See* Appellant Br. at 29–30. The State cites a Seventh Circuit case for the proposition that "evidence is suppressed only if the evidence was not otherwise available to the defendant through the exercise of due diligence." *Id.* at 23–24; Okla. *Brady* Br. at 20 (citing *Harris v. Kuba*, 486 F.3d 1010, 1015 (7th Cir. 2007)).

It is true that many of our sister circuits deem evidence "suppressed" under *Brady* only if "the evidence was not otherwise available to the defendant through the exercise of reasonable diligence." *United States v. O'Hara*, 301 F.3d 563, 569 (7th Cir. 2002). In these circuits, "[e]vidence is not 'suppressed' if the defendant either knew or should have known of the essential facts permitting him to take advantage of any exculpatory evidence." *United States v. LeRoy*, 687 F.2d 610, 618 (2d Cir. 1982) (citations omitted).

But that is not the law in this circuit. In *Banks v. Reynolds*, 54 F.3d 1508, 1516–17 (10th Cir. 1995), we rejected the state's argument "that *Brady* only requires the prosecution to disclose information which

is otherwise unknown to the defendant." Instead, we held that

> the prosecution's obligation to turn over the evidence in the first instance stands independent of the defendant's knowledge. Simply stated, if the prosecution possesses evidence that, in the context of a particular case is obviously exculpatory, then it has an obligation to disclose it to defense counsel whether a general request is made or whether no request is made.
>
> In this case, the fact that defense counsel "knew or should have known" about the [pertinent] information, therefore, is irrelevant to whether the prosecution had an obligation to disclose the information. The only relevant inquiry is whether the information was "exculpatory."

Id. at 1517 (internal quotation marks and citations omitted); *see also United States v. Quintanilla*, 193 F.3d 1139, 1149 (10th Cir. 1999).

This reasoning is sound. The Supreme Court has framed the prosecution's duty to disclose as "broad," *Strickler*, 527 U.S. at 281, and "has never required a defendant to exercise due diligence to obtain *Brady* material," *Lewis v. Conn. Comm'r of Corr.*, 790 F.3d 109, 121 (2d Cir. 2015). To the contrary, in *Banks v. Dretke*, while analyzing *Brady* as cause for excusing procedural default, the Court rejected a rule "declaring 'prosecutor may hide, defendant must seek'" as "not tenable in a system constitutionally bound to accord defendants due process." 540 U.S. 668, 696 (2004). Following *Banks v. Dretke*, several circuits have held

that a defendant's diligence in discovering evidence plays no role in a substantive *Brady* claim. *See Dennis v. Sec'y, Penn. Dep't of Corr.*, 834 F.3d 263, 291 (3d Cir. 2016) (en banc) (clarifying that "the concept of 'due diligence' plays no role in the *Brady* analysis"); *Amado v. Gonzalez*, 758 F.3d 1119, 1135 (9th Cir. 2014) ("The prosecutor's obligation under *Brady* is not excused by a defense counsel's failure to exercise diligence with respect to suppressed evidence."); *United States v. Tavera*, 719 F.3d 705, 712 (6th Cir. 2013) (stating that *Banks v. Dretke* "should have ended th[e] practice" of imposing "a broad defendant-due-diligence rule" in *Brady* cases). In sum, "[t]he *Brady* rule imposes an independent duty to act on the government," *Tavera*, 719 F.3d at 712—an obligation to disclose favorable evidence when it reaches the point of materiality, regardless of the defense's subjective or objective knowledge of such evidence. "Any other rule presents too slippery a slope." *Dennis*, 834 F.3d at 292.

However, "[w]hether the defense knows or should know about evidence in the possession of the prosecution certainly will bear on whether there has been a *Brady* violation." *Banks (Reynolds)*, 54 F.3d at 1517. While it has no bearing on whether the evidence was "suppressed by the state," a defendant's knowledge instead implicates the element of prejudice, or materiality. That is, "if the defense already has a particular piece of evidence, the prosecution's disclosure of that evidence would, in many cases, be cumulative and the withheld evidence would not be material." *Id.* We therefore conclude that both the alibi and phone call evidence was suppressed, but we will consider its availability to the defense in evaluating materiality.

2. Favorable to the Defense

Evidence favorable to the defense encompasses exculpatory evidence, which "tend[s] to establish a criminal defendant's innocence." *Exculpatory Evidence*, Black's Law Dictionary (11th ed. 2019). It also encompasses impeachment evidence, used to undermine a witness's credibility, for "if disclosed and used effectively," such evidence "may make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. 667, 676 (1985). "Impeachment evidence merits the same constitutional treatment as exculpatory evidence." *Bowen*, 799 F.2d at 610.

Mr. Fontenot cites five categories of favorable evidence that the State suppressed. We analyze each category, in addition to a sixth, pertaining to Ms. Haraway's blouse.[53]

a. Alibi evidence

Mr. Butner "was unaware of the numerous OSBI reports supporting Mr. Fontenot's alibi of attending Gordon Calhoun's party during the time Mrs. Haraway went missing." Ex. 16, Vol. 2 at 77. As discussed in

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[53] We can affirm the district court's finding of a *Brady* violation on any ground supported by the record. *See Hernandez v. Starbuck*, 69 F.3d 1089, 1093 (10th Cir. 1995) (a court of appeals has "freedom to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court" (quotation marks omitted)); *see also Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011) ("[W]e may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court or even presented to us on appeal. . . . [W]e are ready to affirm whenever the record allows it.").

connection with actual innocence, these reports include an October 1984 interview of Ms. Roberts; a summary of Mr. Fontenot's statements to the OSBI before and after administration of a polygraph test on October 21, 1984;[54] and a police report documenting the 12:40 a.m. response on April 29, 1984, to a noise complaint about the Calhoun party on South Townsend. *See supra* Part III.C.3.a.

Also not disclosed were summaries of two 1984 interviews of Mr. Calhoun conducted by D.A. Investigator Loyd Bond and included in the prosecutorial. *See* Ex. 11, Vol. 2 at 53 (Terry Hull's affidavit statement that she had no recollection of ever seeing these interview summaries). On November 13, Mr. Calhoun told Investigator Bond that he could not remember a party at his apartment on April 27 or 28. He also stated he was close friends with Bruce DePrater. In a follow-up one month later, Mr. Calhoun recalled going to Texas to buy a keg for a party at his apartment, which he believed could have been on April 27 or 28.

This evidence was favorable because it would have helped establish Mr. Fontenot's alibi for the night of April 28. Ms. Roberts's October 19 statement

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[54] At the preliminary hearing, Mr. Peterson acknowledged that the defense is entitled to "any statements by the Defendants to law enforcement." P/H, Vol. 32 at 926. Yet the summary of Mr. Fontenot's October 21 statement, included in the prosecutorial, was never disclosed. *See* Ex. 16, Vol. 2 at 77 (Mr. Butner's affidavit statement that he "was not provided Karl's poly-graphed statement w[h]ere he admits being at the party"); P/H, Vol. 32 at 1017–23 (Mr. Butner's cross-examination regarding what occurred during the exam); Ex. 81, Vol. 28 at 128 (Mr. Butner's deposition testimony that Mr. Fontenot did not advise him of the polygraph, despite his specific request for that information).

provided independent corroboration of Mr. Fontenot's October 21 assertion that he was at the party all night, and that Mr. Ward, "Bruce" from Konawa, and Ms. Roberts were also in attendance. Further, several details of Ms. Roberts's statement were in turn corroborated by Mr. Calhoun's two interviews—that he traveled to Texas to buy the kegs for the April 28 party, and that the "Bruce" identified by both Mr. Fontenot and Ms. Roberts was most likely Mr. Calhoun's friend Bruce DePrater. The Calhoun interview reports would have strengthened the credibility of Ms. Roberts, and possibly led Mr. Butner to call her as an alibi witness. *See* Ex. 16, Vol. 2 at 77 (Mr. Butner's statement that he would have called Ms. Roberts to testify during the defense case-in-chief had these reports been disclosed).

The information in several of the suppressed reports also would have provided considerable alibi value when combined with other evidence. For example, the withheld APD noise complaint would have verified Mr. Ward's October 12 statement that the police came to the Calhoun party "and told us to quiet it down." J/T, Vol. 41 at 49; *cf.* Ex. 89, Vol. 28 at 332 (reporting that the Calhoun partiers "advised they would quieten down"). And the APD radio log entry from 12:40 a.m. on April 29 of a "loud drummer at 515 S. Townsend," Ex. 42, Vol. 4 at 168, would have verified Mr. Fontenot's withheld October 21 statement that someone was playing drums at the Calhoun party.

The only testimony the jury heard at the new trial about the April 28 keg party was Mr. Calhoun's assertion that neither Mr. Fontenot nor Mr. Ward attended. Had these documents been disclosed, not

only would Mr. Butner have been able to mount a robust alibi defense, he also would have been able to impeach Mr. Calhoun with his statements during the two 1984 interviews. *See* Ex. 11, Vol. 2 at 53 (Ms. Hull's assertion that the interviews carried impeachment value). That is, Mr. Butner could have asked how Mr. Calhoun was now sure that Mr. Fontenot was not at this party when in November 1984 he could not even remember if and when the party occurred.

Mr. Fontenot's October 21 statement is also favorable apart from its alibi value. The OSBI summary of this interview, which occurred just two days after Mr. Fontenot's confession, recounted that he "denied any involvement and stated he only gave the statement to the agent because the agent told him the story he was supposed to have been involved in and he simply agreed to it." Ex. 43, Vol. 4 at 325. Furthermore, "[h]e adamantly stated that none of the statement he gave to the agent involving him in the crime is true and that he also lied when the video confession was taped." *Id*. Not only did this information fit with Mr. Fontenot's defense—that he gave a false confession after being fed information by the police—but the timing of his complete recantation significantly increased the credibility of such defense. As the district court found, "Mr. Fontenot's recantation within days of his confession . . . drastically undercut the reliability of the confession and would have aided defense counsel in proving Mr. Fontenot's confession was false." *Fontenot III*, 402 F. Supp. 3d at 1170. Without benefit of the full statement prepared by law enforcement regarding the October 21 interview, however, Mr. Butner failed to call as a witness the OSBI agent who administered the polygraph, Agent

Featherstone, or to introduce any evidence of Mr. Fontenot's immediate recantation to mitigate the damaging effect of his confession.[55]

b. Witness statements

The district court agreed with Mr. Fontenot that several witness statements included among the APD documents disclosed in 2019 were favorable to the defense:

James Boardman and James Moyer

A few days after Ms. Haraway disappeared, James Boardman told police that he saw two men inside McAnally's on April 28 between 5 and 6 p.m. who were acting suspiciously. One of the men had brown hair and the other had sandy blond hair. Mr. Boardman thought they were driving an old, light-colored pickup, a Chevy or a Ford. Around November 1, 1984, Mr. Boardman came to the Ada police station to view photo lineups of Mr. Ward, Mr. Fontenot, and Mr. Titsworth, with Agent Rogers and D.A. investigator Bond present. Mr. Boardman failed to identify Mr. Fontenot. *See* Ex. 93, Vol. 30 at 516.

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[55] In his 2017 deposition, Mr. Butner discussed the significant communication difficulties that plagued his representation of Mr. Fontenot, in the context of addressing Mr. Fontenot's failure to inform him of his October 21, 1984 polygraph exam. *See supra* note 7. These difficulties highlight the damage done by the State's suppression of Mr. Fontenot's own statements to police, despite being aware of the obligation to turn those statements over. They also indicate that here, damage was likely done by withholding alibi evidence even if certain of those underlying facts were within Mr. Fontenot's knowledge, and thus potentially discoverable via due diligence.

This information is exculpatory. Mr. Boardman's report of seeing a suspicious-looking pair of men together in McAnally's on the evening of April 28, one blond and one with darker hair, who drove an old, light-colored pickup, fits with the reports of other witnesses who saw a similar pair of men driving a similar pickup later that night. Further, the fact that he was in McAnally's between 5 and 6 p.m. coincides with the State's timeline, indicating that the men he saw could have been the men at J.P.'s—Ms. Wise testified that the suspicious pair of individuals first entered her store at 4 p.m., left at some point thereafter, then returned around 7 p.m. And most critically, the suppressed report states that Mr. Boardman identified "#1 out of the Ward folder and could not identify anyone from the Fontenot and Titsworth folders." *Id.*

It is unclear if "#1 out of the Ward folder" was a photo of Mr. Ward or of another blond-haired man. Regardless, around five days later—on November 6, 1984—Mr. Moyer was also shown photo lineups and also picked out "#1 in the Ward folder" as the picture most resembling the blond-haired man he saw in McAnally's, a fact documented by another APD report first disclosed in 2019. Ex. 102, Vol. 30 at 552. It thus seems apparent that Mr. Boardman and Mr. Moyer selected the same photograph from the Ward folder when asked to identify the blond-haired man they saw in McAnally's on the night of April 28, 1984. In combination with the other similarities between their accounts, this alignment in photo identification provides strong evidence that the two suspicious men Mr. Boardman saw in McAnally's between 5 and 6 p.m. were the same two suspicious

men Mr. Moyer saw in the store at around 7:30 p.m. Thus, Mr. Boardman's failure to identify Mr. Fontenot as the brown-haired man is in turn strong evidence that Mr. Fontenot was not the companion of the blond-haired man whom both witnesses selected from the photo lineup.

As Mr. Bond, the D.A. investigator, was present at Mr. Boardman's photo lineup, there is no question the prosecution knew of this failed identification. *See* Ex. 72, Vol. 26 at 301 (Mr. Butner's request for any "information of misidentification of the Defendant by any source or witness" included in December 1987 discovery motion). If this report had been disclosed, Mr. Butner could have called Mr. Boardman as a witness to cast further doubt on the State's tenuous identification. And if Mr. Butner had received both the Boardman and Moyer reports, he could have developed the information each report contained about photo #1 in the Ward folder to further establish that Mr. Fontenot was not the dark-haired man seen by various witnesses at J.P.'s and McAnally's that night.

John McKinnis

John McKinnis spoke with the APD the day after Ms. Haraway's abduction. Notes taken of this phone call indicate that Mr. McKinnis was in the store at 8:05 p.m. the prior evening, and that he saw a "man standing at counter. Large guy with full beard. WM 5′11", 195–200[,] 26–30 years old. Dark jeans buttoned up shirt." Ex. 94, Vol. 30 at 519. While somewhat cryptic, these notes indicate that Mr. McKinnis felt it necessary to pass along information about a man he saw standing at the counter with Ms. Haraway less than an hour before she disappeared.

Mr. McKinnis provided an affidavit in 2013, six years before the notes of his original phone call were uncovered in APD files. Mr. McKinnis stated that he told Detective Baskin that there was a man standing "behind the counter with Haraway" when he was in the store around 8 p.m. on April 28. Ex. 5, Vol. 2 at 36. Detective Baskin allegedly told Mr. McKinnis that this information was not relevant to the investigation, because whatever happened to Ms. Haraway occurred later on, and that the police already knew the identity of the man he had seen behind the counter.

Mr. McKinnis's information was favorable to Mr. Fontenot. A report of an unknown individual seen standing behind the McAnally's counter with Ms. Haraway around 8 p.m. could have led to the development of an alternate suspect. With this information, Mr. Butner could have interviewed Mr. McKinnis to potentially identify this unknown man and called Mr. McKinnis to testify that the man he saw with Ms. Haraway within roughly 45 minutes of her disappearance was neither Mr. Fontenot nor Mr. Ward. (An Ada native, Mr. McKinnis knew both defendants by sight and could not identify the man behind the counter as either of them. *See id.*) Further, disclosure of Mr. McKinnis's call could have led to more information regarding the gray-primered Chevy pickup, as Mr. McKinnis recalls seeing such a vehicle during his trip to McAnally's.

[* * *]

One additional suppressed report also warrants discussion:

Karen Wise's April 30 interview:

A summary of an interview of Karen Wise by Agent Rogers on April 30, 1984 was included in the prosecutorial. Ms. Wise told the OSBI that two white males came into J.P.'s around 7:15 p.m. and asked to use the phone, before requesting two dollars in quarters to play pool. The descriptions Ms. Wise gave of these men helped form the composites of the two suspects later alleged to be Mr. Fontenot and Mr. Ward. Ms. Wise said that she thought these two men could have left the store then returned a little later, shortly after 8 p.m. Upon returning, they got more quarters for pool, and sometime after that bought a six pack of Budweiser and a bottle of wine. The two men then departed in an older model pickup, which had light color spots and reddish-brown primer, and headed west, back toward town and McAnally's.

Ms. Wise told the OSBI that she thought these two men looked familiar, and that they had been in the store the week prior, also to play pool, driving the same pickup. On this prior trip, they also bought a six-pack of Budweiser, and Ms. Wise remembered that "she checked the tall subject's driver's license and she feels that he was possibly twenty-four years old or close to it," which she recalled because his birthday was close to hers. Ex. 44, Vol. 8 at 30.

This statement provided exculpatory and impeachment evidence which Mr. Butner could have made significant use of at both the preliminary hearing and trial. On the impeachment front, Ms. Wise's description of the two visits made to J.P.'s by these two men in her April 30 interview differs markedly from her testimony at the preliminary hearing and the new trial. In the interview, she stated the two men first arrived around 7:15 p.m.,

got quarters to play pool, left for a brief time, returned shortly after 8 p.m., got more quarters, bought beer and wine, then left. At the preliminary hearing and at trial, she testified that these two men were first in the store at 4 p.m., bought the beer and wine during that initial visit, then left, before returning at around 7 p.m. She further testified that they were in the store continuously for the next hour and a half before leaving again at around 8:30, and that they made no purchases during this period.

Also favorable was the fact that Ms. Wise told the OSBI on April 30 that she thought she remembered the tall suspect—the man alleged to be Mr. Fontenot—from checking his ID a week earlier, and believed he was around 24 years old. Further, Ms. Wise's April 30 statement seems to indicate that it was also the tall man who bought the wine on April 28. *See id.* at 29 ("[T]he tall man asked Wise where was the wine and she showed them. They bought a half a gallon of red Reunite Wine. . . . "); *cf.* P/H, Vol. 32 at 182–83 (Ms. Wise's testimony that the taller subject picked out the wine); *id.* at 179 ("Q: Did you check the identification, driver's license, or anything of the person who bought the beer or the wine? A: On the wine, I certainly did."). This was exculpatory information, given that Mr. Fontenot was 19 at the time of the crime. Mr. Butner came close to eliciting this inference at the preliminary hearing:

> Mr. Butner: A twenty year old couldn't get into your establishment. Is that right?
>
> Ms. Wise: No. . . . But like I told them, I remember the I.D. was old enough. I can't recall the picture on it. I just remember it was old enough. I looked—was trying to make sure

that they weren't, you know, using someone else's I.D.

Mr. Butner: . . . And so, when you say that they were old enough, that would put them over the age of twenty-one.

Ms. Wise: Yes.

Mr. Butner: And that identification and that I.D. matched the person giving it to you. Is that right?

Ms. Wise: Yes, it did.

P/H, Vol. 32 at 203. Without Ms. Wise's April 30 statement, however, Mr. Butner could not inquire about her recollection of the taller suspect from a prior visit as being around 24 years old. He also could not drill down further into the issue of photo ID to establish that both of the two men—or at least the taller man—must have been at least 21 years old. And he could not impeach her testimony that she could not recall ever having seen the gray-and-red-primered pickup prior to the night of April 28 with her statement in the April 30 interview that she believed the two men were in the store a week prior and had been driving the same pickup.

At the preliminary hearing, Ms. Wise was non-responsive when Mr. Butner asked what she told the police when she first spoke to them. His cross-examination at the hearing and at the new trial would have been significantly enhanced by the ability to impeach Ms. Wise on the details of her April 30 interview, for "[a] jury would reasonably have been troubled by the adjustments to [Ms. Wise's] original story by the time of the second trial." *See Kyles*, 514

U.S. at 443. The material in that report was of obvious value to the defense, despite Mr. Peterson's objection that Ms. Wise's original identification was irrelevant. *See* P/H, Vol. 32 at 198 ("Mr. Peterson: I don't see why what [Ms. Wise] said on the night of the 28th is relevant to her description."). The trial court rightly overruled him: "There might be something that she described that doesn't fit the characteristics of one of the witnesses." *Id.*

Given the discrepancies and inconsistencies outlined above, Mr. Butner could have used Ms. Wise's April 30 statement to significantly damage her credibility at the new trial, and to eliminate all corroborative value from her testimony regarding Mr. Fontenot's confession. *See Fontenot II*, 881 P.2d at 78 (finding that Ms. Wise's testimony that she saw two men who "resembled Fontenot and Ward" corroborated the confession); *cf. Kyles*, 514 U.S. at 443 (access to contemporaneous reports "would have fueled a withering cross-examination, destroying confidence in [the witness's] story"). Damaging Ms. Wise's credibility would erode one of two pillars supporting the State's theory of Mr. Fontenot's involvement—that he was one of the two suspicious men hanging out in J.P.'s on the night of April 28.

[* * *]

In sum, these undisclosed statements of April 28 witnesses were favorable to Mr. Fontenot. "Since the evolution over time of a given eyewitness's description can be fatal to its reliability," *Kyles*, 514 U.S. at 444, Mr. Butner could have made significant use of Ms. Wise's OSBI interview to discredit her trial testimony and cast doubt on the State's timeline, while using the information provided by Mr. Boardman, Mr.

Moyer, and Mr. McKinnis to cast more doubt on the identity of the dark-haired man seen in McAnally's.

c. Floyd DeGraw

Among the 1992 OSBI disclosures were approximately seventy-five pages of reports concerning an alternate person of interest, Floyd DeGraw, who emerged as a suspect in Ms. Haraway's abduction in the first few days after her disappearance.

In arguing for the favorability of these reports, Mr. Fontenot points to *Bowen v. Maynard*, 799 F.2d at 612, where suppressed evidence of an alternate suspect created reasonable doubt that the defendant committed the murders in question, and "could have been used to uncover other leads and defense theories and to discredit the police investigation of the murders." In *Bowen*, however, the alternate suspect had direct ties to the victim, giving him a motive to commit the crime, and "had a distinct opportunity to commit the murders." *Id.* at 612. Furthermore, the evidence of the alternate suspect helped bolster the defendant's alibi. *Id.* at 612–13. And in *Smith v. New Mexico Dep't of Corrections*, another *Brady* case cited by Mr. Fontenot, the suppressed alternate-suspect evidence was both highly exculpatory—it indicated that the victim's common-law husband was "near the vicinity of the bodies on two separate occasions"—and impeaching—the alternate suspect testified as a witness for the state. 50 F.3d at 829–30.

Here, the connection between Mr. DeGraw and the crime is far more speculative. Mr. DeGraw was arrested in Texas on May 3, 1984, for raping a woman, and a search of his car turned up belongings of women from several Oklahoma cities, including

Ada. But OSBI technicians conducted an extensive search of this car and found no evidence linking Mr. DeGraw to Ms. Haraway's murder. Mr. Fontenot also highlights the fact that Mr. DeGraw was "deceptive" when answering polygraph questions about Ms. Haraway's murder, and later became emotional when shown her picture. Ultimately, however, the officer who administered the exam did not believe Mr. DeGraw was involved in the abduction. Furthermore, polygraph tests are inadmissible for any purpose under Oklahoma law, *see Paxton v. State*, 867 P.2d 1309, 1323 (Okla. Crim. App. 1993), meaning that the results of Mr. DeGraw's polygraph "is not 'evidence' at all," *Wood v. Bartholomew*, 516 U.S. 1, 6 (1995) (per curiam).

Mr. Fontenot argues that Mr. DeGraw had opportunity to commit the crime. Late on April 27, 1984, or early the next morning, Mr. DeGraw headed west on Interstate 40 from Memphis, Tennessee, bound for California, and likely passed through Oklahoma the day of Ms. Haraway's abduction. Ada, however, is 40 miles from I-40. *See* Vol. 31 at 531. And the record reveals that Mr. DeGraw received a traffic citation in California at 4 p.m. on April 30, making it unlikely he spent time in Ada on the night of April 28. Additionally, Mr. DeGraw traveled cross-country in a Fiat Renault; nothing in the record links him to any model of gray pickup.

There is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." *Moore v. Illinois*, 408 U.S. 786, 795 (1972). Because not enough evidence tied Mr. DeGraw to Ms. Haraway's murder, law enforcement was justified in

abandoning this lead. Thus, contrary to the district court's finding, the investigation of Mr. DeGraw was not "ripe ground for impeachment of law enforcement." *Fontenot III*, 402 F. Supp. 3d at 1182. In our assessment, the OSBI reports on Mr. DeGraw do not rise to the level of *Brady* material.

d. Jeff Miller & Terri McCartney

The prosecutorial includes a table of contents listing "exhibits not attached and in possession of [Agent] Rogers." Ex. 43, Vol. 4 at 178. Among the exhibits in this category are two videotaped interviews of Jeff Miller, which have never been disclosed.

Months after Ms. Haraway's abduction, the investigation's focus shifted back to Mr. Ward based on "some additional information that came in" from Mr. Miller, whom the police interviewed several days prior to October 12, 1984. P/H, Vol. 32 at 520, 729–30. Detective Baskin testified at the preliminary hearing that Mr. Miller's information was pertinent, informative, and useful. The information Mr. Miller gave police was relayed to him from several others. The defense attempted to discover these names at the hearing, to which Mr. Peterson objected based on work product, an objection the State concedes "might be debatable." Vol. 31 at 279. The trial court denied the request and directed the defense to move for discovery after the hearing. In later testimony, Detective Smith revealed that Mr. Titsworth first became known to the police based on the information provided by Mr. Miller.

As mentioned, the prosecution need not "make a complete and detailed accounting to the defense of all police investigatory work on a case." *Banks (Reynolds)*,

54 F.3d at 1517 (quoting *Moore*, 408 U.S. at 795). And the defense "has no constitutional right to conduct [its] own search of the State's files to argue relevance." *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987). But as the gatekeeper of the state's evidence, and thus the main arbiter of *Brady* materiality, the prosecutor "must resolve close cases and 'doubtful questions in favor of disclosure.'" *Banks (Reynolds)*, 54 F.3d at 1517 (quoting *Agurs*, 427 U.S. at 108). That is, "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence." *Kyles*, 514 U.S. at 439.

A trial court may order an in camera review of any evidence suppressed by the state and claimed to be favorable and material if the defendant establishes a basis for that claim. *See Ritchie*, 480 U.S. at 58 n.15. "[T]he degree of specificity" of a request may bear upon whether the defendant has established such a basis. *Id.* The defendant "must at least make some plausible showing of how th[e evidence] would have been both material and favorable to his defense." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). Mere speculation that the evidence will be favorable is insufficient to compel disclosure. *See United States v. Holloway*, 939 F.3d 1088, 1105 (10th Cir. 2019).

As Mr. Miller's taped interviews have never been disclosed, whether they contain information favorable to the defense is a matter of speculation. Mr. Fontenot contends that a plausible showing of favorability was established by Detective Smith's testimony that the police first connected Mr. Titsworth to Mr. Fontenot and Mr. Ward via information from Mr. Miller. Given Mr. Titsworth's lack of involvement in the crime, Mr.

Fontenot argues, whatever Mr. Miller told police should be viewed as highly suspect. We agree that this reasoning would have been sufficient to establish a basis for the trial court to conduct an in camera review of the disputed tapes. However, the record does not contain any indication that the defense specifically requested that the trial court review them on that basis. *See* P/H, Vol. 32 at 522 (trial court's invitation "to make that motion after preliminary hearing" with respect to Mr. Miller's information). Thus, while we strongly disapprove of the State's failure to turn over the recorded interviews of Mr. Miller—and reiterate that close cases should always be resolved in favor of disclosure—in the absence of a contemporaneous request for court review setting forth a plausible basis for their favorability, we will not presume the tapes contained information that was both favorable and material to Mr. Fontenot.

Also listed in the prosecutorial's table of contents, but never disclosed, is a videotaped statement of Terri McCartney taken by Agent Rogers. Ms. McCartney testified at the preliminary hearing that Mr. Fontenot confessed his involvement in Ms. Haraway's murder on the first day he was booked into the Pontotoc County jail. Because she was not called back to testify in 1988, the State argues "there can be no finding of a material *Brady* violation based on Ms. [McCartney]," for "she did not testify at the only trial that matters." Appellant Br. at 37. But Mr. Fontenot only received one preliminary hearing in this case, which determined whether there was probable cause to bind him over for trial. Ms. McCartney's testimony at that hearing certainly mattered.

The defense made a request at the preliminary hearing to view Ms. McCartney's videotaped interview for any inconsistencies with her testimony, which the trial court overruled. While this specific request militates in favor of requiring disclosure, here, too, we find that the defense did not establish a substantial basis for claiming materiality or make a plausible showing that the withheld interview would be favorable. While it is possible Ms. McCartney's prior interview would reveal impeachment evidence, "[a] *Brady* claim fails if the existence of favorable evidence is merely suspected." *United States v. Erickson*, 561 F.3d 1150, 1163 (10th Cir. 2009).

Furthermore, Ms. McCartney was vigorously impeached at the hearing, regarding not just her prior criminal history, but the fact that Mr. Fontenot told her many different stories in jail. *See* P/H, Vol. 32 at 922–24; *id.* at 924 ("I heard so many stories, I wasn't going to believe any of them."). Thus, this is a situation where "defense counsel had extensively and thoroughly cross-examined the witness and raised questions about h[er] reliability." *Nuckols*, 233 F.3d at 1267 n.8. "When a witness's credibility has already been substantially called into question in the same respects by other evidence, additional impeachment evidence will generally be immaterial and will not provide the basis for a *Brady* claim." *Id.* (quoting *Tankleff v. Senkowski*, 135 F.3d 235, 250 (2d. Cir. 1998)).

Mr. Fontenot's related argument that significant impeachment material would have been provided by a transcript in the prosecutorial of a November 6, 1984, interview of Ms. McCartney by a Pontotoc County sheriff's deputy fails for the same reason. This inter-

view, in which Ms. McCartney also recounted what Mr. Fontenot allegedly told her in jail, is generally consistent with her testimony and would have added only "an incremental amount of impeachment evidence on an already compromised witness." *United States v. Cooper*, 654 F.3d 1104, 1120 (10th Cir. 2011) (quotation marks omitted).

The district court credited Mr. Fontenot's additional argument that it "appears" Ms. McCartney "got rewarded for her testimony by the prosecutor . . . though it has never been admitted by the prosecution." *Fontenot III*, 402 F. Supp. 3d at 1187. Mr. Fontenot cites an affidavit from Randy Holland, former husband of Ms. McCartney (now deceased), who claims she made a deal with the prosecution on his behalf: In exchange for her testimony against Mr. Fontenot and Mr. Ward, Mr. Holland would receive a sentencing break on his pending case, and the two would be allowed to marry while he was in jail.

This alleged deal is not borne out by the record. Mr. Holland was charged with committing second degree burglary in April 1985, then charged with committing another burglary in August 1985. The referenced plea deal, via which Mr. Holland received a seven-year sentence, was entered on April 6, 1987. Both the relevant offenses and the plea deal occurred *after* Ms. McCartney testified against Mr. Fontenot in the preliminary hearing, on January 16, 1985. The deal described in Mr. Holland's affidavit, if it was ever struck, has no bearing on the case against Mr. Fontenot, given that Ms. McCartney did not testify at the new trial in 1988.

e. Obscene phone calls

The suppressed reports documenting the harassing calls received by Ms. Haraway in the weeks prior to her abduction are discussed *supra* Part I.A.4 and III.C.3.b.

The State asserts Mr. Butner was made aware before the new trial, via the information obtained by private investigator Richard Kerner from Anthony Johnson, that shortly before she disappeared, Ms. Haraway was receiving strange calls at work and had asked where to buy a gun. But far from "add[ing] nothing to what defense counsel learned from his investigator," Appellant Br. at 30, additional corroboration of these calls from people close to Ms. Haraway would have been of significant value to Mr. Fontenot's defense. Mr. Butner might have discounted Mr. Johnson's information—the alleged conversation took place three years earlier, and Mr. Johnson's account was largely hearsay. But if this report, from a random McAnally's customer one week before Ms. Haraway's disappearance, was validated by reports from her family and coworkers, a powerful defense could have emerged: that Ms. Haraway was receiving strange calls in the weeks before her abduction which led her to become increasingly uneasy at work, and that whoever made the calls was involved in her murder.

The suppressed reports of harassing phone calls were exculpatory, and "in the hands of the defense, . . . could have been used to uncover other leads and defense theories[.]" *Bowen*, 799 F.2d at 612; *see* Ex. 11, Vol. 2 at 53 (Terry Hull's affidavit statement that "[t]hese reports would have been helpful to further the defense investigation into alternate suspects or

people in the vicinity of McAnally's who were watching or stalking Ms. Haraway"). "Thus, we may draw reasonable inferences as to what those other lines of defense may have been." *Banks (Reynolds)*, 54 F.3d at 1519. The most basic defense that might emerge, had Mr. Butner received the full cache of relevant reports, is that Ms. Haraway was familiar with her abductor(s). *Cf.* Ex. 15, Vol. 2 at 72 (speculation by Mr. Watts after speaking with Ms. Haraway that the caller was a regular McAnally's customer); Ex. 22, Vol. 2 at 260 (speculation by Mr. Johnson after speaking with Ms. Haraway that she knew who was making the calls). Another potential theory, which might have emerged after the preliminary hearing testimony of Ms. Wise, is that whoever murdered Ms. Haraway was subsequently threatening Ms. Wise to keep silent about what she knew while Mr. Fontenot was in custody. *Compare* P/H, Vol. 32 at 1085–86 (preliminary hearing testimony by Ms. Wise detailing "several phone calls" she has received "since this whole mess started," which included "some breathers" and a threatening call at work) *with* Ex. 22, Vol. 2 at 260 (statement by Mr. Johnson that Ms. Haraway told him "the caller never really said anything, just did some heavy breathing on the phone"); *see also* N/T, Vol. 35 at 581 (Ms. Wise's trial testimony that when she called the police on the man watching her from the alley late one night in January 1985, she told them "I was involved in a case and it could be people that were aware of where I was"); P/H, Vol. 32 at 1091–92 (testimony by Ms. Wise that the phone calls caused her apprehension about her safety).

"A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision

to charge the defendant, and we may consider such use in assessing a possible *Brady* violation." *Bowen*, 799 F.2d at 613. These reports could also have been used "to discredit the police investigation of the murder[]," *id.* at 612, because "[t]he withheld evidence also raises serious questions about the manner, quality, and thoroughness of the investigation that led to [Mr. Fontenot's] arrest and trial," *id.* at 613. It appears the police conducted no investigation into the identity of the unknown man (or men) making obscene phone calls to Ms. Haraway at work. Anyone who read Ms. Weldon's account and was familiar with the facts of the case would likely flag the man who told Ms. Haraway that "he was going to come out to the store some night and wait outside while she was working," Vol. 4 at 294, as a prime suspect in her abduction. This is especially so given the multiple eyewitnesses' reports of a gray-primered pickup parked outside McAnally's for up to an hour before she disappeared. Yet there is no indication the APD or OSBI followed up on this obvious lead by conducting further interviews or auditing store telephone records. These investigatory failures could have been attacked by Mr. Butner to cast doubt on whether the police identified the right culprit.

Not only were these reports exculpatory, they also carried impeachment value. The State asked Ms. Weldon at the new trial about the phone conversation she had with Ms. Haraway on the night of April 28, and whether Ms. Haraway gave "any indication that anything was wrong or she was upset or disturbed about anything." N/T, Vol. 36 at 170. Ms. Weldon stated it was just a normal conversation. *Id.* Given the information Ms. Weldon told police about Ms.

Haraway's uneasiness working at McAnally's, her testimony painted an unrealistic picture. The defense could have inquired into the conversation between the two sisters, which likely occurred only a day or so before April 28, when Ms. Haraway did indicate that something was wrong and that she was upset and disturbed over the obscene phone calls.

The State also argues that the exculpatory nature of the undisclosed reports outlining the obscene phone calls is neutralized because Mr. Fontenot "has never discounted the possibility that he and/or his co-defendant could have been responsible for the harassing phone calls." Appellant Br. at 29. This argument "is at best speculation and at worst fantasy." *Bowen*, 799 F.2d at 612. The State presented no evidence at trial—and points to none now—that Mr. Fontenot had been in McAnally's prior to April 28, 1984, knew Ms. Haraway, or, indeed, had ever even seen her before. *See, e.g.*, Ex. 43, Vol. 4 at 324 (Mr. Fontenot's October 21, 1984 statement that he has never been in McAnally's and never seen Ms. Haraway). Furthermore, the State cannot tenably argue that the phone call evidence "was incapable of exculpating anyone," Appellant Br. at 31, while at the same time floating the possibility that Mr. Fontenot himself made the calls.

In sum, the State-suppressed reports detailing the obscene phone calls Ms. Haraway received in the weeks before her disappearance constitute favorable evidence that should have been disclosed to Mr. Fontenot prior to his new trial.

f. Floral blouse

In their confessions, Mr. Fontenot and Mr. Ward gave descriptions of the blouse worn by Ms. Haraway that were striking in their level of detail and in their similarity. *See supra* Part I.C. Mr. Fontenot described the blouse as having short sleeves with "elastic like in them" and "ruffles around the buttons and the sleeves," P/H, Vol. 32 at 689, while Mr. Ward described it as having "little fringe deals" around both the collar and the "end of the sleeves," *id.* at 671.

The OCCA determined that this description corroborated Mr. Fontenot's confession. *See Fontenot II*, 881 P.2d at 79. The district court went further, finding that "the only arguable evidence of guilt independent of Mr. Fontenot's confession was the blouse description," *Fontenot III*, 402 F. Supp. 3d at 1229, a characterization that is borne out by the new trial transcript. For example, in cross-examining Detective Smith, Mr. Butner inquired whether it was correct that "the only evidence that you have at this point in time as to what transpired is the blouse, the description of the blouse," to which Detective Smith responded, "Well, the blouse did match." N/T, Vol. 36 at 336. On redirect, Detective Smith stated that Mr. Fontenot and Mr. Ward "both described the blouse nearly identically, close enough that you knew or we would know that they had seen it." *Id.* at 355. And in closing argument, the prosecution asserted that "it would be impossible for someone to make up that description of the blouse. Doubly impossible for two and that leaves us with only one alternative, and that is that this Defendant was there, just like he confessed he was." N/T, Vol. 37 at 328.

There was, of course, another alternative—that police fed Mr. Fontenot the facts of the crime to bolster a confession of highly questionable validity, including details of the blouse, as Mr. Butner asserted at trial. *See* N/T, Vol. 36 at 234; Vol. 37 at 145; *cf. Pavatt*, 159 P.3d at 288 ("While the letters were detailed, they were perhaps *too* detailed, appearing to parrot certain key features of the State's case."). This contention hinged on establishing that the police had a detailed description of this blouse prior to the two confessions.

The police did receive a description of the floral blouse immediately following Ms. Haraway's disappearance, which was given to them by Mr. Holkum, the off-duty APD officer who stopped at McAnally's between 7:30 and 7:45 p.m. on April 28. At the new trial, Mr. Holkum testified as to what he remembered Ms. Haraway wearing that night:

> I observed her wearing a gray sweater type jacket of the type worn with a sweat suit, it had a hood and a zipper. She had on blue jeans. . . . The blouse she was wearing was a light colored lavender or light blue, what I would call a pastel colored with small print or design on it.

N/T, Vol. 36 at 160. Mr. Holkum believed this blouse "had a lace design around the collar." *Id.* at 161. The next day, April 29, after learning Ms. Haraway was missing, Mr. Holkum told Detectives Smith and Baskin what Ms. Haraway had been wearing the night before. On cross-examination, Mr. Holkum confirmed that he was certain he gave this information to Detectives Smith and Baskin on April 29.

Detective Baskin testified after Mr. Holkum. On cross-examination, Mr. Butner asked whether he was the one who took down Mr. Holkum's April 29 blouse description. Detective Baskin stated that he had "no written notes or any recollection of taking the description." *Id.* at 403; *see also id.* at 354 (Detective Smith's testimony that the description of the blouse provided to the APD by Mr. Holkum was not written down). The 1992 disclosures, however, contain an April 29, 1984 OSBI missing person report filled out by Detective Baskin, which provides a "Clothing Description" of Ms. Haraway's blouse as "possibly lavender w/ blue flowers, lace." Ex. 44, Vol. 10 at 36. The missing person report introduced into evidence by the prosecution at trial did not contain these details in its "Clothing Description." *See* N/T, Vol. 36 at 388.

Although in possession of a description of Ms. Haraway's floral blouse since the day after the abduction, the prosecution maintained that several key details of this blouse remained unknown to the police prior to the confessions in October 1984. In particular, the prosecution emphasized that Mr. Holkum could not have seen the sleeves of Ms. Haraway's blouse because she had on a sweatshirt over it when he saw her. *See* N/T, Vol. 36 at 162 ("Q: Since she had on a long sleeved sweat shirt, you never had occasion to see the sleeves of her shirt? A [Mr. Holkum]: No, sir."). Thus, according to the prosecution, it would have been impossible for the interrogating detectives—including Agent Rogers—to feed the two suspects information regarding the blouse's sleeves:

> Q [Prosecutor Ross]: How could [Mr. Fontenot and Mr. Ward] have had the description, Agent, of the short sleeve with elastic around

> them if she had on a long-sleeved shirt over it?
>
> A [Agent Rogers]: They couldn't have, unless they were there.

N/T, Vol. 37 at 128. This point was reiterated by the State in closing argument:

> Mr. Holkum said she had on a long sleeved sweat shirt. He could not see the sleeves. How could the police possibly have told [Mr. Fontenot] it was short-sleeved and had elastic around the biceps, I suppose and puffs, if they couldn't have seen it?
>
> . . . There is no one who could have told him that it was short sleeved with elastic around it from the police department.

Id. at 326.

Documents suppressed by the State reveal this to be untrue. The police in fact did have a complete description of the blouse, including its sleeves, prior to the October confessions. Just "[a] few days after" the abduction, Mr. Boardman told the APD he "was pretty sure Deni[c]e was wearing a blue short sleeve T shirt" on the evening of April 28. Ex. 93, Vol. 30 at 516. And in a May 17, 1984, hypnosis session, conducted at Agent Rogers's request, David Timmons described the woman he saw leaving McAnally's as wearing a white top that "may have ruffles around sleeves shoulders." Ex. 44, Vol. 23 at 19, 21. Most critically, in August 1984, Janet Weldon informed Detective Baskin about the missing blouse in an interview summarized in the prosecutorial:

> Janet said she gave Donna a light lavender blouse that was very lightly tinted. It had blue flowers on it and had lace around the collar *with elastic around the sleeves*. The shirt was made of thin material and buttoned down the front. . . . *Janet checked Donna's clothes and could not find the shirt*. She checked her own clothes to make sure that she had given it to Donna and she is positive she gave the shirt to Donna.

Ex. 43, Vol. 4 at 238 (emphasis added).

This August 1984 investigative report was highly favorable to the defense. It was exculpatory, because it shows that prior to the arrests, the police knew each specific detail about the blouse that was later recounted in the two confessions and also knew the blouse was missing from Ms. Haraway's wardrobe. And it carried major impeachment value, because Ms. Weldon, Agent Rogers, and Detective Smith all testified that the police did not receive any information from Ms. Weldon on the blouse until after the confessions.

Ms. Weldon testified when she told police about the blouse on direct examination:

> Q: Did you have, Mrs. Weldon, an occasion, prior to the time these men were arrested, to tell the police department or any representative of law enforcement that that shirt was missing?
>
> A: No, I didn't.
>
> Q: You never told any of them?
>
> A: No.

N/T, Vol. 36 at 172–73. She further testified that it was only after Mr. Fontenot and Mr. Ward were arrested that her mother told her "about this blouse that [Ms. Haraway] supposedly had on[.]" *Id.* at 171. On cross-examination, Mr. Butner asked Ms. Weldon whether it was correct that she "had not given a description of this blouse to any law enforcement officers" until after her mother notified her about the blouse—that is, until after the arrests. *Id.* at 174. She responded, "That's right." *Id.*

On cross-examination, Agent Rogers corroborated this testimony, stating that he was unaware of Ms. Weldon's description of the blouse until after the confessions:

> I did not even know the identification of that blouse that she was wearing until, probably, November, when the victim's sister appeared at the police department in an interview with [Detective] Baskin. . . .
>
> [I]t was some time in November when Detective Baskin was interviewing Donna's sister that the description of this blouse came up. . . . And then that is when the light bulb come on as far as really any important significance was even attached to the description of the blouse.

N/T, Vol. 37 at 50–51. Likewise, Detective Smith testified on cross-examination that Ms. Weldon gave a description of the blouse to the police after the confessions, which "matched the description that Mr. Fontenot had given us that, you know, initially we didn't place any value on[.]" N/T, Vol. 36 at 359.

This testimony appears to be false, because the interview with Ms. Weldon in which she provided a description of the blouse is documented as taking place in August 1984, not November or any other point after the arrests. And because this documentation was included in the prosecutorial, the prosecution either knew or should have known that the picture presented at trial regarding what and when the police knew about the blouse, including its sleeves, was inaccurate. *See Giglio v. United States*, 405 U.S. 150, 153 (1972) ("[T]he presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears."). Rather than correct this picture, the prosecution proceeded to argue falsely in closing that no one from the police could have told Mr. Fontenot that the blouse "was short sleeved with elastic around it[.]" N/T, Vol. 37 at 326. Had it been disclosed, the report detailing Ms. Weldon's August 1984 transmittal to the APD of information on the floral blouse—not to mention the other suppressed reports documenting early police knowledge of that blouse—would have allowed Mr. Butner to effectively impeach State's witnesses, cast doubt on the motives and integrity of the police and the prosecution, and bolster the defense that Mr. Fontenot was fed details about the blouse in a coordinated effort to apply a patina of independent corroboration to his confession.

3. Prejudice

"Prejudice satisfying the third element exists 'when the suppressed evidence is material for *Brady*

purposes.'" *Douglas*, 560 F.3d at 1173 (quoting *Banks*, 540 U.S. at 691). "[R]egardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a *reasonable* probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles*, 514 U.S. at 433 (quoting *Bagley*, 473 U.S. at 682) (emphasis added). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682. "[T]he adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Strickler*, 527 U.S. at 289–90 (alteration in original) (quoting *Kyles*, 514 U.S. at 434).

Thus, "this is not a requirement that the evidence be sufficiently strong to *ensure* an acquittal had it been presented at trial." *Douglas*, 560 F.3d at 1173. "Nor is the materiality requirement a sufficiency of the evidence test." *Id.* "[T]he question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same." *Kyles*, 514 U.S. at 453. Therefore, a defendant establishes a *Brady* violation "by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435.

"In evaluating the materiality of withheld evidence, we do not consider each piece of withheld evidence in isolation. Rather we review the cumulative impact of the withheld evidence, its utility to the defense as

well as its potentially damaging impact on the prosecution's case." *Simpson v. Carpenter*, 912 F.3d 542, 572 (10th Cir. 2018) (quotation marks omitted). That is, "we evaluate the materiality of withheld evidence in light of the entire record in order to determine if 'the omitted evidence creates a reasonable doubt that did not otherwise exist.'" *Banks (Reynolds)*, 54 F.3d at 1518 (quoting *Agurs*, 427 U.S. at 112). As a result, "if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Agurs*, 427 U.S. at 113; *United States v. Robinson*, 39 F.3d 1115, 1119 (10th Cir. 1994).

As discussed above, Mr. Fontenot's verdict is already of highly questionable validity. *See infra* Part III.C.4. And, when viewed in light of the entire record, the cumulative impact of the favorable evidence discussed above is sufficient to create reasonable doubt. Confidence that the jury's verdict would have been the same "cannot survive a recap of the suppressed evidence and its significance[.]" *Kyles*, 514 U.S. at 453:

First, the suppressed evidence casts serious doubt on whether Mr. Fontenot was the dark-haired man seen in McAnally's by Mr. Moyer. Mr. Boardman's failure to identify Mr. Fontenot as one of the two men he saw in the store that evening was material, exculpatory evidence, given how Mr. Boardman's description of the two men (and their pickup) aligned with Mr. Moyer's description, and how both picked out #1 from the Ward folder. Suppressing the report on Mr. Boardman's information denied the defense a strong counter to the State's emphasis at trial on the fact that Mr. Moyer had previously identified Mr.

Fontenot at both the preliminary hearing and a live lineup.

Second, the suppressed evidence casts further doubt on whether Mr. Fontenot was the dark-haired man seen in J.P.'s by Ms. Wise. Her April 30 statement to the OSBI—that she thought she remembered the taller, dark-haired suspect from checking his ID in the store a week earlier, and that she believed he was around twenty-four years old—could have aided in establishing that the nineteen-year-old Mr. Fontenot was not in J.P.'s that night.

Third, the suppressed evidence carries impeachment value regarding one of the State's key witnesses. If the defense had access to those statements made by Ms. Wise in her April 30, 1984, interview that differed significantly from her trial testimony, the value of her testimony "would have been substantially reduced or destroyed." *Kyles*, 514 U.S. at 441. This suppressed statement would have "significantly enhance[ed] the quality of the impeachment evidence," *Douglas*, 560 F.3d at 1174, satisfying the materiality standard. *Cf. Smith v. Cain*, 565 U.S. 73, 76 (2012) ("[E]vidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict. That is not the case here." (citation omitted)).

Fourth, the suppressed evidence points to an alternate suspect—whoever targeted Ms. Haraway in the weeks leading to her abduction by making obscene calls to McAnally's—and thus deprived the defense of a critical investigatory lead.

Fifth, the evidence of these obscene calls would also raise an opportunity to attack "the thoroughness

and even the good faith of the investigation." *Kyles*, 514 U.S. at 445. The defense could have probed why the police failed to conduct any investigation into the evidence of the harassing calls, despite "its obvious relevance to the case." *Fontenot III*, 402 F. Supp. 3d at 1139.

Sixth, the suppressed evidence denied an opportunity to establish Mr. Fontenot's alibi. In particular, by failing to turn over Mr. Fontenot's statement from October 21, 1984, the APD write-up of the noise complaint regarding the Calhoun party, Ms. Roberts's October 19 statement, and Mr. Calhoun's two 1984 interviews, the prosecution prevented the defense from rebutting Mr. Calhoun's testimony at the new trial that neither Mr. Fontenot nor Mr. Ward attended the keg party on April 28, 1984.

And *seventh*, the suppressed evidence prevented Mr. Fontenot from establishing that the police did indeed have each detail contained in the confessions about Ms. Haraway's floral blouse by the time of the arrests, including a description of the shirt's sleeves. This evidence would have significantly strengthened the defense's contention that the police fed these highly specific facts to Mr. Fontenot during his interrogation. Lacking the summary of information provided to police by Ms. Weldon in August 1984 also deprived the defense of material that could have been used to impeach key witnesses and question whether the interrogators and the prosecution were acting in good faith.

[* * *]

The absence of this evidence was prejudicial. Its disclosure would have created a reasonable probability

of acquittal, for the suppressed evidence is significant enough to disturb an already highly questionable verdict by fostering a reasonable doubt that did not otherwise exist. In short, the absence of this evidence ensured that Mr. Fontenot did not receive a fair trial. We thus determine that "[t]he conviction before us, hanging on the barest of threads and dependent on the omission of exculpatory evidence, is 'inconsistent with the rudimentary demands of justice.'" *United States v. Ford*, 550 F.3d 975, 995 (10th Cir. 2008) (Gorsuch, J., dissenting) (quoting *Brady*, 373 U.S. at 87).

D. Remedy

"We review the district court's formulation of an appropriate habeas corpus remedy for abuse of discretion." *Douglas*, 560 F.3d at 1176. The issue of harmless error is reviewed de novo under the habeas standard established in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *See Willingham v. Mullin*, 296 F.3d 917, 931 (10th Cir. 2002).

Brecht held that "the *Kotteakos* harmless-error standard applies in determining whether habeas relief must be granted because of constitutional error of the trial type." 507 U.S. at 638. "The test under *Kotteakos* is whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). A finding of material *Brady* error equates to nonharmless error under *Brecht*, "because a reasonable probability of a different result in the proceeding 'necessarily entails the conclusion that the suppression must have had substantial and injurious effect or influence in determining the jury's

verdict.'" *Douglas*, 560 F.3d at 1173–74 (quoting *Kyles*, 514 U.S. at 435).

We thus affirm the district court's finding of nonharmless error based on *Brady* violations, without reaching the rest of Mr. Fontenot's constitutional claims. *See Scott*, 303 F.3d at 1232; *Nuckols*, 233 F.3d at 1267. Based on Mr. Fontenot's meritorious showing of actual innocence, and the State's suppression of material, favorable evidence, the district court did not abuse its discretion in ordering either Mr. Fontenot's permanent release from custody or a new trial as the remedy for this violation of his right to due process under law. *See Giglio*, 405 U.S. at 154 ("A new trial is required if '[the suppressed evidence] could . . . in any reasonable likelihood have affected the judgment of the jury . . . '" (ellipses in original) (quoting *Napue*, 360 U.S. at 271)).

V. Conclusion

The State "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). In our determination, Mr. Fontenot did not receive the benefit of that interest. We **AFFIRM** the district court's grant of habeas relief and lift our stay of the district court's order granting a new trial. If the State wishes to try Mr. Fontenot once again for the kidnapping and murder of Ms. Haraway, it must do so within 120 days of the issuance of this order.

EID, J., DISSENTING

In order to avoid procedural default, petitioner-appellee Karl Fontenot must prove that "it is more likely than not that no reasonable juror would have convicted him," "in light of all the evidence," including newly discovered evidence. *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quotations omitted). The majority does a meticulous job of recounting the evidence in this case, and it states that it is applying the "no reasonable juror" standard. Yet in practice it views the evidence in the light most favorable to Fontenot, failing to account for the reality that the relevant new evidence is either peripheral, cumulative of trial evidence, or based on recollections that are three decades old. Because a reasonable juror would take these evidentiary weaknesses into account, Fontenot has not met his burden to show that no reasonable juror would have convicted him. But even if I were to reach the merits in this case, I would still part ways with the majority. The majority resolves Fontenot's claim pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), in his favor even though the district court decided the issue without the benefit of briefing from the State, which in my view is a fundamental error. Respectfully, I dissent.

I.

Fontenot's application under § 2254 faces three threshold issues that we review on appeal: exhaustion, procedural default, and untimeliness. The majority holds Fontenot can overcome all of them—exhaustion through anticipatory procedural default, Maj. Op. at 71, and procedural default and untimeliness through

actual innocence, *id.* at 125–26. I agree with the majority's exhaustion analysis. But because I do not believe Fontenot has met the "demanding" standard for an actual innocence claim, which "permits review only in the extraordinary case," I would not excuse his procedural default or time bar. *House v. Bell*, 547 U.S. 518, 538 (2006) (quotations omitted).

To make an actual innocence claim, Fontenot must prove that "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Bousley*, 523 U.S. at 623 (quotations omitted). I do not, as the majority states, read this standard to require Fontenot to make "a case of conclusive exoneration." Maj. Op. at 78 n.20 (quoting *House*, 547 U.S. at 553). However, I do understand this standard to be satisfied only in "exceptional cases involving a *compelling* claim of actual innocence." *House*, 547 U.S. at 522 (emphasis added). The majority acknowledges these principles, but, in my view, fails to apply them in practice. Instead of viewing the relevant evidence as a reasonable juror would, the majority views it in the light most favorable to Fontenot.

For example, the two affidavits relied upon by the majority—the James Moyer and Karen Wise affidavits—were written by trial witnesses *nearly three decades* after the affiants' original testimony. We know that recanted testimony, especially after such a long amount of time, is "notoriously unreliable." *Case v. Hatch*, 731 F.3d 1015, 1044 (10th Cir. 2013). Such testimony is "easy to find but difficult to confirm or refute: witnesses forget, witnesses disappear, witnesses with personal motives change their stories many times, before and after trial." *Id.* (quoting *Carriger v. Stewart*,

132 F.3d 463, 483 (9th Cir. 1997) (Kosinski, J., dissenting)). For these reasons, a reasonable juror would tend to discount the two affidavits in this case.

But perhaps even more problematic is that the two affidavits barely state anything of value. The jury already had serious cause to deemphasize Moyer's identification of Fontenot at trial because it was riddled with hedging and admissions of uncertainty. *See* R. Vol. XXXI at 890–92. And Wise's affidavit does not directly recant anything about Fontenot. She said: "My belief is that if Tommy Ward and Karl Fontenot committed this crime (and I don't know that they did), they didn't do it alone. I'm still very afraid someone will come after me." R. Vol. I at 219. A reasonable juror would put little weight on the two affidavits because they do not add much to what was already presented at trial.

Overemphasizing peripheral evidence is something the majority does in other contexts as well. For example, the majority assumes that a report about problems with the medical examiner's process—most of which came out at trial—would undermine a juror's confidence in the *entire* police investigation. Maj. Op. at 116 ("After seeing this report, a reasonable juror's confidence in the competence of the investigation into Ms. Haraway's murder would decrease, which would in turn decrease confidence that law enforcement identified the right culprits."). At most, a reasonable juror would see this evidence as cumulative.

Another issue in the majority's opinion is that it repeatedly draws inferences in support of Fontenot's innocence without considering whether a reasonable juror would draw the opposite inference. For example, the majority concludes that interviews placing Fontenot

at a party during the night of the murder create an alibi. The majority does not consider that a reasonable juror could conclude that Fontenot could have attended the party *and* committed the crimes. In fact, in his confession, he discusses being at a party before leaving to kidnap the victim, Donna Haraway. And his co-defendant was found to have been at both.

Similarly, the majority assumes that reports of obscene phone calls that Haraway received prior to her abduction would have led the jury to believe that someone other than Fontenot had motive to abduct her. The calls were never confirmed or investigated by police. In my view, a reasonable juror presented with information about suspicious calls that were never investigated by law enforcement would most likely deem the calls irrelevant to the case. Or, the jury would view the calls in light of the other evidence against Fontenot and infer that he was the caller. The majority's attempt to classify this wholly unexplored evidence as exculpatory ignores the limits of our review under the reasonable juror standard.

The Supreme Court has suggested that, in order to show actual innocence, a petitioner must present new evidence that is consequential. *See Schlup v. Delo*, 513 U.S. 298, 324 (1995) (explaining the petitioner must present "new reliable evidence—whether it be *exculpatory* scientific evidence, *trustworthy* eyewitness accounts, or *critical* physical evidence—that was not presented at trial" (emphases added)). Fontenot has failed to do so. The majority acknowledges that there is a "lack of any physical evidence" in this case, and that this is not "a case of conclusive exoneration." Maj. Op. at 125. Instead of pointing to some paramount piece of consequential new evidence, it relies on many

small pieces—each with a problem of its own. One might then ask how the new evidence leads the majority to find Fontenot proved his actual innocence claim. Perhaps the answer is that the majority finds the case against Fontenot to be so weak and insignificant that the slightest new piece of evidence—no matter how peripheral, cumulative, or remote in time—would have changed the outcome. *See id.* at 119 (characterizing the evidence at trial against Fontenot as "extremely weak"); *id.* at 125 (noting the "manifest weaknesses" in the State's case at trial).

The majority's understanding, however, fails to give sufficient weight to the fact that Fontenot confessed. It notes that "[t]he State, of course, did have the statement given by Mr. Fontenot." *Id.* at 120. But according to the majority, that confession was "shot through with clear falsehoods and inconsistencies, produced no independently verifiable information, and provided the police no new facts about the crime. . . . What is more, Mr. Fontenot fully recanted just two days later, accusing the police of feeding him a false narrative of his own involvement. . . . " *Id.* A reasonable juror would take these factors that the majority identifies into account when considering the confession. However, the majority misses the fact that a reasonable juror would give substantial weight to the confession in the first instance. The majority's under-appreciation of the impact that Fontenot's confession would have on a reasonable juror then leads it to over-appreciate the value of the new evidence he presents.

Without actual innocence, Fontenot's claims can be heard only if he demonstrates cause and prejudice to excuse his procedural default *and* equitable tolling to excuse his time bar under the Antiterrorism and

Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d). As the majority correctly notes, Fontenot provided "negligible briefing" on the "cause" element of cause and prejudice and forfeited the equitable tolling argument. Maj. Op. at 75. Even without those issues, both arguments would fail due to Fontenot's inability to demonstrate diligence. Cause must be "something *external* to the petitioner" that impeded his compliance with the state procedure. *Maples v. Thomas*, 565 U.S. 266, 280 (2012). Such objective factors include "a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials made compliance impracticable." *Simpson v. Carpenter*, 912 F.3d 542, 571 (10th Cir. 2018) (quoting *Scott v. Mullin*, 303 F.3d 1222, 1228 (10th Cir. 2002)). Since Fontenot could have avoided the procedural default imposed on his petition in 2013 by initiating his collateral proceedings when the Oklahoma State Bureau of Investigation material was released in 1992, he cannot prove something external caused the default. Similarly, his inability to demonstrate diligence prevents him from taking advantage of equitable tolling under AEDPA. *McQuiggin v. Perkins*, 569 U.S. 383, 391 (2013). In sum, in my view, his failure to establish actual innocence is procedurally fatal to his case.

II.

Even assuming Fontenot could succeed in getting around his procedural bar by demonstrating actual innocence, I still would not consider the merits of his *Brady* claim and instead would reverse and remand the case to permit the State to brief the issue.

Fontenot filed his second amended habeas petition with the district court on March 15, 2019. R. Vol. XXX at 17. On April 29, the State moved to dismiss Fontenot's petition, urging that it contained unexhausted claims and was procedurally barred by the statute of limitations and laches. R. Vol. XXXI at 211. Then, on August 21, the district court in a single Opinion and Order resolved all of the issues in the State's motion to dismiss in favor of Fontenot and—without ordering further response—proceeded to the merits of Fontenot's petition, which contained nearly a dozen separate claims for relief. *Id*. at 857.

Rules 4 and 5 of the Rules Governing Section 2254 Cases in the United States District Courts outline the district court's authority to manage pleadings in a habeas case. When a § 2254 petition is not plainly meritless, the district court "must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order." Rules Governing Section 2254 Cases, Rule 4. The Committee Notes for Rule 5 "address the practice in some districts" of having "the respondent file[] a pre-answer motion to dismiss the petition," and clarify that "revised Rule 4 permits that practice and reflects the view that if the court does not dismiss the petition, it may require (or permit) the respondent to file a motion." *See also Scott v. Romero*, 153 F. App'x 495, 498 (10th Cir. 2005) (unpublished) ("The rules do not prohibit the State from filing a motion to dismiss prior to filing an answer and the Advisory Committee Notes specifically recognize the district court's discretion [here].").

The district court abused its discretion by failing to "follow[] the traditional procedure of allowing Res-

pondent to file a merits response after denying a procedural motion to dismiss." Aplt. Br. at 46. Indeed, Oklahoma district courts routinely allow habeas respondents such as the State in this case to file answers after denying their pre-answer motions to dismiss. *See, e.g.*, *Bryant v. Dowling*, No. 17-CV-0468-CVE-JFJ, 2019 WL 3304812, at *6 (N.D. Okla. July 23, 2019) (denying Respondent's motion to dismiss for untimeliness and ordering Respondent to file an answer in accordance with Rule 5); *Roberts v. McCollum*, No. 15-CV-0406-JED-FHM, 2016 WL 447499, at *6 (N.D. Okla. Feb. 4, 2016) (denying Respondent's motion to dismiss for failure to exhaust state remedies and ordering Respondent to answer the exhausted claims); *Draper v. Farris*, No. CIV-16-1231-R, 2017 WL 5711408, at *1 (W.D. Okla. Nov. 27, 2017) (adopting Magistrate's recommendation to deny Respondent's motion to dismiss and allow Respondent time to answer the petition); *Boyd v. Allbaugh,* No. CIV-15-1236-HE, 2016 WL 1559174 (W.D. Okla. Apr. 18, 2016) (same); *Carter v. Jones*, No. CIV-08-1119-C, 2009 WL 455433, at *1–3 (W.D. Okla. Feb. 23, 2009) (same).

This practice promotes judicial economy and the conservation of judicial resources because it prevents respondents and courts from engaging with the merits of dismissible claims. In fact, the district court judge in this case has often benefited from the efficiency of pre-answer motions to dismiss. *See, e.g.*, *Green v. Pettigrew*, No. CIV-19-014-JHPKEW, 2020 WL 618823, at *4 (E.D. Okla. Feb. 10, 2020) (granting Respondent's pre-answer motion to dismiss as time-barred); *Martin v. Bear*, No. CIV-18-134-JHP-KEW, 2019 WL 1437603, at *5 (E.D. Okla. Mar. 29, 2019) (granting Respondent's

pre-answer motion to dismiss due to untimeliness and failure to exhaust claims); *McCarroll v. Rudek*, No. CIV-10-364-JHP, 2011 WL 2112389, at *2 (E.D. Okla. May 26, 2011) (granting Respondent's pre-answer motion to dismiss as time-barred). It is worth noting that these successful Respondents neither asked permission to bifurcate their responsive pleadings nor included merits responses as a backup plan in case their motions were denied. *See* Maj. Op. at 129 (suggesting that respondents take these steps).

In this case, the district court exercised its discretion and allowed the State to file a "response." R. Vol. XXIX at 896. A "response" meant either an answer or a motion. *See* Rules Governing Section 2254 Cases, Rule 4 (differentiating between "an answer, motion, or other response"). The State filed a motion to dismiss. But once the court denied the State's motion to dismiss, it went on to consider the merits of the case without giving the State an opportunity to file a further response addressing the merits. Its only explanation for this decision was provided in a footnote, which said:

> Respondent was ordered to respond to the Second Amended Petition on February 14, 2019. (Dkt.# 118). Pursuant to Rule 5(a) of the Rules Governing Section 2254 Cases Respondent was not required to answer the petition unless ordered to do so by the court. **Once the Respondent was ordered to respond, the Respondent was required to address all allegations in the Second Amended Petition. "The answer must address the allegations in the petition. In addition, it must state whether any**

> **claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, nonretroactivity, or a statute of limitations."** ***Id.*** **at [5(b)]** (emphasis added).

R. Vol. XXXI at 857 n.1.

The district court is incorrect in its assertion that the State "was required to address all allegations in the Second Amended Petition." *Id*. The court did not order the State to respond to *all* allegations. By using the word "response" rather than "answer," the court gave the State the option of responding to only procedural issues in a pre-answer motion or responding to all points in an answer.

Certainly, as a general matter it was in the court's ultimate discretion whether to allow a merits response after denying the State's motion to dismiss. There is no doubt that "[d]istrict courts generally are afforded great discretion regarding trial procedure applications (including control of the docket and parties), and their decisions are reviewed only for abuse of discretion." *Garza v. Davis*, 596 F.3d 1198, 1205 (10th Cir. 2010) (quoting *United States v. Nicholson*, 983 F.2d 983, 988 (10th Cir. 1993)). But that discretion is not unbounded. An appellate court may disturb a lower court's decision about trial procedure where it has "a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *McEwen v. Norman*, 926 F.2d 1539, 1553–54 (10th Cir. 1991).

Those "circumstances" can include the complexity of a case. *See Hall v. Quarterman*, 534 F.3d 365, 372

(5th Cir. 2008) (holding the district court abused its discretion by relying on "affidavits unaired in court and shielded from cross examination" and failing to conduct a meaningful hearing in "unusual and unique circumstances"); *Ameritox, Ltd. v. Millennium Lab'ys., Inc.*, 803 F.3d 518, 520 (11th Cir. 2015) (holding the district court abused its discretion by taking supplemental jurisdiction over state-law claims that were "novel and complex"); *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 254 (9th Cir. 1992) (holding the district court abused its discretion in awarding sanctions against a litigant in a "highly unusual and procedurally complex case"); *United States v. Badwan*, 624 F.2d 1228, 1231 (4th Cir. 1980) (explaining the "complexity of a case is undoubtedly one of the circumstances to be considered in deciding whether to grant or deny a motion for continuance" when reviewing a district court's decision for an abuse of discretion).

This case touches upon two circuit splits—the definition of "new reliable evidence" required for an actual innocence claim and the standard for reviewing a finding of actual innocence. Maj. Op. at 79, 84. It addresses a dozen legal issues. The underlying facts involve a 30-year-old conviction that was the result of two full trials. The record on appeal—which includes the petitioner's trial, direct appeals, postconviction hearings, and other proceedings—spans 43 volumes. The district court's order is 190-pages long. And the majority opinion nearly matches that page count.

If ever there was a case that was "novel," "highly unusual and procedurally complex," and "unique," this is it. Even the majority states that "the district court could, and perhaps should, have crafted a more

specific Rule 4 directive by expressly calling for an 'answer,'" although it ultimately finds that the district court did not abuse its "considerable discretion." *Id.* at 131. I think it did. I would hold that the district court's decision to proceed to the merits without a merits response from the State was outside the bounds of its considerable discretion.[1]

Finally, I disagree with the majority's contention that, even if the district court abused its discretion, the error would be harmless. The only substantive claim the majority reaches is Fontenot's *Brady* claim. Because the State, acting pursuant to the district court's directive, submitted an additional brief addressing the *Brady* claim, the majority concludes the issue was sufficiently briefed. The problem with the majority's conclusion is that the *Brady* brief was mooted before the district court decided the merits. The majority's retelling of oral argument portrays the State as conceding that the "*Brady* issue was thoroughly briefed." *Id.* at 133 n.49 (quoting Oral Arg. at 7:55–8:30). That is not accurate. Yes, the State admitted it had filed a thorough brief during the course of litigation at the district court. But it also stated that the *Brady* brief "related to the State's first motion to dismiss . . . which was later deemed moot

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[1] The majority asserts that the State did not specifically include the complexity of this case as a reason the district court abused its discretion. It is true that the State's argument focused on the district court's unanticipated divergence from the routine practice of allowing pre-answer motions to dismiss in Oklahoma. However, I find this case's complexity to fall within the State's briefing on this issue. The State's argument is that the district court abused its discretion in failing to follow established procedure particularly in this complex case where merits briefing was warranted.

because Petitioner was permitted the opportunity to amend his petition yet again." Oral. Arg. at 07:20–07:53.

The State is correct. Fontenot filed his amended petition for writ of habeas corpus on August 18, 2017, R. Vol. I at 518, which the State moved to dismiss, R. Vol. XXIX at 142. Then, upon the district court's directive, the State filed a response specifically addressing Fontenot's "alleged Brady violations and the newly discovered evidence" outlined in his response. *Id*. at 10, 728. Subsequently, on March 15, 2019, Fontenot submitted a second amended petition. R. Vol. XXX at 17. That prompted the district court in a minute order to deem moot the State's original motion to dismiss. R. Vol. XXXI at 37. The State then filed a motion to dismiss the second amended habeas petition, which underlies the district court's opinion and order granting Fontenot's second amended petition. *Id*. at 211. The district court never referenced the mooted *Brady* brief in its opinion. Therefore, it cannot be said that the State had an opportunity to file a merits response regarding Fontenot's *Brady* claim, and the district court's abuse of discretion for deciding the case without such a response is not harmless. In sum, even if I were to excuse Fontenot's procedural default because he has satisfied the actual innocence standard, I would reverse and remand the case to permit the State to file a merits response.

III.

For the foregoing reasons, I respectfully dissent.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT GRANTING MOTION TO STAY THE CIRCUIT COURT MANDATE (OCTOBER 21, 2021)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KARL FONTENOT,

Petitioner-Appellee,

v.

SCOTT CROW, Interim Director,

Respondent-Appellant.

No. 19-7045
(D.C. No. 6:16-CV-00069-JHP) (E.D. Okla.)

Before: McHUGH, EBEL, and EID, Circuit Judges.

ORDER

Appellant's *Unopposed Motion to Stay the Mandate Pending the Filing of a Petition for Writ of Certiorari* is GRANTED. The issuance of this court's mandate is stayed for 90 days unless the duration of the stay is extended pursuant to Fed. R. App. P. 41(d)(2)(A) or (B).

Entered for the Court,

/s/ Christopher M. Wolpert
Clerk

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA (AUGUST 21, 2019)

PUBLISHED
at 402 F. Supp. 3d 1110

THE UNITED STATES DISTRICT COURT FOR EASTERN DISTRICT OF OKLAHOMA

KARL FONTENOT,

Petitioner,

v.

JOE ALLBAUGH, Warden,

Respondent.

No. CIV 16-069-JHP-KEW

Before: James H. PAYNE,
United States District Judge.

OPINION AND ORDER

This matter is before the Court on Respondent's Motion to Dismiss Second Amended Habeas Corpus Petition filed pursuant to 28 U.S.C. § 2254 (Dkt.#

123, 147).[1] Petitioner filed a response to the motion on May 14, 2019 (Dkt.# 150).

Petitioner's case is one of three the United States District Court for the Eastern District of Oklahoma has found to involve a dream confession of dubious validity.[2] The players in this case, Pontotoc County District Attorney William Peterson, Ada Police Detective Dennis Smith, and Oklahoma State Bureau of Investigation Agent Gary Rogers, were all involved in these suspect confessions and were all involved in Petitioner's case.

The prosecution has acknowledged that Petitioner's confession lacked any corroborating evidence.

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[1] Respondent was ordered to respond to the Second Amended Petition on February 14, 2019. (Dkt.# 118). Pursuant to Rule 5 (a) of the Rules Governing Section 2254 Cases Respondent was not required to answer the petition unless ordered to do so by the court**. Once the Respondent was ordered to respond, the Respondent was required to address all allegations in the Second Amended Petition. "The answer must address the allegations in the petition. In addition, it must state whether any claim in the petition is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations."** ***Id.*** **at 5(b)**." (emphasis added).

[2] *See* Second Amended Petition for Writ of Habeas Corpus, Dkt. #123, Ex.# 61. ("This is at least the third murder conviction in Pontotoc County, Oklahoma, from 1985 through 1988 which was based upon an alleged "dream confession" and circumstantial evidence which resulted in the death penalty. *See Fontenot v. State*, 742 P.2d 31 (Okla. Crim. App. 1987) (appeal after new trial, 881 P.2d 69 (Okla. Crim. App. 1994); *Ward v. State*, 755 P.2d 123 (Okla. Crim. App. 1988); *State ex rel. Peterson v. Ward*, 707 P.2d 1217 (Okla. Crim. App. 1985); *See also* Robert Mayer, *The Dreams of Ada*, 37-38 (1987); *Williamson v. Reynolds*, 904 F.Supp. 1529 (ED OK 1995).

Besides the confession, there was no direct or circumstantial evidence connecting Petitioner to this crime. Further, despite three court orders, the Pontotoc County District Attorney's Office, numerous law enforcement agencies, and Respondent have repeatedly failed to disclose documents relevant to Mr. Fontenot's case for over twenty-five years. At the same time, Respondent both in state post-conviction and in these proceedings argues laches as an affirmative defense to Mr. Fontenot's assertions of actual innocence and numerous constitutional violations. The audacity of that argument in the face of newly "discovered" Ada Police Reports is astounding.

The investigation into Mr. Fontenot's case has revealed both documents and witness statements that prove an alibi defense, and substantiate proof of the ineptness of the police investigation. The newly discovered evidence undermines the prosecutor's case and provides solid proof of Mr. Fontenot's probable innocence. **"Probable innocence" is established if Mr. Fontenot presents "new facts [that] raise[ ] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial . . . "** *Schlup v. Delo*, 513 U.S. 298, 317 (1995) (emphasis added). To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id*. at 327; *see also House v. Bell*, 547 U.S. 518, 538 (2006)(a federal court presented with *Schlup* claim "must make" 'a probabilistic determination about what reasonable, properly instructed jurors would do.'"). Once a federal court makes such a finding, a gateway claim of innocence exists removing any procedural obstacles allow-

ing the substantive review of Mr. Fontenot's claims. *See House,* 547 U.S. at 536-537; *Case v. Hatch*, 731 F.3d 1015, 1036 (10th Cir. 2013). The evidence presented in Mr. Fontenot's Second Amended Petition establishes his probable innocence and merits the removal of any procedural hurdles.

Petitioner, a prisoner currently incarcerated at North Fork Correctional Facility in Sayre, Oklahoma, is challenging his convictions in Hughes County District Court Case No. CF-88-43 for First Degree Murder, Robbery with a Dangerous Weapon, and Kidnapping.

He sets forth the following grounds for relief:

I. Newly discovered evidence establishes that Mr. Fontenot is innocent, satisfying the gateway requirements of *Schlup v. Delo*, 513 U.S. 298 (1995).

II. Mr. Fontenot's Fourteenth Amendment rights were violated when the Pontotoc County District Attorney's Office withheld evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

III. Mr. Fontenot's Sixth and Fourteenth Amendment fundamental right to counsel was violated by the Ada Police Department's interference with attorney-client privilege.

IV. Mr. Fontenot's Sixth Amendment right to effective assistance of counsel was violated when his trial counsel failed to investigate the case and present viable evidence supporting his innocence.

V. Mr. Fontenot's Sixth Amendment right to effective assistance of appellate counsel was

violated when his appellate counsel failed to present viable constitutional claims in Mr. Fontenot's direct appeal proceedings.

VI. Mr. Fontenot's due process rights were vio lated due to police misconduct when taking a false confession and the prosecution knowingly introduced false testimony during his trial in violation of the Fifth and Fourteenth Amendment to the U.S. Constitution.

VII. The evidence was insufficient to convict Mr. Fontenot because the State failed to show the existence of the corpus delicti of the charged crimes outside of the confession and failed to establish the trustworthiness of the confession in violation of the Fourteenth Amendment.

VIII. The State's injection of inadmissible hearsay from the extrajudicial confession of Mr. Ward in Mr. Fontenot's trial violated his constitutional right of confrontation.

IX. Mr. Fontenot's Fourteenth Amendment due process rights were violated due to the police misconduct that permeated the investigation into Mrs. Haraway's disappearance.

Respondent has filed a motion to dismiss the Second Amended Petition as barred by the statute of limitations set forth in 28 U.S.C. § 2244(d), and the state bar of laches. (Dkt.# 147). Respondent also asserts the Second Amended Petition includes unexhausted claims, rendering it a mixed petition. *Id*. Petitioner responds he has established the actual innocence gateway removing the procedural impairments, and

all of his claims should be deemed exhausted. (Dkt.# 150).

PROCEDURAL HISTORY[3]

On April 24, 1984, Donna Denice Haraway was last seen at McAnally's convenience store in Ada, Oklahoma. A few customers arrived to find the store empty and called emergency services. Several law enforcement agencies responded to the scene including the Ada Police Department ("APD"), and the Pontotoc County Sheriff's Office. Later, the Oklahoma State Bureau of Investigation joined the local agencies in the investigation.

On October 12, 1984, with Mrs. Haraway still missing, the police contacted Thomas Ward in Norman,

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[3] There are several records cites within this Opinion and Order. Abbreviations to the various court records, hearings, and trials will be as follows:

OR: Original trial court record

P/H: Preliminary Hearing Transcript (there was only one preliminary hearing held in this case even after remand from the OCCA).

J/T date and page: Joint trial of Thomas Ward and Karl Fontenot in 1986.

N/T date and page: Fontenot's trial held over several days in 1988.

Ward N/T date and page: Thomas Ward's trial held over several days in 1989.

State's Exhibit: State exhibits from Mr. Fontenot's trial.

The Court also takes judicial notice of the public records of the Oklahoma State Courts Network at http:/www.oscn.net. *See Pace v. Addison*, No. CIV-14-0750-HE, 2014 WL 5780744, at *1 n.1 (W.D. Okla. Nov. 5, 2014).

Oklahoma, and interviewed him for more than two hours. (PH Tr. 506). Mr. Ward denied any involvement or knowledge of what happened to Mrs. Haraway. (Tr. 1336). Mr. Ward returned to the Oklahoma State Bureau of Investigation to take a polygraph test the next day. After nine hours of interrogation, police videotaped Mr. Ward give a statement in which he described being with Odell Titsworth and Karl Fontenot the night of Mrs. Haraway's disappearance. Mr. Ward also stated the three robbed McAnally's, kidnapped Mrs. Haraway, raped, and stabbed her to death. Based solely on Mr. Ward's confession, police arrested Mr. Fontenot the next day. Mr. Fontenot was interrogated and confessed in similar fashion as Mr. Ward.

Nineteen days later, the Pontotoc District Attorney's Office filed charges against Mr. Fontenot and Mr. Ward in Case No. CRF-84-183 including Count I, Robbery with a Dangerous Weapon; Count II, Kidnapping; Count III, First-Degree Rape; and Count IV, First-Degree (Malice Aforethought) Murder. (O.R. 112). On November 8, 1984, the State filed a Bill of Particulars against each defendant alleging the following aggravating circumstances: (1) the murder was especially heinous, atrocious, or cruel; (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and (3) the existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. (O.R. 591, 592). Mr. Fontenot was appointed counsel on November 29, 1984, 42 days after his arrest. (O.R. 30).

The Pontotoc District Court held a joint preliminary hearing on February 4, 1985. Mr. Fontenot and

Ward were bound over for trial on Count I, Robbery with a Dangerous Weapon; Count II, Kidnapping; and Count IV, Murder in the First Degree. (O.R. 592-A-592-B). The magistrate found insufficient evidence to order either defendant to trial on Count III, First-Degree Rape. (P/H 1047). The State appealed to the District Court to reinstate Count III, but was overruled. (Tr. 26-27). The State appealed the ruling to the Oklahoma Court of Criminal Appeals. On September 6, 1985, while the State's appeal on the rape charge was pending, the State dismissed the rape charge and amended the Information to allege Count I, Robbery with a Dangerous Weapon; Count II, Kidnapping; and Count III, First Degree (Malice Aforethought) Murder, and proceeded to trial. (O.R. 475).

Both Mr. Fontenot and Mr. Ward were convicted on all counts in a jury trial held on September 24, 1985. The trial court sentenced both to twenty years imprisonment on Count I, and ten years imprisonment on Count II. During the penalty phase of the trial, the jury found the existence of the three aggravating circumstances and no mitigation. Mr. Fontenot and Mr. Ward were sentenced to death. An appeal was timely filed for both men in the Oklahoma Court of Criminal Appeals.

During the pendency of the appeal, a man found a skull in Hughes County, Oklahoma, which initiated a search of the area. Eighteen months after Mrs. Haraway's disappearance, her skeletal remains were recovered after several searches of the area. The medical examiner found a bullet hole in the back of her skull was the only evidence of a probable cause of death. (N/T 6/9/1988 at 130). The medical examiner also found no evidence of any stabbing or burning of

the remains. (N/T 6/14/1988 at 134, 136). The Oklahoma Court of Criminal Appeals reversed both the conviction and sentence over *Bruton* violations in *Fontenot v. State*, 742 P.2d 31 (Okla. 1987); *See Bruton v. United States*, 391 U.S. 123 (1968).

Following remand, Mr. Fontenot was tried in Hughes County, Oklahoma, after a change of venue motion was granted by the trial court. On June 7, 1988, the State filed an Amended Information alleging Counts I, II, and III, Robbery with a Dangerous Weapon, Kidnapping and Murder in the First Degree (malice aforethought), respectively, adding to Count IV the cause of death by gunshot. (O.R.II 76.) Another preliminary hearing was not held. Mr. Fontenot's jury trial started on June 7, 1988, in Hughes County District Court. (N/T 6/6/1988 at 1). On June 14, 1988, Mr. Fontenot was convicted on all counts. (N/T 7/8/1988 at 104; O.R. II at 165, 166, 167). The jury assessed punishments of twenty (20) and ten (10) years imprisonment on Counts I and II respectively. (O.R.II at 65, 166). Following the penalty phase, the jury found the existence of the three alleged aggravating circumstances and on June 14, 1988, set Mr. Fontenot's punishment at death. (O.R II at 168, 169). Judgment and sentence in accordance with the jury's verdicts were imposed on July 8, 1988. Mr. Fontenot filed a timely notice of appeal to the Oklahoma Court of Criminal Appeals.

Mr. Ward was tried in Pottawattamie County on the same charges almost a year after Mr. Fontenot was convicted. Before the same trial court, Mr. Ward's trial began on May 31, 1989, and concluded on June 16, 1989. The jury found Mr. Ward guilty on all

charges. However, the jury imposed a sentence of life imprisonment with the possibility of parole.

On June 8, 1994, the Oklahoma Court of Criminal Appeals affirmed Mr. Fontenot's convictions, but overturned his death sentence due to a life without the possibility of parole jury instruction being omitted during the penalty phase. *Fontenot v. State*, 881 P.2d 69 (Okla. 1994). The Court remanded Mr. Fontenot's case for resentencing. Mr. Fontenot was subsequently sentenced to life imprisonment without the possibility of parole.

An Application for Post-Conviction Relief was filed in the District Court of Pontotoc County on July 24, 2013. After requesting additional time to respond, the State filed its response on September 17, 2014. Without an evidentiary hearing, the district court issued its post-conviction findings on December 31, 2014, denying relief based on the Respondent's assertion of Laches. Mr. Fontenot timely filed an appeal to the Oklahoma Court of Criminal Appeals on March 2, 2015. He raised all claims from his state post-conviction proceedings and challenged the laches decision. On November 2, 2015, the Oklahoma Court of Criminal Appeals affirmed the state post-conviction court's order denying relief finding the application was barred by laches. Mr. Fontenot filed a Petition for Writ of Habeas Corpus seeking relief from his state court convictions. (Dkt.# 4).

Since Mr. Fontenot filed his initial Petition, he has engaged in discovery, served several subpoenas, and conducted depositions. The Court authorized discovery, including production and review of the Pontotoc County District Attorney's files. (Dkt.# 24, 44). During the process, Mr. Fontenot's counsel served

a subpoena on the Ada Police Department and in response their organization stated no documents existed. Within the District Attorney's files, counsel discovered reports never disclosed to prior defense counsel. Based upon that discovery, Mr. Fontenot's counsel was allowed to file an Amended Petition. (Dkt.# 77).

Shockingly, thereafter, **additional documents** were produced by Respondent and the Ada Police Department, **but not to Mr. Fontenot**. Pursuant to Thomas Ward's subpoena during state post-conviction proceedings, Respondent received Ada Police Reports. These documents were not immediately turned over to Mr. Fontenot's counsel. Once Mr. Fontenot's counsel discovered this, they requested the records which were subsequently disclosed. Based upon these events, this Court permitted Mr. Fontenot to file the instant Second Amended Petition. (Dkt.# 123).

STATEMENT OF FACTS

On April 28, 1984, Donna Denice Haraway was employed as a convenience store clerk at McAnally's gas station and store in Ada, Oklahoma. Testimony presented at both of Mr. Fontenot's trials explained that Mrs. Haraway walked out of the store with a white male. They both got into a pickup truck and drove away. What exactly happened to Mrs. Haraway in the days and months after her disappearance remained a mystery until her remains were found in Gerty, Oklahoma, more than a year and a half after her disappearance. (Dkt.#123, Ex.# 44). Police found her skeletal remains spread across a large area that required several searches to locate. *Id.* The Oklahoma Medical Examiner's Office determined the cause of

death was a gunshot wound to her head. Marks found on her ribs were found to be caused by animals instead of stab wounds. *Id.*

APD Detective Dennis Smith, and OSBI Agent Gary Rogers headed the investigation into Mrs. Haraway's disappearance. Along with these two officers, APD Detective Mike Baskins handled key parts of the investigation, and was responsible for the McAnally's crime scene. From the period of late April until October 1984, OSBI and APD investigated many alternate suspects and leads. Sometime in late September or October, Detectives Smith and Baskins interviewed Jeff Miller who provided information gleaned from other individuals that implicated Thomas Ward and Karl Fontenot. Based on this uncorroborated conversation, police sought out Thomas Ward and then, Mr. Fontenot as their suspects.

The case against Mr. Fontenot rests primarily on his confession given in October 1984. In his confession, Mr. Fontenot states that he, along with Odell Titsworth, and Tommy Ward robbed McAnally's, kidnapped and murdered Mrs. Haraway before burning her body. After extensive investigation into various areas around Pontotoc County, Oklahoma, the OSBI and APD were unable to locate Mrs. Haraway's remains or any physical evidence corroborating Mr. Fontenot's confession. In fact, not one detail of Mr. Fontenot's confession could ever be corroborated with any evidence in the case.

Along with the confessions, the Pontotoc County District Attorney's case included three witnesses who arrived at McAnally's after Mrs. Haraway's disappearance. These three men testified as to what they witnessed upon arriving at the store. The witnesses

said a man and a woman exited the front door and got in a pickup that was parked about 10 feet away, parallel to the door, facing east. (N/T 6/10/1988 at 60). The man had one arm around her waist. (N/T 6/9/1988 at 66) The pickup was light-colored, "late model, late '60s, early '70s," with an intact tailgate, "greenish, gray" with primered spots and "gray primer." (N/T 6/10/1988 at 40-41, 47, 59). Not realizing anything was amiss, one of the witnesses entered the store finding it empty. Soon afterwards, witnesses called the Ada police after finding the cash register open and all of Mrs. Haraway's belongings, including her purse and school books, still in the store.

While attempting to secure McAnally's, law enforcement received reports of two men who had been at a nearby convenience store earlier in the evening. Karen Wise, the convenience store clerk at J.P.'s Pak-To-Go ("J.P.'s"), a half mile west of McAnally's, and James Paschal, a customer at J.P.'s, told police of two men who were in the store between 7 p.m. and 8:30 p.m. Ms. Wise said the men made her nervous. Both Ms. Wise and Mr. Paschal described the pickup seen with the men at J.P.'s as a "red primered truck . . . mostly red primer . . . [with] grey primered spots," and an "older model" Chevrolet of uniform color with a tailgate that was either missing or painted a different color. (N/T 6/9/1988 at 193, 214, 225).

Ms. Wise positively identified Mr. Ward as one of the men she saw in J.P.'s. *Id.* at 185; (State's Exhibit #s 5 and 51). The second man seen by Ms. Wise at J.P.'s was 6 feet to 6 feet and 2 inches tall, white male, sandy brown hair. (State's Exhibit # 5). However, Mr. Fontenot's height is 5'9." Neither Ms.

Wise nor Mr. Paschal identified Mr. Fontenot as the second man. Ms. Wise testified that the second man she had seen on April 28, 1984, had lighter hair than Mr. Fontenot and that Mr. Fontenot was shorter than the man she had seen. (N/T 6/9/1988 at 194-195). Ms. Wise also testified that she had seen a man staring at her apartment while Mr. Fontenot was incarcerated, and she believed this man resembled the second man at J.P.'s with Mr. Ward. (P/H 1063, N/T 6/9/1988 at 197-199). Ms. Wise said this same man was a spectator at the preliminary hearing. (PH Tr. 161; F-85-769; Tr. 968-969, 981-982, 984-985; N/T 6/9/1988 at 200-202).

Several other witnesses testified about pickup trucks seen that night having a similar description as the one seen at McAnally's and J.P.'s. However, the crux of the District Attorney's case rested on the confession and an identification by Jim Moyer, a customer in McAnally's that night.

Based on this testimony, Mr. Fontenot was convicted in both trials and sentenced to death. His death sentence was overturned after the second trial resulting in a re-sentencing to life without the possibility of parole.[4]

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[4] The Oklahoma Court of Criminal Appeals (OCCA) set forth facts surrounding Mrs. Haraway's abduction and murder in the appeal of Mr. Fontenot's first trial. *Fontenot v. State*, 742 P.2d 31, 32 (Okla. Crim. App. 1987). The OCCA's factual findings are entitled to a presumption of correctness. 28 U.S.C. Section 2254 (e)(1). The facts as set forth by the OCCA are consistent with the above recitation and have been given a presumption of correctness by this Court:

> Donna Denise (sic) Haraway was abducted after being robbed at the convenience store where she was

working on April 28, 1984, in Ada, Oklahoma. [Fontenot] and Tommy Ward were tried for the crimes during September, 1985. In October of 1984, Tommy Ward made a statement to law enforcement officers which inculpated Fontenot, an individual named Odell Titsworth, and to a slighter degree, himself. Fontenot and Titsworth were arrested as a result and Fontenot gave a different statement substantially in agreement with Ward's except that it more clearly inculpated Ward. In each [of] Ward's and Fontenot's statements, the instigator and ringleader in the criminal acts was said to be Titsworth. However, Titsworth was eliminated as a suspect within a few days of his arrest because of clear proof the police had that he had not been an accomplice.

According to the statements of Ward and Fontenot, Haraway was robbed of approximately $150.00, abducted, and taken to the grounds behind a power plant in Ada where she was raped. According to [Fontenot's] version, she was then taken to an abandoned house behind the plant where Titsworth stabbed her to death. She was then burned along with the house. When Haraway's remains were found in Hughes County, there was no evidence of charring or of stab wounds, and there was a single bullet wound to the skull.

The evidence at trial revealed that two men, one of whom was positively identified as Tommy Ward, played pool at J.P.'s convenience store in Ada, Oklahoma from about 7:00 p.m. until about 8:30 p.m. the evening of April 28, 1984. Around 8:30 p.m., the two men left the store. Shortly thereafter, Tommy Ward was seen leaving with Haraway from the convenience store where she worked which was across the road and a quarter of a mile away from J.P.'s. Fontenot was said to resemble the man with Ward at J.P.'s, but could not be identified as having sandy brown hair and being six foot to six foot 2 inches tall. Fontenot had dark brown hair and was several inches shorter than the description given. One

Disturbingly, the recent discovery of Ada Police Department reports contain evidence that may have changed the trial of Mr. Fontenot dramatically, including confidential letters written by Mr. Fontenot to his trial attorney, George Butner. In these letters, he provides names of people to corroborate his alibi. Additionally, he recanted his confession and detailed police attempts to make him confess while in custody. Other newly discovered exculpatory reports include a previously undisclosed handwritten report taken from Gene Whelchel about his description of the men he had seen in McAnally's. (Dkt.# 123, Ex.# 96). The report was made on April 30, 1984, two days after Mrs. Haraway went missing. It provides extremely detailed descriptions of the men, down to Suspect #2 having muscular arms, a narrow waist, and larger shoulders. He describes acne scars on Suspect #2. He describes Suspect #1 as a "neat looking guy" with an athletic build and probably right handed. These details were never provided to defense counsel and would have been essential in cross examining Mr. Whelchel and other witnesses.

Also, recently provided to defense counsel was an interview with James Boardman, an employee with the Ada newspaper. (Dkt.# 123, Ex.# 93). Mr. Boardman was in McAnally's store at 5 p.m. on April 28, 1984, and encountered two men that in his opinion were "acting funny." He saw Mrs. Haraway

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witness went so far as to tell a detective and a private investigator, and attempted to tell the District Attorney, without success, that Fontenot was not the man he saw in J.P.'s. Other than the statements given by Ward and Fontenot, there was no other evidence linking [Fontenot] to the crimes.

there. Ada police officers went back to Mr. Boardman after Mr. Fontenot was arrested in October 1984 and he could not identify Mr. Fontenot as one of the men he saw. Additionally, two witnesses whose names were written on the McAnally's register tape, provided almost the exact information to the Ada Police that they did to post conviction investigators when they provided their affidavits. (Dkt.# 123, Ex.# 94).

I. Mr. Fontenot Qualifies for Substantive Review Under Both the Actual Innocence and Cause and Prejudice Exceptions

A. Statute of Limitations

Respondent alleges the Second Amended Petition is barred by the statute of limitations, pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), codified at 28 U.S.C. Section 2244(d). According to 28 U.S.C. § 2244(d)(1) a state petitioner challenging his felony conviction must file his Petition for Writ of Habeas Corpus prior to the lapse of the one-year statute of limitations. However, the U.S. Supreme Court has found this statute of limitations may be waived upon a credible finding of actual innocence. *McQuiggin v. Perkins*, 569 U.S. 383, 133 S. Ct. 1924, 1935, 185 L.Ed.2d 1019 (2013).

Further, numerous jurisdictions, including the Tenth Circuit Court of Appeals have found that to prevent a manifest injustice of continuing to incarcerate one who is actually innocent, a number of procedural defects will be waived. *See Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986)(allowing successive petitions with rejected constitutional claims); *McClesky v. Zant*, 499 U.S. 467, 494-495 (1991)(excusing "abusive petition"

exception in federal habeas); *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11-12(1992)(actual innocence trumps failure to develop facts in state court); *Lopez v. Trani*, 628 F.3d 1228, 1230-31 (10th Cir. 2010)(actual innocence is an exception to procedural barriers in a petitioner's case including statute of limitations); *see also Lee v. Lampert*, 653 F.3d 929, 932 (9th Cir. 2011) (allowing actual innocence cases to receive substantive review despite being time-barred); *Souter v. Jones*, 395 F.3d 577, 602 (6th Cir. 2005); *San Martin v. McNeil*, 633 F.3d 1257, 1267-68 (11th Cir. 2011); *Jones v. State*, 591 So.2d 911, 915-16 (Fla. 1991) (permitting actual innocence based on new evidence in a writ of error *coram nobis*); *In re Clark*, 855 P.2d 729, 760 (Cal. 1993)(claims of factual innocence based on newly discovered evidence permitted at any time regardless of delay or failure to raise claim previously); *Summerville v. Warden*, 229 Conn. 397, 244 (Conn. 1994)(allowing state habeas corpus petition on newly discovered evidence of innocence even with other procedural problems); *People v. Washington*, 171 Ill. 2d 475, 489 (Ill. 1996)(procedural due process allows newly discovered evidence of innocence at any time); *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996) (permitting a claim of actual innocence action in the interest justice); *State ex rel Amrine v. Roper*, 102 S.W.3d 541, 547 (Mo. 2003) (permitting actual innocence to be raised in state habeas corpus proceedings outside of the normal post-conviction avenue); *State v. Armstrong*, 2005 WI 119 (WI 2005) (state supreme court could use its inherent power to remedy a miscarriage of justice); *Montoya v. Ulibarri*, 142 N.M. 89,97 (N.M. 2007)(allowing actual innocence claims in state habeas petition as an act of fundamental fairness). While Mr. Fontenot is filing his

habeas corpus petition beyond the one-year statute of limitations, he claims he is actually innocent of his convictions and the failure to file timely was through no fault of his own.[5]

An unexplained delay in presenting new evidence may bear on a determination of whether a petitioner has made the requisite showing to overcome the statute of limitations. However, in the instant case Mr. Fontenot did not "sit on" newly discovered evidence for over twenty years before raising these claims in state post-conviction or federal habeas corpus as the State suggests. *See infra* at 62-118. While records were disclosed to the Oklahoma Indigent Defense Services (OIDS) at some point after the December 1992 Oklahoma Court of Criminal Appeals ("OCCA")

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[5] Petitioner's convictions became final before the enactment of the AEDPA. Therefore, the statute of limitations commenced on the AEDPA's enactment date of April 24, 1996 and expired on April 24, 1997. *See Serrano v. Williams*, 383 F.3d 1181, 1183 (10th Cir. 2004). Because his habeas corpus petition was not filed until February 24, 2016, this action is time-barred under 28 U.S.C. Section 2244(d)(1)(A). (Dkt.# 4). Further, pursuant to 28 U.S.C. Section 2244(d)(2), the statute of limitations is tolled while a properly-filed application for post-conviction relief or other collateral review of the judgment at issue is pending. On July 24, 2013, Petitioner filed an application for post-conviction relief in Pontotoc County Case No. CRF-1984-183. (Dkt.# 99-2). The post-conviction application was denied by the state district court on December 31, 2014. (Dkt.# 99-8). On October 29, 2015, the OCCA entered an Order Granting Motion to [Allow] Associate Counsel and Affirming Denial of Post-Conviction Relief in Case No. PC-2015-76. (Dkt.# 99-10). Petitioner filed a petition for writ of habeas corpus in this Court on February 24, 2016. (Dkt.# 4). Because he did not file his post-conviction proceedings until after the one-year limitations period had expired, he is not eligible for statutory tolling. *See May v. Workman*, 339 F.3d 1236, 1237 (10th Cir. 2003).

order, there is no evidence that Mr. Fontenot personally knew of their existence. Further, he had no means by which he could have developed these records had he known. He could not investigate them, find witnesses mentioned in them, obtain affidavits and supporting evidence, and submit it all to a court. Given that Mr. Fontenot is learning disabled, it makes the possibility of this occurring even more remote, if not impossible.

Further, these records were not disclosed until after his second direct appeal was almost finished. His appellate counsel's opening brief had been filed and there was no means for further factual development at that point. When the OCCA affirmed his conviction, but overturned his sentence, there was no means to develop these documents to challenge the underlying conviction. Attorney Mark Barrett, who represented Thomas Ward, Mr. Fontenot's co-defendant, removed Mr. Fontenot's files, including the OSBI reports from the OIDS office without any authorization or release from Mr. Fontenot. Mr. Barrett claims to have been representing both Mr. Ward and Mr. Fontenot, but only filed a state post-conviction brief for Mr. Ward in October 2017. Mr. Barrett never filed a state application for Mr. Fontenot. Mr. Barrett's representation of both Mr. Ward and Mr. Fontenot represents a conflict which Mr. Fontenot raised, and Respondent questioned, during post-conviction proceedings. Those questions remained unresolved at the time of the state court's order denying the post conviction application.

Respondent also argues that Mr. Fontenot's filing of a "Reply and Motion for Summary Judgment" precludes any additional factual development in the instant federal habeas corpus proceedings. (Dkt.# 148). However, a summary judgment motion is not a

waiver of any further factual development, it is a pleading that alleges there are certain issues that can be decided based on the known evidence at the time. Fed.R.Civ.P. 56. When facts are unavailable to a non-movant, the court may "allow time to obtain affidavits or declarations or to take discovery." Fed.R.Civ.P. 56(d). Further, if a court denies the motion, it does not necessarily end the litigation. Instead, the case may continue with further factual development, including a possible evidentiary hearing, or trial. Fed.R.Civ.P. 56(g). Similarly, in post-conviction proceedings, a summary judgment motion does not preclude any further factual development. It merely suggests to the state court that there are certain issues that may be decided based on the evidence before the court at that point in time.

In this case, it appears there was there was never any waiver of additional factual development beyond the motion for summary judgment. At the last hearing in state court, both parties sought additional factual development beyond the motion based on two grounds: a prior discovery agreement and a potential evidentiary hearing for both sides. (Dkt.# 105, Ex.# 1, Minute order). After that, Respondent had actually requested more time for discovery and in an Agreed Motion for Extension of Time asked for an extension to respond.(Dkt.# 105, Ex.# 2, Agreed Motion).

Further, the Post Conviction Findings issued by the state court do not reach the substantive merits or address the facts of an of Mr. Fontenot's claims. (Dkt.# 99, Ex.# 8). The Court simply found: "Claim of actual innocence, ineffective assistance of counsel, prosecutorial misconduct and *Brady* violation could

have been submitted much earlier . . . [s]imply, too much time has elapsed due to Petitioner's own inaction." *Id.* Discovery was ongoing when the trial court's post conviction findings were entered. However, neither Mr. Fontenot, nor the Court were aware of the lack of full disclosure by the Pontotoc County District Attorney's Office that demonstrated Mr. Fontenot did not unduly delay asserting his constitutional claims. Further, there was no review of whether or not Mr. Fontenot's actual innocence in and of itself merited relief under state law. In fact, following the filings cited above, "there were no further hearings before the state court abruptly filed the two-page order denying relief on New Year's Eve 2014, the day before the state judge retired." (Dkt.# 105, at 4). Because the state court never ruled on the motion for summary judgment, the State's reliance on it is misplaced.

Mr. Fontenot's actual innocence is discussed *infra* pp. 17-48.

B. Procedural Default

Respondent also argues that the petition is procedurally barred by the OCCA's application of laches. Courts may not consider claims that have been procedurally defaulted on adequate and independent state procedural grounds "unless the petitioner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Byrd v. Workman*, 645 F.3d 1159, 1167 (10th Cir. 2011). Specifically, Respondent contends that because the Oklahoma Courts found Mr. Fontenot had "forfeited

[the] right [to have his post-conviction claims heard] **through his own inaction**" he should be procedurally barred from pursuing them now. (Dkt.# 148, Exhibit # 10, at 3-4)(emphasis added).

Mr. Fontenot, however, again contends that all procedural bars have been removed because his case fits within the "actual innocence" gateway exception that would permit federal habeas review of his alleged procedurally defaulted claims, and his alleged "*Brady* error" serves as the "cause and prejudice" sufficient to serve the same function. Mr. Fontenot also contends Respondent cannot assert laches as an affirmative defense for undue delay when their own actions continue to subvert his ability to litigate his claims in a timely manner.

Like the time bar applied in statute of limitation cases, in general, absent a showing of cause and prejudice, a habeas court will not entertain a claim that has been defaulted in state court because of a procedural state court bar. *See Dretke v. Haley*, 541 U.S. 386, 388 (2004). However, there are several narrow, but critical, exceptions to this general rule. First, the Court requires that the rule must be adequate and independent–that is, it was firmly established, regularly followed, and consistently applied at the time of the alleged default. *Ford v. Georgia*, 498 U.S. 411 (1991). Second, there is "a narrow exception to the general rule when the habeas applicant can demonstrate that the alleged constitutional error has resulted in the conviction of one who is actually innocent of the underlying offense." *Id.*; *see Schlup v. Delo*, 513 U.S. 298 (1995); *House v. Bell*, 547 U.S. 518 (2006). Third, there is an exception in claims of *Brady* error, where the elements of the substantive claim itself mirror

the cause and prejudice inquiry and proof of one is necessarily proof of the other. *See Banks v. Dretke*, 540 U.S. 668 (2004). Mr. Fontenot qualifies for substantive review under both the actual innocence and the cause and prejudice exceptions.

C. Actual Innocence

As explained above, Mr. Fontenot's actual innocence can equitably toll the AEDPA's statute of limitations. *Miller v. Marr,* 141 F.3d 976, 978 (10th Cir. 1998). "Actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . [or] expiration of the statute of limitations." *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). The purpose of the procedural actual innocence standard is to prevent a manifest injustice of the continued incarceration of one who is actually innocent. When asserting actual innocence in federal habeas corpus, a petitioner must present newly discovered evidence that a jury did not consider during their deliberations. *See Schlup*, 513 U.S. at 327. Specifically, newly discovered evidence consisting of "trustworthy eyewitness accounts" and "critical physical evidence" provide the factual basis for the gateway claim. *Schlup v. Delo*, 513 U.S. 298, 324 (1995); *see also Cummings v. Sirmons*, 506 F.3d 1211,1223-1224 (10th Cir. 2007); *O'Boyle v. Ortiz*, 242 Fed. Appx. 529, 530-531 (10th Cir. 2007)(discussing that petitioner must demonstrate the newly discovered evidence was not available at trial); *Sistrunk v. Armenakis*, 292 F.3d 669, 673 n. 4 (9th Cir. 2002); *Carriger v. Stewart*, 132 F.3d 463, 478 (9th Cir. 1997). Once an actual innocence gateway is established, any procedural defects in Mr. Fontenot's constitutional claims are removed permitting this Court to evaluate

each claim on its merits. *See Schlup,* 513 at 315. The significance of the evidence presented below casts grave doubt on the validity of Mr. Fontenot's convictions.

Once the factual grounds of actual innocence are present, a federal court's review must assess whether "the petitioner [has shown] that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup* 513 at 327; *see also House v. Bell*, 547 U.S. 518, 528 (2006). The Supreme Court instructs federal courts to examine the strength of the prosecution's case at trial when weighing the significance of all newly discovered evidence. *See House*, 547 U.S. at 539-553 (assessing newly discovered evidence within the state's theory of the case at trial). The State's theory of the case shows what evidence is significant to the jury's determination of guilt. More importantly, the state's theory of the case demonstrates the strength of the case against a defendant.

The Pontotoc County District Attorney's Office tried Mr. Fontenot twice for the robbery, kidnapping, and murder of Donna Denice Haraway. In both trials, the prosecution's case against Mr. Fontenot rested on his confession regarding the robbery of McAnally's, the kidnapping of Mrs. Haraway from the store, and her subsequent murder. (N/T 6/14/1988 at 34-36). During trial, the prosecution acknowledged the plethora of inconsistencies between his confession and all the other evidence found in the case. A key discrepancy was Mr. Titsworth's non-involvement in the crime, although he was identified by both Mr. Ward and Mr. Fontenot in their confessions as being present during the alleged murder:

> Well, what does Officer Rogers, and Officer Smith, and Officer Baskins say? It is not unusual to have them tell you part lies. I ask you to consider ladies and gentlemen, first of all, Odell Titsorth[sic] was not there. Therefore, part of the story had to be a lie. Anytime he said Odell Titsworth [sic] did anything, the rest of the story had to be a lie, because Tommy and him, one of them had to do it, what Odell, what they said Odell did. So, of course, it is going to appear there are some lies, and some mistruths and it is not going to match exactly to the facts as told by the Defendant.

(N/T 6/14/1988 at 94). Evidence showed Mr. Fontenot was unable to describe, or identify Mr. Titsworth when asked to do so by law enforcement. (J/T at 2074-75; P/H 968, 994-95). Both Ada Police Detectives Smith and Baskins admitted that nothing in Mr. Fontenot's confession was corroborated by their investigation. (P/H 546-547; N/T 6/10/1988 at 178-179). Once Mrs. Haraway's remains were found, the medical examiner's report further disproved the confession by showing the cause of death to be a gunshot wound to the head and refuting that there were any knife-marks on her ribs. (Dkt.# 123, Ex.# 46).

In addition to the confession, the prosecution relied on two witnesses who identified Mr. Fontenot as being both at McAnally's and hanging around J.P.'s convenience store. (N/T 6/14/1988 at 21, 70-71). Those witnesses were James "Jim" Moyer (*see infra* at 33-37) and Karen Wise (*see infra* at 37-40). This was the crux of the evidence brought against Mr. Fontenot to obtain his conviction.

The remainder of the evidence presented against Mr. Fontenot focused on his guilt by association with his co-defendant, Tommy Ward. Much of the prosecution's opening statement, closing argument, and rebuttal focused on Mr. Fontenot's guilt by association with his co-defendant. (N/T 6/8/1988 at 31-35; N/T 6/14/1988 at 17-19, 35-36, 70, 79). Instead of direct evidence inculpating Mr. Fontenot, the prosecution asked the jury to infer his guilt, based on Mr. Ward's guilt. In fact, much of the State's case focused on the witnesses who saw Mr. Ward in J.P.'s, or McAnally's, (N/T 6/14/1988 at 20-21, 27). Mr. Ward's possible possession of the knife, *Id.* at 17, and his family's access to a grey pickup truck. *Id.*

During Mr. Fontenot's second trial, the prosecution recounted the testimony of several witnesses who had given statements to law enforcement **that were never provided to Mr. Fontenot's defense counsel**. Specifically, those witnesses were Janet Weldon (aka Lyon), who was Mrs. Haraway's mother; James Watt, who was Mrs. Haraway's co-worker at McAnally's; Richard Holkum, an Ada Police Officer; and Karen Wise, the sales clerk at J.P.'s convenience store. Without these witnesses' prior statements to police, defense counsel was unable to cross examine the prosecution witnesses about critical evidence that either exonerated Mr. Fontenot, or impeached the testimony of various police officers. While defense counsel presented some evidence challenging the confession, he could not provide evidence establishing Mr. Fontenot's innocence, or the inherent weaknesses in the police investigation.

All the evidence presented at trial must be evaluated along with the newly discovery evidence presented herein. *See House,* 547 U.S. at 537-538. The

federal court must conduct a cumulative assessment of the prosecution's evidence at trial, along with the newly discovered evidence when considering whether actual innocence is proven.

> Our review in this case addresses the merits of the *Schlup* inquiry, based on a fully developed record, and with respect to that inquiry *Schlup* makes plain that the habeas court must consider "'all the evidence,'" old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under "rules of admissibility that would govern at trial."

Id.

The investigation into Mr. Fontenot's case has revealed both documents and witness statements that prove an alibi defense, and substantiate proof of the ineptness of the police investigation. The newly discovered evidence undermines the prosecutor's weak case and provides proof of Mr. Fontenot's probable innocence. As noted *supra* at p. 2, **"Probable innocence" is established if Mr. Fontenot presents "new facts [that] raise[] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial . . . "** *Schlup v. Delo*, at 317 (emphasis added). To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* at 327; *see also House v. Bell*, 547 U.S. 518, 538 (2006) (a federal court presented with a *Schlup* claim "must make" 'a probabilistic determination about what reasonable, properly instructed jurors would do.'"). Once a federal court makes such a finding, a gateway claim of

innocence exists removing any procedural obstacles allowing the substantive review of Mr. Fontenot's claims. *See House,* 547 U.S. at 536-537; *Case v. Hatch*, 731 F.3d 1015, 1036 (10th Cir. 2013). The evidence presented in Mr. Fontenot's Second Amended Petition puts the entirety of his case in a different light meriting the removal of any procedural hurdles.

Some of the new evidence presented includes evidence that Mrs. Haraway was being harassed and stalked by a man in the weeks and months leading up to her disappearance. The sole eyewitness, Jim Moyer, placing Mr. Fontenot in McAnally's recanted his identification. Karen Wise, the convenience store clerk at J.P.'s was pressured by both the police and prosecution to change her description of the men she saw at her store to fit the police theory of the crime.

Further, a medical examiner's report withheld by the prosecution shows not only a mishandling of the crime scene-a pattern in this case-but more importantly shows that Mrs. Haraway possibly gave birth to a child sometime before her death (a striking fact given she had told a friend she was pregnant at the time of her abduction). The totality of this newly discovered evidence establishes Mr. Fontenot's probable innocence. After a cumulative assessment, it is evident to this Court that, "more likely than not, no reasonable juror would have convicted him." *Schlup*, 513 U.S. at 327.

1. Newly Discovered Evidence Establishes Mr. Fontenot's Alibi.

Investigators knew Mr. Fontenot had told them he was elsewhere when Mrs. Haraway was abducted. Within the Oklahoma State Bureau of Investigation

(OSBI) records are documents corroborating Mr. Fontenot's whereabouts the night of April 28, 1984. The defense never got these documents. The facts show Mr. Fontenot agreed to submit to a polygraph examination on October 21, 1984. Within the OSBI prosecutorial[6] submitted to the Pontotoc County District Attorney's Office is a report of Mr. Fontenot's conversation with OSBI Agent Rusty Featherstone. (Dkt.# 123, Ex.# 43, prosecutorial bates 142-143). During that conversation, Agent Rusty Featherstone reported the following:

> During the pretest interview, FONTENOT indicated he has never been in the McAnally's convenience store nor even having driven by it. He has never seen DONNA DENICE HARAWAY before and does not believe he would recognize a picture of her if shown it now, although he recalls seeing a picture of a girl when she was first reported missing . . . FONTENOT recalls on the evening of Saturday, April 28, 1984, he went to the apartment of GORDON CALHOUN, arriving there at approximately dark or shortly after the kegs arrived. CALHOUN lives adjacent to ROBERTSES, where FONTENOT was currently staying. At the party FONTENOT recalls drinking and doing marijuana and then returning to the ROBERTS apartment where he slept on the floor all night. He

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6 The prosecutorial is a report created by the OSBI agents and given to the Pontotoc County District Attorney to review for charging decisions and prosecution. It does not contain the entirety of the investigative documents from law enforcement.

> believes he returned to the apartment between 2330 and 2400 hours that night . . . "

Id.[7] Later in the statement, Agent Featherstone stated that Mr. Fontenot mentioned a man named Bruce who was also at the party along with a Michael Shane Lindsay. *Id.*

During the post-conviction investigation, it was determined the Bruce mentioned was Bruce DePrater who acknowledged being at the party and seeing Mr. Fontenot there the whole evening. (Dkt.# 123, Ex.# 8). Interestingly, Agent Featherstone found Mr. Fontenot's polygraph results were inconclusive but bordering on deceptive. (Dkt.# 123, Ex.# 44 at 605, 628)(explaining that the examiner cannot make definitive determinations on whether Mr. Fontenot was truthful or deceptive on questions about the disposal of Mrs. Haraway's body and whether he stuck her with a knife).

Mr. Fontenot also made a handwritten statement on October 21, 1984, recanting his confession. In his letter, he said he had simply agreed with the story OSBI Gary Rogers told him and lied on the video. (Ex.# 44 at 626). He explained that he had never been to McAnally's or ever met Mrs. Haraway, and

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[7] When Mr. Fontenot attempted to explain his whereabouts to Detective Smith and Agent Rogers, they interpreted it as confirmation of whatever Jeff Miller told them over the summer. They failed to independently assess whether the party occurred as Mr. Fontenot stated rather than as confirmation of Mr. Miller's version of what occurred. Counsel for Mr. Fontenot represents that "If they did investigate it, those documents have never been disclosed to any defense counsel including undersigned counsel." (Dkt.# 77, pg. 21, n.4).

reaffirmed his presence at the party. (Dkt.# 123, Ex.# 44 at 625-627).

What is significant is that both the OSBI and Ada Police Department had proof of this party based upon several witness reports, dispatch records, and police reports. However, this evidence was never provided to the defense. Ada Police radio logs show several calls made in response to a loud party held at Gordon Calhoun's apartment. One of the officers who responded to this call, Ada Police Officer Larry Scott wrote a report specifically mentioning the "Gordon Calhoun" party and warning the revelers to keep it down or go to court. (Dkt.# 123, Ex.# 43, prosecutorial bates 98).

Other witnesses who knew about the party at Mr. Calhoun's apartment testified at Mr. Ward's trial, but not at Mr. Fontenot's. One of these witnesses, Stacey Shelton, not only remembered the events of that night, but remembered some of the other people present. Stacey Shelton attended the party at Gordon Calhoun's apartment. She testified at Mr. Ward's trial[8] about the party and others who attended:

Q Did you have occasion to attend a party at Gordon Calhoun's apartment on April 28th, 1984?

A Yes, sir. It was the graduation party for my younger brother, Bruce.

Q And how did you come to go to that party?

---

[8] Mr. Ward's trial took place in 1989, after Mr. Fontenot's trial and conviction on June 8-14, 1988.

A I was at a club called LaFraqua that night and I had seen my younger brother there, and Gordon, and they told me that they were having a party at his apartment and asked if wanted to come.

Q. Now, do you recall who went to that party with you?

A Yes, sir. My roommate, Laura Ingram, my boy-a boy I knew who I ended up, I ended up dating for two years, that was our first date, and Lyndel Gibson and his roommate. I don't recall his name. I'm sorry, it wasn't his roommate, it was a friend.

Q And did you see anyone at the party that you knew?

A My brother, Bruce, was there, Gordon was there, my next-door neighbors from my home in Konawa were there, Chris and Eric Thompson. And of course, I knew Laura and Lyndel and was familiar with the friend that Lyndel brought.

Q Now, have you seen a lady in the hall today known as Janette Roberts?

A Yes. They called her "Red". She was at that party, yes.

Q. You saw her at the party also?

A. Yes, I did.

Q. Now, do you recall about what time you got to the party?

A. It was late. The club didn't close until mid-night, and I want to say that that is about the

time we went, around that time, somewhere. I knew that it was late.

Q. All right. Did you see the Defendant, Tommy Ward, at that party?

A. I can't say positively that I did, no. There were probably twenty to twenty-five people there and, like I said, the only ones I knew were about six or seven people.

Q. All right. Now at the time of the first trial of this case, who were you working for?

A. A radio station in Ada, KADA Radio.

Q. And what were you doing for them?

A. I was a news anchor and reporter.

Q. And did you attend that trial?

A. Yes, sir, I did.

Q. And did anything happen in that trial to surprise you?

A. Yes, sir. I viewed a videotape where Mr. Ward was talking to some detectives and he told them that the night that Denice Haraway was taken, he was at a party and he started describing in minute detail about the party. He told of my little brother playing the electric guitar and Gordon was playing on the drum set and of two guys from Konawa asleep in the bedroom and also told of the police coming about 1:00 o'clock in the morning telling us to quiet down. And the minute I saw that, I knew that he had been there to know that.

Q. Now, did you know who these people from Konowa were?

A. Yes. They were Chris and Eric Thompson. I grew up next door to them.

Q. Now, did you see them asleep at that party?

A. Yes, sir, I did.

Q. And where were they asleep?

A. In the bedroom. One was on the bed and one was on the floor.

(Ward Vol. 10, at 193-195). Ms. Shelton had told the police and prosecution that she was at the party and knew who was there. Instead of notifying George Butner, counsel for Mr. Fontenot, of evidence supporting Mr. Fontenot's alibi, the prosecution's reaction to her information was to pressure her to recant.

> As I was watched the video, I realized that Ward was referring to a party I had attended at Gordon Calhoun's house. My brother, Bruce DePrater, was from Konawa and had been playing the guitar and Gordon had been playing the drums. Ward has also eluded to the fact that there were two other boys from Konawa at the party who were passed out on a bed. Those two boys were my childhood neighbors, Chris and Eric Thompson. I remembered them being at the party and indeed, they were passed out on a bed in an adjacent room to the living room.
>
> I also remember Janette Blood being at the party with several of her friends. At the time, I did not know who she was or her

name, but, I remembered her specifically because after I remarked that everyone needed to lower the noise because of the warning from the police, she came up to me and yelled in my face. She was easy to remember because of her flaming red hair and missing teeth. It was only at the trial, when she testified that I learned her name.

I specifically remember the night of the party as Saturday, April 28, 1984. First, my brother had invited me to the party after seeing me with my roommate Laura Ingram, and my date, Lyndel Gibson, at a local dance club. All three of us went to the party with the intent of only staying for a short while. It was the first time I had gone out with Lyndel, who I ended up dating for the next two years. It was the one and only time I went to Calhoun's house. I kept a calendar, almost like a diary, of everything I did. I wrote it in my calendar the following day. Also, during that time, I never went out on Friday nights because I worked on Saturday mornings and liked to go to bed early.

The police should have been aware of the date of the party since they arrived at the house a couple times to quiet the party. However, the police would not have been aware of everyone at the party. I know this because my friend, Laura and I were hidden in a different part of the house when the officers arrived and never interacted directly with them. After watching the video of Tommy Ward describing the April 28, 1984,

party, I left the courtroom and approached Dennis Smith. I told him that there was no way Ward would know details about the party unless he was there. Smith told me that anyone could have told him about the party. I argued with him that Ward would not have known all the details that he spoke about if someone had just told him about it. He said to me, "I don't want to hear it," and turned and walked away.

I later informed Mike Baskins about the accuracy of Ward's description of the party that night. I insisted that Ward and Fontenot couldn't have committed the crime since they were at the party that night. Baskins argued with me concerning the validity of the alibi, claiming that police logs showed that the party actually took place on a Friday night. I knew that could not have been correct and several years later, I discovered that the police log actually showed that the party was, in fact, on Saturday night.

At the second trial of the defendants, I testified for the defense, verifying that Tommy Ward's details matched what I had seen at the party.

After testifying at the trial, I was confronted by Bill Peterson who brought me into an office he and Chris Ross were using within the courthouse. Once I was there, Peterson told me I was to get back on the stand and recant my

testimony. I told him I wouldn't do it because I had told the truth. He made me stay in the office for about half an hour and then came back in with what he told me were trial transcripts. He ordered me to read them. I did and then he yelled at me saying that I was lying because, he said, the transcripts didn't match my testimony. Again, he demanded that I return to the stand to recant my previous testimony and again, I refused telling him that while not everything I testified to was in the transcript he showed me, that I clearly remembered what took place that night and I clearly remembered seeing the tape sometime during the preliminary hearing or trial, although I could not recall exactly which one.

Peterson was extremely volatile during the course of this confrontation. He slammed his fist on the desk. He slammed the transcript on the desk. He was red faced and yelling almost to the point of spitting. He insisted over and over again that I go "back on the stand and testify that everything you said was wrong."

Because I refused, he told me I was not to leave his office until I agreed to recant. I stayed in the office for several more hours while the trial continued. He would come into the office during breaks and again demand that I retake the stand, which I refused to do. At the end of the day, he let

> me go, but told me I was to return every day until I agreed to recant. He told me he was going to recall me and rip my testimony to shreds and although I returned each day of the trial and was made to sit on a bench in the hallway until the trial concluded, he never recalled me, and I refused to go on the stand of my own accord and recant.
>
> Peterson left me with the impression that if I did not remain in his office the first day or return the following days that I would be jailed. I missed several days of work because of it.
>
> I interpreted all of the foregoing actions by Peterson as intimidating, although I continued to stand by my testimony.

(Dkt.# 123, Ex.# 12) (emphasis added). While Ms. Shelton could not remember specifically Mr. Fontenot being at the party, her knowledge of who else was present provided new evidence supporting Mr. Fontenot's alibi. Specifically, she named her brother, Bruce DePrater, and Eric and Chris Thompson as being at Mr. Calhoun's apartment.

When interviewed, Mr. DePrater not only remembered the party but knew Mr. Fontenot:

> Sometime prior to this party, I recall traveling to Texas with Gordon Calhoun to purchase one or two kegs of beer, and probably some cases of beer. The alcohol content for beer sold in Texas was higher than that of beer sold in Oklahoma, making 'Texas Beer' more desirable.

I recall Eric and Chris Thompson, from Konawa attended this party. I recall that Eric Thompson had passed out early that night; but, during the daylight hours I witnessed an incident between Eric Thompson and Karl Fontenot while they were both standing around talking at Gordon Calhoun's party. Karl Fontenot was refilling a beer can from the keg's spout and joking to Eric that he (Karl) was only having one beer.

Later that same night, probably around 11 pm or shortly thereafter, I recall planning a trip to La Fragua, a college bar in Ada, with Chris Thompson. Chris and I wanted to visit the bar and invite women to come back to Gordon's keg party. On the way out, I recall mentioning this plan to Karl Fontenot, who responded by making an inappropriate gesture involving the tugging upward on his belt, while commenting verbally that he and Tommy had already been with an older woman that evening.

At La Fragua that night, I recall seeing my sister Stacy Deprater. She was with her friend Laura Ingram and on a date with Lyndel Gibson. Surprisingly, my sister Stacy and her friend and date came back to Gordon Calhoun's party that night, after La Fragua closed at midnight.

Later that same night, after my sister and her friends had gotten to Gordon Calhoun's party, I recall playing guitar while Gordon played his drums. While we were both playing loudly, someone announced that a police

> officer was coming up the stairs to Gordon's apartment.
>
> Almost simultaneously, I recall Karl Fontenot running by me telling me to follow him, that he knew a good place to hide. I had no reason to hide, and to this day, I don't know why I followed Karl Fontenot into this strange hiding place, but I did. Karl showed me a hidden passageway, which seemingly connected Gordon Calhoun's kitchen with his neighbor Janette's apartment. This passageway was hidden behind Gordon's refrigerator. That is where Karl and I stayed until the police officer left.
>
> I believe each of these incidents occurred on the same night, during the same party at Gordon Calhoun's apartment sometime during the spring of 1984.

(Dkt.# 123, Ex.# 8). Along with Mr. DePrater, Eric Thompson also remembers Mr. Fontenot being at the party that evening. (Dkt.# 123, Ex.# 9). Such information was crucial to Mr. Fontenot's defense at trial because it established his whereabouts for the night; precluding the belief he was involved in Mrs. Haraway's abduction.

Mr. Fontenot recanted his confession shortly after he gave it.(Dkt.# 123, Ex.# 44 at 626). More importantly, in both his interview for the polygraph and afterwards he provides as much information as he can about a party he attended six months prior. Given that the videotape confession of Mr. Fontenot only contains the confession and not the interrogation that occurred beforehand, his statements providing

his whereabouts to law enforcement are critical new evidence. The prosecution failed to disclose these documents to Mr. Fontenot's trial attorney, George Butner.

The OSBI records that were withheld from defense counsel document Mr. Fontenot's alibi and his recantation and are important for two reasons. First, these documents provide independent corroboration of any conversations between Mr. Fontenot and his trial counsel. Given that he never testified at any hearing, these documents would impeach Agent Rogers' and Detective Dennis Smith's testimony about the veracity of the confession. Both law enforcement officers admitted that nothing in the confession could be substantiated. Therefore, OSBI reports reflect that Mr. Fontenot denied any involvement and told officers about the party with specific names of people in attendance shows substantial flaws in their investigation.

Second, these reports provide new investigative leads defense counsel could have followed. Had Mr. Fontenot's defense been given this information, they could have investigated the people who attended Mr. Calhoun's party the night of April 28th. These people remember seeing Mr. Fontenot from the very early part of the evening until much later into the night. Their accounts clearly show that at no time did Mr. Fontenot leave to participate in whatever transpired with Mrs. Haraway. Affidavits from party-goers, Eric Thompson, Bruce DePrater, and Stacey Shelton along with police reports from Janette Blood place Mr. Fontenot at the party for the entirety of the night.

2. Donna Denice Haraway was being Harassed by an Unknown Man.

The Pontotoc County District Attorney maintains it did not have most of the OSBI and other law enforcement records made during the investigation into Mrs. Haraway's disappearance and murder. Amongst those records not turned over to the prosecution or defense counsel include OSBI reports about witness accounts to police detailing Mrs. Haraway's statements to them about how she received obscene telephone calls during her shifts while working at McAnally's. According to a co-worker, these calls had stopped for a period in the early months of 1984, but began again in the weeks leading up to her disappearance. (Dkt.# 123, Ex.# 62). Mrs. Haraway told the witness that the male caller telephoned the store during her shifts in the evenings from Thursday to Sunday. *Id.*

Mrs. Haraway's mother, Janet Lyon, also told police that her daughter had told her about the calls and said that she feared these calls and did not like working at McAnally's. These calls, greatly distressed Mrs. Haraway, her family, and co-workers.

> According to Janet, Donna told her on the phone she hated working at the store because it did not have an alarm and a lot of weirdo's come in and out of the store. She told Janet that she was going to look for another job because she felt uneasy working at the store alone at night. She told Janet that the phone calls had started again but didn't go into the whole story. **Janet said that earlier Donna had been receiving calls at work from a man that said he**

> **was going to come out to the store some night and wait outside while she was working. She said that Donna was upset because she had asked for the night off and a guy refused to work, and she had to work anyway.**

(Dkt.# 123, Ex.# 43, prosecutorial bates 20, 109) (emphasis added). OSBI Agents received similar information from the store manager, Monroe Atkeson, about a conversation he had with Steve Haraway, Mrs. Haraway's husband.

Mrs. Haraway's husband, Steve, also told police about the harassing phone calls his wife received. On the night of her disappearance, the police spoke with Steve Haraway who told them: "Steve received a phone call from the police who told him that his wife was missing. He knew of no one that Donna was having problems with at the store, other than she had received two to three obscene phone calls at the store. The last phone call was two or three weeks prior to her disappearance." (Dkt.# 123, Ex.# 43, prosecutorial bates 20).

OSBI Agents received similar information from the store manager, Mr. Atkeson when agents interviewed him on April 30, 1984. He recounted a conversation with Steve Haraway about a Vietnam Veteran that had been harassing Mrs. Haraway. (Dkt.# 123, Ex.# 44, OSBI 0006). She received several obscene telephone calls during her shifts. *Id.* Mr. Atkeson told police he had seen the veteran that Steve spoke of who was described as a white male, six feet, 190 pounds, black hair, brown eyes, mustache, light complexion, who usually drove a white Chevrolet Chevette and bought a soft drink. *Id.* Mr. Atkeson

believed that the veteran attended a rehabilitation school in Okmulgee. *Id.*

James D. Watts, a co-worker of Mrs. Haraway's from McAnally's had also given police a statement about the obscene phone calls that Mrs. Haraway had received, a statement that likewise was not produced to the defense. Mr. Watts gave a statement to Pontotoc County District Attorney's Office investigator Lloyd Bond on July 25, 1985. Mr. Watt explained that "Denice had told me of some obscene phone [calls] she had received at the store for a while, these calls upset her a great deal. She could not recognize the voice over the phone. The calls stopped about one month before she disappeared." (Dkt.# 123, Ex.# 62).

Other individuals were not interviewed by police who had knowledge about the impact these calls had on Mrs. Haraway. Anthony Johnson, a frequent customer at McAnally's, remembered a conversation he had with Mrs. Haraway a week before her disappearance.

> Johnson is a co-worker with Tommy Ward's sister, Tricia Wolf in an Ada, Oklahoma plant. Johnson admitted to this investigator that one week before Haraway's disappearance he was in the McAnally's convenience store when Haraway asked him where she could buy a gun. Haraway referenced the need for a gun with some funny calls she had recently been receiving. Haraway said she didn't really know who was making the calls, and that the caller never really said anything, just did some heavy breathing on the phone. Johnson asked Haraway if she had any ex-boyfriends that could be making

> these calls and said that in Johnson's opinion, she knew who was making the calls but did not seem to want to indicate who it was.

(Dkt.# 123, Ex.# 22). Further, just two days before Mrs. Haraway went missing, she spoke with Darlene Adams, another customer at McAnally's. Mrs. Haraway explained she was afraid of working nights at the store, but her schedule would not be changed. (Dkt.# 123, Ex.# 1).

It is unclear whether the Ada police or the OSBI ever investigated who was making these calls to McAnally's. No telephone records were obtained of incoming calls to the convenience store according to the disclosed OSBI reports. No witnesses were interviewed regarding men who may have hung around the store or watched Mrs. Haraway in the months and weeks leading up to her disappearance. Obviously, whomever was making these calls knew her work schedule because the telephone calls occurred only during her shifts. (Dkt.# 123, Ex.#s 15 & 44, OSBI 0006). The man making these calls targeted Mrs. Haraway and had been doing so for an extended period of time before her abduction. *Id.*

This newly discovered evidence was not presented to either of Mr. Fontenot's juries because the prosecution failed to disclose it to defense counsel. Beyond the failure to disclose, this evidence illustrates the defects in the police investigation into Mrs. Haraway's disappearance. This evidence should have been investigated in 1984, given this evidence was willingly provided by those closest to Mrs. Haraway either on the night of her disappearance, or within a day or so of it. This is not a situation where only one person made a comment about a few suspicious telephone

calls. Instead, numerous people including her husband, manager, coworker, customers, and mother were aware of this conduct and recognized its obvious relevance to the case. They immediately shared this information with police in the hopes that it would assist in their investigation into her mysterious disappearance. Instead, the police ignored it and the prosecution withheld it from Mr. Fontenot's defense.

3. The Only Eyewitness Who Identified Mr. Fontenot Recants His Identification.

Jim Moyer is the only witness who placed Mr. Fontenot in McAnally's the night of Mrs. Haraway's disappearance. Mr. Moyer's account of that night changed over time. From his first interviews with the Ada Police to his testimony at the preliminary hearing and trial, he was not consistent. (Dkt.# 123, Ex.# 102). He testified that he saw both Tommy Ward and Mr. Fontenot in McAnally's shortly before Mrs. Haraway's disappearance. (P/H at 213-214). He testified that while talking to Mrs. Haraway during his purchase of cigarettes, he saw two men walking into the store; one man with dark hair while the other one was blond. (P/H at 218-220). However, this testimony is not what he originally told police in 1984. He was interviewed twice by Ada Police. The first time was on April 30, 1984, by Ada Police Officer Barrett:

> MOYER advised he went to McAnally's at 7:30 p.m., Saturday, 4-28-84. A pickup pulled in faceing [sic] the building between the door and the ice machine. A dark-haired guy came in the store first, then a blond haired guy came in later. MOYER left approxim-

> ately one minute after they came in. The pickup was about a 67-69 Chevrolet, light gray, rough looking. MOYER glanced at the tag but cannot remember it. The pickup may have had a trailer hitch on it.

(Dkt.# 123, Ex.# 102). His second interview with Ada Police Officers D.W. Barret and Fox, he told a completely different story.

> On 11-6-84 Dets Barrett and Fox went to Martins Phillip 66 station on Arlington and talked to Jim Moyer. Mr. Moyer said he went to McAnally's on Arlington about 7:30 p.m. on 4-28-84. Mr. Moyer said there was a dark haired male at the back of the store, but he did not get a very good look at him. While Moyer was at the counter talking with Denice Haraway a second male came in the door and walked past him. This person he described as being blond headed and of average height and weight. Moyer said he stayed in the store only a minute or two after the second subj. came in. As he was leaving he saw a pickup parked into to the curb facing the store. He only knew it was prior to a 1971 model and was a Ford or a Chevy. Moyer looked at the picture lineups and said the pictures that most resembled the men he saw was #1 in the Ward folder and #2 in the Titsworth folder.

(Dkt.# 123, Ex.# 102). These Ada Police Reports should have been made available to defense counsel during pretrial proceedings in both 1984-1985, and prior to Mr. Fontenot's second trial in 1988. As such, it is a *Brady* violation for failure to disclose impeach-

ment evidence and prior inconsistent statements. Further, this report was just made available in the instant proceedings in 2019.

Not only was the sequence of events from the men being in the store different than his testimony, but he was not shown Mr. Fontenot's photospread. **As the prosecution relied upon him to put Mr. Fontenot in the store, it is interesting that he was not asked to identify him during his interview.** Mr. Moyer's account of his time in McAnally's is widely inconsistent from his original interview, through his preliminary hearing and trial testimony.

Mr. Moyer identified Mr. Fontenot in the courtroom as the dark-haired man who walked towards the back of the store. (N/T 6/9/1988 at 16). But during cross examination, Mr. Moyer admitted doubts about his identification of Mr. Fontenot.

Q. All right. You have had an opportunity at Preliminary Hearing to stand next to and look at the height of Karl Fontenot, didn't you?

A. Yes.

Q. And as I recall that, Mr. Fontenot was two to three inches shorter than you were. Is that correct?

A. Yes.

Q. Okay. so, if you were, in fact, five ten, Mr. Fontenot would be five seven to five eight. Is that correct?

A. Yes.

Q. Okay. And, in fact, then to be taller than you, he would have to have heels on his boots about three to four inches tall, but even to reach a six-foot height, the composite reflects he would have to have five to seven inch boots then. Is that correct?

A. To match that height, yes.

Q. And after you came up here to Preliminary Hearing, had an opportunity to look at the height of Mr. Fontenot, had an opportunity to look around the courtroom, sometime after the Preliminary Hearing you became convinced that Karl Fontenot was not the man, didn't you?

A. I became confused about it.

Q. You became so confused or convinced that you attempted to contact the District Attorney's Office and say that Karl Fontenot was not the second man, didn't you?

A. At a time, yes.

Q. Okay. All right. In fact, you tried to get a hold of the District Attorney all summer to tell him that, didn't you?

A. Yes.

Q. Okay. The District Attorney wouldn't return your telephone calls would he?

A. Well, I never left my name.

Q. Okay. so, you just called the District Attorney's Office for a couple of months during the summer and never left your name. Is that right?

A. Yes.

Q. All right. You believed, Mr. Moyer, that there was someone sitting in the back of the courtroom that was more familiar to you that evening as being in McAnally's on April 28th, 1984, didn't you?

A. Yes.

Q. Okay. And you did that because of the fact that this gentlemen was wearing boots, you saw those out in the hall, didn't you?

A. Yes.

Q. His hair was longer than Mr. Fontenot's?

A. Yes.

Q. He was much taller than Mr. Fontenot?

A. Yes.

Q. Okay. And, in fact, you became convinced that that was, in fact, the second man, didn't you?

A. Well, I don't know if I was convinced about it.

(N/T 6/9/1988 at 24-26). His doubts make sense in the context of his initial interview where he was never asked to identify Mr. Fontenot and his time of actually viewing either man in the store was seconds at most. However, Mr. Moyer clarified his position from Mr. Fontenot's trial in 1988. When interviewed during post-conviction he now asserts:

> While at the courthouse testifying in the preliminary hearing, I saw a man in the back of the courtroom I had seen before. I

also saw him downstairs, where I had been waiting to testify. I also saw this man speak to Tommy Ward during the preliminary hearing. It came to me that this was the same man I had seen in McAnally's with Tommy Ward. He looked more familiar to me. I was no longer one hundred percent sure about my identification of Karl Fontenot.

After that, I tried to call Mr. Peterson, the District Attorney, to tell him I was no longer one hundred percent sure that Karl Fontenot was the man I had seen in McAnally's that night. In fact, I was leaning more in the direction of Steve Bevel, the man I saw at the courthouse. While I was never able to speak with Mr. Peterson, I did speak with someone else in the district attorney's office. I told this person of my concern. This person said to me, "It was not him (Bevel)."

After that, I was afraid to change my story. I felt pressure from both sides. I overheard the lawyers argue about the content of the story I had given to Richard Kerner, an investigator working for Mr. Wyatt, while I was on the stand. On one hand, I felt betrayed by Mr. Kerner, as he tape-recorded our conversation without my consent. On the other hand, I felt like it was Steve Bevel that I had seen with Tommy Ward that night. I felt conflicted. I chose to then state that I was confused about the identity of the man with Tommy Ward.

> **I am now convinced that my assessment, at the time of the preliminary hearing, that Steve Bevel was the man with Tommy Ward, was correct. I am confident that Karl Fontenot was not the man I saw at McAnally's. The man I saw at McAnally's was definitely taller than Karl Fontenot and had much more intimidating look about him. At this time, I am about 95% sure that it was Steve Bevel, not Karl Fontenot, that I saw in McAnally's on April 28, 1984.**

(Dkt.# 123, Ex.# 14)(emphasis added).

When Mr. Moyer told the prosecution he was unsure about his identification of Mr. Fontenot, he was told he was wrong in his identification of Mr. Bevel. *See also* Ward Vol. 3 p. 97-99, "Not positive about the dark-haired person." Mr. Moyer's uncertainty as to whom he saw in McAnally's with Mr. Ward casts further doubt of Mr. Fontenot's involvement in this crime. Without Mr. Moyer's identification, no evidence places Mr. Fontenot in McAnally's besides the false confession.

4. Law Enforcement Pressured Karen Wise to Change Her Account of What Transpired in J.P.'s Convenience Store.

Karen Wise was a crucial witness not only for the investigation into Mrs. Haraway's disappearance, but for the prosecution of Mr. Fontenot. After going to McAnally's in response to the initial report that Mrs. Haraway was gone, Ada Police Detective Mike Baskins travelled to J.P.'s to inquire about the men who had been reported as rowdy earlier in the evening. When

Detective Baskins arrived, Ms. Wise told him how two men were in the store that night harassing her. Both men came up to the counter several times to get change for the video game machines and buy alcohol.(N/T 6/8/1988 at 161-162). She described the two men as follows: a blond male 5'8" tall dressed in a white t-shirt and jeans with his hair parted in the middle. The second man was a bit shorter than the blond with dark, shoulder length hair also dressed in a t-shirt and jeans. (*Id.* at 165-166). Law enforcement, with no indication that the men seen in J.P.'s were connected in any way with McAnally's, decided to construct composites of the two men from Ms. Wise's description. *Id.* at 167; *see also* (Dkt.# 123, Ex.#s 76-77). These composites became the suspects for the crux of law enforcement's investigation.

However, despite the composites and descriptions, Ms. Wise never identified Mr. Fontenot as one of the men she saw at J.P.'s on April 28, 1984.(N/T 6/8/1988 at 177 & 193-194). Mr. Fontenot was both shorter and had lighter hair than the man accompanying Mr. Ward. Further, when shown Mr. Fontenot's line-up, she was unable to identify him. (Dkt.# 123, Ex.# 43, prosecutorial bates 138, 0377). While the Ada Police Detective Dennis Smith testified that Ms. Wise called him after the line-up and identified Mr. Fontenot, there was no police report supporting the subsequent identification.

Creating more doubt is Ms. Wise's affidavit that she saw four men in J.P.'s on April 28, 1984, rather than two men that became the center of the prosecution's theory of the case.

> That evening, after reports that Denice Haraway was missing, I was interviewed by

the police. They asked me to help them construct composite drawings of two young men who were in J.P's that night. At first, I didn't want to help with the drawings. I told police that just because they were in J.P's didn't mean they had hurt Ms. Haraway or taken her anywhere. I said they were just kids.

Another reason I didn't want to help with the drawings at first was that there were four men who were at J.P.'s at the same time. The police wanted drawings of only two men. I told police that there were two other men present, **but police insisted that there were only two men**.

I was particularly nervous because of two other men in the store that evening. I knew them. They were in the store that night during approximately the same time as the men who were later reported to be Tommy Ward and Karl Fontenot. I told police-on April 28, 1984-that there were four men hanging out around the store for an extended period of time, instead of two. I told police that I recognized two of the men and knew their names and did not know the names of the other two.

Prior to the first trial (the trial at which Tommy Ward and Karl Fontenot were tried together), I met with Bill Peterson, at his request, to discuss the case with him in preparation for my testimony. l told Bill Peterson that the other two men were in J.P's at the same time as the

two persons in the sketches. I told him I was afraid of the other two men because of the way they were behaving in the store. Bill Peterson said he already had the "ones who did it." I told him the names of the two men I knew were in the store. Those two men were Bubba Daggs and Jim Bob Howard. Bill Peterson said that Jim Bob Howard couldn't have committed the murder because he "didn't have the I.Q. of a grub worm."

Bill Peterson said that I couldn't bring up in Court that Jim Bob Howard and Bubba Daggs were with the other two men. He said it couldn't be mentioned because it wasn't relevant. I was not at all comforted by that because I didn't think Peterson had all of the people that might have been involved.

It bothers me that I couldn't discuss the other two men, because I don't think all of the truth came out. I never mentioned to the defense directly anything about the other two men, except to the extent my June 8, 1988 testimony made reference to them. (See paragraph 10). I got the impression from law enforcement that I wasn't supposed to talk about the other two men. It was not until a number of years after all the trials were over that I finally mentioned the other two men to representatives of Ward and Fontenot.

(Dkt.# 123, Ex.# 13) (emphasis added). The police investigation focused on the wrong suspects from the beginning in both number and description. That four rambunctious men were in J.P.'s on a Saturday night is in no way relevant to the events of McAnally's where eyewitnesses repeatedly told police they saw one man walking out of the store with Mrs. Haraway. (N/T 6/9/1988 at 38, 40, 47-48, 51, 59-60). Like Mr. Moyer's experience, when Ms. Wise tried to clarify what she saw to prosecutors, she was pressured to change her story to conform to what the State sought to present. This pattern of police and prosecutorial misconduct permeated the case against Mr. Fontenot.

Ms. Wise shared her frustrations over the improper tactics of law enforcement. She told her best friend, Vickie Jenkins, what she truly saw and her interactions with the state:

> She advised that Wise was sure Ward was in J.P.'s this evening along with three other males. Wise said Ward kept watching her all the while he was in the store which made Wise uneasy. Jenkins believes that another J.P.'s employee, one Jack W. Paschall, East of City, telephone 436-1611, pointed out the suspect truck to Wise. **Jenkins further related that Wise was upset about the composite drawings because the police just weren't doing them right. She did not know what was being done wrong with these drawings. Jenkins and the owner of J.P.'s related that Wise was very upset with the Ada Police over this investigation because they have harassed her over and over and made**

> **promises to her that were broken.** Jenkins knew nothing about Wise saying that the two guys she observed coming into the store after Ward was arrested.

(Dkt.# 123, Ex.#s 23 and 3 at 2, 10-11) (emphasis added). Both Ms. Wise and Ms. Jenkins further substantiate the improper actions of law enforcement in dealing with witnesses in this case. Like Ms. Shelton and Mr. Moyer, Ms. Wise was pressured to conform her true account of what transpired to an improbable theory with no connections to the facts and no evidentiary support. Instead of focusing on the facts and evidence gleaned from McAnally's, the actual crime scene, police almost immediately generated two suspects matching descriptions of two of the four individuals in J.P.'s with no evidence that these men were seen at the crime scene.

5. Numerous Inconsistent Statements about the Gray Primered Truck

The prosecution's theory of the case rested on both Mr. Ward and Mr. Fontenot forcing Mrs. Haraway into a gray primered pickup truck and driving off with her. (N/T 6/8/88 at 32-33). During closing arguments, the prosecution recounted several witnesses' testimony about seeing the gray pickup the night of April 28. (N/T 6/14/88 at 17, 22, 27, 68, 75, 85, & 93-95). However, there was little consistency between witnesses as to what type of truck was seen. Specifically, there was considerable differences in the size, color, body type and tire size depending on the person questioned. Mr. Fontenot's defense counsel was unable to cross examine many prosecution witnesses about

their inconsistent statements about what the gray pickup truck looked like.

The official OSBI description of the pickup was an early model "Chevy pickup truck w/light gray primer color, narrow bed w/oversized tires on rear; rear end was jacked up." (Dkt.# 123, Ex.# 44, OSBI 0004). This description was distributed to the FBI and numerous counties and states on April 29, 1984. *Id.* One problem with this description is that it did not provide the specific year of the pickup truck. For example, Chevrolet pickup body styles changed greatly from the early 60's to the 80's. (Dkt.# 123, Ex.#s 82-84). Because of the numerous types of Chevrolet pickups on the road during that time, and likely being driven in Ada during that time, specificity was critical to identifying the correct pickup seen by witnesses. Instead, there were conflicting reports of the pickup described by three witnesses who first saw the suspect and victim leave McAnally's.

Lenny Timmons described the truck as a green and gray, older Chevy pick-up that was not well maintained. (Dkt.# 123, Ex.# 44, OSBI 0842). Further, the rear wheels or tires were plain. *Id.* David Timmons thought the pickup was blue, rough, and had dents on the side. The rear bumper was white, possibly raised in the rear. (Dkt.# 123, Ex.# 44, OSBI 0851). Gene Whelchel said the pick-up was full sized and light colored. He suggested it might be an early 1970s model, but he was sure it was not a narrow bed. (Dkt.# 123, Ex.# 44, OSBI 0060). These three men reported seeing Mrs. Haraway get into the pick-up truck with a white male. (Dkt.# 123, Ex.# 44, OSBI 0061-0063). However, their descriptions not only conflict with each other but with the official description

used by OSBI. *See* Dkt.# 123, Ex.# 21, explaining the difficulties encoding memories for various events.

The prosecution's theory relied on other witnesses who supposedly saw the same pickup truck driving around town the night of Mrs. Haraway's disappearance. OSBI reports state that James Moyer, described the pickup truck as light gray, rough looking, a 1967 to 1969 Chevy pickup. (Ex.# 44, OSBI 0245; Ex.# 82). However, his trial testimony was not nearly as specific.

> Q. Okay. And did you see what kind of vehicle these two people drove up in?
>
> A. Yes. It was a Chevy pickup, gray primered.
>
> Q. Okay. And do you have any way of knowing what year it was?
>
> A. I'm not too good on years on Chevy pickups. It was . . .
>
> Q. Okay. That's fine. Do you recall whether it was a painted pickup or a primered pickup?
>
> A. It was primered. It was a flat color, not a glossy color.
>
> Q. Okay. It was a gray primered Chevrolet pickup?
>
> A. Yes, sir.

(N/T 6/9/1988 at 16). Because they had not been given Mr. Moyer's statement to police, defense counsel was unable to cross examine Mr. Moyer on his inconsistent statements concerning the truck, which was a critical part of the prosecution's case.

The descriptions of the pickup truck from J.P.'s employees conflict with those from McAnally's witnesses. For example, Karen Wise told the police the truck was an older model, short bed, with maybe a step side, "light color spots" on the driver's side door and bed, with a darker color–possibly reddish brown primer on it. Most of the pick-up was "primered." (Dkt.# 213, Ex.# 44, OSBI 0058-0059; Ex.#s 82 and 83, examples of possible truck body styles). The truck had wide back tires and possibly a loud exhaust. *Id.* At trial, she testified:

> Q. And do you recall how these two individuals arrived at your store, how they got there?
>
> A. I didn't really realize until the customers kind of let up some, until I saw what cars was still there. There was a pickup truck parked out front.
>
> Q. And do you recall the color of it?
>
> A. It was red and gray primered colored.
>
> Q. Okay. The entire driver's side or just from the door back or from the back door back or–
>
> A. Well, all I can basically remember is from the driver's side door back, because that was where it was real spotty, it was some red and some gray and that is the only reason I remember that.

(N/T. 6/8/1988 at 162). As in Mr. Moyer's testimony, Ms. Wise's police report varies in details that would have aided a jury in assessing whether these people were talking about the same truck.

Jack Paschal, who was in J.P.'s that evening, saw the men in the back of the store. He also described the pick-up truck. He told police it was an older model, maybe a mid-60's to early 70s Chevy with primer paint on it. (Dkt.# 123, Ex.# 43 at 10, 63). He thought the tailgate was either bent badly or missing. *Id.* His trial testimony is mostly consistent with the description provided to the police including his inability to make out the truck's color due to the lighting at the store. (N/T 6/8/88 at 214-215). However, it does not coincide with the description provided by OSBI, or McAnally witnesses.

The conflicting accounts of the pickup truck are critical evidence casting doubt on whether these prosecution witnesses saw the same truck, or many trucks that happen to look alike. The prosecution's theory of the case focused on a gray primered truck being used in the abduction. If the defense had the opportunity to point out the numerous police reports of these witnesses providing conflicting descriptions of the truck, it would have cast significant doubt on whether the truck was used at all since it was never located.

As exhibit numbers 82-84, attached to the Second Amended Petition illustrate, Chevrolet manufactured several body styles, cab sizes, and bed sizes from the 60's up to the early 80's. (Dkt.# 123, Ex.#s 82-84). At no time did law enforcement show these witnesses pictures of trucks to make sure they identified the correct model. Failure to glean cohesion in a crucial piece of evidence in the police's investigation demonstrates another example of the poor quality of the police investigation in this case. There was no connection between a truck seen at McAnally's and the

one seen at J.P.'s earlier that evening. Yet, the lead detectives and prosecution insisted that such a connection existed regardless of the numerous versions of what the truck looked like. Had a jury known about the high number of inconsistencies in truck descriptions, it would have created doubt as to the prosecution's witnesses who later testified they saw several men in grey pickup trucks near the power plant. (N/T 6/8/1988 at 33-35). Jurors could also conclude that alternate suspects may have had more motive to commit this crime than Mr. Fontenot, who had no interaction with the police until October of 1984.

6. Undisclosed Portions of the Medical Examiner's File

The skeletal remains of Donna Denice Haraway were found in Gerty, Oklahoma in January 1986, while Mr. Fontenot's initial direct appeal was pending. (Dkt.# 123, Ex.# 46, at 1). The location where the body was found is on the opposite side of the county from where Mr. Fontenot confessed to leaving the body. Further, how the bones were found, ultimate determination of the cause and manner of death did not match any details of his confession. The State's theory, based solely on Mr. Fontenot's confession, argued that Mrs. Haraway was robbed, kidnapped, and murdered with a knife. (N/T 6/8/1988 at 33-35). She was supposedly stabbed numerous times, her remains were burned and left at a power station west of Ada. (J/T 2593-94, 2735-36, 2742-43). However, both the location of her remains and the medical examiner's report disproved his confession. A full review of the medical examiner's report documents the cause of death as a single gunshot wound to the head. (Dkt.# 123, Ex#. 46, at. 1, 3, 12, 40). There

were no knife wounds on any of the bones uncovered at the Gerty crime scene. (Dkt.# 123, Ex.# 46, at 20, 36, 40).

While certain parts of the medical examiner's file were released to Mr. Fontenot's initial direct appeal counsel, the full 43-page report was not. (Dkt.# 123, Ex.# s 46, 11). Specifically, two key pages of the report were not provided despite the fact the trial court ordered full disclosure of the ME's Report. (Dkt.# 123, Ex.# 59). The initial page not disclosed describes the improper procedure followed by OSBI agents and other law enforcement personnel who were tasked to properly document and preserve evidence from the Gerty crime scene.

> 1-21-86 1650 I returned a call to Hughes County District Attorney Bill Peterson concerning some bones that were found. Mr. Peterson didn't know anything, about the discovery but they are thought to be the remains of a missing store clerk-Donna Hariway.[sic] **No ME was notified**. He stated that the OSBI was notified out of McAlister.[sic] That some people from the OKC office had come down. [sic]
>
> OSBI Lab people out of OKC did photo the scene and they just had a field day picking up bones. **No diagrams.** The OSBI agent out of McAlester never showed up at the scene. Mr. Peterson believes that the bones are en route to OKC but didn't know for sure. The sheriff didn't know where the bones were but thought that the OSBI had them. Notified the OSBI in OKC & spoke with Rick Spense. He didn't have the bones

> but thought that the lab man David Dixon had them. I spoke with the Sheriff Orvall Rose who didn't know where they were. Finally the OSBI found them in their lab and delivered them at 2040 by Ann Reed. Come to find out the bones were found by a trapper.
>
> Several problems with this case:
>
> #1 No one notified a county medical examiner which would've been more than happy to go to the scene.
>
> #2 Since no one notified a medical examiner or the DA they had no legal authority to remove the body.
>
> #3 This is Tulsa's jurisdiction so therefore the remains should've been transported to Tulsa.
>
> #4 If this is not Donna Haraway, they've screwed up the crime scene.
>
> #5 No one seems to give a "shit" and provide OCME with any information on Ms. Haraway.

(Dkt.# 123, Ex.# 46, at 10) (emphasis added).

The incompetence in processing and handling the Gerty crime scene is a critical failure by law enforcement given that very little physical evidence was found besides the skeletal remains. It continues a pattern of general disregard, or lack of professional capacity demonstrated by the police involved in this case from the initial call at McAnally's to the Gerty

crime scene.[9] (Dkt.# 123, Ex.# 20). More importantly, no evidence of the flowered blouse described in Mr. Fontenot's confession was found at the scene further discrediting Mr. Fontenot's already weak and baseless confession. Due to the improper processing of the Gerty crime scene, it cannot be determined if Mrs. Haraway was murdered at this location, or her body was taken there.

Further, no bullet or casing was found potentially leading to the actual perpetrator. The medical examiner investigator's report detailing the careless and unprofessional scene processing was withheld from the defense. The investigator opined that any ability to determine what happened to Mrs. Haraway was lost by virtue of law enforcement's incompetence. Such inept police work coincides with the processing of the scene at McAnally's where evidence was destroyed rather than collected. (N/T 6/9/1985 at 103-110-111; J/T 1259-1240, 1422-23, 1439, 1441, 1447-1448).

Another part of the original medical examiner's file not disclosed was the forensic anthropology report about the skeletal remains evaluated by Dr. Richard McWilliams.[10] His report indicates that the skeletal

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[9] The police failed to properly secure McAnally's after Mrs. Haraway's disappearance. They allowed customers to continue to use the store and allowed access Mr. Atkeson, the owner, to wipe down the counter and dispose of trash destroying valuable evidence. (N/T 6/10/1988 at 156; JT p. 1239-1240, 1422-23, 1439, 1441, 1447-48). Further, Ada police officers failed to follow up on witnesses who called in about what they saw in the store prior to Mrs. Haraway's disappearance.

[10] The ME's Office states that all photographs, x-rays, bench notes, and any further documentation other that the report itself is missing pertaining to Denice Haraway's case.

remains are of a woman who gave birth. There is no evidence that Mrs. Haraway had given birth at any time before her abduction.

> Skeletal remains examined this date revealed partial skeletal remains of an Indian white female less than 35 years of age and more likely 25 years of age. Marks on the pelvis indicated she had given birth to at least one child.
>
> INJURIES:
>
> 1. Bullet entrance wound at the left lambdoidal suture and exit wound at the right coronal suture.
> 2. A scalloped cut wound on the superior rim of the left 6th or 7th rib.

(Dkt.# 123, Ex.# 46, at 12). As documented in Mr. Fontenot's Second Amended Complaint, Dr. McWilliams, a forensic anthropologist, wrote a text book regarding the evaluation of human bones for the purposes of identification. (Dkt.# 123, Ex.# 25). *Forensic Anthropology: The Structure, Morphology, and Variation of Human Bone and Dentition*, Mahmoud El-Najjar and K. Richard McWilliams, (1978). Per both doctors' research, the evaluation of skeletal remains permit not only the determination of gender, but whether a woman has experienced childbirth.

> Another kind of pitting occurring in the innominate is parturition or postpubic pits. This is one or usually more deep pits found on the posterior surface of the pubic bone roughly parallel to the edge of the pubic symphysis. Angel (1969) and Stewart (1957,

> 1970) agree that these pits are associated with childbirth trauma and therefore are diagnostic of female pelvis.
>
> Nemeskeri (1972) has published a five-stage scheme for estimation of the number of pregnancies a female has experienced. The method is based upon observed degenerative changes in pubic symphyses in adult female innominates which are assumed to be attributable to pregnancy. Nemeskeri observed that the number of pregnancies he attributed to each stage remained to be verified by control investigation in autopsy material.

Id. at 81-82. Further, Petitioner states that "according to the Smithsonian Institute, the back pelvic bones would show marks where the ligaments tore during natural childbirth. *See* Smithsonian Nation Museum of Natural History, http://anthropology.si.edu/writteninbone/difficult_births.html (last visited 2013)." Anthropologists consistently evaluate the pelvic bones not only to ascertain gender, but to tell more about the skeletal remains of the person. *Id.*

This previously undisclosed evidence is a startling revelation in this case. If Mrs. Haraway was three months pregnant at the time of her abduction, which the evidence indicated, then it was impossible for Mr. Fontenot to have killed Mrs. Haraway on April 28, 1984. Such information is crucial not only in determining what caused her death but, equally important, what happened to her prior to her death. Combined with the newly obtained evidence showing that the APD and OSBI mishandled the evidence collection at both crime scenes, it is apparent that law enforcement deprived Mr. Fontenot of the ability to argue

an alternate suspect and motive for Mrs. Haraway's abduction and murder.

That Mrs. Haraway's pelvic bones showed indications of natural childbirth is newly discovered evidence of innocence. Her friends and family are adamant that she did not have a child prior to her disappearance. However, shortly before her disappearance, Mrs. Haraway informed Karen Wise, convenience store clerk at J.P.'s, that she was three months pregnant. (Dkt.# 123, Ex.# 2). Ms. Wise shared this information with her best friend, Vickie Blevins. (Dkt.# 123, Ex.# 2). Given the evidence of natural childbirth from the marks on her pelvis, it is possible Mrs. Haraway had a child sometime before her skeletal remains were found in Gerty, Oklahoma over a year and a half after her disappearance and months after Mr. Fontenot was in custody.

Such evidence undermines the state's entire theory as to the motive of Mrs. Haraway's kidnapping and what happened to her in the months leading up to her death. The State's failure to disclose the entirety of the medical examiner's report deprived the defense of meaningful avenues of investigation regarding the motive of Mrs. Haraway's abductor along with impeachment evidence regarding the processing of the Gerty crime scene. Had a jury been presented with such evidence, there is a reasonable probability of a different result due to the weakness in the prosecution's theory of the case.

"The miscarriage of justice exception . . . survived the AEDPA's passage." *McQuiggin v. Perkins*, 569 U.S. at 393. "A prisoner's proof of actual innocence may provide a gateway for federal habeas review of a procedurally defaulted claim of constitutional error."

House, 547 U.S. at 537-538. Accordingly, the Court finds Mr. Fontenot has overcome all procedural bars as "[s]ensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is AEDPA's statute of limitations." *McQuiggin v. Perkins*, 569 U.S. at 393.

II. Exhaustion of State Court Remedies

Respondent alleges Petitioner's Second Amended Petition contains three claims that have not been presented to the state courts, rendering it a "mixed petition" containing unexhausted claims. Specifically, the Respondent contends Mr. Fontenot did not raise the claims of; (1) ineffective assistance of appellate counsel[11]; (2) the imposition of the bar of laches by

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11 Respondent argues that Mr. Fontenot's claim of ineffective assistance of appellate counsel is unexhausted. However, the Court finds Mr. Fontenot fairly presented this claim in both his amended and state post-conviction petition and his opening brief to the Oklahoma Court of Criminal Appeals. Thus, Mr. Fontenot presented the substance of the constitutional claim in state court. *See Bland v. Sirmons*, 459 F.3d 999, 1011 (10th Cir. 2006). The state court is not obligated to rule on the claim for it to be rendered exhausted. A petitioner is only required to submit the constitutional basis and facts to the state court in order to satisfy the exhaustion requirement. Further, a simple reading of the state amended application for post-conviction relief shows that the ineffective assistance of appellate counsel was fairly raised in the petition, as the petition clearly asserts that appellate counsel was ineffective for failing to investigate and use the evidence asserted as the basis for the ineffective assistance of trial counsel claim. Mr. Fontenot's counsel alleged in the Amended Brief in Support of Application for Post Conviction Relief that Mr. Fontenot's Sixth Amendment right to effective assistance of counsel was violated when his trial counsel failed to investigate the case and present viable evidence supporting his innocence. (Dkt.# 99, Exhibit #2 at 59). After

the State Courts did not prevent Petitioner from fully developing his actual innocence, *Brady*, or any other federal claim in the state courts, and (3) *Brady* claim based on newly discovered evidence presented in the instant case. The Court finds, however, that Mr. Fontenot's Second Amended Petition can be reviewed on the merits due to the futility of exhaustion, Fed.R.Civ.P.15(b) and (c), and Fed.R.Civ.P. 60(b) and 60(d).

A. Futility

According to 28 U.S.C., Section 2254 (c), constitutional claims must be fairly presented to the state court prior to being raised in a federal habeas corpus petition. *See Picard v. Connor*, 404 U.S. 270, 277-278 (1971); *Rose v. Lundy*, 455 U.S. 509 (1982). Although interests of federalism and comity create a presumption in favor of requiring a petitioner to exhaust available state remedies, the failure to exhaust is not an absolute bar to federal jurisdiction over a habeas petition. *See Granberry v. Greer*, 481 U.S. 129, 141 (1987) (failure to exhaust does not deprive appellate court of jurisdiction to consider merits of habeas corpus application); *Harris v. Champion*, 15 F.3d 1538, 1554-55 (10th Cir. 1994) (exhaustion is based

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discussing the many errors committed during the trial counsel continued, "It is the defense counsel's duty to investigate all aspects of the State's case including physical evidence introduced at trial . . . Further, appellate counsel, likewise should have pursued this evidence in building a defense for Mr. Fontenot. *Id.* at 69. Supporting exhibits from appellate counsel were attached to the claim. Finally, the Court finds this claim is also considered exhausted because Mr. Fontenot has satisfied the "miscarriage of justice exception" by establishing his actual innocence. *See* infra.

on principles of comity; exhaustion is not jurisdictional). Courts recognize it is futile for a petitioner to return to state post-conviction when state courts fail to provide substantive review of constitutional claims. *See Bear v. Boone*, 173 F.3d 782, 785 (10th Cir. 1999).

If a state routinely imposes a procedural bar on those claims which are being exhausted, the exhaustion requirement may be bypassed. *See Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) ("An exception is made only if there is no opportunity to obtain redress in state court, or if the corrective process is so clearly deficient as to render futile any effort to obtain relief."); *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991); *Harris v. Reed*, 489 U.S. 255, 269 (1989) concurring opinion. Okla. Stat. tit. 22, Section 1086 delineates when successor post-conviction applications are permitted.

> All grounds for relief available to an applicant under this act must be raised in his original, supplemental, or amended petition. Any ground not so raised, or knowingly, voluntarily, and intelligently waived in this proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted **which for sufficient reason was not asserted or was adequately raised in the prior application.** (emphasis added).

Oklahoma's successor state post-conviction process is ineffective in providing any hope of substantive review of Mr. Fontenot's constitutional claims. As discussed *infra,* Mr. Fontenot has alleged sufficient reasons

either for not asserting these claims, or proving they were adequately raised in the prior application.

Mr. Fontenot asserts it would be futile to proceed with a state post-conviction action because the claims would be procedurally barred based upon the consistent pattern and practice of the OCCA. The Court agrees the claims that Respondent asserts Mr. Fontenot needs to exhaust would be procedurally barred in a successor application. *See Johnson v. State*, 823 P.2d 370, 372 (Okla. Crim. App. 1991); *Moore v. State*, 889 P.2d 1253 (Okla. Crim. App. 1995). Therefore, the Court finds a return to state court is futile, and federal habeas relief is available. 28 U.S.C., Section 2254(b)(1)(B)(ii).

Specifically, if Mr. Fontenot returned to state post conviction on a successor action to exhaust his claims, those claims would be procedurally barred based upon a consistent pattern and practice of the Oklahoma Court of Criminal Appeals ("OCCA"). In fact, Mr. Fontenot's Post Conviction Application in which he already raised both a *Brady* violation and an ineffective assistance of appellate counsel claim, was denied based upon laches. In a 2 page order, the state court, without discussion, while discovery was ongoing, and without ruling on the pending summary judgment motion, denied Mr. Fontenot's application for post conviction relief. (Dkt.# 99, Exhibit # 8). The court stated, "Simply too much time has elapsed due to Petitioner's own inaction." *Id.* This two page order is dated December 31, 2014, the day before the state court judge retired. Now, approximately 4 1/2 years later, Mr. Fontenot is still receiving evidence from the State in the instant litigation.

Mr. Fontenot contends the futility is further illustrated by the habeas litigation of Petitioner Beverly Moore's actual innocence claim in the Western District of Oklahoma in *Beverly Michelle Moore v. Warden Millicent Newton-Embry*, Western District Court Case No. CIV-09-985-C; (Dkt.# 148, Respondent's Br. at 85). The federal district court found that Ms. Moore established the actual innocence gateway but was concerned about her unexhausted constitutional claims. She consequently filed a second state post conviction petition in the state district court.

After almost six years of litigating her unexhausted claims, the state district court found all of Ms. Moore's claims procedurally barred. During this process, Ms. Moore repeatedly requested that the federal court find the state post-conviction proceeding inadequate to provide any substantive review of her constitutional claims. The unnecessary delay in the state evidentiary hearing process due to the decisions to bifurcate based on the elements of each constitutional claim, scheduling issues, and transcript complications demonstrates the failings of the state process to promptly handle successor claims. Based on the similarity of Mr. Fontenot's claims and Ms. Moore's, Mr. Fontenot would face the same procedural bar imposition by the OCCA.

When the highest state court can be counted on to impose a procedural bar, exhaustion is futile. *See Goodwin v. Oklahoma*, 923 F.3d 156, 157 (10th Cir. 1991)(exhaustion is not required "where the state's highest court has recently decided the precise legal issue petitioner seeks to raise in his federal habeas petition."); *Richie v. Simmons*, 563 F.Supp. 2d 1250, 1274 (ND OK 2008)(finding that an ineffective

assistance of counsel claim concerning undiscovered statements would be procedurally defaulted by state courts concerning exhaustion); *Rojem v. State*, 925 P.2d 70 (Okla.Crim.App. 1996); *See e.g., Granberry v. Greer*, n. 8, *citing Marino v. Ragen*, 332 U.S. 561, 564 (1947) (Rutledge, J., concurring)(exhaustion should not be required "whenever it may become clear that the alleged state remedy is nothing but a procedural morass offering no substantial hope of relief.").

Even in capital cases where new evidence is found in federal habeas proceedings establishing a *Brady* violation, a return to state court in a successor petition results in the imposition of a procedural bar. In *Douglas v. Workman*, the OCCA denied both Mr. Powell's and Mr. Douglas' successor applications on strictly procedural grounds, holding that the claims were barred by Rule 9.7(G)(3), Rules of the Court of Criminal Appeals, 22 Okla.Stat. Ch. 18 app'x (2003), which requires successive post-conviction petitions to be filed "sixty (60) days from the date the previously unavailable legal or factual basis serving as the basis of the claim for the new issue is. . . . discovered." *Douglas v. Workman*, 560 F.3d 1156, 1167-68, 1171-72 (10th Cir. 2009). There is no basis to find that the state court has any available means for substantive review through a successive state application.

Further, as Mr. Fontenot has argued his actual innocence, it constitutes a manifest injustice for him to return to state court thereby delaying his right to substantive review of his wrongful conviction. The failure to totally exhaust his state remedies does not divest this Court of jurisdiction over the merits of Mr. Fontenot's constitutional claims. *See Granberry v. Greer*, 481 U.S. 129, 131 (1987). In determining

whether the "interests of justice" warrant requiring Mr. Fontenot to pursue additional state remedies, the Court considers the interests of comity and federalism. *Granberry*, 481 U.S. at 134, *Harris v. Champion*, 15 F.3d 1538, 1555-57 (10th Cir. 1994) (holding that excessive delays in the state system in resolving claims for relief justified the federal court excusing the prisoner from having to exhaust the state remedies). Similarly, this case presents unusual circumstances, or circumstances of peculiar urgency that warrant the federal court taking action. *Granberry*, 481 U.S. at 134; *Harris v. Champion*, 48 F.3d 1127, 1133 (10th Cir. 1995)(noting that the federal court should determine whether "the interests of comity will be better served by hearing the merits of the claims); *see also, Granberry v. Greer* at 134, citing *Ex Parte Hawk*, 321 U.S. 114, 117 (1944)("this Court reiterated that comity was the basis for the exhaustion doctrine: **'it is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only 'in rare cases where exceptional circumstances of peculiar urgency are shown to exist.'"** (emphasis added). The entire basis for this Court entertaining this mixed petition at all is due to the continued behavior by state actors in failing to abide by numerous court orders and subpoenas to disclose records.

The Tenth Circuit has stated that a petitioner able to satisfy the "miscarriage of justice" standard could be excused from the habeas exhaustion requirement. *See Gradiz v. Gonzales*, 490 F.3d 1206, 1209 (10th Cir. 2007) (looking to habeas law to carve the exception to statutory exhaustion requirement

under the Immigration and Nationality Act). The Seventh Circuit has also determined that "actual innocence" is a ground upon which a federal court can relax the total exhaustion requirement. *Milone v. Camp*, 22 F.3d 693, 699-701 (7th Cir. 1994). Moreover, it should be noted that the exhaustion rule and the procedural default rule both serve the same general purposes of principles of comity and federalism. *See e.g. Edwards v. Carpenter*, 529 U.S. 446 (2000), and there is no question actual innocence serves as a narrow exception to the procedural default rules. *House v. Bell*, 547 U.S. 518, 536-67 (2006); *Schlup,* 513 U.S. 298 (2005). In fact, "[i]f petitioner is actually innocent of the crime for which he was convicted, it may be a 'fundamental miscarriage of justice' for a federal court not to entertain his constitutional claims." *Milone v. Camp*, 22 F.3d at 700. Because Mr. Fontenot satisfies the "miscarriage of justice" exception by establishing his actual innocence, he has established the unique and compelling circumstances sufficient to warrant being excused from having to return to state court.

B. Federal Rule of Civil Procedure 15

In *Banks v. Dretke*, 540 U.S. 668, 704 (2004), the United States Supreme Court found Fed. R. Civ. P. 15(b) applicable in federal habeas proceedings. Fed. R. Civ. P. 15(b)(2) provides that "when an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move –at any time, even after judgment–to amend the pleadings to conform them to the evidence and to raise an unpleaded issue." Further, Fed.R.Civ.P. 15 (c)(1) provides that an amendment to a pleading

relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out the conduct, transaction, or occurrence set out—**or attempted to be set out**—in the original pleading.' (emphasis added).

In the instant case, Mr. Fontenot presented his *Brady* claim both to the state district court and the OCCA in his request for post conviction relief. See further discussion *Brady* claim *infra* at pp. 62-118). However, On January 31, 2019, over four and half years from the initial state court order, and two years from the federal subpoena authorized by this Court, Mr, Fontenot's counsel became aware the Ada Police Department had released police reports to counsel for Thomas Ward, Mr. Fontenot's co-defendant pursuant to a joint discovery motion. Respondent was served with the Ward subpoenas requesting discovery from various law enforcement agencies, including the Ada Police Department. **After decades of discovery requests by Mr. Fontenot, and years after the instant litigation began in this court, over 300 pages of police reports were disclosed by the City Attorney of Ada to Ward's counsel and Respondent on January 4, 2019. At no time did Respondent or the City Attorney for Ada contact Mr. Fontenot's counsel regarding the discovery of the Ada Police Reports.** Laches is an equity defense based upon the premise that the undo delay penalizes the state. However, unclean hands negate an assertion of laches as the Respondent's actions contributed to the malfeasance or severe wrongdoing regarding the claims at issue.

Mr. Fontenot's counsel, and this Court were extremely surprised to learn of the "discovery" of the

Ada Police Department Reports since Mr. Fontenot had served this Court's subpoena to the Ada Police Department in February 2017 and received nothing in response. (Dkt.# 114, Ex.# 3). Further, counsel for Respondent was aware of the 2017 subpoenas because he had been provided copies of them by Mr. Fontenot's counsel.

Respondent did not forward the 300 pages of new discovery to Mr. Fontenot's counsel until contacted by him; nearly a month after receiving the documents himself. It is important to note that Respondent's attorney is counsel in both the instant case and in Mr. Ward's state post-conviction proceedings. As such, he agreed to discovery in Mr. Ward's case in much the same manner as he did in Mr. Fontenot's case. (Dkt.# 114, Ex.# 5). Further, he knew a state court subpoena had been issued to the Ada Police Department in late November 2018. *Id*. Yet, counsel did not notify opposing counsel, or this Court of the Ada Police Department's disregard of this Court's subpoena. Instead, Mr. Fontenot's counsel learned of the undisclosed documents' existence from Mr. Ward's counsel.

A repeated pattern of failing to comply with court orders and subpoenas has plagued the State for over three decades, and resulted in the necessity of the Second Amended Petition. During state post-conviction, Mr. Fontenot requested the very records from the Ada Police Department that are now at issue. Post-conviction counsel was told the records did not exist. (Dkt.# 150, Ex.# 5). Mr. Fontenot again sought these records in the instant federal habeas corpus proceedings. The City of Ada Attorney informed counsel there were no records. (Dkt.# 150, Ex.# 6).

The nondisclosure is a direct violation of this Court's subpoena to the Ada Police Department and the state court order which focused on these very documents. (Dkt.# 114, Ex.#s 1, 2). In his March 17, 2017, response to this Court's subpoena, the Ada City Attorney stated that, "I inquired of Chief Miller regarding the requested documents and he has informed me that the City of Ada Police Department no longer has any of the documents requested. (Dkt.# 150, Ex.3). The Ada Police Department had similarly told counsel in Mr. Fontenot's state post-conviction proceedings that there were no records to be produced. That the police department has now "found" records for Mr. Fontenot's co-counsel that were "unavailable" in the instant and prior proceedings is troubling. "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. at 696.

A claim keeps its exhausted status so long as the newly developed facts do not fundamentally alter the claim reviewed by the state courts. *See generally, Vasquez v. Hillery*, 474 U.S. 253, 260 (1986). This Court finds these new documents provide supplemental evidence and do not fundamentally alter Mr. Fontenot's *Brady* claim already considered by the state courts. Further, pursuant to Fed.R.Civ.P. 15(c)(1), these documents relate back to Mr. Fontenot's original *Brady* claim as they "arose out of the conduct, transaction, [and] occurrence set out—or attempted to be set out—in the original pleading." *Id*.

Finally, the Tenth Circuit Court of Appeals has also concluded that there are circumstances a claim raised in an initial habeas petition can be supple-

mented. *Douglas v. Workman*, 560 F.3d 1156, 1187 (10th Cir. 2009). In such instances, defendants are not subject to the exhaustion requirements of the AEDPA.

> In reaching this conclusion, we note the AEDPA itself 'does not define the terms 'second or successive.'" *United States v. Lopez*, 534 F.3d 1027, 1033 (9th Cir. 2008), *reh'g granted*, 301 Fed.Appx. 587, 588 (9th Cir. 2008); *see also Panetti v. Quarterman*, 551 U.S. 930 (2007) (noting that "[t]he phrase 'second or successive' is not self-defining," but "takes its full meaning from [the Supreme Court's] case law, including decisions predating the enactment of [AEDPA]"); *United States v. Scott*, 124 F.3d 1328, 1329 (10th Cir. 1997) (noting AEDPA "does not define what is meant by 'second or successive'"). And "[t]he [Supreme] Court has declined to interpret 'second or successive' as referring to all Section 2254 applications filed second or successively *in time*, even when the later filings address a state-court judgment already challenged in a prior Section 2254 application. *Panetti,* 127 S. Ct. at 2853 (emphasis added). In deciding whether a pleading should be deemed a second or successive pleading subject to 28 U.S.C. Section 2244(b)'s restrictions, the Supreme Court instead looks to the purposes of AEDPA, which are "to further the principles of comity, finality, and federalism." *Id.* at 2854 (quotation marks omitted). The Court has further indicated that "[t]hese purposes, and the practical

> effects of our holdings, should be considered when interpreting AEDPA. **This is particularly so when petitioners run the risk under the proposed interpretation of forever losing their opportunity for any federal review . . . " *Id.* (quotation marks omitted) (addressing a situation where petitioners might forever lose review of their unexhausted federal habeas claims). The Court has, thus, "resisted an interpretation of the statute that would produce troublesome results, create procedural anomalies, and close our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent. *Id.* (quotation omitted); *see also Castro v. United States*, 540 U.S. 375, 380-81 (2003).**

Id. at 1187-1188 (emphasis added).

In *Douglas* the Tenth Circuit Court of Appeals was specifically addressing a claim of prosecutorial misconduct which the defendant had raised in his initial habeas petition. Defendant was allowed to supplement his previously asserted prosecutorial misconduct claim with his newly discovered *Brady* allegations, which involved proven willful misconduct by the prosecutor. The defendant in *Douglas* discovered the existence of an agreement between a key witness and the prosecutor which the "State not only suppressed [] by presenting false, uncorrected testimony denying the existence of any deal between the prosecutor and Smith, it also relied heavily on the lack of any deal in vouching for the credibility of [the witness]. The

denial of the opportunity to impeach [the witness] on the evidence clearly prejudiced [the defendant]. *Id.* at 1187.

The Court concluded that *Brady* requires disclosure of tacit agreements between the prosecutor and a witness. *Douglas v. Workman*, 560 F.3d 1156, 1186 (10th Cir. 2009). In light of the materiality and prejudice caused by such agreements the Court found it was appropriate to treat the defendant's *Brady* claim as a supplement to his prosecutorial misconduct claim first raised in his initial habeas petition. "The threat of incorrect jury verdicts is further increased by tacit agreements, because when testifying, a witness whose agreement is tacit, rather than explicit, can state the he has not received any promises or benefits in exchange for his testimony . . . Likewise the prosecutor can argue to the jury that the witness is testifying disinterestedly, which artificially increases the witness's credibility –artificially, that is, because the premise of the argument is false." *Id.* at 1186-1187 citing *Bell v. Bell*, 512 F.3d 223, 244-45 (6th Cir. 2008).

As will be discussed *infra* at pp. 102-108, the prosecutor in this case, as in the *Douglas* case, is alleged to have had a tacit agreement with a key witness, Terri Holland (formerly Terri McCartney), who testified against Mr. Fontenot in his preliminary hearing and joint trial. She claimed to have heard Mr. Fontenot speak about his involvement in Mrs. Haraway's abduction and murder. (P/H 888-931). Ms. Holland also testified there was no deal between her and the prosecutor, which testimony was never corrected by the prosecution. Ms. Holland was specifically asked, "Were there any deals made by you and the District Attorney's Office, any agreements, any

considerations, any agreements not to file or proceed on an "after former" charge against you?" (PH at 896). Ms. Holland answered, "No." *Id.*

Ms. Holland had a history of being a snitch. At the same time she claimed to have heard Mr. Fontenot confess, she also claimed to have heard Ron Williamson make incriminating comments about his involvement in Debbie Carter's murder. Her testimony in the *Williamson* case proved to be false. *See Williamson v. Reynolds*, 904 F.Supp. 1529 (E.D. OK 1995). In fact, the same District Attorney's Office used her testimony in both Mr. Williamson's and Mr. Fontenot's cases.

Ms. Holland was interviewed by Pontotoc County District Attorney Investigator Lloyd Bond and Pontotoc County Sheriff Deputy Tom Turner. (P/H 883-884, 897-898). Deputy Turner's interview report was included in the OSBI reports that Mr. Fontenot's counsel obtained in the instant case, which were not a part of the prosecutorial report and had not been given to the defense. (Dkt.# 123, Ex.# 44 at 282-289). Ms. Holland's statement as recounted by Deputy Turner in his report has numerous inconsistencies with her preliminary hearing and trial testimony. Although the prosecutorial table of contents references Ms. Holland's videotaped statements, the State divulged no such videotape statement to defense counsel.

Because of Ms. Holland's history as a snitch, her testimony was used by the prosecution to bolster an uncorroborated confession. She was placed in a cell near Mr. Fontenot for this very purpose. As part of the newly produced *Brady* material provided to this Court is an affidavit from Ms. Holland's husband who represents Ms. Holland (now deceased) committed

perjury when she testified in Mr. Fontenot's preliminary hearing and joint trial. He states that because of an agreement she had with the prosecutor; that if she testified against Mr. Fontenot, he would be released from jail and they could marry. *See infra* at 108. Furthermore, Mr. Holland's charges and plea agreement were found in the Pontotoc County District Attorney's file made available during the instant proceedings. (Dkt.# 86 at 30-31). These documents support Mr. Holland's statement of the benefits received and the timing of when he received them.

As in the *Douglas* case, the prosecutor in Mr. Fontenot's case also acted willfully, and not just negligently or inadvertently. His conduct warrants special condemnation and justifies permitting Mr. Fontenot to supplement his habeas petition. "It has long been established that the prosecutor's deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with the rudimentary demands of justice." *Id.* at 1190, citing *Banks v. Dretke*, 540 U.S. 668, 694 (2004)(quoting *Giglio*, 405 U.S. at 153).

C. Fraud on the Court

The prosecutor's knowing use of false testimony involves, not "just" prosecutorial misconduct, but "more importantly . . . [the] corruption of the truth seeking function of the trial process." *Douglas v. Workman*, 560 F.3d at 1191 citing *United States v. Agurs*, 427 U.S. 97, 104 (1976). Further, it was the prosecutor's conduct in this case in taking affirmative action, after Mr. Fontenot's trial, to conceal the tacit agreement made in exchange for Terri Holland's testimony that prevented Mr. Fontenot from

discovering the *Brady* claim in time to assert that claim originally in his first habeas petition. In light of these circumstances, it is appropriate to treat this newly discovered evidence as a supplement to Mr. Fontenot's original *Brady* claim, instead of requiring exhaustion. To hold otherwise, "would be to allow the government to profit from its own egregious conduct." *Id*. at 1193. There continue to be disclosures of exculpatory and impeachment evidence starting with Mr. Fontenot's second appellate process and continuing through these proceedings**.**

"The prosecutor's conduct at issue here, then, is akin to a fraud on the federal habeas courts; that is, the prosecutor took affirmative actions to conceal his tacit agreement with the state's key witness until it was too late, procedurally, for [the defendant] to use that undisclosed agreement successfully to challenge his capital conviction." *Id.* In other circumstances, the Supreme Court has noted that fraud on a federal habeas court might exempt a petitioner from meeting the strict limitations AEDPA places on second and successive requests for habeas relief. *Douglas v. Workman*, 560 F.3d at 1193. Additionally, as discussed *supra,* the State in this case flagrantly disregarded the federal subpoena issued by this Court. At the very least, new evidence has been presented which is over 30 years old, the subject of numerous State and Federal court orders, and was withheld from Mr. Fontenot and the Courts. The newly discovered evidence recently discovered by the City of Ada was not divulged to this Court by the State.

While the fraud on the court cases may, or may not apply directly to the circumstances of this case, they lend support to this Court's decision to treat Mr.

Fontenot's *Brady* claim as part of his initial request for habeas relief. *See Douglas v. Workman*, 560 F.3d at 1193. "Where a prisoner can show that the state purposefully withheld exculpatory evidence, that prisoner should not be forced to bear the burden of section 2244, which is meant to protect against the prisoner himself withholding such information or intentionally prolonging the litigation. *Id.* citing *Workman v. Bell*, 227 F.3d 331, 335 (6th Cir. 2000). Further,

> fraud upon the court calls into question the very legitimacy of a judgment. That characterization of the situation which arises when the prosecution fails to reveal exculpatory evidence to the defense would seem to satisfy, at least in spirit, the requirement of section 2244. The difference between questions of fraud upon the court and ordinary newly-discovered evidence situations is that an allegation of fraud upon the court casts a dark shadow over the prosecution's intentions. The situation suggests that a judgment may have been reached with the assistance of a prosecutor who may not have had the intention of finding the true perpetrator. Such a judgment is inherently unreliable, and therefore satisfies the requirements of section 2244 in spirit. *Id.* Moreover, [p]rosecutors are subject to constraints and responsibilities that don't apply to other lawyers. While lawyers representing private parties may—indeed, must—do everything ethically permissible to advance their client's interests, lawyers representing the govern-

> ment in criminal cases serve truth and justice first. The prosecutor's job isn't just to win fairly, staying well within the rules. As Justice Douglas once warned, "[t]he function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial.

Douglas v. Workman, 560 F.3d at 1194, citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 648-49 (1974) (Douglas, J. dissenting).

For similar reasons, in this case, which involves fraud perpetrated on Mr. Fontenot and this Court, Mr. Fontenot is permitted to supplement his *Brady* claim with all the newly discovered evidence produced in the instant case. *See also, United States v. Smiley*, 553 F.3d 1137, 1144 (8th Cir. 2009), where the court agreed that defendant's fraud on the court motion was not a second or successive petition and "reasoned that the fact the case involved a criminal sentencing process, rather than a civil proceeding such as in *Hazel-Atlas Glass Co. v. Hartford Empire Co.,* 322 U.S. 238 (1944) was inconsequential, . . . and as such, is not a second or successive 2255 motion." The Supreme Court, as long ago as *Mooney v. Hologan* 294 U.S. 103, 112 (1935), stated that deliberate deception of a court by the presentation of false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213 (1942).

> The same result obtains when the State, although not soliciting false evidence, allows it

> to go uncorrected when it appears." (Napue v. Illinois, 360 U.S. 264, 269 (1959). Tampering with the administration of justice in the manner indisputably alleged here involves far more than an inquiry to a single litigant." It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud."

Hazel-Atlas, 322 U.S. at 246.

III. Mr. Fontenot's Fourteenth Amendment Rights Were Violated When the Pontotoc County District Attorney's Office Withheld Evidence in Violation of *Brady v. Maryland*.

The Due Process Clause of the Fourteenth Amendment requires prosecutors to disclose to the defense all evidence favorable to the accused concerning guilt and penalty. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 153-56 (1972); *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). This duty extends to, "all stages of the judicial process." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60, 94 L.Ed.2d 40, 107 S. Ct. 989 (1987); *see also Smith v. Roberts*, 115 F.3d 818, 820 (10th Cir. 1997). There are three elements of a *Brady* violation: "[t]he evidence

at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Banks v. Dretke*, 540 U.S. 668, 691 (2004) *quoting Strickler*, 527 U.S. at 281-82 (1999). Due process also places upon the prosecutor a corresponding duty to correct false or misleading evidence that is harmful to the defendant. *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

A prosecutor has an independent obligation to locate *Brady* materials within the possession of law enforcement.

> Third, the "prosecution" for Brady purposes encompasses not only the individual prosecutor handling the case, **but also extends to the prosecutor's entire office**, . . . as well as law enforcement personnel and other arms of the state . . . to the text of the note involved in investigative aspects of a particular criminal venture. Logically, then, it follows that because ""**"investigative officers are part of the prosecution, the taint on the trial is no less if they, rather than the prosecutors, were guilty of nondisclosure.**"'

Smith v. Secretary of N.M. Dep't of Corrections, 50 F.3d 801, 824 (10th Cir. 1995); *see also United States v. Buchanan*, 891 F.2d 1436, 1442 (10th Cir. 1989) (discussing the failure on the part of law enforcement to disclose *Brady* materials falls upon the prosecutor).

The prosecution's failure to disclose police reports of alternate suspects with connections to the victim

is a *Brady* violation as that evidence is potentially exculpatory, impeachment of the quality of a police investigation, and aids a defense investigation. *See Smith*, 50 F.3d. 801 at 829-830; *see also Bowen v. Maynard*, 799 F.2d 593, 612-13 (10th Cir. 1986). Given that multiple police agencies often investigate a criminal matter, it is incumbent upon the prosecutor to ensure that *Brady* materials are obtained for disclosure to defense counsel in accordance with the Fourteenth Amendment. *See Smith* at 824; *see also United States v. Thornton*, 1 F.3d 149, 158 (3d Cir. 1993), holding that prosecutors are obligated to conduct a "thorough inquiry" of police for *Brady* materials); *United States v. Osorio*, 929 F.2d 753, 762 (1st Cir. 1991); *see generally Tiscareno v. Anderson,* 639 F.3d 1016, 1022 (10th Cir. 2011) (discussing other state actors who worked on a criminal matter that would fall within *Brady's* obligations).

The U.S. Supreme Court holds that a prosecutor fails his *Brady* obligation when he does not obtain exculpatory, impeachment evidence that aids a defense during the pretrial process and disclose to the defense. *See U.S. v. Bagley*, 473 U.S. 667, 675 (1985); *see also Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995); *Williams v. Whitley*, 940 F.2d 132 (5th Cir. 1991); *United States v. Brooks*, 296 U.S. App. D.C. 219, 966 F.2d 1500, 1500-04 (D.C. Cir. 1992) holding a prosecution's duty to learn of *Brady* evidence includes files of the police department's homicide and internal affairs divisions). That a state court rule or law excused a prosecutor from having to disclose any evidence to defense counsel does not supersede that prosecutor's obligations under the United States Constitution.

A prosecutor who adopts an open-file policy of disclosure does not remove his obligations under the Due Process Clause of the Fourteenth Amendment.

> We certainly do not criticize the prosecution's use of the open file policy. We recognize that this practice may increase the efficiency and the fairness of the criminal process. We merely note that, if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*.

Strickler v. Greene, 527 U.S. 263, 283 fn. 23; *see also Banks v. Dretke*, 540 U.S. 668, 693 (2004) (defense counsel may rely on the prosecution's assertion that *Brady* evidence will be disclosed). Therefore, if a prosecutor utilized an open-file policy, the defense and courts will rely on that assertion as an assurance that all exculpatory, impeachment, and evidence that aids the defense will be within the file. That reliance extends to a defendant's post-conviction counsel. *See Strickler*, 527 at 284.

The prosecution is obligated to disclose impeachment evidence as well. For evidence to be considered material, it does not have to "reflec[t] upon the culpability of the defendant. Exculpatory evidence includes impeachment evidence that is material to the case against the accused." *See Napue v. Illinois*, 360 U.S. 264, 269 (1959). Impeachment evidence is evidence that can be used to challenge the credibility of a prosecution witness or that can be used to challenge the prosecution's case. *Bagley*, 473 U.S. at 676 (*Brady*'s disclosure requirements apply to any materials

that, whatever their other characteristics, can be used to develop impeachment of a prosecution witness). There is no distinction between exculpatory and impeachment evidence under the Due Process Clause of the Fourteenth Amendment. *See Kyles*, 514 U.S. at 433.

Evidence is material under *Brady* when it could "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Strickler v. Greene*, 527 U.S. at 290. "A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles v. Whitley*, 514 at 434, *quoting Bagley*, 473 U.S. at 678. Withheld evidence is material whenever it would have affected the course of the defense investigation, or the strategy defense counsel would have employed at trial. *See Bagley*, 473 U.S. at 683; *United States v. Perdomo*, 929 F.2d 967, 97 (3d Cir. 1991) "[T]he *Bagley* inquiry requires consideration of the totality of the circumstances, including possible effects of nondisclosure on the defense's trial preparation." *United States v. Spagnoulo*, 960 F.2d 990, 994 (11th Cir. 1992); *see also Smith*, 50 F.3d at 827 (*Brady* violation found when withheld evidence affected defense preparation or presentation).

In determining the merits of Mr. Fontenot's claim under *Brady*, "[t]he question is not whether [Mr. Fontenot] would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 437. The Court should not evaluate the evidence item-by-item, but in terms

of its cumulative effect on the fairness of the trial. *Id.* at 436. For Mr. Fontenot to be entitled to a new trial, he only has to meet the standard whether it would have affected the judgment of the jury.

In this case, *Brady's* materiality prong is satisfied by the fact that the prosecution withheld evidence on several key points. Had Mr. Fontenot's defense counsel been provided the evidence presented below, he could have shown an alibi defense clearly establishing his whereabouts when Mrs. Haraway disappeared. Further, substantial impeachment and exculpatory evidence suppressed or ignored by the prosecution would have certainly affected the jury's judgment of guilt on all the charges.

A. The Pontotoc District Attorney's Office Did Not Disclose *Brady v. Maryland* material as a Matter of Policy.

The Pontotoc County District Attorney's Office had a pattern and practice of not divulging documents gathered from a variety of law enforcement agencies. This pattern began during Mr. Fontenot's 1985 pretrial proceedings, his 1987 retrial proceedings, his 1992 resentencing, his 2014 post-conviction proceedings, and has continued throughout the current proceedings. Despite assurances of open file policies, or full compliance with *Brady v. Maryland* made by both Mr. Peterson and Mr. Ross, documents that were and continue to be exculpatory, impeachment, and aid defense counsel remained in their custody.[12] (Dkt.#

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12 The entirety of the Pontotoc County District Attorney's Office file concerning the prosecution of Mr. Fontenot, and his co-defendant, Mr. Ward, was copied pursuant to a federal subpoena. Within that file were Ada Police Reports and DA investigative

123, Ex.#s 78 at 14, 37; Ex.# 79 at 21, 25, 52-53). Despite the prosecution's claim of ignorance about the police investigation and reports, the DA's investigator, Lloyd Bond assisted in the investigation of the disappearance of Mrs. Haraway alongside Ada Police Detectives Smith and Baskins.(Dkt.# 123, Ex.#s 62, 88). Because of the prosecution's alleged "hands off" approach to obtaining *Brady* materials, the likelihood that *Brady* materials would not be made available to defense counsel was all but assured.

The practice of the District Attorney's Office was to rely wholly on a "prosecutorial" when engaged in the charging and prosecution of a defendant. A prosecutorial was compiled through an OSBI regional office located in McAlester, OK. According to OSBI Agent Gary Rogers, all his interviews and reports, and reports from other agencies, were sent directly to the regional office and stored there. (Dkt.# 123, Ex.# 80, at 10). He explained how his regional supervisor edited and compiled the reports that became the prosecutorial. *Id.* at 10-11.

Once completed, it was sent directly from the regional office to the District Attorney's Office. *Id.* Mr. Peterson testified that the prosecutorial was the only document he used to charge Mr. Fontenot. (Dkt.# 123, Ex.# 78, at 15).

The District Attorney's reliance on law enforcement bringing files to them rather than pursuing information to ensure their compliance created a culture where volumes of documents were never seen by

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files of witness statements and reports along with other documents that should have been made available to either Mr. Fontenot's or Mr. Ward's defense attorneys prior to trial.

prosecutors, or if they were, they were pushed aside as irrelevant to the case they were building against Mr. Fontenot despite evidence to the contrary. (Dkt. 123, Ex.# 78, at 4-5). What resulted was a haphazard investigation where evidence in police custody was destroyed, interviews were mishandled, and proper police procedure was neglected. The consistent thread in Mr. Fontenot's collateral proceedings has been that OSBI conducted the investigation and whatever documentation was gathered was housed by OSBI. The OSBI compiled a "prosecutorial" summary of police reports, witness interviews, and relevant evidence on the suspect(s) they believed were involved in the criminal offense. (Dkt.# 213, Ex.# 78, at 10-12).

Even more egregious was the pattern of not disclosing the prosecutorial or any other discovery to defense counsel. (Dkt.# 123, Ex.# 78, at 48-49). This pattern and practice resulted in a systemic due process violation of Mr. Fontenot's constitutional rights. *See Miller-El v. Cockrell*, 537 U.S. 322 (2003) (explaining how the use of policy and practice of the prosecution to strike minority jurors supports a Batson constitutional violation), *Connick v. Thompson*, 131 S. Ct. 1350 (2011) (holding that deliberate indifference to the need for *Brady* training could result in a 42 USC § 1983). The only disclosures made to defense counsel during trial were court ordered and extremely limited in nature.

After repeated requests for Ada Police Reports and to the other law enforcement agencies to disclose their parts of the investigation, their reports were nevertheless, not made available. However, they did exist. (Dkt.# 123, Ex.# 87). While not every document

may be material to Mr. Fontenot, it illustrates that there were in fact separate files by the DA's investigator and the Ada Police Department within their custody during the trials. Those specifically pertaining to Mr. Fontenot will be discussed below.

1. Pontotoc District Attorney's failure to ensure *Brady* materials were obtained from law enforcement.

The OSBI and Ada Police Department conducted the investigation into Mrs. Haraway's disappearance and murder. The two primary law enforcement officers responsible were OSBI Agent Gary Rogers and Ada Police Detective Dennis Smith.[13] The Ada Police Department and OSBI kept separate files of all interviews conducted, evidence collected, and other aspects of the investigations, OSBI Agent Rogers was ultimately responsible for the case. (Dkt.# 123, Ex.# 53, at 33); (P/H p. 533-36, 947-948). The preparation of the prosecutorial was done by OSBI Agents. (Dkt.# 213, Ex.# 80, at 11-12, 19-20). The prosecutorial was comprised of the relevant police reports, witness statements, and documents that the OSBI administration deemed relevant for the district attorney's review. (Dkt.# 123, Ex.# 55, at 13, 56). These documents were edited and culled internally by other OSBI supervisors prior to the final prosecutorial report's release to the district attorney's office. (Dkt.# 123, Ex.# 29, at 968-978). Based on the evidence presented in the prosecutorial, and only that evidence, would the district attorney pursue charges. (Dkt.# 123, Ex.#

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[13] These two officers led the investigation into the Debbie Carter homicide which occurred prior to Mrs. Haraway's abduction from McAnally's.

55, at 13, 56).The prosecutorial generated by OSBI from the police investigation into the abduction and homicide of Donna Denice Haraway consisted of approximately 146 pages. (Dkt.# 123, Ex.# 43). However, discovery has revealed there were hundreds of police reports from the various law enforcement agencies that investigated the case that were not included in the prosecutorial by the OSBI, and ultimately not available to Mr. Fontenot's defense counsel.

Pontotoc County District Attorney Peterson testified that he relied solely on OSBI Agent Roger's prosecutorial report to charge and prosecute Mr. Fontenot. (Dkt.# 123, Ex.# 78, at 11-12). His reliance on the prosecutorial would not be problematic if he had ensured his officers provided him with the evidence necessary for his compliance with his *Brady* obligations. In a prior deposition taken on this very issue, Mr. Peterson admitted understanding his obligations under *Brady* and its progeny, but failed to actively pursue such evidence from the various law enforcement agencies investigating cases in his jurisdiction.[14] (Dkt.# 123, Ex.# 55, at 142-143). Mr. Peterson took very little active measures to ensure evidence that must be disclosed to defense, was, in fact, given to him by his law enforcement agencies so that he could comply with his constitutional obligations.

> Q. And isn't it your responsibility as the prosecutor to make sure that exculpatory evidence is disclosed to you from police?
>
> A. Well, I would hope that they would do that.

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[14] The depositions referenced were taken from the Ron Williamson and Dennis Fritz civil suit.

Q. Well, in your 20 or so years as a prosecutor in Ada, haven't you tried to direct, first, Ada police officials about the need to disclose exculpatory material?

A. They are aware that they need to give me all the evidence in a case. All of it, not just portions of it, but, all of it.

Q. How have you communicated—

A. Exculpatory–

Q. How have you communicated that to the Ada police?

A. I've told them over and over again.

Q. Have you had training courses?

A. I haven't given them training courses.

Q. Have you directed anybody to give them training courses?

A. No, sir.

(Dkt.# 123, Ex.# 54, at 351-352, and Ex.# 53, at 214-216) (emphasis added). Mr. Peterson recognized his obligation to obtain evidence but made no effort to receive the material, or to inform law enforcement of its obligations to turn over evidence. Similar to the facts in the Williamson and Fritz case, the defense was denied critical evidence that was exculpatory or impeaching while it remained in the custody of law enforcement. There is no proof this crucial evidence was ever made available to Mr. Fontenot's trial counsel. Rather, Mr. Peterson fought to keep such evidence from ever being given to defense counsel during either the joint or separate trials of Mr. Ward and Mr. Fontenot.

Further, Mr. Peterson's own understanding of what evidence must be disclosed was dubious at best. His misunderstanding of his obligation to disclose exculpatory and impeachment evidence hampered not only the actions of his office but led to his willful ignorance of evidence that challenged the state's case. "Exculpatory evidence is . . . all fact-based, whether it is exculpatory or not, and it has to be material." (Dkt.# 123, Ex#. 54, at 371, 368). Mr. Peterson's failure to grasp that exculpatory evidence shows that defendant did not commit the crime, and is material to the case at hand, is the clearest indication of his ability to discern what evidence should be disclosed. Further, it demonstrates his inability to properly instruct not only those assistant district attorneys assisting him in the prosecution of Mr. Fontenot, but to direct the police officers' compliance in giving him "all the evidence in the case."

Mr. Peterson attempted to satisfy his disclosure obligations by instituting an open file policy within the Pontotoc County District Attorney's Office. Under that policy, all documentation that was not work product was available for defense counsel to review pretrial. (Dkt.# 123, Ex.# 78, at 14-15, 90). As the Haraway investigation concluded, the only documentation the prosecution had was the prosecutorial. (Dkt.# 123, Ex.# 78, at 11-12, and Ex.# 79, at 11-12). Thus, the prosecutor's file was devoid of volumes of relevant and exculpatory evidence that police had gathered–in effect the open file was empty. An open file policy is a good step towards ensuring compliance under *Brady* and its progeny, but it does not absolve a prosecutor's obligation to turn over exculpatory, impeachment evidence that aids a defense

investigation. *See Kyles*, 514, U.S. at 421 ("and we hold that the prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention"). Once alerted to the specific needs and requests of defense counsel, the district attorney is on notice that such evidence is necessary for a defendant's case. *See Bagley*, 473 U.S. at 682; (Dkt.# 123, Ex.# 81 pg. 12-15). However, the Pontotoc County District Attorney's Office never even asked the Ada Police Department or the OSBI whether they had obtained all the law enforcement reports.

2. Lack of training of law enforcement to understand what evidence constituted *Brady* material.

Similarly to the lapse in understanding demonstrated by the Pontotoc County District Attorney's Office, both OSBI and the APD lacked any training of what evidence obtained during a police investigation must be disclosed. Under the custom, policy, and practice of the Ada Police Department, the captain determined who was assigned to handle a specific investigation. (Dkt.# 123, Ex.# 51, at 71). The captain supervised the other investigator on the case, but no one directly supervised his work on a case. It is the responsibility of the lead investigator to determine what reports to include in the prosecutorial report or case report, which is sent to the district attorney's office. (Dkt.#23, Ex.#s 51, at 71; Ex.# 18, at 52). However, officers within the department did not understand what evidence they were required to provide the district attorney or when it must be disclosed.

The Ada Police Department did not have its own internal training program in the 1980s based on APD Assistant Chief Richard Carson's testimony. (Dkt.#123, Ex.# 49, at. 10-11). Police officers did not receive any training on exculpatory evidence. *Id.* (Dkt.# 123, Ex.# 49, at 68). Carson did not know of any training programs on exculpatory evidence (Dkt.# 123, Ex# 49, at 68). Even decades later, there are no internal training programs in the Ada Police Department that address exculpatory evidence. (Dkt.# 123, Ex.# 49, at 68; Ex.# 18, at 51-52). He further explained the lack of training or systematic way to ensure such evidence ever made its way to the Pontotoc County District Attorney's Office. (Dkt.# 123, Ex.# 48, at 67-69).

Ada Police Department Chief Fox[15] explained that it was APD policy to give total discretion to the detectives, or any individual officer to determine what information to turn over to the district attorney. (Dkt.# 123, Ex.# 48, at 59-60); *see also* (Dkt.# 123, Ex.# 65, at 79-81). However, when asked what exculpatory evidence meant, Chief Fox said he was unfamiliar with the term "exculpatory evidence." He said there was no policy in the Ada Police Department regarding evidence favorable to a defendant that might indicate innocence. (Dkt.# 123, Ex.# 48, at 67, 76). The current director of training, Carl Allen, a director of training for police officers, stated in his deposition that he was familiar with the term "exculpatory evidence," but that the meaning of it "elude[d] him right now." (Dkt.# 123, Ex.#50, at 30-310). Fur-

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15 Chief Fox assisted in the investigation of Tommy Ward also. (Dkt.# 123, Ex.# 88).

ther, he could recall no internal training in the Ada police department on exculpatory evidence being covered in the mandated, statewide law enforcement training (CLEET). (Dkt.# 123, Ex.# 50, at 31; Ex.# 18, at 52)

While the Ada Police Department obviously lacked any institutional training or organizational structure to ensure that exculpatory evidence made its way to the prosecution, OSBI's policy did little to ensure its compliance with *Brady*. Agent Rogers understood that any evidence uncovered that was beneficial to a defendant should be turned over. (Dkt.# 123, Ex.# 52, at 92). However, OSBI's mandate that all reports and evidence come from its central repository limited his ability to give information directly to Mr. Peterson.

Q In other words, it was-as far as you understood it, it was the custom, policy, and practice of the OSBI that you only give the prosecutor the documents in the prosecutorial report, going through the regional office?

A That's correct, yes, sir.

Q And if you were to give them any other document, you would route that through the regional office the way you did the prosecutorial summary?

A Yes, sir.

Q And did you deviate in your personal custom, policy, or practice and give Mr. Peterson, in the course of this investigation, any documents other than the ones that went through

the regional office, which include this prosecutorial summary?

A None that I recall, sir.

Q And did you ever tell Mr. Peterson that you had a practice of tape-recording witness interviews and then erasing them?

A No, sir.

(Dkt.# 123, Ex.# 52, at 90-91). Even when confronted with exculpatory evidence, Agent Rogers did not deviate to disclose this to the prosecutor unless the prosecutor specifically sought such evidence from the OSBI repository. (Dkt.# 123, Ex.# 52, at 96). However, even if Agent Rogers did want to provide evidence beneficial to a defendant in his prosecutorial report, his immediate supervisor had wide latitude to edit his reports before providing them to Mr. Peterson.

Q. And you were the person that made the decision as to what you were going to include in the prosecutorial summary . . . documents sent over the course of time to the regional office and were in the OSBI file.

A. Well, I'll have to clarify that to a degree. My supervisor, B.G. Jones would have quite a bit of input, as far as what would be included and what is not, as far as when you put the prosecutorial together.

[* * *]

Q. And between you and Mr. Jones, you would decide what to put in and what not to put in.

A. Well, the bottom line, sometimes was Mr. Jones would either include or exclude stuff that I may or may not think should be in the report.

Q. Well, before the prosecutorial summary was submitted, did you review it?

A. Yes, sir. I believe I did.

Q. And would it be your ordinary practice to review it, not just in this case, but in any case?

A. Yes, sir.

Q. And it you found that certain reports or interviews in the prosecutorial report left out information that might be exculpatory, beneficial to a defendant, you would make sure that they got put in.

A. If I was aware of it.

(Dkt.# 123, Ex.# 52., at 212, 213). The lack of any organizational structure or policy ensuring the proper disclosure of exculpatory and impeachment evidence from the APD and OSBI to the Pontotoc County District Attorney's Office resulted in systemic *Brady* violations not only in Mr. Fontenot's case but others as well. The misunderstanding of the law and its requirements demonstrated by the Pontotoc County District Attorney made certain that vital evidence favorable to the defense would never be disclosed in accordance with state and federal law.

Documents uncovered after Mr. Fontenot's convictions and direct appeals show exculpatory, impeachment, and other evidence which would have furthered

his defense and investigation were never turned over to defense counsel prior to trial. Over 860 pages of police reports, witness statements, criminology reports, and polygraphs–all detailing the investigation into the events leading to Mrs. Haraway's murder–weren't disclosed until years after trial. (Dkt.# 123, Ex.# 44). Of the 860 pages of OSBI, APD, and various other law enforcement reports within the State's custody, the Pontotoc County District Attorney's Office relied only on the 160 pages of the prosecutorial. (Dkt.# 123, Ex.# 43). In January 2014, an additional 263 pages of OSBI reports were disclosed pursuant to an agreement between post-conviction counsel and the Oklahoma Attorney General's Office.[16] Of these additional reports, approximately forty-five were never disclosed either at the time of trial or under the OCCA's order.[17] In

[16] The 263 pages of discovery were disclosed to post conviction counsel pursuant to an agreement between the parties concerning Mr. Fontenot's post conviction request for discovery filed in October 2013. Specifically, Mr. Fontenot sought disclosure of documents mentioned in the original OSBI Reports that were not included. According to these OSBI reports, these investigative reports were witness statements, taped recordings, or other reports from key witnesses in the State's investigation leading to the arrest and prosecution of Mr. Fontenot. While some of these documents were duplicates of some of the information provided in the original 860 pages of material, there were several new or altered documents that had never been disclosed to any defense attorney for Mr. Fontenot. The post conviction discovery remained unsolved at the time the post conviction court denied Mr. Fontenot's application based on laches.

[17] The Oklahoma Court of Criminal Appeals ordered the full disclosure of all OSBI records to Mr. Fontenot's second direct appeal counsel during the pendency of that appeal. Clearly, OSBI did not fully comply with that order as further reports were only given to post-conviction counsel in 2014, and again in 2019.

May 2017, the Pontotoc County District Attorney's entire file was disclosed pursuant to a federal subpoena. Within those files were DA investigative reports along with Ada Police Reports that should have been disclosed. (Dkt.# 123, Ex.#s 85–90). More recently, on February 6, 2019, hundreds of pages of Ada Police Reports were disclosed for the first time based on a state court subpoena from Thomas Ward's state post-conviction litigation.

The fact that long withheld law enforcement documentation pertaining to the investigation of Denice Haraway's disappearance and murder continues to surface clearly demonstrates that all the necessary records related to this case were not disclosed during post-conviction proceedings. This has continued through the instant action. Because *Brady* violations are evaluated cumulatively based on all undisclosed evidence and the evidence presented at trial, the continual failure of the state to fully disclose all exculpatory and impeachment evidence that aids the defense makes it difficult for Mr. Fontenot to fully articulate the actual prejudice he suffered due to the State's actions. *See Kyles v. Whitley*, 514 U.S. 419, 421 (1995).

The State's failure to properly gather and disclose such crucial information in a timely fashion continues to derogate Mr. Fontenot's state and federal constitutional rights to substantive due process. The police or prosecution had most, if not all, of this evidence prior to Mr. Fontenot's first trial in 1985. All the while, the defense filed discovery requests and the trial court ordered the production of exculpatory evidence that the prosecutor never delivered. Even after the Oklahoma Court of Criminal Appeals ordered the full disclosure

of all OSBI records in the Haraway case, files referenced in the investigate reports show non-compliance with the Court's order. (Ex.#s 38 & 59). This blatant disregard for court precedent and ordered discovery has continued throughout Mr. Fontenot's case and demonstrates a clear pattern of police and prosecutorial misconduct that requires reversal of his conviction.

B. Mr. Fontenot's Defense Counsel Repeatedly Requested Exculpatory, Impeachment Evidence

George Butner represented Mr. Fontenot throughout both of his trials. During the pretrial proceedings in both cases, he filed numerous discovery motions and made requests on the record for discovery of police and interview reports within the possession of the APD and OSBI. Mr. Butner specifically alerted the prosecution to the following pieces of evidence he required:

1) The identities of alternate suspects. (Dkt.# 123, Ex.# 72).

2) All statements of witnesses in the case. (Dkt.# 123, Ex.# 73).

3) Production of witnesses and how the investigation led to Ward and Fontenot. (P/H p. 769).

4) Statements of Jeff Miller. (P/H pp. 496, 502-208, 710-712).

5) Criminal records of any prosecution witness. (Dkt.# 123, Ex.# 74).

6) Exculpatory evidence. (Dkt.# 123, Ex.# 74).

7) Any and all medical, forensic, or chemical report made, or completed in the future, regarding the angle and location of purported or actual knife wound upon the remains of Donna Denice Haraway, regarding the location and comparison of any fibers or hairs located upon either the remains or the clothing of Donna Denice Haraway, regarding the caliber of the projectile which did or may have caused the bullet wound to the back of the skull of Donna Denice Haraway, in the now or future control or possession of any Federal, State, County, or Municipal governmental agency, or any agent or member thereof. (Dkt.# 123, Ex.# 72).

8) Written or taped statements of any witness concerning any alternate suspects or those providing information involving the investigation of Donna Denice Haraway. (Dkt.# 123, Ex.# 72).

9) Moyer's statement not disclosed. (P/H at 246-247).

10) The criminal record of any person the State intends to call as a witness in its case-in-chief or in rebuttal. (Ex.# 75).

11) Any sworn statements that the State has in its file regarding this particular case. (Dkt.# 123, Ex. #75).

12) All information of whatever form, source or nature, which tends to **exculpate the Defendant either through an indication of his innocence or through the potential impeachment of any state witness, and**

> **all information of whatever form, source or nature which might lead to evidence which tends to exculpate the Defendant whether by indicating his innocence or impeaching the credibility of any potential state's witness, and all information which may become of benefit to the Defendant in preparing or presenting the merits of his defense of innocence at trial. This request includes all facts and information of whatever form, source or nature which the District Attorney or his assistants or the police and sheriff's departments has or knows about, which is or may be calculated to become of benefit to the Defendant either on the merits of the case or on the question of the credibility of witnesses.**

(Dkt.# 123, Ex.# 75) (emphasis added).

Mr. Butner repeatedly requested discovery from the Pontotoc County District Attorney's Office for disclosure of evidence necessary to formulate a viable defense against the serious charges his client faced. Instead, Bill Peterson, Pontotoc County District Attorney made scant disclosures and stonewalled against providing any evidence to defense counsel in both trials.(P/H at 82-89, 96-99; N/T 406, 502-503, & 769-771). This left defense counsel clearly lacking evidence he was entitled to have acquired.

The requested evidence would have been extremely helpful, fitting within the defense's theory of the case and would have been used if provided. At the very least, the information gleaned from these police reports would have aided in providing witnesses relevant to

Mr. Fontenot's alibi, establish that alternate suspects had both motive and opportunity to kidnap Mrs. Haraway, and that because of an apparent stalker-Mrs. Haraway feared being at McAnally's. These viable defense theories would have created reasonable doubt in the minds of the jury had not the prosecution wrongfully tipped the scales in its own favor. "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *U.S. v. Agurs*, 427 U.S. 97, 107 (1976). As the Supreme Court explained further,

> The more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the non-disclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption . . . [**T]he reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case.**

Bagley, 473 U.S. at 682-83 (emphasis added); *see also Davis v. Cline*, 277 Fed.Appx. 833, 839-840 (10th Cir. 2008). Because the prosecution either thwarted or failed to disclose evidence that it requested, Mr. Butner's reliance on those assertions was reasonable given the circumstances. *See Banks*, 540 U.S. at 693.

The prosecution's willful ignorance and refusal to seek out evidence that the defense notified him was important only heightens the violation. "The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the

government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith,) the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Kyles*, 514 U.S. at 437-438-9 (citations omitted). Whether anyone in the Pontotoc County District Attorney's Office knew about the evidence within the custody of the OSBI, APD, or Pontotoc Sheriff's Office[18] or any agency assisting in the Haraway investigation, their obligation was evident and based firmly in the law: Locate the evidence and disclose to defense. Mr. Peterson and his staff failed to do so which resulted in numerous *Brady* violations.

C. Material Evidence Was Withheld from Mr. Fontenot's Defense Counsel

The Pontotoc County Prosecutor's Office failed to disclose both exculpatory, and impeachment evidence that aided the defense from various sources. Those agencies include its own files, the OSBI's, the ME's Office, the Pontotoc County Sheriff's Office files, and the Ada Police Department files. A consistent pattern has been the constant drip of documents during the course of appellate review, post-conviction, and federal habeas corpus. Because *Brady* claims are evaluated cumulatively, the failure of the Pontotoc County District Attorney's Office and Respondent to ensure the complete disclosure of these documents as mandated

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[18] Counsel represents that neither they, nor appellate or trial counsel received any police reports from the APD, Pontotoc County Sheriff's Office, or the Oklahoma Highway Patrol, prior to the filing of the instant Second Amended Petition.

by the Fourteenth Amendment resulted in the state post-conviction proceedings not being the full and fair proceedings contemplated by the AEDPA. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9-10 (1992).

The APD reports were fist uncovered during the disclosure of the Pontotoc County District Attorney's Offices files pursuant to this Court's subpoena. (Dkt.# 123, Ex.# 87). These files were demonstrated a consistent pattern and practice of state actors failing to review their files and disclose documents they had a continuing obligation to disclose. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987); *Douglas v. Workman*, 560 F.3d 1156, 1173 (10th Cir. 2004) *citing Smith v. Roberts*, 115 F.3d 818, 820 (10th Cir. 1997).

In February 2019, despite both a state court order and a subpoena issued by this Court, hundreds of additional pages of Ada Police Reports were "discovered" pursuant to Thomas Ward's state court subpoena. This set of police reports contains numerous documents that are both exculpatory and impeachment evidence against the prosecution's witnesses at trial. As Mr. Fontenot pled previously and continues to assert, the totality of these documents eviscerate the Prosecution's theory of the case making it untenable that Mrs. Haraway disappeared in the manner suggested and further support Mr. Fontenot's assertions that he was not present at McAnally's because he was at a party. There is no doubt that this evidence, had it been disclosed would have been instrumental in establishing a viable defense for Mr. Fontenot showing a reasonable probability of a different result.

1. OSBI and Ada Police Department Reports establishing Mr. Fontenot's alibi

OSBI reports establish that Mr. Fontenot was at a party the night of April 28, 1984, during the time the police and prosecution believed that Mrs. Haraway disappeared. According to the prosecution's theory, Mrs. Haraway left from McAnally's with a White male between 8:30 pm and 8:45 pm. (N/T 6/14/88 at 25-26). Evidence was admitted that the first APD officer arrived close to 9 pm. (N/T 6/9/88 at 86). The prosecution's theory was that Mr. Fontenot and his codefendant were with Mrs. Haraway from the time Mrs. Haraway was taken until they supposedly killed her later that evening. (N/T 6/3/88 at 51-55; 6/14/88 at 35-36).

However, Mr. Fontenot told OSBI agents that he attended a party the night of Mrs. Haraway's disappearance. This statement was not divulged to the defense by the prosecution prior to any of his trials. Mr. Fontenot was arrested on October 19, 1984, and polygraphed by OSBI Agent Rusty Featherstone. When asked where Mr. Fontenot was on the night in question, Mr. Fontenot explained:

> He went to the apartment of Gordon Calhoun, arriving there at approximately dark or shortly after the kegs arrived. Calhoun lives adjacent to the ROBERTS, where
>
> FONTENOT was currently staying. At the party, FONTENOT recalls drinking and doing marijuana and then returning to the ROBERTS apartment where he slept on the floor all night. He believes he returned to

> the apartment between 2330 and 2400 hours that night and recalled that later that night Tommy Ward also ended up spending the night at the ROBERTS apartment.

(Dkt.# 123, Ex.# 43, prosecutorial bates 142).[19]

Furthermore, because the entirety of Mr. Fontenot's interrogation was not recorded, there is no indication of what exculpatory evidence he provided prior to the video camera being turned on. Any statement made by him in which he refutes the confession was paramount to the defense. Likewise, on October 21, 1984, in a handwritten statement, Mr. Fontenot recanted his confession. In his letter, which he gave to law enforcement, Mr. Fontenot said he had agreed with the story OSBI Gary Rogers told him and had lied on the video. (Dkt.# 123, Ex.# 44 at 626). He explained that he had never been to McAnally's or ever met Mrs. Haraway, and reaffirmed his presence at the party. (Dkt.# 123, Ex.# 44 at 625-627).

This undisclosed evidence would aid a defense theory that Mr. Fontenot was innocent, pressured to confess, and fed key details by the police. Defense counsel requested such evidence several times prior to trial. (Dkt.# 123, Ex.#s 73-75). Had these documents been disclosed, defense counsel could have interviewed

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[19] At the very minimum, the prosecution was obligated to turn over any statements made by a defendant to his counsel. The State did disclose Mr. Fontenot's recorded confession, but not his prior alibi statement. The statement clearly is exculpatory under *Brady*. "If the exculpatory evidence 'creates a reasonable doubt' as to the defendant's culpability, it will be held to be material." *United States v. Starusko*, 729 F.2d 256 260 (3d Cir. 1984) *quoting United States v. Agurs*, 427 U.S. 97, 112, 49 L.Ed.2d 342, 96 S. Ct. 2392 (1976).

Agent Featherstone and questioned him about Mr. Fontenot's statements prior to polygraph examination.[20] Mr. Fontenot's recantation within days of his confession and that the handwritten note was in OSBI's custody drastically undercut the reliability of the confession and would have aided defense counsel in proving Mr. Fontenot's confession was false. (Dkt.# 123, Ex.# 44 at 626); (N/T 6/14/88 at 51-62).

Additionally, the statement would have been essential impeachment evidence to use in cross examining Detective Smith and Agent Rogers about their interrogation, investigation, and lack of any corroborating evidence of the confession. This violation was compounded by the fact that this was not the only evidence placing Mr. Fontenot in another location when the crime occurred. Both OSBI and Ada Police Department were aware of this party that Mr. Fontenot was at when Mrs. Haraway disappeared based upon several witness reports, dispatch records, and police reports. Instead of investigating the information, the prosecution and police withheld the information from the defense.

Janette Roberts also confirmed Mr. Fontenot's presence at the party. (Dkt.# 123, E(x.# 44, OSBI 0139). Had police looked at the radio dispatch logs for April 28th, they would have seen the neighbor complaints about the loud party at the Calhoun residence. (Dkt.# 123, Ex.#s 21 41, 42, & 89). Calls

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[20] According to Agent Featherstone, Mr. Fontenot's polygraph was inconclusive but bordering on deceptive. (Dkt.# 123, Ex.# 44 at 605, 628).

came in at 9:20 pm[21] and 12:40 am about the loud music. *Id.* One of the officers who responded to the second call, Ada Police Officer Larry Scott,[22] wrote a report specifically mentioning "Gordon Calhoun" party and warning the revelers to keep it down or go to court. (Ex.# 43, at 98, 89). This report was also not provided to defense counsel.[23]

Further, Stacey Shelton, (AKA Deprater-Brashier) testified at Mr. Ward's trial, that she had attended Mr. Calhoun's party. She told Ada Police Chief, and Detectives Dennis Smith and Mike Baskins that she knew of the party and knew the people who attended the party. (Ex.# 12). They disregarded her information, failed to take a formal statement, did not investigate further into her account, and did not inform Mr. Fontenot's counsel about the information.

When Ms. Shelton explained her knowledge of the party, Mr. Peterson not only failed to inform the defense about this crucial fact, he threatened Ms. Shelton and held her against her will in an attempt to get her to recant her testimony after she testified in Mr. Ward's trial. (Dkt.# 123, Ex.# 12). While Ms.

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[21] The radio dispatch log shows the call to McAnally's occurred at 8:50 pm. (Dkt.# 123, Ex.# 41.)

[22] While Officer Scott testified in Ward's trial on June 13, 1989, he did not testify in Mr. Fontenot's trial.

[23] While the State focused on Mr. Fontenot's ability to both be at the Calhoun party and participate in Mrs. Haraway's abduction and murder, this theory becomes inconceivable given that no witness identified him at either McAnally's or J.P.'s, he had no access to a truck, and people remember him being at the party for the entire night. The prosecution lacks any evidence to the contrary besides the dubious confession.

Shelton acknowledged she did not know many people at the party, she did list people she knew who attended. *Id.* Amongst those people were Bruce DePrater and Eric Thompson who also recall Mr. Fontenot's attendance at the party and provided essential details to prove Mr. Fontenot was there during the evening Mrs. Haraway was kidnapped and murdered. (Dkt.# 123, Ex.# 95).

An alibi irrefutably shows a defendant could not commit a crime because he was elsewhere when the crime was committed. This is critical evidence for a defense attorney, and Mr. Fontenot's defense attorney acknowledged he would have presented it if he had known of it. "I was trying to pursue that at trial, that some other dude did it, and anything that would have pointed me in any direction other than Karl, I would have appreciated it." (Dkt.# 123, Ex.# 81 pg. 35).

In summary, Mr. Fontenot told police of his whereabouts during his interrogation at OSBI. Police collected several statements from witnesses able to corroborate Mr. Fontenot's whereabouts. Yet this evidence was not included in the prosecutorial. The only conclusion is that the exculpatory alibi evidence was intentionally kept from the prosecution's knowledge as Mr. Peterson considered charging Mr. Fontenot.

The party attendees, whom police knew and had identified, had no impetus to lie and could have been interviewed by defense counsel and later testified about the timing of this party, who else was present, and whether Mr. Fontenot was present the entire night. These essential witnesses remember seeing Mr. Fontenot from the very early part of the evening until much later into the night. This makes it

impossible for him to be involved in Mrs. Haraway's disappearance. Their accounts–willfully kept from the defense-clearly show that at no time did Mr. Fontenot leave to participate in whatever transpired with Mrs. Haraway. Affidavits from party-goers, Eric Thompson, Bruce DePrater, and Stacey Shelton along with police reports from Janette Blood place Mr. Fontenot at the party for the entirety of the night.

2. People at McAnally's the night of Mrs. Haraway's Disappearance

According to the prosecution's opening statement in Mr. Fontenot's 1988 trial, both Thomas Ward and Mr. Fontenot drove to McAnally's in a grey pickup truck, robbed the store, abducted Mrs. Haraway and then drove away. (N/T 6/81988 at 35). The witnesses to these events were Gene Whechel and his nephews David and Lenny Timmons.(N/T 6/91988 at 34-69). However, in the Ward trial, Lenny Timmons mentions that there were other people coming to the store while they were there.(Ward N/T 6/21989 p. 160).

In response to Mrs. Haraway's disappearance, Ada Police Detective Dennis Smith asked people who shopped in McAnally's the night of Mrs. Haraway's disappearance to contact the APD. (Dkt.# 123, Ex.# 28). Police theorized the last purchase before Mrs. Haraway's disappearance was a tallboy beer.[24] (Dkt.#

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[24] The register tape from the day's purchases was collected by Detective Baskins and placed into evidence by the state at all three trials. (J/T 1160 State's Exhibit 16; N/T 6/9/1988 at 197 State's Exhibit 60; Ward N/T 6/12/1989 at 6, State's Ex.# 60). While the entire roll was placed into evidence, it is unclear whether it was ever unrolled during the trial by any of Mr. Fontenot's attorneys during trial, or direct appeal. It was ineffec-

123, Ex.# 44, OSBI 0496). In response to the APD request, numerous people contacted the police department to explain their purchases and the time they were in the store. Police interviewed many of those people who provided numerous details of people, cars, and trucks around McAnally's on April 28, 1984.(Dkt.# 123, Ex.#s 93, 94 and 99). These reports refute the prosecution's theory that Mrs. Haraway left the store with Mr. Ward and Mr. Fontenot as the Timmons bothers and Gene Whechel went into the store.

Found in the most recent Ada Police Department reports recently produced was a report by Carrie McClure who says she saw Mrs. Haraway at the store on April 28 around 8-8:30 p.m. (Dkt.# 123, Ex.# 103). She was interviewed by Ada Police, but her name was never turned over to Mr. Fontenot. She says that based on her contact with Ada Police that she thinks she was the last person to see Mrs. Haraway at the store before her disappearance. Other witnesses provided more detailed information calling into question the District Attorney's case.

Jimmy Simpson told Ada Police Officer D.W. Barrett that he was in the store when no clerk was at the counter.

> Jimmy parked ten or fifteen feet west of the Ice box. Jimmy went into the store and there was no one there. Jimmy went to the pop box and got a coke and walked to the back of the store to the door going to the back room and said "there is someone up front." No one ever came out of the back

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tive assistance of counsel for defense counsel not to examine the entire roll.

> room so, Jimmy left the store. There was a car possibly a GM w/gr at the gas pumps with three or four people around it. There was a pickup on the east side of the store with a man in the driver side and a woman next to him. It was dark, and Jimmy could not identify them. Jimmy did not see a car on the east side of the building (Haraway's vehicle). Jimmy saw a man standing outside the store as he want in [sic] he thought was Odell Titsworth. Jimmy had gone to school with Titsworth at Byng several years earlier. Jimmy was unable to pick Titsworth out of a picture lineup.

(Dkt.# 123, Ex.# 100). Officer Barrett assumed Mr. Simpson arrived while Timmons and Whechel waited for the police. However, this conflicts with their accounts that the man and woman in the pickup truck drove away when they were in the store. Other witnesses mention this pickup truck being at the store along with many other men around the time of Mrs. Haraway's disappearance. Mr. Simpson's account would impeach the state's theory of the case and the focus of their investigation.

Also interviewed by police was James Boardman, an Ada newspaper employee. In another report taken by Ada Police Officer Barrett, he reported:

> A few days after Denice Haraway disappeared Mr. Boardman called the police dept. and advised he was at McAnally's store on Arlington about 5 pm on 4-28-84. There were two men in the store that in his opinion were acting funny. Subj #1 6 ft. brn hair, brn shirt, blue jeans.

> Subj #2 6 ft. blond hair, blue plaid flannel shirt.
>
> He thought they were in a light-colored pickup. Boardman was pretty sure Denice was wearing a blue short sleeve t shirt.
>
> Around the first of November 1984, James Boardman came to the police dept. and was shown a picture lineup. Boardman picked #1 out of the Ward folder and could not identify anyone from the Fontenot and Titsworth folders. Agent Rogers and Lloyd Bond were present at this lineup.

(Dkt.# 123, Ex.# 93). Mr. Boardman's interview report is exculpatory evidence for Mr. Fontenot. OSBI Agent Rogers thought Mr. Boardman's account was significant enough that he asked him to view photospreads of all three suspects after Mr. Fontenot had been arrested. After the description originally provided, he could not identify Mr. Fontenot as being at the store. Further, Pontotoc County District Attorney investigator Lloyd Bond's presence makes it much more likely that District Attorney Peterson or Ross were aware of this witness and his report. Mr. Boardman's report should have been disclosed as exculpatory evidence. Mr. Butner could have interviewed and called him as a witness refuting not only the confession but establishing other witnesses who could not place him there. It also deprived the defense of arguing inconsistent factual accounts as to what happened at the convenience store.

Another witness police interviewed was Duney Alford who came to the store close in time to Mrs. Haraway' disappearance. He told police

> On 11-28-84, I talked with Duney Alford by telephone about the Haraway case. Duney said that on the day she was taken, he had went to McAnalley's (sic) to get some soap. He pulled up to the front of the store and got out and went inside. He said there was a guy standing by the front door on the inside of the store. Duney spoke to him but the guy did not speak back. Duney said about the only thing he remembers about the guy was that he was dark haired, kind of slick downed, and that his hair was parted on the side. Duney said that when he walked outside the store he noticed a pickup parked on the outside of the store and that he remembers that it was a chalky gray color. He said that he knows Donna Haraway because he shopped at the store and she worked there. Duney said as far as he can remember Donna Haraway was wearing blue jeans and a light blue pull over blouse that day.

(Dkt.# 123, Ex.# 101). These witnesses provide significant insight into the people coming into and out of the store. Several people remember seeing the pickup truck at the store for a much longer period from what the prosecutors presented. The fact that the pickup was there refutes the theory that the events at J.P.'s convenience store had anything to do with those at McAnally's. Therefore, these reports should have been made available for Mr. Fontenot's defense counsel to raise the reasonable doubt that whomever was involved was at the store for much longer than police believed. Additionally, the description

of the men and other people around the store create more doubt as to whom may have been involved, and their motive. None of these witnesses place Mr. Fontenot at the crime scene.

Beyond the list of people directly interviewed in the fall of 1984, were various other people Police Detectives noted on April 28, 1984 while at the store. However, he wrote the names, times, and contact information on the register tape for only 5 people, the last of whom was Gene Whechel. (Dkt.# 123, Ex.# 32-38). Each of these people discussed with the APD what they witnessed in McAnally's. None of these reports were disclosed to defense counsel. Richard Holkum, John McKinnis, Gary Haney and Guy Keyes provided evidence that was patently exculpatory and impeachment evidence. Police never followed up on this evidence which provided critical information as to an alternate suspect in a grey pickup truck, Mrs. Haraway's frame of mind that evening, and the thoroughness of the police investigation in the hours after she was reported missing.

a. Richard Holkum

Richard Holkum was an off-duty Ada police officer who had visited McAnally's on the night of April 28th. Notations on the McAnally's register tape show his purchases occurring between 7:45 pm to 8:00 pm, thirty minutes before Mrs. Haraway supposedly walked out of the store with an unknown man. (N/T 6/9/1988 p. 34-35, 67-68). The crux of his trial testimony focused solely on the clothing he saw Mrs. Haraway wearing the night of her disappearance. (N/T 6/9/1988 p.143-145). Further, he testified that he told lead Detectives Dennis Smith and Mike

Baskins immediately about being in the store that evening after he learned of the abduction. (N/T 6/9/1988 p. 144).

The clothing description was not all that Mr. Holkum witnessed in McAnally's. The omitted details he recalls reveal he gave his fellow Ada police officers significant information about the pick-up truck Mrs. Haraway supposedly left in thirty minutes later.

> That night, I recall stopping at McAnally's when it was still barely light out. I parked my vehicle, near the west corner of the building. I believe I bought a six-pack of beer, a loaf of bread and maybe some other things. I knew Denice Haraway and spoke to her inside McAnally's that night. There was no one else in the store when I stopped at McAnally's, however, one woman did step in and laid a penny on the counter, telling Denice that she had given her too much change back for a previous gas purchase. Both Denice and I thought that was odd, for the woman to bring back a penny.
>
> Everything in the store, including Denice, seemed normal. I did not detect any tension or anything wrong. While standing at the counter making small talk with Denice, **I recall seeing two vehicles sitting on the eastern edge of the pavement outside, just to the east of the gas pumps. These vehicles were parked parallel with the driver's side facing each other and the drivers were apparently talking. One vehicle was a green Ford Torino or Mercury Montego. The other vehicle was**

a Chevy or GMC pickup truck painted primer gray. This pick-up had a straight, conventional bed. I believe these vehicles were still parked next to each other when I left McAnally's to drive home.

Based on my own memory, and knowing that civil twilight ended at 7:36pm that night, I believe I was probably at McAnally's somewhere between 7:30pm and 7:45pm. The next morning, April 29, 1984, I first heard about the disappearance of Denice Haraway when I got to work.

That day, I approached Det Dennis Smith and Det Mike Baskins about my visit to McAnally's the night before. Neither Smith nor Baskins were interested in talking to me about the Haraway disappearance. Neither formally interviewed me about what I saw or when I was there. My recollection of both of these detectives was that they were not interested in talking to me about my visit to McAnally's. I remember thinking that they "just blew me off."

Sometime later that day or that week, Det. Smith or Det. Baskins showed me the register tape from McAnally's and asked me if I could ID my purchase on the tape. I recall that this tape only had the prices, which made it difficult for me to find my purchases. I'm not sure if I ever found my purchase at McAnally's that night. I recall that both detectives were very condescending toward me for not being able to immediately

> identify my purchases from the Saturday night.
>
> I recall some time right before the trial of Tommy Ward and Karl Fontenot, OSBI Agent Gary Rogers informally interviewed me about my stop at McAnally's on 4/28/1984. **I recall that he was mainly interested in my recollection of what Denice Haraway was wearing that night. I don't believe he took down any information about the two vehicles I saw sitting outside the building.**

(Dkt.# 123, Ex.# 6) (emphasis added).

Mr. Holkum's description of a gray-primered pickup truck parked in the exact location other witnesses testified to seeing it when Mrs. Haraway departed was remarkable. The State's theory was that whomever left the store with Mrs. Haraway got into a gray-primered pick-up truck and drove off when David Timmons entered the store that night at approximately 8:30 pm based on testimony and the dispatch logs.(N/T.6/15/1988 at 39). That Mr. Holkum saw a truck remarkably similar in appearance to that described by the Timmons brothers and Gene Whelchel at the store for at least half an hour before Mrs. Haraway's disappearance changes the motive for the abduction and suggests an alternate suspect(s). Because she was fearful about working the night shift given the obscene and harassing phone calls, it creates a reasonable doubt as to Mr. Fontenot's involvement. Such evidence would have been something police and defense counsel should have pursued. That the truck was driven by one man is also interesting because, clearly, it was not two people as

police and prosecution theorized and argued in their case against Mr. Fontenot. Further, the total lack of interest in the eyewitness testimony of a fellow law enforcement officer shown by the lead detectives would have been important impeachment on the quality of the investigation. His treatment and testimony about the APD bolsters the proof of a lack of training to investigate the serious crimes facing the officers.(Dkt.# 123, Ex.#s 53, at 10, 12). (Detective Smith discussing his level of training and the intuitiveness of police investigation).

b. John McKinnis

Mr. McKinnis grew up in Ada, Oklahoma, and frequented McAnally's convenience store. The register tape documents him in the store between 7:50 pm to 8:00 pm on April 28th.[25] (Dkt. # 123, Ex.# 35). Mr. McKinnis recalled his visit in stark detail.

> In April of 1984, I was 22 years old and I lived in a trailer about 7 miles east of Ada, Oklahoma. I worked in the oil field business for an Ada company. I often stopped at McAnally's on East Arlington, which was on the eastern edge of town. From my many stops at McAnally's I became familiar with Donna Denice Haraway, who worked behind the counter in that store at night. I recalled Haraway as being a happy and nice looking woman with a bubbly personality. Whenever

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[25] To the extent that the register tape was shown to defense counsel, Mr. Butner's failure to follow-up on such leads is a violation of the Sixth Amendment right to effective assistance of counsel.

I stopped at McAnally's it was enjoyable to see her behind the counter. I knew she was teaching, or studying to be a teacher. I was not aware that she was married.

On the night of April 28, 1984, a Saturday night, I stopped at McAnally's on my way home and purchased a couple of items and paid with a twenty dollar bill. I lived about 10 minutes east of McAnally's. I know that I got home that night sometime after 8 pm, between 8 pm and 8:10pm.

While watching the local TV news that night, I learned that Denice Haraway had disappeared while working at McAnally's. **I recalled that when I had stopped in at McAnally's earlier that night, there was a man I did not recognize standing behind the counter a few feet from Haraway. He appeared to be someone Haraway knew, an acquaintance, like a boyfriend or a husband or someone like that. He appeared to be unhappy, or concerned about something. Denice Haraway appeared to be her normal, happy self.**

I also recalled the lone vehicle parked in front of McAnally's when I drove up, presumably belonging to the man I saw behind the counter. It was a 1978 Chevy pick-up truck, light colored, maybe white, with gray primer spots painted on the body. I immediately wondered if this man I saw behind the counter might have had something to do with Har-

away's disappearance. I called the Ada Police.

The dispatcher, or whoever I talked to said someone would call me back. Sometime later that night, I received a call, apparently from a police investigator at McAnally's. I believe I spoke to Mike Baskin. As I described my visit to McAnally's a few hours earlier, and was able to determine the probable time of that visit as being between 7:50pm and 8 pm, this police officer, said to me, "Here you are. I'm looking at the cash register tape (at McAnally's) and see your purchase right here with the twenty dollar bill." I described to this police officer, Mike Baskin, the man I saw behind the counter with Haraway during my visit. This man was bigger than me, standing about 5'10' to 6'1", 210 lbs., with light colored hair, not very long. This man was about my age or a little older, about 22 to 25 years old. He wore a white t-shirt, and some type of work pants, maybe khaki or blue jeans. This man looked clean, not rough-looking. He was not dirty, but appeared to have been out working that day. He looked more like a construction worker, than a college student.

I also described the truck that I saw parked outside McAnally's to the police officer, Baskin. I knew it was a 1978 or maybe 1977 model, because it was the new body style, which had changed for Chevy pick-ups around 1975 or 1976. I told him that this truck had a short,

conventional bed with lots of primer paint prep spots. I recall that either during that call with Police Officer Baskin, or on a call back to him later that night or the next day, this officer told me that what I had seen wasn't relevant to their investigation into Haraway's disappearance. I recall the police officer telling me that the guy I saw behind the counter, was someone police knew. I recall him saying specifically, "Oh yeah, we know who that was."

I recall being told that whatever happened to Haraway happened later in the evening, so that anything I saw was not relevant to their investigation. After that last phone call with the police officer, after that weekend, no one with the Ada Police or any other police agency ever contacted me regarding Denice Haraway. I never spoke to any police officer or investigator face-to-face, only by phone.

I knew both Tommy Ward and Karl Fontenot by face, from growing up in Ada. That man I saw standing with Denice behind the counter at McAnally's about 8 pm on April 28, 1984, was neither Tommy Ward nor Karl Fontenot. At the time I believe I could have identified that person by his photograph. I never spoke to anyone else about the Haraway case in an official capacity, until recently, when I spoke to Dan Grothaus, an investigator

> with the Oklahoma Innocence Project. He showed me a photo of what he believes is the register tape from McAnally's on April 28, 1984. The photo of that register tape shows my name and phone number hand-written next to a purchase of $2.61, paid for with a twenty dollar bill.
>
> I was able to tell Mr. Grothaus what I told that police officer that night. It was fairly easy for me to remember that conversation with the police officer that Saturday night, because I was so concerned about Haraway's disappearance, and wondered what significance this man I saw behind the counter might have played in her disappearance.

(Dkt.# 123, Ex. # 5)(emphasis added).

Ada police interviewed Mr. McKinnis the day after Mrs. Haraway was reported missing. The sparse notes from the police could have been followed up on in much the same manner as was done in state post-conviction proceedings. Mr. McKinnis' detailed account of the man he saw behind the counter with Mrs. Haraway is exculpatory evidence that defense counsel should have given to the defense to present to the jury. (Ex.# 81, at 35). This man was seen talking to another individual in a Torino type car when police officer Holkum stopped. **Mr. McKinnis, who grew up with Mr. Fontenot in Ada, stated Mr. Fontenot was not the man behind the counter with Mrs. Haraway**. Considering Mr. McKinnis' information in conjunction with the new evidence about Mrs. Haraway's potential stalker presents a very different picture of the abduction and the motive.

Further, whoever Mr. McKinnis saw stayed at the store for a much longer period than suggested during Mr. Fontenot's trial. The longer this man stayed around McAnally's decreases the likelihood that it could be Mr. Fontenot. Evidence such as this strengthens Mr. Fontenot's alibi defense and dovetails with the fact that other testimony proved the abductor's description does not match with Mr. Fontenot's.

Additionally, Mr. McKinnis' discussions with Detective Mike Baskins were extremely important both to impeach the thoroughness of the investigation and to establish an alternate suspect with whom the APD seemed familiar with. First, Mr. McKinnis provided a clear description of a man in the store standing next to Mrs. Haraway. While Detective Baskins told Mr. McKinnis that the police were aware of that individual, there are no disclosed police reports that identify whom this man was, how the APD knew him, what his connection with Mrs. Haraway was, why he was behind the counter that night, and why he was eliminated as a person of interest.[26]

Another interesting flaw involves the lack of follow-up investigation into those who stopped in the store. Based on several witness accounts, the APD failed to document leads from witnesses who called the police. From the prosecution's theory of the case, it made no sense to ignore those present in McAnally's shortly before Mrs. Haraway disappeared.(N/T 6/14/

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[26] The haphazard way the police investigation transpired is important to Mr. Fontenot's defense because of the six month delay in making an arrest, the specious information that led to his arrest, and the cumulative evidence establishing both an alternative motive and suspect from the crime scene.

1988 p. 25-26).[27] Since the APD stated they were aware of the individual identified to have been with Mrs. Haraway, his identity should have been disclosed to defense counsel as either a potential witness, or a suspect, what his conversation with Mrs. Haraway was about, and if he owned the pickup truck seen by Officer Holkum and Mr. McKinnis. The APD's continued apathy toward vital evidence was a pattern that permeated several murder investigations and displayed the agency's inability to properly handle cases of this magnitude. (Dkt.# 123, Ex.#s 46 & 61).

Further, Mr. McKinnis' interview with police continued their leads into the gray-primered pickup truck that Mrs. Haraway departed in with an unknown White male. Officer Holkum and Mr. McKinnis describe a Chevy pickup truck that conflicts with the description provided by David and Lenny Timmons, and their uncle, Gene Whelchel. In those witnesses' statements to OSBI (also withheld from counsel), the men describe the pickup as being "late 60's–70's," "'72 pickup possible dull dark blue with grey primer spots and a conventional straight bed," and "light colored full size pick-up possibly early '70's, not a narrow bed." (Ex.#44, OSBI 0060-0063). The fact that the truck was seen at the store as early as forty-five minutes before Mrs. Haraway's abduction, changes the profile of who may have taken her. Clearly, that person could not have been Mr. Fontenot since he did not have access to such a truck and Mr. McKinnis who was a long-time acquaintance, said Mr. Fontenot was not the man behind the counter.

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[27] "Ladies and gentlemen, around 8:30 on April 28th, 1984, death drove up in front of McAnally's in a gray primered Chevrolet pickup, parked facing east in the drive . . . "

Law enforcement's failure to investigate the witness accounts they had in hand demonstrates a consistent pattern of failing to develop evidence. *See Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986)(explaining that a *Brady* violation may occur because, "A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible Brady violation."); *see also Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985).

c. Gary Haney & Guy Keys

Both Gary Haney and Guy Keys contacted police in response to Detective Dennis Smith's request for information carried in local television and newspapers. Mr. Haney states he was in McAnally's with his son about 8 p.m. and stayed about ten to twelve minutes. (Dkt.# 123, Ex.# 4). He said nothing unusual transpired during their time in the store. *Id.* The register tape does not give a time for his arrival at the store. His purchase which took place after both Officer Holkum and Mr. McKinnis. (Dkt.# 123, Ex.# 35). Mr. Keys also recalled being in the store on that day and telling the police the same facts. (Ex.# 7). He is noted as arriving at McAnally's at 8:25 pm. (Dkt.# 123, Ex.# 32). For both gentlemen, no police reports document how they had responded to Detective Smith's request for information, what, if any details they provided the APD, and whether that information was developed by police in some meaningful fashion.

The timing of Mr. Key's visit to McAnally's is critical because it is five minutes before David and Lenny Timmons arrived at McAnally's with their

uncle. **If their account of arriving close to 8:30 pm is true, then three other purchases must have been made in quick succession to allow for the last transaction of a tallboy beer.** (Dkt.# 123, Ex.# 33) (highlighted in yellow)(emphasis added).

Other evidence casts doubt regarding the timing of Mrs. Haraway's disappearance. Witnesses who arrived at McAnally's only to find it empty prior to the Timmons' arrival. A family coming to get gas entered the store to find that Mrs. Haraway was not there. (Dkt.# 123, Ex.# 56). Such witness accounts place further doubt about when precisely Mrs. Haraway went missing and the circumstances surrounding her disappearance. Establishing the timing of Mrs. Haraway's departure from the convenience store is essential to proving to the jury that Mr. Fontenot was at a party with numerous people during this timeframe.

Whether the APD received other calls which may have filled in the missing transactions is unknown since no reports concerning who was in the store were provided to defense counsel. This information would have been extremely helpful to narrow down the time when Mrs. Haraway went missing. That supported Mr. Fontenot's alibi, the possible people who had motive to abduct her, and the pickup truck present around the store for thirty minutes prior to her abduction. None of this evidence was ever presented at any of Mr. Fontenot's trials, apparently was not given to the prosecution via the OSBI prosecutorial, was not provided in post-conviction, and continues to be withheld from Mr. Fontenot's counsel.

d. Gene Whelchel

The last notation on the register tape lists a transaction with Gene Whelchel at 9:00 pm. (Ex.# 37). Mr. Whelchel testified that he arrived at McAnally's around 8:30 pm. (N/T 6/9/1988). After realizing there was no clerk in the store, he called the owner of the store, the manager, and the Ada Police.(N/T 6/9/1988 p. 63). The dispatch logs from the APD show the call at 8:50 pm. (Dkt.# 123, Ex.# 41). The police responded to the scene shortly thereafter. (N/T 6/9/1985 p. 85 86). After the initial APD patrol arrived, Detective Mike Baskins arrived at McAnally's to start the investigation. (P/H p. 462, 464). At the time the APD and the Detectives arrived, the crime scene should have been secured to preserve evidence, *e.g.* fingerprints, cigarette butts, beer cans, Mrs. Haraway's purse, all of which were found on the counter. (N/T 6/9/1985 p. 103-110-111; J/T 1259-1240, 1422-23, 1439, 1441, 1447-1448). Instead, the police failed to secure the crime scene. (Dkt.# 123, Ex.# 20). At the very minimum, had defense counsel known about the 9:00 p.m. transaction, numerous lines of cross-examination and impeachment would have been pursued not only for law enforcement, but for Mr. Whelchel and the Timmons brothers, the prosecution's sole eyewitnesses. Police malfeasance that caused loss or degradation of evidence was something defense counsel was entitled to use to investigate and pursue through direct and cross examination. *See Kyles*, 514 U.S. at 445 (discussing how evidence can be material if its disclosure helps defense counsel attack the thoroughness of law enforcement investigations).

Challenging the timing of events and the convenience store evidence was a key issue to Mr. Fon-

tenot's defense. Uncertainty about the timing casts further doubt on Mr. Fontenot's confession and the quality of the police investigation. Specifically, defense counsel could have asked Mr. Whelchel why his purchase was rung up **after** the police arrived **and by whom**. Mr. Butner could have asked Monroe Atkeson, McAnally's manager, who was there when police arrived, whether he rung up the transaction, and if he knew any details of the sales that night.

Defense counsel would have examined witnesses about the names, dates, and purchases from the register tape from Mr. Whelchel and the Timmons brothers to probe the accuracy of their accounts. Further, the defense would have had the information necessary to cross examine detectives about proper procedure for securing the crime scene and why the procedure was not followed during a robbery and abduction. The continued pattern by the APD of failing to properly document witness contacts and other crucial evidence underscores the lack of credibility and reliability of their investigation and casts significant doubt about their ability to properly determine what happened at McAnally's.

Additionally, knowing the accounts of people in McAnally's in the moments leading up to Mrs. Haraway's disappearance supports Mr. Fontenot's undisclosed alibi in two regards:

First, it would have been of utmost importance to the defense to inquire if anyone saw Mr. Fontenot at the store. The withheld reports provide more people who were interviewed, shown lineups, and did not inculpate Mr. Fontenot. They provide descriptions of men seen in the store which support the possibility that either the man was known to Mrs. Haraway, or

it could have been someone stalking her beforehand. Without the benefits of the reports, defense counsel was deprived of the opportunity of developing these defenses. Second, it provides a profile of a suspect who did commit this crime. At least two witnesses who did not testify saw the primered truck at McAnally's. These witnesses also remember a gray pickup truck being at McAnally's for much longer than the prosecution asserts. The truck did not belong to Mrs. Haraway nor anyone who was employed at the store. Whomever owned the truck either abducted Mrs. Haraway, or had knowledge of what transpired in the store. In either situation, the police failed to investigate this obvious lead and deprived Mr. Butner of the opportunity to do the same for his client.

3. Floyd DeGraw

Shortly after Mrs. Haraway's disappearance, the APD focused their attention on a suspect arrested in Texas for assaulting another woman named Donna. (Dkt.# 123, Ex.# 24). Police mentioned to the press that Floyd DeGraw was a possible suspect in the Haraway case. (Dkt.# 123, Ex.# 26) This was the extent of information given by law enforcement into Mr. DeGraw's potential involvement. However, the APD and OSBI extensively investigated Mr. DeGraw. Their investigation took place from shortly after April 28th until after December 1984, two months after Mr. Fontenot was charged with Mrs. Haraway's abduction and murder. (Ex.# 44, OSBI 0747 0750, 0751, 0754-0759). What is unclear is why these agencies, so focused in finding Mrs. Haraway, stopped investigating Mr. DeGraw when his statements and

behavior continued to implicate himself in her abduction.

Mr. DeGraw came to the attention of Pontotoc County law enforcement as a suspect when he was arrested in Amarillo, Texas on May 3, 1984, for raping Donna Ellis and leaving her naked in a field. (Dkt.# 123, Ex.# 24). Mr. DeGraw had several other prior convictions including serving three years for malicious wounding and is currently serving life imprisonment for stabbing a woman to death. Dkt.# 123, (Ex.#s 44, OSBI 0014 & 47). When arrested in Amarillo, police searched his car. Prior to Mr. DeGraw's arrest, someone had apparently removed the back seat. When the car was searched, police found jewelry and other belongings of women from several Oklahoma cities along with a stolen driver's license from a woman in Ada. (Ex.# 24, at 16-18). Police also found pornographic materials depicting violence against women. (OSBI 0713-0722). While in custody in Texas, Detective Dennis Smith relayed information to OSBI Agent Gary Davis who was tasked with interviewing Mr. DeGraw for the OSBI. (Dkt.# 123, Ex.# 44, OSBI 0014). Agent Davis took along an OSBI criminalist to document and examine the contents of Mr. DeGraw's car.

OSBI Reports show Mr. DeGraw had told agents he left Detroit in a friend's car heading west sometime in April 1984. *Id.* During his drive, he picked up a hitchhiker, Jeffrey Johnson, and they journeyed to visit Johnson's friend in Memphis, Tennessee. *Id.* While in Memphis, they stayed several hours at Gordon Elliott's house before continuing west on April 27th. *Id.* When asked if the men drove through Oklahoma, specifically stopping in Ada, Oklahoma,

DeGraw was adamant that he slept through his entire drive through the state; if they had stopped, it was not in Ada. (Dkt.# 123, Ex.# 44, OSBI 0027). However, most, if not all of Mr. DeGraw's story turned out to be a lie as shown by OSBI's later investigation.

Not only did the OSBI send agents to interview Mr. DeGraw and search his car, a polygraph examination was arranged. On May 10, 1984, Mr. DeGraw was polygraphed by Amarillo Detective Jimmy Stevens. During the examination, Detective Stevens asked several questions pertaining to the Haraway case.

> Concerning the kidnapping of the girl in Ada, Oklahoma, do you intend to be truthful about?" DeGraw was very deceptive on this question. Also, on question #6, which was "About ten days ago did you participate in a kidnapping in Ada, Oklahoma? Lieutenant Stevens stated that DeGraw was deceptive in this. Also, question #10 which was, "Have you ever seen the girl whose pictures is on the wall in front of you now?", was deceptive, but other questions that were asked, the response was very flat, and Lieutenant Stevens felt that overall DeGraw was not involved in the kidnapping of this girl from Ada.

(Dkt.# 123, Ex.# 44, OSBI 0024).

Reports show Detective Lieutenant Stevens had invited the OSBI to evaluate the polygraph data for themselves. However, the results, if any, of OSBI's assessment of the polygraph are unknown to defense because it was not included in the disclosed OSBI

reports. Further, OSBI files do not contain either the raw data received from Amarillo Police, or any other parts of their investigation. (Dkt.# 123, Ex.# 24, at 16-18). Whatever the OSBI's opinion of Mr. DeGraw, this did not end their investigation or eliminate him as a suspect.

OSBI Agent Davis, along with the Amarillo police, showed Mr. DeGraw pictures of Denice Haraway during their interrogation. While police pointed out numerous inconsistencies in his story about traveling from Detroit, Mr. Degraw claimed the reason he had problems with questions related to Mrs. Haraway was because his cousin was kidnapped and raped when he was twelve. (Dkt.# 123, Ex.# 44, OSBI 0024). Mr. DeGraw also stated that his sister looked like Mrs. Haraway. *Id.* When pressed further about Mrs. Haraway,

> At one time during the conversation and as Agent Davis put the picture of the victim from Ada before DeGraw, DeGraw held his head in his hands and appeared about to break down, but after recomposing himself, lifted his head with his eyes very red and stated that he did not know anything about the woman who was abducted in Ada, but hoped we would find her alive. DeGraw then became irritable, pacing the floor, saying he did not want to answer any more questions and continued doing this while Agent Davis continued talking. DeGraw then insisted on being taken back to his cell and not answering any more questions . . .

(Ex.# 44, OSBI 0027). Mr. DeGraw admitted stealing money for his journey and discussed a robbery which

had occurred several years prior. (Ex.# 44, OSBI 0025). He also discussed his institutionalization for mental health issues including his tendency to, "fly off the handle." (Ex.# 44, OSBI 0026).

Agent Davis investigated Mr. DeGraw's story and quickly found several untruths. He obtained court files from Missouri showing that Jeff Johnson who Mr. DeGraw claimed to have travelled with was incarcerated on murder charges when he was supposedly traveling with Mr. DeGraw. (Dkt.# 123, Ex.# 45). Agent Davis reached out to the Calloway Police Department in Missouri for Jeffrey Johnson's murder investigation file.(Dkt.# 123, Ex.# 85). The first page of notes detail that the file was mailed to Agent Davis on May 22nd. *Id.*

Also, Gordon Elliott, who was supposedly Johnson's longtime friend, spoke more familiarly with Mr. DeGraw after his arrest in Texas. (Ex.# 44, OSBI 0021 & 0023). OSBI recorded the call between Elliott and Mr. DeGraw regarding the Haraway case, but that tape, or a transcript of the conversation was not provided to defense counsel and has yet to be disclosed. (Dkt.# 123, Ex.# 44, OSBI 0023). Very little of Mr. DeGraw's story checked out once investigated by OSBI. These discrepancies in Mr. DeGraw's version of events were troubling given his past violence towards women, his lies to police about his activities in Oklahoma, the drivers license of a woman from Ada, the timing of the rape in Amarillo, and his incriminating statements and conduct when interviewed by OSBI.

Why and if OSBI and Ada PD eliminated DeGraw as a suspect remains a mystery given his story was completely fabricated. His acknowledged deception

during the polygraph, emotional breakdown when questioned further about Haraway, his proximity to Ada, mental health issues, and his consistent violence towards women made Mr. DeGraw a likely suspect. His booking photograph shows a striking similarity to the composite drawings released by police. (Dkt.# 123, Ex.#s 24, at 23; 76; & 77).

Mr. DeGraw would certainly have been a prime target for a defense attorney. It is unclear why the police investigation into DeGraw stopped when his story as to who he traveled with proved to be a complete fabrication. Defense counsel was entitled to know the extent to which the OSBI and APD investigated DeGraw in the week after Mrs. Haraway's disappearance. Investigators continued to generate reports even after Mr. Fontenot was charged with her abduction and murder. (Dkt.# 123, Ex.# 44, at 0747-0750, 0751, 0754-0759). The withheld evidence not only provided a viable alternative suspect for the defense, but it was ripe ground for impeachment of law enforcement, based upon their failure to fully explore Mr. DeGraw's lies or to competently explain why he was apparently cleared as a suspect. The prosecution's willful failure to disclose this valuable evidence to the defense is a serious violation of the trust placed in the prosecutor by the judicial system.

The failure of the district attorney to disclose such important exculpatory evidence is a violation of Mr. Fontenot's constitutional rights. *See Kyle*, 514 at 446 (finding the cross examination into flaws in the police investigation a viable avenue regarding *Brady* evidence); *see also Bowen v. Maynard*, 799 F.2d 593, 612 (10th Cir. Okla. 1986) (granting habeas relief because withheld evidence of a different suspect created

a "reasonable doubt" and "in the hands of the defense, it could have been used to uncover other leads and defense theories and to discredit the police investigation of the murders"); *Smith v. Secretary of N.M. Dep't of Corrections*, 50 F.3d. 801, 830 (10th Cir. 1995)(failure to disclose alternate suspect police report was a *Brady* violation because, "it dramatically altered and limited the effectiveness of Mr. Smith's defense at trial . . . would have been useful in 'discrediting the caliber of the investigation or the decision to charge the defendant'"). The fact that the State continues to withhold taped conversations between DeGraw and Elliott, polygraph data, and other evidence pertaining to the DeGraw investigation continues to deprive Mr. Fontenot of his Fourteenth Amendment constitutional rights.

4. Withheld interview reports and taped statements of Jeff Miller and Terri Holland (McCarthy)

The OSBI prosecutorial contains a table of contents. It details the evidence collected during the investigation. This table was not previously provided to the defense. (Dkt.# 123, Ex.# 43, at 7-8). Included in the list is all physical evidence supporting the OSBI's case against Mr. Fontenot and his codefendant, Tommy Ward. This table of contents reveals three specific items that were not disclosed to defense counsel:

1. The audio recorded interview of Jeffrey Miller;
2. The video tape interview of Jeffrey Miller and;
3. The audio tape of Terri Holland.

Jeff Miller was the person Detective Smith testified had given police the information that led to both Mr. Ward and Mr. Fontenot being questioned and later arrested. (P/H at 502). Detective Smith testified that Mr. Miller provided information against O'Dell Titsworth prior to October 12, 1984, in a statement to police. (P/H at 710).

Given that Mr. Titsworth could not have been involved in any crimes related to Mrs. Haraway's death because he was in police custody at the time, any statements made by Mr. Miller were suspect. Whatever Mr. Miller said became the catalyst for the law enforcement investigation against Mr. Fontenot. However, it is unknown exactly what Jeff Miller said to the Ada Police because no report or, statements detailing what Mr. Miller said, have ever been disclosed to the defense even though the police have acknowledged possessing such information. Jeff Miller never testified at any hearing or trial about what information he provided inculpating Mr. Fontenot. Further, it is unclear what investigation, other than the interrogations of Mr. Fontenot and Mr. Ward, that law enforcement conducted to verify any of the information Mr. Miller provided.

The police investigation into what happened to Mrs. Haraway had stalled prior to whatever information Mr. Miller provided. The police investigation rested completely on whatever information Mr. Miller provided to Detectives Baskins and Smith. The State opposed any action to disclose the information gleaned

from Mr. Miller based on the work product doctrine.[28] (P/H at 765-771).

The disclosure of Mr. Miller's statements and recordings were specifically and repeatedly requested by defense counsel. (P/H at 496, 501-508, 710-712). Mr. Butner sought to understand why, after six months, the police focused on Mr. Ward which led them to Mr. Fontenot.

A. We interviewed everyone and then we had some additional information that came in.

Q. From whom?

A. Jeff Miller.

Q. When did that come in, approximately?

A. Prior to October 12th, I'm not sure of the exact date.

Q. Who is Jeff Miller?

A. He lives here in Ada, that's about all I know about him.

Q. Did you interview Mr. Miller?

A. Yes, we did.

Q. Where?

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[28] The work product doctrine does not excuse a prosecutor's obligation to disclose *Brady* materials. *See generally Castleberry v. Crisp*, 414 F. Supp. 945 (N.D. OK 1976). While a prosecutor's thoughts and impressions are protected, if there is exculpatory or impeachment evidence, that must be disclosed to a defendant prior to trial. *See United States v. Armstrong,* 517 U.S. 456, 474-75, 116 S. Ct. 1480, 134 L.Ed.2d 687 (1996) (Breyer, J., concurring in part and concurring in the judgment) (presupposing *Brady* overrides work-product doctrine)

A. In the Police Department.

Q. The District Attorney has advised that he is not among the list of witnesses in this case. Did you feel his information in this case was pertinent, that it was informative and useful?

A. Yes.

Q. Do you have knowledge as to why he's not being used as a witness?

A. No, I don't.

Q. And it's from his statement that you went back to Ward, is that correct?

A. Well, it's from his–what he told us, but the information that he had was from someone else.

Q. From whom?

A. Several people I—

Q. Let me have their names please.

A. I can't think of them right off.

Ada Police Detective Mike Baskins. (P/H 1/14/85 at 501-502).

Defense counsel repeatedly requested Mr. Miller's statements, or the people he mentioned leading to Mr. Ward and Mr. Fontenot. *Id.* However, the district attorney fought any disclosure of this evidence. "Judge, Mr. Wyatt doesn't have any right to any more discovery than he had before, and by standing up here and saying "they may be exculpatory" has nothing to do with whether they are or not. And this police officer does not have to turn him over-what he's trying to

find out, Judge, is [work] product, and he can't do that through this mechanism or through a motion for discovery or anything else." *Id.* at 503. The trial court did order the disclosure of any of the names Jeff Miller provided to police or his statements to police.

Terri (McCarthy) Holland testified during the preliminary hearing about hearing both Mr. Fontenot and Mr. Ward confess to participating in the murder of Mrs. Haraway. She told a jail trustee of her conversation with Mr. Fontenot. (P/H at 878-879). Afterwards, DA investigator Lloyd Bond came to interview them concerning her statement. *Id.* at 883-884. Ms. Holland was serving three years for hot checks. *Id.* at 888-889. She claimed to have heard Mr. Fontenot's incriminating statements while being held at the Pontotoc County Jail. Strategically, she had been placed by the Pontotoc County Sheriff in a cell across from him for nine days. *Id.* at 901.

A. Yeah, I hollered at Karl. Well, see, Ron Scott told us not to talk to each other.

Q. And who is Ron Scott?

A. The jailer.

Q. Okay.

A. The head jailer over there.

Q. And he told you not to talk to each other, is that correct?

A. Right. So, when he left the room and locked the big door, the first thing I do was holler at Karl. Well, at first he wouldn't answer me, and I guess it was about ten minutes

and he hollered at me, and he wanted a cigarette. And as the conversation went, I asked him what he was in there for, and he told me.

Q. What did he tell you he was in for?

A. he told me that they–He asked me if I knew Donna Haraway; and I told him no, I didn't. And it just went from there, he told me about what had happened.

Q. Would you tell the Court what he told you, please.

A. He told me that him and Odell and Tommy went to the store; that Tommy and Odell went in and got her; they took her out to an old house; there Odell raped her and then Tommy; she run from Tommy; Tommy caught her. In the process, somehow, he cut her down the arm and bit her on the titty, and Odell stabbed her to death, he killed her; then Karl raped her. Uh–yeah, they kicked her off in a rotty part of the floor and poured gasoline on her and burned her.

Id. at 890-891.[29] During her cross examination, she acknowledged being interviewed by deputy Tom Turner and videotaped by OSBI Agent Rogers a month after hearing Mr. Fontenot's supposed confession. *Id.* at 897-898. Mr. Butner requested access to her videotape statement to which both Mr. Peterson and Mr. Ross

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[29] Ms. Holland's cell was across from Mr. Fontenot's even though he was moved to a juvenile section at one point. (P/H 854, 872, 890-891). She then admitted she was trustee allowing her access to other area of the jail. *Id.* at 891.

objected. *Id.* at 907-908.[30] The trial court overruled the defense request for the video. *Id.*

After the trial court found probable cause to hold Mr. Fontenot over for trial, Ms. Holland testified during the joint trial. (J/T. at 1824). Ms. Holland admitted getting married in between the preliminary hearing and her trial testimony on September 18, 1985. (J/T. at 1823). Her trial testimony was consistent with her preliminary hearing testimony. (J/T at 1823-1854). However, the district attorney still had not, and has never divulged the videotape or any police reports concerning Ms. Holland's statements about the jailhouse confession.

Ms. Holland was a known snitch[31] who had previously served the district attorney in another case in

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[30] Belying the DA's office statement of open file discovery and disclosure, they fought any release of information concerning witnesses. Regarding Ms. Holland, who had a history of providing such testimony, Mr. Peterson stated: MR. PETERSON: First of all, Your Honor-May, we approach the bench? They're entitled to sworn statements of the Defendant. Okay? Sworn statements of any witness, that they're getting right now; and any statements by the Defendant to law enforcement. Now, I fail to see where this woman is a law enforcement officer. (P/H 907-908).

Mr. Ross countered a defense counsel request for inconsistent statements:

> MR. ROSS: Your Honor, in that these are right along the line of a prior written statement, they don't have a right to see that. If there's an inconsistency-only if we bring out an inconsistency, do they have a right to view it. We have not done that with Ms. McCartney. I don't think they have a right to see the video tape until after the Defendants have been bound over for trial. *Id.* at 909.

31 When she came forward claiming to have heard Mr. Fontenot confess, she also heard Ron Williamson confess at the same time. The United States District Court found this problematic in Mr. Williamson's habeas corpus litigation. (pgs. 33-35, 61-62). During the Williamson & Fritz 42 USC § 1983 civil litigation, Bill Peterson, Pontotoc County District Attorney at the time of these trials, was asked about Terri Holland's testimony in other cases and the Haraway murder was discussed:

"Q All right. Did you know Terri Holland before this case?

A I knew of her.

Q Had you ever put her on as a witness before?

A Boy, I think she's-as I'm sitting here, my memory is that she's testified, that I know of, in two different cases, two homicides.

Q All right. One was the Haraway case?

A Yes.

Q That's the book that was called-written about it called "The Dreams of Ada"?

A Yeah. That' s a book that was written about his idea of what the case was yeah.

Q And the Haraway murder case, Dennis Smith and Gary Rogers were also lead investigators?

A They were part of the investigative team, yes.

Q And were there also confessions in that case from some of the defendants that involved their statements that they dreamed about the crime?

A No, sir. That's not how it happened at all.

Q Were there any such statements from defendants?

A There was videotaped statements of both Fritz and–excuse me–Fontenot and Ward making statements that were very incriminatory, and at the end of Mr. Ward's statement, Mike-excuse me—Dennis Smith asked him the question, "is there anything else you

which she had claimed to have heard similar incriminating comments from another inmate. (Dkt.# 123, Ex.# 61) (discussing her testimony in the Williamson case where she supposedly overheard him confess to a murder).

A written version of her statement to Deputy Turner was included in the 860 plus pages of OSBI Reports. (Dkt.# 123, Ex.# 44 at 282-289). Again, none of these documents had been provided to the defense until long after all trials and well into the post-conviction process. The withheld statement was taken on November 6, 1984, and contradicts several statements made by Ms. Holland during her preliminary hearing testimony and trial testimony. *Id*. at 282. She interweaved conversations with Mr. Ward, Mr.

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would like to add to this?" And he said, "It all seems like a dream now."

Q Okay. Now—

A So there's where we get "Dreams of Ada."

Q So other than the Haraway case and this case, was there any other time that you had used Terri Holland as a witness?

A Not to my memory.

Q And in both cases you used her as a jailhouse informant?

A. She happened to be in the jail at the same time these people, all these people were in jail. Yeah.

Q. All right. Now I'm showing you page–

A She was not the entire case against Tommy Ward and Karl Fontenot."

(Peterson Vol II, p. 360-362; Rogers Vol II, p. 415 similar testimony).

Titsworth, and Mr. Fontenot while also explaining how all of this was relayed to other officers or jail personnel. *Id.* One commonality in Ms. Holland's withheld report was the inconsistency in the statements she attributes to Mr. Fontenot.

Because the District Attorney failed to turn over this statement, Mr. Butner was unable to impeach Ms. Holland's inconsistent testimony during the preliminary hearing and joint trial. (P/H. at 888-927). Just as important, it is unknown what transpired during the taped statement that could have further undermined her credibility, or shed light on the benefits received for her testimony. Her conduct in this case mirrors her testimony in the Williamson-Fritz wrongful convictions. Ms. Holland received substantial benefits for her role in assisting the district attorney. It appears Ms. Holland also got rewarded for her testimony by the prosecutor in this case, though it has never been admitted by the prosecution. Randy Holland, Ms. Holland's husband during the time of Mr. Fontenot's trial, explained the extent of her deals for her testimony:

> I was formerly married to Terri Holland, now deceased. Terri and I got married while I was an inmate at the Pontotoc County Jail, on September 4, 1985.
>
> I was facing up to forty years, but Terri made a deal with Bill Peterson, the district attorney in Pontotoc County. She agreed to testify for him in the state's case against Tommy Ward and Karl Fontenot. In exchange for her testimony, I was to receive seven years on my pending case and we were

> given permission to marry while I was in jail.
>
> I only found out about the deal Terri made with Bill Peterson when Terri and I got into an argument. We were living near the dam on Ft. Gibson Lake, in about 1992. This was a very intense argument, and she let me know at that time what she had done for me.

(Dkt.# 123, Ex.#s 10, 86). Clearly, any benefits conferred on a witness for the state, must be disclosed to defense counsel. *See U.S. v. Bagley*, 473 U.S. 667 (1985); *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009). The State only used Ms. Holland as a witness during the preliminary hearing, However, this does not remove the constitutional obligation to disclose impeachment evidence.

5. OSBI Reports of Mrs. Haraway's Fear of Being Stalked.

Several withheld interview reports indicate Mrs. Haraway was scared about working at McAnally's not only due to the clientele, but more importantly because of the harassing telephone calls she received during her shifts. Whomever this man was making these harassing calls knew her work schedule. Many of Mrs. Haraway's friends, family, and co-workers knew this, and told police, but the prosecution disclosed none of their statements to the defense.

James Watt, a co-worker, explained that Mrs. Haraway told him these calls had stopped for a period in the early months of 1984, but began again in the weeks leading up to her disappearance. (Dkt.#

123, Ex.#s 15 & 62). Mrs. Haraway only worked at McAnally's in the evenings from Thursday to Sunday. (Dkt.# 123, Ex.# 15). All the witnesses agreed that these calls, always from a man, greatly distressed her, her family, and her co-workers. Mrs. Haraway's sister, Janet, stated the fact that Mrs. Haraway was afraid of someone and did not like to work at McAnally's.

> According to Janet, Donna told her on the phone she hated working at the store because it did not have an alarm and a lot of weirdo's come in and out of the store. She told Janet that she was going to look for another job because she felt uneasy working at the store alone at night. **She told Janet that the phone calls had started again but didn't go into the whole story. Janet said that earlier Donna had been receiving calls at work from a man that said he was going to come out to the store some night and wait outside while he was working. She said that Donna was upset because she had asked for the night off and a guy refused to work, and she had to work anyway.**

(Dkt.# 123, Ex.# 43, prosecutorial bates 20, 109) (emphasis added). This information was also relayed to police by the store manager, Monroe Atkeson, about a conversation he had with Steve Haraway, the victim's husband.

> Steve told Atkeson that a Vietnam Veteran had been harassing Donna and Donna had received several obscene telephone calls. Atkeson had seen the veteran that Steve

> spoke of and Atkeson described the veteran as a white male, six feet, 190 pounds, black hair, brown eyes, mustache, light complexion, usually drove a white Chevrolet Chevette and bought a soft drink. Atkeson believed that the veteran attended a rehabilitation school in Okmulgee.

(Dkt.# 123, Ex.# 44, OSBI 0006). The police also spoke with Steve Haraway who confirmed the calls his wife received while working at McAnally's. "Steve received a phone call from the police who told him that his wife was missing. He knew of no one that Donna was having problems with at the store, other than she had received two to three obscene phone calls at the store. The last phone call was two or three weeks prior to her disappearance." (Dkt.# 123, Ex.# 43, prosecutorial bates 20). Clearly, the people closest to Mrs. Haraway were aware of a potential threat that continued for months and weeks prior to April 28th.

Another withheld document was a report from co-worker James D. Watts who testified for the State at Mr. Fontenot's trial. In an interview with the Pontotoc County Sheriff's Office on July 25, 1985, Mr. Watt explained that "Denice had told me of some obscene phone calls she had received at the store for a while, these calls upset her a great deal. She could not recognize the voice over the phone and the calls stopped about one month before she disappeared." (Dkt.# 123, Ex.# 62).[32]

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[32] The duplicate version found in the District Attorney's files pursuant to this Court's subpoena shows notes from one of the trials illustrating the prosecution's awareness of this document

The State did not turn over any of these vital reports to the defense. Information related to potential suspects falls within the evidence a prosecutor must disclose to defense counsel. *See Kyles*, 514 U.S. at 446 (evidence of alternative suspects allows the defense to attack "the reliability of the investigation" if it shows that investigators were less than energetic in exploring other potential suspects . . . After all, a "common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant . . . ."); *Trammell v. McKune*, 485 F.3d 546, 552 (10th Cir. 2007) (suppressing evidence of alternative suspects "could also have been used to cast doubt on police officers' decision to focus their attention . . . on [the defendant] rather than" the other suspects).

Had reports from OSBI and the Sheriff's office been disclosed, they would have aided Mr. Fontenot's defense to investigate alternate suspects who had intent along with motive and opportunity to harm Mrs. Haraway. It is obvious from these statements that a likely suspect existed that had been stalking Ms. Haraway for months, and provided a much more likely suspect than Mr. Fontenot.

These statements tied in with the interview report of Anthony Johnson. Mr. Johnson, a frequent customer at McAnally's, remembered a conversation he had with Mrs. Haraway a week before her disappearance.

> Johnson is a co-worker with Tommy Ward's sister, Tricia Wolf in an Ada, Oklahoma plant. Johnson admitted to this investigator

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despite his statements to the contrary. (Dkt.# 123, Ex.# 78 at 50-51).

> that one week before Haraway's disappearance he was in the McAnally's convenience store when Haraway asked him where she could buy a gun. Haraway referenced the need for a gun with some funny calls she had recently been receiving. Haraway said she didn't really know who was making the calls, and that the caller never really said anything, just did some heavy breathing on the phone. Johnson asked Haraway if she had any ex-boyfriends that could be making these calls and said that Johnson was of the opinion that she knew who was making the calls but did not seem to want to indicate who it was.

(Dkt.# 123, Ex.# 22). Mrs. Haraway was so afraid of the stalker that she wanted a gun to keep at the store as protection. With such evidence, the defense could have pursed other witnesses who would have known of Mrs. Haraway's fears and potentially identified the alternate suspect. Further, just two days before Mrs. Haraway went missing, she spoke with Darlene Adams, another customer at McAnally's. Mrs. Haraway explained to Ms. Adams she was afraid working at night at the store, but her schedule would not be changed.[33] (Dkt.# 123, Ex.# 3).

The State failed in two regards concerning this information. First, this evidence should have been

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[33] Another line of inquiry could have been to Monroe Atkeson, McAnally's store manager, about his awareness of Mrs. Haraway's fear about working in the store. Mr. Butner could have cross-examined him about the obscene phone calls during her shift, or why he refused to change her schedule given her statements about the strange men in the store.

investigated in 1984, particularly because this information came from those closest to Mrs. Haraway. This is not a situation where only one person made a side comment about a few weird telephone calls. Instead, numerous people, including her husband, manager, co-worker, customers, and mother were aware of this conduct. They immediately shared this information with police in the hopes that it would assist in their investigation into her mysterious disappearance. Instead, the police ignored it completely. At the time, it would have been possible for law enforcement to pull McAnally's telephone records to see who called the store. Further, OSBI and APD could have cross-referenced callers with customers.

Second, despite their obligations, the police or prosecution kept this critical information from defense counsel. This evidence should have been disclosed because it clearly points to another person who watched and threatened the victim and could have generated additional exculpatory evidence if investigated. *See Bowen*, 799 F.2d at 613.

D. Prejudice from The Non-Disclosure of Exculpatory Evidence

No one in Mr. Fontenot's defense had access to the OSBI or APD reports showing any of the new witnesses accounts from McAnally's, alternate suspects—including Floyd DeGraw, witnesses supporting Mr. Fontenot's alibi, the stalker of Mrs. Haraway, and the reports of Jeff Miller's statements and Terri Holland's deal. Despite both trial and appellate counsel's repeated requests and attempts to gain access to such crucial information, exculpatory and vital impeachment evidence was squelched. The

withheld evidence clearly fell within the gambit of the defense discovery pleadings and would have been vital to a defense.

Mr. Fontenot's trial counsel, George Butner, received none of the evidence discussed above as "newly discovered evidence of innocence" or "*Brady*" material. During his deposition, he explained the flaws in the District Attorney's open file policy and law enforcement's withholding of evidence from the defense.

> You–you go in. You sit down. I–I want everything you've got. I want your discovery. And if they-if they mean that they're–you're (sic) going to give you the case file and let you go through it, then that's–if the policy, the open file policy, is appropriate, all of the things from 8 law enforcement should, in fact, be in it, but we have discovered in other cases that not everything from law enforcement is available and it seems to be more likely than not something that may be classified as a *Brady–Brady* matter, because I'm–I'm only speculating, but I figure that law enforcement, if they went out and talked to George Butner about the Donna Denice Haraway killing and I was in Zambia at the time, that it–it was not disclosed, okay. I mean, I just don't think that the law enforcement gathered everything that they did to allow proper examination in the open file policy by defense counsel.

(Dkt.# 123, Ex.# 81 at 44).

> And Mr. Peterson's position was that law enforcement was the integral part of his being district attorney. Keep law enforcement happy, he stays with it a long time. And, so, he-I don't think-to be perfectly honest with you, my opinion is that he did not exercise appropriate professional supervision in requiring law enforcement to get him the appropriate stuff. I mean–and Bill takes a lot of heat for this, but I think they try it like the law enforcement officers want it tried and so law enforcement officers sometimes just give him what they think he needs and so-

Id. at 16. Further, in his statement, Mr. Butner explained that he did not receive the OSBI reports during his representation of Mr. Fontenot. As is now clear, these files were not in the District Attorney's open file by their own admission.

> I represented Karl Fontenot from late 1984 through 1988, for Karl's first and second trials. I did not represent Karl during his appeals. I handled all pre-trial and trial matters for both trials including the preliminary hearing. During the scope of my representation, I filed numerous pretrial motions requesting discovery and disclosures of records, physical evidence, investigation reports, witness statements, records, and other evidence pertaining to the disappearance and homicide of Donna Denice Haraway. Additionally, I made numerous motions on the record during the preliminary hearing and at various points in the trial asking for

access to evidence, police reports, and other evidence within the custody of law enforcement and Pontotoc District Attorney's Office. In most cases, these requests were denied.

Tiffany Murphy, Director of the Oklahoma Innocence Project, provided me with 860 pages of Oklahoma State Bureau of Investigation reports (OSBI) of their investigation of Donna Denice Haraway's disappearance, Central Office of the Chief Medical Examiner's file, and photographs of McAnally's register tape from 4/28/1984. **After reviewing these materials, I did not receive any of the OSBI Reports from the Pontotoc District Attorney's Office or from OSBI prior to either of Mr. Fontenot's trials. Additionally, I do not believe I received the whole 44 pages of ME's Office files. While I know the McAnally's register tape was admitted at trial as a state's exhibit, I received no police reports about the names, telephone numbers, and times of the men mentioned on the tape regarding any interviews related to the events of April 28, 1984.**

During both trials, my main focus was proving Mr. Fontenot's innocence. Any evidence which would support proving his innocence was paramount. Evidence that the law enforcement investigation strongly considered alternate suspects for Ms. Haraway's abduction and murder would have been evidence that fit in the defense's innocence case. I was unaware

of the extensive investigation done into Floyd DeGraw by Ada Police Detective Dennis Smith, OSBI Agents Gary Rogers and Gary Davis. I did not know he was poly-graphed by Agent Davis and that DeGraw showed indications of deception when asked about Ms. Haraway. Further, when DeGraw was interrogated by Davis and Texas law enforcement, he grew agitated when asked about Mrs. Haraway and abruptly ended the interview. Police reports related to DeGraw's investigation, his rape conviction in Texas, and the possessions of belonging from Oklahoma women would have been extremely important to Mr. Fontenot's case.

Further, I was unaware that Ms. Haraway received obscene phone calls while at work during the months and weeks leading up to her disappearance. I never saw reports from various people like Monroe Atkeson, Janet Lyons, James David Watts and others describing Ms. Haraway's great concern about a man making obscene phone calls only while she worked at McAnally's. Janet's report providing the names of all of Ms. Haraway's ex-boyfriends would have been extremely helpful to determine if they were the source of these calls or had motive to cause her harm. Also, Janet's comment that Ms. Haraway hated working at McAnally is because it did not have an alarm, her

knowledge that the obscene phone calls continued to occur, and the bizarre people who came into the store at night would have been helpful to establish Karl's innocence. These OSBI reports would have been extremely helpful to further the defense investigation into alternate suspects or people around McAnally's who were watching Ms. Haraway.

I was unaware of the numerous OSBI reports supporting Mr. Fontenot's alibi of attending Gordon Calhoun's party during the time Mrs. Haraway went missing. Impeachment evidence from the OSBI reports regarding Gordon Calhoun's interview that the party could have been the weekend of April 27th or 28th was vital. This information ·would have helped substantiate Karl's alibi during the time Ms. Haraway disappeared. Janette Roberts' report about the party and Karl's attendance was important because I would have called her to testify during the defense case-in-chief. I was unaware that Ada Police Officer Larry Scott responded to one of the dispatch calls listed on the state's radio log exhibit. Officer Scott's police report about responding to Gordon Calhoun's party supported the alibi that the police were aware of the party. Finally, I was not provided Karl's poly-graphed statement where he admits

> **being at the party. Such evidence would have been extremely useful to build a viable defense that Karl had nothing to do with Mrs. Haraway's disappearance and homicide.**

(Dkt.# 123, Ex.# 16)(emphasis added).

The impact this evidence would have had on either of Mr. Fontenot's trials or how Mr. Butner would have utilized such evidence is incalculable. (P/H. at 496, 502-503, 769; J/T at 1816–1817); (Dkt.# 123, Ex.# 81). Instead, defense counsel during both trials lacked the necessary evidence to provide not only a viable defense to the state's charges, but an alternative theory of the crime, several alternate suspects, along with impeachment evidence for many of the State's witnesses. It is evident, in the absence of such exculpatory evidence, Mr. Fontenot did not, "receive[ ] a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434.

The egregious conduct by the State extends beyond the trial through Mr. Fontenot's direct appeal when the state discovered the remains of the victim. Appellate counsel properly sought discovery of relevant evidence including the medical examiner's reports, police reports, crime scene information, and other related evidence. (Ex.#s 57 & 58). Although the trial court granted her access to such evidence; the State continued to withhold the full medical examiner's report, photographs of the crime scene and other relevant evidence that would assist in the appeal. (Dkt.# 123, Ex.# 59).

During my representation of Mr. Fontenot in his first direct appeal, skeletal remains later identified as Donna Denice Haraway were discovered on approximately January 20 or 21, 1986, near Gerty in Hughes County, Oklahoma. Due to the timing of this discovery and the unique circumstances of the case, and in anticipation of filing a motion for new trial based on newly discovered evidence, I filed a Motion to Disclose and Produce in Pontotoc County District Court on January 30, 1986, regarding the discovery of the remains, the condition of the remains and the Hughes County crime scene, and any interviews, reports, or investigations in connection therewith. I further requested all material which was exculpatory or favorable to Mr. Fontenot, which might be used to impeach prosecution witnesses who had testified at his trial, or which might lead to the discovery of same. At a hearing on this motion conducted March 3, 1986, I made a supplemental discovery request asking for all statements placing or tending to place any other suspect or suspects at or near the location of the discovery of Ms. Haraway's remains.

On March 3, 1986, the Pontotoc County District Court entered an Order granting all of my discovery requests excepting only oral statements never reduced to writing. In granting my motion, the district court ordered, inter alia, that reports, medical examiner findings and photographs pertaining to the

discovery of the remains, the examination of the remains, the analysis of the remains and any other physical evidence uncovered at the crime scene be produced. Based upon this Order the Pontotoc County District Attorney's Office disclosed to me two pages of Oklahoma State Bureau of Investigation (OSBI) Criminalistics Examination Reports and three pages of reports from the Office of the Chief Medical Examiner for the State of Oklahoma. These five documents were appended to the Motion for New Trial on Newly Discovered Evidence I filed with the Oklahoma Court of Criminal Appeals on August 8, 1986. These five documents were the entirety of the records disclosed to me by the State.

In the fall of 2012, Tiffany Murphy contacted me regarding the Oklahoma Innocence Project's (OIP) review of Mr. Fontenot's case. We discussed what law enforcement reports and records were disclosed to me in connection with the above-described discovery proceedings. Ms. Murphy questioned me concerning approximately 860 pages of Bates stamped OSBI reports, which I did not recall ever having seen. In March of 2013, I reviewed approximately 860 pages of Bates-stamped OSBI reports, apparently obtained by OIDS after I left employment there. **After I reviewed these documents, I confirmed to Ms. Murphy that I do not recall ever having seen them before, although I had seen the two OSBI**

> **documents and three medical examiner documents described in the previous paragraph when they were disclosed to me by the Pontotoc County District Attorney's office but without Bates stamps on them. In April of 2013, the OIP sent me additional police reports, witness statements and other documents for my review to ascertain whether they were disclosed to me during my representation of Mr. Fontenot.**
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> **During litigation of Mr. Fontenot's direct appeal and his motion for new trial based on newly discovered evidence, my main focus was his innocence. To that end, any evidence which would support proving his innocence was paramount. Evidence that law enforcement strongly considered alternate suspects for Ms. Haraway's abduction and murder would have fit into the defense's case for innocence.**

(Dkt.# 123, Ex.# 11)(emphasis added). Neither counsel for Mr. Fontenot was required to continue to seek such evidence. *Banks v. Dretke*, 540 U.S. 668, 695 (2004) (holding that defense counsel is not required to scavenge for evidence the State was obligated to disclose). Instead they are entitled to rely on the prosecution to do its job in meeting its constitutional obligations to disclose such evidence. "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed Brady material when the prosecution represents that all such material has been disclosed. As we observed in *Strickler*,

defense counsel has no 'procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred.'" *Id.* at 695-696.

This Court's evaluation of Mr. Fontenot's *Brady* claim rests on whether the evidence puts the case within an entirely different light concerning the evidence presented at trial and that which was impermissibly withheld. When evaluating the evidence withheld, the Court must conduct a cumulative evaluation of the evidence.

> While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. **But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.**

Kyles v. Whitley, 514 U.S. at 437 (emphasis added). A cumulative assessment of the evidence presented places clear doubt on an already weak case against

Mr. Fontenot. *Id.* at 436. There was no physical evidence connecting him to McAnally's, Mrs. Haraway, or her abduction and murder.

Further, the only witness who claims he saw Mr. Fontenot at McAnally's, on the night in question, tried to recant his identification at Mr. Fontenot's second trial and has affirmatively done so now. (Dkt.# 123, Ex.# 14). The evidence of Mr. Fontenot's presence at Gordon Calhoun's party for the entirety of the night, and the investigative leads of that evidence, clearly reveal a reasonable probability of a different result had this evidence been made available. The only evidence remaining is Mr. Fontenot's confession; a confession which lacks factual support and caused the State's own detectives to doubt its veracity as of the preliminary hearing.[34] The State's

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Q. Okay, And so you didn't believe anything they had said previously, did you? You didn't believe that, did you?

A I believed part of it.

Q You believed part of it, but you don't believe all of it. What part do you believe? What parts do you believe?

A Well, I believe that they're the ones that did kidnap her.

Q Okay. But you didn't believe the part about Odell Titsworth, you proved that to be wrong, didn't you?

A That's correct.

Q. Didn't believe the part about the pickup, you proved that to be wrong, didn't you?

A Yes.

failure to disclose these records and its resistance to disclosing the remainder of the outstanding evidence resulted in a Fourteenth Amendment Due Process violation.

IV. Mr. Fontenot's Sixth and Fourteenth Amendment Fundamental Right to Counsel Was Violated by the Ada Police Department's Interference with Attorney-Client Privilege.

The attorney-client privilege is the bedrock of any attorney's ability to ensure honest and open communication between lawyer and client. The Oklahoma Rules of Professional Conduct Rule 1.6 mandate the confidentiality of information between a lawyer and client. The comments to Rule 1.6 explain the importance of this rule as

> [2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. *See* Rule 1.0(e) for the definition of informed consent. This contributes to

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> Q And you didn't believe the part about where the body is, because you went and looked. You don't believe that, do you?
>
> A No, sir,
>
> Q So you want this Judge to pick and choose what you're picking and choosing, is that right? What to believe, is that right? Now, Detective, I didn't hear the response, was there a response?
>
> A (No audible response)

P/H p. 538-539 (George Butner cross examination of Detective Mike Baskins).

> the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex maze of law and regulations deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

The Supreme Court recognized that interference by the state in a defense counsel's privileged communications with their client can unduly impair the effectiveness of that counsel under the Sixth Amendment. *See Weatherford v. Bursey*, 429 U.S. 545, 554 (1977).

For a petitioner to establish a *per se* violation of the right to counsel, he must show an, "intentional prosecution intrusion [] lack[s] a legitimate purpose." *Shillinger v. Haworth*, 70 F.3d 1132, 1140 (10th Cir. 1995). The Tenth Circuit Court of Appeals found that a fundamental denial of counsel occurred when, "its purposeful intrusion into the attorney-client relationship and lacks a legitimate justification for doing so, a prejudicial effect on the reliability of the trial process must be presumed." *Shillinger*, 70 F.3d at 1142. Other Circuit Courts of Appeal have found similar grounds for *per se* Sixth and Fourteenth

Amendment violations where the prosecution retained records and memorandums about trial strategy from privileged information from the defense. *See e.g.* U.S. v. Danielson, 325 F.3d 1054 (9th Cir. 2003); *U.S. v. Chaves*, 902 F.3d 259 (4th Cir. 1990); *U.S. v. Mastoianni*, 749 F.2d 900, 904-908 (1st Cir. 1984) (Sixth Amendment violation analyzed when an informant attended defense meetings and law enforcement debriefed him).

The Ada Police Department violated Mr. Fontenot's Sixth Amendment fundamental right to counsel when they seized letters he wrote to his defense counsel. Found in the Ada police reports, and only recently disclosed, were original letters written by Mr. Fontenot addressed to his defense attorney "George" Butner. From other documents discussed in the Second Amended Petition, Mr. Fontenot was incarcerated by the Pontotoc County Sheriff. While in custody, his only means to communicate with counsel were visits and letters. Mr. Fontenot wrote these letters while in custody awaiting trial. In those letters, he asked questions about past legal visits, frustrations about the delay in his trial, questions as to his absence from Thomas Ward's court hearing, and most significantly, leads and witnesses who could testify about his innocence and alibi. (Dkt.# 123, Ex.# 95). One of the people Mr. Fontenot discussed was his ex-girlfriend, Dottie Edwards, who he dated around April 28, 1984.

The Ada Police Department interviewed Dorothy Edwards on November 27, 1984, after Mr. Fontenot was in custody. The interview conducted by Ada Police Officer D.W. Barrett consisted of the following:

> Det. Barrett talked to Dorothy Edwards by telephone on 11-27-84 at 8:00 P.M. while

she was at work. She said she dated Karl Fontenot about three or four times around the first of May 1984. She said they went in her Ford Torino. When they went to the River they went in Jannette's pickup. Jannette and Mike Roberts, she and Karl and Tommy Ward all went to the river together. Dorothy said she dated Karl two and a half or three weeks at the most. She said one of the reasons she stopped dating Karl was when he told her that the OSBI had come and talked to him about Denice Haraway. She said she talked to Karl right after he talked to the OSBI. Karl told her he was not in on it and had no knowledge of it. Dorothy does not remember if she was dating Karl on 4-28-84. She did go with him while he was living with Janette. She moved to Perry the last part of May 1984. Dorothy said she never saw Karl or Tommy in a pickup other than Jannette's. She said she went to school with Brian Cox, but didn't know if he owns a pickup. She has heard of Odell Titsworth but does not know him. She went to school at Ada High with his sister Kathy. Dorothy said she didn't know of a Ronald Tisdale. She said she did not go to any parties at Jannette's.

Dorothy said she met Karl through Jannette when she worked at Taco Tico. She said he seemed friendly, he had his own problems, his parents were dead and he was still copeing [sic] with that, he was down because

> he couldn't find a job, she said, "he was just a sweet guy."
>
> Dorothy said she went to school with Tommy Ward and never liked him. She tried not to go around Karl if Tommy was there. She was round him the day they went to the river, but she did not like him at all.

(Dkt.# 123, Ex.# 92).[35] Ms. Edwards' report demonstrates the police intercepted original letters from Mr. Fontenot to his attorney, retained them, and investigated based on those letters. These letters, beyond being the critical thread of communication between Mr. Fontenot and his counsel, would have provided helpful information to Mr. Butner Mr. Butner could have used these letters to prepare for trial and gained insight into Mr. Fontenot's behavior which could have helped his mitigation against the death penalty. Along with Ms. Edwards, Mr. Fontenot tried to give counsel a list of people who could confirm he was at Janette's on April 28, 1984, *i.e.* witnesses crucial to his alibi. These people included: Jannette Blood Roberts, Amy Blood, Bruce Self, Johnny Duck Konawa, Gordon Calhoun, Joe Youngblood, and Regina Youngblood. (Dkt.# 123, Ex.# 95). Although OSBI interviewed some of these people, these reports were not disclosed to defense counsel.

Mr. Fontenot expected these letters to be seen or delivered only to Mr. Butner. However, these letters were never mailed or delivered to Mr. Butner. Mr.

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[35] Ada police officers went to interview Mr. Fontenot shortly after 4-28-84, but he did not speak with them because he had to go to work. (N/T 6/10/1988 at 160-161). He was not interviewed again until he confessed in October 1984. *Id.* at 59-63.

Butner has reviewed these letters and states he was never made aware of them prior to either trial. (Dkt.# 123, Ex.# 98). Further, Terri Hull, who represented Mr. Fontenot during the first direct appeal and was counsel when Ms. Haraway's remains were found, also confirmed that she never saw these letters. (Dkt.# 123, Ex.# 97). There can be no legitimate reason why the Pontotoc County Sheriff's Office did not deliver these letters to Mr. Butner, or, more significantly, how these letters diverted to the custody of the Ada Police Department. *See U.S. v. Shreck*, 2006 U.S. Dist. LEXIS 33158, 17 (ND OK 2006) (discussing per se violations of the Sixth Amendment where there are "affirmative actions on the part of the government which comprised the attorney-client relationship.") It is now evident that police investigated several of the witnesses Mr. Fontenot had tried to tell his attorney about as a means to undercut his alibi defense. Not only did they commit the egregious act of withholding of exculpatory and impeachment evidence that was favorable to Mr. Fontenot's defense, they denied him even the ability to ensure his attorney knew of this evidence.

A fundamental violation under the Sixth Amendment occurs when, "[t]here are circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *U.S. v. Cronic*, 466 U.S. 648, 658 (9184). When law enforcement interferes with the attorney-client relationship in a criminal context, that interference may result in a fundamental violation per se. Here, Ada Police officers gained possession of original letters from Mr. Fontenot, investigated the witnesses he mentioned, and withheld evidence helpful to his

defense. By keeping the original letters, it crippled the privileged relationship between Mr. Fontenot and Mr. Butner.

The Court finds the actions of the Pontotoc County Sheriff and the Ada Police were not legitimate, and further finds proof of prejudice to substantiate a Sixth Amendment violation. Mr. Fontenot has met his burden to prove "a realistic possibility of injury or benefit to the State." *Rodriguez v. Zavaras*, 42 F.Supp. 29, 1059, 1084 (DC Co. 1999) *quoting Schillinger*, 20 F.3d at 1142. The prejudice occurred when the use of confidential letters from Mr. Fontenot to his counsel affected the attorney-client relationship.

Amazingly, these stolen letters reveal key information about an affirmative defense to murder, mitigating evidence to the death penalty and other useful information both through the trial and penalty phases.

As mentioned above, defense counsel never saw these letters. Mr. Butner did not have evidence proving Mr. Fontenot's alibi. (Dkt.# 123, Ex.# 81 at 34-37). The argument that everything mentioned in these letters could have been relayed in a visit is without merit given the lack of any defense presented at trial, the failure of Mr. Butner to call any of the witnesses mentioned by Mr. Fontenot during the trial, or appellate counsel seeing any indication in Mr. Butner's files of interviews with the people mentioned in the letters. And Respondent's argument that there is no violation of attorney-client privilege because the letters were not used against Mr. Fontenot, misses the point. These were private communications between a defense counsel and his client about Mr. Fontenot's thoughts and ideas about **his defense**. In

the letters, Mr. Fontenot discusses witnesses, strategy, and his thoughts about Mr. Butner and the process. Mr. Butner stated that he never saw these letters and Ms. Hull who had Mr. Butner's files for the appellate process echoed not seeing these communications. *See* Dkt.# 123, Ex.#s 97 & 98. Such actions by the Ada Police Department, "impair[ed] the accused enjoyment of the Sixth Amendment guarantee by disabling his counsel from full assisting and representing him. *Schillinger v. Haworth*, 70 F.3d 1132, 1141 (10th Cir. 1995).

Respondent's assertions of conversations between Mr. Butner and Mr. Fontenot before the trial court regarding whether Mr. Fontenot took the stand and other communications does not alleviate the possession of privileged correspondence hidden from counsel.[36] If Mr. Fontenot chose to communicate with his counsel via letters, that's his right to do so and that communication is protected under the rules of professional conduct and the Constitution. The number of times Mr. Fontenot and Mr. Butner discussed their defense and the manner in which they chose to do so is privileged from opposing counsel which included law enforcement. The Ada Police Department's confis-

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[36] During his deposition, Mr. Butner explained some of the problems he ran into while talking with Mr. Fontenot. (Dkt.#85, Ex.#9 at 27. Mr. Butner agreed that Mr. Fontenot was limited intellectually and said, "It was his personality too, because he was not, at that time, forward. I mean, he was reserved and—would not—he was not bubbling over with information . . . [S]pecifics to Mr. Fontenot, a specific was not in his vocabulary. He was a young person and a—what happened two days ago in Karl's life, he in all probability, could not remember or could not recall . . . I'm not sure Karl grasped at that time the gravity and the—and the issues because he was—he was a little quiet."

cation of Mr. Fontenot's privileged letters did not involve jail security or any legitimate law enforcement function. Such actions violated Mr. Fontenot's fundamental right to counsel.

The importance of this rule is evident by the *per se* violation under the Sixth Amendment. Despite what other communications occurred or did not occur, there is no plausible explanation or justification for keeping such correspondence from defense counsel. As the case law presented in the Second Amended Petition establishes, there is a per se violation when there is an "intentional prosecution intrusion[ ] lack[s] a legitimate purpose. *Shillinger*, 70 F.3d at 1140.

Conversely, the benefit to the prosecution and law enforcement is overwhelming–they presented defense counsel from knowing about helpful witnesses. And their actions foreclosed a fair trial by interviewing these people themselves and failing to disclose those interviews. Such a violation of attorney-client privilege strikes at the heart of the right to effective assistance of counsel guaranteed by the Sixth Amendment. The interference by the State in the most sacred relationship is an unconscionable and prejudicial infringement of Mr. Fontenot's right to counsel.

V. Mr. Fontenot's Sixth Amendment Right to Effective Assistance of Counsel Was Violated When His Trial Counsel Failed to Investigate the Case and Present Viable Evidence Supporting His Innocence

A trial counsel's function "is to make the adversarial testing process work in the particular case." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). To prevail on a claim of ineffective assistance of

counsel, a convicted defendant must show that counsel's representation fell below an objective standard of reasonableness, and that the deficient performance prejudiced the defendant, *Strickland*, 466 U.S. at 693, 104 S. Ct. 2067 and thus create a "reasonable probability" of a different result. *Id.* at 694. *See Rompilla v. Beard*, 545 U.S. 374, 390 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2001).

Deficient performance is "measured against an objective standard of reasonableness under prevailing professional norms." *Rompilla*, 545 U.S. at 380. Courts "long have referred" to the American Bar Association standards on the performance of counsel "as guides to determining what is reasonable." *Id.*; *Wiggins*, 539 U.S. at 524; *Strickland*, 466 U.S. at 688. [T]he American Bar Association Standards for Criminal Justice in circulation at the time of [Mr. Fontenot's] trial describe the obligation in circumstances such as those in the instant case:

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. **The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty**.

ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.) (emphasis added); *see also Rompilla*, 466 U.S. at 400. Counsel's performance fell below an objective standard of reasonableness in this case for several reasons. First, counsel failed to present evidence showing Mr. Fontenot's innocence of the charged actions when his co-defendant made statements exculpating him of the crime. Second, counsel neglected to investigate evidence showing that Mrs. Haraway was being stalked by someone familiar to her. Finally, defense counsel failed to impeach numerous State witnesses about their inconsistent statements.

a. Trial Counsel Was Ineffective for Failing to Introduce Tommy Ward's Sworn Statement Made During the Preliminary Hearing Exculpating Mr. Fontenot from Involvement in Mrs. Haraway's Case

On January 5, 1984, Tommy Ward testified in a closed hearing about his involvement in Mrs. Haraway's disappearance. This hearing took place in the middle of the only preliminary hearing in this case. Different from Mr. Ward's confession in October 2014, this testimony occurred under oath with both defense counsel present along with several representatives for the prosecution and law enforcement. Specifically, the trial judge, court reporter, Don Wyatt, Mr. Ward's defense counsel, George Butner, Mr. Fontenot's defense counsel, Bill Peterson and Chris Ross for the District Attorney's Office, Ada Detectives Dennis Smith and Mike Baskins, and several members of the Pontotoc County Sheriff's Office. (Dkt.# 123, Ex.# 60 at 27).

Mr. Ward's statement consisted of the following:

Defendant: And then we went from there [J.P.'s] to McAnally's.

Mr. Wyatt: You stopped at McAnally's?

Defendant: Uh-huh.

Mr. Wyatt: Did you go in?

Defendant: Yeah.

Mr. Wyatt: Did Discus–or Ashley go in? **Defendant**: yeah.

Mr. Wyatt: Why did you stop there?

Defendant: To get a beer.

Mr. Wyatt: What happened when you got inside?

Defendant: I walked back towards the back to get a beer, and Marty started talking to Donna (Denice Haraway), and—

Mr. Wyatt: Did Marty know Donna?

Defendant: Yeah.

Mr. Wyatt: How long had he known her?

Defendant: I don't know.

Mr. Wyatt: But they knew each other?

Defendant: Yeah. They, you know, acquainted each other when he come in.

Mr. Wyatt: What happened?

Defendant: He started flirting with her and she told him that he was married–I mean she was married. And then after she told him that she was married he goes, "You must not be happily married because if you was happily married you wouldn't have to be

working." And then he started hinting around to her about saying, "Well, if you marry me, and everything, you wouldn't have to do nothing, like this or anything."

Mr. Wyatt: Okay. Now, where were you when this conversation took place?

Defendant: I was getting ready to walk on back towards the back. And then I was kind of listening to them, you know, because I thought it was kind of funny, you know, after her saying that she was already married and everything, and then–so then I went on back to the back and then when I come on back up to the front he bent over the counter and kissed her. And then he walked out the door. And then I walked on up and payed [sic] for the beer. Then after I payed [sic] for the beer she come around the counter and went out the door and I walked out behind her. And then I walked out to the pickup, and then she–when I opened the door she goes, she was talking to Marty, and she goes, "Are you serious about what you're talking about?" And he goes, "Yeah." And so, she jumped in the pickup with him. And then we drove from there to my house, and that's when he let me out. It was about 9:00 when I got back to my house.

(Dkt.# 123, Ex.# 60). Mr. Ward said he made this statement under oath because he felt it would help his case and the police investigation into this case. *Id.* at 6. He testified that Mr. Fontenot did not participate in these events, or have knowledge that they occurred. *Id.* at 25. In fact, Mr. Ward only told Mr.

Fontenot about these events the morning of the hearing.[37] *Id.* at 36. Further, Mr. Ward testified the only reasons he implicated O'Dell Titsworth and Karl Fontenot in his October 1984 confession is because of Detective Smith's suggestion of what to say.[38] *Id.* at 27.

Mr. Ward's testimony coincided with details from the crime scene. He explained his purchase of a beer in the cooler at McAnally's, drinking some of it and leaving it on the counter after Mr. Ashley and Mrs. Haraway exited the store. *Id.* at 30. The last transaction on the McAnally's register tape shows $.80 for a Tallboy beer. (Dkt.# 123, Ex.# 34); (Dkt.# 123, Ex.# 43, prosecutorial bates 22), (Dkt.# 123, Ex.# 44, OSBI 0495). According to his statement, the cigarette Lenny Timmons saw in the store belonged to Mr. Ward. (Dkt.# 123, Ex.# 60 at 30); (J/T at 1089). All three, Mr. Ashley, Mr. Ward, and Mrs. Haraway, drove away in a gray, Chevy pickup truck that belonged to Mr. Ashley. (J/T at 1682).

Lenny Timmons testified that he entered McAnally's around 8:30 pm on April 28, 1984. He described passing a man and woman leaving the store, getting into a pickup truck, and driving away.

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[37] Mr. Ward's statement would have been admissible during Mr. Fontenot's trial under Okla. Stat. tit. 12 § 2408(B)(3) given that any statement made by Mr. Ward placing himself at McAnally's around the time of Ms. Haraway disappeared is clearly against his penal interest. To the extent that Mr. Butner failed to prove Mr. Ward was unavailable to testify is part of his ineffectiveness in failing to present this evidence.

[38] In Mr. Fontenot's recantation letter, he too stated that Detective Smith suggested much of the story in his confession. *See* Dkt.# 123, Ex.# 44 at 626.

(N/T 6-9-88 at 34). At the time, he paid little attention to the couple until he realized the store clerk was missing. After alerting his brother, David, and uncle, Gene Whelchel, they continued to search the store before calling police. All three men described a man climbing into the pick-up truck with a woman they believed to be Mrs. Haraway. (P/H at 269-270, 308-313; N/T 6-9-88 p. 38, 47-48, 56). During Mr. Ward's statement, he explained that he was the man walking Mrs. Haraway out of the store that evening. (Ex.# 60, at 9).

After Mr. Ward's statement, the police interviewed Marty Ashley and several other people Mr. Ward mentioned. Many of these people testified during the joint trial but not in Mr. Fontenot's trial.[39] As the pattern continues to reveal, these interviews were not disclosed at either trial, or through post-conviction proceedings. The sole exception was the taped statement of Marty Ashley found during post-conviction.[40] (Dkt.# 123, Ex.# 66). Detective Smith, along with Chief of Police Fox, interviewed Mr. Ashley at the Paul's Valley Police Station on January 10, 1985, the day after Mr. Ward's testimony. The police asked him his whereabouts on April 28, 1984, to which he said he did not know. *Id.*

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[39] These people include Marty Ashley, Shelly Mantzke, Theresa Mantzke, Jackie Mantzke, and Jay Dicus. (J/T 1646-1742).

[40] The Ada Police interviewed Marty Ashley, Jay Dicus, Shelly Mantzke, Theresa Mantzke, and Jackie Mantzke to investigate all or part of Mr. Ward's testimony. Many of these individuals testified for the prosecution during the joint trial and Mr. Butner attempted to examine them without the benefit of knowing what prior statements they made to police. (N/T 9-17-1985 at 1646-1740).

On cross examination during the joint trial, Mr. Ashley admitted that the police interviewed him only one time, even after telling them he could not remember where he was on April 28, 1984.[41] (Dkt.# 123, Ex.# 66; J/T 1678). Mr. Ashley, along with his girlfriend Theresa Mantzke, acknowledged living in Ada at the time of Mrs. Haraway's disappearance, but moving to Ardmore very early in May 1984. (J/T at 1720). She also could not recount where Mr. Ashley was on April 28, 1984, but he was not with her. (J/T at 1724). The police failed to inquire whether Mr. Ashley owned or had access to a pickup truck . . . which he in fact did. (J/T at 658, 1682).

The undisclosed interviews took place on the days following Mr. Ward's testimony and were conducted by Ada Police Detective Mike Baskins, Ada Police Detective Dennis Smith, and DA Investigator Lloyd Bond. (Ex.# 88). These reports were individual interviews with little purpose other than to disprove Mr. Ward's testimony. There is no investigation into the discrepancies provided by Mr. Ashley and his girlfriend's testimony, or into where Mr. Ashley was when Mr. Ward said Mr. Ashley drove off with Mrs. Haraway. Detective Baskins interviewed Anthony Norman at the Ada Police Department about his knowledge of "Tommy Ward and Jackie Mantzke." (Dkt.# 123, Ex.# 88). Mr. Norman provided character evidence about Mr. Ward and said he did not remember Mr. Ashley being at the

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[41] The police took a photograph of Marty Ashley during their interview. (Dkt.# 123, Ex.#s 39,40). It is unknown whether police received any calls as to whether Mr. Ashley resembled the composite drawing or if they showed any other witnesses Mr. Ashley's photograph.

Mantzke household when Mr. Norman was there. *Id.* Detective Baskins concluded his report by stating, "Tommy did not seem sure about his answers. He had to think before answering questions. He answered slowly and would not definitely commit himself to questions." *Id.* Clearly, the police investigation was committed to its theory of the case despite the weaknesses and contradictory evidence that continued to emerge.

Mr. Ward's statement should have been used by Mr. Fontenot's defense counsel during his trial. Clearly, this statement would have been admissible under Title 12 § 2804(B)(3) Admission Against Penal Interest.[42] *See generally Funkhouser v. State*, 1987 OK CR 44; 734 P.2d 815 (OK 1987)(outlining the procedure for declaring a witness unavailable and explaining that there is no confrontation clause issue when there has been an opportunity to cross-examine the witness); *see also Britt v. State*, 1986 OK CR 99; 721 P.2d 812 (Ok. 1986). The fact that Mr. Butner failed to try to admit the statement into evidence, establish that Mr. Ward was unavailable to testify in Mr. Fontenot's trial, given that his own trial was scheduled after Mr. Ward's.

Further, this was evidence that strongly supported the defense's case. The fact that Mr. Butner repeatedly requested in discovery motions, in motions in limine, and on the record his desire for exculpatory evidence

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[42] The State introduced Mr. Ward's statement against him during his separate trial in 1989, through Detective Dennis Smith who was present and could testify as to what occurred during the hearing. (Ward Vol. 6 p. 127 132). Since, Detective Smith testified in Mr. Fontenot's trial, defense counsel had the opportunity to introduce such crucial exculpatory evidence in similar fashion.

and any evidence showing Mr. Fontenot's lack of knowledge exacerbates his ineffectiveness on this issue. Defense counsel knew Marty Ashley had no alibi, his girlfriend was adamant he was not with her the day of the kidnapping, and both moved out of Ada days after Mrs. Haraway disappeared. Not only does this evidence corroborate Mr. Ward's statement, it creates reasonable doubt as to Mr. Fontenot's participation in the crimes against Mrs. Haraway. (Dkt.# 123, Ex.# 81, at 35-36). What better evidence to present but Mr. Fontenot's co-defendant explaining not only that his client was unaware of his criminal actions, but that Mr. Fontenot was only told about such criminal activity the morning of January 9, 1985. There could be no strategic or tactical reason for such ineffective actions that deprived Mr. Fontenot of valuable evidence showing his innocence. Mr. Butner concedes his ineffectiveness for failing to present this evidence:

> During the preliminary hearing, Tommy Ward made a sworn statement during a closed hearing. I was present at the hearing along with Mr. Wyatt, counsel for Mr. Mr. Ward, Pontotoc County District Attorney Bill Peterson, Assistant District Attorney Chris Ross, and law enforcement. Mr. Ward gave a detailed statement about being present at J.P.'s convenience store and McAnally's with Marty Ashley. Mr. Ward stated that Mr. Fontenot was not present having nothing to do with the events of April 28, 1984. This statement was very helpful to Mr. Fontenot's case because it proved crucial evidence from his co-defendant that he had no involvement

> in Mrs. Haraway's disappearance. **While I used this statement in Mr. Fontenot's joint trial with Tommy Ward, I did not introduce it into evidence during Mr. Fontenot's second trial. I had no strategic reason for not using it. It clearly fit within my trial strategy to show Mr. Fontenot had nothing to do with Mrs. Haraway's homicide.**

(Dkt.# 123, Ex.# 16) (emphasis added); (Dkt.# 123, Ex.# 81). Mr. Butner's performance was deficient for failing to include this exculpatory piece of evidence during his trial.

In determining whether a defendant has been prejudiced by his trial counsel's deficient performance, a court must consider whether a defendant has suffered actual prejudice from his attorney's actions. Similar to *Brady*'s materiality standard, a defendant must establish those deficiencies were prejudicial, defined as errors that collectively "undermine confidence in the outcome," and thus create a "reasonable probability" of a different result, *Strickland*, 466 U.S at 694. As a court assesses whether a defendant suffered prejudice, it must assess the totality of the evidence before the factfinder. *Id.* at 695. Given the absence of any independent physical evidence connecting Mr. Fontenot to the crimes against Mrs. Haraway, a cumulative evaluation of the evidence not presented to the jury including: the exculpatory statements by the co-defendant, along with the *Brady* materials not presented during trial including the alibi testimony, would have impacted the jury's deliberation and verdict. Failure to introduce Mr. Ward's statement resulted

in ineffective assistance of counsel in violation of Mr. Fontenot's Sixth Amendment rights.

b. Trial Counsel Was Ineffective for Failing to Investigate Evidence of Denice Haraway Being Stalked and Evidence Establishing a Different Motive for the Crime.

i. Defense investigation reports showing Denice Haraway's fear of obscene phone calls she received.

The trial court granted limited funds for investigation for Mr. Fontenot's second trial. Richard Kerner, who assisted Mr. Wyatt during the investigation for Tommy Ward and worked for Mr. Butner prior to trial stated that during the course of his investigation, he found an important witness who would have provided not only an alternate motivation for the abduction of Mrs. Haraway, but potential alternate suspects as well. Mr. Kerner interviewed Anthony Johnson, a frequent customer at McAnally's. Mr. Johnson remembered a conversation he had with Mrs. Haraway a week before her disappearance.

> Johnson is a co-worker with Tommy Ward's sister, Tricia Wolf in an Ada, Oklahoma plant. Johnson admitted to this investigator that one week before Haraway's disappearance he was in the McAnally's convenience store when Haraway asked him where she could buy a gun. **Harraway [sic] referenced the need for a gun with some funny calls she had recently been receiving. Haraway said she didn't really know who**

> **was making the calls, and that the caller never really said anything, just did some heavy breathing on the phone. Johnson asked Haraway if she had any ex-boyfriends that could be making these calls and said that Johnson was of the opinion that she knew who was making the calls but did not seem to want to indicate who it was.**

(Dkt.# 123, Ex.# 22) (emphasis added). Defense counsel submitted a subpoena for Mr. Johnson's appearance for Mr. Fontenot's trial, but it was never served. (Ex.# 71). Clearly Mr. Johnson was a witness that defense counsel sought to present during Mr. Fontenot's defense-in-chief, but Mr. Johnson never testified. There was no strategic or tactical reason not to present such evidence showing that Mrs. Haraway not only received obscene phone calls and that someone was watching and harassing her over a longer period of time prior to her disappearance, but also demonstrating her fear of this individual to the degree she inquired about buying a gun. Not only should Mr. Johnson have testified at trial, but defense counsel should have pursued such leads further. The failure to do so resulted in ineffective assistance of counsel for failing to call Mr. Johnson as a witness and for not developing such evidence.

The cumulative effect of this evidence demonstrates actual prejudice. The totality of the evidence not presented to a jury paints a picture of alternate suspects having motive to harm Mrs. Haraway. Given the weakness of the prosecution's case against Mr. Fontenot, the impact of the unknown and unpresented evidence is immense.

ii. Register tape showing witnesses who were in McAnally's in short proximity to her disappearance

Detective Dennis Smith made numerous requests for people who were in McAnally's the night of Denice's disappearance to contact the APD with information about the time they were in the store and the purchases made. (Dkt.# 123, Ex.# 27). In response to the APD request, at least four people contacted the police department to explain what purchases they made and what time they recalled being in the store. Their names, times, and, on occasion, contact information was included on the register tape. (Dkt.# 123, Ex.#s 32-38). The State introduced the register tape into evidence at both trials and it was available to Mr. Fontenot's first direct appeal counsel. (J/T at 1160); (States's Ex.# 16); (N/T 6/9/1988 at 197); (State's Trial Ex.# 60). That neither defense counsel, at trial or on appeal, reviewed the entirety of the register tape was ineffective performance.

Defense counsel's obligation to evaluate and investigate not only the factual witnesses the prosecution intended to call at trial, but also the physical evidence supporting the case, is a basic tenant of providing effective assistance of counsel. "Apart from any formal processes of discovery that are available, prosecutors and law enforcement officers have in their possession facts that defense counsel must know. Prosecutors will often reveal facts freely in the hope of inducing a guilty plea. If defense counsel can secure information known to the prosecutor, it will obviously facilitate investigation." ABA Standards for Criminal Justice 4-4.1 Commentary (2d ed. 1982 Supp.). Coun-

sel's failure to fully evaluate the State's evidence introduced at trial resulted in crucial evidence which challenged the State's theory of the case going undeveloped.

Not only was the testimony as to what the four people witnessed in the store that night extremely helpful, but the timing of their purchases along with the other transactions establish a very narrow window in which Mrs. Haraway could have disappeared. (Dkt.# 123, Ex.#s 67 & 68). The State's theory rested largely on the testimony of David and Lenny Timmons and Gene Whelchel to establish the man and woman walking out of McAnally's were Mr. Ward and Mrs. Haraway. (P/H at 349, 351, 3680; N/T 6/14/1988 at 26-28). All three men describe seeing only one man in the truck. (N/T 6/9/1988 at 38, 40, 47-48, 51, 59-60). The description they provided resembled Mr. Ward. (P/H at 341). Had the defense utilized the information gleaned from the register tape, exculpatory evidence would have been presented to the jury. First, the witnesses would have narrowed down the window of her disappearance based on Mr. Keyes' transaction at 8:25 pm and the four purchases immediately after his. Additionally, it lent credence to Mr. Ward's statement of kidnapping Mrs. Haraway with Mr. Ashley.

In the alternative, defense counsel could have used the information presented by Mr. Haney of a man seen in McAnally's behind the counter with Mrs. Haraway. The gray primered truck described by several witnesses was in the McAnally's parking lot at least thirty minutes before Mrs. Haraway's abduction. (Dkt.# 123, Ex.#s 6 & 4). However, this evidence was not developed by the defense. This evidence con-

sidered cumulatively with the records impermissibly withheld by the State presents a viable defense that the man harassing Mrs. Haraway for months and weeks leading up to April 28th, was involved in her disappearance. *See supra* Claim II; *Williams v. Taylor*, 529 U.S. 362, 399, 120 S. Ct. 1495, 1516, 146 L.Ed.2d 389, 421 (2000) (holding that a cumulative review of ineffective assistance of counsel claims requires both evidence presented at trial and not presented); *Wiggins v. Smith*, 539 U.S. 510, 538, 123 S. Ct. 2527, 2544, 156 L.Ed.2d 471, 495 (2003); *Rompilla v. Beard*, 545 U.S. 374, 393, 125 S. Ct. 2456, 2469, 162 L.Ed.2d 360, 379 (2005).

Finally, defense counsel could have interviewed Gene Whelchel about the 9:00 pm transaction. An investigator could have inquired who rang up the purchase, what the purchase was, and why the crime scene was not immediately closed down upon the arrival of Officer Harvey Philips and Detective Mike Baskins at approximately 8:55 pm. (Dkt.# 123, Ex.# 41). (dispatch was logged at 8:50 pm). This line of investigation could establish how vital evidence was lost due to improper police procedure. (J/T at 1239-1240, 1422-23, 1439, 1441, 1447-48). Defense counsel could have impeached Mr. Whelchel about the timing of events, inquired more specifically as to those present in McAnally's after his initial call, and whether the State's timing was off given the details provided on the register tape. Evidence presented at trial showed the police failed to close the store to process the scene as other customers bought gas and items from the store. (N/T 6/9/1985 at 92-93). Since it is clear the police seized the register tape, their documentation of the timing of transactions goes to the

thoroughness of their investigation. Solidifying the timing of the only eyewitness accounts and the immediate actions of the police in response to this evidence was crucial for the defense. The defense's failure to pursue this evidence deprived Mr. Fontenot of numerous means to challenge the State's case.

It is the defense counsel's duty to investigate all aspects of the State's case including the physical evidence introduced in trial. "The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense," it is an obligation set forth in the ABA Standards regarding the baseline of representation a defense attorney must provide his client. *Rompilla v. Beard*, 545 U.S. 374, 387 (2005). Defense counsel failed to investigate viable leads and build such evidence into a defense he sought to pursue. (Ex.# 16). Further, appellate counsel, likewise, should have pursued this evidence in building a defense for Mr. Fontenot. (Dkt.# 123, Ex.# 11). It is not enough that the defense reviewed this evidence in court, but prior to the proceedings.

Defense counsel's failure to investigate Mr. Fontenot's case due to limited funding does not negate his constitutional obligation. *See Hinton v. Alabama*, 134 S. Ct. 1081, 1088-1089 (2014) (ineffective assistance of counsel was found when defense counsel failed to ask for further investigative funds for an expert). This Court must determine the impact of the absence of this evidence on the totality of his case. "In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a rea-

sonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S 510, 527 (2003).

All the evidence mentioned was available to defense counsel prior to trial, but none of it was presented to the jury. Had it been, there is a reasonable probability of a different result due to the weakness of the State's case against Mr. Fontenot. *See Strickland*, 466 U.S. at 694. The prosecution's case rested on Mr. Fontenot's confession which did not coincide with any evidence they presented, including the cause of Mrs. Haraway's death, the location of her remains, and the details of how he supposedly killed her. (Dkt.# 123, Ex.#s 18, 45, & 68). Further, the sole eyewitness at McAnally's who places Mr. Fontenot at the scene recanted his testimony after the preliminary hearing and attempted to tell the State the same. (J /T at 1042, 1051-52, 1056-1057); (Dkt.# 123, Ex.#14). But for defense counsel's failure to challenge the evidence the State presented, Mr. Fontenot would not have been convicted of these crimes. The failure to investigate this evidence deprived Mr. Fontenot of his Sixth Amendment right to effective assistance of counsel.

VI. Mr. Fontenot's Sixth Amendment Right to Effective Assistance of Appellate Counsel Was Violated When His Appellate Counsel Failed to Present Viable Constitutional Claims in Mr. Fontenot's Direct Appeal Proceedings

The claims and factual allegations set forth in Petitioner's Second Amended Petition also establish Mr. Fontenot received ineffective assistance of appellate counsel. Under *Strickland v.*

Washington, 466 U.S. 668 (1984) counsel provides ineffective assistance whenever (1) counsel's performance is deficient, *i.e.*, that the attorney's performance fell below "an objective standard of reasonableness," *Id.* at 688; and (2) those deficiencies were prejudicial, defined as errors that collective "undermine confidence in the outcome," and thus create a "reasonable probability" of a different result, *Id.* at 694. *See Rompilla v. Beard*, 545 U.S. 374, 390 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2001).

Mr. Fontenot suffered ineffective assistance of counsel on direct appeal because appellate counsel failed to raise substantial and cognizable state and federal constitutional issues, and failed to raise all available grounds, on his direct appeal to the Oklahoma Court of Criminal Appeals. There was no strategic or tactical reason for not presenting these claims in Mr. Fontenot's second direct appeal brief. Had appellate counsel raised these issues, it is likely that the Oklahoma Court of Criminal Appeals would have reversed his conviction and ordered a new trial. Because appellate counsel failed to raise substantial and cognizable constitutional claims Mr. Fontenot was deprived of appellate review of the constitutional errors inherent in his trial, and the reliability of the judgment and sentence.

VII. Mr. Fontenot's Due Process Rights Were Violated Due to Police Misconduct When Taking a False Confession and the Prosecution Knowingly Introduced False Testimony During His Trial in Violation of the Fifth and Fourteenth Amendment to the U.S. Constitution.

A. Police Misconduct in The Interrogations of Mr. Fontenot

On October 19, 1984, at the OSBI office in Ada, Oklahoma, detectives videotaped Mr. Fontenot's "confession" to the murder of Denice Haraway. However, before the video machine was turned on, Agent Gary Rogers and Detective Dennis Smith conducted a one hour and forty-five-minute interrogation that was not included on the videotape. (P/H. at 960-61; J/T at 2034, 2047). Prior to the interrogation, Detective Smith acknowledged that Mr. Rogers read Mr. Fontenot his rights, but no *Miranda* form was ever presented to him, nor did Mr. Fontenot ever sign a form. (P/H at 956-957); *Miranda v. Arizona*, 384 U.S. 436 (1966). Although Mr. Fontenot's interrogators deny ever having threatened or coerced him,[43] it is indisputable that during the time prior to turning on the video recorder, the interrogators supplied Mr. Fontenot with the information that Tommy Ward had confessed to the murder of Mrs. Haraway and inculpated Mr. Fontenot in his confession.[44] (P/H at

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[43] This statement is dubious at best given the other witnesses who admit being pressured to alter their accounts: Stacy Shelton, Karen Wise, and Jim Moyer.

[44] Mr. Ward's confession was the product of hours of interrogation. After police repeatedly insisted it was in Mr. Ward's self-interest

960). Even though. Mr. Fontenot denied knowing anything about Mrs. Haraway's disappearance, or what Mr. Ward's confession involved, both interrogators ignored his denials and continued to tell him he knew about the crimes. (P/H at 961-962). Agent Rogers and Detective Smith began feeding Mr. Fontenot information about the crime to aid in his confession.

> A. Well before his story changed, I think Agent Rogers mentioned to him that we knew that he and Tommy Ward and Odell Titsworth were at a party on South Townsend.
>
> Q. Okay.
>
> A. And we knew that they had left the party and where they had gone.
>
> Q. Okay. All right. What else did you tell him, or Agent Rogers tell him?
>
> A. I think that was basically the extent of it and—
>
> Q. Was the name Odell Titsworth mentioned prior to Agent Rogers mentioning it?
>
> A. I don't think so.

(P/H. at 964); (Dkt.# 123, Ex.# 44 at 626). Giving Mr. Fontenot details of Mr. Ward's confession could have

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to admit to the murder of Denice Haraway, even after he denied any involvement, he told police that he had a dream about the murder. Mr. Ward's description of the dream was considered a confession by police, but was not corroborated by any credible evidence.

ingrained information in Mr. Fontenot's mind that became part of his confession.[45]

The confession included several facts that could not be corroborated with any evidence. According to his confession, Mr. Fontenot attended a party with his co-defendant, Tommy Ward, and Odell Titsworth.[46] (Dkt.# 123, Ex.#s 19 & 69). The three men drove to McAnally's in Mr. Titsworth's truck, where they abducted Denice Haraway and subsequently took her out behind a power plant in Ada. The three men took turns raping the victim before transporting her in Mr. Titsworth's truck to a house off of a country road near the power plant. At the house, Mrs. Haraway was stabbed to death, and burned. (Dkt.# 123, Ex.# 69, at 1-21). Mr. Fontenot did not know Mr. Titsworth prior to being shown his picture and presenting Mr. Titsworth to Mr. Fontenot's jail cell. (P/H at 968, 994-995).

After investigating these claims, police knew that nothing in Mr. Fontenot's confession could be verified. First, the police eliminated Mr. Titsworth as a suspect due to his broken arm on the night in question. Furthermore, neither Mr. Titsworth nor his family owned a truck like the one described in Karl's statement. (P/H at 965). Further, the medical examiner's report established that Mrs. Haraway was not

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[45] False confessions occurred in 13% of the 1,730 known exonerations in this country. *See* https://www.law.umich.edu/special/exoneration/Pages/about.aspx.

[46] It is interesting that police disclosed the videotaped confession to Mr. Butner, but failed to include the polygraphed and handwritten statement where Mr. Fontenot detailed being at a party and people he was present with.

stabbed, but died from a single gunshot wound to the head. (Dkt.# 123, Ex.# 46, at 1, 3, 12, 40). Mrs. Haraway's body was found a county over from where Mr. Fontenot had said it would be found. Finally, the house Mr. Fontenot claimed had been burned with Mrs. Haraway's body inside had in fact been burned a year before the murder occurred. (P/H at 977). These discrepancies, along with the fact that the details of Mr. Fontenot's confession changed several times before the police recorded it, leaves questions about how such a confession could be made, much less considered reliable.(P/H at 973-74, 1372, 1420-1421). Most importantly, Mr. Fontenot recanted his confession shortly after giving it-but that evidence was withheld from his defense attorney. (Dkt.# 123, Ex.# 44, at 626).

Police interrogations, by their very nature are coercive. However, police are trained to investigate a case before interrogating suspects to ensure only the strongest suspects are subjected to the process. As noted by counsel for Mr. Fontenot:

> There are three important decision points in the interrogation process to analyze when trying to understand the causes of a false confession. The first decision point is the police decision to classify someone as a suspect. This is important because police only *interrogate* individuals whom they first classify as suspects; police *interview* witnesses and victims. There is a big difference between interrogation and interviewing: unlike interviewing, an interrogation is accusatory, involves the application of specialized psychological interrogation

techniques, and the ultimate purpose of an interrogation is to get an incriminating statement from someone whom police believe to be guilty of the crime. **False confessions only occur when police misclassify an innocent suspect as guilty and then subject him to a custodial interrogation. This is one reason why interrogation training manuals implore detectives to adequately investigate their cases before subjecting any potential suspect to an accusatorial interrogation**.[47]

The second important decision point in the process occurs when the police interrogate the suspect. As mentioned above, the goal of police interrogation is to elicit a voluntary incriminating statement from the suspect by moving him from denial to admission. To accomplish this, police use psychologically persuasive, manipulative and deceptive interrogation techniques. As described in

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47 Fred Inbau, John Reid and Joseph Buckley (1986). CRIMINAL INTERROGATION AND CONFESSIONS, Third Edition (Baltimore, MD: Williams & Wilkins) at 3 ("Prior to the interrogation, and preferably before any contact with the suspect, become thoroughly familiar with all the known facts and circumstances of the case."). *See also* Fred Inbau, John Reid, Joseph Buckley and Brian Jayne (2013). CRIMINAL INTERROGATION AND CONFESSIONS, 5th Edition (Burlington, MA: Jones & Bartlett Learning) at 18 ("One basic principle to which there must be full adherence is that the interrogation of suspects should follow, and not precede, an investigation conducted to the full extent permissible by the allowable time and circumstances of the particular case. The authors suggest, therefore, that a good guideline to follow is "investigate before you interrogate.").

detail in the previous section, police interrogators use these techniques to accuse the suspect of committing a crime, persuade him that he is caught and that the case evidence overwhelmingly establishes his guilt, and then induce him to confess by suggesting it is the best course of action for him. **Properly trained police interrogators do not use physically or psychologically coercive techniques because they may result in involuntary and/or unreliable incriminating statements, admissions and/or confessions.**

To understand how and why police-induced false confessions occur, one must first understand how interrogation is intended to influence and manipulate a suspect's perceptions, reasoning and decision-making. **Police interrogation is designed for the guilty, not the innocent. Police are trained only to interrogate suspects whom they believe to be guilty,[48] and the purpose of interrogation of suspects unlike the interviewing of witnesses or victims is to elicit an incriminating statement, admission and/or confession**

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48 *See also* Fred Inbau, John Reid, Joseph Buckley and Brian Jayne (2013). CRIMINAL INTERROGATION AND CONFESSIONS, 5th Edition (Burlington, MA: Jones & Bartlett Learning) at 187 ("These nine steps are presented in the context of the interrogation of suspects whose guilt seems definite or reasonably certain"). For empirical support for this observation, *see* Richard A. Leo (2008). POLICE INTERROGATION AND AMERICAN JUSTICE (Harvard University Press).

> **that confirms the interrogator's belief in the suspect's guilt and assists the state in prosecuting the suspect**. Because police expect the suspect to deny his guilt, interrogation is intended to break down the suspect's resistance and move him to admission. As discussed above, police typically achieve this by accusing a suspect of committing the crime, attacking the suspect's alibi, cutting off a suspect's denials and confronting the suspect with seemingly irrefutable (whether real or non-existent) evidence of his guilt. The point of these techniques is to break down a suspect's confidence in his denials by convincing him that he is caught, that no one will believe his assertions of innocence, and that objective evidence of his guilt is so overwhelming that it will inevitably lead to his arrest and conviction regardless of what he says or does during interrogation.

(Dkt.# 123, Ex.# 19, at 11) (emphasis added).

Here, Detective Smith admitted Mr. Fontenot was unknown to the police prior to his arrest.(P/H at 948). He had never been involved in any crimes or interrogated prior to the events of October 19, 1984. (J/T at 1607-1608). The only reason Mr. Fontenot was arrested and subjected to this interrogation is because Mr. Ward mentioned him during his interrogation the day before based on a suspect lead provided by Jeff Miller. Prior to being arrested, no other individual provided any inculpatory evidence connecting Mr. Fontenot to Mrs. Haraway other than Mr. Ward. Law enforcement is trained to conduct a

thorough investigation into the suspects prior to commencing the interrogation to ensure the evidence given is valid. (Dkt.# 123, Ex.# 19).

> The purpose of evaluating the fit between a suspect's post-admission narrative and the underlying crime facts and derivative crime evidence is to test the suspect's actual knowledge of the crime. **If the suspect's post-admission narrative corroborates details only the police know, leads to new or previously undiscovered evidence of guilt, explains apparent crime fact anomalies and is corroborated by independent facts and evidence, then the suspect's post-admission narrative objectively demonstrates that he possesses the actual knowledge that would be known only by the true perpetrator and therefore is strong evidence of guilt.**

(Dkt.# 123, Ex.# 19, at 15-16).

No investigation was done into the possibility of Mr. Fontenot being involved other than police taking as true Mr. Ward's confession the prior day. Such lax police investigation before the interrogations led to the corrupted investigation which followed in the days and weeks after these confessions where nothing either defendant said could be verified.

> If the suspect is innocent, the detective can use the suspect's post-admission narrative to establish his lack of knowledge and thus demonstrate his likely or certain innocence. **Whereas a guilty suspect can corroborate**

> **his admission because of his actual knowledge of the crime, the innocent suspect cannot. The more information the interrogator seeks, the more frequently and clearly an innocent suspect will demonstrate his ignorance of the crime. His answers will turn out either to be wrong, to defy evaluation, or to be of no value for discriminating between guilt and innocence.** Assuming that neither the investigator nor the media have contaminated the suspect by transferring information about the crime facts, or that the extent of contamination is known, the likelihood that his answers will be correct should be no better than chance. Absent contamination, the only time an innocent person will contribute correct information is when he makes an unlucky guess. The likelihood of an unlucky guess diminishes as the number of possible answers to an investigator's questions grows large. If, however, his answers about missing evidence are proven wrong, he cannot supply verifiable information that should be known to the perpetrator, and he inaccurately describes verifiable crime facts, then the post-admission narrative provides evidence of innocence.

Id. at 19-20 (emphasis added.). At every turn, law enforcement uncovered absolutely no evidence from the "confession." Mr. Fontenot described Mr. Titsworth as 5'10" to 5'11' and weighing approximately 140-150 pounds. He said his hair length was just below his ears and Mr. Titsworth had no distinguishing marks

or tattoos. (J/T at 2074-75). In actuality, Mr. Titsworth's hair fell to mid-waist, he weighed 170 lbs. and had sleeve tattoos from his shoulders to his wrists, tattoos along his back, stomach and both legs. Further, the Ada police broke Mr. Titsworth's arm during his arrest two days prior to Mrs. Haraway's disappearance. (P/H at 792-793, 795797, 838). When Mr. Fontenot was shown pictures of Mr. Titsworth, he was unable to identify him. (P/H at 968, 994-995).

Police interrogated Mr. Titsworth along with seizing his mother's truck. After the police searched the truck and after Mr. Titsworth's repeated denials and verification of his broken arm, they realized neither he nor his property had anything to do with the crime. (P/H. at 520, 522). Police repeatedly tried to locate Mrs. Haraway's remains at the power plant and surrounding areas with no success despite seventy-five to eighty people being involved in the search. (P/H at 599-600); (N/T 6/10/1988 at 83-85, 89-90).

During the preliminary hearing, defense counsel asked Detective Baskins if he was able to corroborate any parts of Mr. Fontenot's confession.

Q. Has he told you anything that you have been able to ascertain is the truth? You personally?

A. No.

Q. No fact in his statement, you have been able to prove right or wrong have you? A. No.

Q. To the best of your knowledge, Detective Baskins, has any statement that Karl Fontenot made to you been–any fact, at all, been proven true or false? Any fact?

A. To me personally, no.

Q. Now, what about Tommy Ward? Any fact that Tommy Ward has told you, have you proven or disproven any fact that he's told you?

A. The ones he's told me personally, disproved.

Q. So the ones he's told you personally and the facts about this case and the statements he's made, no facts have you been able to prove. Is that right?

A. That he's made to me personally?

Q. Yes, sir.

A. That's correct.

(P/H at 546-547). Detective Baskins attempted to locate the crime scene based on the claims in Mr. Ward's and Mr. Fontenot's confessions. He received a series of telephone calls from Agent Rogers and Detective Smith on possible locations based on the "evidence" given in the confessions. However, after numerous searches, only animal bones were recovered. (N/T 6/10/1988, at 169). In the totality of their investigation, the police lacked any physical evidence or eyewitness accounts to support Mr. Fontenot's confession. *Id.* at 178-179.

Due to the inability of law enforcement to support his confession with any meaningful evidence, they resorted to several improper actions to garner viable evidence from Mr. Fontenot. After the confession, but before he was arraigned, Detectives Smith and Baskins **took a sack of human bones to his cell** to coerce Mr. Fontenot to tell them the whereabouts

of the victim's body. (N/T. 6/10/1988 at 172) (emphasis added). Police showed Mr. Fontenot a human skull stating that they had found Mrs. Haraway, and wanted to find the rest of her remains so that her family could proceed with giving her a Christian burial. (P/H at 537, 559, 981-82). These bones were obtained from a science lab at East Central University in Ada and used improperly as a tool to intimidate Mr. Fontenot. (P/H at 975-76).

Although this tactic was used after a confession had already been obtained, it is illustrative of the coercion surrounding Mr. Fontenot's confession and the desperation of the police. The actions of the Ada Police and OSBI agents involved in the interrogations of Mr. Fontenot engaged in police misconduct in violation of known police procedure and Mr. Fontenot's constitutional rights.

B. Mr. Fontenot's Confession Is False and Unreliable.

Based on the detective's own admissions, there is no reliable information provided in Mr. Fontenot's confession. Police did not learn one detail as to what occurred to Mrs. Haraway on the night of April 28, 1984, that they did not already know. No new leads were developed, or witnesses found. Every attempt by the Ada police and OSBI to substantiate Mr. Fontenot's confession resulted in dead ends. Instead of acknowledging that Mr. Fontenot did not know anything about the case, police and the prosecution continued to blindly pursue a defendant with no involvement in these crimes.

Dr. Richard Leo, a renowned psychologist who studies interrogations and confessions has reviewed

the evidence in Mr. Fontenot's case concerning the validity and reliability of Mr. Fontenot's confession:

> In my professional opinion, Karl Fontenot's confession statement to abducting, raping, murdering, and burning the body of Denice Haraway with Tommy Ward and Odell Titsworth contains *numerous* and *substantial* indicia of unreliability and no–zero–corresponding indicia of reliability. Karl Fontenot's confession statement possesses all of the hallmarks of a false and unreliable confession in spades. In the thousands of confessions I have analyzed in the last three decades, I have rarely seen a post-admission narrative that is so thoroughly contradicted by the underlying crime facts, that fails so completely to demonstrate the lack of any personal knowledge of the crime facts, and that contains so many alleged crime scene details that were not merely erroneous but physically impossible and provably false. In my professional opinion, Karl Fontenot's confession statement is almost certainly, if not certainly, false.

The numerous and substantial indicia of unreliability include:

1) Karl Fontenot's confession statement contains the wrong method of killing: Fontenot confessed that Haraway was stabbed to death when, in fact, she was murdered by a single gunshot to the head. There is no evidence that Fontenot ever owned a gun. Significantly, Fontenot's confession statement did not mention that Haraway (whose body

had not been discovered until more than a year after the murder) had been shot in the head or even that a gun was involved in the crime. Additionally, there is no evidence that Haraway was ever stabbed nor is there any evidence that she was raped or that her body was burned, contrary to Fontenot's confession statement.

2) In Fontenot's confession statement, the body had been burned in an abandoned house near the power plant and then Titsworth, Ward and Fontenot burned down the house. Not only is there no evidence that Haraway's body was burned, but the abandoned house had been torn down and burned in June 1983–10 months before the murder of Denice Haraway in April 1984–and so did not exist at the time of the crime. It was therefore physically impossible for Fontenot, Ward and Titsworth to have burned down the house in April 1984 because it no longer existed at that time. Nor had there been any fire reported on that property on April 28, 1984.

3) Fontenot's confession statement claims that Odell Titsworth physically forced Haraway to get into a pick-up truck, carried Haraway, raped her, stabbed her, and set her on fire. Because Titsworth's arm had been broken by the Ada Police Department on April 26, 1984 (two days before the murder of Denice Haraway on April 28, 1984), he had a very painful spiral fracture that would have made it impossible for him to have physically

forced Haraway to get into a truck and thereafter carry Haraway and put her over a fence, much less rape, stab or set her on fire. Indeed, Titsworth was eventually cleared of the crime altogether, making his presence in Fontenot's confession statement a major red flag for a false confession. Fontenot makes no mention of Titsworth's injury in his confession.

4) Remarkably, Fontenot could neither correctly describe nor even identify Titsworth. Fontenot described Titsworth as 5'10-5"11, 140-150 lbs., with black hair below his ears, and as having no tattoos or distinguishing marks. In fact, Titsworth was 170 lbs., had hair down to the middle of his waist, and was covered in visible tattoos on both arms and both legs. Obviously, Fontenot did not know who Odell Titsworth was. Not surprisingly, Fontenot could not identify pictures of Titsworth shown to him by police nor could he identify Titsworth in person when Titsworth was brought to Fontenot's jail cell and standing right in front of him, though Titsworth would have been easily recognizable to anyone who had ever seen him up close because of his numerous visible tattoos. In addition, Fontenot's confession statement claimed that Odell Titsworth's pick-up truck had been used to kidnap and transport Denice Haraway to the crime scene, but Titsworth did not own a pick-up truck. A pickup truck owned by Titsworth's mother

was searched and no evidence was found implicating Fontenot or Titsworth.

5) As occurs in so many false confessions to murder, Fontenot could not identify the location of the crime or lead police to Denice Haraway's body, which was found over a year after Fontenot's confession statement in a different county in a completely different direction than his confession states.

6) Fontenot's confession statement contains an erroneous description of the time of the day in which the crime occurred. Fontenot's confession statement stated that it was almost dark when Denice Haraway had been kidnapped, but that would have occurred around 8:30 p.m. when it had already been dark for some time.

7) As in so many multiple false confession cases,[49] Fontenot's confession statement to the murder of Denice Haraway contradicts, on numerous details, Tommy Ward's statement a day earlier, which itself led to Fontenot's arrest and interrogation. The two confession statements contradict one another regarding the number of perpetrators who allegedly raped Denice Haraway (even though there is no evidence that she was even raped); whether she was stabbed by her assailant(s) (even though there is no evidence that she was stabbed) as well as the

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49 *See* Steven Drizin and Richard A. Leo (2004). "The Problem of False Confessions in the Post-DNA world. *North Carolina Law Review*, 82, 891-1007.

number and location the alleged stab wounds; whether she was able to temporarily break free of her assailant(s); how she died; when she died; and where the assailant(s) disposed of her body.

8) Other than Tommy Ward's discredited, factually false confession, there is no evidence at all linking Karl Fontenot to the murder of Denice Haraway. Only one witness identified him as being present at McAnally's on April 28, 1984, when Donna Denice Haraway left the store. That witness, who underwent hypnosis prior to the preliminary hearing, recanted his identification of Fontenot at trial. Additionally, Fontenot did not match the eyewitness descriptions that led to the composite picture posted by Ada police following Ms. Haraway's disappearance.

Without the assistance of information related to him by Agent Rogers and Detective Smith, nothing Mr. Fontenot said was reliable. Knowing how susceptible Mr. Fontenot was to suggestion in an interrogation makes it understandable why he would agree with information given to him by the police.

Mr. Fontenot was particularly susceptible to making a false confession. The Supreme Court recognizes that a suspect's mental incapacities could render a confession involuntary if obtained because of "persistent and protracted questioning," and furthermore that "the use of a confession obtained under such circumstances is a denial of due process and the judgment of conviction must be reversed." *Ward v. Texas*, 316 U.S. 547, 555 (1942).

A psychological evaluation of Mr. Fontenot performed by Dr. Joel Dreyer, M.D. around the time of trial indicates that he has "an abnormally low intelligence" and, at the time of the interrogation, was "suffering from Post-Traumatic Stress Disorder," related to guilt associated with the death of his mother.[50] These psychological infirmities made Karl particularly vulnerable to police coercion.[51] In Dr. Dreyer's medical opinion, Mr. Fontenot's guilt over his mother's death is ultimately responsible for his willingness to accept blame for the murder of the victim in this case. According to Dr. Dreyer, "[Fontenot] believes in his own mind in some talion law, an eye for an eye, a tooth for a tooth, that even though he never met Denice Haraway and had never been at McAnally's East Confectionery, that he was willing to take the rap for her murder and willing to repeat. . . . the story given to him from the dream of Tommy Ward." *See* (Dkt.# 123, Ex.#s 63 & 64, at 3).

Additionally, Dr. Sandra Petrick, a psychiatrist at Eastern State Hospital, evaluated Mr. Fontenot in order to determine his competency to stand trial. Dr. Petrick determined that Mr. Fontenot had great difficulty in understanding legal terminology along with the adversarial nature of criminal proceedings. (N/T 6/13/1988 at 30-31, 36). Of particular importance is Dr. Petrick's opinion from her report that "[Fontenot]

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[50] In 1984, Mr. Fontenot witnessed the death of his mother as she was hit by a car while walking across a 4-lane highway in order to join Mr. Fontenot inside of a restaurant. Mr. Fontenot was inside the restaurant attempting to make a phone call for assistance with their broken-down vehicle.

[51] Richard A. Leo (2008). POLICE INTERROGATION AND AMERICAN JUSTICE (Harvard University Press).

did not understand the implications of his confession." Specifically, he referred to his confession as a "confessment" and said he did not know he was admitting that he did something. (N/T 6/13/1988 at 33).

Under the standard outlined in *Crawford v. State*, 840 P.2d 627 (Ok 1992), and *Malloy v. Hogan*, 378 U.S. 1 (1964), Mr. Fontenot's confession was neither the product of free, nor unconstrained choice.

> In addition, as discussed above, there were several factors present in this case that elevated the risk of eliciting a false and unreliable confession from Mr. Fontenot. These included Mr. Fontenot's abnormally low I.Q., which suggests he would have been highly suggestible, compliant and easily manipulated into making or agreeing to a false confession; and the interrogation pressure and high-end inducements he describes occurring during the largely unrecorded interrogation, that if he had been capable of repairing the car, or making the phone call more quickly, his mother never would've felt the need to come help him inside the restaurant, and would therefore, be alive.
>
> In addition to these mental instabilities, Mr. Fontenot lived in poverty from birth to adolescence with an alcoholic father, and then with strangers who picked him up off the street after his mother's death, which, as substantial social science research has

> demonstrated, are known to lead to false and unreliable confessions.[52]

(Dkt.# 123, Ex.# 19). Because Mr. Fontenot's psychological conditions rendered him incapable of reasoning the way a mentally healthy interrogation subject would have, his ability to voluntarily provide a statement to police in the face of their insistence on his guilt, should not be considered trustworthy.

C. The Pontotoc County District Attorney Office Knowingly Admitted False Testimony during Mr. Fontenot's Trial.

The prosecution, as a representative of the people, must zealously prosecute cases while also upholding justice. *See Berger v. U.S*, 295 U.S. 78 (1935). In that endeavor, the prosecution must not present evidence it knows to be false but must ensure that the record is corrected when a prosecutor learns the evidence is false. *See Napue v. Illinois*, 360 U.S. 264 (1959). The reason is to ensure a fair verdict from the factfinder, whether judge or jury; one worthy of reliability and finality. "A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.'" *Id.* at 269-270. The district attorney's obligation is to ensure the evidence presented has indicia of reliability. The

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[52] Richard A. Leo (2008). POLICE INTERROGATION AND AMERICAN JUSTICE (Harvard University Press).

source of that evidence is irrelevant if the evidence is wrong, even if that evidence is a confession.

The ABA Standards for Criminal Justice advise prosecutors to ensure the evidence presented at trial is worthy of reliability and credibility.

> Standard 3-5.6 Presentation of Evidence
>
> (a) A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.

ABA Standards for Criminal Justice (Prosecution Function) 3-5.6; *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation).

After Agent Rogers presented the prosecutorial to Mr. Peterson, he was obligated to vet the case and determine whether charges should be brought and what those charges should be.

The absence of any corroboration for Mr. Fontenot's confession should have alerted him of the serious flaws in this case. Instead, Mr. Peterson continued to pursue charges against Mr.

Fontenot in the absence of evidence. Even after his sole eyewitness to Mr. Fontenot's involvement recanted his testimony **after the preliminary hearing**, he continued to move forward knowing that evidence against Mr. Fontenot rested largely on his guilt by association with Mr. Ward. (N/T 6/9/1988 at 24-26); (Dkt.# 123, Ex.# 14). The sole evidence the State presented was Mr. Fontenot's false confession knowing it was not substantiated in any way.

The State's continued presentation of Mr. Fontenot's confession, in the absence of any corroboration, when all the evidence presented conflicted with that confession was not only a violation of the prosecution's professional obligation, but violated Mr. Fontenot's constitutional rights. Mr. Fontenot's confession failed to inform law enforcement where Mrs. Haraway's remains were located, or what might have happened to her. Instead, a year and a half after the confession, her remains were found in a completely different location with a cause of death different from what Mr. Fontenot described in his confession. (Dkt.# 123, Ex.#s 17, 46). The discovery of Mrs. Haraway's remains betray any shred of validity Mr. Fontenot's confession retained. However, instead of dismissing the case, Mr. Peterson remained staunch. "When asked if the discovery of the body would affect Ward's and Fontenot's conviction, Peterson said, 'Why would it? We convicted them without a body and now we have one.'" (Dkt.# 123, Ex. # 70).

The State's comments, in a vacuum, would seem innocuous, but given the extent to which the undisclosed evidence provided a viable defense for Mr. Fontenot, presented alternate suspects, and revealed other key pieces of evidence, it shows the lengths the

state went to present false evidence under the guise of a valid "confession" "[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." *Giglio v. United States*, 405 U.S. 150, 153 (1972) (internal quotations omitted). The actions of the State resulted in the presentation of evidence the police knew to be false at the preliminary hearing. It is unconscionable that a prosecutor, with numerous years of experience, failed to grasp the importance of a confession of a defendant with no connection to the victim, or the case.

Further, as discussed *supra,* the State also utilized the statement of the jailhouse snitch, Terri Holland (McCartney), and denied any deal had taken place in exchange for her testimony. This is extremely probative in light of the new evidence presented which includes the affidavit of her husband and court documents proving otherwise.

VIII. The Evidence Was Insufficient to Convict Mr. Fontenot Because the State Failed to Show the Existence of the *Corpus Delicti* of the Charged Crimes Outside of the Confession and Failed to Establish the Trustworthiness of the Confession in Violation of the Fourteenth Amendment.

Exclusionary rules relating to criminal confessions find their basis in a single premise, insulation of the adversary system of jurisprudence from introduction of false and unreliable evidence. Such false testimony, when undetected, can only result in a fraud

> upon society–conviction of the innocent and freedom for the guilty.

Note, *Voluntary False Confessions: A Neglected Area in Criminal Administration*, 28 Ind.L.J. 374 (1953).

Despite vast inconsistencies between Mr. Fontenot's confession and the evidence, the prosecution tried desperately to force the evidence to fit Mr. Fontenot's story; claiming in essence that it would be inconceivable for any person to confess to crimes he had not committed. In closing argument, the prosecutor contended:

> I ask, you, ladies and gentlemen, when you are deciding who to believe and who not to believe I ask you to consider, first of all, is it reasonable to believe that you could convince a man in fifteen minutes to confess to a crime like this? Now, we are not talking about any crime here, we are not talking cutting tires or whatever. We are talking robbery, kidnapping and murder. Could you confess, get a man to confess to that, especially a murder so heinous and brutal and cruel where he his saying-could you get a man to say, well, she was screaming help and crying and begging and there wasn't no one there to help her, we weren't going for what she was saying. Could you get someone to say that if they really hadn't done that? In fifteen minutes?
>
> I don't care how stupid, stupidity is not a lack of morality. A stupid person would still know he was saying bad things about himself. Could you get a man to do that?

(N/T 6/14/1988 at 73-74).

Yet, false confessions are not new to legal history. As stated in *Smith v. United States*, 348 U.S. 147, 153, 75 S. Ct. 194, 197 (1954), the "experience of the courts, the police and the medical profession recounts a number of false confessions voluntarily made." *See also* Note, *Corroboration of Confessions in the Theft by Receiving Context: Is Proof of Theft Enough*, 44 Ark.L.R. 805 (1991); Ayling, *Corroborating Confessions: An Empirical Analysis of Legal Safeguard Against False Confessions*, 1984 Wisconsin L.R. 1121; Note, *Voluntary False Confessions, supra*, 28 Ind.L.J. 374 (1953).

Among the reasons legal scholars and courts cite for false confessions are psychological factors including two substantiated by the evidence in this case: guilt feelings over unrelated acts and a desire for notoriety. Ayling, *Corroborating Confessions*, *supra* at 1158-59; *Voluntary False Confessions*, *supra*, at 379-382.

Psychiatrist Joel Dreyer, who examined Mr. Fontenot before retrial, found that Mr. Fontenot felt extreme personal guilt over the death of his mother who just a few years before his confession died in an auto-pedestrian accident as she crossed a four-lane highway to find him. A teenage Mr. Fontenot watched helplessly as his mother came to find him and was hit and killed by a car.[53] (N/T 6/13/1988 at 193-94).

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[53] Dr. Dreyer related that Mr. Fontenot's mother bad been involved in a minor traffic accident and had sent Karl across the highway to telephone for assistance, but "[h]e didn't have any money when he got there and be couldn't figure out how to call the police . . . So he had taken so long talking to the people in that little restaurant, that finally his mother crossed that

Dr. Dreyer's testimony was that "he [Mr. Fontenot] felt responsible for her death and feels he should take the responsibility for this other person's death, for the death of his mother . . . " (N/T 6/13/1988 at 193-94). Dr. Dreyer also noted Mr. Fontenot:

> . . . saw this as an opportunity to be important, to have notoriety, to have a claim, to be written up, to be in the papers, to have friends, to have people interested in him. And so he did like a lot of people do, all the way from the Son of Sam to other people who go and say, 'I'm the Son of Sam.' but only one was the Son of Sam. Those other hundred and eleven couldn't have all been the Son of Sam. He is like those hundred and eleven people, willing to gain some claim (sic), because he is not bright and because he was just wandering the street.

(N/T 6/13/1988 at 199).[54]

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four-lane highway to find out what he was doing." (N/T 6/13/1988 at 193-94).

[54] Dr. Dreyer testified: " . . . he was a vagrant, he was like a bum in a way, I mean be was wandering the streets. First of all his dad bad left him six years before his mother left him and his dad left him to go somewhere and he hadn't had contact with him since. His dad was a proverbial ubiguitous [sic] alcoholic and his mom then, of course, died in this pedestrian auto accident. And so he is just wandering the streets and doing some pot and drinking some booze and talking to some people and doing what he has to do, primarily drinking from time to time, not doing too much with his life and wandering the streets, not knowing what this world is going to hold for him and feeling responsible for his mother's death and thinking death for himself and suicide." (N/T 6/13/1988 at 199).

Other evidence showed Mr. Fontenot sought attention and often made false claims. Gordon Calhoun, who testified for the State that Mr. Fontenot claimed to know something about Haraway's disappearance, agreed Mr. Fontenot "kind of likes spinning yarns and, that is how he got his attention." (N/T 6/9/1988 at 145-146, 149). Mr. Calhoun did not believe Mr. Fontenot's claims about Mrs. Haraway's disappearance. *Id.* at 151. He agreed Mr. Fontenot "would downright lie to you if he thought it would get your attention." *Id.* at 154.

The development of legal safeguards to ensure the reliability of confessions relates directly to the very real experiences of the judiciary with false confessors to crimes, even to crimes that never occurred. The fact that Mr. Fontenot confessed to a crime does not make his confession a reliable one, for false confessions to real crimes are just as likely as those to imaginary ones. *See Corroboration of Confessions*, *supra*, at 832. The goal of the legal safeguards for confessions is not just to protect the confessor from unjust imprisonment, but to ensure that society is protected from the actual wrongdoer. *Voluntary False Confessions*, *supra*, at 374.

A. The State's Failure to Sufficiently Prove the *Corpus Delicti* of the Charged Crimes Independent of the Confession Requires Reversal.

The State, before extracting confessions from Mr. Ward and Mr. Fontenot, had little accurate information about what happened to Mrs. Haraway. She had been missing for six months and the State presumed she had been the victim of foul play despite its

inability to locate her remains or to properly secure the scene of Mrs. Haraway's disappearance. The State's evidence before Mr. Ward's October 18, 1984, confession, consisted of a description of varying pickup trucks, a composite drawing of the man with whom Mrs. Haraway had been seen leaving McAnally's, and descriptions of two men who had aroused the suspicion of a clerk at a completely different convenience store shortly before Mrs. Haraway's disappearance.[55] **Although police denied they had a clothing description before the confessions, evidence showed that APD Detectives Smith and Baskins were given the description of a blouse a day or two after she disappeared-the same description that was incorporated first into Mr. Ward's and then into Mr. Fontenot's confessions six months later**. (N/T 6/10/1988 at 144); (N/T 6/13/1988 at 116) (emphasis added).

In *State ex. rel. Peterson v. Ward*, 707 P.2d 1217 (Okl.Cr.1985), the Oklahoma Court of Criminal Appeals stated:

> It is a fundamental rule of law in this jurisdiction, and most others, that "no criminal conviction can be based upon a defendant's extrajudicial confession or admission, although otherwise admissible, unless there is other evidence tending to establish the *corpus delicti*." We have defined corpus delicti "as the substantial and fundamental fact or facts necessary to the commission of

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55 This is the evidence made available to Mr. Fontenot's defense counsel. As discussed previously, the police had much more evidence at their disposal that they ignored.

> a crime, and means when applied to any particular offense, the actual commission by someone of particular offense charged."

Id., 707 P.2d at 1219; *see also Opper v. U.S.*, 348 U.S. 84 (1954).

Here, the State failed to sufficiently show independent evidence of the corpus delicti of the charged crimes of kidnapping and first-degree murder in order to admit of Mr. Fontenot's confessions into evidence.

The elements of kidnapping given to the jury were: 1) unlawful; 2) forcible seizure and confinement; 3) of another; 4) with intent to confine secretly; 5) against the person's will. (O.R.II, at 161) The evidence showed Mrs. Haraway calmly left the convenience store accompanied by a man with his arm around her waist. She said nothing to a bystander entering the store as she was leaving. She indicated no distress and the customer was in the store about ten minutes before he realized the clerk was gone. Although the State claimed circumstantial evidence showed it was out of character for Mrs. Haraway to leave the store unattended and disappear, the objective evidence was that she left the store with a man without protest to available rescuers. The evidence outside of Mr. Fontenot's confession failed to show Mrs. Haraway was taken unlawfully, by force or against her will, and thus the corpus delicti of the crime of kidnapping was not established outside the confession.

Ordinarily, the discovery of Mrs. Haraway's remains with a bullet hole in the skull would suffice to show the corpus delicti of murder. *See Goforth v. State*, 644 P.2d 114 (Ok. 1982) (the corpus delicti of a murder may be shown by evidence that a body was

found under circumstances indicating a violent death). The only evidence indicating a violent death caused by the acts of another in this case was a bullet hole in the skull. However, the medical examiner testified that he could not determine whether the bullet wound was inflicted before or after Mrs. Haraway's death. (N/T 6/9/1988 at 132). When Mr. Fontenot sought a new trial while awaiting a decision on appeal after the 1985 trial, the State contended the bullet was not the cause of death, but was merely a post-mortem injury:

> The State maintains its trial theory that Denice Haraway died due to extensive stab wounds. Moreover, the skeletal remains would not adequately reflect stab wounds to an individual's body. As the remains were found approximately 1-1/2 years after her death, the areas of the stab wounds were long ago decomposed. This is not to say that the incised-type injuries to the ribs could not be evidence of animal activity. It would be highly unlikely that a body exposed to the elements for any length of time would not exhibit some type of animal activity. Further, the evidence of a gunshot wound to the head does not dispel the State's theory of death. In a newspaper clipping attached to the defendant's appeal brief, it is stated that a man came across the skeletal remains while hunting in the woods. It is not unreasonable to theorize that the bullet wound to the skull came from a hunter's bullet.

(F-85-769, Brief of Appellee in Response to Mr. Fontenot's Motion for New Trial on Newly Discovered Evidence, at 5).

The State failed to show the corpus delicti of murder, because, as the State previously argued, and the medical examiner's testimony substantiates, the evidence failed to show an unnatural cause of death. No stab wounds were found, and the evidence of the gunshot wound would not definitively be determined to be the cause of death. (N/T 6/9/1988 at 130). In a case on-point with Mr. Fontenot's, the Oklahoma Court of Criminal Appeals reversed and dismissed a first-degree murder conviction where there was no evidence of stabbing as the cause of death even though the defendant had confessed to stabbing the victim (and, unlike Mr. Fontenot had accurately told the police where the body was located). *Thornburgh v. State*, 815 P.2d 186 (Ok. 1991). The State's failure to independently show the corpus delicti of murder in this case likewise requires reversal of Mr. Fontenot's conviction. In order to find that the gunshot wound adequately established the corpus delicti of murder, one must find Mr. Fontenot's confession materially false and insufficiently corroborated by independent evidence to support his convictions. In order to find that the stabbing adequately established the corpus delicti of murder, one must disregard all independent evidence and rely solely on Mr. Fontenot's confession.

B. The State Failed to Establish Through "Substantial Independent Evidence" the Trustworthiness of Mr. Fontenot's Confession; The Confession Was Patently Unreliable and Thus Inadmissible

Even if this Court determines the evidence was sufficient to show the corpus delicti of the crimes alleged, Mr. Fontenot's confession lacked any independent indicia of reliability or trustworthiness. The United States Supreme Court, in *Opper v. United States*, 348 U.S. 84, 75 S. Ct. 158 (1954), stated:

> It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense.

348 U.S. at 93, 75 S. Ct. at 164, adopted by Oklahoma in *Jones v. State*, 555 P.2d 63, 68 (Ok. 1976). The *Opper* standard requires a confession actually have some resemblance to the known facts of the crime to show that the confession is trustworthy.

In *Williamson v. State*, 812 P.2d 384 (Ok. 1991), *cert. denied*, 112 S. Ct. 1592 (1992), the Oklahoma Court of Criminal Appeals found that "factual errors and omissions" do not necessarily render a confession unreliable. The OCCA recited the discrepancies in the Williamson confession as:

> Specifically, these errors and omissions are that the decedent had a washcloth in her

> mouth and not her panties, and that a lid to a catsup bottle and not a coke bottle was discovered inside her rectum, and that no mention was made of the ligature, the writing on the wall or the presence of another person.

Id. at 397. Relying on the language in *Opper* that it was "sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth," the Oklahoma Court of Criminal Appeals found that the essential facts of the murder described by Williamson were sufficiently consistent with the physical evidence found at the crime scene, despite the minor inconsistencies described above. *Id., quoting Opper*, 348 U.S. at 93, 75 S. Ct. at 164.

Here, the chasm between Mr. Fontenot's confession and the known facts of the case are hardly minor. The State alleged the kidnapping was accomplished by force or fear, yet the witnesses seeing Mrs. Haraway leave the convenience store saw no weapon or any apparent distress or signs of struggle. The prosecution alleged the murder was committed by repeated stabbing and by gunshot, yet they could offer no independent evidence that a stabbing had occurred and no evidence linking Mr. Fontenot or his codefendant to a firearm. The confession said Mrs. Haraway was stabbed; she had a bullet hole in her skull. The confession is replete with other factual errors, not the least of which include Mr. Fontenot' s naming of Mr. Titsworth. The police proved irrefutably Mr. Titsworth had not been involved.

The other contradictions between the evidence and the confession are the location of the body in another county rather than where Mr. Fontenot

claimed; the evidence of death from a gunshot wound, which the State even contended was post-mortem, while no evidence supported Mr. Fontenot's claim of stabbing the victim; no evidence of rape described by Mr. Fontenot; and evidence that the body was not burned, which was contrary to Mr. Fontenot's story.

The only "facts" in the confessions supported by independent evidence were those known to the police and public before the confessions. Mr. Fontenot correctly described using an older-model pickup truck, which had been widely publicized as the perpetrator's vehicle. Mr. Fontenot knew about how much money had been taken from the convenience store in the alleged robbery, an amount that was published within days of Mrs. Haraway's disappearance. The blouse description was given to police by Mr. Ward the day before Mr. Fontenot was interrogated, but also had been given to investigating officers long before their interviews with either Ward or Mr. Fontenot. Even this description is disputed by the evidence subsequently discovered at the site where Mrs. Haraway's remains were found.

As detailed in Petitioner's Response Brief, the following portions of Mr. Fontenot's confession and subsequent statements were factually disproved, primarily by the State's own evidence at trial.

Mr. Fontenot's Statement October 19, 1984	**Evidence June 7-14, 1988**
1. Mr. Fontenot knew Odell Titsworth and was at a party with Titsworth and Tommy Ward on the evening of April 28, 1984. (Ex.# 69 at 690).	1. Mr. Fontenot had never seen Odell Titsworth until police brought Mr. Titsworth to his cell after the confession; Mr. Fontenot could not identify Mr. Titsworth in a photographic lineup or in person. (N/T 6/13/1988 at 86-88).
2. Mr. Fontenot described Mr. Titsworth as 5 feet 10 to 11 inches tall, weighing around 140 to 150 pounds, with black hair just below his ears and having no tattoos or distinguishing marks about him. Mr. Fontenot's description of Mr. Titsworth was markedly incorrect. (Ex.# 69 at 689).	2. In April 1984, Odell Titsworth had hair down to the middle of his waist, weighed 175 pounds, and had very noticeable tattoos covering both harms from the wrists to the shoulders, inside and out, on his back, his stomach, and up and down both legs. On April 28, 1984, his arm was in a cast, having been broken by the Ada Police Department on April 26, 1984. (P/H at 792-796, 795-97, 838); (N/T 6/13/1988 at 81-82); (N/T 6/10/1988 at 184-85);(N/T 6/14/1988 at 88-89).

Mr. Fontenot's Statement October 19, 1984	**Evidence June 7-14, 1988**
3 Odell Titsworth was a participant in robbing, kidnapping, raping and stabbing Mrs. Haraway. The lock-blade knife and the pickup truck used in the commission of the crimes belonged to Mr. Titsworth. (Ex.# 69 at 664, 676-678).	3. The police eliminated Odell Titsworth from being in any way involved in the Mr. Haraway case. Mr. Titsworth's truck was searched and no evidence relating to this case was found. The State presented evidence to show that Mr. Ward owned a lockblade Buck knife, but the actual weapon was never recovered. (N/T 6/10/1988 at 23-24).
4. After the party, the trio "went out from north of town." (Ex.# 69 at 64).	4. Ada has two McAnally's convenience stores, one north, and one east. N/T 6/9/1988 at 91 Haraway disappeared from the McAnally's in east Ada.
5. Mr. Titsworth went into McAnally's and brought Mrs. Haraway out to the pickup truck while Mr. Fontenot and Ward waited outside by the gas pumps. Mr. Fontenot and Mr. Ward got into the truck after Mrs. Haraway was forced in. (Ex.# 69 at 664)	5. Eyewitnesses at the convenience store when Mrs. Haraway left saw only one man with Mrs. Haraway and no others standing outside the truck. This man's description did not remotely match Odell Titsworth. (N/T 6/9/1988 at 34-68).

Mr. Fontenot's Statement October 19, 1984	**Evidence June 7-14, 1988**
6. Four people drove away in the pickup to the power plant (west of McAnally's). (Ex.# 69 at 664-665)	6. Eyewitnesses at McAnally's saw only one man with Mrs. Haraway, no other person around or near the pickup and no other person in the store. Mary Scroggins reported seeing a gray pickup with three persons in it speeding toward the power plant on night of Mrs. Haraway's disappearance, but could identify any of them. (N/T 6/9/1988 at 80).
7. It was "almost dark" twenty minutes after the rapes began. (Ex.# 69 at 673).	7. Mr. Whechel testified it was dark when he arrived at the McAnally's at 8:30 p.m. and saw Mrs. Haraway leaving. (N/T 6/9/1988 at 64).
8. Mr. Titsworth stabbed Mrs. Haraway to death, stabbing her in the chest "[h]ard enough to get the full blade in. (Ex.# 69 at 682).	8. There was no evidence of stabbing and no indication of nick marks or broken ribs that would signify a stabbing. (N/T 6/8/1988 at 134). Further, the State's evidence showed the only apparent cause of death was a gunshot wound

Mr. Fontenot's Statement October 19, 1984	Evidence June 7-14, 1988
	and Mr. Fontenot never mentioned a gun in his confession or in subsequent statements.
9. Mrs. Haraway was placed in a rotted out hole in the floor of a house behind the power plant, gasoline poured on her and the house set afire. (Ex.# 688).	9. The house located near the power station had been completely torn down to its concrete foundation and burned by its owner in June of 1983, ten months before Mrs. Haraway disappeared. There was no fire reported on the owner's property on April 28, 1984. Mrs. Haraway's remains were found in a brushy countryside area near Gerty, Oklahoma. Her body had not been burned. (N/T 6/14/1988 at 136).

On January 20, 1986, physical evidence was discovered substantially disproving Mr. Fontenot's confession. A farmer setting traps near Gerty, Oklahoma, east of Ada in adjacent Hughes County, found what appeared to be a human skull. A subsequent search of the area uncovered human remains that were identified as those of Mrs. Haraway. The medical examiner found no evidence indicating Mrs. Haraway

had been stabbed,[56] but a bullet hole was found in the back of the skull. Mr. Fontenot had never mentioned the use of a firearm in his confessions. The body had not been burned. (N/T 6/13/1988 at 136).

The State contended the blouse description in the confession was corroborated by the evidence that Mrs. Haraway had such a blouse and testimony describing her clothing before she disappeared. But this "corroboration" must be viewed considering evidence that police had previously been given the description of this blouse; the suggestive interrogation techniques used with Mr. Ward and most likely with Mr. Fontenot; **and the evidence of red and gold earrings and the back of a red and white shirt found near Mrs. Haraway's remains** (State's Trial Exhibits #s 19, 20, 22F) (emphasis added).

The State had no real theory of this case and certainly no evidence until obtaining the confessions of Mr. Ward and Mr. Fontenot. Rather than showing the reliability of Mr. Fontenot's statement, the State's evidence showed its unreliability and untrustworthiness. Uncorroborated and untrustworthy confessions are not competent evidence. *Opper*, 348 U.S. at 93, 75 S. Ct. at 164.

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[56] The testimony was that since the only remains of Mrs. Haraway were skeletonized, it would have been possible for her to have been stabbed, and the bones not reflect it. *See Thornburgh v. State*, 815 P.2d 186 (Ok. 1991).

C. No Rational Trier of Fact Could Find Mr. Fontenot's Guilt Beyond a Reasonable Doubt on the Evidence at Trial, even if the Confession is Deemed Properly Admitted

At the close of the State's case, Mr. Fontenot moved for a directed verdict of acquittal because of insufficient corroboration of the confession and the failure of the State to prove each element of the charged crimes beyond a reasonable doubt. The motion was overruled. (N/T 6/13/1988 at 127). The motion was renewed after the defense case and was overruled. (N/T 6/14/1988 at 11).

Outside of the false confession, no evidence linked Mr. Fontenot to Mrs. Haraway's disappearance. At trial, not one witness identified Mr. Fontenot as being at McAnally's on April 28, 1984. Although Ms. Wise and Mr. Moyer identified his co-defendant Mr. Ward, neither could identify Mr. Fontenot as Mr. Ward's companion. Both saw a man in the courtroom at the preliminary hearing who was more familiar to them as that man than Mr. Fontenot. (N/T 6/8/1988 at 194-95, 197-99); (N/T 6/9/1988 at 26).

Likewise, the police had no physical evidence placing Mr. Fontenot at McAnally's on April 28, 1984. Significantly, the crime scene at McAnally's went unpreserved despite the presence of an Ada police officer and detective shortly after Mrs. Haraway' s disappearance. (N/T 6/9/1988 at 92-93). Fingerprints from the counter, cash register and the glass doors of McAnally's, as well as a still-burning cigarette (Mrs. Haraway did not smoke) were destroyed because the manager wanted to clean up the store. (N/T 6/9/1988 at 92-93). Police investigated numerous individuals

who looked like the composites and at least 28 pickup trucks like those reported seen at J.P.'s and McAnally's in the six months between Mrs. Haraway's disappearance and Mr. Fontenot's arrest, but they found nothing. (N/T 6/14/1988 at 30-33).

Likewise, there was no evidence of Mr. Fontenot in the area where Mrs. Haraway's remains were found.

Detective Smith testified:

Q. . . . there is absolutely no physical evidence whatsoever to tell us what happened at the scene, nothing, right? I mean, you can't tell who did what, when and where or anything. Is that correct?

A. **Well, to me the strongest evidence is the confession.**

Q. Okay. Fine. Okay. Other than the statements of Karl Fontenot, okay, as to what transpired at the scene, do you have any other physical evidence?

A. From the scene?

Q. Yes. And we-The Jury has already seen the remains of Donna Denice Haraway. Okay. All right. But, at the scene, I'm talking about what was said, what happened, you have no other, you have no physical evidence. All we have is, according to you, Karl's statement. Right?

A. And the body.

(N/T 6/10/1988 at 106-107). Compare this with OSBI Agent Gary Roger's testimony at Mr. Fontenot's first trial, before the body was found:

> Q. Aside from these two statements [Ward's and Fontenot's] do you have any proof, separate from these statements, that Donna Denice Haraway was kidnapped, raped or murdered? Aside from these statements?
>
> A. We have proof that she has not been seen or heard from in a year and a half.
>
> Q. All right. So, basically if we say-if we take the statements aside, the only thing you can prove is Donna Haraway is gone?
>
> A. That's correct.

(J/T 86-769 Tr. 2048-85).

Federal constitutional law requires as a matter of due process that any criminal conviction stand only upon proof beyond a reasonable doubt as to each and every essential element of the crime or crimes charged. U.S. Const. Amend XIV; *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781 (1979); *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068 (1970). Speculation and guesswork are fundamentally antagonistic to the constitutional requirement of proof beyond a reasonable doubt, and a conviction cannot stand where the evidence establishes no more than speculation or suspicion. *Hager v. State*, 612 P.2d 1369 (Ok. 1980). Yet, the mere issuance of an instruction charging the jury with its duty to find proof beyond a reasonable doubt is not enough. As the United States Supreme Court stated in *Jackson v. Virginia*, 443 U.S. at 316-17, 99 S. Ct. at 2788:

> The *Winship* doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence. A 'reasonable doubt,' at a minimum, is one based upon 'reason.' Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, ...

The U.S. and Oklahoma Constitution's guarantee that no person shall be deprived of liberty or life without due process of the law, encompassing the right to be free from convictions except upon proof beyond a reasonable doubt of guilt. Fourteenth Amendment; Okla.Const. Art.II, § 7; *Young v. State*, 89 OK. 395, 208 P.2d 1141 (1949). The federal and state constitutions are in accord on the requirement of proof beyond a reasonable doubt and on the test to be applied when examining the record for absence or existence of such proof. The test for determining whether proof is sufficient to support a criminal conviction is whether, in the light most favorable to the State, a rational trier of fact could find guilt beyond a reasonable doubt. *Jackson v. Virginia, supra*; *Spuehler v. State*, 709 P.2d 202 (Ok. 1985).

In the light most favorable to the State, the evidence at trial established beyond a reasonable doubt that Mrs. Haraway disappeared on April 28, 1984, and was found dead on January 20, 1986. Beyond these basic facts, the evidence introduced to establish the cause of death, criminal agency and the identity of the person responsible for her death was unreli-

able, contradictory, uncorroborated, or simply nonexistent. None of the eyewitnesses identified Mr. Fontenot as the man who left the store with Mrs. Haraway, and they saw only one man with her in the truck as they left. None of the physical evidence, including the body, linked Mr. Fontenot to Mrs. Haraway's disappearance or death. At best, the evidence established Mrs. Haraway died from a gunshot wound to the head or was struck by a stray bullet after she died from unknown causes. In either case, there was no independent evidence tending to suggest she was raped, stabbed or burned, or ever taken to any location other than where her remains were found.

No rational juror who was able to set aside the tragedy of Mrs. Haraway's death could find beyond a reasonable doubt that Mr. Fontenot should be convicted on his own words. Given the uncontroverted evidence of Mr. Fontenot's mental and psychological impairments, the material discrepancies between the physical evidence and the story Mr. Fontenot told the police; the absence of evidence to corroborate his version of the events; and the circumstances surrounding his coerced confession, no reasonable juror would have convicted Mr. Fontenot.

IX. The State's Injection of Inadmissible Hearsay from the Extrajudicial Confession of Mr. Ward in Mr. Fontenot's Trial Violated His Constitutional Right of Confrontation

In its opinion reversing Mr. Fontenot's previous convictions for these crimes, the Oklahoma Court of Criminal Appeals (OCCA) held it was reversible error for the trial court to admit the inculpatory statements of the non-testifying co-defendant at the

joint trial of Mr. Fontenot and Mr. Ward. *Fontenot v. State*, 742 P.2d 31, 32 (Ok. 1987). The OCCA found Mr. Fontenot's Sixth Amendment right to confront the witnesses against him was damaged beyond repair by the admission of the non-testifying co-defendant's statement. *Id.* Further, the appellate court found that Mr. Ward's statement "did not have sufficient indicia of reliability as it relates to Mr. Fontenot to overcome the presumption of unreliability to permit its direct admission. . . . " *Id.; see also Lee v. Illinois*, 476 U.S. 530, 106 S. Ct. 2056 (1986).

Yet, at retrial the State injected key portions of the codefendant's extrajudicial statements into the evidence presented at trial for the purpose of corroborating Mr. Fontenot's confession. The State then inferred and argued Mr. Fontenot's guilt from this inadmissible evidence. Mr. Fontenot was not given the opportunity to confront Mr. Ward to test the truthfulness of his extrajudicial statements. The denial of the fundamental right of confrontation, the prejudicial weight of the particular portions of the co-defendant's statements used by the State, and the weakness of the State's case without the improper corroboration of Mr. Fontenot's statement require reversal of these convictions. U.S. Const., amends. VI and XIV, Okla. Const., Art. II, § 7, *Douglas v. Alabama*, 380 U.S. 415, 420, 85 S. Ct. 1074, 1077 (1965).

The State did not introduce the entirety of Mr. Ward's statements, which includes Mr. Ward's preliminary hearing testimony-but injected cherry-picked inculpatory information gathered from his statements. Most prejudicial was the hearsay testimony of Detective Smith, who stated that Mr. Ward's description of a blouse purportedly worn by Mrs. Haraway matched

the description given in Mr. Fontenot's confession, and placed the two together at the crime scene. From Detective Smith and OSBI Agent Gary Rogers, the jury learned Mr. Ward confessed and described details of the crime in a similar fashion to Mr. Fontenot.

Both Detective Smith and Agent Rogers were specifically admonished not to repeat anything told him by Mr. Fontenot's co-defendant. (N/T 6/10/1988 at 52); (N/T 6/13/1988 at 19 20). Nonetheless, Detective Smith made the following statements:

> Q. [Defense Counsel] You had a description of the blouse prior to interviewing Karl Fontenot?
>
> A. [Smith] **From Tommy Ward**.

(N/T 6/10/1988 at 116) (emphasis added). Defense counsel did not invite the reference to Mr. Ward, but asked a question to which an answer of "yes" or "no" was necessary. The cross-examination was not to establish from whom Detective Smith learned the blouse description, but that he had been given a similar blouse description by Richard Holkum[57] within days of Mrs. Haraway's disappearance.

The importance-and prejudice-of Mr. Ward's extrajudicial statements regarding the blouse was elicited by the State on re-direct examination:

> Q. **And I believe you started to testify it was more important for another reason and**

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57 *See supra* at 87-90 detailing the totality of Mr. Holkum's statements to Detective Smith and that the exculpatory evidence was withheld from defense counsel.

that was because it matched Tommy Ward's description.

A. Yes, it did. The two descriptions of the blouse were very close and that is what made it important. If one of them said, well, she had a light-colored blouse with flowers on it and the other one had said, well, she had a striped blouse on, then the importance of the blouse would not be an issue. **But, they both described the blouse nearly identically, close enough that you knew, or we would know that they had seen it**. We didn't place the importance on it until later, much later after they were arrested, in fact.

Id. at 132 (emphasis added). **Other hearsay testimony improperly admitted told jurors Mr. Ward confessed, implicated Mr. Fontenot, and gave similar details about the crime as had Mr. Fontenot. Detective Smith's additional references to the plurality of confessions and their content inculpated Mr. Fontenot:**

Q. What did Agent Rogers tell him exactly or you tell him exactly in order for him [Fontenot] to stop denying that he was involved?

A. What he said was: "Karl, we have already talked to Tommy and we have a confession from him."

Q. Okay. And did you go on and tell him that we knew that he was involved, we wanted him to tell the truth and give you a statement?

A. That is . . . usually what we tell people that we are interrogating, yes. *Id.* at 104; and

Q. [Butner] The pickup was in Ada and was driven by Tommy Ward. . . . and Karl Fontenot. You never saw that personally?

A. No, Tommy Ward said that.

Id. at 146; and

Q. [Butner]: Detective Smith, I'm not talking about the confessions. I'm asking you, would, in fact, the ease with which an article of clothing came off a body due to animal activity, wouldn't that have some effect as to how long it lasted, if you know or have an opinion?

A. Well, in the confessions they said the clothes were taken off and it was my opinion that they weren't even on.

Id. at 153.

Agent Rogers, purportedly testifying about the actions taken as a result of Mr. Ward's confession, injected information showing correlations with Mr. Fontenot's confession. After he was admonished not to state anything told him by Mr. Ward, (N/T 6/13/1988 at 19-20), he related that during his conversation with Mr. Ward, Agent Rogers had directed Detective Baskin to search a power plant located off Richardson Loop west of Ada for Mrs. Haraway's remains. Another call directed Detective Baskin to a burned-out house and a third directed him even further west from the power station to Sandy Creek to locate "a concrete citron or bunker, . . . basically a large hole in the ground that had concrete walls." (Tr. At 20-21). This testimony

assured jurors that Mr. Ward's statements corroborated those of Mr. Fontenot concerning crimes at the power plant and attempts to dispose of the body.

The testimony of Detective Smith and Agent Rogers about portions of Mr. Ward's extrajudicial statements was hearsay and offered to prove the truth of the matter asserted, *i.e.*, that the confessions of Mr. Fontenot and Mr. Ward corroborated each other, and that the only explanation for this was their guilt. The prosecution succeeded in doing indirectly what the OCCA had rule it could not do directly-using Mr. Ward's confession to inculpate Mr. Fontenot in this crime.

It is well settled that the hearsay rule does not preclude testimony to show that a statement was made or that certain actions resulted from a conversation with a third person. *Greer v. State*, 763 P.2d 106 (Ok. 1988); *Thompson v. State*, 705 P.2d 188 (Ok. 1985); *Godwin v. State*, 625 P.2d 1262 (Ok. 1981). *Garcia v. State*, 639 P.2d 88 (Ok. 1981); *Dunagan v. State*, 734 P.2d 291 (Ok. 1987). However, in *Washington v. State*, 568 P.2d 301 (Ok. 1977), the Oklahoma Court of Criminal Appeals held that the State cannot circumvent the hearsay rule and effectively place into evidence the inculpatory substance of a conversation with a third party through the ruse of relating the information in terms of the actions resulting from the conversation. In *Washington, supra*, 568 P.2d at 311 a police officer had spoken with a young boy who was a witness to a crime. The police officer testified that after his conversation with the boy, he directed his investigation at the defendant. The Oklahoma Court of Criminal Appeals stated:

> The recitation of the preceding cases makes it apparent that it is permissible for an officer to testify that he received information from a third party which led to the defendant's arrest; provided, however, that the information received shows that the arrest was for a crime other than the one charged or provided that the information received was just a description of the criminal and not an extrajudicial identification of the defendant as the perpetrator of the crime charged.

Id. In *Washington*, had the officer repeated the boy's statement that the defendant had committed the crime, this would have been inadmissible hearsay. The court found evidence is no less inadmissible hearsay when the jury is made aware of the substance of the third-party statement through indirect testimony.

The same is true here. The prosecution elicited sufficient testimony to tie together the statements of Mr. Fontenot and Mr. Ward as if they contained the same inculpatory information, *i.e.*, that Mr. Ward, too, claimed Mr. Fontenot was guilty of the offenses charged. Detective Smith's testimony that Mr. Ward had given a description of the blouse "very close" to Mr. Fontenot's was a clear signal to the jury that Mr. Ward's confession corroborated that of Mr. Fontenot and inculpated Mr. Fontenot. (N/T 6/10/1988 at 132). The prosecution drew direct inferences of Mr. Fontenot's guilt through this testimony. Detective Smith testified:

> The two descriptions of the blouse were very close and that is what made it important. If one of them said, well, she had a light-colored blouse with flowers on it and the other one had said, well, she had a striped

> blouse on, then the importance of the blouse would not be an issue. But, **they both described the blouse nearly identically, close enough that you knew, or we would know that they had seen it.**

(N/T 6/10/1988 at 132) (emphasis added). Prosecutor Ross contended in closing argument:

> Mr. Butner, Mr. Smith, Mr. Rogers, Mr. Gridner (sic), have all agreed that it would be impossible for someone to make up that description of the blouse. Doubly impossible for two, and that leaves us with only one alternative, and that is that this Defendant was there, just like he confessed he was.

(N/T 6/14/1988 at 79).

Significantly, had the prosecution presented Mr. Ward as a witness to testify concerning his statements and had Mr. Fontenot been afforded his constitutionally guaranteed right of confrontation, this evidence could have been tested. After Mr. Fontenot's conviction, Mr. Ward was tried again for the same crimes and testified. His testimony revealed the following:

> Q. Did anybody tell you what the Haraway girl was supposed to be wearing when she disappeared?
>
> A. Yes, sir. Dennis Smith did.
>
> Q. What did he tell you?
>
> A. Well, they told me that she either had a white blouse with blue roses on it or a red and white striped shirt.

Q. And did he tell you which one to select or to—

A. No.

Q. —put in your statement?

A. No, I just took a guess. And at that time, when I guessed, saying the white shirt with blue roses, he kept on trying to-which I thought that he was trying to get me to change my mind and say a white shirt with red stripes—a white—yea, a white shirt with red stripes on it.

Q. What did you think would happen when they checked this all out and found out the things you were telling them weren't true?

A. Like I said before, I thought that they would run me out for lying to them.

(Ward-90-17 Tr. at 139-140).

The introduction of portions of Mr. Ward's statements circumvented the Court's ruling in *Fontenot v. State*, 742 P.2d 31, 32 (Ok. 1987), where the Oklahoma Court of Criminal Appeals found the introduction of Mr. Ward's confession violated Mr. Fontenot's constitutional right to confront his accusers. Had Mr. Ward testified about his confession, Mr. Fontenot could have cross-examined him about his repudiations of that statement. He could have cross examined him on the preliminary hearing testimony he had given exculpating Mr. Fontenot. The State used the most damning portions of Mr. Ward's confession to show similarities to Mr. Fontenot's statement and convince the jury to reach the conclusion both were guilty.

Before Detective Smith's testimony, defense counsel objected to any reference to statements made by Mr. Ward and Detective Smith. Police were warned by the trial court not to repeat anything they had heard from Mr. Ward. (N/T 6/10/1988 at 52). Before cross-examination, defense counsel requested Detective Smith be admonished again. *Id.* at 94-95. The same was done with Agent Rogers. (N/T 6/13/1988 at 19-20). As these admonitions repeatedly were ignored, additional objections would have exacerbated the damage by calling attention to the prejudicial hearsay. Defense counsel was left in the untenable position of focusing the jury's attention on the issue of the matching descriptions by objecting. Although generally a contemporaneous objection is necessary to preserve error, 12 O.S. 1981, § 2104(A)(l), the Evidence Code provides for review of "plain errors affecting substantial rights" when no objection is made. 12 O.S. 1991, § 2104(D). Defense counsel did everything he could reasonably do to prevent the errors from occurring ahead of time, and all attorneys, relevant witnesses, and the trial court were clearly on notice of his objections to any testimony relating to the substance of Mr. Ward's extrajudicial statements.

Mr. Fontenot's objections to the admission of Ward's statements and the admonitions specifically warning witnesses not to relate Mr. Ward's statements preserved this error. The denial of Mr. Fontenot's constitutional right of confrontation was "plain error" and affected "substantial rights," and thus is subject to review. 12 O.S., 1991, § 2104(D); *McCall v. State*, 539 P.2d 418 (Ok. 1975). As the United States Supreme Court has said:

> This case cannot be characterized as one where the prejudice in the denial of the right of cross-examination constituted a mere minor lapse. The alleged statements [extrajudicial confession of separately tried, nontestifying accomplice] clearly bore on a fundamental part of the State's case against petitioner.

Douglas v. Alabama, 380 U.S. 415, 420 (1965)

The denial of Mr. Fontenot's constitutional right of confrontation was fundamental error leading to conviction and not subject to waiver. *Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1985). The prejudice of ignoring the appellate court's holding in *Fontenot v. State*, 742 P.2d 31, 32 (Ok. 1987), is that the only arguable evidence of guilt independent of Mr. Fontenot's confession was the blouse description. Absent Mr. Ward's live testimony, this "evidence" was already greatly weakened by the fact that no such blouse material was found with the remains; that the police insisted on denying they had been given a similar blouse description long in advance of the confessions despite the fact they clearly had; and that a different shirt found with the remains in fact matched the earrings Mrs. Haraway wore. These problematic facts demonstrate why it was so important for the State to inject Mr. Ward's extrajudicial statements concerning the blouse as "corroboration" at every opportunity, as well as the impact Mr. Ward's statements must have had on the jury. The "corroborative" value of Ward's statements and the impact they must have had on Mr. Fontenot's jury would have been greatly diminished, if not destroyed, by Mr. Ward's live testimony-which we now know would have disputed the veracity of his description and explained how he

came to give that description. Mr. Ward's explanation at his retrial was consistent with statements he made to his attorney long in advance of the discovery of Mrs. Haraway's remains and consistent with the existence of a red and white striped shirt having been found with her remains, while no evidence of the described blouse was found. Mr. Ward ultimately received a life sentence while Mr. Fontenot was sentenced to death[58] for convictions of the same crimes.

X. Mr. Fontenot's Fourteenth Amendment Due Process Right Was Violated Due to the Police Misconduct That Permeated the Investigation into Mrs. Haraway's Disappearance

a. The Ada Police Department's Complete Lack of Training to Handle Major Crimes Resulted in an Incompetent Police Investigation.

The Ada Police Department (APD) is the sole law enforcement agency responsible for investigating crimes in the City of Ada. As such, officers are required to be trained on the preservation of evidence, witness interviewing, report drafting and other investigative procedures to ensure the proper handling of criminal activity within their jurisdiction. Because they are the only agency investigating major crimes in Ada, their failure to follow proper protocol resulted in the ineffective evaluation and collection of evidence. At the time of Mrs. Haraway's abduction and through the investigation of her case, the APD lacked the

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[58] Mr. Fontenot's death sentence was overturned on his second direct appeal. He was later resentenced to life imprisonment without the possibility of parole.

requisite training to properly secure potential evidence and evaluate the evidence collected in the case.

The only substantial training in investigative techniques by the lead APD detective, Dennis Smith, was inadequate on-the-job training. Detective Smith testified police officers were "intuitively investigators" and got investigative experience through investigating traffic stops and domestic abuse cases, (Dkt.# 123, Ex.# 53, at 10, 12), and that personally, he "received on-the-job training, which was probably the most beneficial." (Dkt.# 123, Ex.# 53, at 12). Prior to Mrs. Haraway's abduction, Detective Smith had only been involved with two homicide investigations in his numerous years on the police force. *Id.* at 126. One of them remained unsolved during the investigation of the Haraway case.[59]

OSBI's involvement in the Haraway case came only at the request of the local police agency, APD. (Dkt.# 123, Ex.# 43, prosecutorial bates 3). While OSBI's documentation of the investigation does show more thorough reporting than the APD, there are still questions concerning the Haraway investigation that remain unclear. It is evident both agencies received numerous witness reports in close proximity to the crime providing information of alternate suspects and former boyfriends who many have had a hand in Mrs. Haraway's disappearance. APD's and OSBI's inability to pursue such leads, vet the information, and make reasonable investigative decisions is clear from the actions of both agencies in this case.

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[59] The second homicide investigation involved Debbie Carter's murder which occurred in 1983. Ronald Williamson and Dennis Fritz were convicted of that murder, then later exonerated.

b. The Ada Police Department's Primary Function Was to Investigate the Disappearance of Denice Haraway and They Failed That Role Because They Did Not Collect Information from Readily Available Witnesses

Starting from the first call to emergency services, the police failed to properly preserve the crime scene, evaluate evidence, and follow investigative leads. When law enforcement fails in this endeavor, it places the district attorney in a precarious position of evaluating evidence without a full understanding of crucial facts of the crime. *See Brady v. Dill,* 187 F.3d 104, 114 (1st Cir. 1999) (A valuable role and standard police function is to provide information to the prosecutor and the courts). Detectives in this case failed to properly preserve evidence creating a ripple effect limiting the investigative avenues detectives could consider and develop further.

The Court has admonished police behavior that relies on flimsy information. When witnesses are readily available for interviews, physical evidence is available, and medical diagnosis is forthcoming, yet the police do not conduct appropriate interviews, inspect the evidence for signs of the crime, or wait for preliminary reports from the medical technician, the Tenth Circuit Court of Appeals has concluded the police failed to conduct an investigation. *See Cortez v. McCauley*, 478 F.3d 1108, 1117-18 (10th Cir. 2007).

> The investigation of reported crime is the statutory and jurisdictional province of various local, state, and federal law enforcement agencies (Sullivan, 1977). The specific agencies responding to a criminal complaint,

and ultimately in charge, depend on which laws have been reported to be broken and where. Whichever agency takes charge of a criminal complaint, they have the legal authority to respond to the scene, interview witnesses and suspects, collect evidence, and make arrests.

Any responding law enforcement agency also has a professional duty of care. This refers to the professional and legal obligation to be competent custodians of any victims that are encountered; any criminal investigations that are initiated; any evidence that supports or refutes allegations of criminal activity against accused suspects; and any suspects that they take into custody (see Bopp and Schultz, 1972; Gross, 1924; Hansen and Culley, 1973; Kappeler, 2006; SATF, 2009; and Savino and Turvey, 2011). Very often this duty of care is a matter of explicit statute and agency policy, wherein law enforcement officers are not allowed to turn a blind eye to crime and must respond to protect life and property. Very often it is also made part of the formal oath they take when being sworn in. If an agency, or its officers and investigators, do not hold or perceive a professional duty of care to their community, then they are not fit to serve it (Gross, 1924); let alone respond to criminal complaints and assume the responsibilities associated with the collection and testing of physical evidence.

The primary responsibilities of law enforcement, when responding to a criminal complaint, include (adapted from basic criminal investigation and crime scene processing guidelines found in Gross, 1924; O'Connell and Soderman, 1936; Rau, 2000; Snyder, 1944; Wade, 1999; and Weston and Wells, 1974):

i. Protect themselves; call for back-up when needed.

ii. Establish who is involved.

iii. Ensure that everyone involved is safe.

iv. Get medical assistance for those that need it.

v. Determine what happened.

vi. Establish who made the complaint and what it is about.

vii. Identify any witnesses.

viii. Seek out, identify, collect, and protect any physical evidence.

ix. Ensure the objective forensic examination of all relevant evidence.

x. Determine whether or not a crime has taken place.

xi. Identify any legitimate criminal suspects.

xii. Establish whether probable cause exists for an arrest.

xiii. Arrest any criminal perpetrators.

These tactical issues also reflect an ethical responsibility. Investigators may not assume what happened based on the statements of one party. They may not assume that any crime has actually occurred until the facts have been established by a thorough investigation. They must be sufficiently educated to understand what the elements of each crime are and what probable cause is. They must also impartially place the cuffs on anyone they determine has broken the law. For example, as explained in Bryden and Lengnick (1997; pp. 1230-1231):

> As with all crimes, the police decide whether a reported rape actually occurred, and attempt to determine who committed it. If they want the case to go forward, they "found" the complaint and transmit the file to the prosecutor's office . . . The police must investigate, a task that cannot easily be combined with offering the emotional support that the victim needs. The detective presumably wishes to avoid an injustice to a wrongly accused individual. In addition, for reasons of professional pride, he does his best to avoid looking naive by falling for a story that turns out to be false.

Meeting these responsibilities is best accomplished with a thorough, diligent, and comprehensive investigation. By comprehensive investigation, the examiner means a detailed review of the complainant and

> their statements; the careful consideration of witness and suspect statements; and the diligent collection and examination of any physical evidence. All of this must be attended prior to making final determinations regarding whether a crime has been committed and whether probable cause exists to arrest any suspects. *See generally* Bopp and Schultz (1972); Gross (1924); Kappeler (2006); Leonard (1969); O'Connell and Soderman (1936); Sullivan (1977); Savino and Turvey (20 11); and Weston and Wells (1974).

(Dkt.# 123, Ex.# 20, at 2-3). The investigation conducted by the APD and OSBI failed to follow even the basic duty of care owed in the disappearance and murder of Mrs. Haraway. Such disregard at the beginning of the investigation allowed valuable information to be destroyed or completely ignored, including potentially exculpatory evidence for Mr. Fontenot.

When Mr. Whelchel contacted APD at approximately 8:50 p.m. on April 28th, 1984, Ada Police Officer Harvey Philips responded first shortly followed by Detective Baskins. (N/T 6/9/1988 at 86, 91). Upon Officer Phillips arrival, he neglected to close the store to preserve the scene, "because there were several people that had already been in the store and I don't know how many had been there before they got there." *Id.* at 93. When Detective Baskins arrived, he observed "there was Sergeant Phillips, who was the sergeant on duty at the time. He was there, the manager of the store was there, and there were a couple of other people there, there was a lady there and some

children."[60] (N/T 6/10/1988 at 156). Clearly, the crime scene had not been secured for the police to properly evaluate the evidence.

Both officers acknowledge that a cigarette in the ashtray, a beer on the counter, and Mrs. Haraway's purse were not properly preserved as evidence. *Id.*; (J/T at 1239-1240, 1422-23, 1439, 1441, 1447-48). This allowed for evidence to be mishandled, misplaced, or destroyed entirely. Consequently, valuable information that could have led to the actual perpetrator was lost forever. (N/T 6/9/1988 at 87-93, 102-103); (N/T 6/10/1988 at 155-157).

The failure to preserve this evidence deprived the defense of viable evidence, but equally important, it limited what evidence the police possessed to determine what happened to Mrs. Haraway. J.D. Watts, the store clerk who was on duty prior to Mrs. Haraway's shift returned to the store at the behest of Mr. Atkeson, the store manager. When he arrived, he noted the following:

> When I arrived at McAnally's later that **night I recall seeing a lot of police, more than I could count. I recall seeing Ada police, Pontotoc County Sheriff's Deputies and Oklahoma Highway Patrolman. Inside the store, I recall seeing police officers standing at the counter and looking at the register tape. I remember hearing one of those officers saying that**

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[60] As a continuing pattern of non-disclosure, the APD never turned over or made known the list of people who were in McAnally's that evening, what they witnessed, or if they also saw a grey truck.

> **the last purchase made on the register tape was a tallboy can of bee**r.

(Dkt.# 123, Ex.# 15). (*emphasis added*). Not only did the APD not properly secure the scene, their allowance of numerous other officers inside the store demonstrates a blatant disregard for proper police procedure. Further, the failure for all of these officers to document their involvement in the investigation continues to show a failure to properly record the investigation and those taking part in it.

Detective Baskins collected the McAnally's register tape while at the store, receiving telephone calls from customers that very evening. As presented earlier, Officer Richard Holkum, John McKinnis, Gary Haney and Guy Keys all provided information crucial to the investigation of Mrs. Haraway's abduction, but were disregarded. These witnesses explain seeing a pickup truck believed possibly to be involved at the scene thirty minutes before Mrs. Haraway's disappearance. (Dkt.# 123, Ex.#s 5, 6). Mr. McKinnis provided evidence showing a man in the store behind the counter with Mrs. Haraway. (Dkt.# 123, Ex.# 5). However, not only did the APD and OSBI never document their interviews, they never followed up on these leads. Police found no signs of forced entry, a physical confrontation or any obvious signs of violence. (J/T at 1087-1088, 115-116-, 1135, 1139, 1143). With no indication of violence, the possibility that Mrs. Haraway may have been familiar with her abductor was clearly a possibility based not only on Mr. McKinnis' interview, but also the harassing telephone calls made repeatedly to Mrs. Haraway while she was on duty. This was all evidence the police received by their own request.

They sought out witnesses who made purchases in the store; those witnesses responded. They asked family members about anything odd involving Mrs. Haraway; they gave numerous reports of harassing behavior from an unknown assailant. Either these leads were blatantly ignored by APD and OSBI whose duty it was to accurately investigate the case, or they lacked training, which created an inability to recognize the obvious evidentiary value of that evidence. Whatever the excuse, the failings of the Ada Police Department and the OSBI to collect, preserve and evaluate the evidence generated in the hours following Mrs. Haraway's disappearance violated Mr. Fontenot's right to a fair trial with a reliable result.

The Ada Police Department investigators turned a blind eye to many important pieces of evidence, relying instead on witness statements that fit their theory of the case while disregarding much stronger evidence of alternate suspects. This caused the police department to only look at limited facts and witness statements as opposed to getting all the facts and statements from witnesses and letting that define the scope of the investigation. "[A]n officer may not choose to ignore information that has been offered to him or her . . . Nor may the officer conduct an investigation in a biased fashion or elect not to obtain easily discoverable facts." *Kingsland v. City of Miami*, 369 F.3d 1210, 1219 (11th Cir. 2004). This reliance on limited information is the type of investigation which resulted in a misguided investigation. *See generally Kyles v. Whitley*, 514 U.S. at 445.

c. Police Misconduct Involving Witness Interviews Resulted in Descriptions of the Suspects That Have No Relevance to The Disappearance of Mrs. Haraway

The police created a profile of two suspects within four hours of Ms. Haraway's disappearance without a proper evaluation of the facts in the case. (Dkt.# 123, Ex.# 41). The police then focused on Karen Wise's description of two men, even though she was not present at McAnally's. Ms. Wise worked at J.P.'s, another convenience store down the road from McAnally's, and did notice four patrons that evening who made her feel uncomfortable. (N/T 6/8/1988 at 163); (Dkt.# 123, Ex.# 13). However, at no time during the evening of April 28, 1984, did Ms. Wise visit McAnally's where Ms. Haraway worked. It is unclear how the police learned of the four men in J.P.'s or why they focused on Ms. Wise's account as the basis of the two suspects, that later became two composites, when Ms. Wise saw four men in her store that night. *Id.* Ms. Wise admitted police pressure caused her to change her account to conform with evidence with no connection to the crime. *Id.*

This pattern of pressuring witnesses to change their statements to match the police's hypothesis was a common theme and caused truthful information to get lost in the process. James Moyer, the sole eyewitness placing Mr. Fontenot in McAnally's, recounted his attempts to alert the State of his uncertainty of his identification only to be told he too was incorrect. (Dkt.# 123, Ex. 14). Stacey Shelton went to Detective Baskins to explain how she knew about the party held at Gordon Calhoun's apartment was correct because she was there. (Ward Vol. 10 p. 93-195); (Dkt.#

123, Ex. #12). Instead of investigating her account, she was disregarded as a complication to the State's case. *Id.* Such improper handling of witnesses includes Mr. Fontenot himself, who gave a false confession after being told not only that his alibi was wrong, but that Mr. Ward had implicated him in the crime with Odell Titsworth. Such action by the police handling this case demonstrates a disregard not only for the proper development of factual information in a criminal investigation, but a blatant abuse of power for those witnesses who do voice concerns.

d. Law Enforcement Failed to Investigate Leads from other Jurisdictions

Throughout the investigation into Mrs. Haraway's disappearance, both the Ada Police Department and the OSBI interviewed numerous people regarding alternate suspects, potential leads, and other vital information related to the case. Maintaining proper documentation of these various contacts and their substantive interviews was paramount to discern what happened. However, the report writing and records keeping by both the OSBI and APD was flawed throughout the investigation of this case. Contained within OSBI reports are numerous leads for alternate suspects fitting the composite sketch description with little to no documentation as to what happened to these potential leads. It is unclear why certain suspects were or were not interviewed, or why a person was eliminated as a suspect.

For example, agents interviewed Jerry East and several of his family members to ascertain whether he was in Ada around the time of Mrs. Haraway's disappearance. (Dkt.# 123, Ex.# 29, at 1104-1106).

The report states Mr. East was arrested for burglary in Ada in May 1983 and was on probation at the time Mrs. Haraway disappeared. *Id.* When asked his whereabouts on April 28th, he claimed he was with his sister and her family at the lake. *Id.* The Agent's notes on the interview states, "EAST is very poor in remembering times and dates. EAST matches the description of the number two suspect in the Haraway disappearance being fair complexed [sic] with blond hair and green eyes. EAST also has a small amount of acne around his face.

However, EAST's hair is cut, left long in the back and the front in the middle of the ear. It is light blond in color." *Id.* OSBI continued to investigate Mr. East as a potential suspect before dropping the investigation for no clear reason provided in any reports. This pattern continues for numerous other potential suspects.

Police from Beaumont, Texas, contacted the OSBI concerning three Caucasian men arrested for attempting to steal a woman's purse from her car and then attempting to run over the owners when they were caught.

> On June 29, 1984, Detective Barrow, Beaumont Police Department . . . advised Deputy Insp., Roberts his department had taking into custody on June 28, 1984 at 1935 hours a while male who resembled one of the suspects in the composite. The suspect and the two other individuals attempted to steal a purse from a car, but the owners caught the subjects. Subjects then attempted to run over the owners. The subjects were in a '70's blue Chevrolet pickup with primer spots,

> bearing Oklahoma License ATF1975, which was impounded by Beaumont P.D. Before Det. Barrow could check the pick-up for evidence the pick-up and subjects were released.

(Dkt.# 123, Ex.# 44, OSBI 0125). The full names and dates of birth were provided for all three suspects: Denver Russell Davis, Daryl Patrick Robins, and Christopher Lynn Hammock. *Id.* Photographs of these three men were provided along with their criminal histories which included robbery, burglary, larceny, dangerous drugs, and assault.[61] (Dkt.# 123, Ex.# 29, p. 1149-1160). For all the vital information provided by the Beaumont Police Department on these three criminals who fit not only the description, but a truck strikingly similar to the one seen by the only eyewitnesses,[62] nothing was done by either OSBI or the APD to follow-up on this lead. These men obviously had ties to Oklahoma, including working within the state. (Dkt.# 123, Ex.#s 33 & 44, OSBI 0125). It would have been relatively easy to track the license number to find out whether these men, or one of them, was involved in Mrs. Haraway's disappearance. Yet inexplicably, no further investigation is shown as to what transpired with this information.

Further, OSBI received information regarding two men arrested in Tulsa for attempting to rob and kidnap a female convenience store clerk in a very similar manner to the description in the Haraway

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[61] The photographs of these three suspects were disclosed in the January 2014 discovery during the state post-conviction for the first time.

[62] David Timmons described the primered truck he saw as blue in color. (Dkt.# 123, Ex.# 44, OSBI 0851).

case. Not only were these two men arrested in August 1984, three months after Mrs. Haraway's disappearance, but they also matched the composite description used by police.

> During the early morning hours of August 9, 1984, ORVEL REEVES drove a silver, 1984 Datsun passenger car to a Circle "K" Convenience Store in Tulsa. DENNIS REEVES entered the store, robbed the female clerk at knife point and then abducted the clerk from the store. A Tulsa Police Department Patrolman was sitting across the street from the store and saw DENNIS REEVES walk out of the store arm and arm with the female clerk. The patrolman became suspicious and followed the car a short distance, then stopped it. As the patrolman was approaching the car, the female convenience store clerk alerted the patrolman to the fact that she had been robbed and abducted. Patrolman then took DENNIS and ORVEL REEVES into custody.

(Dkt.# 123, Ex.# 29, at 1111). Tulsa County prosecuted and convicted both men for these events resulting in fifteen-year prison sentences. (Dkt.# 123, Ex.# 30). Because they remained in custody, OSBI Agent Gary Rogers, or APD Detective Dennis Smith, could have interviewed these men given that the facts of this robbery/kidnapping mirror those described in Mrs. Haraway's case. However, no further follow-up, witness interviews, or police reports provided demonstrate whether anyone developed such a critical lead in this investigation. These three examples are not anomalies but a consistent pattern of a lax and incompetent

investigation that repeatedly ignored assistance of various jurisdictions. The OSBI reports disclosed pursuant to the OCCA's order and those recently released continue to provide additional alternate suspects and viable leads that were dropped by law enforcement. Given the singular role that law enforcement plays in investigating criminal activity, the failure of those leading the investigation into what happened to Denice Haraway utterly failed in their obligation and resulted in numerous alternate suspects being ignored in favor of "suspects" who not only had alibis, but no motive for these crimes.

e. Law Enforcement Failed to Properly Preserve Evidence Connected with The Crime After Mrs. Haraway's Remains Were Found

Given that law enforcement are the only agencies that may collect physical evidence, the proper storage and cataloging of that evidence is paramount. However, the OSBI and APD failed to conduct a proper search of the Gerty crime scene where Denice Haraway's remains were discovered. Allen Tatum found the skull while laying traps on his property. (N/T 6/08/1988 at 37-38). He then contacted the police who began searching for other bones over the course of a few days. (N/T 06/08/1988 at 40-44). However, the search conducted by several OSBI agents did not provide a comprehensive list of what bones were found, the exact location of those bones, what other items may have been found with the bones, and the area description of where the bones were uncovered. (Dkt.# 123, Ex.# 44, OSBI 0185-0201, 0203-0204, 0211-0212); (Dkt.# 123, Ex.# 29 at 0932-0933, 0936-0951, 1124-1145).

The investigative and forensic efforts of law enforcement at the location where Haraway's remains were found (West of Gerty, off a county road; Monday, January 20th, 1986) were inadequate rising to the level of abandonment. This prevented the recognition, preservation, collection, and testing specific items of evidence, as well as an untold volume of evidence that would have been missed. This is based on at least the following facts and evidence:

A. The First Officer on site did not secure crime scene or provide for scene integrity in any reasonable or effective fashion. This is standard practice even when remains have been in place for extended periods of time, to prevent further evidence loss, damage, or obliteration (Chisum and Turvey, 2011).

   - No security tape deployed.
   - No security log kept re: personnel/ witnesses/ patrons entering and exiting the scene.

B. It is unclear from the record whether scene was "processed" on 1120/86 or 1121186

C. Scene photos lacked sufficient quantity, quality, context and measurements.

D. Some bones appeared to be improperly piled together for photos, and were then packaged together in a sack.

E. There is no written investigative or forensic report on who found what or where at the scene.

F. There is no scene diagram.

G. There was no directed or deliberate forensic excavation for other evidence concealed by brush or beneath soil.

H. According to a supplemental MEs report, some victim bones and a watch were found in a rat's nest by a farmer some 30' away from the original site on 1-30-96. There is no evidence that the watch put under a clear chain of custody or submitted for forensic analysis (*e.g.*, fingerprinting; now DNA testing).

I. Additionally, there is no evidence that anyone in authority investigated or confirmed whether the watch or the earrings found with these remains actually belonged to the victim.

J. The ME's office was not notified; bones were therefore removed without proper legal authority by the police, the OSBI and the Sheriff's Department.

K. The scene was vacated and left unsecured before investigators returned on 1/24/86: the OSBI, the prosecutor, the sheriff and the ME went out there and found more bones.

L. In late February of 1986, law enforcement investigators returned to search this scene with both ECU college students and victim family members. Either group being involved with formal search efforts at this scene is highly inappropriate.

M. There were, in effect, multiple searches on multiples dates by multiples agencies with no reports of search activity or chain of custody regarding evidence collected.

N. Based on a review of the documentation, it is likely that evidence still exists at that location, to include more bones and perhaps even the victim's engagement ring, which was not recovered.

(Dkt.# 123, Ex.# 20). Without this information, it was impossible for trial counsel, appellate, or post-conviction counsel to properly understand exactly what happened to Mrs. Haraway prior to her death. These difficulties did not only impact the defense, but the ability of the Medical Examiner's Office to properly evaluate and identify the remains they were provided. The ME's Office investigator noted the poor investigation and evidence collection destroyed any ability of that office to fully understand what happened to Mrs. Haraway.

> 1-21-86, 1650 I returned a call to Hughes County District Attorney Bill Peterson concerning some bones that were found. Mr. Peterson didn't know anything, about the discovery but they are thought to be the remains of a missing store clerk-Donna Hariway.[sic] No ME was notified. He stated that the OSBI was notified out of McAlister.[sic] That some people from the OKC office had come down. OSBI Lab people out of OKC did photo. **The scene and they just had a field day picking up bones. No diagrams. The OSBI agent out of McAlister never showed up at the scene.**

> **Mr. Peterson believes that the bones are en route to OKC but didn't know for sure.** The sheriff didn't know where the bones were but thought that the OSBI had them. Notified the OSBI in OKC & spoke with Rick Spense. He didn't have the bones but thought that the lab man David Dixon had them. I spoke with the Sheriff Orvall Rose who didn't know where they were. Finally, the OSBI found them in their lab and delivered them at 2040 by Ann Reed. Come to find out the bones were found by a trapper.

(Dkt.# 123, Ex.# 46, at 10) (emphasis added). Because no systematic approach was taken to properly collect evidence, not all of the viable evidence related to the case was uncovered in the January 1986 search. Instead, family members, university students, friends of the victim, and unrelated people found critical evidence and brought it to police during a much larger search conducted at the end of February that same year. (N/T 6/08/1988, at 82-95). These searches also occurred without proper evidence collecting practices clearly showing the lack of a proper search done by police in January 1986. Further, yet other people found evidence missed by the OSBI and APD. Shelia Desoto and her daughter, Sandi Mantzke found a grey sweatshirt at the Gerty crime scene.

> Several months after Karl Fontenot and Tommy Ward were convicted of Denice Haraway's murder, I saw news reports that Denice Haraway's remains had been found in an isolated location near Gerty, Okla.

Those remains were discovered on Jan 21, 1986.

Several weeks later, mom's sister, Hazel Faulkner, was visiting from Texas. She was interested in the [sic] the Denice Haraway case. On Friday, March 7, 1986, I went with my Aunt Hazel Faulkner and my mom, Sheila Desoto, and drove over to Gerty to look at the site where Denice Haraway's remains had been discovered. We were there out of curiosity. After viewing the trial, this was just one more fact which didn't make sense. We were walking around this site when we literally stumbled over three large flat rocks, which appeared to have been placed carefully over a large cloth object. We carefully removed the rocks, and found a nearly intact gray sweatshirt with a hood and a zippered front. We placed this sweatshirt into a paper sack in order to preserve any possible evidence. We thought this might have been the sweatshirt worn by Denice Haraway the night she disappeared.

We also took photographs of the sweatshirt and where we found this sweatshirt. Copies of those photographs are attached. By the time we got to a payphone it was late on Friday afternoon. We called, but were unable to reach Dennis Smith or Gary Rodgers. We put the paper bag with the sweatshirt into the trunk of my mom's car where it stayed all weekend.

On Monday, March 10, 1986, my mom and I personally handed this gray sweatshirt to

> Ada Police Chief Gray in his office. Chief Gray told us he would put this sweatshirt with the other evidence related to the Denice Haraway case, in the property room. No investigators, including Dennis Smith and Gary Rogers has ever interviewed me or asked me where or how we found that sweatshirt.

(Dkt.# 123, Ex.# 31).

The problem with the failure to collect, document, and store the evidence related to the Gerty crime scene and what has transpired to that evidence is that crucial information which explains what happened on April 28th is lost. Further, records pertaining to the evaluation of this evidence are also missing. Dr. Fred Jordan, a former Medical Examiner who knew of the evaluation conducted by Drs. Glass and Balding have explained it was the M.E.'s practice at the time to photograph all remains given to them along with x-raying any bones. (Dkt.# 123, Ex.# 36) This was standard practice for the office who handled the bones and evidence brought to them from the Gerty crime scene. However, none of this evidence can now be found. Such evidence is crucial to the understanding of the events that transpired from the time Mrs. Haraway left McAnally's on April 28, 1984, until her skeletal remains were discovered almost a year and a half later. The fact that almost every state agency who investigated, analyzed, or prosecuted this case have lost the evidence and documentation in this case not only deprives Mr. Fontenot of his ability to properly prove his innocence, it makes it almost impossible to answer the question, "What happened?" The inept handling of reports, evidence, and all other

vital documentation from this case clearly falls within a known pattern of police misconduct that the lead detectives and agents working on this case were known to commit.

The failure to properly train officers with the Ada Police Department to investigate a case resulted numerous errors. If the police investigating this case had collected available evidence, investigated leads of other potential suspects, listened to witnesses even if their information was contrary to APD's theory of the case, and followed up on the information people were giving them, it is likely Mr. Fontenot would have never been convicted. Regardless of how "intuitive" a detective is, the detective is still duty bound to build a case not on gut feeling, but on evidence. Additionally, the detective is duty bound to consider all available evidence instead of only considering evidence his intuition tells him is important. Finally, the detective must make all evidence available to the prosecution, so a proper assessment of discoverable materials can be timely made pretrial. Based on the numerous constitutional violations that occurred in this case, it is clear Mr. Fontenot did not receive a fair trial to which he was entitled both under the laws of the state of Oklahoma and the U.S. Constitution.

CONCLUSION

The United States and Oklahoma Constitution's guarantee that no person shall be deprived of liberty or life without due process of the law, encompassing the right to be free from convictions except upon proof beyond a reasonable doubt of guilt. Fourteenth Amendment; Okla. Const. Art.II, Section 7. The federal and state constitutions are in accord on the re-

quirement of proof beyond a reasonable doubt and on the test to be applied when examining the record for absence or existence of such proof. The test for determining whether proof is sufficient to support a criminal conviction is whether, in the light most favorable to the State, a rational trier of fact could find guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316-17 (1979).

In the light most favorable to the State, the evidence at trial established beyond a reasonable doubt that Mrs. Haraway disappeared on April 28, 1984, and was found dead on January 20, 1986. Beyond these basis facts, the evidence introduced to establish the cause of death, criminal agency and the identity of the person responsible for her death was unreliable, contradictory, uncorroborated or simply nonexistent. None of the eyewitnesses identified Mr. Fontenot as the man who left the store with Mrs. Haraway, and they saw only one man with her in the truck as they left. None of the physical evidence, including the body, linked Mr. Fontenot to Mrs. Haraway's disappearance or death. At best, the evidence established Mrs. Haraway died from a gunshot wound to the head, or was struck by a stray bullet after she died from unknown causes. In either case, there was no independent evidence suggesting she was raped, stabbed or burned, or ever taken to any location other than where her remains were found. The Court finds no rational juror who was able to set aside the tragedy of Mrs. Haraway's death could find beyond a reasonable doubt that Mr. Fontenot should be convicted based solely on his unsubstantiated confession. Given the uncontroverted evidence of Petitioner's mental and psychological impairments; the material

discrepancies between the physical evidence and the story the Petitioner told the police; the absence of evidence to corroborate his version of the events; and the circumstances surrounding his coerced confession, the Court finds no reasonable juror would have convicted the Petitioner.

ACCORDINGLY, this Court finds Petitioner has established the actual innocence gateway removing the procedural impairments from his Second Amended Petition for Writ of Habeas Corpus, and all his claims are deemed exhausted. Respondent's Motion to Dismiss Second Amended Petition is **DENIED.** Mr. Fontenot's Second Amended Writ of Habeas Corpus is **GRANTED** and it shall issue, unless within one hundred twenty (120) days of the entry of this Order the State grants Petitioner a new trial or, in the alternative, orders his permanent release from custody.

IT IS SO ORDERED this 21st day of August, 2019

/s/ James H. Payne
United States District Judge
Eastern District of Oklahoma

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT GRANTING MOTION TO STAY THE DISTRICT COURT MANDATE (NOVEMBER 4, 2019)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KARL FONTENOT,

Petitioner-Appellee,

v.

SCOTT CROW, Interim Director,

Respondent-Appellant.

No. 19-7045

(D.C. No. 6:16-CV-00069-JHP) (E.D. Okla.)

Before: HOLMES and PHILLIPS, Circuit Judges.

Scott Crow, the Interim Director for the Oklahoma Department of Corrections (ODOC), filed a motion for a stay pending appeal of the district court's decision granting Oklahoma state prisoner, Karl Fontenot, a conditional writ of habeas corpus. The district court's decision states that the writ will issue, unless within 120 days of the entry of its decision—which is December 19, 2019—the State of Oklahoma grants

Mr. Fontenot a new trial or, in the alternative, orders his permanent release from custody.

The State, through ODOC, seeks a stay pending appeal to prevent Mr. Fontenot's immediate retrial or his permanent release. In his response to the stay motion, Mr. Fontenot states he does not oppose a stay of his retrial if he is released on bond pending the State's appeal. He also agrees to be subject to conditions of release to ensure he stays in Oklahoma while this court considers the State's appeal.

After considering the parties' submissions, the rules governing release in a habeas appeal under Federal Rule of Appellate Procedure 23, and the traditional stay factors outlined in *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), we grant in part and deny in part the motion for stay. We grant a stay pending appeal of the district court's order to grant Mr. Fontenot a new trial. We deny the request to stay Mr. Fontenot's release from custody on December 19, 2019. However, we direct the district court to set a briefing schedule for the parties to propose conditions of release for Mr. Fontenot pending appeal and, if necessary, to hold a hearing on appropriate conditions of release. The district court's briefing schedule shall ensure that appropriate conditions of release are in place before Mr. Fontenot's release on December 19, 2019.

Entered for the Court,

/s/ Elisabeth A. Shumaker
Clerk

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA (SEPTEMBER 30, 2019)

THE UNITED STATES DISTRICT COURT
FOR EASTERN DISTRICT OF OKLAHOMA

KARL FONTENOT,

Petitioner,

v.

JOE ALLBAUGH, Warden,

Respondent.

No. CIV-16-069-JHP

Before: James H. PAYNE,
United States District Judge.

This matter is before the Court on Respondent's Motion for Stay of the Opinion and Order Granting Second Amended Petition for Writ of Habeas Corpus entered by this court on August 21, 2019. Pursuant to that Order, this court directed that a Writ of Habeas Corpus be issued, unless within one hundred twenty (120) days of the entry of that Order, the State grants Petitioner a new trial or orders his permanent release from custody.

Respondent asserts a stay should be granted because there is a substantial likelihood of success on appeal to the Tenth Circuit Court of Appeals. Respondent further argues that the State will suffer irreparable injury if the stay is not granted, and a stay would serve the public interest and not injure Petitioner.

Petitioner objects to the granting of a stay on the ground that Respondent cannot meet the requirements of Fed. R. App. P. 8, 10th Cir.R. 8.1, or overcome the presumption in favor of Petitioner's release pursuant to Fed. R. App. P. 23. Petitioner further asserts Respondent has clearly failed to make a showing of a substantial likelihood of success on appeal, and his continued confinement would result in irreparable harm to Petitioner.

The United States Supreme Court has held that "a court has broad discretion in conditioning a judgment granting habeas relief . . . [and is] authorized, under 28 U.S.C. section 2243, to dispose of habeas corpus matters 'as law and justice require.'" *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987). Fed. R. App. P. 23(c) "undoubtedly creates a presumption of release from custody in such cases, but that presumption may be overcome if the judge rendering the decision, or an appellate court or judge, 'otherwise orders.'" *Id.* at 744 (footnote omitted).

In determining whether the presumption or correctness to the initial custody determination may be overcome, the Supreme Court has outlined the factors regulating issuance of a stay pursuant to Fed. Civ. P. 62(c).

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 776.

Traditional factors contemplating individualized judgments in each case should also be considered. Such factors include the possibility of flight, risk to the public if the prisoner is released, the State's interest in continuing custody and rehabilitation pending appeal, and the petitioner's substantial interest in release. The final determination then "may depend to a large extent upon the State's prospects of success in its appeal . . . [or the State's showing of] a substantial case on the merits." *Id*. at 777-78.

After an evaluation of all the factors, the court finds that Respondent has failed to meet the burden required to overcome the presumption of correctness of this court's initial custody determination. Fed. R. App. P. 23(d). Respondent does not assert there is the possibility of flight or risk to the public, and the court finds the remaining factors weigh heavily toward Petitioner's retrial or release pursuant to the Order Granting Writ of Habeas Corpus.

ACCORDINGLY, Respondent's Motion for Stay is Denied.

IT IS SO ORDERED this 30th day of September, 2019

/s/ James H. Payne
United States District Judge
Eastern District of Oklahoma

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING (OCTOBER 6, 2021)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KARL FONTENOT,

Petitioner-Appellee,

v.

SCOTT CROW, Interim Director,

Respondent-Appellant.

No. 19-7045

(D.C. No. 6:16-CV-00069-JHP) (E.D. Okla.)

Before: McHUGH, EBEL, and EID, Circuit Judges.

This matter is before the court on Appellant's *Petition for Rehearing and Request for En Banc Consideration*. We also have a response from Appellee. Having carefully considered the petition and the filings in this appeal, we direct as follows.

Appellant's request for panel rehearing is denied pursuant to Fed. R. App. P. 40. Judge Eid would grant panel rehearing.

The request for *en banc* consideration was transmitted to all judges of the court who are in regular

active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the petition seeking rehearing *en banc* is denied pursuant to Fed. R. App. P. 35(f).

Entered for the Court,

/s/ Christopher M. Wolpert
Clerk

COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA, ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF (OCTOBER 29, 2015)

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

KARL FONTENOT,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

No. PC-2015-76

Before:, Clancy SMITH, Presiding Judge,
Gary L. LUMPKIN, Vice Presiding Judge,
Arlene JOHNSON, Judge, David B. LEWIS, Judge,
Robert L. HUDSON, Judge.

ORDER GRANTING MOTION TO ASSOCIATE COUNSEL AND AFFIRMING DENIAL OF POST-CONVICTION RELIEF

Before the Court is Petitioner Karl Fontenot's appeal of an Order entered in the District Court of Pontotoc County, Case No. CRF-84-183, by the Honorable Thomas S. Landrith, District Judge, denying

post-conviction relief.[1] We affirm the district court's Order.

I. Motion to Allow Out-of-State Attorney as Associate Counsel

Jonathan A. Neal, Fontenot's local counsel, filed a "Motion to Associate Counsel" wherein he asks that attorney Tiffany R. Murphy, who is not admitted to practice in Oklahoma, be permitted "to practice in the above styled and numbered cause."[2] Rule 1.6, *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2015), permits a practicing attorney of another state who has professional business before this Court, but who is not licensed in Oklahoma, to be recognized as associate counsel in accordance with the rules in 5 O.S.2011, ch. 1, app. 1, art. II, § 5. The motion comports with the rules and no objection has been filed in this Court. The Court therefore grants this Motion.

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[1] A change of venue to the District Court of Hughes County occurred during the retrial of Petitioner's case. There it proceeded under Hughes County District Court Case No. CRF-88-43.

[2] According to the Motion and its attachments, Ms. Murphy is admitted to the bar of Pennsylvania where she is an attorney in good standing. The Motion advises that Ms. Murphy has made application to the Oklahoma Bar Association, and she has been approved as an out-of-state attorney under 5 O.S.2011, ch. 1, app. 1, art. II, § 5. A "Certificate of Compliance," issued by the Oklahoma Bar Association, is attached to the Motion as is required by those provisions. 5 O.S.2011, ch. 1, app. 1, art. II, § 5 (B)(5). Also attached to the Motion is an order by Judge Landrith that admitted Ms. Murphy as associate counsel before the trial court in Fontenot's case.

II. History of Petitioner's Convictions

A jury convicted Fontenot for the first degree murder, robbery, and kidnapping of Donna Denise Haraway who went missing in April of 1984, from an Ada convenience store where she was working as the store clerk.[3] The court sentenced Fontenot to death, twenty years imprisonment, and ten years imprisonment, respectively. In *Fontenot v. State*, 1994 OK CR 42, 881 P.2d 69, we affirmed Fontenot's convictions, but vacated his death sentence on the murder conviction and remanded for resentencing. On remand, Fontenot waived jury sentencing in return for the State's agreement to withdraw the bill of particulars seeking the death penalty and to recommend a sentence of life imprisonment without the possibility of parole. The trial court followed that recommendation and sentenced Fontenot on September 18, 1995.

III. Discussion

Fontenot raised five claims in his post-conviction application before the district court.[4] The State filed

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[3] Haraway's body was not found until January of 1986.

[4] Fontenot argued: (1) newly discovered evidence of actual innocence required post-conviction relief; (2) his Fourteenth Amendment rights were violated when the State of Oklahoma withheld evidence in violation of *Brady v. Maryland*; (3) his Sixth Amendment right to effective assistance of counsel was violated when his trial counsel failed to investigate the case and present viable evidence supporting his innocence; (4) his due process rights were violated because police misconduct induced a false confession and the prosecution knowingly introduced false testimony during his trial in violation of the Fourteenth Amendment to the U.S. Constitution; and (5) his Fourteenth Amendment due process rights were violated because of police

a response to Fontenot's Application, asserting that because of his delay in seeking post-conviction relief, his claims should be barred from review under the doctrine of laches.[5] The State contended that as best as could be discerned from Fontenot's pleadings, the primary information on which he relied for relief was available to him at the time of his trial or during the time of his second appeal.[6] The State contended, "All of Petitioner's substantive claims could have been raised years ago." (O.R. 1315.) The District Court agreed and denied Fontenot's Application based solely on the State's laches defense.

In *Thomas v. State*, this Court found the doctrine of laches, which had been applied in cases prior to enactment of the Post-Conviction Procedure Act, "continues to be applicable, in appropriate cases, to collateral attacks upon convictions . . . by means of an application for post-conviction relief" and that laches "may prohibit the consideration of an application for post-conviction relief where petitioner has forfeited that right through his own inaction." *Thomas v. State*, 1995 OK CR 47, ¶ 15, 903 P.2d 328, 332. *Thomas* also noted that when the State invokes laches as a defense, it is not required to demonstrate that it has suffered actual prejudice because of the delay in the filing of the post-conviction claim. *Id.*, ¶ 14, 903 P.2d at 332. We **FIND** that Fontenot has

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misconduct that permeated the investigation into the victim's disappearance. [O.R. 1250.]

[5] The State argued further that Fontenot's claims were procedurally barred under the Post-Conviction Procedure Act.

[6] Fontenot was previously convicted and his convictions reversed in *Fontenot v. State*, 1987 OK CR 170, 742 P.2d 31.

not shown the District Court erred in finding laches applicable to his post-conviction claims. As Fontenot has failed to demonstrate any abuse of discretion in the District Court's decision, its order denying post-conviction relief is affirmed.

IT IS THEREFORE THE ORDER OF THIS COURT that the motion requesting Tiffany R. Murphy to be given leave to appear before this Court and to be recognized as associate counsel is **GRANTED.**

IT IS THE FURTHER ORDER OF THIS COURT that the final order of the District Court, denying Petitioner post-conviction relief in Pontotoc County District Court Case No. CRF-84-183 and Hughes County District Court Case No. CRF-88-43, is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015), **MANDATE IS ORDERED ISSUED** on the filing of this decision.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 29th day of October, 2015.

/s/ Clancy Smith
Presiding Judge

/s/ Gary L. Lumpkin
Vice Presiding Judge

/s/ Arlene Johnson
Judge

/s/ David B. Lewis
Judge

/s/ Robert L. Hudson
Judge

ATTEST:

/s/ Michael S. Richie
Clerk

ORDER OF THE DISTRICT COURT OF PONTOTOC COUNTY, STATE OF OKLAHOMA, POST CONVICTION FINDINGS (DECEMBER 31, 2014)

IN THE DISTRICT COURT OF PONTOTOC COUNTY, STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,

Petitioner,

v.

KARL FONTENOT,

Respondent.

Pontotoc County Case No. CRF-84-143

Retrial: Hughes Co. Case No. CRF-88-43

Before: Thomas S. LANDRITH, District Judge.

POST CONVICTION FINDINGS

ORIGINAL CHARGE:

Count 1-Murder, First Degree-21 O.S. § 701.7

JUDGMENT & SENTENCE:

Found guilty by jury and sentenced to death.

RETRIAL:

Count 1
Murder, First Degree: Death

Count 2
Robbery with a Dangerous Weapon: 20 years

Count 3
Kidnapping: 10 years

REMAND:

Count 1
Murder, First Degree: Life imprisonment without possibility of parole.

APPLICATION FOR POST CONVICTION RELIEF FILED:

July 24, 2013

RESPONSE BY STATE FILED:

September 17, 2013

IS THERE A GENUINE ISSUE OF MATERIAL FACT?

No.

IS AN EVIDENTIARY HEARING NECESSARY? (Petitioner having stipulated to have decision heard on briefs and motions and responses.)

No.

IS THE TESTIMONY OF TRIAL JUDGE MATERIAL TO SUCH A HEARING?

No.

FINDINGS OF FACT AND CONCLUSION OF LAW:

This Court finds as follows to wit:

1. Petitioner and Defendant Thomas Jesse Ward were tried together and convicted in Pontotoc County in CRF-84-183 on the 25th day of October. 1985.
2. Oklahoma Court of Criminal Appeals reversed Petitioner's conviction in Fontenot v. State, 1987 OK CR170, 742 P.2d 31.
3. Change of venue to Hughes County was granted and Petitioner was retried in CRF-1988-43 and was convicted again as set forth above.
4. Oklahoma Court of Criminal Appeals affirmed their conviction but remanded for re-sentencing.
5. At re-sentencing, Petitioner waived his right to a jury and by agreement with the State, was sentenced to life without parole. Petitioner did not thereafter appeal.
6. Petitioner has had possession of the 860 pages of OSBI documents since 1992.
7. Petitioner has had access to Medical Examiner report since 1986.
8. Claim of actual innocence, ineffective assistance of counsel, prosecutorial misconduct, and Brady violation could have been submitted much earlier.
9. Simply, too much time has elapsed due to Petitioner's own inaction. Thomas v. State 95 OK CR47, 903 P.2d 328.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that based on doctrines of laches

that Petitioner's Application for Post-Conviction relief be denied.

IT IS SO ORDERED THIS 31 DAY OF DECEMBER, 2014.

/s/ Thomas S. Landrith
District Judge

OPINION OF THE COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA (JUNE 8, 1994)

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881 P.2d 69

COURT OF CRIMINAL APPEALS OF OKLAHOMA

KARL ALLEN FONTENOT,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

No. F-88-571

An Appeal from the District Court of Hughes County; Case No. CRF-88-43; Donald E. Powers, District Judge

Before: Gary L. LUMPKIN, P.J., Charles A. JOHNSON, V.P.J., James F. LANE, Charles S. CHAPEL and Reta M. STRUBHAR, JJ.

OPINION

CHAPEL, Judge:

Karl Allen Fontenot was tried by jury and convicted of First Degree Malice Aforethought Murder 21 O.S.Supp.1982, § 701.7) (Count III), Kidnapping (21 O.S.1981, § 741) (Count II) and Robbery with a

Dangerous Weapon (21 O.S.Supp.1982, § 801) (Count I), in Hughes County District Court, Case No. CRF-88-43, before the Honorable Donald E. Powers, District Judge. Fontenot received a twenty year prison sentence for the robbery conviction and a ten year prison sentence for the kidnapping conviction. The jury found three aggravating circumstances and sentenced Fontenot to death for the murder conviction. We affirm all counts, but must remand[1] the murder conviction for resentencing to afford Fontenot the "life without parole" jury instruction to which he is entitled.[2]

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[1] Because we are remanding this case to the trial court for resentencing, the second stage errors Fontenot raises in propositions VII, VIII, IX, X, XI, XIII, XIV and XVII will not be addressed. Propositions XV, XVI and XVIII raise both first and second stage errors. Review of theses propositions will be confined to the first stage errors alleged.

[2] The Oklahoma Legislature enacted the "life without the possibility of parole" option in November of 1987. *See* 21 O.S.Supp.1987, §§ 701.9 and 701.10. Although Fontenot committed the offenses at issue prior to this date, his second trial and conviction did not occur until June of 1988—well after the statute's enactment.

Under these circumstances, this Court's recent opinions in *Salazar v. State*, 852 P.2d 729 (Okl.Cr.1993) and *Hain v. State*, 852 P.2d 744 (Okl.Cr.1993), require that Fontenot's case be remanded for a new sentencing proceeding providing him with the life without parole punishment option. We note that Fontenot did not request an instruction on life without parole. As we stated in *Salazar*, however, the error resulting from instructions which fail to provide the proper range of punishment is fundamental and cannot be waived.

The dissent argues that the Legislature has effectively precluded this Court from applying the *Hain* and *Salazar* holdings to Fontenot's case. Shortly after those opinions were handed down, the Legislature amended the statute setting forth the proce-

dures to be followed when this Court remands a capital case for resentencing. Upon remand, the sentencer may now impose "any sentence **authorized by law at the time of the commission of the crime**. . . . " 21 O.S.Supp.1993, § 701.10a (emphasis added). The dissent claims this amendment, which was expressly made retroactive, prohibits this Court from granting relief under *Salazar* and *Hain* to all defendants whose cases are handed down after its enactment.

The Legislature did not, however, amend 21 O.S.Supp.1987, § 701.9, which clearly provides that the punishment for first degree murder shall be life, life without parole or death, and that these punishment options are effective upon "conviction." Fontenot was convicted **after** this provision was enacted, and was thus entitled to have his jury instructed on the life without parole sentencing option. *See Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). The trial court erred in failing **sua sponte** to instruct Fontenot's jury in accordance with section 701.9. The Legislature's procedural amendments to the remand provisions in section 701.10a did not obviate the trial court's section 701.9 sentencing error.

Moreover, we rejected a similar argument raised by the State in its Petition for Rehearing in *Salazar v. State*, 859 P.2d 517 (Okl. Cr.1993) (order denying petition for rehearing). In response to the State's claim that the amended section 701.10a warranted rehearing in Salazar's case, we stated as follows: "To apply [section 701.10a] to Salazar would deprive him of a sentencing option that this Court has stated was available to him in *Wade v. State*, 825 P.2d 1357 (Okl.Cr.1992), and *Allen v. State*, 821 P.2d 371, 376 (Okl.Cr.1991), and would result in harsher penalty options, which would violate the prohibition against imposing a harsher punishment in an ex post facto manner." (Citations omitted).

Fontenot committed his crime before but was tried after the life without parole provision became effective. He was therefore similarly situated to Salazar. Accordingly, *Wade* and *Allen* also granted *Fontenot* the right to have his sentencer instructed on the life without parole option. The fact that the Legislature's amendment to section 701.10a was enacted before rather than

The facts surrounding the abduction and murder of Donna Harraway are set forth generally in *Fontenot v. State*, 742 P.2d 31 (Okl.Cr.1987). In that opinion, this Court reversed Fontenot's first set of convictions and remanded for a new trial.[3] The present appeal is from the convictions obtained against Fontenot during his second trial. Any additional facts implicated in this appeal will be set forth in the discussion of those propositions to which they relate.

Issues Relating to Jury Selection

In his eighteenth proposition, Fontenot claims that the trial judge erred in denying his pretrial motion to have the jury panel individually voir dired. He argues that the history of the case, the large number of venirepersons subject to pretrial publicity and the special scrutiny required in capital cases merited individual voir dire. We disagree.

This Court has consistently held that there is no right to individual voir dire. *See Trice v. State*, 853 P.2d 203, 209 (Okl.Cr.1993); *Douma v. State*, 749 P.2d 1163, 1165 (Okl.Cr.1988). Whether to grant a motion for individual voir dire is a decision resting within

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after this Court rendered an opinion in Fontenot's case cannot deprive him of this right.

[3] Fontenot and Tommy Ward were originally tried together for the kidnapping, robbery and murder of Mrs. Harraway. This Court determined that the admission of Ward's confession during Fontenot's trial constituted reversible error. Ward's convictions were reversed on identical grounds in *Ward v. State*, 755 P.2d 123 (Okl.Cr.1988). Both Ward and Fontenot were retried separately. Ward was also found guilty on all three counts at his second trial, but received a life sentence for his murder conviction.

the trial judge's sound discretion. *See Trice*, *supra* at 209. *See also Brown v. State*, 743 P.2d 133, 137 (Okl.Cr.1987). Fontenot has not demonstrated an abuse of discretion. Accordingly, this proposition is denied.

Issues Relating to Guilt/Innocence

Fontenot argues in his first proposition that his confession was not voluntary and should therefore have been suppressed. He claims that the police used improper and coercive interrogation techniques to exploit his mental deficiencies.

According to Fontenot, his explicit waiver of *Miranda*[4] rights and subsequent confession was no more than the product of police exploitation of his low mental capability. We disagree.

The ultimate test of the voluntariness of a confession is whether it is the product of an essentially free and unconstrained choice by its maker. *See Crawford v. State*, 840 P.2d 627, 635 (Okl.Cr.1992), *citing Malloy v. Hogan*, 378 U.S. 1, 7, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964). A confession is involuntary or coerced if the "totality of the circumstances" demonstrates that the confessor did not freely decide to give the statement. *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991). Under the totality of the circumstances approach, both the characteristics of the accused and the details of the interrogation are considered. *Turner v. State*, 803 P.2d 1152, 1158 (Okl.Cr. 1990), *cert. denied,* 501 U.S. 1233, 111 S.Ct. 2859, 115 L.Ed.2d 1026 (1991), *citing Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

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4 *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Fontenot cites the testimony of Dr. Sandra Petrick, a clinical psychologist, and Dr. Joel Dryer, a psychiatrist, as evidence of his mental deficiencies. Dr. Petrick had interviewed Fontenot on May 17, 1985, for the limited purpose of determining whether he was competent to stand trial.[5] She concluded that he was. During the second trial, which is the subject of the present appeal, defense counsel asked Dr. Petrick questions about her session with Fontenot. Based upon the information she had obtained, she could not offer a conclusive opinion on whether Fontenot could have knowingly and voluntarily waived his *Miranda* rights prior to his confession.

Defense counsel also questioned Dr. Petrick about some additions she made to her original report, in which she initially concluded Fontenot was competent to stand trial. While her competency determination was unconditional, Dr. Petrick also mentioned that Fontenot might need assistance in understanding legal terminology.[6] After the first trial in August of 1986, Dr. Petrick generated a supplemental competency report in response to Fontenot's then appellate counsel. She stated in that report that Fontenot had been competent to stand trial but added the stipulation "that he receive assistance in the area of legal terminology." Dr. Petrick also stated in this supplemental report that Fontenot did not understand the implications of a confession when he was arrested. During the second

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[5] Dr. Petrick evaluated Fontenot prior to the first trial.

[6] When Dr. Petrick interviewed Fontenot, he apparently did not understand and appreciate the district attorney's role in his prosecution. He also referred to the statement he had given to the police as a "confessment."

trial, Dr. Petrick testified that she did not consider these additions to be changes in her original report, but merely detailed elaborations on conclusions already reached.

Dr. Joel Dryer evaluated Fontenot on May 23, 1988, just prior to the second trial, at defense counsel's request. Dr. Dryer ultimately concluded that Fontenot suffered from "post-traumatic stress disorder," but that he did not kill Donna Harraway. This conclusion was based in part on his review of a psychological report written by a doctor who had analyzed Fontenot when he was six years old. Dr. Dryer also obtained information about Fontenot's mother. Fontenot witnessed and apparently felt responsible for his mother's death. According to Dr. Dryer, Fontenot wanted to die. Dr. Dryer concluded that Fontenot's guilt and death wish, coupled with his loneliness and desire for attention, caused Fontenot falsely to confess to the murder of Donna Harraway.

Fontenot claims that the testimony of Drs. Petrick and Dryer, the testimony of witnesses who stated that he was prone to exaggeration, and the fact that he was a twenty year old with a twelfth grade education, together support his claim that he was incapable of giving a knowing and voluntary confession. Even if we were to find Fontenot's mental condition to be a significant factor in the voluntariness calculation, the dispositive inquiry is whether police misconduct contributed to the confession. *See Colorado v. Connelly*, 479 U.S. 157, 164, 107 S.Ct. 515, 520, 93 L.Ed.2d 473 (1986). We therefore turn to Fontenot's allegations of improper interrogation techniques.

An officer read the *Miranda* warnings to Fontenot at the beginning of his October 19, 1984, videotaped

confession. Fontenot stated that he understood his rights and agreed to talk to the police. Agent Gary Rogers then asked Fontenot if he was giving the statement freely and voluntarily; Fontenot stated that he was.

Agent Rogers and Captain Dennis Smith were present during the interrogation. They each acknowledged that the videotaping did not commence until almost two hours after Fontenot had entered the police station. Both Rogers and Smith also testified that during this two hour time period, they did not supply Fontenot with any of the information surrounding the death of Mrs. Harraway, other than to tell Fontenot that Tommy Ward had confessed and implicated him. Rogers and Smith also denied ever threatening or coercing Fontenot in any manner.

Fontenot claims that to fully appreciate the degree of police misconduct to which he was subjected, we must consider three other instances of separate but related improper police behavior toward other people involved in the case. First, Fontenot offers the circumstances surrounding Tommy Ward's confession. However, the evidence allegedly supporting these claims is contained in the transcripts from the first trial, which is not at issue here. Because there is no evidence in the record now before this Court to support these particular claims, we will not address them.

As his second argument in support of police misconduct, Fontenot points to the manner in which the police allegedly interrogated former suspect and defendant Odell Titsworth.[7] Fontenot claims that during

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[7] In their confessions, Fontenot and Ward told police that Odell Titsworth was the third party involved in Mrs. Harraway's

Titsworth's three or four interrogation sessions, Captain Smith and Detective Mike Baskin repeatedly fed him facts about the Harraway case. However, when asked during preliminary hearing whether he had learned facts about the case from these officers, Titsworth initially replied "Not really." P.Hrg.Tr. 809. Titsworth later contradicted himself, stating that the officers had told him facts about the crimes which he did not already know.

Finally, Fontenot describes two instances of police misconduct directed toward him **after** his confession and argues that these incidents are indicative of their mistreatment of him **during** the confession.[8] The first involved Titsworth. Captain Smith testified that a few days after Fontenot's confession, he took Titsworth to Fontenot's cell to see if Fontenot could identify him. While there, Smith asked Titsworth if he would like to enter Fontenot's cell and "settle the score." Titsworth was never in fact allowed to enter the cell.

The second incident involved Fontenot, Smith and Baskin. Smith admitted that after the confession, he and Detective Baskin took a sack of human bones to Fontenot's cell in an effort to persuade Fontenot to tell them where Mrs. Harraway's body was located.

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abduction and ultimate death. They claimed Titsworth instigated the crimes. Titsworth was eventually exonerated, however, when the police determined that several days before Mrs. Harraway's disappearance, he had suffered a debilitating spiral fracture of the arm which would have rendered him incapable of helping to abduct and murder her.

[8] Again, Fontenot cites extensively to the transcripts from the first trial. We will limit our review to evidence generated by the second trial, which is now at issue before this Court.

Baskin admitted that this was an improper tactic, and that the district attorney prosecuting the case had not been pleased with the maneuver.

Some of these incidents are disturbing. However, they occurred either before or after but not during Fontenot's confession. Fontenot has failed to cite and our research has not uncovered any case which holds that a confession can be found involuntary on the basis of police misconduct directed toward someone other than the confessor, or directed toward the confessor after the statement at issue was given.

Fontenot has presented no evidence of police misconduct directed toward him either just prior to or during his confession. Even if Fontenot was not very intelligent and perhaps mentally unstable, there is no evidence that the police exploited these possible weaknesses and coerced him into confessing. After careful consideration of all relevant, surrounding circumstances, we find that Fontenot's confession was voluntarily given. This proposition is denied.

In his second proposition, Fontenot argues that the evidence was insufficient to sustain his convictions. He first claims his confession cannot be considered competent evidence, since the State failed independently to establish the *corpus delicti*[9] of the crimes

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[9] *Corpus delicti* means the body or substance of the crime charged. 27 *Wharton's Criminal Law* 142 (14th ed. 1978). It consists of two elements: a criminally prohibited injury and a criminally prohibited act as its cause. This Court has consistently restated this definition as "the substantial and fundamental fact or facts necessary to the commission of a crime, and means when applied to any particular offense, the actual commission by some one of [the] particular offense charged." *State ex rel. Peterson v. Ward*, 707 P.2d 1217, 1219 (Okl.Cr.1985). The

charged. Fontenot also claims his confession was unreliable and thus cannot support his convictions. He maintains that because the State failed to present independent evidence to corroborate his confession, it was rendered untrustworthy.

Although the relatively simple question is whether Fontenot's confession was sufficiently reliable to support his convictions, this Court in prior opinions has obscured the proper method of resolving the issue. We have previously utilized together two separate and contradictory analyses when addressing whether a defendant's confession was competent to support a conviction. First, we determined whether the State provided substantial, independent evidence of the *corpus delicti* of the crime charged. Then, we determined whether the State provided independent evidence substantially corroborating the confession. *See Thornburgh v. State*, 815 P.2d 186 (Okl.Cr.1991); *Williamson v. State*, 812 P.2d 384, 397 (Okl.Cr.1991), *cert. denied,* 503 U.S. 973, 112 S. Ct. 1592, 118 L.Ed.2d 308 (1992). If the State presents independent evidence of the *corpus delicti* as well as additional corroborating evidence, the confession is deemed competent evidence upon which a conviction may be based. We now reject the *corpus delicti* line of analysis and reaffirm this Court's prior adoption of the

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issue in this case is not whether the State must prove the *corpus delicti* of a charged crime in order to obtain a conviction. It is obvious that by proving beyond a reasonable doubt the elements of a given crime, the State automatically proves the *corpus delicti*. Rather, the issue in this case is whether the *corpus delicti* of the charged crime must be proven by evidence independent of a defendant's extra judicial confession, before that confession may be admitted into evidence for the jury to consider.

standard which requires only that a confession be supported by "substantial independent evidence which would tend to establish . . . [its] trustworthiness. . . . " *Opper v. United States*, 348 U.S. 84, 93, 75 S. Ct. 158, 164, 99 L.Ed. 101 (1954), *adopted in Jones v. State*, 555 P.2d 63, 68 (Okl.Cr.1976).

Federal Courts also apply the *Opper* standard exclusively. In fact, the United States Court of Appeals for the Seventh Circuit has held that "the *corpus delicti* rule no longer exists in the federal system, . . ." because it failed to serve its original purpose. *United States v. Kerley*, 838 F.2d 932, 940 (7th Cir. 1988). Accordingly, the competence of a defendant's confession is conditioned upon the government having provided "'substantial independent evidence which would tend to establish [its] trustworthiness. . . . '" *Id.* at 940, *quoting Opper, supra*, 348 U.S. at 93, 75 S.Ct. at 164.

The State in the present case did provide sufficient, corroborative evidence independent of Fontenot's confession to show its trustworthiness and thus its competence.[10] First, Fontenot made two extrajudicial, post-crime statements in addition to confessing to the police. He told a friend that he knew facts about the Harraway abduction —specifically the perpetrator's identity. And, while he was awaiting trial in the county

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[10] We note that the State's independent evidence need not have established the essential elements of each of the charged crimes of kidnapping, robbery and murder: "It is well settled, . . . that there need not be corroborative evidence proving every element of the offense before an admission can be received in evidence." *United States v. Davanzo*, 699 F.2d 1097, 1100-01 (11th Cir. 1983). To reemphasize, the corroborative evidence had to have been sufficiently substantial to establish the trustworthiness of Fontenot's statement. *See Opper*, *supra.*

jail, a fellow inmate overheard him saying "I knew we'd get caught." Tr. II 8.[11]

Second, in accordance with Fontenot's account of the abduction, three witnesses saw Mrs. Harraway leaving the convenience store with a man on the day she disappeared. They saw this man take her to an old, gray primered Chevy pick-up, which Fontenot had described. They saw her enter from the passenger side, with the man following—just as Fontenot had described.

Third, an insurance agent testified that he had insured an old, gray primered Chevy truck for its owner—former codefendant Ward's brother. A witness who knew both Ward and Fontenot testified that the two were friends and that he had seen them riding

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11 Fontenot's two admissions did not themselves require independent corroboration prior to being introduced to the jury. "An 'admission' is something less than a confession and is but an acknowledgment of some fact or circumstance which in itself is insufficient to authorize conviction and which tends only toward the proof of the ultimate fact of guilt; whereas a 'confession' leaves nothing to be determined in that it declares defendant's intentional participation in a criminal act, and it must be a statement of such nature that no other inference than that of guilt may be drawn therefrom." *Brewer v. State*, 414 P.2d 559, 563 (Okl.Cr.1966) (citation omitted). Fontenot's two admissions only **tended to prove** his guilt; they alone could not have supported his guilt. Thus, these admissions did not rise to the level of confessions and did not require independent corroboration before their introduction to the jury. *But see Opper*, *supra*, 348 U.S. at 89-90, 75 S. Ct. at 162-63 ("[A]n accused's admissions of essential facts or elements of the crime, subsequent to the crime, are of the same character as confessions and [thus] corroboration should be required."). These two admissions may properly be considered as part of the State's independent evidence tending to establish the trustworthiness of Fontenot's confession.

around together in a gray primered Chevy pick-up. Fourth, one witness who had entered McAnally's (the convenience store from which Mrs. Harraway was abducted) just before the abduction testified that he had seen two men generally matching Fontenot's and Ward's descriptions inside the store. The two men were driving an old, gray primered pick-up. One of the men acted as if he wanted the witness to leave.

Fifth, another witness who worked just one-fourth of a mile down the road at another convenience store testified about having seen two men meeting Ward's and Fontenot's descriptions in her store earlier on the evening of Mrs. Harraway's abduction. She described the truck they were driving as red and gray primered. The two resembled Fontenot and Ward. They were watching her and she felt uncomfortable. When they left at around 8:30 or 9:00 p.m., they headed toward McAnally's.

Sixth, the manager of McAnally's testified that $167.00 had been taken from the store. Fontenot stated in his confession that they had taken about $150.00 during the robbery. Seventh, the blouse Mrs. Harraway was wearing on the evening of her abduction was buttoned up the front and had lace around the collar and cuffs. Fontenot said in his confession that she had worn a blouse with "ruffles" around the sleeves and collar and elastic in the sleeves.

Eighth, the shoes found with Mrs. Harraway's remains were soft-soled, canvas shoes. Mrs. Harraway's husband had characterized these shoes as "tennis" shoes. However, Fontenot gave a more accurate description of them. He specifically described Mrs. Harraway's

shoes as "soft-soled" shoes, stating that they were not tennis shoes.[12]

Ninth, and most generally, there was considerable testimony describing Mrs. Harraway's life: her somewhat recent marriage; her eager anticipation of a teaching degree; her overall happiness and contentment; and, her dedication to her job responsibilities. This testimony corroborated Fontenot's statement that Mrs. Harraway did not willingly leave McAnally's, but was abducted.

Fontenot first attacks these corroborating facts on the grounds that much of what he said to the police was simply a regurgitation of what they had already "fed" to him. However, we established in the discussion of the first proposition that there was no evidence to support this allegation. Fontenot also tries to cast doubt on the strength of the corroborating facts by pointing to the following inconsistencies between his confession and the evidence: he said Mrs. Harraway had been stabbed to death, but a bullet **wound** was found in her skull and her remains did not indicate that she had been stabbed; her body was not found where he said it would be; her body showed no signs of having been burned, whereas Fontenot said they had set fire to her body; and, Odell Titsworth, whom Fontenot originally implicated in his confession, was ultimately exonerated.

While these inconsistencies were by no means inconsequential, we do not believe they rendered Fontenot's confession untrustworthy and incompetent.

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[12] During oral argument, held before this Court on December 7, 1993, Fontenot's appellate counsel stated that information about Mrs. Harraway's shoes had not been made public prior to his confession.

The only means of calculating the trustworthiness of Fontenot's statement is to review all the other independent evidence and determine whether it is sufficiently corroborative to suggest that Fontenot's admission of guilt was truthful. This standard does not require that each material element of the charged offenses be corroborated by facts independent of the confession[13], or that there be no inconsistencies whatsoever between the facts proven and the facts related in the confession.[14] Unless inconsistencies between the confession and the other evidence so overwhelm the similarities that the confession is rendered untrustworthy, it remains within the province of the jury to determine whether the confession is credible. *See Crane v. Kentucky*, 476 U.S. 683, 688, 106 S.Ct. 2142, 2145, 90 L.Ed.2d 636 (1986), *citing Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L.Ed.2d 908 (1964), ("[Q]uestions of credibility, whether of a witness or of a confession, are for the jury, ... "). *See also*

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[13] *See Davanzo*, *supra* n. 10. We must also mention that our holding does not conflict with OUJI-CR-814. *See infra* n. 15. The "material and basic fact or facts necessary for the commission of the offense charged" need not include the elements of the crime. Rather, the facts provided in the confession which the independent evidence must corroborate must be facts which are relevant to and significantly related to the commission of the offense or offenses.

[14] In *Williamson*, *supra*, 812 P.2d at 397, this Court stated that "the **essential facts** were corroborated despite the inconsistencies between the State's evidence and the defendant's confession." (Emphasis added). When making the legal determination whether a confession has been sufficiently corroborated by independent evidence, however, we do not believe that any fact is necessarily more "essential" than any other. Rather, the focus should be on the overall consistencies and/or discrepancies between the confession and the other evidence presented.

Maxwell v. State, 742 P.2d 1165, 1169 (Okl.Cr.1987) (noting that in reviewing the sufficiency of the evidence on appeal, an appellate court must accept all reasonable inferences and credibility choices that tend to support the decision of the trier of fact.).

After reviewing Fontenot's confession, the independent corroborative evidence and the alleged inconsistencies, we find that his confession was trustworthy. Accordingly, it was competent evidence which the jury was entitled to consider against him. The jury was informed of the inconsistencies between Fontenot's confession and the other evidence presented, and it chose to believe Fontenot when he stated that he participated in the robbery and in Mrs. Harraway's subsequent abduction and murder. A rational trier of fact faced with this evidence could have found Fontenot guilty beyond a reasonable doubt of the crimes charged. *See Rawlings v. State*, 740 P.2d 153, 160 (Okl.Cr.1987). *See also Crawford, supra*, 840 P.2d at 632.

To summarize, we now hold that whether an accused's confession is competent to support a conviction depends not upon whether substantial evidence of the *corpus delicti*[15] of the crime has been introduced,

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15 Our decision to abolish the requirement that the *corpus delicti* of a charged crime must be substantially and independently proven before an accused's confession may be considered competent evidence does not conflict with 21 O.S.1981, § 693, "Proof necessary to conviction of murder or manslaughter." Section 693 states that

> [n]o person can be convicted of murder or manslaughter, or of aiding suicide, unless the death of the person alleged to have been killed and the fact of the killing by the accused are each established as independent facts beyond a reasonable doubt.

We believe this section was intended only to prohibit the State from using a defendant's confession to prove **that a death occurred**. *See State v. Gibson*, 69 N.D. 70, 284 N.W. 209 (1938) (in response to defendant's claim that section 693 prototype prohibited the State from using his confession to prove that he killed the victim, court held only the fact of the victim's death must be established by direct proof supplied by evidence independent of the confession). "The fact of the killing" which must be proven as an independent fact and beyond a reasonable doubt, may indeed be proven by a defendant's own properly admitted confession.

This Court has mistakenly construed section 693 as a "super" *corpus delicti* rule requiring "that the *corpus delicti* of [a] homicide be established independent of the confession or statement by the defendant, **beyond a reasonable doubt**." *State ex rel. Peterson v. Ward*, 707 P.2d 1217, 1219, n. 1 (Okl.Cr.1985) (emphasis added). That interpretation of section 693 is too broad. Interestingly, it has not been consistently applied in homicide cases. *See Thornburgh*, *supra*, 815 P.2d at 187 (The prosecution "is not required to prove the *corpus delicti* beyond a reasonable doubt independent of a defendant's confession." (Emphasis added). Because section 693 has been misconstrued, the jury instruction based upon it is incorrect and must be altered. OUJI-CR-815 reads as follows:

> No person may be convicted of [any homicide] unless both the fact of the death of the person allegedly killed and the fact that his/her death was caused by the conduct of another person are established as independent facts and beyond a reasonable doubt. **Such proof must consist of evidence which is wholly independent of any [confession] made by the defendant(s). Such evidence, however, may be circumstantial and need not include proof of the identity of the person who caused the death**.

(Emphasis added). The unhighlighted portion of the instruction is almost verbatim section 693 and shall remain as is. The highlighted portion is incorrect and must be excised.

Additionally, OUJI-CR-814 shall henceforth be administered in homicide cases in which a defendant has given a properly

but upon whether the confession is trustworthy. A confession may be considered trustworthy if it is corroborated by substantial, independent evidence. Under Oklahoma statutory law, the only fact which may not be proven by an accused's properly admitted confession is the fact that a death occurred.[16]

In the present case, the evidence the State presented independent of Fontenot's confession was sufficiently corroborative of the confession to render it trustworthy. The discovery of Mrs. Harraway's remains provided independent proof of her death as required by section 693. Accordingly, the evidence properly presented at trial was sufficient to support Fontenot's convictions for robbery, kidnapping and murder. Fontenot's second proposition is denied.

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admitted extrajudicial confession. The pertinent portion of that instruction reads as follows:

> A confession alone does not justify a conviction unless it is corroborated, that is, confirmed and supported by other evidence of the material and basic fact or facts necessary for the commission of the offense charged. Unless you find that the confession, if made, is corroborated, you must disregard it.

Because of this Court's overly broad interpretation of section 693, the caption before and notes after OUJI-CR-814 admonish trial judges not to administer this particular instruction in homicide cases. Rather, trial judges are told to administer OUJI-CR-815, the instruction outlined in the preceding paragraphs. Again, OUJI-CR-815 must be altered to reflect both the actual language of section 693 and today's decision adopting the trustworthiness test for extrajudicial confessions. Both OUJI-CR-815 as altered and OUJI-CR-814 must be administered from now on in all cases in which a defendant's extrajudicial confession has been properly admitted.

16 *See* 21 O.S.1981, § 693, *supra* n. 15.

Fontenot argues in his third proposition that in an effort to corroborate his confession, the State elicited testimony describing key portions of Tommy Ward's confession which had been ruled unreliable and inadmissible by this Court in *Fontenot v. State*, *supra.* Fontenot also claims that some of this testimony constituted inadmissible hearsay the introduction of which violated his Sixth Amendment right to confront witnesses against him. We will separately review each contested portion of testimony and the corresponding claims against them.

First, in response to defense counsel's question to Detective Smith asking whether he had been given a description of Mrs. Harraway's blouse prior to interviewing Fontenot, Smith replied "From Tommy Ward." Tr. III, 116. Fontenot argues that Smith's answer was not responsive to the question, and was calculated to emphasize to the jury the fact that Ward had implicated Fontenot. Fontenot claims the prejudice caused by this statement was reemphasized by the State on redirect examination. At that time, Smith testified that because both Ward and Fontenot had given the same description of the blouse Mrs. Harraway had been wearing, the blouse description became an important piece of inculpatory evidence against Fontenot.

We first note that none of Ward's inadmissible **statements** were actually placed before the jury. Thus, this Court's ruling in *Fontenot, supra*, was not violated. And, the testimony can not be considered hearsay, which is defined as "a **statement**, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the

truth of the matter asserted;. . . . " 12 O.S.1981, § 2801 (3) (emphasis added).

Further, defense counsel placed the emphasis on the connection between Ward's and Fontenot's confessions. At the beginning of cross-examination of Captain Smith and prior to the complained of testimony, defense counsel said to Smith, "[Y]ou had information that connected Tommy Ward, Karl Fontenot and Odell Titsworth, did you not?" Tr. III, 100. Defense counsel then asked Smith what Agent Rogers had said to Fontenot in order to convince him to stop denying his involvement in the Harraway abduction. In response, Smith testified that Rogers had said "Karl, we have already talked to Tommy and we have a confession from him." Tr. III, 104. These connections between Ward's and Fontenot's statements were clearly offered or invited by defense counsel. Fontenot has no basis upon which to complain of these alleged errors. *See Price v. State*, 782 P.2d 143 (Okl. Cr.1989). *See also Penn v. State*, 684 P.2d 562, 564 (Okl.Cr.1984). The second portion of testimony Fontenot attacks concerns Captain Smith's statement that prior to Fontenot's confession, he told Fontenot that the police had spoken with Ward and had obtained a confession from him. Smith later responded to a defense question by stating "Tommy Ward said that." Finally, Smith, again responding to defense questions, referred to the "confessions" and what "they said" in the confessions. Again, our review of the transcript indicates all of these responses were elicited and encouraged by defense counsel.

The third and final portion of testimony Fontenot claims was prejudicial involves Agent Rogers's descriptions of several actions he took as a result of his

interview with Ward. In accordance with defense counsel's objection, Rogers never related anything Ward had **said** to him. Rather, he described to the jury what he **did** as a result of their conversation.

Rogers made three calls to Detective Baskin. He first directed Baskin to search for Mrs. Harraway's remains in an area around a local power plant. In a second call, Rogers told Baskin to look for an incinerated house on the property surrounding the power plant. Lastly, Rogers told Baskin to try to locate a concrete bunker or hole in the ground on that property.

Fontenot claims Rogers's testimony describing what he did as a result of his interview with Ward constituted inadmissible hearsay. In attacking this testimony, however, Fontenot concedes that the hearsay rule does not preclude a witness from testifying about the actions he or she took as a result of a conversation with a third party. *See Greer v. State*, 763 P.2d 106, 108 (Okl.Cr.1988). The thrust of Fontenot's claim is that this testimony so conclusively connected Fontenot's and Ward's confessions as to apprise the jury that Ward had in fact inculpated Fontenot as well as himself. According to Fontenot, the admission of this testimony violated this Court's ruling in *Washington v. State*, 568 P.2d 301 (Okl.Cr.1977). We disagree.

In *Washington*, a police officer had spoken to an eyewitness. During direct examination at trial, the prosecutor asked the officer what actions he had taken in response to the information this eyewitness had given him. The officer replied that after having spoken to the eyewitness, he directed his investigation toward the defendant. This Court held that this officer's testimony constituted error, although it was ultimately

ruled harmless. We reasoned that while a witness may tell the jury about actions taken in response to information received from a nontestifying third party, such testimony is rendered inadmissible when it effectively points the "finger of accusation" at the defendant. *Id.* at 309-10. In other words, the State may not indirectly accomplish what the hearsay rule directly forbids.

Detective Smith's testimony did not point the finger of accusation at Fontenot and did not, therefore, constitute the type of evidence criticized in *Washington.* After talking with Ward, Smith ordered Baskins to search a certain area for Mrs. Harraway's remains. He described where her body might have been placed. Smith's testimony hardly suggested to the jury that Ward had inculpated Fontenot. This proposition is denied.

Fontenot claims in his fourth proposition that his convictions must be reversed because prejudicial other crimes evidence was improperly admitted against him. In his confession, Fontenot admitted to having raped Mrs. Harraway. Both before and during the second trial, each side vigorously argued their respective positions on the issue of whether the references to the rape should be deleted from the videotaped confession. The trial judge ultimately ruled that Fontenot's statements concerning the rape were admissible under the **res gestae** exception to the prohibition against admission of other crimes evidence.

Fontenot's attack upon the rape evidence is based primarily on language from this Court's opinion in *State ex rel. Peterson*, *supra.* Fontenot and Ward were originally charged prior to the first trial with having raped Mrs. Harraway. Each rape count was dismissed

by the preliminary hearing magistrate, and the State appealed this ruling. In *State ex rel. Peterson*, this Court reviewed the State's claim and reinstated the rape charges, concluding that the State had met its preliminary hearing burden. *Id.* at 1219. However, this Court then went on to caution the State that if it could not strengthen its case on the rape counts, the charges should be dismissed and "all references to [that crime] should be deleted from the . . . confessions." *Id.*[17]

We first note that this Court's decision in *State ex rel. Peterson, supra*, has no bearing upon the issue now before us. In cautioning the State to delete all references to the rape if the charges for that offense were dropped, we were not addressing the specific issue raised here, *i.e.* whether the rape evidence constituted part of the **res gestae** of the crimes for which Ward and Fontenot were on trial. The legal arguments for and against admission of the rape evidence as part of the **res gestae** had not been presented in that Rule Six appeal, and we did not consider them. Accordingly, we will now address Fontenot's "other crimes" argument on its merits.

After reviewing Fontenot's "other crimes" contention, we conclude that the description of Mrs. Harraway's rape contained in the videotaped confession was properly admitted as part of the **res gestae** of the charged offenses. The evidence helped to "complete a full picture of the transaction," and was properly introduced to present to the jury "enough facts to understand the full sequence of events." *Johnson*

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17 The rape charges against both Ward and Fontenot were eventually dropped.

v. State, 760 P.2d 838, 840 (Okl.Cr.1988) (Parks, J., Specially Concurring). Without this evidence, Fontenot's account of the facts leading to the murder of Mrs. Harraway would have been nonsensical. "Inexplicable gaps" would have left the jury without a clear picture of the events during those time periods. *See Dunagan v. State*, 755 P.2d 102, 104 (Okl.Cr.1988). *See also Carter v. State*, 698 P.2d 22, 25 (Okl.Cr.1985).

Further, the probative value of this evidence was not outweighed by the danger of unfair prejudice. *See* 12 O.S.1981, § 2403. Although Fontenot's account of the rape portrayed him as cruel and callous, omitting this evidence might have left the jury with the more damaging impression that he had committed the murder for absolutely no reason. The portions of Fontenot's confession in which he describes his participation in the raping of Mrs. Harraway constituted part of the **res gestae** of the charged offenses and was properly admitted.[18] This proposition is denied.

In his fifth proposition, Fontenot claims that the trial court's failure to instruct the jury on the defense of voluntary intoxication and on the lesser included

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[18] Fontenot also claims that even if the rape evidence constituted part of the **res gestae** of the charged offenses, it did not meet the "clear and convincing" level or proof required by *Burks v. State*, 594 P.2d 771 (Okl.Cr.1979), *reversed on other grounds*, *Jones v. State*, 772 P.2d 922, 925 (Okl.Cr.1989), because there was no independent evidence of the *corpus delicti* of the rape. However, none of the *Burks* requirements apply to **res gestae** evidence. *See Dean v. State*, 764 P.2d 1355, 1356 (Okl.Cr.1988); *Duvall v. State*, 780 P.2d 1178, 1180 (Okl.Cr.1989). Accordingly, we need not determine whether the evidence of the rape was "clear and convincing."

offense of second degree murder violated[19] his right to due process. Both instructions were requested. Accordingly, any alleged error was preserved for review.

In his confession, Fontenot stated that prior to committing the offenses against Mrs. Harraway, he had smoked some "pot," "gotten high," and had been drinking "some." Fontenot argues that once the trial judge ruled his confession reliable, all the information contained in that confession had to have been considered truthful. Accordingly, the trial judge should have considered Fontenot's descriptions of his pre-crime cognitive state to be evidence which conclusively supported a voluntary intoxication defense. We disagree.

Fontenot was entitled to an instruction on the defense of voluntary intoxication only if there was sufficient evidence of impairment "to raise a reasonable doubt as to his ability to form the requisite criminal intent" to commit first degree murder. *Calhoun v. State*, 820 P.2d 819, 822 (Okl.Cr.1991). *See also Sellers v. State*, 809 P.2d 676, 686-87 (Okl.Cr.1991), *cert. denied,* 502 U.S. 912, 112 S.Ct. 310, 116 L.Ed.2d 252 (1991). If supported by the evidence, voluntary intoxication may negate the "intent to kill" **mens rea**

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[19] Fontenot argues that the trial court's failure to administer his requested instruction on the non-capital offense of second degree murder violated the United States Supreme Court's holding in *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), as reaffirmed in *Schad v. Arizona*, 501 U.S. 624, 111 S. Ct. 2491, 115 L.Ed.2d 555 (1991). In *Beck*, the Supreme Court concluded that in capital cases, a defendant is constitutionally entitled to an instruction on a lesser-included, noncapital offense where the evidence would support the lesser offense. We note that neither *Beck* nor *Schad* were implicated in the present case, since the jury did in fact receive an instruction on the noncapital offense of first degree heat of passion manslaughter.

element of first degree murder. *See Stanley v. State*, 762 P.2d 946, 949 (Okl.Cr.1988), *citing Williams v. State*, 513 P.2d 335 (Okl.Cr.1973).

While Fontenot did confess to drinking some liquor and smoking some marijuana prior to abducting Mrs. Harraway, this evidence did not raise a reasonable doubt as to his ability to form the intent to kill her. He never stated that his judgment was in any way impaired by having drunk alcohol or smoked marijuana, or that his actions were in any way caused by his impaired mental state. Further, there were no gaps in his account of what occurred to suggest that he might have been dazed during the events leading to Mrs. Harraway's death. *See Calhoun, supra*, at 822. *See also Banks v. State*, 810 P.2d 1286, 1294 (Okl. Cr.1991), *cert. denied,* 502 U.S. 1036, 112 S.Ct. 883, 116 L.Ed.2d 787 (1992). The trial judge did not abuse his discretion in refusing to administer Fontenot's requested voluntary intoxication defense instruction.[20]

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[20] It is important to note that the trial court did administer one of Fontenot's requested instructions which allowed the jury to consider the circumstances surrounding Mrs. Harraway's death in determining whether he had formed the requisite intent to kill her. That instruction reads as follows:

> The external circumstances surrounding the commission of a homicidal act may be considered in finding whether or not deliberate intent existed in the mind of the defendant to take a human life. External circumstances include words, conduct, demeanor, motive, and all other circumstances connected with a homicidal act.

O.R. 176. Although Fontenot's jury did not receive the voluntary intoxication instruction, the above-quoted instruction allowed it to consider **all circumstances surrounding the homicidal act** in determining whether he had the requisite intent to kill.

Fontenot also claims the trial court erred in refusing to administer his requested instruction on the lesser offense of second degree murder. He was entitled to a lesser included offense instruction only if the evidence was sufficient to support it. *See Boyd v. State*, 839 P.2d 1363, 1367 (Okl.Cr.1992). *See also Williams v. State*, 807 P.2d 271, 274-75 (Okl.Cr.1991). Apart from the alleged evidence of intoxication, Fontenot provides no evidentiary justification for the second degree murder instruction. We have already determined that there was not sufficient evidence to support a voluntary intoxication instruction. Accordingly, there was not sufficient evidence under Fontenot's theory to support the second degree murder instruction. This proposition is denied.

Fontenot argues in his sixth proposition that the trial court committed reversible error in administering a modified version of OUJI-CR-804, when he had requested the unmodified version of that instruction. The instruction administered, with the highlighted portion indicating the trial court's additional phrase, reads as follows:

> The State relies [in part] for a conviction upon circumstantial evidence. In order to warrant conviction of a crime upon circumstantial evidence, each fact necessary to prove the guilt of the defendant(s) must be established by the evidence beyond a reasonable doubt. All the facts necessary to such proof must be consistent with each other and with the conclusion of guilt the state seeks to establish. **It is not necessary that the circumstances proven exclude every theory or negate any possibility other**

> **than guilty, but** [a]ll of the facts and circumstances, taken together, must be inconsistent with any reasonable theory or conclusion of a defendant's innocence. All of the facts and circumstances, taken together, must establish to your satisfaction the guilt of the defendant(s) beyond a reasonable doubt.

O.R. 182. Fontenot argues that the trial court's additional phrase allowed the jury to discount the discrepancies in the State's evidence, and that the jury could have interpreted it as authorizing his conviction even if the evidence **negated** his guilt. The State argues that the modified instruction correctly stated the applicable law and was therefore proper.

Generally speaking, when a jury must be instructed on a certain subject, the relevant uniform instruction "**shall** be used unless the court determines that it does not accurately state the law." *Palmer v. State*, 788 P.2d 404, 408 (Okl.Cr.1990), *citing* 12 O.S. 1991, § 577.2 (emphasis in original). Failure to follow this general rule, however, does not warrant automatic reversal. *See Smallwood v. State*, 763 P.2d 142, 144 (Okl.Cr.1988). Rather, the overriding concern on appeal is whether the instruction at issue fairly and accurately stated the applicable law. *Id. See also Sellers v. State, supra*, 809 P.2d at 685. Even if error was committed, reversal is not required unless such error "resulted in a miscarriage of justice or constituted a substantial violation of a constitutional or statutory right." *Brown v. State*, 777 P.2d 1355, 1358 (Okl.Cr. 1989), *citing* 20 O.S.1991, § 3001.1.

Fontenot concedes the trial court's modifying phrase mirrors this Court's language in several opin-

ions. *See R.D.O. v. State*, 735 P.2d 1198, 1200 (Okl.Cr. 1987); *Banks v. State*, 728 P.2d 497 (Okl.Cr.1986). He claims this is the appropriate appellate review standard, but that it is incorrect, confusing and prejudicially misleading when included in a jury instruction. We disagree.

While the better and safer practice would have been to administer the uniform instruction as written, the trial court's additional phrase rendered the instruction neither erroneous nor prejudicial. The uniform portion of the instruction administered correctly informed the jury that the circumstantial evidence against Fontenot would support a conviction only if it were found to be inconsistent with any **reasonable** theory of his innocence. The trial court's additional phrase merely explained to the jury the inverse of this standard, *i.e.*, that it could rely on the circumstantial evidence for a conviction even if such evidence failed to exclude **all possibilities** other than Fontenot's guilt. This proposition is denied.

In his fifteenth proposition, Fontenot claims that prosecutorial misconduct during closing argument constituted fundamental, reversible error. Fontenot claims that the prosecutor made six improper comments during first stage closing arguments. Five of these comments received no objection and will be reviewed for fundamental error only. *See Trice, supra*, 853 P.2d at 214. *See also Huntley v. State*, 750 P.2d 1134, 1136 (Okl.Cr.1988). Our review of these five comments reveals no error which went to the foundation of Fontenot's case or deprived him of a right essential to his defense. *See West v. State*, 764 P.2d 528 (Okl.Cr. 1988). Accordingly, they do not support Fontenot's claim for reversal.

In the comment which was met with a contemporaneous objection, the prosecutor referred to one of the books of the Bible. He said this particular book of the Bible states there is a time to live and a time to die, that God did not intend for Mrs. Harraway to die on March 28, 1984, and that Fontenot and Ward decided she would die on that day. Closing argument during a criminal trial should not include biblical references. Even though the prosecutor's mention of the Bible in the present case was improper, the question on appeal is whether the comment deprived Fontenot of his right to a fair trial. *See Pickens v. State*, 850 P.2d 328, 343 (Okl.Cr.1993). While the prosecutor did specifically refer to biblical passages, he did not encourage the jury to follow biblical standards rather than the Court's instructions. Rather, he used the biblical passage at issue to emphasize what the evidence showed: that Mrs. Harraway died at the hands of human beings. In light of the substantial evidence of guilt and the relatively innocuous nature of this comment, it cannot be said that the prosecutor's reference to the Bible deprived Fontenot of his right to a fair trial. This proposition is denied.

Issues Relating to
Ineffective Assistance of Counsel

Fontenot claims in his sixteenth proposition that ineffective assistance of counsel denied him his right to a fair trial. Fontenot argues that defense counsel at trial failed to investigate issues central to his case. He also claims his attorney failed to properly utilize available evidence that would have strengthened his defense.

Fontenot first alleges there was evidence that the gray primered truck he and Ward allegedly used to abduct Mrs. Harraway did not belong to Ward's brother. During Fontenot's trial, an insurance agent testified that he had insured for Ward's brother a truck that matched the gray primered truck's description. During Ward's trial, Ward's brother as well as other witnesses testified that he [Ward's brother] did not in fact own a gray primered Chevy pick-up. Fontenot suggests that this evidence helped win Ward a sentence of life imprisonment rather than death. According to Fontenot, defense counsel's failure adequately to investigate this issue and present this impeachment evidence at his trial constituted ineffective assistance of counsel.

"Appellate review of an ineffective assistance of counsel claim begins with a presumption of competence, and the burden is upon the defendant to demonstrate both a deficient performance and resulting prejudice." *Strickland v. Washington*, 466 U.S. 668, 687-89, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674 (1984). The ultimate test is whether, but for the allegedly deficient performance, the result of the trial would have been different. *Id.* at 694, 104 S. Ct. at 2068. *See also Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The fact that a defense attorney could have investigated an issue more thoroughly does not, in and of itself, constitute ineffective assistance. *Williamson v. State*, *supra*, 812 P.2d at 413; *Boltz v. State*, 806 P.2d 1117, 1126 (Okl.Cr.1991), *cert. denied,* 502 U.S. 846, 112 S.Ct. 143, 116 L.Ed.2d 109 (1991). *See also Dutton v. Brown*, 812 F.2d 593, 598 (10th Cir. 1987) ("A fair assessment of attorney performance requires that every effort be made to

eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.") If an ineffective assistance claim "can be disposed of on the ground of lack of prejudice, an appellate court need not determine whether trial counsel's performance was deficient." *Strickland, supra*, 466 U.S. at 697, 104 S.Ct. at 2069.

The evidence which Fontenot claims his trial counsel incompetently failed to present during both first and second stage proceedings was not so compelling that its absence reversibly prejudiced Fontenot. Ward's brother's testimony at Ward's retrial, along with that of several other family members, simply rebutted the testimony of the insurance agent. While presenting these witnesses during Fontenot's trial **might** have cast some shadow of doubt upon who exactly owned that gray truck, there is no reasonable probability that it would have.

Further, it must be noted that Ward's retrial occurred one year after Fontenot's. We cannot even determine whether, at the time of Fontenot's retrial, his defense attorney had access to or knowledge of these witnesses, or whether he would have considered the presentation of their testimony wise defense strategy. The manner in which Fontenot's trial counsel chose to develop and present his defense did not prejudice Fontenot and did not, therefore, constitute ineffective assistance.

Fontenot also claims trial counsel's failure to object to numerous first and second stage instances of allegedly improper prosecutorial comment constituted ineffective assistance. We concluded in the proposition attacking these comments that they did not rise to the

level of fundamental, reversible error. Even if defense counsel had interposed objections to all of these comments, they would not have required reversal. Accordingly, defense counsel's failure to object to these comments did not render him ineffective. This proposition is denied.

Fontenot's convictions and sentences for kidnapping and robbery are **AFFIRMED**. His conviction for first degree murder is also **AFFIRMED**, but his sentence of death must be **VACATED** and this cause **REMANDED** for **RESENTENCING**.

JOHNSON, V.P.J., and LANE and STRUBHAR, JJ., concur.

Lumpkin, P.J., concurs in part/dissents in part.

LUMPKIN, PRESIDING JUDGE, CONCURRING IN PART/DISSENTING IN PART:

I concur with the Court's affirming Appellant's conviction. The Court's excellent analysis in determining the standard discussed in *Opper v. United States*, 348 U.S. 84, 75 S.Ct. 158, 99 L.Ed. 101 (1954) is well taken. The adoption of this more practical approach standard should eliminate the aberrations found in cases such as *Thornburg v. State*, 815 P.2d 186 (Okl. Cr.1991), which I believe to be overruled by this decision.

However, I cannot agree with the result reached in remanding for resentencing based on *Hain v. State*, 852 P.2d 744 (Okl.Cr.1993) and *Salazar v. State*, 852 P.2d 729 (Okl.Cr.1993). In adopting that rationale to this set of facts, the Court has gone a step beyond what was even reasonably foreseeable.

I shall not repeat why I believe the underlying premise is faulty here; rather, I stand on my dissents in *Hain* and *Salazar*. However, I am forced to write here because this goes beyond mere *stare decisis*, as the facts amply demonstrate.

The victim was killed in April 1984. Appellant was tried in September 1985. This Court reversed in July 1987. The life without parole provision became effective November 1987. Appellant was retried in June 1988. As a result, this Court seeks to remand once again because a new provision of law went into effect *not* between the time of the act's commission and the time of trial, but *between trials.*

Stare decisis is one thing; but following it here would be in direct contravention of the law.

This ruling ignores the changes in 21 O.S.Supp. 1993, § 701.10a, dealing with remanding for sentencing. In the new version, the Legislature clarified what should have been obvious, giving the jury the option of choosing any sentence "*authorized by law at the time of the commission of the crime*." 21 O.S.Supp. 1993, § 701.10a(1) (emphasis added). The provisions are *specifically intended to apply retroactively*. 21 O.S.Supp.1993, § 701.10a(5) This provision became effective June 7, 1993. This Court's opinion comes down after that time. It should therefore logically control over this Court's *Salazar* ruling, as it is a clear indication of the Legislature that it disagreed with this Court's pronouncements.

The Court in this decision exceeds even what could have been anticipated in allowing an appellant to latch on to the vestiges of *Hain* and *Salazar*. The benefit of foreseeability should be given to the State as well as a defendant; and this case should be a stopping point for reaching back into the past for purposes of attaching a decision upon which an appellant has no clear right to depend.

Therefore, I must respectfully dissent to that portion of the opinion remanding for a new sentencing hearing.

OPINION OF THE COURT OF CRIMINAL APPEALS, STATE OF OKLAHOMA (AUGUST 11, 1987)

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742 P.2d 31

COURT OF CRIMINAL APPEALS OF OKLAHOMA

KARL ALLEN FONTENOT,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

No. F-85-769

An Appeal from the District Court of Pontotoc County; Case No. CRF-84-183; Donald E. Powers, District Judge

Before: BUSSEY, P.J., PARKS, J.

OPINION

BUSSEY, Judge:

Karl Allen Fontenot was convicted in Pontotoc County District Court of Robbery With a Dangerous Weapon, Kidnapping, and Murder in the First Degree. He received sentences of twenty (20) years' imprisonment, ten (10) years' imprisonment, and the death penalty, respectively.

Donna Denise Haraway was abducted after being robbed at the convenience store where she was working on April 28, 1984, in Ada, Oklahoma. Appellant and Tommy Ward were tried for the crimes during September, 1985. In October of 1984, Tommy Ward made a statement to law enforcement officers which inculpated Fontenot, an individual named Odell Titsworth, and to a slighter degree, himself. Fontenot and Titsworth were arrested as a result and Fontenot gave a statement substantially in agreement with Ward's except that it more clearly inculpated Ward. In each Ward's and Fontenot's statements, the instigator and ringleader in the criminal acts was said to be Titsworth. However, Titsworth was eliminated as a suspect within a few days of his arrest because of clear proof the police had that he had not been an accomplice.

According to the statements of Ward and Fontenot, Haraway was robbed of approximately $150.00, abducted, and taken to the grounds behind a power plant in Ada where she was raped. According to appellant's version, she was then taken to an abandoned house behind the plant where Titsworth stabbed her to death. She was then burned along with the house. When Haraway's remains were found in Hughes County, there was no evidence of charring or of stab wounds, and there was a single bullet wound to the skull.

The evidence at trial revealed that two men, one of whom was positively identified as Tommy Ward, played pool at J.P.'s convenience store in Ada, Oklahoma, from about 7:00 p.m. until about 8:30 p.m. the evening of April 28, 1984. Around 8:30 p.m., the two men left the store. Shortly thereafter, Tommy Ward was seen leaving with Haraway from the convenience

store where she worked which was across the road and a quarter of a mile away from J.P.'s. Fontenot was said to resemble the man with Ward at J.P.'s, but could not be identified by the people who saw Ward there. In fact, the second man was described as having sandy brown hair and being six foot to six foot two inches tall. Fontenot had dark brown hair and was several inches shorter than the description given. One witness went so far as to tell a detective and a private investigator, and attempted to tell the District Attorney, without success, that Fontenot was not the man he saw in J.P.'s. Other than the statements given by Ward and Fontenot, there was no other evidence linking appellant to the crimes.

In this case, we find that the trial court erred in admitting at the joint trial of Ward and Fontenot the statement of Ward which inculpated appellant. In *Cruz v. New York*, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987), the United States Supreme Court held that the fact interlocking confessions are introduced does not mitigate the harm done to a defendant's Sixth Amendment right to confront the witnesses against him when a nontestifying codefendant's statement which inculpates defendant is admitted at their joint trial. *See Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Even if the jury is advised to not consider it against the defendant, the harm is not repaired.

We find in this case that codefendant Ward's statement did not have sufficient indicia of reliability as it relates to appellant to overcome the presumption of unreliability to permit its direct admission against Fontenot. *Lee v. Illinois,* 476 U.S. 530, ___, 106 S.Ct. 2056, ___, 90 L.Ed.2d 514 (1986). Nor can we find

that the admission of Ward's statement at their joint trial amounted to harmless error. *Harrington v. California,* 395 U.S. 250, 89 S. Ct. 1726, 23 L.Ed.2d 284 (1969). The evidence of appellant's guilt, while significant, cannot be called overwhelming.

For the foregoing reasons, the judgments and sentences are REVERSED and the case is REMANDED for a new trial.

BRETT, P.J., and PARKS, J., concur.

ORDER DENYING PETITION FOR REHEARING AND DIRECTING ISSUANCE OF MANDATE (SEPTEMBER 30, 1994)

COURT OF CRIMINAL APPEALS OF OKLAHOMA

KARL ALLEN FONTENOT,

Appellant,

v.

THE STATE OF OKLAHOMA,

Appellee.

No. F-88-571

An Appeal from the District Court of Hughes County; Case No. CRF-88-43; Donald E. Powers, District Judge

Karl Allen Fontenot was tried by a jury and convicted of First Degree Malice Aforethought Murder in violation of 21 O.S.Supp.1982, § 701.7 (Count III), Kidnapping in violation of 21 O.S.1981, § 741 (Count II), and Robbery with a Dangerous Weapon in violation of 21 O.S.Supp.1982, § 801 (Count I), in the District Court of Hughes County, Case No. CRF-88-43. In accordance with the jury's recommendation, the Honorable Donald E. Powers sentenced Fontenot to twenty years imprisonment for Count I, ten years imprisonment for Count II, and death for Count III.

In a June 8, 1994 published opinion, this Court affirmed Fontenot's convictions on all three counts, but remanded the murder conviction for a new sentencing hearing at which Fontenot was to receive the "life without parole" jury instruction. Fontenot is now before the Court on a Petition for Rehearing, which is governed by Rule 3.14, *Rules of the Court of Criminal Appeals,* 22 O.S.Supp.1993, Ch. 18, App. According to Rule 3.14, a Petition for Rehearing shall not be filed as a matter of course, but only for two reasons:

(1) That some question decisive of the case and duly submitted by the attorney of record has been overlooked by the Court, or

(2) That the decision is in conflict with an express statute or controlling decision to which the attention of this Court was not called either in the brief or in oral argument.

The sole proposition Fontenot raises in his Petition for Rehearing does not meet the criteria set forth in Rule 3.14 and will not be addressed.

IT IS THEREFORE THE ORDER OF THIS COURT that Fontenot's Petition for Rehearing be DENIED. The Clerk of the Court is directed to issue the mandate forthwith.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 30th day of September, 1994.

/s/ Gary L. Lumpkin
Presiding Judge

/s/ Charles A. Johnson
Vice Presiding Judge

/s/ James F. Lane
Judge

/s/ Charles S. Chapel
Judge

/s/ Reta M. Strubhar
Judge