

No. _____

IN THE
Supreme Court of the United States

TREMANE WOOD,
Petitioner,

vs.

STATE OF OKLAHOMA,
Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE OKLAHOMA COURT OF CRIMINAL APPEALS**

**APPENDIX TO PETITION
FOR A WRIT OF CERTIORARI**

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APPENDIX A

APPENDIX A

ORIGINAL



**IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF OKLAHOMA**

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

AUG 18 2022

TREMANE WOOD,

JOHN D. HADDEN
CLERK

Petitioner,

NOT FOR PUBLICATION

v.

Case No. PCD-2022-550

THE STATE OF OKLAHOMA,

Respondent.

**OPINION DENYING FOURTH APPLICATION FOR
CAPITAL POST-CONVICTION RELIEF AND RELATED MOTIONS
FOR DISCOVERY AND EVIDENTIARY HEARING**

ROWLAND, PRESIDING JUDGE:

Petitioner Tremane Wood has filed a fourth application for capital post-conviction relief and related motions for discovery and an evidentiary hearing. A jury convicted Wood in 2004 in the District Court of Oklahoma County, Case No. CF-2002-46, of the robbery and first-degree murder of Ronnie Wipf and sentenced him to death.¹

¹ Wood's jury convicted him of Count 1-First Degree Felony Murder in violation of 21 O.S.2001, § 701.7(B), Count 2-Robbery with Firearms, After Former Conviction of a Felony in violation of 21 O.S.2001, § 801, and Count 3-Conspiracy to Commit a Felony, After Former Conviction of a Felony in violation of 21 O.S.2001, § 421. The jury recommended the death penalty on Count 1 after finding that Wood knowingly created a great risk of death to more than one person, that the murder was especially heinous, atrocious, or cruel, and that Wood posed a continuing threat to society. See 21 O.S.2001, §§ 701.12(2), (4) and (7). The jury fixed his punishment on Counts 2 and 3 at life imprisonment and he was sentenced accordingly.

Since then Wood has challenged his Judgment and Sentence on direct appeal² and in collateral proceedings in this Court.³ All of Wood's previous challenges before this Court have proved unsuccessful. Wood's challenges in federal court have likewise been unsuccessful and he has an execution date set for February 8, 2024.⁴

Our review of post-conviction claims in capital cases is extremely limited under 22 O.S.2011, § 1089. Applicants have very few grounds on which to challenge their conviction and sentence:

The only issues that may be raised in an application for post-conviction relief are those that:

(1) Were not or could not have been raised in a direct appeal; and

² This Court affirmed Wood's Judgment and Sentence in *Wood v. State*, 2007 OK CR 17, 158 P.3d 467. The United States Supreme Court denied certiorari in *Wood v. Oklahoma*, 552 U.S. 999 (2007).

³ This Court denied Wood's original, second, and third applications for post-conviction relief in unpublished decisions. See *Wood v. State*, Case No. PCD-2005-143 (Okla.Cr., June 30, 2010) (unpublished); *Wood v. State*, Case No. PCD-2011-590 (Okla.Cr., Sept. 30, 2011) (unpublished), *Wood v. State*, Case No. PCD-2017-653 (Okla.Cr, Aug. 28, 2017) (unpublished), *cert. denied*, 139 S.Ct. 938 (2019).

⁴ The United States District Court denied a petition for writ of habeas corpus in *Wood v. Trammell*, No. CIV-10-0829-HE, 2015 WL 6621397 (W.D.Okla. 2015). The Tenth Circuit affirmed the denial of habeas corpus in *Wood v. Carpenter*, 899 F.3d 867 (10TH Cir.), *opinion modified and superseded on denial of rehearing*, 907 F.3d 1279 (10th Cir. 2018). The Supreme Court denied certiorari review of the Tenth Circuit's opinion in *Wood v. Carpenter*, 139 S.Ct. 2748 (2019).

(2) Support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent.

22 O.S.2011, § 1089(C). Furthermore, claims raised in a successive post-conviction application will not be considered by this Court unless:

a. the application contains claims and issues that have not been and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the legal basis for the claim was unavailable, or

b. (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date, and

(2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.

22 O.S.2011, § 1089(D)(8). Additionally, under our court rules, a successive post-conviction application will not be considered unless
1) it contains claims which were not and could not have been previously presented in the original application because the factual

or legal basis for the claim was unavailable, and 2) it is filed “within sixty (60) days from the date the previously unavailable legal or factual basis serving as the basis for a new issue is announced or discovered.” Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*; Title 22, Ch.18, App. (2022).

Wood claims in this application that newly discovered evidence supports a finding that he received ineffective assistance of trial counsel in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and corresponding provisions of the Oklahoma Constitution.⁵ Wood maintains that trial counsel’s ongoing addiction to, and use of, drugs and alcohol prevented him from properly investigating and litigating this capital case under prevailing professional norms and to Wood’s detriment. This claim is barred by the doctrines of res judicata and waiver.

Wood claimed in his original application for post-conviction relief that newly discovered evidence rendered his conviction and death sentence unreliable. The thrust of that application was that trial counsel, Johnny Albert, rendered ineffective assistance of

⁵ Okla.Const. Art. 2, §§ 7, 9, and 20.

counsel because of his substance abuse problems. We rejected the claim, finding that Wood had failed to prove that trial counsel was struggling with his substance abuse issues at the time of Wood's 2004 trial. In the present application, Wood provides affidavits from two of trial counsel's former clients, Benito Bowie and Michael Maytubby, to support his ineffective assistance of counsel claim. These two convicted felons claim they had frequent contact with trial counsel from the late 1990's through 2007, including around the time of Wood's capital trial. Both attest that by 2004 trial counsel was using drugs and alcohol daily. Wood offers these affidavits as proof that trial counsel's substance abuse started long before the date found by this Court in his first post-conviction application and as support for his ineffective assistance claim, i.e., that substance abuse affected trial counsel's performance during Wood's capital trial. Wood's current claim is, for all intents and purposes, identical to his claim of ineffective assistance raised in his previous post-conviction application. That he provides additional, new evidence will not avoid a finding of procedural bar, namely *res judicata*. See *Woodruff v. State*, 1996 OK CR 5, ¶ 3, n.2, 910 P.2d 348, 350 n.2

(applying doctrine of res judicata to previously raised claim despite reliance upon newly discovered evidence).

Wood's current claim of ineffective assistance of counsel is also waived under Section 1089(8)(b)(1) and Rule 9.7(G)(3). The application does not provide sufficient specific facts showing that the current claim has not and could not have been presented previously in a prior application because the factual basis for the claim was unavailable. Nor do we find that Wood has sufficiently shown that the instant application was filed within sixty days from the date that the information provided by trial counsel's former clients could reasonably have been discovered. Rule 9.7(G)(3). We must, therefore, find that the claim is waived and that we are barred from considering the merits of the claim in this application. For these reasons, we find Wood's ineffective assistance of counsel claim is procedurally barred from review.

DECISION

Petitioner Wood's Fourth Application for Capital Post-Conviction Relief and Motions for Evidentiary Hearing and Discovery are **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of*

Criminal Appeals, Title 22, Ch. 18, App. (2022), the **MANDATE** is
ORDERED issued upon delivery and filing of this decision.

ATTORNEYS FOR PETITIONER

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OPINION BY: ROWLAND, P.J.

HUDSON, V.P.J.: Concur
LUMPKIN, J.: Concur
LEWIS, J.: Concur
MUSSEMAN, J.: Concur

APPENDIX B

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

TREMANE WOOD,	)	
	)	
Petitioner,	)	NOT FOR PUBLICATION
	)	
-vs-	)	No. PCD-2005-143
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

**OPINION DENYING APPLICATION FOR
POST-CONVICTION RELIEF**

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUN 30 2010

A. JOHNSON, VICE-PRESIDING JUDGE:

MICHAEL S. RICHIE
CLERK

Before the Court is Petitioner Tremane Wood's original application for post conviction relief. Wood was convicted by jury in the District Court of Oklahoma County, Case No. CF-2002-46, of Count 1 - First Degree Felony Murder in violation of 21 O.S.2001, § 701.7(B), Count 2 - Robbery with Firearms, After Former Conviction of a Felony in violation of 21 O.S.2001, § 801, and Count 3 - Conspiracy to Commit a Felony, After Former Conviction of a Felony in violation of 21 O.S.2001, § 421. The jury recommended the death penalty on Count 1.¹ The jury fixed punishment on Counts 2 and 3 at life imprisonment. The Honorable Ray C. Elliott, who presided at trial, sentenced Wood accordingly and ordered the sentences to be served consecutively. We affirmed Wood's Judgment and Sentence in *Wood v. State*,

¹ Wood's jury found three aggravating circumstances: 1) that Wood knowingly created a great risk of death to more than one person; 2) that the murder was especially heinous, atrocious, or cruel, and that Wood posed a continuing threat to society. See 21 O.S.2001, §§ 701.12 (2), (4) and (7).

2007 OK CR 17, 158 P.3d 467. The United States Supreme Court denied certiorari in *Wood v. Oklahoma*, 552 U.S. 999, 128 S.Ct. 507, 169 L.Ed.2d 355 (2007).

Wood raises six propositions of error in his application for post-conviction relief. Under the Capital Post-Conviction Procedure Act, the only claims that may be raised are those that “[w]ere not and could not have been raised in a direct appeal” and that also “[s]upport a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent.” 22 O.S.Supp.2006, § 1089(C)(1) and (2). “This Court will not consider issues which were raised on direct appeal and are barred by *res judicata*, or issues which have been waived because they could have been, but were not, raised on direct appeal.” *Cummings v. State*, 1998 OK CR 60, ¶ 2, 970 P.2d 188, 190. The burden is on the applicant to show that his claim is not procedurally barred. See 22 O.S.Supp.2006, § 1089(C).

1. Error at the Evidentiary Hearing

While Wood’s case was pending on direct appeal, this Court remanded the case to the district court for an evidentiary hearing on Wood’s claim of ineffective assistance of trial counsel. The district court concluded, and we agreed, that Wood was not denied effective assistance of counsel at trial. See *Wood*, 2007 OK CR 17, ¶ 38 and ¶ 44, 158 P.3d at 479 and 481. He now claims on post-conviction that the district court erred in excluding expert testimony during the evidentiary hearing.

The evidentiary hearing on Wood's claim of ineffective assistance of counsel was held before this Court heard oral argument in the direct appeal and decided Wood's case. Both parties were provided an opportunity to submit supplemental briefs after the evidentiary hearing prior to oral argument. Wood chose not to raise any claim in his supplemental brief about the judge's ruling excluding his expert's testimony. Accordingly, this claim is waived because Wood could have raised it on direct appeal.

2. Newly Discovered Evidence

Wood claims that he is entitled to post conviction relief because newly discovered evidence shows that his trial attorney was ineffective. He further claims that he is entitled to post-conviction relief because other newly discovered evidence, namely a report by Dr. Kate Allen, supports a finding that the outcome of his trial would have been different had the new evidence been admitted. And lastly, Wood claims he is entitled to post-conviction relief because his jury was not instructed on the 85% Rule.

This Court rejected Wood's claim of ineffective assistance of trial counsel on direct appeal; he now argues on post-conviction that newly discovered evidence not previously presented to this Court warrants a different finding on the issue and a new trial in this case. To support his claim, he points to: 1) a transcript showing that trial counsel was involved in direct contempt proceedings regarding counsel's performance in several unrelated cases two weeks after trial counsel was a witness at the evidentiary hearing investigating

his performance in Wood's case; and 2) an affidavit showing that trial counsel was suspended indefinitely from the practice of law within two months following the evidentiary hearing in this case. Wood has further provided for this Court's review materials related to the 2006 disciplinary proceedings involving trial counsel and the grievances filed against him.² Wood has also furnished the Court with the Findings of Fact and Conclusions of Law from hearings conducted in two other death penalty cases investigating trial counsel's performance in those matters.³ Wood maintains such evidence is "critical" in deciding whether trial counsel rendered ineffective assistance in Wood's case.

Wood appears to claim that these materials show that trial counsel's representation was so deficient as to give rise to prejudice per se under *United States v. Cronin*, 466 U.S. 648, 658-61, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (noting that there are circumstances when a presumption of prejudice is appropriate, but requiring the defendant in that case to demonstrate that his trial counsel had made specific errors).⁴ We disagree and fail to see how trial

² Trial counsel had a number of grievances filed against him from April 2005 to March 2006.

³ This Court ultimately granted relief in each case based on ineffective assistance of counsel. See *Littlejohn v. State*, 2008 OK CR 12, ¶¶ 25-28, 181 P.3d 744-45 (reversed for a new sentencing proceeding); *Fisher v. State*, 2009 OK CR 12, ¶¶ 6-25, 206 P.3d 607, 609-14 (reversed for new trial).

⁴ The circumstances warranting a presumption of prejudice include: 1) the complete denial of counsel, in which the accused is denied the presence of counsel at a critical stage; 2) when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and 3) when counsel is placed in circumstances in which competent counsel very likely could not render assistance. *Cronin*, 466 U.S. at 659-60, 104 S.Ct. at 2047.

counsel's appearance at a contempt proceeding involving unrelated cases almost two years after acting as counsel at Wood's 2004 death penalty trial proves counsel was ineffective. Nor do we see how the fact that trial counsel was suspended from the practice of law two years after Wood's trial proves that trial counsel was ineffective. The Findings of Fact and Conclusions of Law from Keary Littlejohn's case indicate that trial counsel's secretary noticed an increase in trial counsel's consumption of alcohol around the time of Wood's trial. Trial counsel's client neglect, abuse of drugs and alcohol and emotional instability, however, appear to have begun—based on the materials provided by Wood—after Wood's death penalty trial had been completed.⁵ Without proof trial counsel was suffering from his addiction during Wood's trial, evidence of trial counsel's subsequent struggles with substance abuse and other difficulties does not prove or show that he was more than likely incapacitated or ineffective during Wood's trial.

The aspects of counsel's performance challenged by Wood are plainly of the same sort as other specific attorney errors subject to the performance and prejudice test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As noted above, Wood raised an ineffective assistance of counsel claim on direct appeal, primarily challenging trial counsel's investigation and presentation of mitigating evidence or lack thereof.

⁵ Evidence adduced during trial counsel's disciplinary proceeding showed that his problems with alcohol and substance abuse peaked in March 2006 and trial counsel himself recalled that

This Court remanded the matter for an evidentiary hearing and ultimately concluded that trial counsel was not ineffective. We found that the substance of material testimony from credible witnesses not called at trial was nonetheless presented to Wood's jury during the penalty phase of his trial and that Wood failed to show that the outcome of his case would have been different had the credible evidence developed at the evidentiary hearing been presented during his capital sentencing proceeding. *Wood*, 2007 OK CR 17, ¶ 44, 158 P.3d at 481. Nothing in the materials provided by Wood about his trial counsel's subsequent personal and professional difficulties calls into doubt our prior finding that trial counsel rendered effective assistance of counsel to Wood or convinces us to revisit that decision and order a new trial.

Next, Wood contends that a supplemental report by Dr. Kate Allen, the expert whose testimony was excluded from the evidentiary hearing, is newly discovered evidence that entitles him to post-conviction relief. To determine if a defendant is entitled to a new trial on the basis of newly discovered evidence, we consider: (1) whether the evidence is material; (2) whether the evidence could have been discovered before trial with reasonable diligence; (3) whether the evidence is cumulative; and (4) whether the evidence creates a reasonable probability that, had it been introduced at trial, it would have changed the outcome. *Ellis v. State*, 1992 OK CR 45, ¶ 50, 867 P.2d 1289, 1303.

his substance abuse disorder began in earnest in March 2005, a year after Wood's death penalty trial.

Information contained in Dr. Allen's report is not newly discovered, but a new assessment of previously presented and discovered evidence.⁶ On direct appeal, we noted that trial counsel presented evidence about Wood's troubled background and about his childhood growing up in an abusive household with little parental supervision and absent parents. *Wood*, 2007 OK CR 17, ¶ 43, 158 P.3d at 481. We found that evidence of Wood's chaotic home life and background was presented for the jury to consider in balancing the aggravating circumstances against the mitigating evidence. *Id.* at ¶ 44, 158 P.3d at 481. The information cited by Wood does not meet the criteria of this Court's test for newly discovered evidence and thus we deny Wood post-conviction relief on that basis.

Lastly, Wood argues he is entitled to post-conviction relief because his jury was not instructed on the 85% Rule in 21 O.S. 2001, § 13.1.⁷ This claim is waived because Wood failed to raise this issue on direct appeal. This Court's rules provide that a party may file a supplemental brief to raise new propositions of error "on an issue of first impression decided after an appellant's brief-in-chief is filed but before the appellant's case is decided by this Court." Rule 3.4(F)(2), *Rules of the Oklahoma Court of Criminal Appeals*,

⁶ Dr. Allen found that Wood's father failed him and continues taking no responsibility for the abuse he inflicted on the family, that domestic violence shaped Wood, that Wood's family had 11 of the 14 known indicators of domestic violence likely to end in death, and that Wood is remorseful.

⁷ Under the "85% Rule," persons convicted of crimes enumerated in 21 O.S., § 13.1 are required to serve at least 85% of their sentences before they can be considered for parole.

Title 22, Ch. 18, App. (2005). Wood's post-conviction claim is predicated on our decision in *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273 decided on February 22, 2006. Wood's brief-in-chief was filed on June 28, 2005, but his case was not decided until April 30, 2007. This claim could have been raised under our rules on direct appeal and is therefore waived.

3. Ineffective Assistance of Counsel

Wood's third proposition of error is a protracted complaint detailing numerous allegations of ineffective assistance of his trial and appellate counsel. This Court reviews claims of ineffective assistance of counsel *de novo*, to see whether counsel's constitutionally deficient performance, if any, prejudiced the defense so as to deprive the defendant of a fair trial with reliable results. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Davis v. State*, 2005 OK CR 21, ¶ 7, 123 P.3d 243, 246. Under this test, Wood must not only overcome the presumption of competence but show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* We need not determine whether counsel's performance was deficient if the claim can be disposed of on the ground of lack of prejudice. See *Ball v. State*, 2007 OK CR 42, ¶ 59, 173 P.3d 81, 96.

A. Ineffective assistance of appellate counsel for failing to supplement the record

Wood claims that his appellate counsel should have supplemented the direct appeal record with evidence that trial counsel was involved in contempt proceedings in 2006 due to client neglect and a substance abuse problem and that trial counsel was suspended from the practice of law. As discussed above, evidence of trial counsel's involvement in a contempt proceeding in unrelated cases and his suspension from the practice of law two years after Wood's conviction does not prove that trial counsel was ineffective during Wood's trial. For this reason, Wood cannot show that the outcome of his appeal would have been different had appellate counsel supplemented the record with this material.

B. Ineffective assistance of appellate counsel at evidentiary hearing

Wood claims that appellate counsel provided ineffective assistance at the evidentiary hearing investigating trial counsel's performance. Wood contends that appellate counsel failed to impeach trial counsel and clarify the number of cases that trial counsel had lost, resulting in a death sentence. Trial counsel testified at the evidentiary hearing that he had tried fifteen capital murder cases in which he estimated three resulted in the imposition of the death penalty. Records provided by Wood show that trial counsel was incorrect and that the death penalty had been imposed in seven cases. The accuracy of trial counsel's testimony about his success rate in other cases has no bearing on whether he rendered effective assistance in Wood's case. Neither the trial

court's findings of fact and conclusions of law finding counsel effective nor this Court's affirmation of the trial court's findings and conclusions rest in any way on trial counsel's win-loss record. Because it has no bearing, Wood cannot show that the outcome of the evidentiary hearing or his appeal would have been different had appellate counsel impeached trial counsel with evidence the death penalty had been imposed in seven of the fifteen capital cases trial counsel had tried.

Wood argues next that appellate counsel should have impeached trial counsel with his statement in second stage opening statement, listing the three witnesses he intended to present in mitigation. He contends the transcript would have contradicted trial counsel's testimony at the evidentiary hearing that the defense was going to call other mitigation witnesses until Wood told trial counsel not to call any other family members after his mother's emotional testimony. Wood suggests that trial counsel's testimony was nothing more than a self-serving attempt to avoid being found ineffective and that had counsel been impeached with his opening statement, trial counsel would have been forced to admit he never intended to call any other family members.

Appellate counsel confronted trial counsel at the evidentiary hearing about Wood's alleged request not to call additional family members following his mother's testimony. Appellate counsel emphasized that Wood's request pertained only to family members and did not include friends, mentors or workers from the Office of Juvenile Affairs. Appellate counsel further elicited

that trial counsel did not have any other witnesses present and ready to testify in mitigation except the ones called. The point Wood claims should have been made—that trial counsel failed to investigate other witnesses and to present their testimony—was made. In addition, both the trial court and this Court have reviewed the mitigating evidence Wood claimed trial counsel failed to uncover and present. We found that the substance of material testimony from credible witnesses not called at trial was nonetheless presented to Wood's jury in deciding his fate. Wood cannot show that the outcome of the evidentiary hearing or his direct appeal would have been different had appellate counsel impeached trial counsel with his opening statement in second stage.

Wood argues appellate counsel should have reminded the trial court of its concern about trial counsel's preparation by asking trial counsel about a pre-trial exchange with the trial court on the subject. This claim is based on a mistaken memory and is without merit. Prior to jury selection, the trial judge asked trial counsel about his preparation time because the judge recalled trial counsel stating at an earlier status conference that trial counsel would be in trial the week before Wood's trial was set to begin. The trial judge inquired, in light of his memory, whether trial counsel had adequate time to prepare. Trial counsel explained that the trial court was confusing a co-defendant's lawyer's statement with his, that he had plenty of time to prepare, and that he was ready to proceed. We find no prejudice in appellate counsel's failure to point out this exchange at the evidentiary hearing.

Wood also claims appellate counsel failed to present evidence at the evidentiary hearing in support of Wood's claim that his father, Raymond Gross, Jr., was abusive to his wife and children. Wood contends appellate counsel should have used documents related to Wood's parents' divorce and to Gross' criminal conviction for feloniously pointing a weapon at Wood's mother to corroborate Wood's mother's testimony of abuse and to discredit Gross' testimony.

The documents Wood provides now and claims should have been used at the evidentiary hearing are insufficient to convince us that appellate counsel was ineffective. The divorce petition filed by Wood's mother contained nothing more than allegations that Ms. Wood was seeking a divorce in part because of Mr. Gross' "extreme cruelty" and stated that he was a "violent man." The divorce decree shows the divorce was granted on the grounds of incompatibility; it notes only that Ms. Wood was entitled to a permanent restraining order against Gross without listing any facts or reasons for the provision. Ms. Wood's requests for protective orders offer no proof that abuse occurred as they memorialize only her allegations in support of her petition. The fact that emergency protective orders were issued is of little consequence since such orders are routinely issued upon complaints; the orders were rendered practically meaningless here because all were later dismissed for failure to prosecute. We fail to see how the allegations of abuse contained in

these documents would have bolstered Ms. Wood's testimony or changed the trial court's findings of fact or the outcome of the evidentiary hearing.

Wood appears to argue also that appellate counsel was ineffective for failing to point out to this Court the fact trial counsel had previously signed an affidavit purporting to admit ineffective assistance that trial counsel did not explicitly repudiate at the evidentiary hearing. Appellate counsel questioned trial counsel about his performance and the affidavit in depth at the evidentiary hearing. Appellate counsel did, in fact, put trial counsel's performance and the affidavit in issue.

Wood argues that appellate counsel was ineffective for failing to cite all of the factual inaccuracies he asserts exist in the trial court's findings of fact and conclusions of law. Appellate counsel filed a ten page supplemental brief after the evidentiary hearing in accordance with this Court's order remanding the case for evidentiary hearing. Appellate counsel went through each question this Court asked the district court to consider and explained why the district court's findings and conclusions were wrong. Appellate counsel outlined as many inconsistencies within the limitations imposed by the page constraint set by this Court allowed. Wood has not shown that appellate counsel's decision about what to include in his limited space was anything but a sound strategic

decision. We will not second-guess that decision.⁸ See *Hanson v. State*, 2009 OK CR 13, ¶ 37, 206 P.3d 1020, 1032.

Wood contends appellate counsel was ineffective for failing to raise a claim in the supplemental brief about the exclusion of the defense mitigation expert at the evidentiary hearing. Wood concedes that appellate counsel preserved the claim by admitting the expert's report for appeal, but argues he failed to present the claim in his brief and failed to "provide what she [the expert] would have testified to had she been allowed." As noted above, appellate counsel went through the questions the district court considered and addressed the district court's findings and conclusions. Appellate counsel chose to utilize the ten page limit to challenge the trial court's decision that trial counsel was effective with evidence presented at the hearing rather than attack the trial court's decision excluding his expert. This was a reasonable strategy. Furthermore, appellate counsel did provide this Court with the expert's findings by admitting the expert's report below. This claim, like Wood's other claims, must fail, because he can show neither deficient performance nor prejudice.

Wood argues that appellate counsel was ineffective in failing to obtain a handwriting exemplar from one of the State's witnesses. Wood maintains that he was prejudiced by this failure because, if he had been able to conclusively

⁸ We note that appellate counsel in the supplemental brief raised complaints that the trial court's finding that trial counsel had all the records was erroneous and that the trial court's findings concerning the testimony of a former juror was wrong.

prove the witness wrote two letters she denied writing, her trial testimony would have been impeached. We rejected a similar claim on direct appeal, finding that, because the witness admitted making statements similar to those in the letters, trial counsel was able to impeach the witness as effectively as she could have been had it been proven conclusively that she had authored the letters. *Wood*, 2007 OK CR 17, ¶ 45, 158 P.3d at 481-82. Because we have already held that Wood was not prejudiced by the failure to impeach the witness with proof that she had written the letters, he cannot have been prejudiced by appellate counsel's failure to obtain a handwriting exemplar from the witness for the evidentiary hearing. This claim is denied.

Wood argues that appellate counsel should have introduced a videotape at the evidentiary hearing entitled "Gangs in Stillwater." The videotape, apparently made by the Stillwater Police Department, depicts gang graffiti on buildings in Stillwater, some Stillwater gang members with blurred faces to conceal their identities, and some weapons confiscated from these gang members. Wood contends the tape would have proved what a former parole and probation officer was not allowed to testify about, namely how the police viewed the Wood brothers and the community's low tolerance for biracial people. This tape had no specific connection to Wood. Its message was that the Stillwater community should take measures to address problems associated with street gangs. Wood fails to convince us that the videotape was relevant and that he was prejudiced by counsel's failure to offer it. We cannot,

therefore, find appellate counsel ineffective for failing to offer the videotape at the evidentiary hearing.

Finally, Wood argues appellate counsel was ineffective in failing to present evidence at the evidentiary hearing that Brandy Warden, Wood's former girlfriend and accomplice-turned-State's-witness, had her sentence reduced after she testified against him and may have received lenient treatment in other cases.⁹ The trial court knew that Warden had not been charged with the robbery of a local pizza restaurant along with the other defendants in this case because she admitted this fact at trial. The trial court was also aware that her sentence on charges related to Wood's case had been reduced over the strenuous objection of the State because the trial court had ordered it and presided over the other defendants' proceedings. There is nothing in the record to suggest that Warden testified against Wood to receive a sentence reduction. Because the trial court was aware of the rewards Warden had received for testifying and had ordered her sentence reduction after Wood's trial, we cannot find that appellate counsel was ineffective for failing to present evidence of Warden's sentence reduction at the evidentiary hearing.

⁹ Warden was sentenced to 45 years imprisonment for accessory to murder and 10 years for conspiracy, running concurrently. After Wood's trial, the trial court reduced her 45 year sentence to 35 years.

C. Failure of Appellate Counsel to present additional reasons in support of Wood's ineffective assistance of trial counsel claim

Wood raises ten complaints about trial counsel's performance not included in appellate counsel's ineffective assistance of trial counsel claim on direct appeal.¹⁰ According to Wood, he received ineffective assistance of appellate counsel on direct appeal based on appellate counsel's failure to include these issues.

A review of Wood's complaints shows that he can neither show that counsel's decision on which claims to include on direct appeal was unsound strategy nor that the outcome of his appeal would have been different had appellate counsel raised these issues. Appellate counsel has a duty to raise relevant issues for this Court's consideration, but there is no obligation to raise every available non-frivolous issue. See *Martinez v. State*, 1999 OK CR 47, ¶ 22, 992 P.2d 426, 432. It appears to us that appellate counsel presented to this Court those claims, he believed, in light of his professional judgment, had the best chances for success that would fit within this Court's page limitation in a capital case. Appellate counsel raised seven propositions of error that

¹⁰ The complaints include:

1. Trial counsel failed to present available evidence to support his defense.
2. Trial counsel failed to list a crucial mitigating circumstance.
3. Trial counsel failed to request a *Harjo* hearing.
4. Trial counsel failed to challenge the admissibility of DNA evidence.
5. Trial counsel failed to object to handwriting exemplars.
6. Trial counsel failed to object to improperly excused jurors.
7. Trial counsel failed to object when jurors moved their vehicles.
8. Trial counsel failed to request an instruction on the 85% Rule and for a definition of life imprisonment with the possibility of parole.
9. Trial counsel failed to request proper jury instructions.
10. Trial counsel failed to object to prosecutorial misconduct.

filled his allotted 100 pages of brief space, dedicating more than a quarter of his brief to a claim of ineffective assistance of trial counsel. Appellate counsel's efforts resulted in this Court remanding the matter for an evidentiary hearing to investigate the ineffective assistance of trial counsel claim. On this record, we cannot find that Wood has shown that his appellate counsel's performance in presenting ineffective assistance of trial counsel claims was deficient or that he was prejudiced thereby. For this reason, his claim that appellate counsel was ineffective must be denied.

4. Other Crimes Evidence and Prosecutorial Misconduct

Wood argues that he was denied a fair trial by the introduction of improper other crimes evidence and prosecutorial misconduct. Wood's claims are all record-based claims that could have been raised previously on direct appeal. Accordingly, this claim is waived.

5. Jury Sequestration

Wood argues that he was denied a fair trial because jurors were allowed to separate to move their cars at the conclusion of both first and second stage after being sworn but before deliberations began. He also argues he was denied a fair trial because the bailiff may not have been sworn in his case. Again, these claims are record-based claims that could have been previously raised on direct appeal and are waived.

6. Cumulative Error

Wood claims in his final proposition that the accumulation of error on appeal and in post-conviction requires relief. "No authority allows this Court to consider, on post-conviction, errors raised on direct appeal which were not also raised as error in the post-conviction claim." *Harris v. State*, 2007 OK CR 32, ¶ 20, 167 P.3d 438, 445. We have determined that Wood is not entitled to a new trial on the basis of newly discovered evidence. We have further found that neither trial nor appellate counsel were ineffective. There is no cumulative error to consider.

DECISION

Having reviewed Wood's application for post-conviction relief, we conclude: (1) there exist no controverted, previously unresolved factual issues material to the legality of Wood's confinement; (2) Wood's grounds for review have no merit or are barred from review; and (3) the Capital Post-Conviction Procedure Act warrants no relief in this case. Accordingly, Wood's Application for Post-Conviction Relief is **DENIED**. Because Wood's claims can be disposed of on the materials provided, his motions for discovery and an evidentiary hearing are **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

ATTORNEY FOR PETITIONER:

JULIE GARDNER
ATTORNEY AT LAW
228 ROBERT S. KERR.
SUITE 100
OKLAHOMA CITY, OK 73102

ATTORNEYS FOR THE STATE:

W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
PRESTON SAUL DRAPER
ASSISTANT ATTORNEY GENERAL
313 N.E. 21st STREET
OKLAHOMA CITY, OK 73105

OPINION BY: A. JOHNSON, V.P.J.
C. JOHNSON, P.J.: Concur
LUMPKIN, J.: Concur
LEWIS, J.: Concur

RA

APPENDIX C

APPENDIX C

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

November 2, 2022

Scott S. Harris
Clerk of the Court
(202) 479-3011

Ms. Amanda Christine Bass
Federal Public Defender, District of Arizona
850 West Adams Street, Suite 201
Phoenix, AZ 85007

RECEIVED
Federal Public Defender

NOV 9 2022

Capital Habeas Unit
Phoenix, Arizona

Re: Tremane Wood
v. Oklahoma
Application No. 22A371

Dear Ms. Bass:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kavanaugh, who on November 2, 2022, extended the time to and including January 15, 2023.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Susan Frimpong
Case Analyst

**Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001**

NOTIFICATION LIST

Scott S. Harris
Clerk of the Court
(202) 479-3011

Ms. Amanda Christine Bass
Federal Public Defender, District of Arizona
850 West Adams Street, Suite 201
Phoenix, AZ 85007

Clerk
Court of Criminal Appeals of Oklahoma
Room 1
State Capitol Building
Oklahoma City, OK 73105

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WASHINGTON, DC 20543-0001
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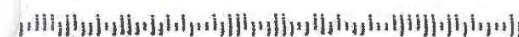
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APPENDIX D

APPENDIX D

IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APR 25 2007

Termane Wood,

Petitioner,

-vs-

State of Oklahoma,

Respondent.

Oklahoma Co. District Court
Case No. CF-02-46
MICHAEL S. RICHIE
CLERK

Court of Criminal Appeals
Direct Appeal Case No.
D-05-171

Post Conviction Case No.
PCD-05-143

COURT OF CRIMINAL APPEALS FORM 13.11A

AMENDED APPLICATION FOR POST – CONVICTION
RELIEF – DEATH PENALTY CASE

Submitted By,

Julie Gardner, OBA#16425
228 Robert S. Kerr, Suite 100
Oklahoma City, OK 73102
(405) 290-7030
Fax: (405) 290-7035
Attorney for Termane Wood

**IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA**

Termane Wood,

Petitioner,

-vs-

State of Oklahoma,

Respondent.

**Oklahoma Co. District Court
Case No. CF-02-46**

**Court of Criminal Appeals
Direct Appeal Case No.
D-05-171**

**Post Conviction Case No.
PCD-05-143**

COURT OF CRIMINAL APPEALS FORM 13.11A

**AMENDED APPLICATION FOR POST – CONVICTION RELIEF –
DEATH PENALTY CASE**

PART A: PROCEDURAL HISTORY

Petitioner, Termane Wood, through undersigned counsel, submits his application for post-conviction relief under Section 1089 of Title 22. This is the first time an application for post-conviction relief has been filed.

The sentence from which relief is sought is:

Death

Pursuant to Rule 9.7A (3)(d), 22 O.S. Ch. 18, App., a copy of the Judgment and Sentences and Death Warrant entered by the District Court are filed herewith and attached to this Application as Exhibits 1-2, *Appendices of Exhibits to Original Application For Post-Conviction Relief*.

1. Court in which sentence was rendered:

- (a)** Oklahoma County District Court.
- (b)** Case Number: CF-02-46.
- (c)** Court of Criminal Appeals: Direct Appeal Case No. D-05-171.

2. **Date of sentence:** May 7, 2004.

3. **Terms of sentence:** Death.

4. **Name of Presiding Judge:** Honorable Ray C. Elliott.

5. **Is Petitioner currently in custody?** Yes.

Where? Oklahoma State Penitentiary, H-unit.

Does Petitioner have criminal matters pending in other courts? No.

If so, where?

List charges:

Does Petitioner have sentences (capital or non-capital) to be served in other states or jurisdictions? No.

If so, where?

List convictions and sentences:

I. CAPITAL OFFENSE INFORMATION

6. **Petitioner was convicted of the following crime, for which a sentence of death was imposed:**

(a) First Degree Murder, in violation of 21 O.S. § 701.7 (C).

Aggravating factors alleged:

(a) The State alleged:

1. During the commission of the murder, the defendant knowingly created a great risk of death to more than one person;
2. The murder was especially heinous, atrocious, or cruel;
3. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution, and
4. At the present time, there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

(O.R. 72).

Aggravating factors found:

- (a) The jury found three of the aggravating circumstances alleged by the State in the Bill of Particulars, to-wit:
1. During the commission of the murder, the defendant knowingly created a great risk of death to more than one person;
 2. The murder was especially heinous, atrocious, or cruel;
 3. At the present time, there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

(O.R. Vol. IV 617).

Mitigating factors listed in jury instructions:

The trial court gave instruction No. 54 to the jury which "lists" mitigating circumstances. (O.R. Vol. IV at 634). The mitigation evidence submitted to the jury was as follows:

Evidence has been introduced as to the following mitigating circumstances:

1. The Defendant is only 24 years old.
2. The Defendant's parents were divorced at a young age.
3. The Defendant has a family that loves him and will continue to support him in a prison environment and desperately wants to do so.
4. The Defendant has a son, Bredon, who is five (5) years old. He would like to see what his son becomes and hopefully be a positive influence on him.
5. The Defendant has another son, Tremane, who is two (2) years old. He would like to see what his son becomes and hopefully be a positive influence on him in the future.
6. The Defendant has no father figure during his childhood, and little support from his natural father.
7. The Defendant's mother was absent during most of his childhood and was faced with substitute parenting.
8. The Defendant has a moderately severe mental health disorder.
9. The Defendant can live in a structured prison environment without hurting anyone.
10. The Defendant's previous felony conviction was non-violent. This is his first violent conviction.
11. With increased age, the Defendant could become a positive influence on others,

even in prison.

12. The Defendant has been employed in the past.
13. The Defendant has prior drug dependencies.
14. The Defendant spent time in foster care.
15. The Defendant took directions from older brother Zjaiton Wood.
16. The Defendant is of educational potential.
17. The Defendant is of average intelligence.

In addition, you may decide that other mitigating circumstances exist, and if so, you should consider those circumstances as well.

Was Victim Impact Evidence introduced at trial? Yes () No (X).

- 7. Check whether the finding of guilty was made:**

After plea of guilty () After plea of not guilty (X).

- 8. If found guilty after plea of not guilty, check whether the finding was made by:**

A jury (X) or A judge without a jury ().

- 9. Was the sentence determined by (X) a jury, or () the trial judge?**

II. NON-CAPITAL OFFENSE INFORMATION

- 10. Petitioner was convicted of the following offense(s) for which a sentence of less than death was imposed (include a description of the sentence imposed for each offense).**

Robbery with Firearms: Mr. Wood received a Life sentence.

Conspiracy to Commit Felony: Mr. Wood received a Life sentence.

- 11. Check whether the finding of guilty was made:**

After plea of guilty () After a plea of not guilty (X).

- 12. If found guilty after plea of not guilty, check whether the finding was made by:**

A jury (X), or A judge without a jury ().

III. CASE INFORMATION

13. Name and address of lawyer in trial court:

John Albert (currently suspended from practice)
3133 N.W. 63rd
Oklahoma City, OK 73116
(405) 767-0522

Names and addresses of all co-counsel in the trial court:

Lance Phillips
1 North Hudson Suite 700
Oklahoma City, OK 73102
(405) 235-5944

14. Was lead counsel appointed by the court? Yes (X) No ().

15. Was the conviction appealed? Yes(X) No().

To what court or courts? Oklahoma Court of Criminal Appeals.

Date Brief In Chief filed: June 28, 2005.

Date Response filed: July 22, 2005

Date Reply Brief filed: August 11, 2005

Date of Oral Argument: November 28, 2006.

Date of Petition for Rehearing (if appeal has been decided): N/A

Has this case been remanded to the District Court for an evidentiary hearing on direct appeal? Yes (X) No ().

If so, what were the grounds for remand?

- 1) Whether the evidence identified in the Application for Evidentiary Hearing was reasonably available to trial counsel in preparation for trial;
- 2) What, if any, of the records contained in the exhibits were reviewed by trial counsel, or the defense expert;
- 3) What effect any evidence that was available but not used might have had on trial proceedings;
- 4) Whether trial counsel's failure to investigate and/or use the evidence was sound trial strategy; and

5) Whether the failure to use the evidence undermines confidence in the outcome of the trial.

Is this petition filed subsequent to supplemental briefing after remand?

Yes (X) No () Not applicable ().

16. Name and address of lawyers for appeal?

Perry Hudson
435 North Walker, Suite 102
Oklahoma City, OK 73102
(405) 557-7800

Jason Spanich
228 Robert S. Kerr, Suite 100
Oklahoma City, OK 73102
(405) 236-0115

17. Was an opinion written by the appellate court? Yes() No () Not applicable (X).

If "yes," give citations if published: If not published, give appellate case no.:

18. Was further review sought? Yes () No () Not Applicable (X).

PART B: GROUNDS FOR RELIEF

19. Has a Motion for Discovery been filed with this application? Yes (X) No () filed on December 26, 2006.

20. Has a Motion for Evidentiary Hearing been filed with this application? Yes (X) No () filed on December 26, 2006.

21. Have other motions been filed with this application or prior to the filing of this application? Yes (X) No ().

If yes, specify what motions have been filed:

Appellant's Request to File Enclosed Motion Ex Parte and Under Seal filed on February 17, 2005.

Appellant's Motion to Hold Proceedings in Abeyance or in the Alternative for an Extension of Time to File an Original Application for Post-Conviction Relief in a Capital Case filed on November 9, 2005.

Appellant's Motion to Continue to Hold Proceedings in Abeyance, or, in the Alternative, for an Extension of Time to File an Original Application for Post-Conviction Relief in a Capital Case. Appellant's Notice to Court filed on July 27, 2006.

Entry of Appearance and Motion to Allow the Capital Post-Conviction Division of OIDS to Withdraw from Further Representation filed on September 7, 2006.

Appellant's Application for an Extension of Time to File Post-Conviction Application filed on October 26, 2006.

Petitioner's Application for Extension of Time to File Post-Conviction Application filed on November 22, 2006.

Motion to Cross Reference Petitioner's Post-Conviction Application with Co-Defendant's Appeal Records filed on December 26, 2006.

Motion to File Oversized Brief filed on December 26, 2006.

Motion for Discovery filed on December 26, 2006.

Motion for Evidentiary Hearing filed on December 26, 2006.

Objection to Petitioner's Motion to File Oversized Application filed on December 28, 2006.

Response to Objection to Petitioner's Motion to File Oversized Application filed on January 3, 2007.

Order Striking Petitioner's Original Application for Post-Conviction Relief for Failure to Comply with Court Rules and Order Denying Motion to File Oversized Application.

22. List propositions raised (list all sub-propositions).

PROPOSITION I

TRIAL COURT ERRED BY EXCLUDING TESTIMONY FROM EXPERT WITNESS.

PROPOSITION II

NEWLY DISCOVERED EVIDENCE AND NEW LAW RENDERS MR. WOOD'S CONVICTION AND SENTENCE SUSPECT AND UNRELIABLE.

- A. Hearing was held regarding whether trial counsel should be held in contempt of court.**
- B. Trial counsel has been suspended from the practice of law.**
- C. Supplemental report of Dr. Kate Allen.**
- D. New Rule of Law.**
- E. Conclusion.**

PROPOSITION III

PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE AND TRIAL COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND ARTICLE II, §§ 7, 9, AND 20 OF THE OKLAHOMA CONSTITUTION.

- A. Appellate counsel failed to supplement record with impeachment evidence.**

1. Trial counsel has been suspended from the practice of law.
 2. Transcript from contempt hearing Regarding.
- B. Appellate counsel provided ineffective assistance of counsel at evidentiary hearing.**
1. Failed to clarify the number of cases that had resulted in a sentence of death.
 2. Failed to utilize trial transcripts to cross-examine counsel.
 3. Failed to show trial court was concerned trial counsel was unprepared.
 4. Failed to prepare for testimony of Raymond Gross, Jr.
 - a. Failed to cross-examine Mr. Gross with divorce decree.
 - b. Failed to provide trial court with relevant divorce documents.
 - c. Failed to investigate Raymond Gross' criminal background.
 - d. Failed to request records detailing the abuse Ms. Wood suffered.
 - e. Conclusion.
 5. Failed to mention trial counsel never stated he had not provided ineffective assistance of counsel.
 6. Failed to list all the factual inaccuracies contained in trial court's Findings.
 7. Failed to provide this Court Dr. Allen's Findings.
 8. Failed to obtain an order for handwriting exemplars from Brandy Warden.
 9. Failed to admit videotape produced by the Stillwater Police Department.
 10. Failed to present evidence Brandy Warden's sentence was reduced.
 11. Conclusion.
- C. Ineffectiveness of trial counsel which appellate counsel failed to raise.**
1. Trial counsel failed to present available evidence to support his defense.
 2. Trial counsel failed to list a crucial mitigating circumstance.
 3. Trial counsel failed to request a *Harjo* hearing.
 4. Trial counsel failed to challenge admissibility of DNA evidence.
 5. Trial counsel failed to object to handwriting exemplars.

6. Trial counsel failed to object to improperly excused jurors.
 7. Trial counsel failed to object when jurors moved their vehicles.
 8. Trial counsel failed to request court to instruct as to life with parole.
 9. Trial counsel failed to request proper jury instructions.
 10. Failed to object to prosecutorial misconduct.
- D. Failure of appellate counsel to perform the professional duty owed to Mr. Wood.

**PROPOSITION IV
PROSECUTORIAL MISCONDUCT RESULTED IN UNFAIR PROCEEDINGS.**

- A. Bad Acts and Evidence of Other Crimes.
1. Prejudicial and Improper Bad Acts Admitted During the First Stage.
 2. Evidence of Another Crime.
 3. Legal Argument.
- B. The Prosecutor Misstated the Law and Demeaned Mitigating Evidence.
- C. Improperly accused Petitioner of lacking remorse.
- D. Invoking sympathy and arguing facts outside the record.
- E. Prosecutor presented inconsistent factual theories as to the victim's murder.
- F. Prosecutor misled the trial court at the remanded evidentiary hearing.
- G. Conclusion.

**PROPOSITION V
ERROR OCCURED WHEN JURORS MOVED VEHICLES AFTER BEING SWORN.**

**PROPOSITION VI
THE CUMULATIVE IMPACT OF ERRORS IDENTIFIED ON DIRECT APPEAL AND
POST-CONVICTION PROCEEDINGS RENDERED THE PROCEEDING RESULTING IN
THE DEATH SENTENCE ARBITRARY, CAPRICIOUS, AND UNRELIABLE.**

PART C: FACTS

**STATEMENT OF THE FACTS OF THE CASE, INCLUDING REFERENCE TO
SUPPORTING DOCUMENTATION, RECORD, AND APPENDICES**

**1.
CITATIONS TO THE RECORD**

Pursuant to Rule 9.7(D)(1)(a) of the *Rules of the Court of Criminal Appeals*, effective January 1, 1998, the record and transcripts in this case will be referred to using the following abbreviations:

Application:	the instant Original Application for Post-Conviction Relief
O.R.:	the four (4) volumes of Original Record in Oklahoma County District Court Case No. CF-02-46, and two (2) volumes from the remanded evidentiary hearing.
PH:	the three (3) volumes of transcripts of the preliminary hearing held on July 25, 2002, July 26, 2002 and August 14, 2002.
Date Tr.:	the six (6) volumes of transcripts of the jury trial held on March 29 through April 5, 2004.
Date Z. Wood Tr.:	the volumes of transcripts of the jury trial of co-defendant Zjaiton Wood, held February 22, 2005 and February 23, 2005. ¹
Vol. I-III:	the three (3) volumes of transcripts for the remanded evidentiary hearing held February 23, February 27, and March 2, 2006.
Findings:	District Court's Findings of Fact and Conclusions of Law filed on April 6, 2006 regarding the remanded evidentiary hearing.
Supplemental Brief:	Supplemental Brief of Appellant filed after the remanded evidentiary hearing on May 1, 2006.

Any additional record in this post-conviction proceeding, not otherwise mentioned above, also consists of the "record on appeal" as defined by Rule 1.13 (f), and the same shall be considered to be incorporated herein by reference and by operation of the rule. References to the *Appendix of Exhibits In Support of the Application For Post-Conviction Relief* will be cited as "Ex." followed by the number, such as "Ex. 1." All citations will be separated from the regular text of the brief by

¹ Counsel for Mr. Wood has filed a Motion to Cross Reference Petitioner's Post-Conviction Application with Co-Defendant's Appeal Records. Petitioner's Co-defendant is Zjaiton Wood, Case No. F-2005-246.

parentheses.

2. PROCEDURAL HISTORY

Termane Laitron Wood² was charged by Amended Information in the District Court of Oklahoma County, Case No. CF-02-46, of First-degree Murder in violation of 21 O.S. § 701.7; one count of Robbery with Firearms; and one count of Conspiracy to Commit a Felony To-Wit: Robbery with a Dangerous Weapon. ³ (O.R. 538-39) A Bill of Particulars was filed alleging the existence of four aggravating circumstances: 1) during the commission of the murder, the defendant knowingly created a great risk of death to more than one person; 2) the murder was especially heinous, atrocious, or cruel; 3) the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and 4) at the present time, there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society. (O.R. 72).

Mr. Wood was represented by John Albert and Lance Phillips. He was tried before a jury from March 29 through April 5, 2004. The Honorable Ray C. Elliott presided over the trial. Assistant District Attorneys Fern Smith and George Burnett prosecuted the case for the State. On April 2, 2004, the jury convicted Mr. Wood on all three (3) charges. After the sentencing stage of the trial, on April 5, 2004, the jury found the existence of three of the four aggravating circumstances and assessed his punishment as death on the murder charge.⁴ He was also sentenced to life on the

² To maintain consistency for the court, Petitioner will be referred to as Termane; however, his first name is actually Tremane.

³ Termane Wood was charged with three other co-defendants in Case No. CF-2002-46. Co-defendant Lanita Bateman went to jury trial and was convicted on all three counts. She was sentenced to life on the murder count, 101 years on the robbery count, and 10 years on the conspiracy to commit a felony. Co-defendant Zjaiton Wood was tried after Tremane Wood. He was found guilty on all three counts and was sentenced to life without the possibility of parole on the murder count, and sentenced to sixty years on each of the remaining counts. Co-defendant Brandy Warden turned State's evidence and testified against each of her co-defendants. She entered a plea and was sentenced to 45 years on accessory after the fact to murder in the first degree, and 10 years on the conspiracy count. The State dismissed the robbery charge. Upon Ms. Warden's one year review, her sentence was modified from 45 years to 35 years.

⁴ The aggravating circumstances found were that during the commission of the murder, the defendant knowingly created a great risk of death to more than one person; the murder was especially heinous, atrocious, or cruel; and at the present time, there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society. (O.R. Vol. IV 617).

robbery charge and life on the conspiracy charge. (O.R. 614-18, 621-22) The District Court pronounced formal judgment and sentence on the verdicts on May 7, 2004.

Mr. Wood appealed the judgments and sentences in *Wood v. State*, Case No. D-2005-171. The appellant's brief in chief and Application for Evidentiary Hearing on Sixth Amendment Claim was filed June 28, 2005. The appellee's brief was filed July 22, 2005, Appellant's reply brief was filed on August 11, 2005.

This Court on November 16, 2005 issued an Order remanding Appellant's case to the district court for an evidentiary hearing regarding Appellant's claim of ineffective assistance of counsel. This remanded evidentiary hearing was held before the district court on February 23, February 27, and March 2, 2006. The District Court issued its Findings of Fact and Conclusions of Law on April 6, 2006. On April 26, 2006, the State filed its Supplemental Brief. On May 1, 2006, Appellant filed his Supplemental Brief of Appellant with this Court. As of the date of the filing of this application, this Court has not issued an opinion in this case.

Mr. Wood's application for post conviction relief was originally due to be filed in this court on July 28, 2006. However, on July 27, 2006, Mr. Wood by and through counsel Vicki Ruth Adams Werneke, Chief of the Capital Post Conviction Division of the Oklahoma Indigent Defense System, filed a Notice advising that Kevin Pate- assigned counsel for Mr. Wood had resigned. Due to Mr. Pate's resignation, counsel advised this Court that Mr. Wood's application for post conviction relief could not be filed by July 28, 2006, and requested an extension of time.

On August 7, 2006, this Court granted Appellant's request for an extension of time. This Court extended the time for filing until October 27, 2006. On September 7, 2006, the undersigned counsel entered her appearance in this case and requested this Court to allow the Capital Post Conviction Division of the Oklahoma Indigent Defense System be allowed to withdrawal from Petitioner's representation. On September 22, 2006, this Court granted the undersigned's motion allowing the Capital Post Conviction Division of the Oklahoma Indigent Defense System to withdraw from Petitioner's representation. The undersigned requested, and was granted two (2)

thirty (30) day extensions of time in which file his application. Said Application was due to be filed on December 25, 2006.

Pursuant to 22 O.S.Supp.1996 § 1089 and Rule 9.7 of the Court of Criminal Appeals Rules, 22 O.S.Supp.1997 Ch. 18., Mr. Wood, by and through his appointed counsel, timely filed this Original Verified Application for Post-Conviction Relief on December 26, 2006. Petitioner on this date also filed a Motion to File Oversized Brief, Motion for Discovery, Motion for Evidentiary Hearing and Motion to Cross Reference Petitioner's Post-Conviction Application with Co-Defendant's Appeal Records.

The State, on December 28, 2006, filed an Objection to Petitioner's Motion to File Oversized Application. Petitioner filed a Response to Objection to Petitioner's Motion to File Oversized Application on January 3, 2007. This Court entered an Order Striking Petitioner's Original Application for Post-Conviction Relief for Failure to Comply with Court Rules and Order Denying Motion to File Oversized Application on March 14, 2007. This order provided Petitioner had 45 days from the date the order was entered to comply with page limitations. Petitioner, by and through his appointed counsel, timely files his Amended Verified Application for Post-Conviction Relief.

3.

FACTS RELATING TO THE OFFENSE

The State's theory of the case was that four individuals, Brandy Warden, Lanita Bateman Termene Wood, and his brother Zjaiton (Jake) Wood set out on a crime spree December 31, 2000, which resulted in the death of Ronnie Wipf. The State argued Tremane Wood was guilty of felony murder. The State's star witness was Brandy Warden, who had turned State's evidence and testified against her three co-defendant's. The State's other key witness was victim Arnold Kleinsasser.

On December 31, 2000, Ronnie Wipf and Arnold Kleinsasser were celebrating New Year's Eve at the Bricktown Brewery in Oklahoma City, Oklahoma. (03/31/04 Tr. 118) While at the Bricktown Brewery the men met and began to socialize with two women, Brandy Warden and Lanita Bateman. After the Bricktown Brewery closed, the women agreed to accompany these men back

to a motel. (03/31/04 Tr. 120-24)

Since the men were not from Oklahoma, Brandy Warden drove their vehicle to a motel of the women's choice, the Ramada Inn. (03/31/04 Tr. 124) Although the men wanted separate rooms, the women wanted only one room. (03/31/04 Tr. 126) Although Mr. Kleinsasser paid for the room, the room was also listed under Ms. Warden's name because he was under twenty-one years of age. (03/31/04 Tr. 125-26)

Once inside the room, the women demanded \$210.00 from the men for sex. (03/31/04 Tr. 125-27) Since the men did not have that much money on them, Brandy Warden drove Mr. Kleinsasser to an ATM to get the cash. (03/31/04 Tr. 127) When they returned to the room, the money exchanged hands, and the women excused themselves to the restroom. (03/31/04 Tr. 127) Not long after the girls had entered the restroom, someone started pounding on the motel room's door and yelled, "Brandy, are you in there? Brandy are you ready to go home?" (03/31/04 Tr. 130)

Although the women tried to exit the room, Mr. Wipf prevented them from leaving and refused to answer the door. (03/31/04 Tr. 129) Mr. Wipf demanded that the women return their money and told Mr. Kleinsasser to call the police. (03/31/04 Tr. 131) However, before he could call the police, Ms. Bateman picked up the phone and proceeded to act as if she were calling the police. (03/31/04 Tr. 118) Eventually, Mr. Wipf decided to let the girls out and opened the door. However, as soon as he did, two masked men entered the room as the two women exited. (03/31/04 Tr. 131-32)

The two men that entered the room were wearing ski masks, long black trench coats, and black leather gloves. One man was described as a black man, bigger than the other, about 5 feet 11 inches tall, weighing approximately 220 pounds, with a small caliber handgun. Other man was described as a white man, approximately 5 feet 11 inches tall, weighing about 190 to 200 lbs, and carrying a knife. (03/31/04 Tr. 131-34) Mr. Kleinsasser testified that the smaller of the two men appeared to be white. (03/31/04 Tr. 171, 173)

Mr. Kleinsasser testified that the man with the gun immediately approached him and demanded his money, which he gave him from his wallet. (03/31/04 Tr. 131, 133, 134) After taking

the money, this man then left him to go and assist the smaller man who had been struggling with Mr. Wipf since they had entered the room. (03/31/04 Tr. 135) Mr. Kleinsasser testified that he heard one of the men say "just shoot the bastard" and a shot was fired. (03/31/04 Tr. 138) Shortly thereafter he was approached by the smaller man with the knife who demanded money from him as well. After Mr. Kleinsasser informed the smaller man that he had already given the other man all his money, the smaller man went back to assist the larger man with Mr. Wipf. (03/31/04 Tr. 139) Once the smaller man turned his back, Mr. Kleinsasser made his escape from the motel room. (03/31/04 Tr. 139-40) Mr. Kleinsasser learned of his friend's death the next morning at approximately 6:00 a.m. when he returned to the motel. (03/31/04 Tr. 144) Mr. Kleinsasser was unable to testify as to which guy stabbed Mr. Wipf. (03/31/04 Tr. 172)

Chief Medical Examiner Fred Jordan testified Mr. Wipf had not been shot, but had died from a single stab wound to his chest, which he classified as a homicide. (04/02/04 Tr. 11-12, 18) He opined that this single stab wound had caused Mr. Wipf to lose a large amount of blood into his right chest cavity. (04/02/04 Tr. 11-12) Dr. Jordan also testified he observed several fresh bruises and scraps along with a number of superficial knife wounds, which appeared to be defensive wounds, on Mr. Wipf's body. (04/02/04 Tr. 14-16)

The State, through the testimony of co-defendant Ms. Warden, was able to piece together the sequence of events that occurred December 31, 2000. Ms. Warden stated that earlier that day she, Lanita Batemen, and Tremane and Zjaiton Wood, had gone to Wal-Mart where she purchased ski masks and gloves. (04/01/04 Tr. 138) Ms. Warden also testified that she and Ms. Batemen knew that they were setting the two men up when they left the Bricktown Brewery. (04/01/04 Tr. 188) Ms. Warden admitted she provided identification for the motel room and that she took Mr. Kleinsasser to the ATM for the money they demanded, and that he gave her this money when they returned to the room. (04/01/04 Tr. 154-63)

Ms. Warden testified she heard Zjaiton Wood yelling at the door. (04/01/04 Tr. 166) She also testified that as she and Lanita Bateman ran out of the motel room, she observed that the smaller of

the two men had a knife, while the larger man had the gun. (04/01/04 Tr. 178) The women waited in the car until the men returned. (04/01/04 Tr. 169) Ms. Warden testified Termene Wood was the smaller of the two men, and Zjaiton Wood was the larger of the two men. (04/01/04 Tr. 134-35)

At trial, the Defendant denied any involvement. Defendant's brother Zjaiton Wood testified during the first stage of trial that he and another man named "Alex" committed this crime. (04/02/04 Tr. 89, 91-95) Zjaiton Wood testified he initially had the gun when he and Alex entered the motel room. (04/02/04 Tr. 94) Zjaiton explained that when he saw that the victim was getting the best of Alex and he went over and started punching the victim in his head and body. (04/02/04 Tr. 94) Zjaiton testified that he grabbed the knife, "I grabbed the victim by the head and I stabbed him in the chest and told him I was God.... Just to let him know, you know, he was dealing with a force to be reckoned with." (04/02/04 Tr. 94) At the conclusion of first stage, the jury found Tremene Wood guilty on all counts. (04/02/04 Tr. 214-15)

In second stage, the State incorporated all the evidence from first stage, and recalled their star witness Brandy Warden to the stand to testify. Ms. Warden testified about the armed robbery of La Franca's Pizza that had occurred at approximately 10:00 p.m. on December 31, 2000. Again, she alleged the four had been involved and that Termene Wood used a knife while Zjaiton Wood used a handgun. (04/05/04 Tr. 17-18)

The State also called Keramat Taghizadeh, the owner of the La Franca's Pizza, who had been robbed that night. He testified that he was robbed by two men. He stated that the larger man had a gun, and that the smaller man had a knife. He testified that the larger man hit him in the head with the gun after he tried to set off the alarm. (04/05/04 Tr. 24-26)

In second stage, the Defendant called his mother Linda Wood, her friend Andre Taylor, and Dr. Ray Hand. Their testimony, or lack thereof, is discussed in greater detail in the following Propositions. At the conclusion of the second stage, the jury recommended death on the murder charge and recommended the maximum sentence of life on the robbery and conspiracy counts. (04/05/04 Tr. 163-64)

Additional relevant facts will be detailed and developed in the following Propositions.

PART D: PROPOSITIONS – ARGUMENTS AND AUTHORITIES

PROPOSITION I TRIAL COURT ERRED BY EXCLUDING TESTIMONY FROM EXPERT WITNESS.

During the remanded evidentiary hearing (hereinafter “hearing”), defense counsel attempted to elicit expert testimony from Dr. Kate Allen. Despite her qualifications,¹ the State objected under *Daubert*² and expressed “I don’t think that a social worker should be allowed to testify in any psychological considerations or conclusions.” (*Id.* at 203) Counsel responded Dr. Allen’s testimony was “prototypical mitigation evidence. This is the type of mitigation evidence that should always be presented, if available, in a capital case.” (*Id.* at 208) The trial court sustained the State’s objection and refused to allow Dr. Allen to testify.³ (*Id.* at 219)

Okla.Stat.tit. 12, § 2702, provides an expert witness may testify in the form of an opinion or otherwise, “If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education.” An expert witness has been defined by this Court as one who has scientific knowledge acquired by study or practice, or both and are ordinarily persons who have experience and knowledge into matters which are not generally known. *See Kennedy v. State*, 1982 OK CR 11, 640 P.2d 971, 977.

In *Salazar v. State*, 1996 OK CR 25, 919 P.2d 1120, this Court was confronted with this very issue. In *Salazar*, this Court determined a social worker qualified as an expert witness under 12 O.S.

¹ Dr. Allen has a bachelor’s degree in psychology/sociology from Texas Christian University, a master’s degree in clinical social work from the University of Texas, and a doctoral degree of philosophy in family sociology from American University in Washington D.C. She has practiced in the field of sociology for 35 years and has treated or worked with hundreds of people. She has been a clinical social worker and a professor. She is currently a consultant in civil and criminal trials as an expert witness. (*Id.* at 199- 200) She can make a psychiatric diagnosis through her training, experience, and her degrees; however she cannot prescribe medication or give psychometric testing. (*Id.* at 212-13) She has testified in 6 other states as to her diagnoses and she has never been prevented from testifying as an expert because she was not qualified. (*Id.* at 213-14) Dr. Allen has personally evaluated 800 clients for neurological or psychological issues, and she personally evaluated Mr. Wood. (*Id.* at 214) Dr. Allen testified that as a clinical social worker she can still make Axis I DSM IV diagnoses as to psychological and psychiatry issues. (*Id.* at 215-16)

² *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

³ Dr. Allen’s report was admitted as Def. Ex. 8 at the hearing, and has been attached as Ex. 3.

§ 2702, and could provide testimony during the second stage proceeding in a capital case. In *Salazar*, the social worker provided testimony she had “specialized knowledge which she acquired through formal education,” and “she had developed skills through training and working in the field.” *Id.* at ¶ 32 The Court also found it relevant “she was able to describe how she arrived at her opinions and that the method she used was consistent with others in her field.” *Id.* The Court also noted the social worker had been recognized as an expert in another court, and “it is a factor to be considered in determining if the party offering the witness has met the foundational requirements of having the witness declared an expert.” *Salazar* at ¶ 32, n.15. The Court determined she “was qualified to render relevant expert opinions within her field of expertise and that the trial erred by not permitting her to testify.” *Id.* at ¶ 33.

Clearly Dr. Allen qualified as an expert witness. Because her testimony was not admitted, the trial court and subsequently this Court, was left with volumes of new records without an explanation as to its relevance or impact. Sadly, this Court remanded this case for a hearing on whether this new evidence would have impacted the trial proceedings, and, to this day, that question remains unanswered. The trial court’s failure to allow Dr. Allen to testify deprived Petitioner of his due process rights to rebut the State’s evidence and to present mitigating evidence in his own behalf, in violation of the 5th, 6th, and 14th Amendments to the United States Constitution. *Skipper*, 476 U.S. 1, at 4-5, 106 S.Ct. 1669, at 1671, 90 L.Ed.2d. 1 (1986); *Barefoot v. Estelle*, 463 U.S. 880, 896-97, 103 S.Ct. 3383, 3396, 77 L.Ed.2d 1090 (1983). Petitioner was also deprived of a fair and reliable sentencing proceeding guaranteed him under the 6th, 8th, and 14th Amendments. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978). It cannot be faithfully said that this error was harmless beyond a reasonable doubt and his death sentence must be vacated. *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, 701; *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

PROPOSITION II
NEWLY DISCOVERED EVIDENCE AND NEW LAW RENDERS MR. WOOD’S
CONVICTION AND SENTENCE SUSPECT AND UNRELIABLE.

Petitioner has uncovered newly discovered evidence which renders his conviction unreliable. This evidence was not or could not have been raised in his direct appeal. Since this evidence supports the conclusion the outcome would have been different, Petitioner respectfully requests his convictions and sentences be reversed and his case remanded to district court for a new trial.

A. Hearing was held regarding whether trial counsel should be held in contempt of court.

On March 9, 2006, shortly after trial counsel testified as a witness at the evidentiary hearing regarding his professional performance, a contempt hearing was held in Oklahoma County District Court addressing Mr. Albert's conduct on March 1, 2006. (Ex. 4-A, at 3, 5, 7) Despite the lack of a transcript from the March 1st hearing, one can ascertain Mr. Albert initially failed to appear before the court, and then when he did appear, he was not ready to proceed on the behalf of 3 clients. (*Id.* at 14) The court noted, "In one of those cases Mr. Colston is charged with murder in the first degree. He's been in jail three years and he has not seen Mr. Albert in at least a year and a half to two years and hasn't had the opportunity to go to trial." (*Id.* at 40)

The court described Mr. Albert as disheveled and disoriented. Mr. Albert admitted he had "some problems in his life," and "I need help." (*Id.* at 7, 18, 19) He represented he "would report here on Monday morning ready to go to inpatient treatment." (*Id.* at 7) However, he failed to report to the court and to go to a treatment facility. (*Id.* at 5, 7, 9, 24) Despite the fact he expressed, "I have not had a beer, anything in seven days. I know that's just seven days, but that is - - that's how it starts," his failure to follow through with the inpatient treatment resulted in a contempt proceeding being held later that afternoon. (*Id.* at 6) Mr. Albert was held without bond. (*Id.* at 39, 41-42, 53, 63) Unfortunately, the subsequent hearing held that afternoon was filed under seal.⁴

The evidence adduced at this contempt proceeding is crucial since it occurred just days after Mr. Albert testified at Petitioner's hearing on February 27, 2006. At his contempt hearing Mr. Albert admitted he has a problem, which appears to involve alcohol and possibly even drugs. Furthermore,

⁴ Petitioner requested an evidentiary hearing and filed a Motion for Discovery to be provided a copy of Volume Two of the sealed transcript in Mr. Wilson's case, Oklahoma County Case. No. CF-2004-6139 (Ex. 4-B-docket sheet).

the evidence reveals a concern by a district court as to his representation of his clients and the fact he has not even seen one of his clients in close to two years. Clearly, this information is critical in determining whether Mr. Albert rendered effective assistance of counsel in Petitioner's case.

B. Trial counsel has been suspended from the practice of law.

According to Ex. 5, which is a sworn affidavit provided by General Counsel with the Oklahoma Bar Association, trial counsel Mr. John Albert has been suspended indefinitely from the practice of law. Said suspension took effect on April 24, 2006, in a confidential proceeding before the Oklahoma Supreme Court. His suspension occurred close to two months after he testified at the evidentiary hearing and a little over a month after his contempt hearing. Additionally, this Court on April 6, 2007, remanded another death penalty case, *Keary Lamar Littlejohn vs. State of Oklahoma*, D-2005-237, for an evidentiary hearing regarding Mr. Albert's performance as trial counsel.

C. Supplemental report of Dr. Kate Allen.

As mentioned in Proposition I, the trial court erroneously prevented Dr. Kate Allen from testifying at Petitioner's hearing. Petitioner subsequently requested Dr. Allen to review additional records and the transcript testimony of the witnesses from the hearing and issue a supplemental report which is attached as Ex. 6.

For this Court's convenience, Petitioner has pulled from Dr. Allen's Supplemental Report new evidence from the following heading:

The Defendant's Parents Failed: Mr. Gross, additionally, failed Tremane in his role as a *father*. .. he continues to avoid taking any responsibility for the malignant domestic violence he predicated on the family, for not financially supporting his children (often choosing not to work), and for not being available to the defendant on *any* basis as a father (all three men consistently attest to having been emotionally and physically abandoned by their father.)

Presence and Significance of Domestic Violence: The issue of authentic presence of domestic violence has been raised... What the court documents reveal is that extreme domestic violence shaped at least the first 10 years of Tremane Wood's life... These documents are evidence of authentic, severe and ongoing violence against Ms. Wood during the early and middle childhood of the defendant, far before his legal troubles began...

Domestic Violence Lethality Checklist: Of the 14 known indicators of domestic

violence likely to end up in death, Tremane Wood's parents, at that time, met...eleven.

Personality Strengths: Toward the end of our interview, Tremane expressed sorrow about what had happened to the young men who had been victimized, stating that they were completely innocent....He felt shame and humility that the parents [of the victim] adamantly opposed the death penalty, a penalty chosen for him by the trial jury. He expressed it directly, as he lowered his head and looked down at the floor, unable to continue talking.

Clearly, the evidence presented in Dr. Allen's report should be presented to a jury for their consideration as mitigation. Especially the fact Petitioner is remorseful, which is a powerful mitigating circumstance. Additionally, since Dr. Allen was not allowed to testify at the hearing her opinions were not considered by the trial court when it issued its Findings of Fact and Conclusions of Law (hereinafter "Findings") and undermines its reliability.

D. New Rule of Law.

The Oklahoma Legislature enacted a truth in sentencing law which forbids someone convicted of murder with a life with parole sentence from being paroled unless 85% of his sentence had been served. 21 O.S. § 13.1. Concerning that statute, this Court recently held that

for cases covered by this new sentencing reality--as in cases where life without parole is a sentencing option--the legislature's specific action compels a specific limitation on our traditional prohibition of mentioning parole at trial.... [T]he 85% Rule is a specific, delineated parole provision that does apply to life sentences for murder (as well as numerous other crimes), which does not vary from one inmate to another, which can be readily defined and explained by a judge, and which is relevant and helpful information for the jury to consider.

Anderson v. State, 2006 OK CR 6, 130 P.3d 273, 278. The trial court should have instructed Mr. Wood's jurors a life sentence according to the Pardon and Parole Board is considered to be forty-five (45) years and Mr. Wood if found guilty of murder in the first degree would have to serve at a minimum of 85% of that forty-five years. *Id.* at 283

E. Conclusion.

The granting of a new trial based on newly discovered evidence is a matter of discretion within the court and should be exercised if there is a reasonable probability that if such evidence had been introduced, a different result in the trial would have been reached. *Griffin v. State*, 1972 OK

CR 224, 501 P.2d 223, 224. “[B]efore a new trial on the ground of newly discovered evidence may be granted, the allegedly newly discovered evidence must be more than merely impeaching or cumulative. It must also be material to the issues involved and must be such as would probably produce an acquittal. *U.S. v. Kelley*, 929 F.2d 582, 586 (10th Cir. 1991). The facts and law presented above is either newly discovered evidence or a new rule of law warranting a new trial.

PROPOSITION III
PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE AND TRIAL COUNSEL IN VIOLATION OF 6th, 8th, AND 14th AMENDMENTS, AND ARTICLE II, §§ 7, 9, AND 20 OF THE OKLAHOMA CONSTITUTION.

Pursuant to 22 O.S. § 1089(C)(1)&(2), the only issues that may be raised in a capital post-conviction application are those that “were not and could not have been raised in a direct appeal; and “support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent.” Pursuant to 22 O.S. § 1089(D)(4)(b), the Court of Criminal Appeals shall review the post-conviction application to determine whether a ground could not have been previously raised if:

- (1) it is a claim of ineffective assistance of trial counsel involving a factual basis that was not ascertainable through the exercise of reasonable diligence on or before the time of the direct appeal, or
- (2) it is a claim contained in an original timely application for post-conviction relief relating to ineffective assistance of appellate counsel.

“All claims of ineffective assistance of counsel shall be governed by clearly established law as determined by the United States Supreme Court.” *See* 22 O.S. § 1089(D)(4)(b).

The Supreme Court has determined an ineffective assistance of counsel claim has two components: a defendant must show that trial counsel’s performance was deficient, and the deficiency prejudiced the defense. *Strickland*, 466 U.S. 668 at 687, 104 S.Ct. 2052 at 2052, 80 L.Ed.2d 674 (1984). To establish deficient performance, a petitioner must demonstrate trial counsel’s representation “fell below an objective standard of reasonableness.” *Id.* at 688, 104 S.Ct. at 2052. The Court has declined to articulate specific guidelines for appropriate attorney conduct and instead has emphasized “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Id.* In *Williams v. Taylor*, 529 U.S. 362, 120

S.Ct. 1495, 146 L.Ed.2d 389 (2000), the Court reiterated counsel has an obligation to “conduct a thorough investigation.” *Id.* at 396, 120 S.Ct. 1495 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed.1980)). *See also Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005)(holding even though the defendant and his family had suggested to defense counsel no mitigating evidence existed, counsel was still bound to obtain and review material the prosecution would rely upon in aggravation.)

In order for counsel’s inadequate performance to constitute a 6th Amendment violation, the defendant must show counsel’s failures prejudiced his defense. *Id.* 466 U.S. at 692, 104 S.Ct. 2052. In *Strickland*, the Court held to establish prejudice a “defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694, 104 S.Ct. 2052.

In addressing appellate ineffective assistance of counsel, the Tenth Circuit in *Cargle v. Mullin*, 317 F.3d 1196,1202 (10th Cir. 2003) held,

[t]he proper standard for assessing a claim of ineffectiveness of appellate counsel is that set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (following *Smith v. Murray*, 477 U.S. 527, 535-36, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986)). The petitioner must show both (1) constitutionally deficient performance, by demonstrating that his appellate counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error(s), the result of the proceeding--in this case the appeal--would have been different. *Id.* at 285, 120 S.Ct. 746 (applying *Strickland*).... [I]n analyzing an appellate ineffectiveness claim based upon the failure to raise an issue on appeal, "we look to the merits of the omitted issue," *Neill v. Gibson*, 278 F.3d 1044, 1057 (10th Cir.2001) (quotation omitted), *cert. denied*, 537 U.S. 835, 123 S.Ct. 145, 154 L.Ed.2d 54 (2002), generally in relation to the other arguments counsel did pursue. If the omitted issue is so plainly meritorious that it would have been unreasonable to winnow it out even from an otherwise strong appeal, its omission may directly establish deficient performance; if the omitted issue has merit but is not so compelling, the case for deficient performance is more complicated, requiring an assessment of the issue relative to the rest of the appeal, and deferential consideration must be given to any professional judgment involved in its omission; of course, if the issue is meritless, its omission will not constitute deficient performance. [FN4] *See*, 1203 *e.g.*, *Smith*, 528 U.S. at 288, 120 S.Ct. 746; *Banks v. Reynolds*, 54 F.3d 1508, 1515-16 (10th Cir.1995); *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir.1994).

Id. at 1202 -1203 (10th Cir. 2003). Petitioner submits due to the “expedited” review afforded under

22 O.S. §1089(A), there are many instances, such as this, wherein the post-conviction application is filed while the Capital Direct Appeal is still pending. Under these circumstances arguing ineffective assistance of counsel is rather difficult when the direct appeal is still being reviewed and/or when issues have been remanded to the district court on direct appeal. Despite this procedural hurdle, Petitioner submits his appellate counsel were wholly ineffective because they failed to raise several meritorious claims. The following sub-propositions are all examples of ineffective assistance of counsel, either by trial counsel, appellate counsel, or both. Capital post-conviction counsel respectfully requests Mr. Wood's convictions and sentences be reversed, and his case remanded for new trial, or new sentencing,⁵ or a new direct appeal.⁶

A. Appellate counsel failed to supplement record with impeachment evidence.

1. Trial counsel has been suspended from the practice of law.

Appellate counsel failed to supplement the direct appeal filed in Mr. Wood's case with relevant documentary evidence from the Oklahoma Bar Association that trial counsel Mr. Albert has been suspended indefinitely from the practice of law. *See* Ex. 5. Said suspension took effect on April 24, 2006, in a confidential proceeding before the Oklahoma Supreme Court. His suspension occurred almost two months after he testified at Petitioner's hearing. Clearly, this is relevant information this Court should consider before issuing its opinion on direct appeal. Additionally, this Court, at Petitioner's oral argument, commented Mr. Albert was an experienced attorney and seemed unaware of his suspension and appellate counsel should have informed the Court at that time.

2. Transcript from contempt hearing.

⁵ This Court in *Garrison v. State*, reversed and remanded for a new sentencing due to "the waiver of these issues by appellate counsel." 2004 OK CR 35, 103 P.3d 590, 620.

⁶ *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); *See, e.g., Mayo v. Henderson*, 13 F.3d 528, 537 (2d Cir.), *cert. denied*, 513 U.S. 820, 115 S.Ct. 81, 130 L.Ed.2d 35 (1994); *Claudio v. Scully*, 982 F.2d 798, 806 (2d Cir.1992), *cert. denied*, 508 U.S. 912, 113 S.Ct. 2347, 124 L.Ed.2d 256 (1993); *Fagan v. Washington*, 942 F.2d 1155, 1156 (7th Cir.1991); *Barry v. Brower*, 864 F.2d 294, 300-01 (3d Cir.1988); *Matire v. Wainwright*, 811 F.2d 1430, 1439 (11th Cir.1987); *Grady v. Artuz*, 931 F.Supp. 1048, 1053-54 (S.D.N.Y.1996); *Laffosse v. Walters*, 585 F.Supp. 1209, 1214 (S.D.N.Y.1984); and *Mason v. Hanks*, 97 F.3d 887, 892 (7th Cir. 1996).

As discussed in Proposition II(A), on March 9, 2006, a contempt hearing was held in an Oklahoma County District Court regarding Mr. Albert. The evidence adduced at this proceeding is crucial since it occurred just days after Mr. Albert testified at Petitioner's hearing on February 27, 2006, as to whether he provided effective assistance of counsel at trial. During his contempt hearing, Mr. Albert admitted he has a problem, which appears to involve alcohol and possibly even drugs. Furthermore, the evidence reveals a concern by a district court as to Mr. Albert's representation of his clients and the fact he has not even seen one of his clients in close to two years. Clearly, this information would have assisted this Court in determining whether Mr. Albert rendered effective assistance of counsel in Mr. Wood's case. Appellate counsel should have supplemented his direct appeal with this evidence for this Court's consideration.

B. Appellate counsel provided ineffective assistance of counsel at evidentiary hearing.

1. Failed to clarify the number of cases that had resulted in a sentence of death.

At the evidentiary hearing, Mr. Albert testified he had tried between 13 to 15 capital cases with only 3 cases resulting in a sentence of death.⁷ (Vol. II Tr. 260) Although counsel requested the court to take judicial notice of a handwritten list of 8 cases wherein Mr. Albert was listed as counsel and a death sentence had been returned, the trial court denied this request.⁸ (02/03/06 Tr. 409-12) Petitioner submits it was error for appellate counsel not to supplement the record documentation verifying Mr. Albert was counsel of record in the following 7 cases out of Oklahoma County- *State of Oklahoma vs. James Fisher*, CF-83-137; *State of Oklahoma vs. James Lawrence Mitchell*, CF-2000-4712; *State of Oklahoma vs. Ronald Clinton Lott*, CF-87-963; *State of Oklahoma vs. Terry Lyn Short*, CF-95-216; *State of Oklahoma vs. Richard Stephen Fairchild*, CF-93-7103; *State of Oklahoma vs. Keary Littlejohn*, CF- 2002-2384; and one case out of Stephens County- *State of Oklahoma vs. Johnny Black*, CF-99-1. (See Exs. 14(A-H))

⁷ The State argued the list was inaccurate and assured the court Mr. Albert had not been counsel on 2 of the 8 cases. This representation by the State was inaccurate and misleading and is addressed in Proposition IV (F).

⁸ Although appellate counsel requested their investigator to bring back relevant documentation as to this inaccuracy, which she did, this evidence was never presented to the trial court. (See affidavit of investigator- Ex. 13)

2. Failed to utilize trial transcripts to cross-examine counsel.

At the evidentiary hearing, trial counsel testified he would have called a number of other mitigating witnesses had Petitioner allowed him to do so. He recalled, "I remember putting on the mother. She got very emotional. Okay? And we were going to put other people on. And I remember he said that he didn't want to do it to family anymore." (Vol. II Tr. 245) Mr. Albert stated he acquiesced to his client's wishes. The trial court then inquired directly of Mr. Albert, "after the testimony of Linda Wood, Mr. Tremane's mother, are you saying that your client said, no more, that's enough? Is that..." Mr. Albert interrupts, with "Family...I don't blame him, yes." (*Id.* at 288)

However, after reviewing counsel's second stage opening, it is apparent he never intended to call anyone else because he stated to the jury they would only hear evidence from Andre Taylor, Linda Wood, and Dr. Ray Hand. (04/05/05 Tr. 12) Sadly, this information was readily available and would have served as powerful impeachment evidence. Unfortunately, since Mr. Albert's self-serving testimony at the hearing went unchallenged, the court, in its Findings at ¶ 11 stated as fact, "[f]ollowing the testimony of Appellant's mother, Linda Wood, Appellant demanded that no more family members be permitted to testify in mitigation." As to this Court's question number 1- "[w]hether the evidence identified in the application was reasonably available to trial counsel in preparation for trial," the trial court responded "[a]lthough attempts by trial counsel to locate Appellant's natural father were unsuccessful, he in all probability would not have testified had he been contacted due to Appellant's desire to have no further family members testify following his mother's testimony." (Findings at page 11) Since this information is clearly incorrect, it renders the trial court's Findings unreliable.

3. Failed to show trial court was concerned trial counsel was unprepared.

Before Petitioner's trial began, the court voiced its concern counsel was not ready to proceed with Petitioner's trial. The trial court inquired "[h]ave you had adequate time to get prepared and so forth?" Mr. Albert responded he was ready for trial. (03/29/04 Tr. 5-6) Appellate counsel should have confronted Mr. Albert about his colloquy with the court, which would have reminded

the trial court of its concerns pre-trial as to whether or not counsel was ready to proceed to trial.

4. Failed to prepare for the testimony of Raymond Gross, Jr.

a. Failed to cross-examine Mr. Gross with divorce decree.

Appellate counsel called Petitioner's father Raymond Gross, Jr., as a witness at the evidentiary hearing. (Vol. I Tr. 16) He testified he had not been called as a witness, nor contacted by any member of the trial team. He expressed he would have been willing to testify. (*Id.* at 16) Although Mr. Gross stated his marriage to Linda Wood was "pretty rocky," he denied most of the allegations of abuse Ms. Wood and his sons testified had occurred. (*Id.* at 19) Although appellate counsel had in their possession a copy of the Gross' divorce decree which documented the physical abuse and the fact a permanent restraining order was in place against Raymond Gross, it was not utilized. (*See* Ex. 8-C, page 2 at ¶ 5) It also provided the children would be exchanged between the parties at the Stillwater Police Department and the Logan County Sheriff's Department. (*Id.* at ¶ 15)

b. Failed to provide trial court with relevant divorce documents.

Although appellate counsel had a copy of the Gross' "Decree of Divorce," they did not have a copy of the parties divorce file. (*See* Ex. 8 (A-C)) The "Petition for Divorce," Ex. 8-A at ¶ 4, detailed Linda Wood Gross in 1988 sought a divorce on the grounds of incompatibility and "extreme cruelty." The petition states the "defendant is a violent man and has kept the plaintiff from seeing her children" and she requested a temporary order restraining the defendant from harassing her or her children. (*Id.* at ¶ 15) A "Temporary Order" provided the children will be exchanged in front of the Stillwater Police Department or at the Logan County Sheriff's Department. (*See* Ex. 8-B)

c. Failure to investigate Raymond Gross' criminal background.

Appellate counsel also failed to investigate Raymond Gross' criminal background. If appellate counsel had performed this investigation, he would have discovered Mr. Gross had a prior criminal conviction for Feloniously Pointing a Weapon at Linda Wood and Acie A. Anderson in Payne County Case No. CRF-88-188. The Preliminary Information filed detailed Mr. Gross on June 15, 1988, "feloniously and without lawful cause point a .44 caliber Magnum Smith & Wesson

revolver at one Linda Jewel Gross for the purpose of threatening and intimidating her, and with the unlawful, malicious and felonious intent then and there on the part of said defendant to injure the said Linda Jewel Gross physically or by mental or emotional intimidation,” and stated the identical language as to Acie Anderson. (See Ex. 12 A-C) Petitioner obtained the Case Report issued by the Oklahoma State University Police Department which further described this offense as an attempted abduction of ex-wife.⁹ It noted both Linda Gross and Acie Anderson had cuts and abrasions from being pistol whipped and Mr. Gross had told them “I’m going to shoot you.” (See Ex. 15)

d. Failed to request records detailing the abuse Ms. Wood suffered.

At the evidentiary hearing Linda Wood testified about the abuse she suffered at the hands of Raymond Gross and about their “horrific” relationship. (Vol. I Tr. 112) She expressed he was “very possessive, very jealous, very controlling” and he alienated her from contact with her family. (*Id.* at 113) He monitored her every move from going to the grocery store to going to work. He told her what she could and could not wear and accused her of having affairs. (*Id.*)

Ms. Wood testified one time he took her out into the middle of nowhere and told her to “give my baby a kiss good-bye because that was the last time I would see him, he was going to kill me.” (*Id.* at 115) Another time he grabbed her by her ponytail and slung her into a patio glass window. (*Id.* at 116) She expressed, “he has hit me with his fist. He has hit me with a pipe wrench. He took a gun to my head and took all the bullets out but one, and actually pulled the trigger. And when the gun did not go off, he has hit me in the head with his gun.” (*Id.*) Many of the physical incidents occurred in front of her children. She recalled one instance when he tied her to a chair with extension cords and poured alcohol on her and then threatened to set her on fire. (*Id.* at 117) She said he had handcuffed her to the car door several times. He did this so she could not protect herself as he beat her face. (*Id.*) Another time drug her down the road as she was cuffed to the car door. (*Id.* at 117-18) She testified she has a scar on the top of her head from when he hit her with the handle

⁹ Petitioner received additional police reports from the Stillwater Police Department regarding this incident. These records are to the Amended Application as Exhibit 21.

of the gun. (*Id.* at 116) She has permanent whiplash from her head going backward so many times and permanent damage to the joints in her shoulders from her arms being bent behind her. She stated she has two fake front teeth from when he knocked them out. (*Id.* at 119)

Unfortunately, all the above information was elicited from Ms. Wood without any documentary support. Although appellate counsel discussed the divorce decree with Ms. Wood, it was not admitted as a separate exhibit. The State on the other hand pulled one DHS record from the volumes of records and questioned Ms. Wood about how DHS had concluded she had made a invalid complaint about him abusing her and her children. (*Id.* at 130-31) The State also made light of the fact Ms. Wood reported very few of the incidents to the police since her husband was a police officer. The State also pointed out no police reports had been provided to the court to detail the abuse, nor medical records in regards to her injuries, nor documentation that she had stayed at any of the battered women's shelters. (*Id.* at 132-33, 135, 141)

Petitioner has since requested records from the battered women's shelters where she stayed. Although, most of the shelters expressed they do not keep records for that length of time, one shelter, the Stillwater Domestic Violence Services, Inc., reported Linda Wood (Gross) "was sheltered by SDVS for one day on 5-16-88, and referred to another shelter on 5-25-94." (*See* Ex. 16) Petitioner also obtained a letter and bill for services rendered on July 29, 1996, by dentist Kelly Brown who made Ms. Wood's fake two front teeth. (*See* Ex. 11)

The most pertinent information Petitioner was able to locate are Ms. Wood's requests for Protective Orders against Raymond Gross out of Tulsa County, Oklahoma for 1986 and 1987. These documents are attached as Exs. 9 and 10. In the 1986 "Petition for Protective Order," Linda Wood reported under question 7: "My husband hit me 4 times with his fist in my face. He verbally abused me. He also physically forced me to have intercourse against my will and to commit sexual acts against my will. He also threatened to kill me and to take my children. This has been a daily occurrence for sometime." (*See* Ex. 9-A)

An "Emergency Protective Order" was granted which reflected she left her home, called the

police, and visited a shelter. She checked the following abuse had occurred: slaps, kicks, punches, burns, choking, physical abuse while pregnant and he has used a weapon (gun) to abuse her. (See Ex. 9-B) As to the injuries received, she checked: bruises, concussions, cuts, internal injuries, complications with pregnancy, burns, and broken bones. As to medical care she received she checked: self care, doctor's care, emergency room, hospitalization, and surgery, which she wrote "had to have jaw wired." She also checked he has threatened to kill her and has access to guns. Unfortunately, the "Emergency Protective Order" was dismissed because she failed to appear to prosecute it. (See Ex. 9-C) This is understandable Raymond Gross was the Chief of Police of the Langston Police Department as detailed in the emergency order.

In 1987, Ms. Wood filed another "Petition for Protective Order" and listed the following:

Raymond threatened to kill me. He kicked me in my left leg and Raymond hit me in the back of my head. Raymond forced me to have sexual intercourse against my will. (Raymond) He forced me to preform sexual acts against my will. In the past Raymond has fractured my jaw, knocked out my teeth, handcuffed me to a car and beat me. Raymond has put a gun to my head, hit me with a gun, hit me in the mouth with handcuffs. Chained me to a swingset in an abandoned park and left me there overnite. Raymond has sodomized me. Tied me to the bed with extension cords. Threatened my life with a gun, a knife, a pipe wrench. And Raymond has forced me to have sex and perform sexual acts everyday for 1 entire year. (See Ex. 10-A)

An "Emergency Protective Order" was granted which reflected Ms. Wood had contacted a crisis line. (See Ex. 10-B) She checked the following abuse occurred 3 or more times a month: slaps, kicks, punches, choking, and throwing of objects and he has used a weapon (gun) and handcuffs to abuse her. As to her injuries, she checked: bruises, concussions, cuts, and broken bones. As to medical care received, she checked: self care, doctor's care, emergency room, and hospitalization. She also checked he had threatened to kill her and had access to guns. Although a Protective Order was initially granted it was dismissed after because neither party appeared. (See Ex. 10 C & D) However, this can be explained by the fact Ms. Wood filed for divorce at the end of November 1988.

e. Conclusion.

Since none of the evidence listed above was presented at this hearing, the court reported the following as to the testimony of Raymond Gross:

Raymond Gross' testimony was in direct conflict with the abuse outlined in Appellant's Application. DHS records provided to this Court indicate that reported abuse by Linda Wood was unfounded and vindictive. Raymond Gross' testimony was consistent and not impeached and was found to be credible by this Court. It would not have been beneficial for Appellant to call Raymond Gross as a witness in mitigation at his trial in order to establish that Appellant had grown up in an abusive home. Raymond Gross' testimony provided just the opposite.

(See Findings, page 2 at ¶ 2.) Clearly, if the court had been presented with this information, it would not have concluded the abuse reported by Linda Wood was "unfounded and vindictive." Petitioner submits appellate counsel provided ineffective assistance of counsel for not bringing these matters to the trial court's attention at the hearing, for not requesting these records to support Ms. Wood's allegations of abuse at the hearing and for not impeaching Mr. Gross with the documents that were available. This failure by appellate counsel undermines the reliability of the trial court's Findings. This Court must reverse Petitioner's case for a new trial or for a new evidentiary hearing.

5. Failed to mention trial counsel never stated he had not provided ineffective assistance of counsel.

At the evidentiary hearing, Mr. Albert testified about his performance at Petitioner's trial and admitted "I could have done better." (Vol. II Tr. 246) Since Petitioner's trial he has removed himself from the Oklahoma County list for counsel appointments in death penalty cases. (*Id.* at 247) He testified he did not have the time to adequately prepare in Petitioner's case.¹⁰ (*Id.* at 248) As to second stage, Mr. Albert testified he did not adequately prepare a mitigation case to effectively represent or defend Petitioner. (*Id.*) He testified he could have been "better and more effective," had he been more involved. (*Id.* 248-49) Mr. Albert agreed it was his responsibility and not Dr. Hand's to develop second stage. (*Id.* at 249) He testified his affidavit contained the truth as to the steps he took to prepare for trial. (*Id.* at 252) He admitted he signed his affidavit and even made corrections to it before he signed it. (*Id.* at 246, 255-57, 268)

Although appellate counsel elicited this testimony from Mr. Albert, he failed to state in his

¹⁰ It is unfortunate he testified at the evidentiary hearing he was not ready for trial. Especially since the court had pre-trial inquired whether he was ready to proceed. See Proposition III(B)(3)

Supplemental Brief that Mr. Albert was does deny signing the affidavit, or state the information contained in it is not truthful. As one would expect, Mr. Albert offered lots of explanations during the hearing that can best be described as professional self-preservation; however, he never once testified the affidavit he signed was untruthful. Appellate counsel's failure to provide this critical information to this Court, leaves the insinuation trial counsel provided effective assistance of counsel. However, that was simply not the case.

6. Failed to list all the factual inaccuracies contained in trial court's Findings.

Petitioner submits the trial court's Findings are clearly not supported by the trial record or the record developed at the hearing. Unfortunately, many of these inconsistencies were not addressed by appellate counsel in his Supplemental Brief. For the convenience of this Court, Petitioner will address the relevant factual inconsistencies in the order in which the trial court addressed them.

The trial court, in its Findings on page 4, erroneously found Dr. Ray Hand, the psychological expert who testified for Petitioner at trial, had the records from Stillwater Public Schools, Meadowlake Hospital, Office of Juvenile Affairs, DHS, and Butner School System. The trial court stated, "much of this information was made available to the jury" at trial. However, the testimony presented at the evidentiary hearing does not support this finding. Bieva Holladay, the records sponsor from Stillwater Public Schools, and Linda Marshall, the records representative for Butner Schools in Cromwell, consistently testified no request for records pertaining to Petitioner had been received prior to the request made by the appellate team. (Vol. I Tr. 10, 12, 13-14; 45) While the State attempted to give the appearance the Oklahoma Office of Juvenile Affairs ("OJA") records were contained in the DHS records since OJA used to be a part of DHS, it is clear from the testimony of OJA representative Helen Killian, their records would only have been received per a direct request to them and not a general request to DHS. (Vol. I Tr. 41-43) Ms. Killian, too, confirmed the only request for records received by OJA had been made by the appellate team. (Vol. I Tr. 86-87) It is clear Dr. Hand did not have the voluminous records from OJA much less the school records since

they were never requested in the first place.¹¹

The trial court at ¶ 2 of its Findings also determined it would not have been beneficial for Appellant to have called his father, Raymond Gross, as a witness in mitigation at his trial. Although Mr. Gross did admit to some physical violence, his testimony regarding Petitioner's relationship with his older brother Zjaiton Wood, a.k.a. Jake, would have provided powerful mitigation. Mr. Gross testified Zjaiton had a strong influence over Petitioner and he explained "If Zjaiton tells Termene, 'Let's go ten blocks on your kneecaps,' Termene will follow him." (Vol. I Tr. 22). Also salient is his testimony he cares for Petitioner. (Vol. I Tr. 23).

The trial court's determination "Appellant provided no evidence that corroborates the claim made by Linda Wood that Appellant had been abused by his father," was clearly contradicted by the testimony presented by Zjaiton and Andre Wood. Andre testified Raymond Gross was abusive to all of his children, including Petitioner, and he was especially abusive to Linda Wood. (Vol. I Tr. 158) Zjaiton confirmed Raymond Gross was abusive to Petitioner. (Vol. II Tr. 331-332).

The court at ¶ 3 of its Finding concluded the evidence Dr. Ray Hand provided to the jury regarding the foster care Petitioner had received was adequate. However, the evidence presented by Petitioner's former foster mother Jan Davis, provided personal observations of his behavior. Although Dr. Hand may have testified Petitioner was at one time placed in foster care and he was successful during placement; Jan Davis offered first-hand accounts of his success. Jan Davis saw him act as a peacemaker in her home with the other foster children. (Vol. I Tr. 79) She expressed he had good manners and complied with her rules. (*Id.* at 79-80) He "seemed to do well in school. He loved football, basketball. Took on all the sports he could." (*Id.* at 80) Clearly, Dr. Hand's testimony from a stale review of records could not replace the personalization Ms. Davis provided. (*Id.* at 81-82)

The trial court at ¶ 4 of its Findings stated the testimony of Petitioner's former juvenile mentor Matthew Netherton, was "of little value as mitigation evidence," and based this on the

¹¹ Counsel testified he had provided two to three hundred pages of records to Dr. Hand. (Vol. II Tr. 244). As this Court can see, the OJA records, which were admitted as Def. Exs. 3 & 4, are voluminous and in excess of 300 pages.

inconsistencies between his testimony he had a high opinion of Petitioner and saw him do many positive things, with his handwritten notes of his behavior. However, Mr. Netherton's notes must be viewed in the context Mr. Netherton mentored Petitioner (Vol. I Tr. 89). Mr. Netherton worked with troubled youth and his notes are simply a reflection of the ups and downs the treatment process. Mr. Netherton's testimony concerning Petitioner was very positive. He testified he volunteered for the Special Olympics, and spoke in front of a juvenile delinquency class. (*Id.* at 98) Regarding Petitioner's involvement with juvenile delinquency class, Mr. Netherton found, "The kids loved him. They asked him questions. He didn't want to leave. By the end of the day, he wanted them to keep asking him questions because he felt – he felt that he could help people. That's what he was doing with those students." (*Id.* at 99) When asked if his opinion of all the hundreds of kids he had mentored was as high as his opinion of him, Netherton replied, "No, not at all." (*Id.* at 105, 106).

Mr. Netherton also testified during the two years he mentored him, his father was never around. (*Id.* at 90, 93) He thought Linda Wood was more of a friend to her children than an authority figure, and found it was "fairly common" for Petitioner to be left in the care of his older brothers. Mr. Netherton stated he was personally scared of Jake Wood. (*Id.* at 94-95).

The trial court at ¶ 7 of its Findings determined Andre Wood's testimony at the hearing was consistent with his testimony at the jury trial and therefore, "the jury at Appellant's trial had the benefit of any mitigating content of his testimony." This finding is completely unsupported by the trial record. Andre was called by the State as a first stage witness. His testimony did not address any mitigation. Therefore, **none** of the mitigating testimony Andre provided at the hearing had been received by the jury at Petitioner's trial. (Emphasis added.)

Andre testified at the hearing that "growing up with my dad was pretty rough... He was a very mean man. Very, very mean. He was abusive to me, to both my brothers, and to my mom, especially my mom." (Vol. I Tr. 157-58) He testified his father put his mother in the hospital once; he broke her jaw and fractured three of her ribs; he had handcuffed her to a car and drug her down a highway, and he had even poured alcohol on her and threatened to set her on fire. (*Id.* at 158)

Andre testified Petitioner was physically abused by his father and recalled an incident where his dad “snatched him [Termene] up from the table and took a leather strap that you would sharpen a razor on and beat him, beat him pretty good. I mean to the point where he had bruises and welts and marks all over his legs and back.” (*Id.* at 161)

The court also found in ¶’s 8 and 10 the testimony of both Wesley Welch and Michael Hiltzman, former friends and foster brothers of Petitioner, was not credible. It appears the court made this finding based upon the witnesses’ felony criminal records. Petitioner submits the jury may have found otherwise as they had clearly accepted and given some weight to the testimony of another convicted felon called at Petitioner’s jury trial –codefendant Brandy Warden.

The trial court at ¶ 11 of its Findings addressed the testimony of trial counsel John Albert. First, the court found, “Mr. Albert attempted to locate Appellant’s natural father, Raymond Gross, but was unable to locate him.” However, direct appeal investigator Brenda McCray testified it was not difficult to locate Mr. Gross. She simply asked his son, Andre Wood, who told her where he lived. (Vol. II Tr. 300). The court also determined Mr. Albert would have attempted to interview any potential witnesses given to him by the Appellant. This is clearly an attempt to shift the responsibility of case investigation onto Petitioner. Furthermore, and more importantly, Mr. Albert testified he relied upon Jack Stringer, an investigator employed by the Oklahoma Indigent Defense System (hereinafter “OIDS”), as his investigator. (Vol. II Tr. 241-42) Jack Stringer on the other hand testified he was assigned by OIDS to work only on the behalf of Zjaiton Wood. (Vol. II Tr. 229) Further, no one ever asked him to do any investigative work on Petitioner’s case because a conflict of interest existed between the Wood brothers. (*Id.* at 229-30)

The court determined in ¶ 11 of its Findings Mr. Albert had in his possession, prior to trial, all of the same records gathered by counsel for Appellant’s co-defendant, Zjaiton Wood. Then contradicted its own findings in ¶ 14 by stating “no one on the trial team for the co-defendant provided anything directly to Appellant’s trial team.” Lead counsel for Zjaiton, Ms. Wayna Tyner of OIDS, testified about this issue at the evidentiary hearing. Ms. Tyner testified a conflict of interest

existed between Zjaiton and Termane. (Vol. III. Tr. 396) Ms. Tyner clearly expressed there was never a time when she or anyone else on Zjaiton's defense team conducted investigation on behalf of Termane. (*Id.*) Ms. Tyner explained both trial counsel for Zjaiton and for Wood possessed some letters purportedly written by Brandy Warden. Additionally, Ms. Tyner testified counsel for Termane should have received some of the same DHS records she received since Termane's counsel had joined in her motion for their production. (*Id.* at 399) However, no other items of evidence or investigation were shared. (*Id.* at 400)

The trial court also determined that although Mr. Albert had not impeached the State's star witness Brandy Warden "with some letters allegedly written by her and sent to Appellant," he had presented to the jury all the information contained in them. Petitioner submits, had trial counsel conducted handwriting analysis on the letters prior to trial, not only would the pertinent content of the letters have come before the jury, but also, Ms. Warden would have been caught in a false statement before the jury, since she denied writing these letters at trial. The impeachment value was not just in the content of the letters, but also in demonstrating, live and in front of a jury, Ms. Warden committed perjury, which did not occur at Petitioner's trial.

The trial court at ¶ 13 of its Findings determined the testimony of handwriting expert Pat Tull would not have been admissible since Ms. Tull did not take a handwriting exemplar from Brandy Warden. Since appellate counsel did not seek an order from the trial court requesting a handwriting exemplar,¹² Tull utilized, as the "known" handwriting sample for Ms. Warden, a letter signed "Brandy Warden" that was filed in her court file for consideration at her sentencing.¹³ Pat Tull concluded the known letter by Ms. Warden from the court file was written by the same person who sent the letters in question to Petitioner while he was in county jail. (Vol. II Tr. 349-50)

The court's Findings in ¶ 12 as to the testimony of Zjaiton Wood is, once again, contrary to

¹² In sub-proposition B(8) Petitioner argues appellate counsel was ineffective for not seeking this order.

¹³ At Ms. Warden's sentencing hearing, her counsel represented this letter was written by Ms. Warden. A copy of the known letter was admitted as Defendant's Exhibit 10 at the evidentiary hearing. *See* Exhibit 13 ¶ 6, affidavit of investigator Brenda McCray for further details.

the evidence presented. Zjaiton testified in the guilt/innocence phase of Petitioner's trial. His testimony concerned only first-stage issues. Therefore his hearing testimony, which included details of the physical and mental abuse he and his family suffered at the hands of their father cannot be characterized as "substantially the same" as his first-stage jury trial testimony. (Vol. II Tr. 331-32) Zjaiton testified, "I just wanted to show him [Termene] that the world we lived in is a world of cruelty." (*Id.* at 337) He admitted he physically beat Petitioner. (*Id.* at 335) He also expressed he loved him and he was his best friend. (*Id.* at 337)

The trial court, in addressing juror Jera Burton's testimony in its Findings at ¶ 15, completely disregarded her testimony because she could not remember the mitigation presented at trial and because the State had not been present when she was shown the affidavits collected by the appellate team. Petitioner submits her testimony should not be so readily dismissed. Ms. Burton testified she would have liked to have heard the type of evidence presented in the affidavits and it would have affected her decision, "I just probably would have held my ground as far as the sentencing goes," and this evidence made her look at him as a different person. (Vol. III Tr. 424-25, 414)

Clearly, the factual contradictions and inconsistencies outlined above, render the trial court's Findings and ultimate conclusions suspect and unreliable.

7. Failed to provide this Court with Dr. Allen's findings.

As discussed in Proposition I, the trial court would not allow Dr. Allen to testify at the hearing. Dr. Allen is the one witness who reviewed the hundreds of pages of mitigation-related records and court documents collected by the appellate team, and interviewed and/or reviewed affidavits by family, friends, and mentors. She is the one witness would have been able to explain how all this new evidence would have effected the outcome of the trial had she been allowed to testify. Although Dr. Allen's report was admitted as Def. Ex. 8, appellate counsel failed to include in the Supplemental Brief the trial court erred by not allowing her to testify and failed to provide what she would have testified to had she been allowed. (*See* Ex. 3)

Petitioner submits had Dr. Allen been allowed to testify she would have conveyed to the

court the following information pulled from these headings in her report:

Early Childhood Development and Experiences: [his parents] together and individually, categorically failed him... His development took place amid consistent poverty, recurring moves, normalized violence and criminality both inside and outside the home, abject emotional and physical neglect, and ongoing experiences of racial hostility and rejection from both Caucasians and African-Americans. Finally, his parents allowed the criminal gang- first brought to him through his mentally ill and extremely violent older brother, Jake- to take over his upbringing at around age 11.... Mr. Wood's most basic needs continually went unmet.... The strongest indicator of Tremane's capacity at that time to function as a healthy, law-abiding young man were the consistent reports of his pro-social development and notable successful rehabilitative behaviors while in residential care. However just as remarkable were the losses in that progress as soon as he was returned to his home and community, which was overwhelmingly structured by gang violence and parental chaos. And that was the pattern of his life until he finally surrendered to the emotional and financial support that criminal gang activity provided him as an older teenager and adult.

The Defendant's Parents Failed: The most significance force in Tremane's early life are his memories (and their corroboration by other family members) of the many incidents of extreme violence of his father toward his mother.... Not only was extreme domestic violence a central experience of the three boys: when the boys took their mother's side and tried to protect her, their father turned his violence on them, beating them sadistically.... Tremane today can easily recall the potent combination of terror, anger, and helplessness he felt as a child being forced to witness such brutality against his mother, as spilling over to himself and his brothers. Children's experience of domestic violence is well-known in the field as child abuse by proxy. It can be more pernicious in a child's development than general child abuse because it conveys to the child that not only is their home not safe, but that adults are inadequate in the world.... It is of course, the major source of his diagnosis of Post Traumatic Stress Disorder and Generalized Anxiety Disorder.... When the parents split for good when Tremane was 8 years old, Linda was unable to earn a good enough living for her family and was not receiving child support. [On almost all of the treatment documentation from Tremane's life with his mother, his family's whereabouts are stated as unknown.] Linda Wood admits that she was away from home working or going to school all the hours of the day except for sleeping. The boys were left completely on their own and the neighborhood did not appreciate it in the least. CPS call about lack of supervision went by without effective responses. They were considered "outcasts" (Linda Wood's word) in the neighborhoods they lived in because of the behaviors of the youngest sons, Linda's absence, and her inclination to blame everyone else in the neighborhood but herself and her children. She taught them steadily to believe that others were to blame for their problems and that most of it was due to racial prejudice.... Linda Wood stated in her mitigation affidavit that she, indeed, made many mistakes with her children and she stated that her children "grew up in an environment of terror, deprivation and exclusion."

Dr. Allen opined Mr. Wood suffered from attachment disorder because his parents were unavailable. She stated his brother Jake was the closet figure of attachment in his early life and then later the criminal gang. Dr. Allen also determined by the time Tremane was 11, Jake had become

the defacto father and “head of the household” even up to the time of this crime. Because Jake was the his only functional bond, she reports he would endure his “bullying and beating.” Dr. Allen described his mother as sadly pathetic and that the records consistently revealed he did well while in the program, but that once he was returned to his mother’s home he reintegrated into the gang.

As for Tremane’s “Neurological and Psychiatric Issues,” Dr. Allen’s review of the records documented depression, dependency, PTSD and generalized anxiety. As for “Race as a Consideration in Development” Dr. Allen explained the biracial child is placed in a rather unique situation because they live in both the “white” and the “black” world and have the expectations and rejections of both. She described when Tremane lived in a predominantly white town he was often rejected due to his skin color. However, when he lived in a black community he would be rejected because he “wasn’t black enough.” She concluded this section with, “I present this duality as a fundamental stressor in the defendant’s life, and one for which he was never responsible and could not overcome on his own.”

Her report listed his personality strengths as his “abiding love for his mother, brothers, and even his father whom he is attempting to forgive” and he has “strong love for his two children and a desire to be the best parent he can be under the circumstances.” She reported “Tremane expressed sadness, feelings of helplessness, and certain remorse,” as to the victim’s murder. Finally, Dr. Allen felt he could positively conform to prison life.

Clearly, Dr. Allen should have been allowed to testify at the evidentiary hearing. Her testimony is clearly more thorough and detailed than Dr. Hand’s. Dr. Allen’s report provided mitigating circumstances not addressed by Dr. Hand, such as remorse. Appellate counsel should have provided this information in his Supplemental Brief.

8. Failed to obtain an order for handwriting exemplars from Brandy Warden.

Appellate counsel argued trial counsel had been ineffective for failing to properly impeach state’s star witness, Brandy Warden, with a handwriting expert. Although Ms. Warden was the only witness that placed Petitioner at the crime scene, trial counsel had in his possession two letters,

purportedly written by Ms. Warden to Petitioner, wherein she stated she knew he did not murder the victim. However, Ms. Warden denied writing these letters. Since trial counsel had not hired a handwriting expert, his attempts to impeach her fell short. In closing argument, the State capitalized on trial counsel's failure to utilize a handwriting expert by pointing out if counsel had believed Ms. Warden had written those letters, he would have hired an expert to prove it. (04/02/02 Tr. 182-83)

On direct appeal, appellate counsel hired Pat Tull, a handwriting expert who expressed Ms. Warden had in fact written those exculpatory letters. However, Ms. Tull made her comparison of the questioned letters with a known letter purportedly written by Ms. Warden. At the time Ms. Tull made her analysis, Petitioner was on appeal to this Court, therefore the trial court was without jurisdiction to issue an order requesting Ms. Warden to provide handwriting exemplars. However, once Petitioner's case was remanded, appellate counsel should have sought this order. Since this was not done, the court in its Findings in ¶ 13 disregarded Ms. Tull's opinion because "[s]he did not take a handwriting exemplar from any person, including Brandy Warden, in connection with her comparison." Had Ms. Tull been provided with handwriting exemplars from Ms. Warden, the court would not have been able to completely ignore this damaging evidence to Ms. Warden's credibility.

9. Failed to admit videotape produced by the Stillwater Police Department .

Sandra Marshall, a former probation and parole officer with the OJA, testified she had been assigned to work with Petitioner's family while they were living in Stillwater, Oklahoma. (Vol. II Tr.183-85) She saw him once a week for about a four month period. Ms. Marshall explained some of the issues he was facing as young man growing up in Stillwater was the low tolerance for his family by the community, school, and by the Stillwater Police Department. (*Id.* at 187) However, when Ms. Marshall attempted to elaborate on each of the issues he was facing, such as "being biracial in Stillwater, Oklahoma, in the early '90's was probably not a real easy thing..." or having the police stop them every time they saw them on the street, her testimony was met by an objection by the State which was sustained by the trial court. (*Id.* at 187, 191)

Since appellate counsel was not allowed to develop Ms. Marshall's testimony or even present

the testimony of Dr. Allen, counsel should have offered into evidence a videotape made by the Stillwater Police Department which featured the Wood brothers. (See Ex.13) This videotape titled "Gangs in Stillwater" shows firsthand how the police viewed the Wood brothers, and the low tolerance the community had for them, which were the very obstacles Ms. Marshall testified prevented Petitioner from successfully completing his treatment/probation plan. (See Ex. 17-DVD)

10. Failed to present evidence Brandy Warden's sentence was reduced.

At Petitioner's trial, Brandy Warden testified she had received a deal from the State. She received 45 years for accessory to murder and 10 years for conspiracy to commit a felony. (04/01/04 Tr. 132, 201) She testified she was not charged for her participation in the robbery of the LaFranca's Pizza, although her other co-defendants were charged. (04/05/04 Tr. 21) On April 15, 2004, just 11 days after testifying in Petitioner's trial, Ms. Warden went before the trial court on her application for a one year review in which her sentence was modified from 45 years to 35 years. Interestingly, two orders were filed into the record as to her modification. The first order filed on April 15, 2004, simply reflected the outcome of the proceeding; however the second order filed on April 19, 2004, reflected her sentence modification was "granted over the strenuous objections of the State." (See Exs.18-A & B) There is no transcript of this proceeding. Counsel should have presented this information to the court.

Additionally, appellate counsel should have presented the court with Ms. Warden's record from Payne County Case No. 2000-202, where she pled guilty to larceny of a house and received a 3 year deferred sentence because she agreed to testify against her co-defendant. (See Ex. 19A) When Ms. Warden was arrested in Oklahoma County, her Payne County probation and parole officer recommended her sentence be accelerated. (See Ex. 19-B) Despite this recommendation, her sentence was not accelerated, but dismissed. (See Ex. 19-C) This evidence should clearly have been submitted for the court to consider regarding her credibility.

Furthermore, appellate counsel, on remand should have utilized the discovery mechanisms provided by the district court to seek information from the Cleveland County, Payne County, and

Oklahoma County District Attorneys Offices as to whether she received any deals or leniency in exchange for her testimony against her three co-defendants. From the record before us, it certainly appears she received leniency in Cleveland and Oklahoma County. Any information concerning any deals or leniency Ms. Warden may have received constitutes undisclosed impeachment under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), which must be disclosed at this time.¹⁴

11. Conclusion.

Clearly, if the trial court had been presented with the above evidence, it would not have concluded in its Findings at page 14 “that confidence in the verdict of the jury has not been undermined by any testimony presented at the evidentiary hearing.” Or, in its final paragraph “this Court cannot find that trial counsel’s methods of utilizing the available mitigation evidence was anything but sound trial strategy, nor that Appellant has demonstrated that he was prejudiced and deprived of a fair trial.” Petitioner submits appellate counsel’s failure to provide effective assistance of counsel at the hearing undermined the reliability of the trial court’s Findings. Therefore, this Court must reverse Petitioner’s case for a new trial or for a new evidentiary hearing.

C. Ineffectiveness of trial counsel which appellate counsel failed to raise.

Petitioner respectfully requests this Court to consider the issues raised in his direct appeal with the issues enumerated in the sub-propositions of error below which were not raised on direct appeal when addressing whether Petitioner was provided effective assistance of counsel. Petitioner submits he was not provided effective assistance of counsel at trial nor was he provided effective assistance of appellate counsel on direct appeal.

1. Trial counsel failed to present available evidence to support his defense.

During the first stage, the defense called Petitioner’s brother, Zjaiton Wood, to the stand.

¹⁴ Petitioner previously filed a Motion for Discovery addressing this issue and requested an evidentiary hearing.

Zjaiton informed the jury he, not Tremane, murdered the victim by stabbing him in the chest. (04/02/04 Tr. 94, 97, 131) Although Zjaiton testified Tremane was not with them during the commission of the crimes, but another individual named "Alex" was present, Zjaiton's admission he was the murderer, not Tremane, was critical.

Defense counsel was ineffective for not presenting readily available evidence which supported Zjaiton's testimony. This evidence is contained in the pre-sentence investigation report ("PSI") of co-defendant Lanita Batemen prepared by probation and parole officer Margaret Little.¹⁵ Ms. Bateman's PSI expressed Jermane (sic) Wood was involved in the crimes, but Zjaiton, a.k.a. Jake, was the person who stabbed the victim. After they left the motel, Jermane (sic) was dropped off at his girlfriend's house. Bateman reported the following occurred at Jake's mother's house, "There, me and Brandy was shaking and crying and his mom asked what had he done now? He took her to her room and told her that he thought he had killed a guy. She started screaming and crying then she watch the news til the next morning and thats when it said something about the homicide." (See Ex. 20 under heading "Defendant's Verison.")

Since counsel did not support Zjaiton's testimony, the State argued in first stage Zjaiton was a gang banging, dope slinging convict whose testimony was unbelievable and expressed,

-I submit to you ladies and gentlemen, that if that defendant [Zjaiton] tells you the sun comes up in the east, in the morning every day you should get up and look out the window. That is how much credibility that gang banging, dope dealing, confessed murderer should have in this courtroom. When you weigh his testimony and his credibility about turning people's lives loose, you look carefully at someone like that. (04/02/04 Tr.7)

There can be no reasonable strategy ascribed to trial counsel's failure to challenge the State's theory of the case and failing to provide adequate evidentiary support and argument for a viable defense. See *Washington v. State*, 1999 OK CR 22, 989 P.2d 960, 979-80 (which noted adversarial testing is the bedrock of our criminal justice system which necessarily requires the effective

¹⁵Although Ms. Bateman invoked her Fifth Amendment rights and did not testify at Petitioner's trial or evidentiary hearing, her probation officer, Margaret Little, could have testified at trial and actually did testify at the evidentiary hearing. Unfortunately, appellate counsel failed to elicit this information from Ms. Little.

assistance of counsel and that counsel's failure to subject the State's case to adversarial testing, deprived defendant of a fair and reliable sentencing proceeding.) Likewise here, trial and appellate counsel's failure to develop and marshal the evidence in support of a viable defense which would have resulted in acquittal, was ineffective assistance of counsel and accordingly, his conviction and sentence must be reversed. This Court has reversed where trial counsel failed to develop and assert defenses which could have been supported by the available record. *See Jennings v. State*, 1987 OK CR 219, 744 P.2d 212, 214; *Smith v. State*, 1982 OK Cr 143, 650 P.2d 904, 908. *See also Groseclose v. Bell*, 130 F.3d 1161 (6th Cir. 1997); *Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432 (9th Cir. 1995); *DeLuca v. Lord*, 858 F. Supp. 1330, 1346 ff. (S.D.N.Y. 1994); *Sims v. Livesay*, 970 F.2d 1575 (6th Cir. 1992); *Proffit v. Waldron*, 831 F.2d 1245, 1248 (5th Cir. 1987).

2. Trial counsel failed to list a crucial mitigating circumstance.

As discussed above in this sub-proposition (C)(1), Zjaiton Wood testified he, not Termene, murdered the victim by stabbing him in the chest. (04/02/04 Tr. 94, 97, 131) Although Zjaiton's admission he was the murderer, not Petitioner was critical, counsel failed to include this on the list of mitigating circumstances submitted to the jury. (O.R. Vol. IV at 634) This very circumstance, "the defendant acted under duress or under the domination of another person," is specifically listed as a mitigating circumstance the jury should consider. *See OUJI-CR-4-79*.

3. Trial counsel failed to request a *Harjo* hearing.

Before the State presented the testimony of co-defendant Brandy Warden, defense counsel approached and objected to any testimony regarding the pizza robbery and "any statements made by Zjaiton Wood or Lanita, the other girl involved in this case, as co-conspirator hearsay." (04/01/04 Tr. 128-29) The court sustained counsel's request regarding the pizza robbery and overruled counsel's objection as to co-conspirator statements. (*Id.* at 129) Petitioner submits defense counsel should have requested a *Harjo* hearing to determine whether Ms. Warden's testimony was admissible, and his failure to do so was ineffective assistance of counsel.

In *Harjo v. State* 1990 OK CR 53, ¶ 21, 797 P.2d 338, this Court held before the State may

admit hearsay statements of co-conspirators the State must prove: “(1) a conspiracy existed, (2) the declarant and the defendant against whom the declarations are offered were members of the conspiracy, and (3) the statements were made in the course and in furtherance of the conspiracy by a preponderance of the evidence. *Id.* at ¶ 21, citing *Bourjaily v. United States*, 483 U.S. 171, at 176, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987) Since defense counsel never requested a *Harjo* hearing, the trial court never made this determination and it was error for any co-conspirator statements to be admitted without the State having to first prove a conspiracy existed. Oddly, when the State objected, based on hearsay, to a conversation Ms. Warden was present for with Zjaiton Wood, the court sustained this objection. Defense counsel then inquired, “Is your ruling that hearsay cannot come out through another co-conspirator?” The trial court responded, “The objection is hearsay and I sustained it. I think that is plenty clear.” (*Id.* at 196)

Petitioner submits had trial counsel requested an actual *Harjo* hearing and not made just an objection based on co-conspirator hearsay, the trial court would have suppressed Ms. Warden’s testimony. However, due to trial counsel’s ineffective assistance of counsel, this improper evidence was submitted to the jury. Therefore, Mr. Wood’s conviction must be reversed and his case remanded for a new trial.

4. Trial counsel failed to challenge admissibility of DNA evidence.

During the first stage, the State presented the testimony of OKC Police Department analyst Kyla Marshall who testified as to her DNA analysis of a glove recovered from the motel room. (04/02/04 Tr. 20, 24) Although there was no blood on the glove, skin cells were recovered and submitted for DNA testing. (*Id.* at 24-25) The results from this testing revealed a mixture of at least three individuals; however, the profiles were incomplete. (*Id.* at 26) Therefore, the most Ms. Marshall could say was Petitioner could be a “possible contributor” to the mixture and “he couldn’t be excluded as a potential contributor to the mixture. But, again, because it is a mixture, those alleles that are consistent with him could be coming from other people.” (*Id.* at 37, 40-41)

Ms. Marshall couldn’t state it was his DNA on either test that she performed. (*Id.* at 47, 52)

She opined "it is not that I can't include him, I can't state it is him, but there is a failure to exclude." (*Id.* at 48) She also testified she was unable to provide statistics because "again I have a mixture and I know that I don't have all the information. So there is no way that I could do stats on that." (*Id.*) Additionally, she stated when she received the glove for testing it was not in a sealed condition, and she was uncertain as to how long it had been at the district attorney's office before it was submitted to her for analysis. (*Id.* at 49) She stated this provided the "potential for contamination," where someone could just walk by and handle the glove. (*Id.* at 50)

During the first stage closing, the State argued the DNA evidence could not exclude Petitioner and that the "DNA was consistent with him not to the exclusion of everyone else, because it is a mixture. But he has got types at every location in the glove that match his. The fact that it is a mixture can't say to the exclusion of everyone else." (*Id.* at 155) In closing argument defense counsel attempted to argue this evidence was a non-issue by pointing out it was not blood that had been tested but skin cells, and Petitioner could not be excluded or included as a donor. Further, defense counsel argued this evidence was contaminated. (*Id.* at 168)

The State must be able to prove the evidence's location at all pertinent times. *Faulkenberry v. State*, 1976 OK CR 131, 551 P.2d 271. The burden of showing, to a reasonable certainty, that evidence has not been tampered with or altered rests upon the party offering it. *Gridler v. State*, 1987 OK CR 212, 743 P.2d 678; *Wilson v. State*, 1987 OK CR 86, 737 P.2d 1197. In determining whether an adequate foundation has been laid for the chain of custody of an item, the trial court should consider the nature of the article, the circumstances surrounding its preservation, and the likelihood of contamination or alteration. *Driskell v. State*, 1983 OK CR 22, 659 P.2d 343, 354-55. A more exhaustive foundation is required where the evidence consists of contraband or bodily specimens. *Fixico v. State*, 1987 OK CR 64, 735 P.2d 580, 582. Because of the difficulty in identifying the substance in such cases, "a break in the chain of custody ... would be of a grave concern." *Brown v. State*, 1974 OK CR 16, 518 P.2d 898, 901-02. In *Williamson v. State*, 1991 OK CR 63, 812 P.2d 384, 389-99 this Court expressed, "The purpose of the chain of custody rule is to guard against

substitution of or tampering with the evidence between the time it is found and the time it is analyzed. The State must lay a foundation showing that the evidence offered is in substantially the same condition as when the crime was committed.”

Here, analyst Marshall admitted when she received the glove it was not in a sealed condition. She was uncertain as to how long it had been at the district attorney’s office before it was submitted to her. (04/02/04 Tr. 49, 50) Given Oklahoma County’s recent scrutiny and litigation due to Joyce Gilchrist, this evidence’s “potential for contamination” should not be overlooked or taken lightly. Additionally, her testimony was unreliable because it provided absolutely no statistical information for the jury’s consideration. In *Taylor v. State*, 1995 OK CR 10, 889 P.2d 319, this Court held, “[w]ithout the statistical component of DNA profiling evidence, juries would be unable to assess the significance of the match evidence.” *Id.* at ¶ 41. Because of the breaks in the chain of custody and the testimony of analyst Marshall this evidence had the potential for contamination, and had no statistical relevance, the admission of the DNA evidence was error. Mr. Wood’s due process rights were violated and his conviction should be vacated and his case remanded for a new trial.

5. Trial counsel failed to object to handwriting exemplars.

Petitioner submits he was forced to physically construct evidence (handwriting exemplars) against himself in violation of the his Fifth Amendment right against self-incrimination. (04/01/04 Tr. 254, 267-68) A letter purportedly written by Petitioner, State’s Ex. 112, provided the following incriminating evidence,

So any ways I need to know some things, you say you are pleading guilty, so what are you going to tell them bout the glove? It was mine and you got it from my house that why my D.N.A. is on it. Are you going to tell them that you called me and asked me to come picc you up at the store after the fact. Cuz its just some shit I need to know. Cuz I know my attorneys won’t come talk to you shit they won’t even come talk me.

This letter was admitted to the jury without objection. Petitioner submits trial counsel provided ineffective assistance of counsel for not objecting to the admission of this evidence, or at a minimum, trial counsel should have requested a *Daubert* hearing to determine its reliability.

While Petitioner was awaiting trial handwriting exemplars were taken from him. (04/01/04

Tr. 254, 267-68) The comparison in this case was performed by David Parrett, who testified,

First of all, no two people write exactly alike. And each person's handwriting, each individual's handwriting, if it is naturally prepared, that handwriting contains repeated individual characteristics. And by individual characteristics, I mean there is a difference between class characteristics, which are general characteristics of a population. And those minute things that you do in your own handwriting that no one else does. And you have a level of skill in your handwriting. And by that, what I'm talking about is that for instance I have little short legs. I can only run so fast. Well, your handwriting is similar in that you had a level of skill in your handwriting. You can't surpass that level of skill. Now, you can write worse than you naturally write. But you can't write any better.

(*Id.* Tr. 272) Mr. Parrett was asked to make a comparison between Petitioner's and Zjaiton's handwriting exemplars and State's Exhibit No. 112. (*Id.* at 274, 277) Mr. Parrett expressed Zjaiton was excluded as the writer of the questioned document. (*Id.* at 293) As to Petitioner, he "found a sufficient number of significant, individual similarities" to conclude he wrote the letter. (*Id.* at 294)

In closing, the State capitalized on this unchallenged evidence and argued to the jury Petitioner writes a letter to his brother and says, "What about my DNA in the glove?" (04/02/04 Tr. 155) The State further argued,

Termene says his DNA is in the glove in that letter... Why does he have to go to all of the trouble to get that letter through the sewer line or through some inmate's hands or however that happened to make sure his brother knew the truth? Have you ever thought about that? That leaves you to one conclusion, ladies and gentleman. Termene Wood did this crime. (*Id.* at 165)

Now, Kyla Marshall, the expert, can't tell you conclusively for sure that it is Termene's DNA in the glove. But Termene Wood tells you for sure that he believes that his DNA is in the glove. And he's trying to get Zjaiton to explain that away. You read it. (*Id.* at 180)

But it is important for Zjaiton to say that he went and got the gloves at Termene's house because again the kite letter, Number 112, suggests that Termene and Zjaiton are getting their story together about how Termene's DNA gets in that glove. (*Id.* at 191)

The issue of handwriting uniqueness has been questioned by other courts in this country. As of 2005, some courts have determined the forensic document examiner's testimony did not meet reliability of *Daubert/Kumho* and excluded this testimony. *United States v. Lewis*, 220 F.Supp.2d 548 (S.D.W.Va.2002); *United States v. Brewer*, 2002 WL 596365 (N.D.Ill. 2002); *United States v.*

Hidalgo, 229 F.Supp.2d 961, 967 (D.Ariz.2002); *United States v. Saelee*, 162 F.Supp.2d 1097 (D.Alaska 2001); *United States v. Fujii*, 152 F.Supp.2d 939 (N.D.Ill.2000). Other courts allowed the examiner to testify to particular similarities and dissimilarities between the documents, but excluded their ultimate opinion as to authorship. *United States v. Rutherford*, 104 F.Supp.2d 1190 (D.Neb.2000); *United States v. Santillan*, 1999 WL 1201765 (N.D.Cal. 1999); *United States v. Hines*, 55 F.Supp.2d 62 (D.Mass.1999); *United States v. Oskowitz*, 294 F.Supp.2d 379,384 (E.D.N.Y. 2003); *United States v. Van Wyck*, 83 F.Supp.2d 515 (D.N.J. 2000).

Mr. Parrett's conclusions "no two people write exactly alike" is hard to believe. (04/01/04 Tr. 272) Further, his conclusion "that the writer of the K-1, known document, Termene Wood prepared the text on the letter Q-1" is also improper. (*Id.* at Tr. 294) It is stated in unequivocal terms, not in terms that handwriting in "the letter" was consistent with the handwriting exemplars taken from Petitioner. This Court has held "it is improper for a forensic expert to state an opinion with absolute certainty where such is beyond the present state of the art of forensic science. *See McCarty v. State*, 1988 OK CR 271, 765 P.2d 1215, 1218- 19 (holding that "admission of this opinion testimony was error, because Ms. Gilchrist did not, and could not, testify that such opinion was based on facts or data 'of a type reasonably relied upon by experts in the particular field' in forming such an opinion."); *Moore v. State*, 1990 OK CR 5, 788 P.2d 387, 399-400.

Since trial counsel did not request a *Daubert* hearing, any basis for Mr. Parrett's opinions was not tested by the trial court although his testimony violated Petitioner's 5th Amendment rights as well as his right to a fair trial.

6. Trial counsel failed to object to improperly excused jurors.

During jury selection, potential jurors were questioned by the Court about whether they could consider all three punishments. Potential juror, Brenda Surnhall, after expressing "[a]ll three, no. ... I cannot consider all three," was summarily excused without the trial court ever clarifying for the record which penalty she could not impose. (03/30/04 Tr. 13-15) Two jurors were removed by the

court for not being able to impose a sentence less than death.¹⁶ In stark contrast, the court summarily excused ten jurors who voiced concerns about their ability to impose the death penalty.¹⁷ Of these ten jurors, defense counsel only questioned one juror, Thieh Trink. (03/29/04 Tr.50-52) Another potential juror, Bennett Ughamadu, who first expressed he didn't "have any problem" with considering all three punishments, was later excused by the court when he expressed he preferred to give something other than the death penalty due to his religious beliefs. Although Mr. Bennett, upon questioning by the State, clarified this did not mean he could not give death as a penalty, was excused by the court, again, without questioning by defense counsel. (03/29/04 Tr. 122 -28) Defense counsel never objected to the their dismissal. Finally, four jurors who strongly favored the imposition of the death penalty sat on Mr. Wood's jury.¹⁸ Defense counsel never challenged these jurors for cause despite the fact they each expressed their preference for the death penalty.

In capital cases, the Supreme Court has set forth certain guarantees to ascertain the imposition of the death sentence is not arbitrary and capricious. "A death sentence cannot be carried out if the jury that imposed...it was chosen by excluding [prospective jurors] for cause simply because they voiced general objections to the death penalty or expressed conscientious religious scruples against its infliction." *Witherspoon v. Illinois*, 391 U.S. 510, 522, 88 S.Ct. 1770, 1777 (1968); *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). This Court has held that all doubts regarding juror impartiality must be resolved in favor of the defendant. *Hawkins v. State*, 1986 OK CR 58, 717 P.2d 1156.

The trial court's summary dismissal of the string of potential jurors who voiced general

¹⁶ Potential jurors Daniel Wade (03/29/04 Tr. 66-67) and Robert Abraham (03/29/04 Tr. 225-26).

¹⁷ Potential jurors Thieh Trink (03/29/04 Tr. 50-52); Cathleen Lawry (03/29/04 Tr. 63-64); Michael Gilbert (03/29/04 Tr. 95-95); Bennett Ughamadu (03/39/04 Tr. 122-128); Neyoma McAlister (03/29/04 Tr. 150-51); Linda Green (03/29/04 Tr.184); Robert Megehee (03/30/04 Tr. 10); Rodney Bolden (03/30/04 Tr. 61-62); Teresa Terry (03/31/04 Tr. 18); and Demetra Gaddis (03/31/04 Tr. 61).

¹⁸ Jurors Elliott, Burton, Dodson, and Clemenceau. (03/29/04 Tr. 116, 169, 198; 03/31/04 Tr. 24)

dislike for the possibility of having to impose the death penalty without allowing defense counsel an attempt to question them resulted in a violation of Petitioner's rights under the 5th and 14th Amendments, and Okla. Stat. Art. II, §§ 7 and 20.

7. Trial counsel failed to object when jurors moved their vehicles.

As discussed in Proposition V, at the end of first and second stage the trial court allowed the jurors to move their vehicles after they had been sworn but before they had begun deliberations. Additionally, it does not appear from the record the bailiff or a deputy escorted the jurors who moved their vehicles. Unfortunately, trial counsel failed to object to this procedure despite the fact that this Court in *Johnson v. State*, 2004 OK CR 23, 93 P.3d 41, 47, held 22 O.S. § 857 is mandatory and designed to preserve the purity of jury trials. Petitioner submits if it is determined that this error was waived due to the absence of an objection by trial counsel, then trial counsel's failure to object should be indicative of ineffective assistance of counsel.

8. Trial counsel failed to request court to instruct as to life with parole.

Trial counsel failed to ask the court to instruct jurors pre-evidence or post-evidence for an instruction on the definition of life with parole. The Oklahoma Legislature enacted a truth in sentencing law which forbids a prisoner with a sentence of life with parole on a murder conviction from being paroled unless 85% of his sentence had been served. *See* 21 O.S. § 13.1 This Court recently held *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273, 278,

...for cases covered by this new sentencing reality--as in cases where life without parole is a sentencing option--the legislature's specific action compels a specific limitation on our traditional prohibition of mentioning parole at trial.... [T]he 85% Rule is a specific, delineated parole provision that does apply to life sentences for murder (as well as numerous other crimes), which does not vary from one inmate to another, which can be readily defined and explained.

Although none of the jurors asked specifically how long a life sentence will keep someone in prison, trial counsel did inform several jurors during voir dire that a life sentence meant Petitioner could get out of prison one day. (03/29/04 Tr. 109, 134, 179, 199, 208, 234; 03/30/04 Tr. 22, 32) This statement, without clarification as to how much time Petitioner would have to serve before even

being considered by the pardon and parole board is misleading. There is a great risk that if the jury is not fully informed about its sentencing options, it will choose the death sentence because it does not completely understand the sentencing options. The trial court should have instructed Mr. Wood's jurors that a life sentence according to the Pardon and Parole Board is considered to be forty-five (45) years and that Mr. Wood, if found guilty of murder in the first degree, would have to serve at a minimum of 85% of that forty-five years. *Id.* at 283.

9. Trial counsel failed to request proper jury instructions.

Petitioner had a fundamental right to have his guilt or innocence determined by a jury properly instructed on Oklahoma law. *Hicks v. Oklahoma*, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980). The purpose of jury instructions is to place before the jury a correct and full statement of the law which is applicable to the case. *Ake v. State*, 1989 OK CR 30, 778 P.2d 460, 470. OKLA. STAT. tit. 12 § 577.2 (1991) provides the instructions set forth in the Oklahoma Uniform Jury Instructions should be used when applicable in a particular case. Petitioner submits his jury was not properly instructed since several instructions simply were not given, while others omitted words, and then one instruction submitted to the jury is not even in the Oklahoma Uniform Jury Instructions.

Despite the applicability of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) and *Tison v. Arizona*, 481 U.S. 137, 150-51, 107 S.Ct. 1676, 1684, 95 L.Ed.2d 127 (1987), "that the accused intended to kill or exhibited such reckless disregard that he is adequately culpable to be death eligible," to Mr. Wood's felony murder conviction, defense counsel failed to request the jury be instructed. As a result, Petitioner's jury was never informed of its constitutional obligation to examine his individual culpability prior to imposing the death penalty. Since evidence had been presented by Zjaiton Wood he was the one that stabbed the victim, regardless of a request from counsel, the trial court's failure to *sua sponte* instruct the jury on the constitutional requirements for the imposition of the death penalty on one convicted of felony murder who did not kill in the course of the felony was fundamental error. *Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986). Further, this Court has held Instruction No. 4-71, OUJI-CR(2d) is necessary

in felony murder cases as it enables the jury to give individualized consideration to the defendant's culpability as required by the Supreme Court. *Allen v. State*, 1994 OK CR 30, 874 P.2d 60, 64-65; *Williamson v. State*, 1991 OK CR 63, 812 P.2d 384, 402.

Additionally, instructions defining "attempts" were omitted. The jury in Instruction No. 10, was informed attempted robbery was the underlying felony the State used to support felony murder. (See O.R. IV 655) The Notes on Use for OUJI CR(2d) 4-65 state "[i]f the predicate felony is an attempted crime, the trial judge should give the appropriate instructions for attempts." The "attempts" instructions, OUJI CR (2d) 2-10 thru 2-15, were not given to the jury. The other instructions omitted address circumstantial evidence. According to Instruction No. 52, the State relied on circumstantial evidence in an attempt to prove Petitioner was a continuing threat. (See O.R. IV at 632). The Notes on Use for OUJI-CR(2d) 4-77 require the court to provide the jury with additional instructions that define direct evidence versus circumstantial evidence and the weight to given to each; however these instructions were not provided. See OUJI-CR(2d) 9-2, 9-3, and 9-4.

The following jury instructions, although given to the jury, were missing words

-Instruction No. 44 left out "or" and according to OUJI-CR(2d) 4-68 should read "shall be punished by death **or** imprisonment for life..." See (O.R. IV at 624).

-Instruction No. 46 left out "with the possibility of parole" and according to OUJI-CR(2d) 4-70 should read "return a sentence of life imprisonment **with the possibility of parole** or life imprisonment without parole." See (O.R. IV at 626).

-Instruction No. 47 left out "At the present time there exists" and according to OUJI-CR(2d) 4-72 this language should start the sentence. (O.R. IV at 627).

-Instruction No. 37 left out "or testimony" and according to OUJI-CR(2d) 10-7 should read "In so doing I have not expressed nor intimated in any way the weight or credit to be given any evidence **or testimony** admitted during the trial." (O.R. IV at 682).

Finally, the trial court submitted its own non-OUJI instruction, Instruction No. 5:

If you have a reasonable doubt as to the guilt of the Defendant on any or all such offenses, you must first find him not guilty of that particular crime. The three (3) counts are to be considered separately. By that I mean that each count is to be given separate though and deliberation. (O.R. IV 649)

While the relevant and proper instructions should have been given by the trial court as a

matter of fundamental right, defense counsel still has a duty to request all relevant and proper instructions if he is to function effectively. This error was fundamental because the instructions failed to force the jury's consideration of the evidence into proper legal channels so that it could reach a legally sound verdict. *Kamees v. State*, 1991 OK CR 91, 815 P.2d 1204, 1207; *see also Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Furthermore it deprived Petitioner of due process and a reliable sentencing proceeding in violation of the 8th and 14th Amendments. *Ake v. Oklahoma*, 470 U.S. 68, 74-75, 105 S.Ct. 1087, 1092, 84 L.Ed.2d 53 (1985).

10. Failed to Object to Prosecutorial Misconduct.

Petitioner, in Proposition IV, sets forth the instances of prosecutorial misconduct that occurred in this case and argues in that proposition trial counsel and appellate counsel were ineffective for their failure to develop this legal issue for this Court to consider.

D. Failure of appellate counsel to perform the professional duty owed to Mr. Wood.

Mr. Wood was denied effective assistance of counsel when his appellate defense counsel failed to perform the professional duty owed to him under prevailing professional norms and the mandates of the law. In *McGregor v. State*, 1997 OK CR 10, 953 P.2d 332, *cert. denied*, 521 U.S. 1108, 117 S. Ct. 2489, 138 L. Ed.2d 996 (1997), this Court established ineffective assistance of appellate counsel claims are properly before this Court only if this Court finds the allegations are true and the performance of the appellate defense counsel would constitute the denial of reasonably competent assistance of counsel under prevailing professional norms. In this case, appellate counsel's performance constituted denial of reasonably competent assistance of counsel under prevailing professional norms. (*See* Rule 1.1 of the Rules of Professional Conduct regarding thoroughness and preparation.) As detailed in all the sub-propositions above, it is clear the required attention and adequate preparation was not provided by appellate counsel. As a result of appellate counsel's failure to perform the professional duty owed to him under prevailing professional norms, Mr. Wood received ineffective assistance of appellate counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L.

Ed.2d 821 (1985); *Garrison v. State*, 2004 OK CR 35, 103 P.3d 590. Mr. Wood respectfully requests a new trial or a new sentencing trial.

**PROPOSITION IV
PROSECUTORIAL MISCONDUCT RESULTED IN UNFAIR PROCEEDINGS.**

A. Bad Acts and Evidence of Other Crimes.

1. Prejudicial and Improper Bad Acts Admitted During First Stage.

During first stage the State called Coleman Givens who was staying at a motel across from the Ramada Inn and testified as to the events he observed as they unfolded that night. (03/31/04 Tr. 224-29) Over defense counsel's objections, the State also elicited improper and irrelevant testimony from Mr. Givens which dealt with the conversations he heard between the co-defendants on the way to Petitioner's preliminary hearing. (*Id.* at 252-55, 256-58) One conversation was if "they didn't say or do like he wanted, he was going to drag them all, you know down with him." (*Id.* at 255-56) They then allegedly questioned him as to what he was going to say. He felt they were trying to make him nervous. Although Givens reported Petitioner asked him what he was going to say; he felt threatened by Zjaiton and expressed he "kind of told me what not to say." (*Id.* at 259, 261)

The State elicited another bad act while cross-examining Zjaiton. The State questioned Zjaiton with "Isn't it true, sir, that on April the 6th of 2002, over in county jail, you and your brother kicked another inmate in the face and injured him, is that right?" (04/02/04 Tr. 112) Defense counsel's objections were overruled. (*Id.* at 112-14)

2. Evidence of Another Crime.

Prior to trial, the Court ruled in the case of co-defendant Bateman the La Franca Pizza Robbery was inadmissible in first stage as *Burks* evidence and the same ruling applied in Petitioner's case. (O.R. 579) Despite this ruling, during first stage, the State forced Zjaiton Wood to testify he and Petitioner had robbed the pizza place earlier that evening. (04/02/04 Tr. 129-30). Again defense counsel's objections were overruled.

3. Legal Argument.

In *Burks v. State*, 1979 OK CR 10, 594 P.2d 771, 774 this Court established a procedure to be followed when the State seeks to introduce other crimes evidence. This procedure was not aimed solely at providing pretrial notice to the defendant but also required a specification of the exception under which the evidence is sought to be admitted; a visible connection between the offense charged and the offense sought to be proved; a showing the evidence is not cumulative and is necessary to support the State's burden of proof; proof of the other crimes by clear and convincing evidence; and an instruction to the jury as to the limited purpose for which the evidence is admitted. 594 P.2d at 774-75. This Court cautioned "[s]uch evidence should not be admitted where it is a subterfuge for showing to the jury that the defendant is a person who deserves to be punished." 594 P.2d at 775.

Here, none of the safeguards of the *Burks*' requirements were established. The State did not file any pre-trial notice it intended to introduce evidence of other crimes or bad acts. The State was never required to specifically identify what evidence it would be sponsoring, was never required to show a legitimate purpose for the introduction of this evidence, was never required to meet a burden of proof with regard to the evidence, and the jury was never instructed it was to use the evidence only for a limited purpose. Therefore, this bad character evidence and "other crimes" evidence, which was intentionally elicited by the State, and improper for the jury to consider resulted in an unfair trial and a violation of due process. U.S. Const. Amend. 8th and 14th and Okla. Const. art. II, § 7 and 9.

Additionally, the introduction of this irrelevant evidence was improper under 12 O.S. §§ 2402 and 2404(B). Even if this Court determines it was arguably relevant, then its probative value was substantially outweighed by the danger of unfair prejudice under 12 O.S. § 2403. The State's intentional admission of this improper character evidence painted Petitioner as a bad person which was not relevant to the charges against him. Further, the admission of this improper, irrelevant evidence for the jury to consider, calls into the question the reliability of Petitioner's trial, and whether Petitioner received a fundamentally fair trial.

B. The Prosecutor Misstated the Law and Demeaned Mitigating Evidence.

Throughout second stage closing, the prosecutor misstated the law and informed the jury a

mitigator had to meet a two-prong test before it could be considered in mitigation. (04/05/04 Tr. 117) The prosecutor stated, "Number one, you must find or you may find that the mitigator is in fact true. And if it is true, then you have a second prong. You have to ask yourself, well, if it is true, does it extenuate or reduce the degree of moral culpability or blame? Once again, don't take my word for it. It is in black and white. It is the law. It's the law." The prosecutor then went over each of the 17 mitigating circumstances listed in Instruction No. 54 and reiterated the alleged two prong test and how each did not meet this test. (04/05/04 Tr. 117-18, 118-19). After addressing the last of the 17 mitigators, the State restated the following:

So, when you go through these 17 proposed mitigating factors, you go through each one of them yourself. You will think of more things that I didn't to help you know these are not mitigating circumstances. You have to find two things: Number one, are they true? Like the first mitigator is, the defendant is 24-years-old. Well, I give you that, he is. That is true. But the number two prong, did that mitigate? Does that extenuate or reduce the degree of moral culpability or blame. A two-prong test. Go through each and ask yourself, number one, is it true? And number two, does it reduce the degree of moral culpability or blame? I submit to you, you will not find one of those to be mitigating. (*Id.* at Tr. 127)

Petitioner respectfully submits this two-prong test is not the law. As set forth in Instruction No. 53, "Mitigating circumstances are which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame." *See* OUII CR(2d) 4-78. The jury is allowed to decide which circumstances it finds mitigating, and the jury does not have to unanimously agree on the mitigators. Additionally, the mitigating circumstances do not have to be proven beyond a reasonable doubt. *Id.*

Furthermore, the clear purpose of the prosecutor's comments and application of a two-prong test was to inform the jurors that they could ignore these mitigating circumstances because, based upon the prosecutor's personal opinion, the circumstances were not worthy of consideration. These remarks were made to confuse the jury about its responsibility for evaluating the mitigating evidence in the way it was legally required. Persuading the sentencer to ignore mitigating evidence is error. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) and *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934,

106 L.Ed.2d 256 (1989). The Supreme Court has held a defendant in a capital case has a constitutional right to consideration of mitigating factors by the sentencer, and the sentencer cannot be precluded from considering mitigating evidence. *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). Misleading the jury about its responsibilities with regard to capital sentencing violates the 8th Amendment. *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

C. Improperly accused Petitioner of lacking remorse.

During second stage closing the State argued Petitioner was not remorseful for these crimes,

Another thing when Dr. Hand testified, what is even more important is what he didn't say. The one thing that Dr. Ray Hand didn't say about this defendant is that he is remorseful for committing this murder. Or that he was sorry for committing this murder. I submit to you that he is because he is not. And that's what makes him different from people like you and me. That is why he deserves the death penalty on top of everything else we discussed. Ask yourselves if you were driving home last Friday night from this jury service and you accidentally ran over another person, accidentally killed that person, not intending to, you would be devastated. Every one of you would. This person stuck a big knife into the chest of a 19-year-old man. Stuck it in there five inches. And he never said to one person, "I'm sorry about that." He has never said to one person "I'm remorseful about that." What kind of a person is that? Somebody that is different from you and me. And that fact, I submit to you, in addition to all of the others facts is the reason why he deserves the death penalty. How can you kill, intentionally, knowingly kill another human being and not be sorry about it?

(04/05/04 Tr. 133-34) The State also commented, "[w]e have to deal with - - what we have today is this defendant. A man who can kill an innocent victim without mercy and without remorse. I submit to you that Mr. Wood needs to be on death row where he can't hurt anyone." (*Id.* at 139)

Petitioner recognizes this Court has held "lack of remorse" is pertinent to the continuing threat aggravating circumstance. *Pickens v. State*, 1993 OK CR 15, 850 P.2d 328, 337; *Sellers v. State*, 1991 OK CR 41, 809 P.2d 676, 689. However, cases in which lack of remorse has been held to be relevant are those in which the defendant admitted committing murder, then expressed a lack of remorse for the deed. There is a huge difference between an individual maintaining he did not commit the offense charged, and one who admits he committed the offense but is not sorry. Under the State's warped theory of criminal justice, a defendant who maintains his innocence throughout

trial should automatically be eligible for the death penalty because he expresses no remorse.

At trial, the defendant is cloaked with the constitutionally protected right to maintain his innocence. It is still the law that a death sentence may not be based on factors that are constitutionally impermissible or irrelevant to the sentencing process. Likewise, a capital sentencing jury may not draw adverse inferences from conduct that is constitutionally protected. *Zant v. Stephens*, 462 U.S. 862, 885, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). It is well settled that to punish a person for exercising a constitutional right is a "due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). Here, the State twisted his constitutional right to claim innocence into evidence he should be executed for exercising this right, unfairly undermining his 8th and 14th Amendment rights to a fair and reliable sentencing.

D. Invoking sympathy and arguing facts outside the record.

Despite the fact no victim impact testimony was presented, the State argued:

- His [Ronnie Wipf's] mom and dad on his birthday don't get to go to the prison and visit him. They go to a grave up on the hill in Montana. That is where they visit Ronnie. (04/05/04 Tr. 118-19)

- I'll bet that Ronnie Wipf's mom and dad would like to visit him in prison instead of in his grave. (*Id.* at 119)

- Well, once again, you know Ronnie Wipf was 19 years-old. I bet his folks would like to see him grow into a young man and have children and visit him and their grandchildren. That will never happen. He age is going to be 19. (*Id.* at 120)

- There used to be a young man, a 19-year-old young man, Ronnie Wipf, who was loved by his family. (*Id.* at 140)

- Don't get hung up about where our victim is. Whether he is on a hill or in a valley. We don't care about that. But his folks will visit his grave. He is buried. Doesn't make any difference where it is at. (*Id.* at 158)

This Court has held that a prosecutor may not argue and infer facts which were not admitted as evidence. *Howell v. State*, 1994 OK CR 62, 882 P.2d 1086; *McCarty v. State*, 1988 OK CR 271, 765 P.2d 1215, 1220 (Okla. Cr. 1988); *Tobler v. State*, 1984 OK CR 90, 688 P.2d 350. Here, the prosecutor's closing served no other purpose than to prejudice the jury against Petitioner with this proposed evidence about how the victim's family felt. Yet, there was absolutely no evidence

presented to support the State's argument. This Court has held that it is improper for the prosecutor to attempt to distract and inflame the jury with tactics designed to cause the jury to find against the defendant for sympathy for the victim. See *McCarty v. State*, 1988 OK CR 271, 765 P.2d 1215, 1225; *Tobler v. State*, 1984 OK CR 90, 688 P.2d 350, 354; *Williams v. State*, 1983 OK CR16, 658 P.2d 499, 501; *Dupree v. State*, 1973 OK CR 397, 514 P.2d 425, 427-28.

E. Prosecutor presented inconsistent factual theories as to the victim's murder.

Petitioner's jury trial occurred before his brother Zjaiton Wood's trial. At Petitioner's trial, Zjaiton took the stand and testified he "grabbed the victim by the head and I stabbed him in the chest and told him I was God." (04/02/04 Tr. 94) Zjaiton further testified "I don't want my brother to die for something that he is not guilty of. I mean, if he was guilty of this, you know what I am saying, I would tell him to be a man and face the heat. But he's not guilty." (*Id.* at 97)

Despite this evidence, during first stage closing argument the State argued Petitioner committed this murder, not his brother Zjaiton. (4/04/04 Tr. 5, 6, 7, 8) The State argued Zjaiton did not make Petitioner commit this murder, he had a choice and he knowingly and voluntarily took his life. (*Id.*) The State completely discounted the testimony of Zjaiton with the following,

-I submit to you ladies and gentlemen, that if that defendant [Zjaiton] tells you the sun comes up in the east, in the morning every day you should get up and look out the window. That is how much credibility that gang banging, dope dealing, confessed murderer should have in this courtroom. When you weigh his testimony and his credibility about turning people's lives loose, you look carefully at someone like that. (*Id.* at 7)

However, at Zjaiton trial, which was before the same judge with the same prosecutors, the State did an about face and argued Zjaiton stabbed the victim, not Petitioner. Although Zjaiton did not take the stand, his prior testimony from Petitioner's trial was presented through Linda Wood and Officer Billy Ricketts.¹⁹ (Linda Wood - Z. Wood 02/22/05 Tr. 221-28; Officer Ricketts - Z. Wood 02/23/05 at 203-09) Petitioner submits the State's presentation of inconsistent theories as to who actually murdered the victim violated his due process rights to a fair trial and his conviction must

¹⁹ Petitioner filed a Motion to Cross Reference with Zjaiton Wood's record before this Court in F-2005-246.

be reversed.

This Court addressed a similar situation in *Littlejohn v. State*, 1998 OK CR 75, 989 P.2d 901. In *Littlejohn* the prosecutor argued inconsistent triggerman theories at each co-defendant's trial to obtain a conviction. Since this was a case of first impression, this Court turned to *Parker v. Singletary*, 974 F.2d 1562 (11th Cir. 1992) for guidance. In *Parker* there were three co-defendants, three separate trials, and three separate arguments as to who was the shooter. The *Parker* court determined, "given the uncertainty of the evidence, the court reasoned it was proper for the prosecutors in the other cases to argue alternative theories as to the facts of the murder. The issue of whether the particular defendant on trial physically committed the murder was an appropriate question for each of the co-defendant's juries." 974 F.2d at 1578. Utilizing this analogy, this Court in *Littlejohn* held it was permissible for the State to argue alternative theories as to who was the shooter when there was no physical evidence demonstrating who had fired the fatal shot, and that the "the evidence was less than conclusive as to the identity of the shooter." *Id.* at ¶ 27.

However, the *Parker* court condemned the use of the State utilizing contradictory evidence to obtain a conviction. In *Littlejohn*, this Court cited to the following analysis in *Parker*,

....two defendants were convicted for the same murder in separate trials. The state had contended at the first defendant's trial that the first defendant had actually killed the victim. The first defendant testified at his trial that he did not participate in the murder and accused the second defendant of being the perpetrator. One year later, the state used the testimony of the first defendant to show that the second defendant had actually killed the victim. **The concurrence concludes that the prosecutor had obtained the second conviction through the use of evidence that he could not have believed, given that the prosecutor had disputed the first defendant's testimony in the first trial.** (citations omitted.) *Parker*, 974 F.2d at 1578 (emphasis added).

The *Parker* court found these two cases distinguishable because *Parker's* prosecution 'did not involve the use of necessarily contradictory evidence.' *Id.* at ¶ 25.

Here, the prosecutor disputed and ridiculed Zjaiton's testimony to obtain a conviction against Petitioner. Then in Zjaiton's trial his testimony suddenly becomes believable and is used by the State to obtain a conviction against him as well. This involves the use of necessarily contradictory evidence which is not condoned by *Littlejohn* or *Parker*.

If this Court determines that it was not improper for the prosecutors to argue inconsistent contradictory theories as to who stabbed the victim to obtain a conviction, Petitioner submits his case, at a minimum, must be sent back for a new sentencing. Recently, the Supreme Court, in *Bradshaw v. Stumpf*, 545 U.S. 175, 187, 125 S.Ct. 2398, 2407-08, 162 L.Ed.2d 143 (2005), in addressing prosecutorial inconsistencies to obtain convictions held, "[t]he prosecutor's use of allegedly inconsistent theories may have a more direct effect on Stumpf's sentence, however, for it is at least arguable that the sentencing panel's conclusion about Stumpf's principal role in the offense was material to its sentencing determination." *Id.* The Supreme Court remanded the case to determine what effect the prosecutor's conduct claim related to Stumpf's sentence of death.

Petitioner submits the State's conduct clearly impacted his sentence. In support of the especially heinous, atrocious and cruel aggravating circumstance the State argued:

-Which it is, I submit to you, to murder a man, to stab him with a knife like was done in this case, and stick it five inches into his body. (04/05/04 Tr. 111)

-You have to resort to stabbing him five inches into his body with that knife. I submit to you that that was extremely wicked for them to do that. (*Id.*)

-Well, what was in the minds of these defendants, especially the defendant on trial today, Mr. Termane Wood, when he stuck that big knife into the chest of Ronnie Wipf? (*Id.*)

-I submit to you that the abuse inflicted to Ronnie Wipf in this case was so serious that it caused his death. Look at that knife. Look at that wound and ask yourself whether or not that was serious abuse. (*Id.* at 112)

-Did Ronnie Wipf suffer? He doesn't just -- he didn't lie down and go to sleep. He suffered. That knife was five inches into his chest. He walked around in his own blood. You will have the pictures up there and see that. Even on his feet there is blood that has dripped from his body. That means it came from the wound and it dripped to his feet. He was standing some time after that knife went into his chest, because blood came out of his chest and dripped on to his feet. You will see the bottom of his feet, where after he bled on the floor he walked on that. That is the reason it is on the bottom of his feet. He was alive long enough to walk in his own blood. Long enough for his blood to spill out and drop on his feet. He was alive long enough to remove that knife from his chest and to lay there on the bed and bleed out after he had already bled into his own body a quart and a half of blood. I submit to you he suffered. And he suffered greatly. (*Id.*)

As for the aggravating circumstance of murder to avoid lawful arrest the State argued:

- They killed this guy for purposes of a trying to avoid lawful prosecution and arrest. They didn't kill the pizza guy. They were in control of that situation. When they lost control in

' this room, it was this man [Termene] that said "Shoot the bastard." (*Id.* at 154-55)
The State, in arguing against mitigation, states "Zjaiton Wood did not make Termene Wood murder Ronnie Wipf on that night." (*Id.* at 126)

Clearly, this evidence impacted Petitioner's resulting sentence of death. The prosecutor repeatedly argued Petitioner stabbed the victim and explained in great detail how those facts supported the aggravating circumstances alleged and diminished his mitigating circumstances. Therefore, Petitioner's resulting sentence of death is in violation of due process and must be vacated.

F. Prosecutor misled the trial court at the remanded evidentiary hearing.

During the evidentiary hearing, Mr. Albert testified he had tried between 13 to 15 capital cases and only had 3 cases had resulted in a sentence of death. (Vol. II Tr. 260) Although appellate counsel tried to have the court take judicial notice of a handwritten list of 8 cases which had resulted in a death sentence, the trial court denied this request. (Vol. III Tr. 409-12) This denial was based on the State's assertion Mr. Albert had not been the trial counsel on at least 2 of the 8 cases on the list. (*Id.* at 410-11) Prosecutor Smith expressed, "James Fisher is listed on here as one of the people, and I can tell you for sure, I tried that case and John Albert was not involved in that case. And this list is incorrect at this first name." (*Id.* at 410) Prosecutor Smith then states "I tried Terry Lyn Short in this courthouse. And to the best of my recollection, I can't remember who the defense attorney was now because it's been so long, but I don't believe it was Mr. Albert." (*Id.* at 411)

As addressed in Proposition II of this Application, Mr. Albert has been involved in at least 8 capital cases wherein a sentence of death which include James Fisher and Terry Short. This misstatement of fact, which was adamantly argued by the State as fact, undoubtably calls into the question of the reliability of the trial court's Findings.

G. Conclusion.

Although some of the State's commentary and arguments were not met with contemporaneous objection, none of the above instances of misconduct constitute a fair comment on the evidence, and all constitute a complete denial of due process. *Donnelly v. DeChristoforo*, 416

U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). Lack of an objection does not preclude the Court from reviewing improper comments. *Atterberry v. State*, 1986 OK CR 186, 731 P.2d 420; *Cobbs v. State*, 1981 OK CR 60, 629 P.2d 368. However, if this Court determines these claims are procedurally barred because an objection was not raised by trial counsel nor addressed on direct appeal by his appellate counsel; Petitioner submits the failure of his prior counsel to raise these meritorious issues resulted in ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984) *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed.2d 821 (1985).

The combined effect of the prosecutorial misconduct was so prejudicial as to adversely affect the fundamental fairness and impartiality of the proceedings and resulted in deprivation of the constitutional rights enumerated above. *See McCarty v. State*, 1988 OK CR 271, 765 P.2d 1215, 1221; *Spees v. State*, 1987 OK CR 62, 735 P.2d 571, 576; *Freeman v. State*, 1984 OK CR 60, 681 P.2d 84, 85; *Rice v. State*, 92 P.2d 857, 859 (Okla. Cr. 1939) Mr. Wood was denied his 14th Amendment right to a fair trial and fair hearing by the repeated abuses of the prosecutor; therefore, his conviction and sentence mandate reversal.

**PROPOSITION V
ERROR OCCURRED WHEN JURORS MOVED VEHICLES AFTER BEING SWORN.**

At the end of first stage at approximately 5:53 p.m. on April 2, 2004, the trial court allowed the jurors to move their vehicles after they had been sworn but before they had begun deliberations. Deliberations began at approximately 6:26 p.m. (04/02/04 Tr. 204-11, 213) At the end of second stage at approximately 5:57 p.m. on April 5, 2004, after the jurors were sworn, but before they began deliberations, the trial court once again allowed the jurors to move their vehicles. Deliberations began at approximately 6:23 p.m. (04/05/05 Tr. 159-61, 163) The record is silent as to which jurors left to move their vehicles. Additionally, it does not appear from the record that the bailiff or a deputy escorted the jurors who moved their vehicles.

Oklahoma Statute Title 22, § 857 provides in pertinent part:

After hearing the charge, the jury may either decide in court, or may retire for deliberation. If they do not agree without retiring, one or more officers must be sworn to keep them together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor do so themselves, unless it be by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, or when ordered by the court.

In *Johnson v. State*, 2004 OK CR 23, 93 P.3d 41, 47, this Court held that the above statute is mandatory and designed to preserve the purity of jury trials. While the law providing for juror sequestration for deliberation is not protected under the federal constitution, it is specifically mandated by Oklahoma statute. Deprivation or deviation of this statute, constitutes a due process violation. *See also, Golden v. State*, 2006 OK CR 2, 127 P.3d 1150, 1153 (holding that deprivation of statutorily prescribed peremptory strikes was a violation of due process).

In addition, the record is silent as to when and even if the bailiff was sworn after the first and second stage evidence and argument had been presented to the jury. *See Castro v. State*, 1987 OK CR 182, 745 P.2d 394, 406 (holding second stage of a capital jury trial “is more like a separate trial in that it involves new findings of fact.”) Thus, the bailiff should have been sworn; it was error not to do so. This Court has held that “the fact that the bailiff in the present case was not immediately sworn to keep the jury together after they had heard the charge does not eliminate the error but rather compounds it.” *Johnson v. State*, 2004 OK CR 23, 93 P.3d 41, 48. The fact the bailiff was not sworn after the charge given for first and second stage deliberations combined with the fact the jurors were allowed to move their cars after being sworn is reversible error, a violation of due process, and also structural error affecting the framework of the trial and the sanctity of the jury function in our court system. *See Hicks v. Oklahoma*, 447 U.S. 343, 100 S. Ct. 2227, 65 L. Ed.2d 175 (1980) and *See Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed.2d 302 (1991).

Petitioner’s conviction should be overturned, and he should receive a new trial.

PROPOSITION VI
THE CUMULATIVE IMPACT OF ERRORS IDENTIFIED ON DIRECT APPEAL AND
POST-CONVICTION PROCEEDINGS RENDERED THE PROCEEDING RESULTING IN
THE DEATH SENTENCE ARBITRARY, CAPRICIOUS, AND UNRELIABLE.

In *United States v. Rivera*, 900 F. 2d 1462 (10th Cir. 1990), the Tenth Circuit held the

cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. *Rivera*, 900 F. 2d at 1469; *see also Cargle v. Mullin*, 317 F.3d 1196, 1206 -1207 (10th Cir. 2003). In assessing cumulative error, this Court must consider both first and second stage errors.

prejudice may be cumulated among different kinds of constitutional error, such as ineffective assistance of counsel and prosecutorial misconduct. We further conclude that prejudice may be cumulated among such claims when those claims have been rejected individually for failure to satisfy a prejudice component incorporated in the substantive standard governing their constitutional assessment. Finally, we conclude that prejudice from guilt-phase error may be cumulated with prejudice from penalty-phase error.

Id. at 1200. Therefore, even though each instance of error alone would not require reversal, some or all errors combined may warrant reversal.

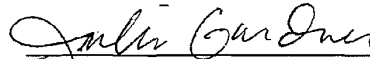
The ineffectiveness of trial and appellate counsel and the errors enumerated by appellate counsel and post-conviction counsel, denied Mr. Wood substantial statutory and constitutional rights. His death sentence was obtained in violation of the 6th, 8th, and 14th Amendments to the Federal Constitution and Article 2, §§ 7, 9, and 20 of the Oklahoma Constitution. Mr. Wood should therefore be granted a new trial, or in the alternative, his death sentence should be modified to life imprisonment or life imprisonment without parole.

PRAYER FOR RELIEF

Wherefore, Mr. Wood respectfully requests that this Court enter an order vacating his convictions and sentences and remanding his case for a new trial or new sentencing. In the alternative, Mr. Wood respectfully requests this Court to impose a sentence of life imprisonment or life imprisonment without parole, or to remand this case for a full and fair evidentiary hearing on the issues presented.²⁰

²⁰ Mr. Wood's Appendices to the Original Post-Conviction Application, Motion for Discovery, and Motion for Evidentiary Hearing, were filed on December 26, 2006.

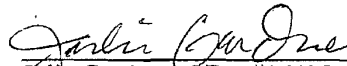
Respectfully submitted,



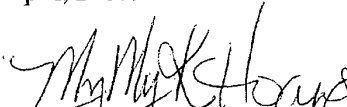
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Attorney for Termane Wood

VERIFICATION OF COUNSEL FOR PETITIONER

I, Julie Gardner, state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.


Julie Gardner, OBA #16425

Subscribed and sworn to before me this 25th day of April, 2007.

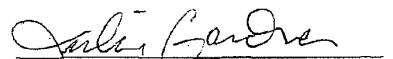

Notary Public

My Commission expires: 1/15/2008
My Commission number: 04000440



CERTIFICATE OF SERVICE

By my signature below, I certify a copy of the foregoing was served on the Attorney General of the State of Oklahoma by depositing a copy of the same with the Clerk of the Court of Criminal Appeals this 25th day of April, 2007.


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APPENDIX E

APPENDIX E

**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

TREMANE WOOD,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

PCD Case No.

Capital Postconviction Proceeding

Third Postconviction No. PCD-2017-653

Second Postconviction No. PCD-2011-590

First Postconviction No. PCD-2005-143

Direct Appeal Nos. D-2004-550; D-2005-171

Oklahoma County No. CF-2002-46

Tenth Circuit Court of Appeals No. 16-6001

U.S. District Court, Western District of

Oklahoma No. 5:10-cv-829-HE

FOURTH APPLICATION FOR POSTCONVICTION RELIEF

DEATH PENALTY CASE

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PART A: PROCEDURAL HISTORY

Petitioner Tremane¹ Wood now submits his fourth application for postconviction relief under 22 O.S. § 1089. Pursuant to Rule 9.7(A)(3) of the Rules of the Oklahoma Court of Appeals, a copy of the amended (first) application for postconviction relief filed April 25, 2007, is appended to this fourth application as Attachment 1; the second application for postconviction relief is appended to this fourth application as Attachment 2; and the third application for postconviction relief is appended to this fourth application as Attachment 3. The addendum and appendix of exhibits have not been attached, but are available should the Court find them necessary for its review of this application. The sentences from which relief is sought are:

Count I—Death; Count II—Life; Count III—Life

1. (a) Court in which sentences were rendered: Oklahoma County District Court
(b) Case Number: CF-2002-46
2. Date of original sentence: April 2, 2004
3. Terms of sentences:
 - a. Count I, First-Degree Murder—Death
 - b. Count II, Robbery with Firearms—Life
 - c. Count III, Conspiracy—Life
4. Name of Presiding Judge: Honorable Ray C. Elliott
5. Petitioner Wood is presently in custody at the Oklahoma State Penitentiary, H-Unit.

Does Petitioner have criminal matters pending in other courts? Yes () No (X)

¹ In many places in the state-court record, Tremane Wood's first name is incorrectly spelled as "Termene."

I. CAPITAL OFFENSE INFORMATION

6. Petitioner was convicted of the following crime for which a sentence of death was imposed: First-Degree Murder

Aggravating factors alleged and found:

- a. The defendant knowingly created a risk of death to more than one person;
- b. The murder was especially heinous, atrocious, or cruel; and
- c. At the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

Mitigating factors listed in jury instructions:

- a. The defendant is only 24 years old.
- b. The defendant's parents were divorced at a young age.
- c. The defendant has a family that loves him and will continue to support him in a prison environment and desperately wants to do so.
- d. The defendant has a son, Brendon, who is five (5) years old. He would like to see what his son becomes and hopefully be a positive influence on him in the future.
- e. The defendant has another son, Tremane, who is two (2) years old. He would like to see what his son becomes and hopefully be a positive influence on him in the future.
- f. The defendant had no father figure during his childhood, and little support from his natural father.
- g. The defendant's mother was absent during most of his childhood and was faced with substitute parenting.
- h. The defendant has a moderately severe mental health disorder.

- i. The defendant can live in a structured prison environment without hurting anyone.
- j. The defendant's previous felony conviction was non-violent. This is his first violent conviction.
- k. With increased age, the defendant could become a positive influence on others, even in prison.
- l. The defendant has been employed in the past.
- m. The defendant has had prior drug dependencies.
- n. The defendant spent time in foster care.
- o. The defendant took directions from older brother, Zjaiton Wood.
- p. The defendant is of educational potential.
- q. The defendant is of average intelligence.

Was victim impact evidence introduced at trial: Yes (X) No ()

7. Check whether the finding of guilty was made:

After plea of guilty () After plea of not guilty (X)

8. If found guilty after a plea of not guilty, check whether the finding was made by:

A jury (X) A judge without a jury ()

9. Was the sentence determined by (X) a jury, or () the trial judge.

II. NON-CAPITAL OFFENSE INFORMATION

10. Petitioner was convicted of the following offenses for which a sentence of less than death was imposed: Robbery with Firearms—Life; Conspiracy to Commit a Felony—Life

11. Check whether the finding of guilty was made:

After plea of guilty () After plea of not guilty (X)

12. If found guilty after a plea of not guilty, check whether the finding was made by:

A jury (X)

A judge without a jury ()

III. CASE INFORMATION

13. Names of lawyers in trial court:

John Albert
3001 NW Classen Boulevard
Oklahoma City, Oklahoma 73106

Lance Phillips
7 South Mickey Mantle Drive, Suite 377
Oklahoma City, Oklahoma 73104

14. Was lead counsel appointed by the court? Yes (X) No ()

15. Was the conviction appealed? Yes (X) No ()

To what court or courts? Oklahoma Court of Criminal Appeals

No. D-2004-550 (dismissed Apr. 5, 2005, as untimely)

No. D-2005-171 (out-of-time appeal allowed)

Date Brief in Chief filed: June 28, 2005

Date Response filed: July 22, 2005

Date Reply Brief filed: August 11, 2005

Date of Oral Argument (if set): November 28, 2006

Date of Petition for Rehearing: May 21, 2007

Has this case been remanded to the District Court for an evidentiary hearing on direct appeal? Yes (X) No ()

If so, what were the grounds for the remand?

Ineffective assistance of trial counsel for (1) failure to investigate, develop and present mitigation evidence; and (2) failure to properly impeach state's witness Brandy Warden.

16. Names and addresses of lawyers for appeal:

Perry Hudson
1315 North Shartel Avenue
Oklahoma City, Oklahoma 73103

Jason Spanich
805 Northwest 8
Oklahoma City, Oklahoma 73106

17. Was an opinion written by the appellate court? Yes (X) No ()

Wood v. State, 2007 OK CR 17, 158 P.3d 467

18. Was further review sought? Yes (X) No ()

Petition for writ of certiorari to the United States Supreme Court
Denied: *Wood v. Oklahoma*, 552 U.S. 999 (2007)

Amended (First) Application for Post Conviction Relief, filed April 25, 2007
Denied: *Wood v. State*, No. PCD-2005-143 (Okla. Crim. App. June 30, 2010)

Second Application for Post Conviction Relief, filed July 6, 2011
Denied: *Wood v. State*, No. PCD-2011-590 (Okla. Crim. App. Sept. 30, 2011)

Petition for a Writ of Habeas Corpus, *Tremane Wood v. Anita Trammell*, No. 5:10-cv-00829-HE, United States District Court for the Western District of Oklahoma
Denied: *Wood v. Trammell*, No. CIV-10-0829-HE, 2015 WL 6621397 (W.D. Okla. Oct. 30, 2015)

Appeal to the United States Court of Appeals for the Tenth Circuit
Denied: *Wood v. Carpenter*, 899 F.3d 867 (10th Cir.), *opinion modified and superseded on denial of rehearing*, 907 F.3d 1279 (2018)

Petition for writ of certiorari to the United States Supreme Court
Denied: *Wood v. Carpenter*, 139 S. Ct. 2748 (2019)

Third Application for Post Conviction Relief, filed June 23, 2017
Denied: *Wood v. State*, No. PCD-2017-653 (Okla. Crim. App. Aug. 28, 2017)

Petition for writ of certiorari to the United States Supreme Court
Denied: *Wood v. Oklahoma*, 139 S. Ct. 938 (2019)

Issues raised in first post conviction application:

- Proposition I: Trial Court Erred by Excluding Testimony from Expert Witness
- Proposition II: Newly Discovered Evidence and New Law Renders Mr. Wood's Conviction and Sentence Suspect and Unreliable
- Proposition III: Petitioner Received Ineffective Assistance of Appellate and Trial Counsel in Violation of the Sixth, Eighth, and Fourteenth Amendments, and Article II, §§ 7, 9, and 20 of the Oklahoma Constitution
- Proposition IV: Prosecutorial Misconduct Resulted in Unfair Proceedings
- Proposition V: Error Occurred When Jurors Moved Vehicles after Being Sworn
- Proposition VI: The Cumulative Impact of Errors Identified on Direct Appeal and Post-Conviction Proceedings Rendered the Proceeding Resulting in the Death Sentence Arbitrary, Capricious, and Unreliable

Issues raised in second post conviction application:

- Proposition One: The Trial Court Violated Tremane's Sixth, Eighth, and Fourteenth Amendment Rights by Impermissibly Coercing the Jury
- Proposition Two: Prosecutorial Misconduct During the State Court Proceedings Deprived Tremane of his Due Process Rights and Rendered his State Court Proceedings Unfair
- Proposition Three: Tremane Was Denied His Sixth and Fourteenth Amendment Right to the Effective Assistance of Trial Counsel Because Counsel Failed to Present Evidence Challenging the Testimony of the State's Forensic Expert
- Proposition Four: Tremane Was Denied His Sixth, Eighth, and Fourteenth Amendment Right to Counsel During his Post-Conviction Proceedings
- Proposition Five: The State Court 3.11 Proceedings Violated Tremane's Due Process Rights
- Proposition Six: Tremane's Due Process Rights Were Violated by the State Withholding Exculpatory Evidence
- Proposition Seven: The Cumulative Impact of the Errors in this Case Requires Relief

Issues raised in third post conviction application:

Proposition One: Newly discovered evidence establishes that the race of the victim combined with the race of Tremane Wood himself, greatly affected the likelihood that Wood would be sentenced to death in violation of Article II Sections 7, 9, 19 and 20 of the Oklahoma Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Issues raised in federal habeas petition:

Claim One: Tremane Was Denied His Sixth and Fourteenth Amendment Right to the Effective Assistance of Counsel During the Penalty Phase of his Capital Murder Trial Because Counsel Failed to Investigate and Present Mitigating Evidence

Claim Two: Prosecutorial Misconduct During his Trial Deprived Tremane of his Due Process Rights

Claim Three: Tremane Was Denied His Fourteenth Amendment Right to Counsel During His Direct Appeal Proceedings

Claim Four: Because of Errors Regarding the Aggravating Factors in Tremane's case, His Death Sentence Is in Violation of His Fifth, Sixth, Eighth, and Fourteenth Amendment Rights

Claim Five: The Trial Court Violated Tremane's Sixth, Eighth, and Fourteenth Amendment Rights by Impermissibly Coercing the Jury

Claim Six: Tremane Was Denied His Sixth and Fourteenth Amendment Right to the Effective Assistance of Trial Counsel Because Counsel Failed to Present Evidence Challenging the Testimony of the State's Forensic Expert

Claim Seven: Prosecutorial Misconduct During the State Court Proceedings Deprived Tremane of His Due Process Rights and Rendered his State Court Proceedings Unfair

Claim Eight: Tremane Was Denied His Sixth, Eighth, and Fourteenth Amendment Rights to Counsel During His Post-Conviction Proceedings

Claim Nine: The State Court 3.11 Proceedings Violated Tremane's Due Process Rights

Claim Ten: Tremane's Due Process Rights Were Violated by the State Withholding Exculpatory Evidence

PART B: GROUNDS FOR RELIEF

19. Has a motion for discovery been filed with this application? Yes (X) No ()
20. Has a motion for Evidentiary Hearing been filed with this application?
Yes (X) No ()
21. Have other motions been filed with this application or prior to the filing of this application? Yes () No (X)
22. List propositions raised (list all sub-propositions):

Proposition One: Newly discovered evidence establishes that Mr. Wood received ineffective assistance of trial counsel in violation of the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article II, §§ 7, 9, and 20 of the Oklahoma Constitution

PART C: FACTS

References to the record will be made as follows:

1. The original trial record is referred to as (O.R.1 ____ using the page number).
2. Transcripts of the jury trial and Rule 3.11 evidentiary hearing will be referred to as (Tr. ____ at ____ using the date of the transcript and the page number).
3. Documents from the second direct appeal, No. D-2005-171, will be referred to as (DA2 docket number ____, ____ at ____ using the exhibit letter and page number.)
4. Documents from the first postconviction proceeding, No. PCD-2005-143, will be referred to as (PCR1 docket number ____, ____ at ____ using the exhibit number and page number or PCR1 docket number ____ at ____ using the page number.)

Procedural History

Tremaine Wood, along with his older brother¹ Zjaiton (“Jake”) Wood, Jake’s girlfriend Lanita Bateman, and Tremaine’s former girlfriend and mother of his child, Brandy Warden, were

¹ Mr. Wood and Jake have another brother, Andre Wood, who is five years older than Mr. Wood. (See Tr. 2/23/06 at 158.)

all charged with first-degree felony murder for the death of Ronnie Wipf that occurred around 3:30 A.M. on January 1, 2002. (O.R.1 79, 614–16.) Mr. Wood was also charged with one count of robbery with firearms and one count of conspiracy to commit a felony (robbery). (*Id.*) A bill of particulars was filed alleging four aggravating circumstances: (1) that during the murder, the defendant knowingly created a great risk of death to more than one person, *see* 21 O.S. § 701.12(2); (2) that the murder was especially heinous, atrocious, or cruel, *see* 21 O.S. § 701.12(4); (3) that the murder was committed for purposes of preventing lawful arrest or prosecution, *see* 21 O.S. § 701.12(5); and (4) there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society, *see* 21 O.S. § 701.12(7). (O.R.1 at 72.)

On April 2, 2004, an Oklahoma County jury found Mr. Wood guilty of all charges. (Tr. 4/2/04 at 214–15.) The jury found three of the four aggravating circumstances presented by the state, rejecting the circumstance that the murder was committed for purposes of preventing lawful arrest or prosecution; the jury recommended life sentences on the non-capital counts and the death penalty on the capital count. (Tr. 4/5/04 at 163–64.) Mr. Wood was formally sentenced on May 7, 2004. He appealed his conviction and sentences, and this Court affirmed.

Wood v. State, 2007 OK CR 17, 158 P.3d 467, *cert. denied*, 552 U.S. 999 (2007).

Mr. Wood's first application for postconviction relief was filed on December 26, 2006. An amended application was filed on April 25, 2007. This Court denied relief. *See Wood v. State*, No. PCD-2005-143 (Okla. Crim. Ct. App. June 30, 2010).

Mr. Wood's second application for postconviction relief was filed on July 6, 2011. This Court denied relief. *See Wood v. State*, No. PCD-2011-590 (Okla. Crim. App. Sept. 30, 2011).

Mr. Wood's petition for writ of habeas corpus under 28 U.S.C. § 2254 was filed in the United States District Court for the Western District of Oklahoma on June 30, 2011, and assigned docket No. 5:10-cv-0829-HE (W.D. Okla.). That petition was denied on October 30, 2015. *See Wood v. Trammell*, No. CIV-10-0829-HE, 2015 WL 6623197 (W.D. Okla. Oct. 30,

2015). The United States Court of Appeals for the Tenth Circuit affirmed the denial of the petition on August 9, 2018. *Wood v. Carpenter*, 899 F.3d 867 (10th Cir.), *opinion modified and superseded on rehearing*, 907 F.3d 1279 (2018). The United States Supreme Court denied Wood's petition for writ of certiorari on June 24, 2019. *Wood v. Carpenter*, 139 S. Ct. 2748. (2019).

Mr. Wood's third application for postconviction relief was filed on June 23, 2017. This Court denied relief. *See Wood v. State*, No. PCD-2017-653 (Okla. Crim. App. Aug. 28, 2017), *cert. denied*, 139 S. Ct. 938 (2019).

Mr. Wood now pursues this fourth application for postconviction relief.

The Record in This Proceeding

The record in this proceeding consists of the trial court and direct appeal record; the record in Mr. Wood's first, second, and third applications for postconviction relief; and the attachments submitted with this application. An appendix is filed contemporaneously with this application containing:

1. Copy of Mr. Wood's amended (first) postconviction application, [Attachment 1].
2. Copy of Mr. Wood's second postconviction application, [Attachment 2].
3. Copy of Mr. Wood's third postconviction application, [Attachment 3].
4. Mr. Wood's documentation of *in forma pauperis* status, [Attachment 4].
5. Copy of Affidavit of Benito Bowie, dated April 19, 2022, [Attachment 5].
6. Copy of Affidavit of Michael Maytubby, dated April 20, 2022, [Attachment 6].
7. Copy of Affidavit of Roshanda Jackson, dated June 11, 2022, [Attachment 7].
8. Copy of Affidavit of Ramona Robinson, dated June 15, 2022, [Attachment 8].
9. Copy of Excerpt of Bryan Stevenson's Rule 3.11 testimony from *Fisher v. State*, [Attachment 9].

Factual Summary

On December 31, 2001, Ronnie Wipf and Arnold Kleinsasser were celebrating New Year's Eve at the Bricktown Brewery in Oklahoma City, Oklahoma. (Tr. 3/31/04 at 14–15, 102, 120–21.) While at the Bricktown Brewery, the men met and socialized with Brandy Warden and Lanita Bateman. After the Bricktown Brewery closed, the women agreed to accompany these men back to a motel (Tr. 3/31/04 at 122–24), which they did after talking to Mr. Wood and his brother Jake Wood.² (Tr. 4/1/04. at 146–50).

Once inside the motel room, Wipf and Kleinsasser agreed to pay Bateman and Warden \$210.00 in exchange for sex. (Tr. 3/31/04 at 125–27.) Bateman pretended to call her mother, but actually called Jake. (Tr. 3/31/04 at 129.) Jake and Mr. Wood came to the room, and Jake banged on the door. (Tr. 3/31/04 at 129; Tr. 4/1/04 at 165–66.) Bateman and Warden ran out of the room, and Jake and Mr. Wood ran in. (Tr. 4/1/04 at 168.) Jake approached Kleinsasser with a gun; Mr. Wood approached Wipf with a knife, and Wipf put up a fight. (Tr. 3/31/04 at 133–36.) Jake left Kleinsasser to go assist Mr. Wood, who had been struggling with Wipf. (*Id.* at 135.) After Mr. Wood demanded more money from Kleinsasser, he returned to the struggle, and Kleinsasser fled the room. (*Id.* at 139.) Wipf died from a single stab wound to the chest. (Tr. 04/02/04 at 11–12, 18.) Kleinsasser was unable to identify who had stabbed Wipf. (Tr. 3/31/04 at 172–73.)

Mr. Wood, along with Jake, Bateman, and Warden, were charged with first-degree felony murder, in violation of 21 O.S. § 701.7(B); robbery with firearms, in violation of 21 O.S. § 801; and conspiracy to commit a felony (robbery), in violation of 21 O.S. § 421(A). (O.R.1 at 79.) Warden, who was represented by the local public defender's office (*see, e.g.*, Tr. 7/25/02 at 1–2), pleaded guilty to being an accessory after the fact in exchange for her testimony at her codefendants' trials.

From February 2002 to October 2002, Mr. Wood was represented by private conflict counsel who was not qualified to handle capital cases. (*See* O.R.1 at 27, 76.) On August 14, 2002,

² Jake's first name is used throughout this application to distinguish him from Mr. Wood.

the final day of the preliminary hearing, the State filed a bill of particulars, informing Mr. Wood and Jake that it was seeking the death penalty against them both. (O.R.1 at 72; Tr. 8/14/02 at 442.) Mr. Wood's and Jake's counsel notified the court that they could not represent the brothers any longer because they did not represent capital defendants. (Tr. 8/14/02 at 442; *see also* O.R.1 at 76.) The trial court appointed the Oklahoma Indigent Defense System to represent Jake, and appointed private conflict counsel, John Albert, to represent Mr. Wood. (Tr. 10/2/02 at 3, 10; O.R.1 at 85.)

Bateman was the first to go to trial. She was convicted of all three counts and received a life sentence. Albert was hoping that Jake's trial would go before Mr. Wood's, but Mr. Wood was tried first, as Albert lamented after the trial. (Tr. 2/27/06 at 247 ("They [Jake's counsel] continued it [his trial] so far that I went to trial first."))

At Mr. Wood's trial, the state's case-in-chief at the first stage lasted three days. (Tr. 3/31/04; Tr. 4/1/04; Tr. 4/2/04.) Albert did not intend to call any witnesses to testify on Mr. Wood's behalf at the first stage. (Tr. 4/2/04 at 60–61 ("I would rest on reasonable doubt, and try to argue reasonable doubt to the jury.")) Albert informed the court that, despite his advice to the contrary, Mr. Wood wanted Jake to testify on his behalf. (Tr. 4/2/04 at 60–61.) After the court separately conducted colloquies with Mr. Wood and with Jake (Tr. 4/2/04 at 61–73), Albert indicated that "because this is a death penalty case, I will let [Mr. Wood] decide" (Tr. 4/2/04 at 79).

Albert waived the defense's opening statement in the jury's presence "since I just have one witness I am calling[.]" (Tr. 4/2/04 at 83, 85.) Jake testified that he and another man named "Alex" committed this crime. (Tr. 4/2/04 at 89, 91–95.) Jake testified that he initially had the gun when he and Alex entered the motel room. (*Id.* at 94.) Jake explained that when he saw that Wipf was getting the best of Alex, he went over and punched Wipf in his head and body. (*Id.* at 94.) Jake grabbed the knife and stabbed Wipf in the chest. (*Id.* at 94.) At the conclusion of the first stage, the jury found Mr. Wood guilty on all counts. (*Id.* at 214–15.)

The second stage, which included both the state's presentation of aggravation and Mr. Wood's presentation of mitigation, began and ended in *one afternoon*. (Tr. 4/2/04 at 218 (ordering the jury to report at 1:00 P.M. on Monday for the second stage); Tr. 4/5/04 at 159 (noting that jury retired for deliberations at 5:57 P.M.)) The state incorporated all the evidence from the first stage, and also presented evidence of a robbery of a pizza restaurant committed by Mr. Wood, Jake, Bateman, and Warden, earlier on December 31, 2001. (Tr. 04/05/04 at 17–18, 24–26.) The entire defense presentation during the second stage consisted of only three witnesses: Mr. Wood's mother Linda Wood, his mother's then-girlfriend Andre Taylor, and psychologist Ray Hand, Ph.D. (O.R.1 at 355–56; Tr. 4/5/04 at 12–13, 33–102.) At the conclusion of the second stage, the jury recommended death on the murder charge and the maximum sentence of life on the robbery and conspiracy counts. (*Id.* at 163–64.)

The prosecutor, Fern Smith, stated, “Mr. Zjaiton [Jake] Wood is really the worst of the two of them, considering the evidence that we know about and that but for Mr. Zjaiton Wood, Termene [*sic*] Wood would not have acted in the manner he did.” (*See State v. Zjaiton Wood*, CF-2002-46 (Okla. Cty. Dist. Ct.), Tr. 9/20/04 at 25.)³ Nevertheless, Mr. Wood was the only one of the four codefendants who received a sentence of death.

Facts Supporting Fourth Application for Postconviction Relief

The relevant facts supporting Mr. Wood's postconviction claims are set forth in the individual propositions below and in the attachments to this application.

³ Smith emphasized Jake's heightened culpability and responsibility for stabbing Wipf at the penalty phase of his subsequent trial. *See Wood*, CF-2002-46, Tr. 3/1/05 at 118 (Smith telling jurors that “Zjaiton [Jake] Wood described his enjoyment of the suffering of Ronnie Wipf.... [H]e said, ‘When I entered that motel room... [a]nd when I stabbed that dead punk, I almost came on myself. To feel the power of that knife slice through the human tissue was a feeling like no other.’”).

PART D: PROPOSITIONS—ARGUMENTS AND AUTHORITIES

Proposition One: Newly discovered evidence establishes that Mr. Wood received ineffective assistance of trial counsel in violation of the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article II, §§ 7, 9, and 20 of the Oklahoma Constitution.

1. Introduction

In his first application for postconviction relief, Mr. Wood alleged that newly discovered evidence of his trial counsel's alcohol and drug abuse establishes that he received ineffective assistance at trial. (PCR1 Dkt. 26 at 2–6.) In support, he offered two documents. First, he presented a transcript of direct contempt proceedings against his trial counsel, John Albert, regarding his conduct in three unrelated cases. (PCR1 Dkt. 17, Exh. 4.) Second, he presented an affidavit from the General Counsel of the Oklahoma Bar Association, which explained that on April 24, 2006, the Oklahoma Supreme Court issued an order indefinitely suspending Albert from the practice of law. (PCR1 Dkt. 17, Exh. 5.) Mr. Wood also submitted other materials from the 2006 attorney disciplinary proceedings against Albert, including grievances from several of Albert's clients filed with the bar between April 2005 and March 2006. (PCR1 Dkt. 32-1.) *See generally State ex rel. Oklahoma Bar Ass'n v. Albert*, 2007 OK 31, 163 P.3d 527 (confirming retroactive suspension and reinstatement to probation).

In addition, Mr. Wood provided the findings of fact and conclusions of law from two capital cases in which the impact of Albert's substance abuse on his performance and the outcomes of those proceedings was in issue. (PCR1 Dkts. 36, 37.) In both of those cases, this Court concluded that Albert rendered ineffective assistance and granted relief on that basis. *See Littlejohn v. State*, 2008 OK CR 12, ¶¶ 25–28, 181 P.3d 736, 744–45 (vacating death sentence and remanding for resentencing); *Fisher v. State*, 2009 OK CR 12, ¶¶ 6–25, 206 P.3d 607, 609–14 (reversing conviction and death sentence and remanding for new trial).

In the face of this evidence, this Court denied Mr. Wood’s ineffective assistance claim as presented in the first postconviction proceeding. It concluded that Albert’s “client neglect, abuse of drugs and alcohol and emotional instability, however, appear to have begun—based on the materials provided by Wood—after Wood’s death penalty trial had been completed.” (PCR1 Dkt. 42 at 5 (footnote omitted).) The Court acknowledged that evidence showed an increase in Albert’s alcohol consumption around the time of Wood’s trial. (*Id.* (recognizing that “[t]he Findings of Fact and Conclusions of Law from Keary Littlejohn’s case indicate that trial counsel’s [i.e., Albert’s] secretary noticed an increase in trial counsel’s consumption of alcohol around the time of Wood’s trial[.]”).) However, it relied on Albert’s self-serving assertion that “his substance abuse disorder began in earnest in March 2005, a year after Wood’s death penalty trial[.]” noting that Albert’s problems with alcohol and drug abuse did not peak until March 2006. (*Id.* at 5–6 & n.5; *see also Wood*, No. PCD-2011-590, Attachment 14, ¶ 10 (Albert attesting, “I was very defensive while on the stand at Tremane’s evidentiary hearing. I had a pending bar investigation, and I was worried about the impact that being found ineffective would have on my license to practice law[.]”). The Court concluded, “Without proof trial counsel was suffering from his addiction *during Wood’s trial*, evidence of trial counsel’s subsequent struggles with substance abuse and other difficulties does not prove or show that he was more than likely incapacitated or ineffective during Wood’s trial.” (PCR1 Dkt. 42 at 5 (emphasis added).)

Mr. Wood has now uncovered proof that Albert’s struggles with substance abuse predated his trial. Benito Bowie, who first became acquainted with Albert in 1998, explains, “During the almost decade I knew John [Albert], he did cocaine every day. John also drank regularly, probably daily.” (Attachment 5 ¶¶ 2, 4.) Bowie further explains that starting in 1999 or 2000, Albert represented all the members of the Playboy Gangsta Crips, who provided him with drugs. (Attachment 5 ¶ 3.)

Michael Maytubby also attests that he first met Albert in 2001, when Albert began representing him in a negligent homicide case. (Attachment 6 ¶¶ 1–2.) In his sworn affidavit,

Maytubby provides greater detail about Albert's abuse of alcohol, painkillers, and anti-anxiety drugs, sometimes in combination:

Johnny [Albert] and I spent a lot of time together, even when he was not working directly on my case. We attended OU games, or he would come over to my place to hang out. We also hung out at bars and partied together. Starting in 2001, I knew Johnny drank regularly. He also took Oxycontin, Lortabs, and Xanax. I saw him take the pills while drinking alcohol. This occurred at various times throughout the day, including during the workweek and workday. I also spent time at Johnny's office where we would play pool and drink.

(Attachment 6 ¶ 3.) Maytubby first heard that Albert was using cocaine, in addition to drinking and using pills, in 2001. (Attachment 6 ¶ 4.) Maytubby states, "I am sure Johnny was using cocaine in 2002 because I would give it to him as payment for legal fees." (Attachment 6 ¶ 4.) By 2003, Maytubby witnessed Albert use powder cocaine and crack cocaine. (Attachment 6 ¶ 5.) Maytubby recalled, "Johnny really started to decline and was slipping during this period. Johnny would sometimes stop by my house and use cocaine, including in the morning before he had court." (Attachment 6 ¶ 5.) Maytubby further states that, "By 2004 to 2005, Johnny's drug and alcohol abuse had gotten so bad that he looked like someone from the streets. I heard Johnny was also using 'ice' (crystal meth) by that time." (Attachment 6 ¶ 7.)

These accounts from Bowie and Maytubby demonstrate that Albert suffered from a serious addiction to multiple substances while he was handling Mr. Wood's capital murder trial. Their credible evidence of Albert's impairment, which contributed to his numerous failures to subject the prosecution's case against Mr. Wood to meaningful adversarial testing and to investigate, develop, and present mitigation evidence, establish that Mr. Wood was deprived of the effective assistance of counsel in violation the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article II, Sections 7, 9, and 20 of the Oklahoma Constitution. This Court should therefore grant Mr. Wood relief from his unconstitutional convictions and sentences. Alternatively, as Mr. Wood has stated a colorable claim that his rights under the federal and state constitutions have been violated, this Court should grant his

accompanying requests for discovery and an evidentiary hearing to further factually develop and support this claim.

2. On account of Albert’s serious addiction to and use of multiple substances before and during Mr. Wood’s trial, Mr. Wood received ineffective assistance of counsel in violation of the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article II, §§ 7, 9, and 20 of the Oklahoma Constitution.

It is well established that the Sixth Amendment to the U.S. Constitution confers a right to the effective assistance of counsel in criminal proceedings. *Fisher v. State*, 2009 OK CR 12, ¶ 6, 206 P.3d 607, 609 (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* (quoting *Strickland*, 466 U.S. at 686). “This Court reviews claims of ineffective assistance of counsel under the two-part *Strickland* test that requires an appellant to show: (1) that counsel’s performance was constitutionally deficient; and (2) that counsel’s performance prejudiced the defense, depriving the appellant of a fair trial with a reliable result.” *Id.* ¶ 7, 206 P.3d at 609 (citing *Strickland*, 466 U.S. at 687; *Davis v. State*, 2005 OK CR 21, ¶ 7, 123 P.3d 243, 246).

Accusations of ineffective assistance of counsel stemming from a lawyer’s substance-abuse issues are legion. *See, e.g.*, Ken Armstrong, *What Can You Do with a Drunken Lawyer?*, *The Marshall Project* (Dec. 10, 2014), at <<https://www.themarshallproject.org/2014/12/10/what-can-you-do-with-a-drunken-lawyer>>. Nevertheless, courts agree that “[a]lcoholism, or even alcohol or drug use during trial, does not necessarily constitute a *per se* violation of the Sixth Amendment absent some identifiable deficient performance resulting from the intoxication.” *United States v. Jackson*, 930 F. Supp. 1228, 1234 (N.D. Ill. 1996) (citing *Burnett v. Collins*, 982 F.2d 922, 930 (5th Cir. 1993); *Kelly v. United States*, 820 F.2d 1173, 1176 (11th Cir. 1987)). After all, under *Strickland* “[i]t is not enough for the defendant to show that the errors had some conceivable effect on the

outcome of the proceeding.” 466 U.S. at 693. Nor is it sufficient to show that trial counsel was later disbarred due to his substance-abuse issues. *See, e.g., Harris v. State*, 612 S.E.2d 789, 793 (Ga. 2005) (citing *Shiver v. State*, 581 S.E.2d 254, 256 (Ga. 2003)). At the very least, a claim of ineffective assistance of counsel based on counsel’s substance-abuse issues must identify “specific examples of how... trial counsel” rendered deficient performance on account of those issues. *Bridge v. Lynaugh*, 838 F.2d 770, 776 (5th Cir. 1988); *accord Fisher*, 2009 OK CR 12, ¶¶ 13, 24, 206 P.3d at 611, 613 (explaining that the “damaging result of the lack of trust relationship and/or the substance abuse problem was that trial counsel failed to properly investigate, prepare and present relevant and readily available evidence at trial” and in mitigation of a death sentence).

A. On account of his substance-abuse issues, Albert neglected to challenge essential aspects of the prosecution’s case against Mr. Wood at the first stage and to present a cohesive mitigation package to the jury at the second stage.

“An attorney undoubtedly has a duty to consult with the client regarding ‘important decisions,’ including questions of overarching defense strategy.” *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (quoting *Strickland*, 466 U.S. at 688). A lawyer ordinarily fulfills this duty by informing the client about a proposed strategy and its potential benefits. *Id.* Here, however, newly discovered evidence shows that Albert’s substance-abuse problem contributed to his failure to adequately investigate and formulate a defense to the charges at the first stage. Moreover, in “capital cases, the constitutional guarantee to reasonably effective counsel includes the right to a reasonably adequate investigation into potential mitigation evidence—evidence which might convince a jury that a sentence of death is not appropriate.” *Littlejohn*, 2008 OK CR 12, ¶ 27, 181 P.3d at 745. Here, newly discovered evidence also establishes that Albert’s substance-abuse problem contributed to his failure to adequately investigate, prepare, and present relevant and readily available mitigation evidence at Mr. Wood’s trial. *See Fisher*, 2009 OK CR 12, ¶ 13, 206 P.3d at 611.

Albert admitted to meeting with Mr. Wood “on a very limited basis and only when [they] were in court.” (*Wood*, No. PCD-2011-590, Attachment 14, ¶ 5.) Albert stated that at the time he represented Mr. Wood, he “was drinking on a regular basis” and “had an excessive caseload.” (*Wood*, No. PCD-2011-590, Attachment 14, ¶¶ 3, 5.) Albert was also using “cocaine, including in the morning before he had court.” (Attachment 6 ¶ 5.) He had 100 cases (Tr. 2/27/06 at 247), and “would often be in court on ten cases per day” (*Wood*, No. PCD-2011-590, Attachment 14, ¶ 3). Albert conceded that he did “very little to investigate in preparation for [Mr. Wood’s] trial.” (*Wood*, No. PCD-2011-590, Attachment 14, ¶ 5). In fact, he did not have an investigator complete any work on the case. (*Wood*, No. PCD-2011-590, Attachment 14, ¶ 6; Tr. 2/27/06 at 229–30.) When Albert told Mr. Wood that “if we do not put on any witnesses that would be the end of the first stage evidence” (Tr. 4/2/04 at 82), it became abundantly clear to him that Albert was not doing anything to defend him. Indeed, Albert had barely communicated with Mr. Wood, had conducted virtually no investigation, and had no strategy. So when Jake insisted on testifying on Mr. Wood’s behalf, he acquiesced because Albert had offered him no other strategy for defending himself at the first stage of the trial. (*See Wood*, No. PCD-2011-590, Attachment 14, ¶¶ 5–6 (Albert attesting that “I did very little to investigate in preparation for [Tremaine’s] trial[,]” “met with him on a very limited basis and only when we were in court[,]” and “did not ask an investigator to do anything to help me on Tremaine’s case[.]”).)

Beginning with the first stage of the trial, Albert failed to meaningfully test the state’s case. He began the defense’s presentation by waiving opening statement. (Tr. 4/2/04 at 83, 85.) Albert mounted no challenge to the medical examiner’s testimony regarding the autopsy of the victim, Ronnie Wipf. Accordingly, the jury heard virtually unchallenged testimony from the chief medical examiner, Dr. Fred Jordan. But Dr. Jordan was not the medical examiner who actually performed the autopsy of the victim. (Tr. 4/2/04 at 6.) Dr. Larry Balding, who had performed the autopsy, had passed away the previous year. (Tr. 4/2/04 at 6.) Dr. Jordan testified about the results of the autopsy based on Dr. Balding’s report, records, and photographs. (Tr. 4/2/04 at 6.)

Albert lodged no objection based on the Confrontation Clause of the Sixth Amendment. *Cf. Bullcoming v. New Mexico*, 564 U.S. 647, 652 (2011) (explaining that “surrogate testimony” from a scientist who did not “sign the certification or perform or observe the test reported in the certification[]” violates the Confrontation Clause unless the accused has had a prior opportunity to cross-examine the “particular scientist” who made the certification); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310–11 (2009) (holding that chemists who certified that a substance is cocaine give “testimonial” evidence for purposes of the Confrontation Clause, such that they must be available to testify at trial absent the defendant’s prior opportunity to cross-examine them).

Dr. Jordan testified that the cause of death was from a five-inch deep stab wound. (Tr. 4/2/04 at 14.) But a defense expert could have helped Albert attack the autopsy report, and thus the testimony from Dr. Jordan, in several ways. First, a defense expert could have helped him show that the stab wound allegedly caused by the knife was not as wide as the knife itself. (*See Wood*, No. PCD-2011-590, Attachment 9 at 3–4.) Thus the entire length of the knife could not have been inserted into Wipf’s body. Second, the documentation of the stab wound was made after the body was autopsied. This is against the common practice in forensic pathology of documenting the injuries before the autopsy examination is performed. (*Id.* at 6.) Third, the stab wound should have been documented with the approximation of the edges of the wound (with the wound being closed), which was not done in this case. (*Id.* at 6–7.) Finally, an expert would have criticized the medical examiner for not taking photographs of the body before conducting the autopsy. (*Id.* at 6.)

Another problem with the autopsy report involved the toxicology. (*Id.* at 6.) The report stated that Wipf had no drugs or alcohol in his system at the time he died. (Tr. 4/2/04 at 11.) But Wipf’s friend Kleinsasser testified that Wipf had been drinking on the night of the crime. (Tr. 3/31/04 at 121.) And co-defendant Lanita Bateman also indicated that Wipf was drunk. (*See Wood*, No. PCD-2011-590, Attachment 10 at 2.) But Albert did not confront Dr. Jordan with any

of this contradictory testimony. Had this evidence been presented during the first stage of Mr. Wood's trial, the state's case would have been challenged regarding the circumstances surrounding the victim's death. The jury could have determined that the autopsy report was not accurate and that there were problems with Dr. Jordan's testimony. Crucially, the jury could have also disbelieved the state's assertion that the stab wound was five inches deep, which was repeatedly emphasized in support of the heinous, atrocious or cruel aggravating circumstance. (Tr. 4/5/04 at 8, 111, 112, 133, 157.) The prosecutor argued to the jury that it was "shockingly evil" to stab a man with a knife and "stick it five inches into his body." (*Id.* at 111.) This repeated reference to the depth of the wound portrayed a more graphic image of the killing to the jury than the evidence supported. The failure to attack the methods and conclusions from the autopsy have impacted both the first and second stages of Mr. Wood's trial, casting doubt on both the manner of the killing and its heinous, atrocious, or cruel nature.

Albert's failure to adequately investigate, prepare, and mount a first stage defense, or to communicate with Mr. Wood prior to trial, resulted in Mr. Wood acquiescing when his brother, Jake, insisted on testifying on his behalf. (*See Wood*, No. PCD-2011-590, Attachment 14 ¶¶ 4–6.) Prior to Jake's testimony Albert informed the court, "It has been my advice to my client, Termane Wood, that I would not call this witness. I would rest on reasonable doubt, and try to argue reasonable doubt to the jury." (Tr. 4/2/04 at 60–61.) Albert explained, "My concern is more for the second part of this trial. This may hurt us in the second part. He is more focused on the first part. I have talked to him about both stages of this trial and how this could affect both stages." (Tr. 4/2/04 at 64.) Jake was the *only* first stage witness for the defense and the prosecution easily discredited his testimony that a "white" man named "Alex," rather than Mr. Wood, participated in the crime. (*See* Tr. 4/2/04 at 88–100 (Jake testifying about his commission of the crime with "Alex"); *see also id.* at 193 (prosecutor telling jurors that "Zjaiton [Jake] wants you to believe that there was an Alex. I submit to you if there was an Alex, as much as Zjaiton

wanted to come in here and help his brother out, if there had been an Alex why did he wait so long?’’)).

In addition to mounting no first stage defense on Mr. Wood’s behalf, Albert did not challenge the great-risk-to-others aggravating circumstance. Jake’s counsel successfully argued at his trial that this aggravating circumstance should be stricken, and the trial court found the evidence the state presented insufficient to meet the narrow definition under law. *See State v. Zjaiton Wood*, CF-02-46 (Okla. Cty. Dist. Ct.), Tr. 2/28/05 at 23. In making its ruling, the court noted that Mr. Wood’s counsel had not asked the court to dismiss this same aggravating circumstance. (*Id.* at 11.) Thus, due to Albert’s incompetence, the jury was able to apply the great-risk-of-death aggravating circumstance in Mr. Wood’s case, while the jury in Jake’s case could not. (O.R.1 at 617.)

In addition to his failures respecting the first stage, Albert also failed to adequately investigate and present a case in mitigation respecting the second stage. “Counsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client.” *See American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* § 10.11, 31 Hofstra L. Rev. 913, 1058 (rev. ed. 2003) [hereinafter “ABA Guidelines”]. One critical way to do so is by “frontloading” mitigation in an effort “to humanize the client during the guilt or innocence stage of the trial.” *Eaton v. Wilson*, No. 09-CV-261-J, 2014 WL 6622512, at *149 (D. Wyo. Nov. 20, 2014) (citing with approval expert testimony on why frontloading mitigation “is so crucial in a death penalty case”), *aff’d sub nom. Eaton v. Pacheco*, 931 F.3d 1009 (10th Cir. 2019). This is especially important as there is “reason to believe that a number of jurors make up their minds about the defendant’s punishment even before they hear any evidence in the penalty phase.” Stephen Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1543 (1998).

But there is no indication in the record here that Albert gave any thought to frontloading mitigation. During the Rule 3.11 evidentiary hearing, Albert testified that in his opinion, “this was a first-stage case.” (Tr. 2/27/06 at 241.) In other words, in Albert’s view, mitigation did not matter. Accordingly, in preparation for the defense’s mitigation presentation, Albert did not talk to anyone but Mr. Wood’s mother, her then-girlfriend, and Jake—the only people whom Mr. Wood identified to Albert as possible mitigation witnesses. (Tr. 2/27/06 at 253–54.) Albert admitted that he never spoke to any of Mr. Wood’s friends, foster family members, or juvenile officers or mentors assigned to his case while he was in juvenile custody. (*Id.* at 254.) Albert did not formally interview Mr. Wood’s family; rather, he talked to them only when he saw them in the courtroom. (*Id.* at 243, 254.) What’s more, Albert admitted that he spoke with Mr. Wood only when he would see him in court because he did not “like to go” to the jail for visits. (*Id.* at 252.) Essentially, Albert conducted no investigation outside the courtroom. (*Wood*, No. PCD-2011-590, Attachment 14 ¶¶ 5.)

Relatives who were with Mr. Wood both before and after the crime could have provided critical evidence about his mental state during that period. For example, Rashonda Jackson, Mr. Wood’s paternal cousin, could have testified that in the crime’s aftermath Mr. Wood “was red in the face, shaking, and crying” and he “looked so shocked and scared.” (Attachment 7 ¶ 4.) According to Jackson, Mr. Wood “was so distraught that he threw up in the car and on me[]” and insisted that “[n]o one was supposed to die!” (*Id.* ¶ 5.) Jackson’s sister, Ramona Robinson, also could have testified that in the crime’s aftermath she “had never seen [Mr. Wood] cry like that before.” (Attachment 8 ¶ 3.) “He was down on the floorboard in the backseat of the car sobbing uncontrollably and rambling.” (*Id.* ¶ 5.) Their testimony could have been presented at the first stage of trial to preview a compelling mitigation story—that Mr. Wood’s older brother pressured him into participating in the robbery, that he was therefore less culpable than Jake, and that he was remorseful and distraught in the crime’s aftermath. However, this powerful mitigating evidence was never presented to the jury. *See, e.g., Renteria v. State*, 206 S.W.3d 689,

697–98 (Tex. Crim. App. 2006) (vacating death sentence because evidence of remorse was improperly excluded from the penalty phase).

Had Albert adequately communicated with his client and developed a cohesive strategy for both stages of trial aimed at avoiding the death penalty, including calling witnesses during the first stage to rebut the State’s evidence, frontload mitigation, and challenge the aggravating circumstances alleged, a reasonable probability exists that Mr. Wood would not have acquiesced to Jake testifying out of desperation and only because Albert presented him with no trial strategy and did nothing to meaningfully test the state’s case-in-chief.

The second stage of the trial began and ended on the afternoon of the business day following the jury’s guilty verdicts in the first stage. (Tr. 4/2/04 at 218 (ordering the jury to report at 1:00 P.M. on Monday for the second stage); Tr. 4/5/04 at 159 (noting that jury retired for deliberations at 5:57 P.M.).) At the second stage, the state relied in large part on the evidence presented at the first stage of the trial. (Tr. 4/5/04 at 5.) The only additional evidence that the state presented was Mr. Wood’s prior conviction of knowingly concealing stolen property, to which defense counsel stipulated, and testimony regarding the robbery of a pizza place that occurred before Wipf was killed. (*Id.* at 17, 23–24.)

Albert’s presentation in defense of Mr. Wood’s life was not much longer than the state’s second-stage presentation. Andre Taylor, Mr. Wood’s mother’s girlfriend, testified first. She had known Mr. Wood for “[a]bout seven years.” (Tr. 4/5/05 at 34.) Albert asked her a few cursory questions regarding Mr. Wood’s children, and whether she loved Mr. Wood. (Tr. 4/5/04 at 33–36.) Her testimony in support of Mr. Wood’s life spanned a total of three transcript pages.

Albert retained only one expert for the mitigation presentation—psychologist Ray Hand, Ph.D. Dr. Hand gave brief and cursory testimony in 25 pages of direct examination. He provided very vague information to the jury about what occurred in Mr. Wood’s life—using phrases such as “I wonder, I can’t prove this, but I wonder” (Tr. 4/5/04 at 53); “it is hard to know exactly” (*id.* at 54); “it is hard to know which [allegations of abuse] were valid and which

ones were invalid” (*id.* at 54), and “I don’t think he has that history, as I was able to find, of any violence that involved weapons or anything as a young child” (*id.* at 58). Moreover, Dr. Hand used demonstrative exhibits that, as the prosecutor put it, “Dr. Hand carried around with him to every jury trial that he testified in, and they were not specific to the Defendant Tremane Wood[.]” (Tr. 2/27/06 at 292.) He wrote his findings in a two-page letter that was dated March 18, 2004, only 11 days before trial began. (Tr. 4/5/04 at 63; *see also* O.R.1 at 561 (state moving to compel disclosure of Dr. Hand’s report).) The report was never introduced into evidence.

Despite being the only expert witness charged with providing insight into Mr. Wood’s character and background, on direct examination Dr. Hand told the jury that Mr. Wood had a “suspicious” attitude, and that he was “passive aggressive,” “immature,” and “self indulgent.” (Tr. 4/5/04 at 42.) Dr. Hand also discussed problems that were not necessarily features of Mr. Wood’s childhood. (*Id.* at 47–50 (giving overview of factors that could affect development); *id.* at 50–51 (listing factors that lead to healthy development).)

Dr. Hand testified that Mr. Wood’s life included “drug abuse” and “gang involvement.” (*Id.* at 55.) There was no explanation of how or why Mr. Wood ended up using drugs or being involved in a gang at such an early age. Albert had not undertaken any investigation into these matters and did not ask any follow-up questions. Instead of asking Dr. Hand to provide details about Mr. Wood’s chaotic and violent childhood, Albert asked if children in this type of environment—which, as far as the jury was concerned, simply involved parents who did not get along and moved around—end up doing really well. (*Id.* at 55–56.) Dr. Hand answered, “Some.” (*Id.* at 56.) In discussing the relationship between Mr. Wood and his brother Jake, Dr. Hand told the jury simply that Mr. Wood got into trouble “over and over” following Jake, and never expanded on the dynamics of their relationship. (*Id.* at 56–57.) Dr. Hand provided the jury with a confusing explanation of Mr. Wood’s psychological make-up, talking more about the characteristics that do not describe him than the ones that do. (*Id.* at 59–60.)

But the most damaging aspect of Dr. Hand's time on the stand came during cross-examination. Dr. Hand was not aware of Mr. Wood's juvenile offense records, and the prosecutor exploited this lack of awareness. The prosecutor questioned Dr. Hand about several of Mr. Wood's juvenile cases that included charges of assault and battery. (*Id.* at 70–72.) When asked if he was familiar with these charges, Dr. Hand responded that if it was “in the pile” then he reviewed it. (*Id.* at 72.) Dr. Hand, however, was unable to respond with any detail to the questions, and actually agreed that he would consider these crimes violent if the “specifics” indicated such. (*Id.* at 70–72.) Dr. Hand repeated his opinion that Mr. Wood was frustrated, angry, and suspicious. (*Id.* at 80.) On redirect, Albert suggested that the referenced juvenile charges might have been dismissed or might have even been from his brother Jake's record. (*Id.* at 83–85.) But on recross, the prosecutor showed Dr. Hand a copy of Mr. Wood's juvenile profile. Dr. Hand confirmed that it was Mr. Wood's record, not Jake's, and that the record included the assaults that were discussed. (*Id.* at 86–87.)

The third and last witness that testified for Mr. Wood was his mother, Linda, whom Dr. Hand had discredited as a contributor to Mr. Wood's chaotic home environment as a child. (Tr. 4/5/04 at 52–55.) In less than 15 transcript pages, she told the jury that she was abused by Mr. Wood's father, that Mr. Wood loved his children, that she loved Mr. Wood, that he was influenced by Jake, and that she would visit Mr. Wood in prison “[a]ll of the time” “if the jury picks something other than death.” (*Id.* at 100.) Although Linda mentioned that Mr. Wood's father, Raymond Gross, was “very abusive,” she did so in only a few sentences and in scant detail. (*Id.* at 91.) She quickly rattled off that she “had been beaten many, many times in front of my children. Tied up. Dragged down the highway. My bones broke. All kinds of things. Guns put to my head.” (*Id.*) That was the extent of her testimony on the domestic abuse. Albert did not ask her to describe the abuse in any detail, establish any of the foundation (*i.e.*, when, where, and how these incidences occurred, or who may have witnessed them), or introduce any evidence corroborating the abuse. (*Id.*) Prosecutors undermined what little testimony Linda provided by

suggesting that her allegations against Mr. Wood’s father—who they emphasized in closing argument was a police officer and provider—were fabricated (*id.* at 101, 121 (prosecutor arguing that Mr. Wood’s father “worked... [h]e was a police officer. And Ms. Wood made all of these invalid allegations against [him]”))), a fact that Albert failed to follow-up on because he asked no questions on redirect (*id.* at 102). The state also criticized the fact that there was no evidence of Linda being an absent parent. (*Id.* at 122.) As to Dr. Hand, the state discounted his testimony because he was unaware of Mr. Wood’s juvenile record. (*Id.* at 123.) Finally, the state contended that Mr. Wood had made the “choice” to follow Jake. (*Id.* at 125, 131.)

Albert failed to focus on mitigating circumstances in his brief closing argument. Instead of explaining to the jurors all of the reasons that they should vote for life, Albert criticized the state for not proving facts that he himself should have proven. (Tr. 4/5/04 at 142–47.) He told the jury, “These mitigators? I’m going to tear them up. You can do what you want to do with them.” (Tr. 4/5/04 at 147.) He concluded, “I ask you, please, don’t kill him for his sake, his family’s sake, and for all of our sake.” (*Id.* at 151.) In the end, Albert’s entire mitigation presentation amounted to little more than a few naked pleas to the jury for mercy.

B. Albert’s failures in his investigation, preparation, and presentation to the jury at both stages of Mr. Wood’s trial amount to constitutionally deficient performance under the *Strickland* framework.

In Oklahoma at the time of Mr. Wood’s trial, the standard of care for defending a capital client against a death sentence included: “gathering records, investigating family history, and interviewing as many friends, associates and family members as the defense can locate,” investigating “critical aspects of Defendant’s life history” such as “[c]hild abuse, neglect, mental illnesses, mental disorders, emotional disturbances, and the like,” “fully investigat[ing] all relevant circumstances surrounding [the life history],” “hiring expert witnesses and giving them time to digest records and other materials needed to evaluate [the client],” and providing experts “time and opportunity to visit [the client] and conduct any interviews or tests necessary[.]” (O.R.1 at 221–23.) “[N]o one is going to presume that [the defendant’s life] has value or meaning

unless you present that, and that's an incredibly challenging responsibility but absolutely critical in death penalty cases.” (Attachment 9 at 328.) To formulate an effective theory of defense, therefore, the attorney must “understand what all the information is.” (*Id.* at 344.)

The reasonableness of counsel's decisions is measured by the reasonableness of the investigation that goes into making such a decision. *Cf. Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (focusing on “whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background was itself reasonable”). The “investigation preparation is the absolute core of effective assistance.” (Attachment 9 at 336.) An attorney cannot make informed decisions on the case until he “ha[s] all that information in front of [him] and [he]... think[s] through it.” (*Id.* at 344.) “[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Strickland*, 466 U.S. at 690–91; *accord Littlejohn*, 2008 OK CR 12, ¶ 27, 181 P.3d at 745. In other words, any strategic decision made by counsel must be reasonable and informed by a reasonable investigation.

As previously discussed, in Mr. Wood's case, Albert conducted no investigation outside the courtroom. No reasonable professional judgment supported the decision to not investigate, particularly in a case in which his client's life was at stake. *See Littlejohn*, 2008 OK CR 12, ¶ 27, 181 P.3d at 745 (noting that “an uninformed capital mitigation strategy is not a sound one[]”); *Fisher*, 2009 OK CR 12, ¶ 24, 206 P.3d at 613 (deferring to district court's finding that Albert's failure to conduct “anything approaching an adequate second stage investigation cannot be labeled a reasonable trial strategy”). Rather, due to his struggles with drugs and alcohol abuse, Albert simply did not do the job required of him under prevailing professional norms in Oklahoma. *See, e.g., Porter v. McCollum*, 558 U.S. 30, 39 (2009) (finding that “counsel had an ‘obligation to conduct a thorough investigation of the defendant's background’” (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000))).

In this case, Albert's duty to investigate and present a defense was even more critical where the state had alleged four aggravating factors well over a year before the trial. (O.R.1 at 72.) As a result, Albert had sufficient time to prepare a case to rebut the aggravators, particularly the state's use of Mr. Wood's juvenile record to support its argument that he was a continuing threat to society. *Cf. Rompilla v. Beard*, 545 U.S. 374, 383, 385 (2005) (noting that counsel knew that state was going to use "significant history of felony convictions indicating the use or threat of violence" as an aggravator, but counsel failed to look into the prior-conviction file and thereby "seriously compromis[ed] their opportunity to respond to a case for aggravation"). But his penalty phase presentation skipped this important aspect of Mr. Wood's background. *See id.* at 386 n.5 (finding that "[c]ounsel could not effectively rebut the aggravation case or build their own case in mitigation[]" without "making efforts to learn the details and rebut the relevance of [Rompilla's] earlier crime[]").

The fact that Albert spoke with Mr. Wood's mother and brothers in court does not constitute constitutionally adequate competent performance. *See id.* at 381 (finding counsel's investigation deficient despite some efforts to develop mitigation). In fact, the Supreme Court has found counsel's performance deficient in cases where counsel interviewed several people, including an expert, because that was insufficient to satisfy the constitutionally required investigation in death penalty cases based on the information available to counsel pointing to the need to investigate further. *See, e.g., Williams*, 529 U.S. at 369 (counsel merely interviewed three witnesses who described defendant as a "'nice boy'" and "not a violent person" and presented a psychiatrist's taped statement that contained virtually no mitigation evidence); *Wiggins*, 539 U.S. at 516, 524 (counsel conducted investigation into "a narrow set of sources" and "[a]t no point... proffer[ed] any evidence of petitioner's life history or family background"). Albert's brief in-court meetings with Mr. Wood and his family members were not an adequate substitute for a thorough investigation into the mitigating circumstances that could have convinced at least one juror to spare Mr. Wood's life.

Similarly, the mere fact that Albert hired an expert does not make his performance any less deficient. “[C]ounsel may not simply hire an expert and then abandon all further responsibility.” *Wilson v. Sirmons*, 536 F.3d 1064, 1089 (10th Cir. 2008). But that is exactly what happened in Mr. Wood’s case. Dr. Hand was not prepared, was unfamiliar with the record, and was discredited on cross-examination—because Albert failed to equip Dr. Hand with the basic information he needed to testify about Mr. Wood’s background. (*Wood*, No. PCD-2011-590, Attachment 14 ¶ 7 (Albert attesting that “I did not prepare Dr. Hand for his testimony nor did I review any documents before providing them to Dr. Hand[]”).) “This is an example... of trial counsel who did not trouble even to talk to a large portion of the ‘reasonably available’ witnesses.” *Sirmons*, 536 F.3d at 1088 (quoting *Wiggins*, 539 U.S. at 546–47). For all these reasons, Albert’s performance in Mr. Wood’s case fell below the standard of care and amounts to deficient performance.

C. But for Albert’s serious addiction during the time he represented Mr. Wood which prevented him from fulfilling his duties to a defendant facing a death sentence, there is a reasonable probability that Mr. Wood would not have been sentenced to death.

When assessing the prejudice prong of the *Strickland* test, a court must decide whether “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” 466 U.S. at 687. In determining whether a petitioner has established prejudice at sentencing, the reviewing court must “evaluate the totality of the available mitigation evidence... in reweighing it against the evidence in aggravation.” *Williams*, 529 U.S. at 397–98. Although “it is possible that a jury could have heard [all new mitigating information] and still have decided on the death penalty, that is not the test.” *Rompilla*, 545 U.S. at 393. Instead, the court looks to whether the mitigation might have influenced the jury’s consideration of the defendant’s culpability. *Id.* As such, the court assesses whether the mitigating evidence could have influenced “at least one juror” in a manner that could have “struck a different balance.” *Wiggins*, 539 U.S. at 537. Here, when comparing the evidence that was presented to the evidence that could and

should have been presented, there is a reasonable likelihood that a different balance could have been struck.

As previously noted, Mr. Wood was the *only* one among his three codefendants to receive a death sentence. Moreover, this Court granted relief to two other capital defendants whom Albert represented at the same time that he represented Mr. Wood on account of ineffective assistance of counsel. See *Littlejohn*, 2008 OK CR 12, ¶¶ 25–28, 181 P.3d at 744–45; *Fisher*, 2009 OK CR 12, ¶¶ 6–25, 206 P.3d at 609–14. The similarities between this case and *Littlejohn* in particular are striking.

Like Mr. Wood, Keary Littlejohn was convicted of first-degree felony murder and conspiracy to commit robbery. *Littlejohn*, 2008 OK CR 12, ¶ 1, 181 P.3d at 738–39. At the second stage of Mr. Wood’s trial, the state introduced evidence that he had participated in the robbery of a pizza place that occurred before Wipf was killed. (Tr. 4/5/04 at 17, 23–24.) Similarly, “the State presented evidence that [Littlejohn] had been involved in at least two other armed attempts to rob drivers of their vehicles, or ‘car-jackings,’ and that he and his co-defendants had, in fact, attempted to rob another person of his vehicle just hours before they approached [the victim].” *Littlejohn*, 2008 OK CR 12, ¶ 5, 181 P.3d at 739–40. In both cases, the jury found the existence of three aggravating circumstances. *Id.*, 2008 OK CR 12, ¶ 1, 181 P.3d at 739. Further, both Mr. Wood and Littlejohn were each the only one of four co-defendants who received a death sentence even though they were not the most culpable. See *State v. Zjaiton Wood*, CF-02-46 (Okla. Cty. Dist. Ct.), Tr. 9/20/04 at 25 (prosecutor admitting Mr. Wood was less culpable than Jake); *Littlejohn*, 2008 OK CR 12, ¶ 1, 181 P.3d at 746 (Chapel, J., concurring in part and dissenting in part).

In *Littlejohn*, the parties stipulated that, had Albert conducted a reasonably adequate investigation, he would have discovered a number of mitigating factors that might have affected the jury’s decision to sentence Littlejohn to death, including:

(1) that according to school records, Appellant, while not mentally retarded, suffered from a low I.Q. and attended special education classes; (2) that Appellant grew up in an environment of domestic abuse involving his mother and his step-father; (3) that during Appellant's teenage years, his stepfather began selling crack cocaine, and his mother began using crack cocaine; (4) that Appellant did not learn that his stepfather was not his biological father until he was a teenager, and that he subsequently quit school, left home, and began getting into trouble; (5) that according to a friend of Appellant's family, who saw Appellant shortly after [the victim's] murder, Appellant was so upset and remorseful about what had happened that he threatened suicide.

Id., 2008 OK CR 12, ¶ 26, 181 P.3d at 744. In vacating Littlejohn's death sentence, this Court relied on the trial court's finding that, even assuming sufficient evidence supported the three aggravating circumstances found by the jury, "the available but unused mitigation evidence could have made a difference in the jury's ultimate sentencing decision." *Id.*, 2008 OK CR 12, ¶ 28, 181 P.3d at 745.

It is similarly reasonably probable that the mitigating evidence that could and should have been presented at Mr. Wood's trial would have influenced at least one juror to vote for life. The jury would have learned the complete picture of his social history, including how poverty and racism factored into his childhood, how the abusive relationship between his mother and father that he witnessed impacted him developmentally and psychologically, and how his family dynamics and the lack of a positive role model resulted in him seeking inclusion through gang membership and thereby becoming involved in criminal activity at a young age. All of the facts presented in the Rule 3.11 evidentiary hearing could and should have been presented through documentary and testimonial evidence of lay witnesses. And presenting this evidence could well have made a difference, because Mr. Wood's brother Jake did *not* receive a death sentence despite his greater culpability for Wipf's murder.

What is more, an expert who had the benefit of being properly prepared and having a thorough social history provided to her could have explained that Mr. Wood's childhood "took place amid consist[en]t poverty, recurring moves, normalized violence and criminality both inside and outside the home, abject emotional and physical neglect, and ongoing experiences of

racial hostility[.]” (PCR1 Dkt. 17-1, Exh. 3 at 1.) “From the earliest stage of human attachment..., [Mr. Wood’s] most basic needs continually went unmet.” (*Id.* at 1.) And instead, his childhood was plagued with regular occurrences of severe domestic violence. When this occurs, it “conveys to the child that not only is their home not safe, but that adults are inadequate in the world—there are no models of how to ‘make it’ in the world.” (*Id.* at 2–3.) As a result of growing up in this violent home, Mr. Wood has been diagnosed with posttraumatic stress disorder and generalized anxiety disorder. (*Id.* at 3.)

Because the two main aggravating factors found by the jury—heinous, atrocious, or cruel manner of killing and creating a grave risk to others—involved Mr. Wood’s behavior and actions, it was even more critical to furnish the jury with context and background regarding his life and how he ended up involved in criminal activity with his brother. While the defense provided the jury with a list of mitigating factors (O.R.1 at 634–35), these were cursory in nature and failed to even mention the severe violence that Mr. Wood witnessed as a child. There was little, if any, support for the few factors that would have helped the jury understand Mr. Wood’s background. Worse still, in his closing argument Albert affirmatively encouraged the jury to disregard even the meager mitigating evidence he had presented: “These mitigators? I’m going to tear them up. You can do what you want to do with them.” (Tr. 4/5/04 at 147.) Had the jury known the complete story of Mr. Wood’s life, it is reasonably probable that at least one juror would have voted for life. *Wiggins*, 539 U.S. at 537. This is so for five reasons.

First, instead of hearing that Mr. Wood suffers from PTSD as a result of being exposed as a small boy to severe violence, the jury heard the state emphasize that Mr. Wood has “no mental illnesses.” (Tr. 4/5/04 at 115.) The state argued that Linda’s brief testimony about the abuse she suffered at the hands of Mr. Wood’s father, which consisted of only a few sentences (Tr. 4/5/04 at 91), was exaggerated. (*Id.* at 121). Albert could and should have asked Linda to describe the physical and emotional abuse in detail, and called Mr. Wood’s brothers to corroborate her testimony on that score.

Andre Wood testified at the Rule 3.11 evidentiary hearing that their father was “very, very mean” and was abusive to the boys and their mother. (Tr. 2/23/06 at 158.) Andre explained that it was difficult for his mother to report the abuse since their father was a police officer. (*Id.* at 162.) Andre said that their father would come home from work and beat their mother “just because he had a bad day at work.” (*Id.* at 158.) Linda reported an incident where Raymond came home from work and grabbed her by the ponytail while she was sleeping on the couch and slung her across the room into the patio window. (*Id.* at 116.) Raymond would beat Linda with his fist, with a pipe wrench, and with a gun. (*Id.* at 116.) Jake stated that his father hit his mother in the head with a gun. (Tr. 2/27/06 at 331.) Raymond played Russian roulette with Linda. (Tr. 2/23/06 at 116.) Linda and Andre described Raymond tying her to a chair with extension cords, pouring alcohol on her, and threatening to set her on fire—and made the young boys watch him do it. (*Id.* at 117, 158.)

Andre recalled his father beating his mother on numerous occasions, and it was so bad that Linda had to go to the hospital. (*Id.* at 158.) Raymond even knocked out Linda’s front teeth. (*Id.* at 119, 159.) Raymond also used the children to control Linda, and the children were not safe from their father’s violent episodes. Raymond believed Linda was cheating on him so he would ask the boys who Linda was talking to; he would then threaten them, and beat them, saying they were “covering” for her. (*Id.* at 118–19, 158, 160.) Jake testified at the hearing that their father would also beat him and his brothers. (Tr. 2/27/06 at 332.) One time when he was a little boy, Mr. Wood did not say grace at the table; their father snatched him and beat him with a leather strap until he had bruises and welts. (Tr. 2/23/06 at 161.)

Counsel could have presented the jury with evidence that Linda’s allegations were contemporaneously documented in petitions for a protective order and other court documents, which “are evidence of authentic, severe and ongoing violence against Ms. Wood during [Mr. Wood’s] early and middle childhood” (PCR1 Dkt. 17-1, Exh. 6 at 4), and are “completely consistent with the knowledge base in the academic and clinical areas of domestic violence” (*id.*

at 3). An expert could have also explained that, as result of the domestic violence he witnessed between his parents, Mr. Wood suffers from both PTSD and general anxiety disorder, which “are fundamental psychiatric conditions that seasoned into his criminal acting out behavior.” (PCR1 Dkt. 17-1, Exh. 3 at 2–3.)

Second, instead of hearing the explanation of how Mr. Wood, from a very young age, was never provided proper parenting or supervision and how he was confronted with essentially no options but to bond with his brother and the gang, the jury heard the state repeatedly assert that “he made a choice to do these things all throughout his life.” (Tr. 4/5/04 at 115; *see also id.* at 138 (noting that Wood “ha[d] a choice” and he “decided to be a criminal”).) A juvenile probation officer who worked with the Wood family could have testified that there was not much supervision in the home, and the children took over the parenting role. (Tr. 2/27/06 at 187–90). Although Linda left Andre, who was barely a teenager, in charge while she was gone working two jobs and pursuing her bachelor’s degree, Jake was the biggest influence on Mr. Wood. (Tr. 2/23/06 at 121–23.)

Even people outside the family, including a childhood friend and Mr. Wood’s foster mother, knew that Mr. Wood idolized Jake. (Tr. 2/23/06 at 52, 78.) Linda could have testified that unfortunately, Jake was heavily involved in gangs and obsessed with weapons of all kinds; he was also “very, very angry.” (*Id.* at 124.) He was physically large for his age, larger than Mr. Wood was, and he learned that he could get what he wanted by bullying and threatening others. (*Id.* at 124.) Growing up, Jake manipulated Mr. Wood into doing what he wanted because he feared losing Jake’s love and approval. (*Id.* at 124–25.) All Jake had to do to get Mr. Wood to cooperate was tell him that if he really loved his brother, he would do whatever Jake requested of him. (*Id.*)

Jake could have testified that Mr. Wood was naturally caring and generous and an honest student with some athletic talent. (Tr. 2/27/06 at 338.) To rid Mr. Wood of his natural tendencies, in addition to using physical force against him, Jake exerted his influence through, as

his mother indicated, manipulating him, telling him that it would be disloyal to his brother and family to not comply with his wishes. (*Id.* at 337.) A childhood friend could have confirmed that Jake manipulated Mr. Wood into misbehaving; when Mr. Wood refused to do something, Jake would slap him or scream at him, which deeply affected him. (Tr. 2/23/06 at 54–55.)

Third, instead of hearing detailed reports about Mr. Wood thriving in a structured environment, the jury heard the state emphasize that the defense’s own expert “cannot give you any guarantees about” Mr. Wood doing well in prison. (Tr. 4/5/04 at 122.) However, his foster mother could have described how Mr. Wood had thrived at the foster home. (Tr. 2/23/06 at 79.) Removed from Jake’s influence and his chaotic and abusive family, Mr. Wood was a positive influence in the foster family. He was polite, had good manners, and was always laughing. (*Id.*) Mr. Wood helped his foster parents by acting as the peacemaker and stepping in to break up fights between the boys. (*Id.*) He also did well in school and took an interest in sports. (*Id.* at 80.) In addition, numerous witnesses could have testified to his kind and generous nature, his respectful attitude, and his willingness to help others—all these attributes shined when he had the opportunity to be in a positive, stable environment. (*See, e.g.*, Tr. 2/23/06 at 98–99, 149–50.)

Fourth, instead of contextualizing the juvenile incidents that occurred, including explaining that reports indicated that his mother encouraged his violence when he was a young teenager, the jury heard the state focus on Mr. Wood’s violent behavior as a juvenile. (Tr. 4/5/04 at 123.) Linda admitted to making mistakes with her children and stated that they “grew up in an environment of terror, deprivation and exclusion.” (DA2 Dkt. 14-1, Exh. A at 2, ¶¶ E, F.) An expert could have explained how “Linda succumbed to the criminal and violent ethic she was surrounded by, not only by virtue of committing her own felonies, but she encouraged her sons’ violence to get what she wanted in altercations. They became more like mates to her than children she was raising.” (PCR1 Dkt. 17-1, Exh. 3 at 3.)

Fifth, instead of hearing that Tremaine was deeply distressed and remorseful in the crime’s aftermath, the jury heard the state repeatedly argue that he lacked remorse: “Another

thing when Dr. Hand testified, what is even more important is what he didn't say. The one thing that Dr. Ray Hand didn't say about this defendant is that he is remorseful for committing this murder. Or that he was sorry for committing this murder. I submit to you that is because he is not." (Tr. 4/5/04 at 133–34.). The State urged the jury "to deal with—what we have today is this defendant. A man who can kill an innocent victim without mercy and without remorse." (*Id.* at 139.)

As detailed above, Mr. Wood's cousins could have testified about his shock, fear, and remorse in the crime's aftermath. (Attachment 7 ¶¶ 4–5; Attachment 8 ¶¶ 3, 6.) An expert could have testified that Mr. Wood continued to "express[] sorrow about what had happened to the young men who had been victimized, stating that they were completely innocent." (PCR1 Dkt. 17-1, Exh. 6 at 9.)

The information that should have been presented at the second stage of Mr. Wood's trial would have not only undermined the aggravating factors, but would also have added to and dramatically improved the very cursory mitigating evidence that was presented. *See, e.g., Williams v. Allen*, 542 F.3d 1326, 1342 (11th Cir. 2008) (finding ineffective assistance of counsel where trial counsel presented cursory evidence regarding abusive household but where postconviction evidence revealed "vastly different picture of [defendant's] background"). No explanation of "why [Mr. Wood's] life was still worth saving[]" was ever presented to the jury. *See Cargle v. Mullin*, 317 F.3d 1196, 1222 (10th Cir. 2003). In this case, given the overwhelming amount of information that was never presented to the jury, "there is a reasonable probability that, absent the errors, the sentencer... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

Before Mr. Wood obtained the Bowie and Maytubby affidavits, the only significant difference between the facts supporting Mr. Wood's and Mr. Littlejohn's ineffective-assistance claims regarding Albert's substance abuse is that Littlejohn presented "proposed testimony and other information indicating that, during the time he represented Appellant, trial counsel was

suffering from substance abuse problems which contributed to his ability to run his practice.” *Littlejohn*, 2008 OK CR 12, ¶ 26, 181 P.3d at 744 n.7. Mr. Wood has now uncovered evidence showing that Albert’s substance-abuse problem led to his failure to adequately investigate, prepare, and present relevant and readily available mitigating evidence that would have caused at least one juror to strike a different balance. *See Fisher*, 2009 OK CR 12, ¶ 13, 206 P.3d at 611. Mr. Wood was therefore denied his right to the effective assistance of trial counsel, in violation of the Oklahoma and United States Constitutions.

D. Albert’s serious addiction during the time he represented Mr. Wood resulted in his failure to subject the prosecution’s case to meaningful adversarial testing and amounted to a constructive denial of counsel warranting a presumption of prejudice.

In *United States v. Cronin*, 466 U.S. 648 (1984), the Supreme Court “identified three situations implicating the right to counsel that involved circumstances ‘so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.’” *Bell v. Cone*, 535 U.S. 685, 695 (2002) (quoting *Cronin*, 466 U.S. at 658–59). The first circumstance “is the complete denial of counsel.” *Cronin*, 466 U.S. at 659. The second is “if counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing[.]” *Id.* The third is “when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” *Id.* at 659–60.

A defendant has been “constructively” denied counsel when, although counsel is present, “the performance of counsel [is] so inadequate that, in effect, no assistance of counsel is provided.” *Id.* at 654 n.11. Indeed, a trial is “presumptively unfair[.]... where the accused is denied the presence of counsel at ‘a critical stage’” of the proceedings. *Bell*, 535 U.S. at 695–96 (citing *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961); *White v. Maryland*, 373 U.S. 59, 60 (1963) (per curiam)); accord *Littlejohn v. State*, 2008 OK CR 12, ¶¶ 26, 28 & n.7, 181 P.3d 736, 744–45

(accepting the state’s concession of deficient performance partly because Albert “was suffering from substance abuse problems which contributed to his ability to run his practice”).

This Court previously held that the materials Mr. Wood provided in support of his initial postconviction petition were insufficient to give rise to a presumption of prejudice under *Cronic* because they indicated that Albert’s “client neglect, abuse of drugs and alcohol and emotional instability” did not begin until after “Wood’s death penalty trial had been completed.” (PCR1 Dkt. 42 at 4–5.) However, newly discovered evidence—the Bowie and Maytubby affidavits—as well as the discussion *supra* incorporated herein by specific reference, establish that due to Albert’s abuse of alcohol, pills, and cocaine, he was constructively absent during both stages of Mr. Wood’s trial rendering his performance “so inadequate that, in effect, no assistance” was provided. *Cronic*, 466 U.S. at 654 n.11; *cf. Lee v. State*, 238 S.W.3d 52, 55–57 (Ark. 2006) (finding that counsel was not functioning at level of qualified or competent counsel due to impairment by substance-abuse problem, rendering post-conviction proceedings fundamentally unfair). Additionally, Albert may have been impaired to an extent that he “render[ed] assistance under circumstances where competent counsel very likely could not” have rendered effective assistance. *See Bell*, 535 U.S. at 696 (citing *Powell v. Alabama*, 287 U.S. 45 (1932); *Cronic*, 466 U.S. at 659–62).

Additionally, when “counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.” *Cronic*, 466 U.S. at 659. That is the situation in which Mr. Wood found himself at trial: Albert failed to prepare for and challenge the state’s case from the outset of his appointment. His failures infected both the first and second stages of the trial.

This is not a situation in which Mr. Wood argues that his counsel failed to oppose the prosecution at “specific points” of the case, but rather that his counsel failed to meaningfully oppose the prosecution *at all*. *Bell*, 535 U.S. at 697; *see also Lockett v. Trammell*, 711 F.3d 1218,

1248 (10th Cir. 2013) (explaining that *Cronic*'s exception for failing to test the prosecution's case applies when "counsel fails to oppose the prosecution throughout an entire proceeding[]").

As chronicled *supra*, Mr. Wood found himself charged with a capital crime, thrust into an adversarial process with counsel who was battling a substance-abuse problem and unable to "act[] in the role of an advocate." *Cronic*, 466 U.S. at 656 (quoting *Anders v. California*, 386 U.S. 738, 743 (1967)). Because Mr. Wood was constructively left without the assistance of counsel for the entirety of his trial, this Court may presume prejudice under the *Cronic* standard. *Bell*, 535 U.S. at 697 (explaining that *Cronic*'s presumption of prejudice is applicable when the attorney's failure is complete). However the allegations set forth in Sections A–C above also entitle Mr. Wood to relief under *Strickland*.

3. Mr. Wood satisfies the successor postconviction requirements of Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) and Rule 9.7 of the Rules of the Oklahoma Court of Criminal Appeals.

Under the Uniform Post-Conviction Procedure Act, this Court "may not consider the merits of or grant relief" based on a subsequent application for post-conviction relief unless:

- b. (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date, and
- (2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.

Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b). Rule 9.7(G)(1) of the Rules of the Oklahoma Court of Criminal Appeals, meanwhile, allows this Court to entertain a subsequent application for postconviction relief where it asserts claims "which have not been and could not have been previously presented in the original application because the factual or legal basis was

unavailable.” Mr. Wood’s present application for postconviction relief satisfies these requirements.

First, the factual basis for this claim became available only on April 19, 2022, when Benito Bowie agreed to give information about Albert’s substance abuse, which provides new and compelling evidence that Albert was impaired by his addictions throughout the time he represented Mr. Wood. Through Bowie, Mr. Wood located Maytubby, who corroborated that at the time Albert was representing Mr. Wood, he was using alcohol, pills, and cocaine, including during the workday, and had “really started to decline and was slipping during this period.” (Attachment 6 ¶¶ 3–5.) While Mr. Wood’s counsel have diligently pursued this issue, (*see, e.g.*, Attachment 1 at 2–4 (postconviction counsel presenting newly discovered evidence of Albert’s contempt proceedings and suspension from practice of law in support of his ineffectiveness in Mr. Wood’s case)), prior to Bowie agreeing to sign an affidavit attesting under oath to what he witnessed, no other witness provided counsel with credible, firsthand knowledge of Albert’s substance abuse during the relevant time period. As a result, the factual basis for Mr. Wood’s present claim was unavailable and undiscoverable notwithstanding their exercise of due diligence prior to April 19, 2022.

Second, as the discussion *supra* demonstrates, the facts underlying Wood’s present claim are sufficient to establish by clear and convincing evidence that he was deprived of the effective assistance of trial counsel and that, had Mr. Wood been represented by competent counsel, no reasonable fact finder would have sentenced him to death. *See* 22 O.S. § 1089(D)(8)(b)(2).

Mr. Wood has therefore met all the requirements for this Court to consider this successor postconviction application, order discovery and a hearing on his colorable allegations, and grant relief.

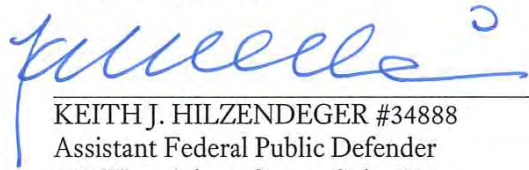
Conclusion

Mr. Wood has set forth herein more than colorable allegations that his convictions and death sentence violate his state and federal rights. While Mr. Wood contends that he is entitled to a new trial and sentencing relief on the record before this Court, if the Court disagrees and determines that further factual development is necessary, Mr. Wood submits that he is entitled to discovery and an evidentiary hearing and respectfully asks this Court to order them forthwith.

Respectfully submitted:

June 16, 2022.

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District of Arizona



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VERIFICATION OF COUNSEL

I, Keith J. Hilzendeger, state under penalty of perjury under the laws of the State of Oklahoma that the foregoing is true and correct to the best of my knowledge, information, and belief.



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CERTIFICATE OF SERVICE

I certify that on June 16, 2022, I caused the foregoing document to be filed with the Court by sending the original and 10 copies to the Clerk of the Appellate Courts by FedEx overnight delivery. I further certify that a copy of this document was served on the Attorney General by depositing a copy with the Clerk of the Appellate Courts at the time of filing.



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ATTACHMENT 1

IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APR 25 2007

Termane Wood,

Petitioner,

-vs-

State of Oklahoma,

Respondent.

Oklahoma Co. District Court
Case No. CF-02-46

MICHAEL S. RICHIE
CLERK

Court of Criminal Appeals
Direct Appeal Case No.
D-05-171

Post Conviction Case No.
PCD-05-143

COURT OF CRIMINAL APPEALS FORM 13.11A

AMENDED APPLICATION FOR POST – CONVICTION
RELIEF – DEATH PENALTY CASE

Submitted By,

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**IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA**

Termane Wood,

Petitioner,

-vs-

State of Oklahoma,

Respondent.

**Oklahoma Co. District Court
Case No. CF-02-46**

**Court of Criminal Appeals
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D-05-171**

**Post Conviction Case No.
PCD-05-143**

COURT OF CRIMINAL APPEALS FORM 13.11A

**AMENDED APPLICATION FOR POST – CONVICTION RELIEF –
DEATH PENALTY CASE**

PART A: PROCEDURAL HISTORY

Petitioner, Termane Wood, through undersigned counsel, submits his application for post-conviction relief under Section 1089 of Title 22. This is the first time an application for post-conviction relief has been filed.

The sentence from which relief is sought is:

Death

Pursuant to Rule 9.7A (3)(d), 22 O.S. Ch. 18, App., a copy of the Judgment and Sentences and Death Warrant entered by the District Court are filed herewith and attached to this Application as Exhibits 1-2, *Appendices of Exhibits to Original Application For Post-Conviction Relief*.

1. Court in which sentence was rendered:

- (a)** Oklahoma County District Court.
- (b)** Case Number: CF-02-46.
- (c)** Court of Criminal Appeals: Direct Appeal Case No. D-05-171.

2. **Date of sentence:** May 7, 2004.

3. **Terms of sentence:** Death.

4. **Name of Presiding Judge:** Honorable Ray C. Elliott.

5. **Is Petitioner currently in custody?** Yes.

Where? Oklahoma State Penitentiary, H-unit.

Does Petitioner have criminal matters pending in other courts? No.

If so, where?

List charges:

Does Petitioner have sentences (capital or non-capital) to be served in other states or jurisdictions? No.

If so, where?

List convictions and sentences:

I. CAPITAL OFFENSE INFORMATION

6. **Petitioner was convicted of the following crime, for which a sentence of death was imposed:**

(a) First Degree Murder, in violation of 21 O.S. § 701.7 (C).

Aggravating factors alleged:

(a) The State alleged:

1. During the commission of the murder, the defendant knowingly created a great risk of death to more than one person;
2. The murder was especially heinous, atrocious, or cruel;
3. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution, and
4. At the present time, there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

(O.R. 72).

Aggravating factors found:

- (a) The jury found three of the aggravating circumstances alleged by the State in the Bill of Particulars, to-wit:
1. During the commission of the murder, the defendant knowingly created a great risk of death to more than one person;
 2. The murder was especially heinous, atrocious, or cruel;
 3. At the present time, there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

(O.R. Vol. IV 617).

Mitigating factors listed in jury instructions:

The trial court gave instruction No. 54 to the jury which "lists" mitigating circumstances. (O.R. Vol. IV at 634). The mitigation evidence submitted to the jury was as follows:

Evidence has been introduced as to the following mitigating circumstances:

1. The Defendant is only 24 years old.
2. The Defendant's parents were divorced at a young age.
3. The Defendant has a family that loves him and will continue to support him in a prison environment and desperately wants to do so.
4. The Defendant has a son, Bredon, who is five (5) years old. He would like to see what his son becomes and hopefully be a positive influence on him.
5. The Defendant has another son, Tremane, who is two (2) years old. He would like to see what his son becomes and hopefully be a positive influence on him in the future.
6. The Defendant has no father figure during his childhood, and little support from his natural father.
7. The Defendant's mother was absent during most of his childhood and was faced with substitute parenting.
8. The Defendant has a moderately severe mental health disorder.
9. The Defendant can live in a structured prison environment without hurting anyone.
10. The Defendant's previous felony conviction was non-violent. This is his first violent conviction.
11. With increased age, the Defendant could become a positive influence on others,

even in prison.

12. The Defendant has been employed in the past.
13. The Defendant has prior drug dependencies.
14. The Defendant spent time in foster care.
15. The Defendant took directions from older brother Zjaiton Wood.
16. The Defendant is of educational potential.
17. The Defendant is of average intelligence.

In addition, you may decide that other mitigating circumstances exist, and if so, you should consider those circumstances as well.

Was Victim Impact Evidence introduced at trial? Yes () No (X).

7. **Check whether the finding of guilty was made:**

After plea of guilty () After plea of not guilty (X).

8. **If found guilty after plea of not guilty, check whether the finding was made by:**

A jury (X) or A judge without a jury ().

9. **Was the sentence determined by (X) a jury, or () the trial judge?**

II. NON-CAPITAL OFFENSE INFORMATION

10. **Petitioner was convicted of the following offense(s) for which a sentence of less than death was imposed (include a description of the sentence imposed for each offense).**

Robbery with Firearms: Mr. Wood received a Life sentence.

Conspiracy to Commit Felony: Mr. Wood received a Life sentence.

11. **Check whether the finding of guilty was made:**

After plea of guilty () After a plea of not guilty (X).

12. **If found guilty after plea of not guilty, check whether the finding was made by:**

A jury (X), or A judge without a jury ().

III. CASE INFORMATION

13. Name and address of lawyer in trial court:

John Albert (currently suspended from practice)
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Oklahoma City, OK 73116
(405) 767-0522

Names and addresses of all co-counsel in the trial court:

Lance Phillips
1 North Hudson Suite 700
Oklahoma City, OK 73102
(405) 235-5944

14. Was lead counsel appointed by the court? Yes (X) No ().

15. Was the conviction appealed? Yes(X) No().

To what court or courts? Oklahoma Court of Criminal Appeals.

Date Brief In Chief filed: June 28, 2005.

Date Response filed: July 22, 2005

Date Reply Brief filed: August 11, 2005

Date of Oral Argument: November 28, 2006.

Date of Petition for Rehearing (if appeal has been decided): N/A

Has this case been remanded to the District Court for an evidentiary hearing on direct appeal? Yes (X) No ().

If so, what were the grounds for remand?

- 1) Whether the evidence identified in the Application for Evidentiary Hearing was reasonably available to trial counsel in preparation for trial;
- 2) What, if any, of the records contained in the exhibits were reviewed by trial counsel, or the defense expert;
- 3) What effect any evidence that was available but not used might have had on trial proceedings;
- 4) Whether trial counsel's failure to investigate and/or use the evidence was sound trial strategy; and

5) Whether the failure to use the evidence undermines confidence in the outcome of the trial.

Is this petition filed subsequent to supplemental briefing after remand?

Yes (X) No () Not applicable ().

16. Name and address of lawyers for appeal?

Perry Hudson
435 North Walker, Suite 102
Oklahoma City, OK 73102
(405) 557-7800

Jason Spanich
228 Robert S. Kerr, Suite 100
Oklahoma City, OK 73102
(405) 236-0115

17. Was an opinion written by the appellate court? Yes() No () Not applicable (X).

If "yes," give citations if published: If not published, give appellate case no.:

18. Was further review sought? Yes () No () Not Applicable (X).

PART B: GROUNDS FOR RELIEF

19. Has a Motion for Discovery been filed with this application? Yes (X) No () filed on December 26, 2006.

20. Has a Motion for Evidentiary Hearing been filed with this application? Yes (X) No () filed on December 26, 2006.

21. Have other motions been filed with this application or prior to the filing of this application? Yes (X) No ().

If yes, specify what motions have been filed:

Appellant's Request to File Enclosed Motion Ex Parte and Under Seal filed on February 17, 2005.

Appellant's Motion to Hold Proceedings in Abeyance or in the Alternative for an Extension of Time to File an Original Application for Post-Conviction Relief in a Capital Case filed on November 9, 2005.

Appellant's Motion to Continue to Hold Proceedings in Abeyance, or, in the Alternative, for an Extension of Time to File an Original Application for Post-Conviction Relief in a Capital Case. Appellant's Notice to Court filed on July 27, 2006.

Entry of Appearance and Motion to Allow the Capital Post-Conviction Division of OIDS to Withdraw from Further Representation filed on September 7, 2006.

Appellant's Application for an Extension of Time to File Post-Conviction Application filed on October 26, 2006.

Petitioner's Application for Extension of Time to File Post-Conviction Application filed on November 22, 2006.

Motion to Cross Reference Petitioner's Post-Conviction Application with Co-Defendant's Appeal Records filed on December 26, 2006.

Motion to File Oversized Brief filed on December 26, 2006.

Motion for Discovery filed on December 26, 2006.

Motion for Evidentiary Hearing filed on December 26, 2006.

Objection to Petitioner's Motion to File Oversized Application filed on December 28, 2006.

Response to Objection to Petitioner's Motion to File Oversized Application filed on January 3, 2007.

Order Striking Petitioner's Original Application for Post-Conviction Relief for Failure to Comply with Court Rules and Order Denying Motion to File Oversized Application.

22. List propositions raised (list all sub-propositions).

PROPOSITION I

TRIAL COURT ERRED BY EXCLUDING TESTIMONY FROM EXPERT WITNESS.

PROPOSITION II

NEWLY DISCOVERED EVIDENCE AND NEW LAW RENDERS MR. WOOD'S CONVICTION AND SENTENCE SUSPECT AND UNRELIABLE.

- A. Hearing was held regarding whether trial counsel should be held in contempt of court.**
- B. Trial counsel has been suspended from the practice of law.**
- C. Supplemental report of Dr. Kate Allen.**
- D. New Rule of Law.**
- E. Conclusion.**

PROPOSITION III

PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE AND TRIAL COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND ARTICLE II, §§ 7, 9, AND 20 OF THE OKLAHOMA CONSTITUTION.

- A. Appellate counsel failed to supplement record with impeachment evidence.**

1. Trial counsel has been suspended from the practice of law.
 2. Transcript from contempt hearing Regarding.
- B. Appellate counsel provided ineffective assistance of counsel at evidentiary hearing.**
1. Failed to clarify the number of cases that had resulted in a sentence of death.
 2. Failed to utilize trial transcripts to cross-examine counsel.
 3. Failed to show trial court was concerned trial counsel was unprepared.
 4. Failed to prepare for testimony of Raymond Gross, Jr.
 - a. Failed to cross-examine Mr. Gross with divorce decree.
 - b. Failed to provide trial court with relevant divorce documents.
 - c. Failed to investigate Raymond Gross' criminal background.
 - d. Failed to request records detailing the abuse Ms. Wood suffered.
 - e. Conclusion.
 5. Failed to mention trial counsel never stated he had not provided ineffective assistance of counsel.
 6. Failed to list all the factual inaccuracies contained in trial court's Findings.
 7. Failed to provide this Court Dr. Allen's Findings.
 8. Failed to obtain an order for handwriting exemplars from Brandy Warden.
 9. Failed to admit videotape produced by the Stillwater Police Department.
 10. Failed to present evidence Brandy Warden's sentence was reduced.
 11. Conclusion.
- C. Ineffectiveness of trial counsel which appellate counsel failed to raise.**
1. Trial counsel failed to present available evidence to support his defense.
 2. Trial counsel failed to list a crucial mitigating circumstance.
 3. Trial counsel failed to request a *Harjo* hearing.
 4. Trial counsel failed to challenge admissibility of DNA evidence.
 5. Trial counsel failed to object to handwriting exemplars.

6. Trial counsel failed to object to improperly excused jurors.
 7. Trial counsel failed to object when jurors moved their vehicles.
 8. Trial counsel failed to request court to instruct as to life with parole.
 9. Trial counsel failed to request proper jury instructions.
 10. Failed to object to prosecutorial misconduct.
- D. Failure of appellate counsel to perform the professional duty owed to Mr. Wood.

**PROPOSITION IV
PROSECUTORIAL MISCONDUCT RESULTED IN UNFAIR PROCEEDINGS.**

- A. Bad Acts and Evidence of Other Crimes.
1. Prejudicial and Improper Bad Acts Admitted During the First Stage.
 2. Evidence of Another Crime.
 3. Legal Argument.
- B. The Prosecutor Misstated the Law and Demeaned Mitigating Evidence.
- C. Improperly accused Petitioner of lacking remorse.
- D. Invoking sympathy and arguing facts outside the record.
- E. Prosecutor presented inconsistent factual theories as to the victim's murder.
- F. Prosecutor misled the trial court at the remanded evidentiary hearing.
- G. Conclusion.

**PROPOSITION V
ERROR OCCURED WHEN JURORS MOVED VEHICLES AFTER BEING SWORN.**

**PROPOSITION VI
THE CUMULATIVE IMPACT OF ERRORS IDENTIFIED ON DIRECT APPEAL AND
POST-CONVICTION PROCEEDINGS RENDERED THE PROCEEDING RESULTING IN
THE DEATH SENTENCE ARBITRARY, CAPRICIOUS, AND UNRELIABLE.**

PART C: FACTS

STATEMENT OF THE FACTS OF THE CASE, INCLUDING REFERENCE TO SUPPORTING DOCUMENTATION, RECORD, AND APPENDICES

1. CITATIONS TO THE RECORD

Pursuant to Rule 9.7(D)(1)(a) of the *Rules of the Court of Criminal Appeals*, effective January 1, 1998, the record and transcripts in this case will be referred to using the following abbreviations:

Application:	the instant Original Application for Post-Conviction Relief
O.R.:	the four (4) volumes of Original Record in Oklahoma County District Court Case No. CF-02-46, and two (2) volumes from the remanded evidentiary hearing.
PH:	the three (3) volumes of transcripts of the preliminary hearing held on July 25, 2002, July 26, 2002 and August 14, 2002.
Date Tr.:	the six (6) volumes of transcripts of the jury trial held on March 29 through April 5, 2004.
Date Z. Wood Tr.:	the volumes of transcripts of the jury trial of co-defendant Zjaiton Wood, held February 22, 2005 and February 23, 2005. ¹
Vol. I-III:	the three (3) volumes of transcripts for the remanded evidentiary hearing held February 23, February 27, and March 2, 2006.
Findings:	District Court's Findings of Fact and Conclusions of Law filed on April 6, 2006 regarding the remanded evidentiary hearing.
Supplemental Brief:	Supplemental Brief of Appellant filed after the remanded evidentiary hearing on May 1, 2006.

Any additional record in this post-conviction proceeding, not otherwise mentioned above, also consists of the "record on appeal" as defined by Rule 1.13 (f), and the same shall be considered to be incorporated herein by reference and by operation of the rule. References to the *Appendix of Exhibits In Support of the Application For Post-Conviction Relief* will be cited as "Ex." followed by the number, such as "Ex. 1." All citations will be separated from the regular text of the brief by

¹ Counsel for Mr. Wood has filed a Motion to Cross Reference Petitioner's Post-Conviction Application with Co-Defendant's Appeal Records. Petitioner's Co-defendant is Zjaiton Wood, Case No. F-2005-246.

parentheses.

2. PROCEDURAL HISTORY

Termane Laitron Wood² was charged by Amended Information in the District Court of Oklahoma County, Case No. CF-02-46, of First-degree Murder in violation of 21 O.S. § 701.7; one count of Robbery with Firearms; and one count of Conspiracy to Commit a Felony To-Wit: Robbery with a Dangerous Weapon.³ (O.R. 538-39) A Bill of Particulars was filed alleging the existence of four aggravating circumstances: 1) during the commission of the murder, the defendant knowingly created a great risk of death to more than one person; 2) the murder was especially heinous, atrocious, or cruel; 3) the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and 4) at the present time, there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society. (O.R. 72).

Mr. Wood was represented by John Albert and Lance Phillips. He was tried before a jury from March 29 through April 5, 2004. The Honorable Ray C. Elliott presided over the trial. Assistant District Attorneys Fern Smith and George Burnett prosecuted the case for the State. On April 2, 2004, the jury convicted Mr. Wood on all three (3) charges. After the sentencing stage of the trial, on April 5, 2004, the jury found the existence of three of the four aggravating circumstances and assessed his punishment as death on the murder charge.⁴ He was also sentenced to life on the

² To maintain consistency for the court, Petitioner will be referred to as Termane; however, his first name is actually Tremane.

³ Termane Wood was charged with three other co-defendants in Case No. CF-2002-46. Co-defendant Lanita Bateman went to jury trial and was convicted on all three counts. She was sentenced to life on the murder count, 101 years on the robbery count, and 10 years on the conspiracy to commit a felony. Co-defendant Zjaiton Wood was tried after Tremane Wood. He was found guilty on all three counts and was sentenced to life without the possibility of parole on the murder count, and sentenced to sixty years on each of the remaining counts. Co-defendant Brandy Warden turned State's evidence and testified against each of her co-defendants. She entered a plea and was sentenced to 45 years on accessory after the fact to murder in the first degree, and 10 years on the conspiracy count. The State dismissed the robbery charge. Upon Ms. Warden's one year review, her sentence was modified from 45 years to 35 years.

⁴ The aggravating circumstances found were that during the commission of the murder, the defendant knowingly created a great risk of death to more than one person; the murder was especially heinous, atrocious, or cruel; and at the present time, there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society. (O.R. Vol. IV 617).

robbery charge and life on the conspiracy charge. (O.R. 614-18, 621-22) The District Court pronounced formal judgment and sentence on the verdicts on May 7, 2004.

Mr. Wood appealed the judgments and sentences in *Wood v. State*, Case No. D-2005-171. The appellant's brief in chief and Application for Evidentiary Hearing on Sixth Amendment Claim was filed June 28, 2005. The appellee's brief was filed July 22, 2005, Appellant's reply brief was filed on August 11, 2005.

This Court on November 16, 2005 issued an Order remanding Appellant's case to the district court for an evidentiary hearing regarding Appellant's claim of ineffective assistance of counsel. This remanded evidentiary hearing was held before the district court on February 23, February 27, and March 2, 2006. The District Court issued its Findings of Fact and Conclusions of Law on April 6, 2006. On April 26, 2006, the State filed its Supplemental Brief. On May 1, 2006, Appellant filed his Supplemental Brief of Appellant with this Court. As of the date of the filing of this application, this Court has not issued an opinion in this case.

Mr. Wood's application for post conviction relief was originally due to be filed in this court on July 28, 2006. However, on July 27, 2006, Mr. Wood by and through counsel Vicki Ruth Adams Werneke, Chief of the Capital Post Conviction Division of the Oklahoma Indigent Defense System, filed a Notice advising that Kevin Pate- assigned counsel for Mr. Wood had resigned. Due to Mr. Pate's resignation, counsel advised this Court that Mr. Wood's application for post conviction relief could not be filed by July 28, 2006, and requested an extension of time.

On August 7, 2006, this Court granted Appellant's request for an extension of time. This Court extended the time for filing until October 27, 2006. On September 7, 2006, the undersigned counsel entered her appearance in this case and requested this Court to allow the Capital Post Conviction Division of the Oklahoma Indigent Defense System be allowed to withdrawal from Petitioner's representation. On September 22, 2006, this Court granted the undersigned's motion allowing the Capital Post Conviction Division of the Oklahoma Indigent Defense System to withdraw from Petitioner's representation. The undersigned requested, and was granted two (2)

thirty (30) day extensions of time in which file his application. Said Application was due to be filed on December 25, 2006.

Pursuant to 22 O.S.Supp.1996 § 1089 and Rule 9.7 of the Court of Criminal Appeals Rules, 22 O.S.Supp.1997 Ch. 18., Mr. Wood, by and through his appointed counsel, timely filed this Original Verified Application for Post-Conviction Relief on December 26, 2006. Petitioner on this date also filed a Motion to File Oversized Brief, Motion for Discovery, Motion for Evidentiary Hearing and Motion to Cross Reference Petitioner's Post-Conviction Application with Co-Defendant's Appeal Records.

The State, on December 28, 2006, filed an Objection to Petitioner's Motion to File Oversized Application. Petitioner filed a Response to Objection to Petitioner's Motion to File Oversized Application on January 3, 2007. This Court entered an Order Striking Petitioner's Original Application for Post-Conviction Relief for Failure to Comply with Court Rules and Order Denying Motion to File Oversized Application on March 14, 2007. This order provided Petitioner had 45 days from the date the order was entered to comply with page limitations. Petitioner, by and through his appointed counsel, timely files his Amended Verified Application for Post-Conviction Relief.

3.

FACTS RELATING TO THE OFFENSE

The State's theory of the case was that four individuals, Brandy Warden, Lanita Bateman Termene Wood, and his brother Zjaiton (Jake) Wood set out on a crime spree December 31, 2000, which resulted in the death of Ronnie Wipf. The State argued Tremane Wood was guilty of felony murder. The State's star witness was Brandy Warden, who had turned State's evidence and testified against her three co-defendant's. The State's other key witness was victim Arnold Kleinsasser.

On December 31, 2000, Ronnie Wipf and Arnold Kleinsasser were celebrating New Year's Eve at the Bricktown Brewery in Oklahoma City, Oklahoma. (03/31/04 Tr. 118) While at the Bricktown Brewery the men met and began to socialize with two women, Brandy Warden and Lanita Bateman. After the Bricktown Brewery closed, the women agreed to accompany these men back

to a motel. (03/31/04 Tr. 120-24)

Since the men were not from Oklahoma, Brandy Warden drove their vehicle to a motel of the women's choice, the Ramada Inn. (03/31/04 Tr. 124) Although the men wanted separate rooms, the women wanted only one room. (03/31/04 Tr. 126) Although Mr. Kleinsasser paid for the room, the room was also listed under Ms. Warden's name because he was under twenty-one years of age. (03/31/04 Tr. 125-26)

Once inside the room, the women demanded \$210.00 from the men for sex. (03/31/04 Tr. 125-27) Since the men did not have that much money on them, Brandy Warden drove Mr. Kleinsasser to an ATM to get the cash. (03/31/04 Tr. 127) When they returned to the room, the money exchanged hands, and the women excused themselves to the restroom. (03/31/04 Tr. 127) Not long after the girls had entered the restroom, someone started pounding on the motel room's door and yelled, "Brandy, are you in there? Brandy are you ready to go home?" (03/31/04 Tr. 130)

Although the women tried to exit the room, Mr. Wipf prevented them from leaving and refused to answer the door. (03/31/04 Tr. 129) Mr. Wipf demanded that the women return their money and told Mr. Kleinsasser to call the police. (03/31/04 Tr. 131) However, before he could call the police, Ms. Bateman picked up the phone and proceeded to act as if she were calling the police. (03/31/04 Tr. 118) Eventually, Mr. Wipf decided to let the girls out and opened the door. However, as soon as he did, two masked men entered the room as the two women exited. (03/31/04 Tr. 131-32)

The two men that entered the room were wearing ski masks, long black trench coats, and black leather gloves. One man was described as a black man, bigger than the other, about 5 feet 11 inches tall, weighing approximately 220 pounds, with a small caliber handgun. Other man was described as a white man, approximately 5 feet 11 inches tall, weighing about 190 to 200 lbs, and carrying a knife. (03/31/04 Tr. 131-34) Mr. Kleinsasser testified that the smaller of the two men appeared to be white. (03/31/04 Tr. 171, 173)

Mr. Kleinsasser testified that the man with the gun immediately approached him and demanded his money, which he gave him from his wallet. (03/31/04 Tr. 131, 133, 134) After taking

the money, this man then left him to go and assist the smaller man who had been struggling with Mr. Wipf since they had entered the room. (03/31/04 Tr. 135) Mr. Kleinsasser testified that he heard one of the men say "just shoot the bastard" and a shot was fired. (03/31/04 Tr. 138) Shortly thereafter he was approached by the smaller man with the knife who demanded money from him as well. After Mr. Kleinsasser informed the smaller man that he had already given the other man all his money, the smaller man went back to assist the larger man with Mr. Wipf. (03/31/04 Tr. 139) Once the smaller man turned his back, Mr. Kleinsasser made his escape from the motel room. (03/31/04 Tr. 139-40) Mr. Kleinsasser learned of his friend's death the next morning at approximately 6:00 a.m. when he returned to the motel. (03/31/04 Tr. 144) Mr. Kleinsasser was unable to testify as to which guy stabbed Mr. Wipf. (03/31/04 Tr. 172)

Chief Medical Examiner Fred Jordan testified Mr. Wipf had not been shot, but had died from a single stab wound to his chest, which he classified as a homicide. (04/02/04 Tr. 11-12, 18) He opined that this single stab wound had caused Mr. Wipf to lose a large amount of blood into his right chest cavity. (04/02/04 Tr. 11-12) Dr. Jordan also testified he observed several fresh bruises and scraps along with a number of superficial knife wounds, which appeared to be defensive wounds, on Mr. Wipf's body. (04/02/04 Tr. 14-16)

The State, through the testimony of co-defendant Ms. Warden, was able to piece together the sequence of events that occurred December 31, 2000. Ms. Warden stated that earlier that day she, Lanita Batemen, and Tremane and Zjaiton Wood, had gone to Wal-Mart where she purchased ski masks and gloves. (04/01/04 Tr. 138) Ms. Warden also testified that she and Ms. Batemen knew that they were setting the two men up when they left the Bricktown Brewery. (04/01/04 Tr. 188) Ms. Warden admitted she provided identification for the motel room and that she took Mr. Kleinsasser to the ATM for the money they demanded, and that he gave her this money when they returned to the room. (04/01/04 Tr. 154-63)

Ms. Warden testified she heard Zjaiton Wood yelling at the door. (04/01/04 Tr. 166) She also testified that as she and Lanita Bateman ran out of the motel room, she observed that the smaller of

the two men had a knife, while the larger man had the gun. (04/01/04 Tr. 178) The women waited in the car until the men returned. (04/01/04 Tr. 169) Ms. Warden testified Termane Wood was the smaller of the two men, and Zjaiton Wood was the larger of the two men. (04/01/04 Tr. 134-35)

At trial, the Defendant denied any involvement. Defendant's brother Zjaiton Wood testified during the first stage of trial that he and another man named "Alex" committed this crime. (04/02/04 Tr. 89, 91-95) Zjaiton Wood testified he initially had the gun when he and Alex entered the motel room. (04/02/04 Tr. 94) Zjaiton explained that when he saw that the victim was getting the best of Alex and he went over and started punching the victim in his head and body. (04/02/04 Tr. 94) Zjaiton testified that he grabbed the knife, "I grabbed the victim by the head and I stabbed him in the chest and told him I was God.... Just to let him know, you know, he was dealing with a force to be reckoned with." (04/02/04 Tr. 94) At the conclusion of first stage, the jury found Termane Wood guilty on all counts. (04/02/04 Tr. 214-15)

In second stage, the State incorporated all the evidence from first stage, and recalled their star witness Brandy Warden to the stand to testify. Ms. Warden testified about the armed robbery of La Franca's Pizza that had occurred at approximately 10:00 p.m. on December 31, 2000. Again, she alleged the four had been involved and that Termane Wood used a knife while Zjaiton Wood used a handgun. (04/05/04 Tr. 17-18)

The State also called Keramat Taghizadeh, the owner of the La Franca's Pizza, who had been robbed that night. He testified that he was robbed by two men. He stated that the larger man had a gun, and that the smaller man had a knife. He testified that the larger man hit him in the head with the gun after he tried to set off the alarm. (04/05/04 Tr. 24-26)

In second stage, the Defendant called his mother Linda Wood, her friend Andre Taylor, and Dr. Ray Hand. Their testimony, or lack thereof, is discussed in greater detail in the following Propositions. At the conclusion of the second stage, the jury recommended death on the murder charge and recommended the maximum sentence of life on the robbery and conspiracy counts. (04/05/04 Tr. 163-64)

Additional relevant facts will be detailed and developed in the following Propositions.

PART D: PROPOSITIONS – ARGUMENTS AND AUTHORITIES

PROPOSITION I TRIAL COURT ERRED BY EXCLUDING TESTIMONY FROM EXPERT WITNESS.

During the remanded evidentiary hearing (hereinafter “hearing”), defense counsel attempted to elicit expert testimony from Dr. Kate Allen. Despite her qualifications,¹ the State objected under *Daubert*² and expressed “I don’t think that a social worker should be allowed to testify in any psychological considerations or conclusions.” (*Id.* at 203) Counsel responded Dr. Allen’s testimony was “prototypical mitigation evidence. This is the type of mitigation evidence that should always be presented, if available, in a capital case.” (*Id.* at 208) The trial court sustained the State’s objection and refused to allow Dr. Allen to testify.³ (*Id.* at 219)

Okla.Stat.tit. 12, § 2702, provides an expert witness may testify in the form of an opinion or otherwise, “If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education.” An expert witness has been defined by this Court as one who has scientific knowledge acquired by study or practice, or both and are ordinarily persons who have experience and knowledge into matters which are not generally known. *See Kennedy v. State*, 1982 OK CR 11, 640 P.2d 971, 977.

In *Salazar v. State*, 1996 OK CR 25, 919 P.2d 1120, this Court was confronted with this very issue. In *Salazar*, this Court determined a social worker qualified as an expert witness under 12 O.S.

¹ Dr. Allen has a bachelor’s degree in psychology/sociology from Texas Christian University, a master’s degree in clinical social work from the University of Texas, and a doctoral degree of philosophy in family sociology from American University in Washington D.C. She has practiced in the field of sociology for 35 years and has treated or worked with hundreds of people. She has been a clinical social worker and a professor. She is currently a consultant in civil and criminal trials as an expert witness. (*Id.* at 199- 200) She can make a psychiatric diagnosis through her training, experience, and her degrees; however she cannot prescribe medication or give psychometric testing. (*Id.* at 212-13) She has testified in 6 other states as to her diagnoses and she has never been prevented from testifying as an expert because she was not qualified. (*Id.* at 213-14) Dr. Allen has personally evaluated 800 clients for neurological or psychological issues, and she personally evaluated Mr. Wood. (*Id.* at 214) Dr. Allen testified that as a clinical social worker she can still make Axis I DSM IV diagnoses as to psychological and psychiatry issues. (*Id.* at 215-16)

² *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

³ Dr. Allen’s report was admitted as Def. Ex. 8 at the hearing, and has been attached as Ex. 3.

§ 2702, and could provide testimony during the second stage proceeding in a capital case. In *Salazar*, the social worker provided testimony she had “specialized knowledge which she acquired through formal education,” and “she had developed skills through training and working in the field.” *Id.* at ¶ 32. The Court also found it relevant “she was able to describe how she arrived at her opinions and that the method she used was consistent with others in her field.” *Id.* The Court also noted the social worker had been recognized as an expert in another court, and “it is a factor to be considered in determining if the party offering the witness has met the foundational requirements of having the witness declared an expert.” *Salazar* at ¶ 32, n.15. The Court determined she “was qualified to render relevant expert opinions within her field of expertise and that the trial erred by not permitting her to testify.” *Id.* at ¶ 33.

Clearly Dr. Allen qualified as an expert witness. Because her testimony was not admitted, the trial court and subsequently this Court, was left with volumes of new records without an explanation as to its relevance or impact. Sadly, this Court remanded this case for a hearing on whether this new evidence would have impacted the trial proceedings, and, to this day, that question remains unanswered. The trial court’s failure to allow Dr. Allen to testify deprived Petitioner of his due process rights to rebut the State’s evidence and to present mitigating evidence in his own behalf, in violation of the 5th, 6th, and 14th Amendments to the United States Constitution. *Skipper*, 476 U.S. 1, at 4-5, 106 S.Ct. 1669, at 1671, 90 L.Ed.2d. 1 (1986); *Barefoot v. Estelle*, 463 U.S. 880, 896-97, 103 S.Ct. 3383, 3396, 77 L.Ed.2d 1090 (1983). Petitioner was also deprived of a fair and reliable sentencing proceeding guaranteed him under the 6th, 8th, and 14th Amendments. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978). It cannot be faithfully said that this error was harmless beyond a reasonable doubt and his death sentence must be vacated. *Simpson v. State*, 1994 OK CR 40, 876 P.2d 690, 701; *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

PROPOSITION II
NEWLY DISCOVERED EVIDENCE AND NEW LAW RENDERS MR. WOOD’S
CONVICTION AND SENTENCE SUSPECT AND UNRELIABLE.

Petitioner has uncovered newly discovered evidence which renders his conviction unreliable. This evidence was not or could not have been raised in his direct appeal. Since this evidence supports the conclusion the outcome would have been different, Petitioner respectfully requests his convictions and sentences be reversed and his case remanded to district court for a new trial.

A. Hearing was held regarding whether trial counsel should be held in contempt of court.

On March 9, 2006, shortly after trial counsel testified as a witness at the evidentiary hearing regarding his professional performance, a contempt hearing was held in Oklahoma County District Court addressing Mr. Albert's conduct on March 1, 2006. (Ex. 4-A, at 3, 5, 7) Despite the lack of a transcript from the March 1st hearing, one can ascertain Mr. Albert initially failed to appear before the court, and then when he did appear, he was not ready to proceed on the behalf of 3 clients. (*Id.* at 14) The court noted, "In one of those cases Mr. Colston is charged with murder in the first degree. He's been in jail three years and he has not seen Mr. Albert in at least a year and a half to two years and hasn't had the opportunity to go to trial." (*Id.* at 40)

The court described Mr. Albert as disheveled and disoriented. Mr. Albert admitted he had "some problems in his life," and "I need help." (*Id.* at 7, 18, 19) He represented he "would report here on Monday morning ready to go to inpatient treatment." (*Id.* at 7) However, he failed to report to the court and to go to a treatment facility. (*Id.* at 5, 7, 9, 24) Despite the fact he expressed, "I have not had a beer, anything in seven days. I know that's just seven days, but that is - - that's how it starts," his failure to follow through with the inpatient treatment resulted in a contempt proceeding being held later that afternoon. (*Id.* at 6) Mr. Albert was held without bond. (*Id.* at 39, 41-42, 53, 63) Unfortunately, the subsequent hearing held that afternoon was filed under seal.⁴

The evidence adduced at this contempt proceeding is crucial since it occurred just days after Mr. Albert testified at Petitioner's hearing on February 27, 2006. At his contempt hearing Mr. Albert admitted he has a problem, which appears to involve alcohol and possibly even drugs. Furthermore,

⁴ Petitioner requested an evidentiary hearing and filed a Motion for Discovery to be provided a copy of Volume Two of the sealed transcript in Mr. Wilson's case, Oklahoma County Case. No. CF-2004-6139 (Ex. 4-B-docket sheet).

the evidence reveals a concern by a district court as to his representation of his clients and the fact he has not even seen one of his clients in close to two years. Clearly, this information is critical in determining whether Mr. Albert rendered effective assistance of counsel in Petitioner's case.

B. Trial counsel has been suspended from the practice of law.

According to Ex. 5, which is a sworn affidavit provided by General Counsel with the Oklahoma Bar Association, trial counsel Mr. John Albert has been suspended indefinitely from the practice of law. Said suspension took effect on April 24, 2006, in a confidential proceeding before the Oklahoma Supreme Court. His suspension occurred close to two months after he testified at the evidentiary hearing and a little over a month after his contempt hearing. Additionally, this Court on April 6, 2007, remanded another death penalty case, *Keary Lamar Littlejohn vs. State of Oklahoma*, D-2005-237, for an evidentiary hearing regarding Mr. Albert's performance as trial counsel.

C. Supplemental report of Dr. Kate Allen.

As mentioned in Proposition I, the trial court erroneously prevented Dr. Kate Allen from testifying at Petitioner's hearing. Petitioner subsequently requested Dr. Allen to review additional records and the transcript testimony of the witnesses from the hearing and issue a supplemental report which is attached as Ex. 6.

For this Court's convenience, Petitioner has pulled from Dr. Allen's Supplemental Report new evidence from the following heading:

The Defendant's Parents Failed: Mr. Gross, additionally, failed Tremane in his role as a *father*. .. he continues to avoid taking any responsibility for the malignant domestic violence he predicated on the family, for not financially supporting his children (often choosing not to work), and for not being available to the defendant on *any* basis as a father (all three men consistently attest to having been emotionally and physically abandoned by their father.)

Presence and Significance of Domestic Violence: The issue of authentic presence of domestic violence has been raised... What the court documents reveal is that extreme domestic violence shaped at least the first 10 years of Tremane Wood's life... These documents are evidence of authentic, severe and ongoing violence against Ms. Wood during the early and middle childhood of the defendant, far before his legal troubles began...

Domestic Violence Lethality Checklist: Of the 14 known indicators of domestic

violence likely to end up in death, Tremane Wood's parents, at that time, met...eleven.

Personality Strengths: Toward the end of our interview, Tremane expressed sorrow about what had happened to the young men who had been victimized, stating that they were completely innocent....He felt shame and humility that the parents [of the victim] adamantly opposed the death penalty, a penalty chosen for him by the trial jury. He expressed it directly, as he lowered his head and looked down at the floor, unable to continue talking.

Clearly, the evidence presented in Dr. Allen's report should be presented to a jury for their consideration as mitigation. Especially the fact Petitioner is remorseful, which is a powerful mitigating circumstance. Additionally, since Dr. Allen was not allowed to testify at the hearing her opinions were not considered by the trial court when it issued its Findings of Fact and Conclusions of Law (hereinafter "Findings") and undermines its reliability.

D. New Rule of Law.

The Oklahoma Legislature enacted a truth in sentencing law which forbids someone convicted of murder with a life with parole sentence from being paroled unless 85% of his sentence had been served. 21 O.S. § 13.1. Concerning that statute, this Court recently held that

for cases covered by this new sentencing reality--as in cases where life without parole is a sentencing option--the legislature's specific action compels a specific limitation on our traditional prohibition of mentioning parole at trial.... [T]he 85% Rule is a specific, delineated parole provision that does apply to life sentences for murder (as well as numerous other crimes), which does not vary from one inmate to another, which can be readily defined and explained by a judge, and which is relevant and helpful information for the jury to consider.

Anderson v. State, 2006 OK CR 6, 130 P.3d 273, 278. The trial court should have instructed Mr. Wood's jurors a life sentence according to the Pardon and Parole Board is considered to be forty-five (45) years and Mr. Wood if found guilty of murder in the first degree would have to serve at a minimum of 85% of that forty-five years. *Id.* at 283

E. Conclusion.

The granting of a new trial based on newly discovered evidence is a matter of discretion within the court and should be exercised if there is a reasonable probability that if such evidence had been introduced, a different result in the trial would have been reached. *Griffin v. State*, 1972 OK

CR 224, 501 P.2d 223, 224. “[B]efore a new trial on the ground of newly discovered evidence may be granted, the allegedly newly discovered evidence must be more than merely impeaching or cumulative. It must also be material to the issues involved and must be such as would probably produce an acquittal. *U.S. v. Kelley*, 929 F.2d 582, 586 (10th Cir. 1991). The facts and law presented above is either newly discovered evidence or a new rule of law warranting a new trial.

PROPOSITION III
PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE AND TRIAL COUNSEL IN VIOLATION OF 6th, 8th, AND 14th AMENDMENTS, AND ARTICLE II, §§ 7, 9, AND 20 OF THE OKLAHOMA CONSTITUTION.

Pursuant to 22 O.S. § 1089(C)(1)&(2), the only issues that may be raised in a capital post-conviction application are those that “were not and could not have been raised in a direct appeal; and “support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent.” Pursuant to 22 O.S. § 1089(D)(4)(b), the Court of Criminal Appeals shall review the post-conviction application to determine whether a ground could not have been previously raised if:

- (1) it is a claim of ineffective assistance of trial counsel involving a factual basis that was not ascertainable through the exercise of reasonable diligence on or before the time of the direct appeal, or
- (2) it is a claim contained in an original timely application for post-conviction relief relating to ineffective assistance of appellate counsel.

“All claims of ineffective assistance of counsel shall be governed by clearly established law as determined by the United States Supreme Court.” *See* 22 O.S. § 1089(D)(4)(b).

The Supreme Court has determined an ineffective assistance of counsel claim has two components: a defendant must show that trial counsel’s performance was deficient, and the deficiency prejudiced the defense. *Strickland*, 466 U.S. 668 at 687, 104 S.Ct. 2052 at 2052, 80 L.Ed.2d 674 (1984). To establish deficient performance, a petitioner must demonstrate trial counsel’s representation “fell below an objective standard of reasonableness.” *Id.* at 688, 104 S.Ct. at 2052. The Court has declined to articulate specific guidelines for appropriate attorney conduct and instead has emphasized “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Id.* In *Williams v. Taylor*, 529 U.S. 362, 120

S.Ct. 1495, 146 L.Ed.2d 389 (2000), the Court reiterated counsel has an obligation to “conduct a thorough investigation.” *Id.* at 396, 120 S.Ct. 1495 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed.1980)). *See also Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005)(holding even though the defendant and his family had suggested to defense counsel no mitigating evidence existed, counsel was still bound to obtain and review material the prosecution would rely upon in aggravation.)

In order for counsel’s inadequate performance to constitute a 6th Amendment violation, the defendant must show counsel’s failures prejudiced his defense. *Id.* 466 U.S. at 692, 104 S.Ct. 2052. In *Strickland*, the Court held to establish prejudice a “defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694, 104 S.Ct. 2052.

In addressing appellate ineffective assistance of counsel, the Tenth Circuit in *Cargle v. Mullin*, 317 F.3d 1196,1202 (10th Cir. 2003) held,

[t]he proper standard for assessing a claim of ineffectiveness of appellate counsel is that set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (following *Smith v. Murray*, 477 U.S. 527, 535-36, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986)). The petitioner must show both (1) constitutionally deficient performance, by demonstrating that his appellate counsel’s conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel’s unprofessional error(s), the result of the proceeding--in this case the appeal--would have been different. *Id.* at 285, 120 S.Ct. 746 (applying *Strickland*).... [I]n analyzing an appellate ineffectiveness claim based upon the failure to raise an issue on appeal, “we look to the merits of the omitted issue,” *Neill v. Gibson*, 278 F.3d 1044, 1057 (10th Cir.2001) (quotation omitted), *cert. denied*, 537 U.S. 835, 123 S.Ct. 145, 154 L.Ed.2d 54 (2002), generally in relation to the other arguments counsel did pursue. If the omitted issue is so plainly meritorious that it would have been unreasonable to winnow it out even from an otherwise strong appeal, its omission may directly establish deficient performance; if the omitted issue has merit but is not so compelling, the case for deficient performance is more complicated, requiring an assessment of the issue relative to the rest of the appeal, and deferential consideration must be given to any professional judgment involved in its omission; of course, if the issue is meritless, its omission will not constitute deficient performance. [FN4] *See*, 1203 *e.g.*, *Smith*, 528 U.S. at 288, 120 S.Ct. 746; *Banks v. Reynolds*, 54 F.3d 1508, 1515-16 (10th Cir.1995); *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir.1994).

Id. at 1202 -1203 (10th Cir. 2003). Petitioner submits due to the “expedited” review afforded under

22 O.S. §1089(A), there are many instances, such as this, wherein the post-conviction application is filed while the Capital Direct Appeal is still pending. Under these circumstances arguing ineffective assistance of counsel is rather difficult when the direct appeal is still being reviewed and/or when issues have been remanded to the district court on direct appeal. Despite this procedural hurdle, Petitioner submits his appellate counsel were wholly ineffective because they failed to raise several meritorious claims. The following sub-propositions are all examples of ineffective assistance of counsel, either by trial counsel, appellate counsel, or both. Capital post-conviction counsel respectfully requests Mr. Wood's convictions and sentences be reversed, and his case remanded for new trial, or new sentencing,⁵ or a new direct appeal.⁶

A. Appellate counsel failed to supplement record with impeachment evidence.

1. Trial counsel has been suspended from the practice of law.

Appellate counsel failed to supplement the direct appeal filed in Mr. Wood's case with relevant documentary evidence from the Oklahoma Bar Association that trial counsel Mr. Albert has been suspended indefinitely from the practice of law. *See* Ex. 5. Said suspension took effect on April 24, 2006, in a confidential proceeding before the Oklahoma Supreme Court. His suspension occurred almost two months after he testified at Petitioner's hearing. Clearly, this is relevant information this Court should consider before issuing its opinion on direct appeal. Additionally, this Court, at Petitioner's oral argument, commented Mr. Albert was an experienced attorney and seemed unaware of his suspension and appellate counsel should have informed the Court at that time.

2. Transcript from contempt hearing.

⁵ This Court in *Garrison v. State*, reversed and remanded for a new sentencing due to "the waiver of these issues by appellate counsel." 2004 OK CR 35, 103 P.3d 590, 620.

⁶ *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); *See, e.g., Mayo v. Henderson*, 13 F.3d 528, 537 (2d Cir.), *cert. denied*, 513 U.S. 820, 115 S.Ct. 81, 130 L.Ed.2d 35 (1994); *Claudio v. Scully*, 982 F.2d 798, 806 (2d Cir.1992), *cert. denied*, 508 U.S. 912, 113 S.Ct. 2347, 124 L.Ed.2d 256 (1993); *Fagan v. Washington*, 942 F.2d 1155, 1156 (7th Cir.1991); *Barry v. Brower*, 864 F.2d 294, 300-01 (3d Cir.1988); *Matire v. Wainwright*, 811 F.2d 1430, 1439 (11th Cir.1987); *Grady v. Artuz*, 931 F.Supp. 1048, 1053-54 (S.D.N.Y.1996); *Laffosse v. Walters*, 585 F.Supp. 1209, 1214 (S.D.N.Y.1984); and *Mason v. Hanks*, 97 F.3d 887, 892 (7th Cir. 1996).

As discussed in Proposition II(A), on March 9, 2006, a contempt hearing was held in an Oklahoma County District Court regarding Mr. Albert. The evidence adduced at this proceeding is crucial since it occurred just days after Mr. Albert testified at Petitioner's hearing on February 27, 2006, as to whether he provided effective assistance of counsel at trial. During his contempt hearing, Mr. Albert admitted he has a problem, which appears to involve alcohol and possibly even drugs. Furthermore, the evidence reveals a concern by a district court as to Mr. Albert's representation of his clients and the fact he has not even seen one of his clients in close to two years. Clearly, this information would have assisted this Court in determining whether Mr. Albert rendered effective assistance of counsel in Mr. Wood's case. Appellate counsel should have supplemented his direct appeal with this evidence for this Court's consideration.

B. Appellate counsel provided ineffective assistance of counsel at evidentiary hearing.

1. Failed to clarify the number of cases that had resulted in a sentence of death.

At the evidentiary hearing, Mr. Albert testified he had tried between 13 to 15 capital cases with only 3 cases resulting in a sentence of death.⁷ (Vol. II Tr. 260) Although counsel requested the court to take judicial notice of a handwritten list of 8 cases wherein Mr. Albert was listed as counsel and a death sentence had been returned, the trial court denied this request.⁸ (02/03/06 Tr. 409-12) Petitioner submits it was error for appellate counsel not to supplement the record documentation verifying Mr. Albert was counsel of record in the following 7 cases out of Oklahoma County- *State of Oklahoma vs. James Fisher*, CF-83-137; *State of Oklahoma vs. James Lawrence Mitchell*, CF-2000-4712; *State of Oklahoma vs. Ronald Clinton Lott*, CF-87-963; *State of Oklahoma vs. Terry Lyn Short*, CF-95-216; *State of Oklahoma vs. Richard Stephen Fairchild*, CF-93-7103; *State of Oklahoma vs. Keary Littlejohn*, CF- 2002-2384; and one case out of Stephens County- *State of Oklahoma vs. Johnny Black*, CF-99-1. (See Exs. 14(A-H))

⁷ The State argued the list was inaccurate and assured the court Mr. Albert had not been counsel on 2 of the 8 cases. This representation by the State was inaccurate and misleading and is addressed in Proposition IV (F).

⁸ Although appellate counsel requested their investigator to bring back relevant documentation as to this inaccuracy, which she did, this evidence was never presented to the trial court. (See affidavit of investigator- Ex. 13)

2. Failed to utilize trial transcripts to cross-examine counsel.

At the evidentiary hearing, trial counsel testified he would have called a number of other mitigating witnesses had Petitioner allowed him to do so. He recalled, "I remember putting on the mother. She got very emotional. Okay? And we were going to put other people on. And I remember he said that he didn't want to do it to family anymore." (Vol. II Tr. 245) Mr. Albert stated he acquiesced to his client's wishes. The trial court then inquired directly of Mr. Albert, "after the testimony of Linda Wood, Mr. Tremane's mother, are you saying that your client said, no more, that's enough? Is that..." Mr. Albert interrupts, with "Family...I don't blame him, yes." (*Id.* at 288)

However, after reviewing counsel's second stage opening, it is apparent he never intended to call anyone else because he stated to the jury they would only hear evidence from Andre Taylor, Linda Wood, and Dr. Ray Hand. (04/05/05 Tr. 12) Sadly, this information was readily available and would have served as powerful impeachment evidence. Unfortunately, since Mr. Albert's self-serving testimony at the hearing went unchallenged, the court, in its Findings at ¶ 11 stated as fact, "[f]ollowing the testimony of Appellant's mother, Linda Wood, Appellant demanded that no more family members be permitted to testify in mitigation." As to this Court's question number 1- "[w]hether the evidence identified in the application was reasonably available to trial counsel in preparation for trial," the trial court responded "[a]lthough attempts by trial counsel to locate Appellant's natural father were unsuccessful, he in all probability would not have testified had he been contacted due to Appellant's desire to have no further family members testify following his mother's testimony." (Findings at page 11) Since this information is clearly incorrect, it renders the trial court's Findings unreliable.

3. Failed to show trial court was concerned trial counsel was unprepared.

Before Petitioner's trial began, the court voiced its concern counsel was not ready to proceed with Petitioner's trial. The trial court inquired "[h]ave you had adequate time to get prepared and so forth?" Mr. Albert responded he was ready for trial. (03/29/04 Tr. 5-6) Appellate counsel should have confronted Mr. Albert about his colloquy with the court, which would have reminded

the trial court of its concerns pre-trial as to whether or not counsel was ready to proceed to trial.

4. Failed to prepare for the testimony of Raymond Gross, Jr.

a. Failed to cross-examine Mr. Gross with divorce decree.

Appellate counsel called Petitioner's father Raymond Gross, Jr., as a witness at the evidentiary hearing. (Vol. I Tr. 16) He testified he had not been called as a witness, nor contacted by any member of the trial team. He expressed he would have been willing to testify. (*Id.* at 16) Although Mr. Gross stated his marriage to Linda Wood was "pretty rocky," he denied most of the allegations of abuse Ms. Wood and his sons testified had occurred. (*Id.* at 19) Although appellate counsel had in their possession a copy of the Gross' divorce decree which documented the physical abuse and the fact a permanent restraining order was in place against Raymond Gross, it was not utilized. (*See* Ex. 8-C, page 2 at ¶ 5) It also provided the children would be exchanged between the parties at the Stillwater Police Department and the Logan County Sheriff's Department. (*Id.* at ¶ 15)

b. Failed to provide trial court with relevant divorce documents.

Although appellate counsel had a copy of the Gross' "Decree of Divorce," they did not have a copy of the parties divorce file. (*See* Ex. 8 (A-C)) The "Petition for Divorce," Ex. 8-A at ¶ 4, detailed Linda Wood Gross in 1988 sought a divorce on the grounds of incompatibility and "extreme cruelty." The petition states the "defendant is a violent man and has kept the plaintiff from seeing her children" and she requested a temporary order restraining the defendant from harassing her or her children. (*Id.* at ¶ 15) A "Temporary Order" provided the children will be exchanged in front of the Stillwater Police Department or at the Logan County Sheriff's Department. (*See* Ex. 8-B)

c. Failure to investigate Raymond Gross' criminal background.

Appellate counsel also failed to investigate Raymond Gross' criminal background. If appellate counsel had performed this investigation, he would have discovered Mr. Gross had a prior criminal conviction for Feloniously Pointing a Weapon at Linda Wood and Acie A. Anderson in Payne County Case No. CRF-88-188. The Preliminary Information filed detailed Mr. Gross on June 15, 1988, "feloniously and without lawful cause point a .44 caliber Magnum Smith & Wesson

revolver at one Linda Jewel Gross for the purpose of threatening and intimidating her, and with the unlawful, malicious and felonious intent then and there on the part of said defendant to injure the said Linda Jewel Gross physically or by mental or emotional intimidation,” and stated the identical language as to Acie Anderson. (See Ex. 12 A-C) Petitioner obtained the Case Report issued by the Oklahoma State University Police Department which further described this offense as an attempted abduction of ex-wife.⁹ It noted both Linda Gross and Acie Anderson had cuts and abrasions from being pistol whipped and Mr. Gross had told them “I’m going to shoot you.” (See Ex. 15)

d. Failed to request records detailing the abuse Ms. Wood suffered.

At the evidentiary hearing Linda Wood testified about the abuse she suffered at the hands of Raymond Gross and about their “horrific” relationship. (Vol. I Tr. 112) She expressed he was “very possessive, very jealous, very controlling” and he alienated her from contact with her family. (*Id.* at 113) He monitored her every move from going to the grocery store to going to work. He told her what she could and could not wear and accused her of having affairs. (*Id.*)

Ms. Wood testified one time he took her out into the middle of nowhere and told her to “give my baby a kiss good-bye because that was the last time I would see him, he was going to kill me.” (*Id.* at 115) Another time he grabbed her by her ponytail and slung her into a patio glass window. (*Id.* at 116) She expressed, “he has hit me with his fist. He has hit me with a pipe wrench. He took a gun to my head and took all the bullets out but one, and actually pulled the trigger. And when the gun did not go off, he has hit me in the head with his gun.” (*Id.*) Many of the physical incidents occurred in front of her children. She recalled one instance when he tied her to a chair with extension cords and poured alcohol on her and then threatened to set her on fire. (*Id.* at 117) She said he had handcuffed her to the car door several times. He did this so she could not protect herself as he beat her face. (*Id.*) Another time drug her down the road as she was cuffed to the car door. (*Id.* at 117-18) She testified she has a scar on the top of her head from when he hit her with the handle

⁹ Petitioner received additional police reports from the Stillwater Police Department regarding this incident. These records are to the Amended Application as Exhibit 21.

of the gun. (*Id.* at 116) She has permanent whiplash from her head going backward so many times and permanent damage to the joints in her shoulders from her arms being bent behind her. She stated she has two fake front teeth from when he knocked them out. (*Id.* at 119)

Unfortunately, all the above information was elicited from Ms. Wood without any documentary support. Although appellate counsel discussed the divorce decree with Ms. Wood, it was not admitted as a separate exhibit. The State on the other hand pulled one DHS record from the volumes of records and questioned Ms. Wood about how DHS had concluded she had made a invalid complaint about him abusing her and her children. (*Id.* at 130-31) The State also made light of the fact Ms. Wood reported very few of the incidents to the police since her husband was a police officer. The State also pointed out no police reports had been provided to the court to detail the abuse, nor medical records in regards to her injuries, nor documentation that she had stayed at any of the battered women's shelters. (*Id.* at 132-33, 135, 141)

Petitioner has since requested records from the battered women's shelters where she stayed. Although, most of the shelters expressed they do not keep records for that length of time, one shelter, the Stillwater Domestic Violence Services, Inc., reported Linda Wood (Gross) "was sheltered by SDVS for one day on 5-16-88, and referred to another shelter on 5-25-94." (*See* Ex. 16) Petitioner also obtained a letter and bill for services rendered on July 29, 1996, by dentist Kelly Brown who made Ms. Wood's fake two front teeth. (*See* Ex. 11)

The most pertinent information Petitioner was able to locate are Ms. Wood's requests for Protective Orders against Raymond Gross out of Tulsa County, Oklahoma for 1986 and 1987. These documents are attached as Exs. 9 and 10. In the 1986 "Petition for Protective Order," Linda Wood reported under question 7: "My husband hit me 4 times with his fist in my face. He verbally abused me. He also physically forced me to have intercourse against my will and to commit sexual acts against my will. He also threatened to kill me and to take my children. This has been a daily occurrence for sometime." (*See* Ex. 9-A)

An "Emergency Protective Order" was granted which reflected she left her home, called the

police, and visited a shelter. She checked the following abuse had occurred: slaps, kicks, punches, burns, choking, physical abuse while pregnant and he has used a weapon (gun) to abuse her. (See Ex. 9-B) As to the injuries received, she checked: bruises, concussions, cuts, internal injuries, complications with pregnancy, burns, and broken bones. As to medical care she received she checked: self care, doctor's care, emergency room, hospitalization, and surgery, which she wrote "had to have jaw wired." She also checked he has threatened to kill her and has access to guns. Unfortunately, the "Emergency Protective Order" was dismissed because she failed to appear to prosecute it. (See Ex. 9-C) This is understandable Raymond Gross was the Chief of Police of the Langston Police Department as detailed in the emergency order.

In 1987, Ms. Wood filed another "Petition for Protective Order" and listed the following:

Raymond threatened to kill me. He kicked me in my left leg and Raymond hit me in the back of my head. Raymond forced me to have sexual intercourse against my will. (Raymond) He forced me to preform sexual acts against my will. In the past Raymond has fractured my jaw, knocked out my teeth, handcuffed me to a car and beat me. Raymond has put a gun to my head, hit me with a gun, hit me in the mouth with handcuffs. Chained me to a swingset in an abandoned park and left me there overnite. Raymond has sodomized me. Tied me to the bed with extension cords. Threatened my life with a gun, a knife, a pipe wrench. And Raymond has forced me to have sex and perform sexual acts everyday for 1 entire year. (See Ex. 10-A)

An "Emergency Protective Order" was granted which reflected Ms. Wood had contacted a crisis line. (See Ex. 10-B) She checked the following abuse occurred 3 or more times a month: slaps, kicks, punches, choking, and throwing of objects and he has used a weapon (gun) and handcuffs to abuse her. As to her injuries, she checked: bruises, concussions, cuts, and broken bones. As to medical care received, she checked: self care, doctor's care, emergency room, and hospitalization. She also checked he had threatened to kill her and had access to guns. Although a Protective Order was initially granted it was dismissed after because neither party appeared. (See Ex. 10 C & D) However, this can be explained by the fact Ms. Wood filed for divorce at the end of November 1988.

e. Conclusion.

Since none of the evidence listed above was presented at this hearing, the court reported the following as to the testimony of Raymond Gross:

Raymond Gross' testimony was in direct conflict with the abuse outlined in Appellant's Application. DHS records provided to this Court indicate that reported abuse by Linda Wood was unfounded and vindictive. Raymond Gross' testimony was consistent and not impeached and was found to be credible by this Court. It would not have been beneficial for Appellant to call Raymond Gross as a witness in mitigation at his trial in order to establish that Appellant had grown up in an abusive home. Raymond Gross' testimony provided just the opposite.

(See Findings, page 2 at ¶ 2.) Clearly, if the court had been presented with this information, it would not have concluded the abuse reported by Linda Wood was "unfounded and vindictive." Petitioner submits appellate counsel provided ineffective assistance of counsel for not bringing these matters to the trial court's attention at the hearing, for not requesting these records to support Ms. Wood's allegations of abuse at the hearing and for not impeaching Mr. Gross with the documents that were available. This failure by appellate counsel undermines the reliability of the trial court's Findings. This Court must reverse Petitioner's case for a new trial or for a new evidentiary hearing.

5. Failed to mention trial counsel never stated he had not provided ineffective assistance of counsel.

At the evidentiary hearing, Mr. Albert testified about his performance at Petitioner's trial and admitted "I could have done better." (Vol. II Tr. 246) Since Petitioner's trial he has removed himself from the Oklahoma County list for counsel appointments in death penalty cases. (*Id.* at 247) He testified he did not have the time to adequately prepare in Petitioner's case.¹⁰ (*Id.* at 248) As to second stage, Mr. Albert testified he did not adequately prepare a mitigation case to effectively represent or defend Petitioner. (*Id.*) He testified he could have been "better and more effective," had he been more involved. (*Id.* 248-49) Mr. Albert agreed it was his responsibility and not Dr. Hand's to develop second stage. (*Id.* at 249) He testified his affidavit contained the truth as to the steps he took to prepare for trial. (*Id.* at 252) He admitted he signed his affidavit and even made corrections to it before he signed it. (*Id.* at 246, 255-57, 268)

Although appellate counsel elicited this testimony from Mr. Albert, he failed to state in his

¹⁰ It is unfortunate he testified at the evidentiary hearing he was not ready for trial. Especially since the court had pre-trial inquired whether he was ready to proceed. See Proposition III(B)(3)

Supplemental Brief that Mr. Albert was does deny signing the affidavit, or state the information contained in it is not truthful. As one would expect, Mr. Albert offered lots of explanations during the hearing that can best be described as professional self-preservation; however, he never once testified the affidavit he signed was untruthful. Appellate counsel's failure to provide this critical information to this Court, leaves the insinuation trial counsel provided effective assistance of counsel. However, that was simply not the case.

6. Failed to list all the factual inaccuracies contained in trial court's Findings.

Petitioner submits the trial court's Findings are clearly not supported by the trial record or the record developed at the hearing. Unfortunately, many of these inconsistencies were not addressed by appellate counsel in his Supplemental Brief. For the convenience of this Court, Petitioner will address the relevant factual inconsistencies in the order in which the trial court addressed them.

The trial court, in its Findings on page 4, erroneously found Dr. Ray Hand, the psychological expert who testified for Petitioner at trial, had the records from Stillwater Public Schools, Meadowlake Hospital, Office of Juvenile Affairs, DHS, and Butner School System. The trial court stated, "much of this information was made available to the jury" at trial. However, the testimony presented at the evidentiary hearing does not support this finding. Bieva Holladay, the records sponsor from Stillwater Public Schools, and Linda Marshall, the records representative for Butner Schools in Cromwell, consistently testified no request for records pertaining to Petitioner had been received prior to the request made by the appellate team. (Vol. I Tr. 10, 12, 13-14; 45) While the State attempted to give the appearance the Oklahoma Office of Juvenile Affairs ("OJA") records were contained in the DHS records since OJA used to be a part of DHS, it is clear from the testimony of OJA representative Helen Killian, their records would only have been received per a direct request to them and not a general request to DHS. (Vol. I Tr. 41-43) Ms. Killian, too, confirmed the only request for records received by OJA had been made by the appellate team. (Vol. I Tr. 86-87) It is clear Dr. Hand did not have the voluminous records from OJA much less the school records since

they were never requested in the first place.¹¹

The trial court at ¶ 2 of its Findings also determined it would not have been beneficial for Appellant to have called his father, Raymond Gross, as a witness in mitigation at his trial. Although Mr. Gross did admit to some physical violence, his testimony regarding Petitioner's relationship with his older brother Zjaiton Wood, a.k.a. Jake, would have provided powerful mitigation. Mr. Gross testified Zjaiton had a strong influence over Petitioner and he explained "If Zjaiton tells Termane, 'Let's go ten blocks on your kneecaps,' Termane will follow him." (Vol. I Tr. 22). Also salient is his testimony he cares for Petitioner. (Vol. I Tr. 23).

The trial court's determination "Appellant provided no evidence that corroborates the claim made by Linda Wood that Appellant had been abused by his father," was clearly contradicted by the testimony presented by Zjaiton and Andre Wood. Andre testified Raymond Gross was abusive to all of his children, including Petitioner, and he was especially abusive to Linda Wood. (Vol. I Tr. 158) Zjaiton confirmed Raymond Gross was abusive to Petitioner. (Vol. II Tr. 331-332).

The court at ¶ 3 of its Finding concluded the evidence Dr. Ray Hand provided to the jury regarding the foster care Petitioner had received was adequate. However, the evidence presented by Petitioner's former foster mother Jan Davis, provided personal observations of his behavior. Although Dr. Hand may have testified Petitioner was at one time placed in foster care and he was successful during placement; Jan Davis offered first-hand accounts of his success. Jan Davis saw him act as a peacemaker in her home with the other foster children. (Vol. I Tr. 79) She expressed he had good manners and complied with her rules. (*Id.* at 79-80) He "seemed to do well in school. He loved football, basketball. Took on all the sports he could." (*Id.* at 80) Clearly, Dr. Hand's testimony from a stale review of records could not replace the personalization Ms. Davis provided. (*Id.* at 81-82)

The trial court at ¶ 4 of its Findings stated the testimony of Petitioner's former juvenile mentor Matthew Netherton, was "of little value as mitigation evidence," and based this on the

¹¹ Counsel testified he had provided two to three hundred pages of records to Dr. Hand. (Vol. II Tr. 244). As this Court can see, the OJA records, which were admitted as Def. Exs. 3 & 4, are voluminous and in excess of 300 pages.

inconsistencies between his testimony he had a high opinion of Petitioner and saw him do many positive things, with his handwritten notes of his behavior. However, Mr. Netherton's notes must be viewed in the context Mr. Netherton mentored Petitioner (Vol. I Tr. 89). Mr. Netherton worked with troubled youth and his notes are simply a reflection of the ups and downs the treatment process. Mr. Netherton's testimony concerning Petitioner was very positive. He testified he volunteered for the Special Olympics, and spoke in front of a juvenile delinquency class. (*Id.* at 98) Regarding Petitioner's involvement with juvenile delinquency class, Mr. Netherton found, "The kids loved him. They asked him questions. He didn't want to leave. By the end of the day, he wanted them to keep asking him questions because he felt – he felt that he could help people. That's what he was doing with those students." (*Id.* at 99) When asked if his opinion of all the hundreds of kids he had mentored was as high as his opinion of him, Netherton replied, "No, not at all." (*Id.* at 105, 106).

Mr. Netherton also testified during the two years he mentored him, his father was never around. (*Id.* at 90, 93) He thought Linda Wood was more of a friend to her children than an authority figure, and found it was "fairly common" for Petitioner to be left in the care of his older brothers. Mr. Netherton stated he was personally scared of Jake Wood. (*Id.* at 94-95).

The trial court at ¶ 7 of its Findings determined Andre Wood's testimony at the hearing was consistent with his testimony at the jury trial and therefore, "the jury at Appellant's trial had the benefit of any mitigating content of his testimony." This finding is completely unsupported by the trial record. Andre was called by the State as a first stage witness. His testimony did not address any mitigation. Therefore, **none** of the mitigating testimony Andre provided at the hearing had been received by the jury at Petitioner's trial. (Emphasis added.)

Andre testified at the hearing that "growing up with my dad was pretty rough... He was a very mean man. Very, very mean. He was abusive to me, to both my brothers, and to my mom, especially my mom." (Vol. I Tr. 157-58) He testified his father put his mother in the hospital once; he broke her jaw and fractured three of her ribs; he had handcuffed her to a car and drug her down a highway, and he had even poured alcohol on her and threatened to set her on fire. (*Id.* at 158)

Andre testified Petitioner was physically abused by his father and recalled an incident where his dad “snatched him [Termene] up from the table and took a leather strap that you would sharpen a razor on and beat him, beat him pretty good. I mean to the point where he had bruises and welts and marks all over his legs and back.” (*Id.* at 161)

The court also found in ¶s 8 and 10 the testimony of both Wesley Welch and Michael Hiltzman, former friends and foster brothers of Petitioner, was not credible. It appears the court made this finding based upon the witnesses’ felony criminal records. Petitioner submits the jury may have found otherwise as they had clearly accepted and given some weight to the testimony of another convicted felon called at Petitioner’s jury trial –codefendant Brandy Warden.

The trial court at ¶ 11 of its Findings addressed the testimony of trial counsel John Albert. First, the court found, “Mr. Albert attempted to locate Appellant’s natural father, Raymond Gross, but was unable to locate him.” However, direct appeal investigator Brenda McCray testified it was not difficult to locate Mr. Gross. She simply asked his son, Andre Wood, who told her where he lived. (Vol. II Tr. 300). The court also determined Mr. Albert would have attempted to interview any potential witnesses given to him by the Appellant. This is clearly an attempt to shift the responsibility of case investigation onto Petitioner. Furthermore, and more importantly, Mr. Albert testified he relied upon Jack Stringer, an investigator employed by the Oklahoma Indigent Defense System (hereinafter “OIDS”), as his investigator. (Vol. II Tr. 241-42) Jack Stringer on the other hand testified he was assigned by OIDS to work only on the behalf of Zjaiton Wood. (Vol. II Tr. 229) Further, no one ever asked him to do any investigative work on Petitioner’s case because a conflict of interest existed between the Wood brothers. (*Id.* at 229-30)

The court determined in ¶ 11 of its Findings Mr. Albert had in his possession, prior to trial, all of the same records gathered by counsel for Appellant’s co-defendant, Zjaiton Wood. Then contradicted its own findings in ¶ 14 by stating “no one on the trial team for the co-defendant provided anything directly to Appellant’s trial team.” Lead counsel for Zjaiton, Ms. Wayna Tyner of OIDS, testified about this issue at the evidentiary hearing. Ms. Tyner testified a conflict of interest

existed between Zjaiton and Termene. (Vol. III. Tr. 396) Ms. Tyner clearly expressed there was never a time when she or anyone else on Zjaiton's defense team conducted investigation on behalf of Termene. (*Id.*) Ms. Tyner explained both trial counsel for Zjaiton and for Wood possessed some letters purportedly written by Brandy Warden. Additionally, Ms. Tyner testified counsel for Termene should have received some of the same DHS records she received since Termene's counsel had joined in her motion for their production. (*Id.* at 399) However, no other items of evidence or investigation were shared. (*Id.* at 400)

The trial court also determined that although Mr. Albert had not impeached the State's star witness Brandy Warden "with some letters allegedly written by her and sent to Appellant," he had presented to the jury all the information contained in them. Petitioner submits, had trial counsel conducted handwriting analysis on the letters prior to trial, not only would the pertinent content of the letters have come before the jury, but also, Ms. Warden would have been caught in a false statement before the jury, since she denied writing these letters at trial. The impeachment value was not just in the content of the letters, but also in demonstrating, live and in front of a jury, Ms. Warden committed perjury, which did not occur at Petitioner's trial.

The trial court at ¶ 13 of its Findings determined the testimony of handwriting expert Pat Tull would not have been admissible since Ms. Tull did not take a handwriting exemplar from Brandy Warden. Since appellate counsel did not seek an order from the trial court requesting a handwriting exemplar,¹² Tull utilized, as the "known" handwriting sample for Ms. Warden, a letter signed "Brandy Warden" that was filed in her court file for consideration at her sentencing.¹³ Pat Tull concluded the known letter by Ms. Warden from the court file was written by the same person who sent the letters in question to Petitioner while he was in county jail. (Vol. II Tr. 349-50)

The court's Findings in ¶ 12 as to the testimony of Zjaiton Wood is, once again, contrary to

¹² In sub-proposition B(8) Petitioner argues appellate counsel was ineffective for not seeking this order.

¹³ At Ms. Warden's sentencing hearing, her counsel represented this letter was written by Ms. Warden. A copy of the known letter was admitted as Defendant's Exhibit 10 at the evidentiary hearing. *See* Exhibit 13 ¶ 6, affidavit of investigator Brenda McCray for further details.

the evidence presented. Zjaiton testified in the guilt/innocence phase of Petitioner's trial. His testimony concerned only first-stage issues. Therefore his hearing testimony, which included details of the physical and mental abuse he and his family suffered at the hands of their father cannot be characterized as "substantially the same" as his first-stage jury trial testimony. (Vol. II Tr. 331-32) Zjaiton testified, "I just wanted to show him [Termene] that the world we lived in is a world of cruelty." (*Id.* at 337) He admitted he physically beat Petitioner. (*Id.* at 335) He also expressed he loved him and he was his best friend. (*Id.* at 337)

The trial court, in addressing juror Jera Burton's testimony in its Findings at ¶ 15, completely disregarded her testimony because she could not remember the mitigation presented at trial and because the State had not been present when she was shown the affidavits collected by the appellate team. Petitioner submits her testimony should not be so readily dismissed. Ms. Burton testified she would have liked to have heard the type of evidence presented in the affidavits and it would have affected her decision, "I just probably would have held my ground as far as the sentencing goes," and this evidence made her look at him as a different person. (Vol. III Tr. 424-25, 414)

Clearly, the factual contradictions and inconsistencies outlined above, render the trial court's Findings and ultimate conclusions suspect and unreliable.

7. Failed to provide this Court with Dr. Allen's findings.

As discussed in Proposition I, the trial court would not allow Dr. Allen to testify at the hearing. Dr. Allen is the one witness who reviewed the hundreds of pages of mitigation-related records and court documents collected by the appellate team, and interviewed and/or reviewed affidavits by family, friends, and mentors. She is the one witness would have been able to explain how all this new evidence would have effected the outcome of the trial had she been allowed to testify. Although Dr. Allen's report was admitted as Def. Ex. 8, appellate counsel failed to include in the Supplemental Brief the trial court erred by not allowing her to testify and failed to provide what she would have testified to had she been allowed. (*See* Ex. 3)

Petitioner submits had Dr. Allen been allowed to testify she would have conveyed to the

court the following information pulled from these headings in her report:

Early Childhood Development and Experiences: [his parents] together and individually, categorically failed him... His development took place amid consistent poverty, recurring moves, normalized violence and criminality both inside and outside the home, abject emotional and physical neglect, and ongoing experiences of racial hostility and rejection from both Caucasians and African-Americans. Finally, his parents allowed the criminal gang- first brought to him through his mentally ill and extremely violent older brother, Jake- to take over his upbringing at around age 11.... Mr. Wood's most basic needs continually went unmet.... The strongest indicator of Tremane's capacity at that time to function as a healthy, law-abiding young man were the consistent reports of his pro-social development and notable successful rehabilitative behaviors while in residential care. However just as remarkable were the losses in that progress as soon as he was returned to his home and community, which was overwhelmingly structured by gang violence and parental chaos. And that was the pattern of his life until he finally surrendered to the emotional and financial support that criminal gang activity provided him as an older teenager and adult.

The Defendant's Parents Failed: The most significance force in Tremane's early life are his memories (and their corroboration by other family members) of the many incidents of extreme violence of his father toward his mother.... Not only was extreme domestic violence a central experience of the three boys: when the boys took their mother's side and tried to protect her, their father turned his violence on them, beating them sadistically.... Tremane today can easily recall the potent combination of terror, anger, and helplessness he felt as a child being forced to witness such brutality against his mother, as spilling over to himself and his brothers. Children's experience of domestic violence is well-known in the field as child abuse by proxy. It can be more pernicious in a child's development than general child abuse because it conveys to the child that not only is their home not safe, but that adults are inadequate in the world.... It is of course, the major source of his diagnosis of Post Traumatic Stress Disorder and Generalized Anxiety Disorder.... When the parents split for good when Tremane was 8 years old, Linda was unable to earn a good enough living for her family and was not receiving child support. [On almost all of the treatment documentation from Tremane's life with his mother, his family's whereabouts are stated as unknown.] Linda Wood admits that she was away from home working or going to school all the hours of the day except for sleeping. The boys were left completely on their own and the neighborhood did not appreciate it in the least. CPS call about lack of supervision went by without effective responses. They were considered "outcasts" (Linda Wood's word) in the neighborhoods they lived in because of the behaviors of the youngest sons, Linda's absence, and her inclination to blame everyone else in the neighborhood but herself and her children. She taught them steadily to believe that others were to blame for their problems and that most of it was due to racial prejudice.... Linda Wood stated in her mitigation affidavit that she, indeed, made many mistakes with her children and she stated that her children "grew up in an environment of terror, deprivation and exclusion."

Dr. Allen opined Mr. Wood suffered from attachment disorder because his parents were unavailable. She stated his brother Jake was the closet figure of attachment in his early life and then later the criminal gang. Dr. Allen also determined by the time Tremane was 11, Jake had become

the defacto father and “head of the household” even up to the time of this crime. Because Jake was the his only functional bond, she reports he would endure his “bullying and beating.” Dr. Allen described his mother as sadly pathetic and that the records consistently revealed he did well while in the program, but that once he was returned to his mother’s home he reintegrated into the gang.

As for Tremane’s “Neurological and Psychiatric Issues,” Dr. Allen’s review of the records documented depression, dependency, PTSD and generalized anxiety. As for “Race as a Consideration in Development” Dr. Allen explained the biracial child is placed in a rather unique situation because they live in both the “white” and the “black” world and have the expectations and rejections of both. She described when Tremane lived in a predominantly white town he was often rejected due to his skin color. However, when he lived in a black community he would be rejected because he “wasn’t black enough.” She concluded this section with, “I present this duality as a fundamental stressor in the defendant’s life, and one for which he was never responsible and could not overcome on his own.”

Her report listed his personality strengths as his “abiding love for his mother, brothers, and even his father whom he is attempting to forgive” and he has “strong love for his two children and a desire to be the best parent he can be under the circumstances.” She reported “Tremane expressed sadness, feelings of helplessness, and certain remorse,” as to the victim’s murder. Finally, Dr. Allen felt he could positively conform to prison life.

Clearly, Dr. Allen should have been allowed to testify at the evidentiary hearing. Her testimony is clearly more thorough and detailed than Dr. Hand’s. Dr. Allen’s report provided mitigating circumstances not addressed by Dr. Hand, such as remorse. Appellate counsel should have provided this information in his Supplemental Brief.

8. Failed to obtain an order for handwriting exemplars from Brandy Warden.

Appellate counsel argued trial counsel had been ineffective for failing to properly impeach state’s star witness, Brandy Warden, with a handwriting expert. Although Ms. Warden was the only witness that placed Petitioner at the crime scene, trial counsel had in his possession two letters,

purportedly written by Ms. Warden to Petitioner, wherein she stated she knew he did not murder the victim. However, Ms. Warden denied writing these letters. Since trial counsel had not hired a handwriting expert, his attempts to impeach her fell short. In closing argument, the State capitalized on trial counsel's failure to utilize a handwriting expert by pointing out if counsel had believed Ms. Warden had written those letters, he would have hired an expert to prove it. (04/02/02 Tr. 182-83)

On direct appeal, appellate counsel hired Pat Tull, a handwriting expert who expressed Ms. Warden had in fact written those exculpatory letters. However, Ms. Tull made her comparison of the questioned letters with a known letter purportedly written by Ms. Warden. At the time Ms. Tull made her analysis, Petitioner was on appeal to this Court, therefore the trial court was without jurisdiction to issue an order requesting Ms. Warden to provide handwriting exemplars. However, once Petitioner's case was remanded, appellate counsel should have sought this order. Since this was not done, the court in its Findings in ¶ 13 disregarded Ms. Tull's opinion because "[s]he did not take a handwriting exemplar from any person, including Brandy Warden, in connection with her comparison." Had Ms. Tull been provided with handwriting exemplars from Ms. Warden, the court would not have been able to completely ignore this damaging evidence to Ms. Warden's credibility.

9. Failed to admit videotape produced by the Stillwater Police Department .

Sandra Marshall, a former probation and parole officer with the OJA, testified she had been assigned to work with Petitioner's family while they were living in Stillwater, Oklahoma. (Vol. II Tr.183-85) She saw him once a week for about a four month period. Ms. Marshall explained some of the issues he was facing as young man growing up in Stillwater was the low tolerance for his family by the community, school, and by the Stillwater Police Department. (*Id.* at 187) However, when Ms. Marshall attempted to elaborate on each of the issues he was facing, such as "being biracial in Stillwater, Oklahoma, in the early '90's was probably not a real easy thing..." or having the police stop them every time they saw them on the street, her testimony was met by an objection by the State which was sustained by the trial court. (*Id.* at 187, 191)

Since appellate counsel was not allowed to develop Ms. Marshall's testimony or even present

the testimony of Dr. Allen, counsel should have offered into evidence a videotape made by the Stillwater Police Department which featured the Wood brothers. (See Ex.13) This videotape titled "Gangs in Stillwater" shows firsthand how the police viewed the Wood brothers, and the low tolerance the community had for them, which were the very obstacles Ms. Marshall testified prevented Petitioner from successfully completing his treatment/probation plan. (See Ex. 17-DVD)

10. Failed to present evidence Brandy Warden's sentence was reduced.

At Petitioner's trial, Brandy Warden testified she had received a deal from the State. She received 45 years for accessory to murder and 10 years for conspiracy to commit a felony. (04/01/04 Tr. 132, 201) She testified she was not charged for her participation in the robbery of the LaFranca's Pizza, although her other co-defendants were charged. (04/05/04 Tr. 21) On April 15, 2004, just 11 days after testifying in Petitioner's trial, Ms. Warden went before the trial court on her application for a one year review in which her sentence was modified from 45 years to 35 years. Interestingly, two orders were filed into the record as to her modification. The first order filed on April 15, 2004, simply reflected the outcome of the proceeding; however the second order filed on April 19, 2004, reflected her sentence modification was "granted over the strenuous objections of the State." (See Exs.18-A & B) There is no transcript of this proceeding. Counsel should have presented this information to the court.

Additionally, appellate counsel should have presented the court with Ms. Warden's record from Payne County Case No. 2000-202, where she pled guilty to larceny of a house and received a 3 year deferred sentence because she agreed to testify against her co-defendant. (See Ex. 19A) When Ms. Warden was arrested in Oklahoma County, her Payne County probation and parole officer recommended her sentence be accelerated. (See Ex. 19-B) Despite this recommendation, her sentence was not accelerated, but dismissed. (See Ex. 19-C) This evidence should clearly have been submitted for the court to consider regarding her credibility.

Furthermore, appellate counsel, on remand should have utilized the discovery mechanisms provided by the district court to seek information from the Cleveland County, Payne County, and

Oklahoma County District Attorneys Offices as to whether she received any deals or leniency in exchange for her testimony against her three co-defendants. From the record before us, it certainly appears she received leniency in Cleveland and Oklahoma County. Any information concerning any deals or leniency Ms. Warden may have received constitutes undisclosed impeachment under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), which must be disclosed at this time.¹⁴

11. Conclusion.

Clearly, if the trial court had been presented with the above evidence, it would not have concluded in its Findings at page 14 “that confidence in the verdict of the jury has not been undermined by any testimony presented at the evidentiary hearing.” Or, in its final paragraph “this Court cannot find that trial counsel’s methods of utilizing the available mitigation evidence was anything but sound trial strategy, nor that Appellant has demonstrated that he was prejudiced and deprived of a fair trial.” Petitioner submits appellate counsel’s failure to provide effective assistance of counsel at the hearing undermined the reliability of the trial court’s Findings. Therefore, this Court must reverse Petitioner’s case for a new trial or for a new evidentiary hearing.

C. Ineffectiveness of trial counsel which appellate counsel failed to raise.

Petitioner respectfully requests this Court to consider the issues raised in his direct appeal with the issues enumerated in the sub-propositions of error below which were not raised on direct appeal when addressing whether Petitioner was provided effective assistance of counsel. Petitioner submits he was not provided effective assistance of counsel at trial nor was he provided effective assistance of appellate counsel on direct appeal.

1. Trial counsel failed to present available evidence to support his defense.

During the first stage, the defense called Petitioner’s brother, Zjaiton Wood, to the stand.

¹⁴ Petitioner previously filed a Motion for Discovery addressing this issue and requested an evidentiary hearing.

Zjaiton informed the jury he, not Tremane, murdered the victim by stabbing him in the chest. (04/02/04 Tr. 94, 97, 131) Although Zjaiton testified Tremane was not with them during the commission of the crimes, but another individual named "Alex" was present, Zjaiton's admission he was the murderer, not Tremane, was critical.

Defense counsel was ineffective for not presenting readily available evidence which supported Zjaiton's testimony. This evidence is contained in the pre-sentence investigation report ("PSI") of co-defendant Lanita Batemen prepared by probation and parole officer Margaret Little.¹⁵ Ms. Bateman's PSI expressed Jermane (sic) Wood was involved in the crimes, but Zjaiton, a.k.a. Jake, was the person who stabbed the victim. After they left the motel, Jermane (sic) was dropped off at his girlfriend's house. Bateman reported the following occurred at Jake's mother's house, "There, me and Brandy was shaking and crying and his mom asked what had he done now? He took her to her room and told her that he thought he had killed a guy. She started screaming and crying then she watch the news til the next morning and thats when it said something about the homicide." (See Ex. 20 under heading "Defendant's Verison.")

Since counsel did not support Zjaiton's testimony, the State argued in first stage Zjaiton was a gang banging, dope slinging convict whose testimony was unbelievable and expressed,

-I submit to you ladies and gentlemen, that if that defendant [Zjaiton] tells you the sun comes up in the east, in the morning every day you should get up and look out the window. That is how much credibility that gang banging, dope dealing, confessed murderer should have in this courtroom. When you weigh his testimony and his credibility about turning people's lives loose, you look carefully at someone like that. (04/02/04 Tr.7)

There can be no reasonable strategy ascribed to trial counsel's failure to challenge the State's theory of the case and failing to provide adequate evidentiary support and argument for a viable defense. See *Washington v. State*, 1999 OK CR 22, 989 P.2d 960, 979-80 (which noted adversarial testing is the bedrock of our criminal justice system which necessarily requires the effective

¹⁵Although Ms. Bateman invoked her Fifth Amendment rights and did not testify at Petitioner's trial or evidentiary hearing, her probation officer, Margaret Little, could have testified at trial and actually did testify at the evidentiary hearing. Unfortunately, appellate counsel failed to elicit this information from Ms. Little.

assistance of counsel and that counsel's failure to subject the State's case to adversarial testing, deprived defendant of a fair and reliable sentencing proceeding.) Likewise here, trial and appellate counsel's failure to develop and marshal the evidence in support of a viable defense which would have resulted in acquittal, was ineffective assistance of counsel and accordingly, his conviction and sentence must be reversed. This Court has reversed where trial counsel failed to develop and assert defenses which could have been supported by the available record. *See Jennings v. State*, 1987 OK CR 219, 744 P.2d 212, 214; *Smith v. State*, 1982 OK Cr 143, 650 P.2d 904, 908. *See also Groseclose v. Bell*, 130 F.3d 1161 (6th Cir. 1997); *Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432 (9th Cir. 1995); *DeLuca v. Lord*, 858 F. Supp. 1330, 1346 ff. (S.D.N.Y. 1994); *Sims v. Livesay*, 970 F.2d 1575 (6th Cir. 1992); *Proffit v. Waldron*, 831 F.2d 1245, 1248 (5th Cir. 1987).

2. Trial counsel failed to list a crucial mitigating circumstance.

As discussed above in this sub-proposition (C)(1), Zjaiton Wood testified he, not Termene, murdered the victim by stabbing him in the chest. (04/02/04 Tr. 94, 97, 131) Although Zjaiton's admission he was the murderer, not Petitioner was critical, counsel failed to include this on the list of mitigating circumstances submitted to the jury. (O.R. Vol. IV at 634) This very circumstance, "the defendant acted under duress or under the domination of another person," is specifically listed as a mitigating circumstance the jury should consider. *See OUJI-CR-4-79*.

3. Trial counsel failed to request a *Harjo* hearing.

Before the State presented the testimony of co-defendant Brandy Warden, defense counsel approached and objected to any testimony regarding the pizza robbery and "any statements made by Zjaiton Wood or Lanita, the other girl involved in this case, as co-conspirator hearsay." (04/01/04 Tr. 128-29) The court sustained counsel's request regarding the pizza robbery and overruled counsel's objection as to co-conspirator statements. (*Id.* at 129) Petitioner submits defense counsel should have requested a *Harjo* hearing to determine whether Ms. Warden's testimony was admissible, and his failure to do so was ineffective assistance of counsel.

In *Harjo v. State* 1990 OK CR 53, ¶ 21, 797 P.2d 338, this Court held before the State may

admit hearsay statements of co-conspirators the State must prove: “(1) a conspiracy existed, (2) the declarant and the defendant against whom the declarations are offered were members of the conspiracy, and (3) the statements were made in the course and in furtherance of the conspiracy by a preponderance of the evidence. *Id.* at ¶ 21, citing *Bourjaily v. United States*, 483 U.S. 171, at 176, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987) Since defense counsel never requested a *Harjo* hearing, the trial court never made this determination and it was error for any co-conspirator statements to be admitted without the State having to first prove a conspiracy existed. Oddly, when the State objected, based on hearsay, to a conversation Ms. Warden was present for with Zjaiton Wood, the court sustained this objection. Defense counsel then inquired, “Is your ruling that hearsay cannot come out through another co-conspirator?” The trial court responded, “The objection is hearsay and I sustained it. I think that is plenty clear.” (*Id.* at 196)

Petitioner submits had trial counsel requested an actual *Harjo* hearing and not made just an objection based on co-conspirator hearsay, the trial court would have suppressed Ms. Warden’s testimony. However, due to trial counsel’s ineffective assistance of counsel, this improper evidence was submitted to the jury. Therefore, Mr. Wood’s conviction must be reversed and his case remanded for a new trial.

4. Trial counsel failed to challenge admissibility of DNA evidence.

During the first stage, the State presented the testimony of OKC Police Department analyst Kyla Marshall who testified as to her DNA analysis of a glove recovered from the motel room. (04/02/04 Tr. 20, 24) Although there was no blood on the glove, skin cells were recovered and submitted for DNA testing. (*Id.* at 24-25) The results from this testing revealed a mixture of at least three individuals; however, the profiles were incomplete. (*Id.* at 26) Therefore, the most Ms. Marshall could say was Petitioner could be a “possible contributor” to the mixture and “he couldn’t be excluded as a potential contributor to the mixture. But, again, because it is a mixture, those alleles that are consistent with him could be coming from other people.” (*Id.* at 37, 40-41)

Ms. Marshall couldn’t state it was his DNA on either test that she performed. (*Id.* at 47, 52)

She opined "it is not that I can't include him, I can't state it is him, but there is a failure to exclude." (*Id.* at 48) She also testified she was unable to provide statistics because "again I have a mixture and I know that I don't have all the information. So there is no way that I could do stats on that." (*Id.*) Additionally, she stated when she received the glove for testing it was not in a sealed condition, and she was uncertain as to how long it had been at the district attorney's office before it was submitted to her for analysis. (*Id.* at 49) She stated this provided the "potential for contamination," where someone could just walk by and handle the glove. (*Id.* at 50)

During the first stage closing, the State argued the DNA evidence could not exclude Petitioner and that the "DNA was consistent with him not to the exclusion of everyone else, because it is a mixture. But he has got types at every location in the glove that match his. The fact that it is a mixture can't say to the exclusion of everyone else." (*Id.* at 155) In closing argument defense counsel attempted to argue this evidence was a non-issue by pointing out it was not blood that had been tested but skin cells, and Petitioner could not be excluded or included as a donor. Further, defense counsel argued this evidence was contaminated. (*Id.* at 168)

The State must be able to prove the evidence's location at all pertinent times. *Faulkenberry v. State*, 1976 OK CR 131, 551 P.2d 271. The burden of showing, to a reasonable certainty, that evidence has not been tampered with or altered rests upon the party offering it. *Grider v. State*, 1987 OK CR 212, 743 P.2d 678; *Wilson v. State*, 1987 OK CR 86, 737 P.2d 1197. In determining whether an adequate foundation has been laid for the chain of custody of an item, the trial court should consider the nature of the article, the circumstances surrounding its preservation, and the likelihood of contamination or alteration. *Driskell v. State*, 1983 OK CR 22, 659 P.2d 343, 354-55. A more exhaustive foundation is required where the evidence consists of contraband or bodily specimens. *Fixico v. State*, 1987 OK CR 64, 735 P.2d 580, 582. Because of the difficulty in identifying the substance in such cases, "a break in the chain of custody ... would be of a grave concern." *Brown v. State*, 1974 OK CR 16, 518 P.2d 898, 901-02. In *Williamson v. State*, 1991 OK CR 63, 812 P.2d 384, 389-99 this Court expressed, "The purpose of the chain of custody rule is to guard against

substitution of or tampering with the evidence between the time it is found and the time it is analyzed. The State must lay a foundation showing that the evidence offered is in substantially the same condition as when the crime was committed.”

Here, analyst Marshall admitted when she received the glove it was not in a sealed condition. She was uncertain as to how long it had been at the district attorney’s office before it was submitted to her. (04/02/04 Tr. 49, 50) Given Oklahoma County’s recent scrutiny and litigation due to Joyce Gilchrist, this evidence’s “potential for contamination” should not be overlooked or taken lightly. Additionally, her testimony was unreliable because it provided absolutely no statistical information for the jury’s consideration. In *Taylor v. State*, 1995 OK CR 10, 889 P.2d 319, this Court held, “[w]ithout the statistical component of DNA profiling evidence, juries would be unable to assess the significance of the match evidence.” *Id.* at ¶ 41. Because of the breaks in the chain of custody and the testimony of analyst Marshall this evidence had the potential for contamination, and had no statistical relevance, the admission of the DNA evidence was error. Mr. Wood’s due process rights were violated and his conviction should be vacated and his case remanded for a new trial.

5. Trial counsel failed to object to handwriting exemplars.

Petitioner submits he was forced to physically construct evidence (handwriting exemplars) against himself in violation of the his Fifth Amendment right against self-incrimination. (04/01/04 Tr. 254, 267-68) A letter purportedly written by Petitioner, State’s Ex. 112, provided the following incriminating evidence,

So any ways I need to know some things, you say you are pleading guilty, so what are you going to tell them bout the glove? It was mine and you got it from my house that why my D.N.A. is on it. Are you going to tell them that you called me and asked me to come picc you up at the store after the fact. Cuz its just some shit I need to know. Cuz I know my attorneys won’t come talk to you shit they won’t even come talk me.

This letter was admitted to the jury without objection. Petitioner submits trial counsel provided ineffective assistance of counsel for not objecting to the admission of this evidence, or at a minimum, trial counsel should have requested a *Daubert* hearing to determine its reliability.

While Petitioner was awaiting trial handwriting exemplars were taken from him. (04/01/04

Tr. 254, 267-68) The comparison in this case was performed by David Parrett, who testified,

First of all, no two people write exactly alike. And each person's handwriting, each individual's handwriting, if it is naturally prepared, that handwriting contains repeated individual characteristics. And by individual characteristics, I mean there is a difference between class characteristics, which are general characteristics of a population. And those minute things that you do in your own handwriting that no one else does. And you have a level of skill in your handwriting. And by that, what I'm talking about is that for instance I have little short legs. I can only run so fast. Well, your handwriting is similar in that you had a level of skill in your handwriting. You can't surpass that level of skill. Now, you can write worse than you naturally write. But you can't write any better.

(*Id.* Tr. 272) Mr. Parrett was asked to make a comparison between Petitioner's and Zjaiton's handwriting exemplars and State's Exhibit No. 112. (*Id.* at 274, 277) Mr. Parrett expressed Zjaiton was excluded as the writer of the questioned document. (*Id.* at 293) As to Petitioner, he "found a sufficient number of significant, individual similarities" to conclude he wrote the letter. (*Id.* at 294)

In closing, the State capitalized on this unchallenged evidence and argued to the jury Petitioner writes a letter to his brother and says, "What about my DNA in the glove?" (04/02/04 Tr. 155) The State further argued,

Termene says his DNA is in the glove in that letter... Why does he have to go to all of the trouble to get that letter through the sewer line or through some inmate's hands or however that happened to make sure his brother knew the truth? Have you ever thought about that? That leaves you to one conclusion, ladies and gentleman. Termene Wood did this crime. (*Id.* at 165)

Now, Kyla Marshall, the expert, can't tell you conclusively for sure that it is Termene's DNA in the glove. But Termene Wood tells you for sure that he believes that his DNA is in the glove. And he's trying to get Zjaiton to explain that away. You read it. (*Id.* at 180)

But it is important for Zjaiton to say that he went and got the gloves at Termene's house because again the kite letter, Number 112, suggests that Termene and Zjaiton are getting their story together about how Termene's DNA gets in that glove. (*Id.* at 191)

The issue of handwriting uniqueness has been questioned by other courts in this country. As of 2005, some courts have determined the forensic document examiner's testimony did not meet reliability of *Daubert/Kumho* and excluded this testimony. *United States v. Lewis*, 220 F.Supp.2d 548 (S.D.W.Va.2002); *United States v. Brewer*, 2002 WL 596365 (N.D.Ill. 2002); *United States v.*

Hidalgo, 229 F.Supp.2d 961, 967 (D.Ariz.2002); *United States v. Saelee*, 162 F.Supp.2d 1097 (D.Alaska 2001); *United States v. Fujii*, 152 F.Supp.2d 939 (N.D.Ill.2000). Other courts allowed the examiner to testify to particular similarities and dissimilarities between the documents, but excluded their ultimate opinion as to authorship. *United States v. Rutherford*, 104 F.Supp.2d 1190 (D.Neb.2000); *United States v. Santillan*, 1999 WL 1201765 (N.D.Cal. 1999); *United States v. Hines*, 55 F.Supp.2d 62 (D.Mass.1999); *United States v. Oskowitz*, 294 F.Supp.2d 379,384 (E.D.N.Y. 2003); *United States v. Van Wyck*, 83 F.Supp.2d 515 (D.N.J. 2000).

Mr. Parrett's conclusions "no two people write exactly alike" is hard to believe. (04/01/04 Tr. 272) Further, his conclusion "that the writer of the K-1, known document, Termene Wood prepared the text on the letter Q-1" is also improper. (*Id.* at Tr. 294) It is stated in unequivocal terms, not in terms that handwriting in "the letter" was consistent with the handwriting exemplars taken from Petitioner. This Court has held "it is improper for a forensic expert to state an opinion with absolute certainty where such is beyond the present state of the art of forensic science. *See McCarty v. State*, 1988 OK CR 271, 765 P.2d 1215, 1218- 19 (holding that "admission of this opinion testimony was error, because Ms. Gilchrist did not, and could not, testify that such opinion was based on facts or data 'of a type reasonably relied upon by experts in the particular field' in forming such an opinion."); *Moore v. State*, 1990 OK CR 5, 788 P.2d 387, 399-400.

Since trial counsel did not request a *Daubert* hearing, any basis for Mr. Parrett's opinions was not tested by the trial court although his testimony violated Petitioner's 5th Amendment rights as well as his right to a fair trial.

6. Trial counsel failed to object to improperly excused jurors.

During jury selection, potential jurors were questioned by the Court about whether they could consider all three punishments. Potential juror, Brenda Surnhall, after expressing "[a]ll three, no. ... I cannot consider all three," was summarily excused without the trial court ever clarifying for the record which penalty she could not impose. (03/30/04 Tr. 13-15) Two jurors were removed by the

court for not being able to impose a sentence less than death.¹⁶ In stark contrast, the court summarily excused ten jurors who voiced concerns about their ability to impose the death penalty.¹⁷ Of these ten jurors, defense counsel only questioned one juror, Thieh Trink. (03/29/04 Tr.50-52) Another potential juror, Bennett Ughamadu, who first expressed he didn't "have any problem" with considering all three punishments, was later excused by the court when he expressed he preferred to give something other than the death penalty due to his religious beliefs. Although Mr. Bennett, upon questioning by the State, clarified this did not mean he could not give death as a penalty, was excused by the court, again, without questioning by defense counsel. (03/29/04 Tr. 122 -28) Defense counsel never objected to the their dismissal. Finally, four jurors who strongly favored the imposition of the death penalty sat on Mr. Wood's jury.¹⁸ Defense counsel never challenged these jurors for cause despite the fact they each expressed their preference for the death penalty.

In capital cases, the Supreme Court has set forth certain guarantees to ascertain the imposition of the death sentence is not arbitrary and capricious. "A death sentence cannot be carried out if the jury that imposed...it was chosen by excluding [prospective jurors] for cause simply because they voiced general objections to the death penalty or expressed conscientious religious scruples against its infliction." *Witherspoon v. Illinois*, 391 U.S. 510, 522, 88 S.Ct. 1770, 1777 (1968); *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). This Court has held that all doubts regarding juror impartiality must be resolved in favor of the defendant. *Hawkins v. State*, 1986 OK CR 58, 717 P.2d 1156.

The trial court's summary dismissal of the string of potential jurors who voiced general

¹⁶ Potential jurors Daniel Wade (03/29/04 Tr. 66-67) and Robert Abraham (03/29/04 Tr. 225-26).

¹⁷ Potential jurors Theih Trink (03/29/04 Tr. 50-52); Cathleen Lawry (03/29/04 Tr. 63-64); Michael Gilbert (03/29/04 Tr. 95-95); Bennett Ughamadu (03/39/04 Tr. 122-128); Neyoma McAlister (03/29/04 Tr. 150-51); Linda Green (03/29/04 Tr.184); Robert Megehee (03/30/04 Tr. 10); Rodney Bolden (03/30/04 Tr. 61-62); Teresa Terry (03/31/04 Tr. 18); and Demetra Gaddis (03/31/04 Tr. 61).

¹⁸ Jurors Elliott, Burton, Dodson, and Clemenceau. (03/29/04 Tr. 116, 169, 198; 03/31/04 Tr. 24)

dislike for the possibility of having to impose the death penalty without allowing defense counsel an attempt to question them resulted in a violation of Petitioner's rights under the 5th and 14th Amendments, and Okla. Stat. Art. II, §§ 7 and 20.

7. Trial counsel failed to object when jurors moved their vehicles.

As discussed in Proposition V, at the end of first and second stage the trial court allowed the jurors to move their vehicles after they had been sworn but before they had begun deliberations. Additionally, it does not appear from the record the bailiff or a deputy escorted the jurors who moved their vehicles. Unfortunately, trial counsel failed to object to this procedure despite the fact that this Court in *Johnson v. State*, 2004 OK CR 23, 93 P.3d 41, 47, held 22 O.S. § 857 is mandatory and designed to preserve the purity of jury trials. Petitioner submits if it is determined that this error was waived due to the absence of an objection by trial counsel, then trial counsel's failure to object should be indicative of ineffective assistance of counsel.

8. Trial counsel failed to request court to instruct as to life with parole.

Trial counsel failed to ask the court to instruct jurors pre-evidence or post-evidence for an instruction on the definition of life with parole. The Oklahoma Legislature enacted a truth in sentencing law which forbids a prisoner with a sentence of life with parole on a murder conviction from being paroled unless 85% of his sentence had been served. *See* 21 O.S. § 13.1 This Court recently held *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273, 278,

...for cases covered by this new sentencing reality--as in cases where life without parole is a sentencing option--the legislature's specific action compels a specific limitation on our traditional prohibition of mentioning parole at trial.... [T]he 85% Rule is a specific, delineated parole provision that does apply to life sentences for murder (as well as numerous other crimes), which does not vary from one inmate to another, which can be readily defined and explained.

Although none of the jurors asked specifically how long a life sentence will keep someone in prison, trial counsel did inform several jurors during voir dire that a life sentence meant Petitioner could get out of prison one day. (03/29/04 Tr. 109, 134, 179, 199, 208, 234; 03/30/04 Tr. 22, 32) This statement, without clarification as to how much time Petitioner would have to serve before even

being considered by the pardon and parole board is misleading. There is a great risk that if the jury is not fully informed about its sentencing options, it will choose the death sentence because it does not completely understand the sentencing options. The trial court should have instructed Mr. Wood's jurors that a life sentence according to the Pardon and Parole Board is considered to be forty-five (45) years and that Mr. Wood, if found guilty of murder in the first degree, would have to serve at a minimum of 85% of that forty-five years. *Id.* at 283.

9. Trial counsel failed to request proper jury instructions.

Petitioner had a fundamental right to have his guilt or innocence determined by a jury properly instructed on Oklahoma law. *Hicks v. Oklahoma*, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980). The purpose of jury instructions is to place before the jury a correct and full statement of the law which is applicable to the case. *Ake v. State*, 1989 OK CR 30, 778 P.2d 460, 470. OKLA. STAT. tit. 12 § 577.2 (1991) provides the instructions set forth in the Oklahoma Uniform Jury Instructions should be used when applicable in a particular case. Petitioner submits his jury was not properly instructed since several instructions simply were not given, while others omitted words, and then one instruction submitted to the jury is not even in the Oklahoma Uniform Jury Instructions.

Despite the applicability of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) and *Tison v. Arizona*, 481 U.S. 137, 150-51, 107 S.Ct. 1676, 1684, 95 L.Ed.2d 127 (1987), "that the accused intended to kill or exhibited such reckless disregard that he is adequately culpable to be death eligible," to Mr. Wood's felony murder conviction, defense counsel failed to request the jury be instructed. As a result, Petitioner's jury was never informed of its constitutional obligation to examine his individual culpability prior to imposing the death penalty. Since evidence had been presented by Zjaiton Wood he was the one that stabbed the victim, regardless of a request from counsel, the trial court's failure to *sua sponte* instruct the jury on the constitutional requirements for the imposition of the death penalty on one convicted of felony murder who did not kill in the course of the felony was fundamental error. *Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986). Further, this Court has held Instruction No. 4-71, OUJI-CR(2d) is necessary

in felony murder cases as it enables the jury to give individualized consideration to the defendant's culpability as required by the Supreme Court. *Allen v. State*, 1994 OK CR 30, 874 P.2d 60, 64-65; *Williamson v. State*, 1991 OK CR 63, 812 P.2d 384, 402.

Additionally, instructions defining "attempts" were omitted. The jury in Instruction No. 10, was informed attempted robbery was the underlying felony the State used to support felony murder. (See O.R. IV 655) The Notes on Use for OUJI CR(2d) 4-65 state "[i]f the predicate felony is an attempted crime, the trial judge should give the appropriate instructions for attempts." The "attempts" instructions, OUJI CR (2d) 2-10 thru 2-15, were not given to the jury. The other instructions omitted address circumstantial evidence. According to Instruction No. 52, the State relied on circumstantial evidence in an attempt to prove Petitioner was a continuing threat. (See O.R. IV at 632). The Notes on Use for OUJI-CR(2d) 4-77 require the court to provide the jury with additional instructions that define direct evidence versus circumstantial evidence and the weight to given to each; however these instructions were not provided. See OUJI-CR(2d) 9-2, 9-3, and 9-4.

The following jury instructions, although given to the jury, were missing words

-Instruction No. 44 left out "or" and according to OUJI-CR(2d) 4-68 should read "shall be punished by death **or** imprisonment for life..." See (O.R. IV at 624).

-Instruction No. 46 left out "with the possibility of parole" and according to OUJI-CR(2d) 4-70 should read "return a sentence of life imprisonment **with the possibility of parole** or life imprisonment without parole." See (O.R. IV at 626).

-Instruction No. 47 left out "At the present time there exists" and according to OUJI-CR(2d) 4-72 this language should start the sentence. (O.R. IV at 627).

-Instruction No. 37 left out "or testimony" and according to OUJI-CR(2d) 10-7 should read "In so doing I have not expressed nor intimated in any way the weight or credit to be given any evidence **or testimony** admitted during the trial." (O.R. IV at 682).

Finally, the trial court submitted its own non-OUJI instruction, Instruction No. 5:

If you have a reasonable doubt as to the guilt of the Defendant on any or all such offenses, you must first find him not guilty of that particular crime. The three (3) counts are to be considered separately. By that I mean that each count is to be given separate though and deliberation. (O.R. IV 649)

While the relevant and proper instructions should have been given by the trial court as a

matter of fundamental right, defense counsel still has a duty to request all relevant and proper instructions if he is to function effectively. This error was fundamental because the instructions failed to force the jury's consideration of the evidence into proper legal channels so that it could reach a legally sound verdict. *Kamees v. State*, 1991 OK CR 91, 815 P.2d 1204, 1207; *see also Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Furthermore it deprived Petitioner of due process and a reliable sentencing proceeding in violation of the 8th and 14th Amendments. *Ake v. Oklahoma*, 470 U.S. 68, 74-75, 105 S.Ct. 1087, 1092, 84 L.Ed.2d 53 (1985).

10. Failed to Object to Prosecutorial Misconduct.

Petitioner, in Proposition IV, sets forth the instances of prosecutorial misconduct that occurred in this case and argues in that proposition trial counsel and appellate counsel were ineffective for their failure to develop this legal issue for this Court to consider.

D. Failure of appellate counsel to perform the professional duty owed to Mr. Wood.

Mr. Wood was denied effective assistance of counsel when his appellate defense counsel failed to perform the professional duty owed to him under prevailing professional norms and the mandates of the law. In *McGregor v. State*, 1997 OK CR 10, 953 P.2d 332, *cert. denied*, 521 U.S. 1108, 117 S. Ct. 2489, 138 L. Ed.2d 996 (1997), this Court established ineffective assistance of appellate counsel claims are properly before this Court only if this Court finds the allegations are true and the performance of the appellate defense counsel would constitute the denial of reasonably competent assistance of counsel under prevailing professional norms. In this case, appellate counsel's performance constituted denial of reasonably competent assistance of counsel under prevailing professional norms. (*See* Rule 1.1 of the Rules of Professional Conduct regarding thoroughness and preparation.) As detailed in all the sub-propositions above, it is clear the required attention and adequate preparation was not provided by appellate counsel. As a result of appellate counsel's failure to perform the professional duty owed to him under prevailing professional norms, Mr. Wood received ineffective assistance of appellate counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L.

Ed.2d 821 (1985); *Garrison v. State*, 2004 OK CR 35, 103 P.3d 590. Mr. Wood respectfully requests a new trial or a new sentencing trial.

**PROPOSITION IV
PROSECUTORIAL MISCONDUCT RESULTED IN UNFAIR PROCEEDINGS.**

A. Bad Acts and Evidence of Other Crimes.

1. Prejudicial and Improper Bad Acts Admitted During First Stage.

During first stage the State called Coleman Givens who was staying at a motel across from the Ramada Inn and testified as to the events he observed as they unfolded that night. (03/31/04 Tr. 224-29) Over defense counsel's objections, the State also elicited improper and irrelevant testimony from Mr. Givens which dealt with the conversations he heard between the co-defendants on the way to Petitioner's preliminary hearing. (*Id.* at 252-55, 256-58) One conversation was if "they didn't say or do like he wanted, he was going to drag them all, you know down with him." (*Id.* at 255-56) They then allegedly questioned him as to what he was going to say. He felt they were trying to make him nervous. Although Givens reported Petitioner asked him what he was going to say; he felt threatened by Zjaiton and expressed he "kind of told me what not to say." (*Id.* at 259, 261)

The State elicited another bad act while cross-examining Zjaiton. The State questioned Zjaiton with "Isn't it true, sir, that on April the 6th of 2002, over in county jail, you and your brother kicked another inmate in the face and injured him, is that right?" (04/02/04 Tr. 112) Defense counsel's objections were overruled. (*Id.* at 112-14)

2. Evidence of Another Crime.

Prior to trial, the Court ruled in the case of co-defendant Bateman the La Franca Pizza Robbery was inadmissible in first stage as *Burks* evidence and the same ruling applied in Petitioner's case. (O.R. 579) Despite this ruling, during first stage, the State forced Zjaiton Wood to testify he and Petitioner had robbed the pizza place earlier that evening. (04/02/04 Tr. 129-30). Again defense counsel's objections were overruled.

3. Legal Argument.

In *Burks v. State*, 1979 OK CR 10, 594 P.2d 771, 774 this Court established a procedure to be followed when the State seeks to introduce other crimes evidence. This procedure was not aimed solely at providing pretrial notice to the defendant but also required a specification of the exception under which the evidence is sought to be admitted; a visible connection between the offense charged and the offense sought to be proved; a showing the evidence is not cumulative and is necessary to support the State's burden of proof; proof of the other crimes by clear and convincing evidence; and an instruction to the jury as to the limited purpose for which the evidence is admitted. 594 P.2d at 774-75. This Court cautioned "[s]uch evidence should not be admitted where it is a subterfuge for showing to the jury that the defendant is a person who deserves to be punished." 594 P.2d at 775.

Here, none of the safeguards of the *Burks*' requirements were established. The State did not file any pre-trial notice it intended to introduce evidence of other crimes or bad acts. The State was never required to specifically identify what evidence it would be sponsoring, was never required to show a legitimate purpose for the introduction of this evidence, was never required to meet a burden of proof with regard to the evidence, and the jury was never instructed it was to use the evidence only for a limited purpose. Therefore, this bad character evidence and "other crimes" evidence, which was intentionally elicited by the State, and improper for the jury to consider resulted in an unfair trial and a violation of due process. U.S. Const. Amend. 8th and 14th and Okla. Const. art. II, § 7 and 9.

Additionally, the introduction of this irrelevant evidence was improper under 12 O.S. §§ 2402 and 2404(B). Even if this Court determines it was arguably relevant, then its probative value was substantially outweighed by the danger of unfair prejudice under 12 O.S. § 2403. The State's intentional admission of this improper character evidence painted Petitioner as a bad person which was not relevant to the charges against him. Further, the admission of this improper, irrelevant evidence for the jury to consider, calls into the question the reliability of Petitioner's trial, and whether Petitioner received a fundamentally fair trial.

B. The Prosecutor Misstated the Law and Demeaned Mitigating Evidence.

Throughout second stage closing, the prosecutor misstated the law and informed the jury a

mitigator had to meet a two-prong test before it could be considered in mitigation. (04/05/04 Tr. 117) The prosecutor stated, "Number one, you must find or you may find that the mitigator is in fact true. And if it is true, then you have a second prong. You have to ask yourself, well, if it is true, does it extenuate or reduce the degree of moral culpability or blame? Once again, don't take my word for it. It is in black and white. It is the law. It's the law." The prosecutor then went over each of the 17 mitigating circumstances listed in Instruction No. 54 and reiterated the alleged two prong test and how each did not meet this test. (04/05/04 Tr. 117-18, 118-19). After addressing the last of the 17 mitigators, the State restated the following:

So, when you go through these 17 proposed mitigating factors, you go through each one of them yourself. You will think of more things that I didn't to help you know these are not mitigating circumstances. You have to find two things: Number one, are they true? Like the first mitigator is, the defendant is 24-years-old. Well, I give you that, he is. That is true. But the number two prong, did that mitigate? Does that extenuate or reduce the degree of moral culpability or blame. A two-prong test. Go through each and ask yourself, number one, is it true? And number two, does it reduce the degree of moral culpability or blame? I submit to you, you will not find one of those to be mitigating. (*Id.* at Tr. 127)

Petitioner respectfully submits this two-prong test is not the law. As set forth in Instruction No. 53, "Mitigating circumstances are which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame." *See* OUII CR(2d) 4-78. The jury is allowed to decide which circumstances it finds mitigating, and the jury does not have to unanimously agree on the mitigators. Additionally, the mitigating circumstances do not have to be proven beyond a reasonable doubt. *Id.*

Furthermore, the clear purpose of the prosecutor's comments and application of a two-prong test was to inform the jurors that they could ignore these mitigating circumstances because, based upon the prosecutor's personal opinion, the circumstances were not worthy of consideration. These remarks were made to confuse the jury about its responsibility for evaluating the mitigating evidence in the way it was legally required. Persuading the sentencer to ignore mitigating evidence is error. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) and *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934,

106 L.Ed.2d 256 (1989). The Supreme Court has held a defendant in a capital case has a constitutional right to consideration of mitigating factors by the sentencer, and the sentencer cannot be precluded from considering mitigating evidence. *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). Misleading the jury about its responsibilities with regard to capital sentencing violates the 8th Amendment. *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

C. Improperly accused Petitioner of lacking remorse.

During second stage closing the State argued Petitioner was not remorseful for these crimes,

Another thing when Dr. Hand testified, what is even more important is what he didn't say. The one thing that Dr. Ray Hand didn't say about this defendant is that he is remorseful for committing this murder. Or that he was sorry for committing this murder. I submit to you that he is because he is not. And that's what makes him different from people like you and me. That is why he deserves the death penalty on top of everything else we discussed. Ask yourselves if you were driving home last Friday night from this jury service and you accidentally ran over another person, accidentally killed that person, not intending to, you would be devastated. Every one of you would. This person stuck a big knife into the chest of a 19-year-old man. Stuck it in there five inches. And he never said to one person, "I'm sorry about that." He has never said to one person "I'm remorseful about that." What kind of a person is that? Somebody that is different from you and me. And that fact, I submit to you, in addition to all of the others facts is the reason why he deserves the death penalty. How can you kill, intentionally, knowingly kill another human being and not be sorry about it?

(04/05/04 Tr. 133-34) The State also commented, "[w]e have to deal with -- what we have today is this defendant. A man who can kill an innocent victim without mercy and without remorse. I submit to you that Mr. Wood needs to be on death row where he can't hurt anyone." (*Id.* at 139)

Petitioner recognizes this Court has held "lack of remorse" is pertinent to the continuing threat aggravating circumstance. *Pickens v. State*, 1993 OK CR 15, 850 P.2d 328, 337; *Sellers v. State*, 1991 OK CR 41, 809 P.2d 676, 689. However, cases in which lack of remorse has been held to be relevant are those in which the defendant admitted committing murder, then expressed a lack of remorse for the deed. There is a huge difference between an individual maintaining he did not commit the offense charged, and one who admits he committed the offense but is not sorry. Under the State's warped theory of criminal justice, a defendant who maintains his innocence throughout

trial should automatically be eligible for the death penalty because he expresses no remorse.

At trial, the defendant is cloaked with the constitutionally protected right to maintain his innocence. It is still the law that a death sentence may not be based on factors that are constitutionally impermissible or irrelevant to the sentencing process. Likewise, a capital sentencing jury may not draw adverse inferences from conduct that is constitutionally protected. *Zant v. Stephens*, 462 U.S. 862, 885, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). It is well settled that to punish a person for exercising a constitutional right is a "due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). Here, the State twisted his constitutional right to claim innocence into evidence he should be executed for exercising this right, unfairly undermining his 8th and 14th Amendment rights to a fair and reliable sentencing.

D. Invoking sympathy and arguing facts outside the record.

Despite the fact no victim impact testimony was presented, the State argued:

- His [Ronnie Wipf's] mom and dad on his birthday don't get to go to the prison and visit him. They go to a grave up on the hill in Montana. That is where they visit Ronnie. (04/05/04 Tr. 118-19)

- I'll bet that Ronnie Wipf's mom and dad would like to visit him in prison instead of in his grave. (*Id.* at 119)

- Well, once again, you know Ronnie Wipf was 19 years-old. I bet his folks would like to see him grow into a young man and have children and visit him and their grandchildren. That will never happen. He age is going to be 19. (*Id.* at 120)

- There used to be a young man, a 19-year-old young man, Ronnie Wipf, who was loved by his family. (*Id.* at 140)

- Don't get hung up about where our victim is. Whether he is on a hill or in a valley. We don't care about that. But his folks will visit his grave. He is buried. Doesn't make any difference where it is at. (*Id.* at 158)

This Court has held that a prosecutor may not argue and infer facts which were not admitted as evidence. *Howell v. State*, 1994 OK CR 62, 882 P.2d 1086; *McCarty v. State*, 1988 OK CR 271, 765 P.2d 1215, 1220 (Okla.Cr. 1988); *Tobler v. State*, 1984 OK CR 90, 688 P.2d 350. Here, the prosecutor's closing served no other purpose than to prejudice the jury against Petitioner with this proposed evidence about how the victim's family felt. Yet, there was absolutely no evidence

presented to support the State's argument. This Court has held that it is improper for the prosecutor to attempt to distract and inflame the jury with tactics designed to cause the jury to find against the defendant for sympathy for the victim. See *McCarty v. State*, 1988 OK CR 271, 765 P.2d 1215, 1225; *Tobler v. State*, 1984 OK CR 90, 688 P.2d 350, 354; *Williams v. State*, 1983 OK CR16, 658 P.2d 499, 501; *Dupree v. State*, 1973 OK CR 397, 514 P.2d 425, 427-28.

E. Prosecutor presented inconsistent factual theories as to the victim's murder.

Petitioner's jury trial occurred before his brother Zjaiton Wood's trial. At Petitioner's trial, Zjaiton took the stand and testified he "grabbed the victim by the head and I stabbed him in the chest and told him I was God." (04/02/04 Tr. 94) Zjaiton further testified "I don't want my brother to die for something that he is not guilty of. I mean, if he was guilty of this, you know what I am saying, I would tell him to be a man and face the heat. But he's not guilty." (*Id.* at 97)

Despite this evidence, during first stage closing argument the State argued Petitioner committed this murder, not his brother Zjaiton. (4/04/04 Tr. 5, 6, 7, 8) The State argued Zjaiton did not make Petitioner commit this murder, he had a choice and he knowingly and voluntarily took his life. (*Id.*) The State completely discounted the testimony of Zjaiton with the following,

-I submit to you ladies and gentlemen, that if that defendant [Zjaiton] tells you the sun comes up in the east, in the morning every day you should get up and look out the window. That is how much credibility that gang banging, dope dealing, confessed murderer should have in this courtroom. When you weigh his testimony and his credibility about turning people's lives loose, you look carefully at someone like that. (*Id.* at 7)

However, at Zjaiton trial, which was before the same judge with the same prosecutors, the State did an about face and argued Zjaiton stabbed the victim, not Petitioner. Although Zjaiton did not take the stand, his prior testimony from Petitioner's trial was presented through Linda Wood and Officer Billy Ricketts.¹⁹ (Linda Wood - Z.Wood 02/22/05 Tr. 221-28; Officer Ricketts - Z. Wood 02/23/05 at 203-09) Petitioner submits the State's presentation of inconsistent theories as to who actually murdered the victim violated his due process rights to a fair trial and his conviction must

¹⁹ Petitioner filed a Motion to Cross Reference with Zjaiton Wood's record before this Court in F-2005-246.

be reversed.

This Court addressed a similar situation in *Littlejohn v. State*, 1998 OK CR 75, 989 P.2d 901. In *Littlejohn* the prosecutor argued inconsistent triggerman theories at each co-defendant's trial to obtain a conviction. Since this was a case of first impression, this Court turned to *Parker v. Singletary*, 974 F.2d 1562 (11th Cir. 1992) for guidance. In *Parker* there were three co-defendants, three separate trials, and three separate arguments as to who was the shooter. The *Parker* court determined, "given the uncertainty of the evidence, the court reasoned it was proper for the prosecutors in the other cases to argue alternative theories as to the facts of the murder. The issue of whether the particular defendant on trial physically committed the murder was an appropriate question for each of the co-defendant's juries." 974 F.2d at 1578. Utilizing this analogy, this Court in *Littlejohn* held it was permissible for the State to argue alternative theories as to who was the shooter when there was no physical evidence demonstrating who had fired the fatal shot, and that the "the evidence was less than conclusive as to the identity of the shooter." *Id.* at ¶ 27.

However, the *Parker* court condemned the use of the State utilizing contradictory evidence to obtain a conviction. In *Littlejohn*, this Court cited to the following analysis in *Parker*,

....two defendants were convicted for the same murder in separate trials. The state had contended at the first defendant's trial that the first defendant had actually killed the victim. The first defendant testified at his trial that he did not participate in the murder and accused the second defendant of being the perpetrator. One year later, the state used the testimony of the first defendant to show that the second defendant had actually killed the victim. **The concurrence concludes that the prosecutor had obtained the second conviction through the use of evidence that he could not have believed, given that the prosecutor had disputed the first defendant's testimony in the first trial.** (citations omitted.) *Parker*, 974 F.2d at 1578 (emphasis added).

The *Parker* court found these two cases distinguishable because *Parker's* prosecution 'did not involve the use of necessarily contradictory evidence.' *Id.* at ¶ 25.

Here, the prosecutor disputed and ridiculed Zjaiton's testimony to obtain a conviction against Petitioner. Then in Zjaiton's trial his testimony suddenly becomes believable and is used by the State to obtain a conviction against him as well. This involves the use of necessarily contradictory evidence which is not condoned by *Littlejohn* or *Parker*.

If this Court determines that it was not improper for the prosecutors to argue inconsistent contradictory theories as to who stabbed the victim to obtain a conviction, Petitioner submits his case, at a minimum, must be sent back for a new sentencing. Recently, the Supreme Court, in *Bradshaw v. Stumpf*, 545 U.S. 175, 187, 125 S.Ct. 2398, 2407-08, 162 L.Ed.2d 143 (2005), in addressing prosecutorial inconsistencies to obtain convictions held, "[t]he prosecutor's use of allegedly inconsistent theories may have a more direct effect on Stumpf's sentence, however, for it is at least arguable that the sentencing panel's conclusion about Stumpf's principal role in the offense was material to its sentencing determination." *Id.* The Supreme Court remanded the case to determine what effect the prosecutor's conduct claim related to Stumpf's sentence of death.

Petitioner submits the State's conduct clearly impacted his sentence. In support of the especially heinous, atrocious and cruel aggravating circumstance the State argued:

-Which it is, I submit to you, to murder a man, to stab him with a knife like was done in this case, and stick it five inches into his body. (04/05/04 Tr. 111)

-You have to resort to stabbing him five inches into his body with that knife. I submit to you that that was extremely wicked for them to do that. (*Id.*)

-Well, what was in the minds of these defendants, especially the defendant on trial today, Mr. Termane Wood, when he stuck that big knife into the chest of Ronnie Wipf? (*Id.*)

-I submit to you that the abuse inflicted to Ronnie Wipf in this case was so serious that it caused his death. Look at that knife. Look at that wound and ask yourself whether or not that was serious abuse. (*Id.* at 112)

-Did Ronnie Wipf suffer? He doesn't just -- he didn't lie down and go to sleep. He suffered. That knife was five inches into his chest. He walked around in his own blood. You will have the pictures up there and see that. Even on his feet there is blood that has dripped from his body. That means it came from the wound and it dripped to his feet. He was standing some time after that knife went into his chest, because blood came out of his chest and dripped on to his feet. You will see the bottom of his feet, where after he bled on the floor he walked on that. That is the reason it is on the bottom of his feet. He was alive long enough to walk in his own blood. Long enough for his blood to spill out and drop on his feet. He was alive long enough to remove that knife from his chest and to lay there on the bed and bleed out after he had already bled into his own body a quart and a half of blood. I submit to you he suffered. And he suffered greatly. (*Id.*)

As for the aggravating circumstance of murder to avoid lawful arrest the State argued:

- They killed this guy for purposes of a trying to avoid lawful prosecution and arrest. They didn't kill the pizza guy. They were in control of that situation. When they lost control in

this room, it was this man [Termene] that said "Shoot the bastard." (*Id.* at 154-55)
The State, in arguing against mitigation, states "Zjaiton Wood did not make Termene Wood murder Ronnie Wipf on that night." (*Id.* at 126)

Clearly, this evidence impacted Petitioner's resulting sentence of death. The prosecutor repeatedly argued Petitioner stabbed the victim and explained in great detail how those facts supported the aggravating circumstances alleged and diminished his mitigating circumstances. Therefore, Petitioner's resulting sentence of death is in violation of due process and must be vacated.

F. Prosecutor misled the trial court at the remanded evidentiary hearing.

During the evidentiary hearing, Mr. Albert testified he had tried between 13 to 15 capital cases and only had 3 cases had resulted in a sentence of death. (Vol. II Tr. 260) Although appellate counsel tried to have the court take judicial notice of a handwritten list of 8 cases which had resulted in a death sentence, the trial court denied this request. (Vol. III Tr. 409-12) This denial was based on the State's assertion Mr. Albert had not been the trial counsel on at least 2 of the 8 cases on the list. (*Id.* at 410-11) Prosecutor Smith expressed, "James Fisher is listed on here as one of the people, and I can tell you for sure, I tried that case and John Albert was not involved in that case. And this list is incorrect at this first name." (*Id.* at 410) Prosecutor Smith then states "I tried Terry Lyn Short in this courthouse. And to the best of my recollection, I can't remember who the defense attorney was now because it's been so long, but I don't believe it was Mr. Albert." (*Id.* at 411)

As addressed in Proposition II of this Application, Mr. Albert has been involved in at least 8 capital cases wherein a sentence of death which include James Fisher and Terry Short. This misstatement of fact, which was adamantly argued by the State as fact, undoubtably calls into the question of the reliability of the trial court's Findings.

G. Conclusion.

Although some of the State's commentary and arguments were not met with contemporaneous objection, none of the above instances of misconduct constitute a fair comment on the evidence, and all constitute a complete denial of due process. *Donnelly v. DeChristoforo*, 416

U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). Lack of an objection does not preclude the Court from reviewing improper comments. *Atterberry v. State*, 1986 OK CR 186, 731 P.2d 420; *Cobbs v. State*, 1981 OK CR 60, 629 P.2d 368. However, if this Court determines these claims are procedurally barred because an objection was not raised by trial counsel nor addressed on direct appeal by his appellate counsel; Petitioner submits the failure of his prior counsel to raise these meritorious issues resulted in ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984) *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed.2d 821 (1985).

The combined effect of the prosecutorial misconduct was so prejudicial as to adversely affect the fundamental fairness and impartiality of the proceedings and resulted in deprivation of the constitutional rights enumerated above. *See McCarty v. State*, 1988 OK CR 271, 765 P.2d 1215, 1221; *Spees v. State*, 1987 OK CR 62, 735 P.2d 571, 576; *Freeman v. State*, 1984 OK CR 60, 681 P.2d 84, 85; *Rice v. State*, 92 P.2d 857, 859 (Okla. Cr. 1939) Mr. Wood was denied his 14th Amendment right to a fair trial and fair hearing by the repeated abuses of the prosecutor; therefore, his conviction and sentence mandate reversal.

**PROPOSITION V
ERROR OCCURRED WHEN JURORS MOVED VEHICLES AFTER BEING SWORN.**

At the end of first stage at approximately 5:53 p.m. on April 2, 2004, the trial court allowed the jurors to move their vehicles after they had been sworn but before they had begun deliberations. Deliberations began at approximately 6:26 p.m. (04/02/04 Tr. 204-11, 213) At the end of second stage at approximately 5:57 p.m. on April 5, 2004, after the jurors were sworn, but before they began deliberations, the trial court once again allowed the jurors to move their vehicles. Deliberations began at approximately 6:23 p.m. (04/05/05 Tr. 159-61, 163) The record is silent as to which jurors left to move their vehicles. Additionally, it does not appear from the record that the bailiff or a deputy escorted the jurors who moved their vehicles.

Oklahoma Statute Title 22, § 857 provides in pertinent part:

After hearing the charge, the jury may either decide in court, or may retire for deliberation. If they do not agree without retiring, one or more officers must be sworn to keep them together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor do so themselves, unless it be by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, or when ordered by the court.

In *Johnson v. State*, 2004 OK CR 23, 93 P.3d 41, 47, this Court held that the above statute is mandatory and designed to preserve the purity of jury trials. While the law providing for juror sequestration for deliberation is not protected under the federal constitution, it is specifically mandated by Oklahoma statute. Deprivation or deviation of this statute, constitutes a due process violation. *See also, Golden v. State*, 2006 OK CR 2, 127 P.3d 1150, 1153 (holding that deprivation of statutorily prescribed peremptory strikes was a violation of due process).

In addition, the record is silent as to when and even if the bailiff was sworn after the first and second stage evidence and argument had been presented to the jury. *See Castro v. State*, 1987 OK CR 182, 745 P.2d 394, 406 (holding second stage of a capital jury trial “is more like a separate trial in that it involves new findings of fact.”) Thus, the bailiff should have been sworn; it was error not to do so. This Court has held that “the fact that the bailiff in the present case was not immediately sworn to keep the jury together after they had heard the charge does not eliminate the error but rather compounds it.” *Johnson v. State*, 2004 OK CR 23, 93 P.3d 41, 48. The fact the bailiff was not sworn after the charge given for first and second stage deliberations combined with the fact the jurors were allowed to move their cars after being sworn is reversible error, a violation of due process, and also structural error affecting the framework of the trial and the sanctity of the jury function in our court system. *See Hicks v. Oklahoma*, 447 U.S. 343, 100 S. Ct. 2227, 65 L. Ed.2d 175 (1980) and *See Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed.2d 302 (1991).

Petitioner’s conviction should be overturned, and he should receive a new trial.

PROPOSITION VI
THE CUMULATIVE IMPACT OF ERRORS IDENTIFIED ON DIRECT APPEAL AND
POST-CONVICTION PROCEEDINGS RENDERED THE PROCEEDING RESULTING IN
THE DEATH SENTENCE ARBITRARY, CAPRICIOUS, AND UNRELIABLE.

In *United States v. Rivera*, 900 F. 2d 1462 (10th Cir. 1990), the Tenth Circuit held the

cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. *Rivera*, 900 F. 2d at 1469; *see also Cargle v. Mullin*, 317 F.3d 1196, 1206 -1207 (10th Cir. 2003). In assessing cumulative error, this Court must consider both first and second stage errors.

prejudice may be cumulated among different kinds of constitutional error, such as ineffective assistance of counsel and prosecutorial misconduct. We further conclude that prejudice may be cumulated among such claims when those claims have been rejected individually for failure to satisfy a prejudice component incorporated in the substantive standard governing their constitutional assessment. Finally, we conclude that prejudice from guilt-phase error may be cumulated with prejudice from penalty-phase error.

Id. at 1200. Therefore, even though each instance of error alone would not require reversal, some or all errors combined may warrant reversal.

The ineffectiveness of trial and appellate counsel and the errors enumerated by appellate counsel and post-conviction counsel, denied Mr. Wood substantial statutory and constitutional rights. His death sentence was obtained in violation of the 6th, 8th, and 14th Amendments to the Federal Constitution and Article 2, §§ 7, 9, and 20 of the Oklahoma Constitution. Mr. Wood should therefore be granted a new trial, or in the alternative, his death sentence should be modified to life imprisonment or life imprisonment without parole.

PRAYER FOR RELIEF

Wherefore, Mr. Wood respectfully requests that this Court enter an order vacating his convictions and sentences and remanding his case for a new trial or new sentencing. In the alternative, Mr. Wood respectfully requests this Court to impose a sentence of life imprisonment or life imprisonment without parole, or to remand this case for a full and fair evidentiary hearing on the issues presented.²⁰

²⁰ Mr. Wood's Appendices to the Original Post-Conviction Application, Motion for Discovery, and Motion for Evidentiary Hearing, were filed on December 26, 2006.

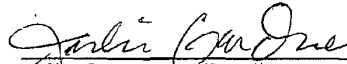
Respectfully submitted,



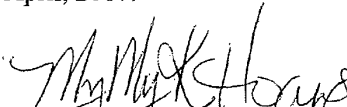
Julie Gardner, OBA #16425
228 Robert S. Kerr, Suite 100
Oklahoma City, OK 73102
(405) 290-7030
Fax: (405) 290-7035
Attorney for Termane Wood

VERIFICATION OF COUNSEL FOR PETITIONER

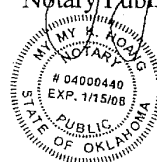
I, Julie Gardner, state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.


Julie Gardner, OBA #16425

Subscribed and sworn to before me this 25th day of April, 2007.

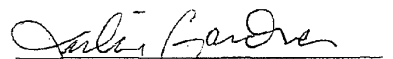

Notary Public

My Commission expires: 1/15/2008
My Commission number: 04000440



CERTIFICATE OF SERVICE

By my signature below, I certify a copy of the foregoing was served on the Attorney General of the State of Oklahoma by depositing a copy of the same with the Clerk of the Court of Criminal Appeals this 25th day of April, 2007.


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Oklahoma City, Oklahoma 73102
(405) 290-7030
Fax: (405) 290-7035
Attorney for Termane Wood

ATTACHMENT 2

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TERMANE WOOD)
) PC Case No.: PCD-2011-590
Petitioner,)
) **CAPITAL POST CONVICTION**
vs.) **PROCEEDING**
) Prior Post Conviction No.: PCD-2005-143
THE STATE OF OKLAHOMA) Direct Appeal No.: PCD-2005-143
) Oklahoma County
Respondent.) District Court Case No: 5:10-cv-00829-HE

**SECOND APPLICATION FOR POST CONVICTION RELIEF - DEATH
PENALTY**

DEATH PENALTY CASE

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUL 06 2011

MICHAEL S. RICHIE
CLERK

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Oklahoma City, Oklahoma 73102
(405) 239-2454 Telephone
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jrowan@ramlaw.biz
ATTORNEY FOR PETITIONER

TREMANE WOOD

July 5, 2011

PART A: PROCEDURAL HISTORY

Petitioner, Tremane¹ Wood, appearing specially through undersigned counsel,² submits his second application for post-conviction relief under Section 1089 of Title 22. Pursuant to Rule 9.7(A)(3), a copy of the original amended application for post conviction relief filed April 25, 2007, is appended to this second application as Attachment 1. The addendum and appendix of exhibits have not been attached, but are available should the Court find them necessary for its review of this application. The sentence(s) from which relief is sought are:

Count I - Death

Count II - Life

Count III - Life

1. (a) Court in which sentences were rendered: Oklahoma County District Court
(b) Case Number: CF-2002-46 Oklahoma County
2. Date of original sentence: April 2, 2004
3. Terms of sentences:
Murder in the First Degree - Death
Robbery with Firearms - Life
Conspiracy to Commit a Felony - Life
4. Name of Presiding Judge: Honorable Ray C. Elliott.

¹The state court record incorrectly spells Tremane Wood's first name as "Termene."

² Undersigned counsel is appearing specially and on a *pro bono* basis in an effort to get Tremane's claims before the Court. Should this Court grant an evidentiary hearing, undersigned counsel respectfully requests he be appointed to represent Tremane.

5. Petitioner is currently in custody at Oklahoma State Penitentiary, H-Unit.

Does Petitioner have criminal matters pending in other courts? Yes (X)* No ()

*Tremane has a habeas corpus petition pending in the Western District of Oklahoma under Case No. 5:10-cv-00829-HE. This is actually a civil or quasi-civil matter but Tremane mentions it here for the sake of completeness. More information is provided in the procedural history.

I. CAPITAL OFFENSE INFORMATION

6. Petitioner was convicted of the following crime for which a sentence of death was imposed:

Murder in the First Degree

Aggravating factors alleged and found:

- a. The defendant knowingly created a risk of death to more than one person;
- b. The murder was especially heinous, atrocious, or cruel;
- c. At the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

Mitigating factors listed in jury instructions:

- a. The defendant is only 24 years old.
- b. The defendant's parents were divorced at a young age.
- c. The defendant has a family that loves him and will continue to support him in a prison environment and desperately wants to do so.
- d. The defendant has a son, Brendon, who is five (5) years old. He would like to see what his son becomes and hopefully be a positive influence on him in the future.

- e. The defendant has another son, Tremane, who is two (2) years old. He would like to see what his son becomes and hopefully be a positive influence on him in the future.
- f. The defendant had no father figure during his childhood, and little support from his natural father.
- g. The defendant's mother was absent during most of his childhood and was faced with substitute parenting.
- h. The defendant has a moderately severe mental health disorder.
- i. The defendant can live in a structured prison environment without hurting anyone.
- j. The defendant's previous felony conviction was non-violent. This is his first violent conviction.
- k. With increased age, the defendant could become a positive influence on others, even in prison.
- l. The defendant has been employed in the past.
- m. The defendant has had prior drug dependencies.
- n. The defendant spent time in foster care.
- o. The defendant took directions from older brother, Zjaiton Wood.
- p. The defendant is of educational potential.
- q. The defendant is of average intelligence.

Was Victim Impact Evidence introduced at trial? Yes (X) No ()

7. Check whether the finding of guilty was made:

After plea of guilty () After plea of not guilty (X)

8. If found guilty after plea of not guilty, check whether the finding was made by:

A jury (X) A judge without a jury ()

9. Was the sentence determined by (X) a jury, or () the trial judge.

II. NON-CAPITAL OFFENSE INFORMATION

10. Petitioner was convicted of the following offense(s) for which a sentence of less than death was imposed:
Robbery with Firearms - Life
Conspiracy to Commit a Felony - Life
11. Check whether the finding of guilty was made:
After plea of guilty () After plea of not guilty (X)
12. If found guilty after plea of not guilty, check whether the finding was made by:
A jury (X) A judge without a jury ()

III. CASE INFORMATION

13. Name of lawyer in trial court:
Johnny Albert
3001 NW Classen Blvd.
Oklahoma City, OK 73106

Lance Phillips
7 South Mickey Mantle Dr. Suite 377
Oklahoma City, OK 73104
14. Was lead counsel appointed by the court? Yes (X) No ()
15. Was the conviction appealed? Yes (X) No ()
- To what court or courts? Oklahoma Court of Criminal Appeals, Case Nos. D-2005-171; and PCD-2005-143.

Date Brief in Chief filed: June 28, 2005

Date Response filed: July 22, 2005

Date Reply Brief filed: August 11, 2005

Date of Oral Argument (if set): November 28, 2006

Date of Petition for Rehearing: May 21, 2007

Has this case been remanded to the District Court for an evidentiary hearing on direct appeal?
Yes (X) No ()

16. Name and address of lawyers for appeal:

Perry Hudson
1315 N. Shartel Ave.
Oklahoma City, OK 73103

Jason Spanich
805 Northwest 8
Oklahoma City, OK 73106

Was an opinion written by the appellate court? Yes (X) No ()

Wood v. State, 158 P.3d 467 (Okla. Crim. App. 2007).

18. Was further review sought? Yes (X) No ()

Petition for writ of certiorari to the United States Supreme Court:
Denied: *Wood v. Oklahoma*, 552 U.S. 999 (Mem) (2007).

Amended Application for Post Conviction Relief, filed April 25, 2007.
Denied: *Wood v. State*, Case No. PCD-2005-143, Unpublished
Order (Okla. Crim. App. June 30, 2010).

Issues raised in original post-conviction application:

Proposition I: Trial Court Erred by Excluding Testimony from Expert Witness

Proposition II: Newly Discovered Evidence and New Law Renders Mr. Wood's
Conviction and Sentence Suspect and Unreliable

Proposition III: Petitioner Received Ineffective Assistance of Appellate and Trial Counsel in Violation of the Sixth, Eighth, and Fourteenth Amendments, and Article II, §§ 7, 9, and 20 of the Oklahoma Constitution

Proposition IV: Prosecutorial Misconduct Resulted in Unfair Proceedings

Proposition V: Error Occurred When Jurors Moved Vehicles after Being Sworn

Proposition VI: The Cumulative Impact of Errors Identified on Direct Appeal and Post-Conviction Proceedings Rendered the Proceeding Resulting in the Death Sentence Arbitrary, Capricious, and Unreliable

Petition for a Writ of Habeas Corpus, Case No. 5:10-cv-00829-HE, United States District Court for the Western District of Oklahoma: Pending.

Issues raised in Habeas Petition:

Claim One: Tremane Was Denied His Sixth and Fourteenth Amendment Right to the Effective Assistance of Counsel During the Penalty Phase of his Capital Murder Trial Because Counsel Failed to Investigate and Present Mitigating Evidence

Claim Two: Prosecutorial Misconduct During his Trial Deprived Tremane of his Due Process Rights

Claim Three: Tremane Was Denied His Fourteenth Amendment Right to Counsel During His Direct Appeal Proceedings

Claim Four: Because of errors regarding the aggravating factors in Tremane's case, his death sentence is in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment Rights

Claim Five: The Trial Court Violated Tremane's Sixth, Eighth, and Fourteenth Amendment Rights by Impermissibly Coercing the Jury

Claim Six: Tremane Was Denied His Sixth and Fourteenth Amendment Right to the Effective Assistance of Trial Counsel Because Counsel Failed to Present Evidence Challenging the Testimony of the State's Forensic Expert

Claim Seven: Prosecutorial Misconduct During the State Court Proceedings Deprived Tremane of his Due Process Rights and Rendered his State Court Proceedings Unfair

Claim Eight: Tremane Was Denied His Sixth, Eighth, and Fourteenth Amendment Right to Counsel During his Post-Conviction Proceedings

Claim Nine: The State Court 3.11 Proceedings Violated Tremane's Due Process Rights

Claim Ten: Tremane's Due Process Rights were Violated by the State Withholding Exculpatory Evidence

PART B: GROUNDS FOR RELIEF

19. Has a motion for discovery been filed with this application? Yes (X) No ()

20. Has a Motion for Evidentiary Hearing been filed with this application? Yes (X) No ()

21. Have other motions been filed with this application or prior to the filing of this application? Yes () No (X)

22. List propositions raised.

Proposition One: The Trial Court Violated Tremane's Sixth, Eighth, and Fourteenth Amendment Rights by Impermissibly Coercing the Jury.

Proposition Two: Prosecutorial Misconduct During the State Court Proceedings Deprived Tremane of his Due Process Rights and Rendered his State Court Proceedings Unfair.

Proposition Three: Tremane Was Denied His Sixth and Fourteenth Amendment Right to the Effective Assistance of Trial Counsel Because Counsel Failed to Present Evidence Challenging the Testimony of the State's Forensic Expert.

Proposition Four: Tremane Was Denied His Sixth, Eighth, and Fourteenth Amendment Right to Counsel During his Post-Conviction Proceedings.

Proposition Five: The State Court 3.11 Proceedings Violated Tremane's Due Process Rights.

Proposition Six: Tremane's Due Process Rights were Violated by the State Withholding Exculpatory Evidence.

Proposition Seven: The Cumulative Impact of the Errors in this Case Requires Relief.

PART C: FACTS
Preliminary Matters

References to the record will be made as follows:

1. The Original Record is referred to as (O.R. __, __ using the volume number in roman numerals and the page number).
2. Transcripts of the Preliminary Hearing will be referred to as (PH Tr. __, __ using the volume number in roman numerals and the page number).
3. Transcripts of the jury trial will be referred to in this application as (Tr. __, __ using the transcript volume number in roman numerals and the page number).
4. Motion Hearings will be referred to in this application as (M. Tr. Date, __) setting out the date of the hearing and the page number).

Procedural History

Tremane Wood, along with his older brother Zjaiton ("Jake") Wood, Jake's girlfriend Lanita Bateman, and Tremane's former girlfriend and mother of his child, Brandy Warden, were all charged with first-degree felony murder for the death of Ronnie Wipf that occurred around 3:30am on January 1, 2002. (O.R.1 at 71, 614-16.) Tremane also was charged with one count of robbery with firearms and one count of conspiracy to commit felony (robbery). (*Id.*) A bill of particulars was filed alleging four aggravating circumstances: (1) that during the murder, the defendant knowingly created a great risk of death to more than one person;

(2) that the murder was especially heinous, atrocious, or cruel; (3) that the murder was committed for purposes of preventing lawful arrest or prosecution; and (4) there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society. (*Id.* at 72.)

The jury found Tremane guilty of all charges. (Tr. 4/2/04 at 214-15.) The jury found only three aggravating circumstances, rejecting the circumstance that the murder was committed for purposes of preventing lawful arrest or prosecution; The jury recommended life sentences on the non-capital counts and the death penalty on the capital count. (Tr. 4/5/04 at 163-64.) Tremane was formally sentenced on May 7, 2004.

Tremane appealed his conviction and sentences, which was denied. *Wood v. State*, No. D-2005-171 (Okla. Crim. Ct. App. Apr. 30, 2007).

Tremane's original Application for Post-Conviction Relief was filed on December 26, 2006. An amended application was filed on April 25, 2007. Relief was denied. *Wood v. State*, No. PCD-2005-143 (Okla. Crim. Ct. App. June 30, 2010).

Tremane's Petition for Writ of Habeas Corpus (28 U.S.C. § 2254) was filed in the Western District of Oklahoma on June 30, 2011. *Wood v. Workman*, No. CIV-10-0829-HE (W.D. Okla.).

Tremane now pursues this Second Application for Post-Conviction Relief.

The Record in This Proceeding

The record in this proceeding consists of the direct appeal record, the record in *Wood's*

original Application for Post-conviction Relief and the Exhibits and Attachments submitted with this Application. An Appendix is filed contemporaneously with this Application containing:

1. Supplementary materials submitted in accordance with subsection OCCA Rule 9.7 A(f) and Rule 9.7 (D) [Attachments 2-17.]
2. Copy of Tremane's original amended Post-Conviction Application, OCCA Rule 9.7A (d) [Attachment 1.]

III. Factual Summary

On December 31, 2000, Ronnie Wipf and Arnold Kleinsasser were celebrating New Year's Eve at the Bricktown Brewery in Oklahoma City, Oklahoma. (Tr. 03/31/04 at 118.) While at the Bricktown Brewery the men met and socialized with Brandy Warden and Lanita Bateman. After the Bricktown Brewery closed, the women agreed to accompany these men back to a motel, (*Id.* at 120-24), which they did after talking to Tremane and Jake, (Tr. 4/1/04 at 146-47; Tr. 3/31/04 at 122.)

Once inside the room, the four agreed on \$210.00 in exchange for sex. (Tr. 3/31/04 at 125-27.) Lanita pretended to call her mother, but actually called Jake. (Tr. 3/31/04 at 109.)

Jake and Tremane came to the motel room, and Jake banged on the door. (Tr. 3/31/04 at 129; Tr. 4/1/04 at 165-66.) Lanita and Brandy ran out of the room, and Jake and Tremane ran in. (Tr. 4/1/04 at 168.)

Jake approached Arnold with the gun; Tremane approached Ronnie with the knife, and

Ronnie put up a fight. (Tr. 3/31/04 at 133-35.) Jake left Arnold to go assist Tremane who had been struggling with Ronnie. (*Id.* at 135.) After Tremane demanded more money from Arnold, he returned to the struggle and Arnold fled the room. (*Id.* at 139.) Ronnie died from a single stab wound to the chest. (Tr. 04/02/04 at 11-12, 18.) Arnold was unable to identify who stabbed Ronnie. (3/31/04 at 172.)

At trial, Jake testified during the first stage of trial that he and another man named “Alex” committed this crime. (Tr. 04/02/04 at 89, 91-95.) Jake testified he initially had the gun when he and Alex entered the motel room. (*Id.* at 94.) Jake explained that when he saw that the victim was getting the best of Alex, he went over and punched Ronnie in his head and body. (*Id.* at 94.) Jake grabbed the knife and stabbed Ronnie in the chest. (*Id.* at 94.) At the conclusion of first stage, the jury found Tremane guilty on all counts. (*Id.* at 214-15.)

In second stage, the State incorporated all the evidence from first stage. In addition, evidence of a pizza place robbery committed by Tremane, Jake, Lanita, and Brandy, earlier on December 31st, was also presented. (Tr. 04/05/04 at 17-18, 24-26.)

Tremane called his mother Linda Wood, her friend Andre Taylor, and Dr. Ray Hand. At the conclusion of the second stage, the jury recommended death on the murder charge and recommended the maximum sentence of life on the robbery and conspiracy counts. (*Id.* at 163-64.)

B. Facts Supporting Second Application for Post-Conviction Relief

The relevant facts supporting Tremane’s Post-Conviction claims are adduced in the

individual propositions raised and in the attachments to the Application referenced in those propositions.

PART D: PROPOSITIONS - ARGUMENTS AND AUTHORITIES

REVIEW PURSUANT VALDEZ v. STATE

This Court has recognized it may grant relief anytime “an error complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right,” regardless of when the claim is presented. *Valdez v. State*, 46 P.3d 703, 710-11 (Okla. Cr. 2002). In *Valdez*, this Court acknowledged that the petitioner’s claim was barred from review under 22 O.S. § 1089(D), but held that it could adjudicate the claim in order to prevent a miscarriage of justice, and granted the petitioner relief from his erroneous death sentence. *See Valdez*, 46 P.3d at 710-11.

Following *Valdez*, this Court granted David Brown an evidentiary hearing on a successive post-conviction application, citing *Valdez*. (See Attachment 3, Order Extending the Stay of Execution and Granting Motion for Evidentiary Hearing, *Brown v. State*, No. PCD-2002-781.³ This Court later cancelled the hearing and dismissed the case due to counsel’s recalcitrance in conducting the hearing. However, the principle remains: This Court always retains the power to correct substantial denials of statutory or constitutional rights, and such claims may be raised and reviewed on a second or successive post-conviction

³ Brown ultimately received the hearing under another case number as a result of issues concerning counsel.

application. The Court recently took a compatible approach in *Slaughter v. State*, 108 P.3d 1052 (Okla. Crim. Ct. App. 2005), electing to review the merits of claims in a third post-conviction application.⁴

The same rule should apply here. If this Court finds it cannot reach Tremane's claims or some aspect of them in the ordinary course, the court nevertheless should reach the merits under the *Valdez* principle. This case presents facts congruent with those in *Valdez*.

This Court has wisely retained the power to correct injustices such as those in Tremane's case. Failure to grant review in this case and, upon review, to grant relief would run counter to the rule of law set forth in *Valdez*. See *Hicks v. Oklahoma*, 447 U.S. 343 (1980) (individual has a due process interest in orderly application of procedures provided by a State). This Court therefore should consider Tremane's case on the merits, order any evidentiary hearing it deems necessary, and grant Tremane relief from his convictions and death sentences.

Proposition One: The Trial Court Violated Tremane's Sixth, Eighth, and Fourteenth Amendment Rights by Impermissibly Coercing the Jury

The court impermissibly coerced the jury into delivering a dispositive decision when it informed jury that it "had to reach a unanimous decision" and that a "hung jury was not an

⁴ Part of the rationale for applying procedural defaults is apparently the concern that petitioners may "lie behind the log" in hopes of springing a claim late in the case. It would be exceedingly foolish to do so not only because of the potential the claim would not be considered but also because of the value of presenting claims in concert. Tremane is in the unenviable position of having viable claims that were missed or not artfully presented by prior counsel.

option.” (See Declaration of Michael Colbart, attached as 4, ¶ 2; Declaration of Candelaria Nunez, attached as 5, ¶ 2.) Such coercion was a violation of Tremane’s due process rights, and his right to an impartial jury trial and a fair sentencing. See *United States v. McElhiney*, 275 F.3d 928, 937 (10th Cir. 2001); *Jones v. United States*, 527 U.S. 373, 381–82 (1999); see also Okla. const. Art. II-19 and II-20.

For more than a century, the United States Supreme Court has warned trial courts that they must be vigilant to instruct a jury in such a way as to not coerce the jury into returning a death sentence. See, e.g., *Lowenfield v. Phelps*, 484 U.S. 231, 238-41 (1988) (“Any criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body.”); *Allen v. United States*, 164 U.S. 492, 493, 501 (1896). Instructing a jury in such a way as to eliminate the possibility of a deadlock—particularly during the penalty phase where a deadlock demands the dismissal of the jury and the imposition of life sentence⁵—impermissibly coerces the jury into returning a death sentence. *Jenkins v. United States*, 380 U.S. 445 (1965) (holding that comment, “You have got to reach a decision in this case,” during supplemental charge was of itself coercive and therefore ground for reversal). Nevertheless, the court in this case did just that and, in doing so, denied Tremane the basic constitutional protections afforded every capital defendant.⁶

⁵21 Okla. Stat. Ann. § 701.11 (2004); see also *Davis v. State*, 665 P.2d 1186, 1203 (Okla. Ct. Crim. App. 1983).

⁶This Court recently reversed a conviction where the presiding judge in Tremane’s trial (Judge Elliott) made coercive comments to a jury suggesting that they had to reach a verdict. See *Bills v. State*, CF-2009-404, Opinion, May 4, 2011 (attached as Attachment 6).

While it is fundamental to our jury system that a criminal case “may terminate with the failure to reach a verdict,” the court in this case repeatedly denied the jurors the option of disunity and, in turn, denied Tremane the possibility of a mistrial. *McElhiney*, 275 F.3d at 935. According to Juror Colbart, the jury was also “told that if we did not reach a unanimous decision, we could not break for the weekend.” (Attachment 4, ¶ 2.) Juror Nunez adds that, to the best of her recollection, she and her fellow jurors “were instructed to continue to deliberate until [they] had reached a unanimous decision.”⁷ (Attachment 5, ¶ 2.) Consistent with the transgressions described in the declarations of Jurors Colbart and Nunez—the trial transcript reveals that the court also instructed the jurors to return “verdicts of either guilty and not guilty” on more than a dozen occasions.⁸ A failure to agree during the penalty phase would have been a victory for Tremane and a legitimate end of the trial. *McElhiney*, 275 F.3d at 935.

⁷That Juror Nunez now attests to being mislead by the court is entirely understandable given, *inter alia*, the court’s affirmative answer to her direct question during voir dire, “when you say unanimous, do you mean all agree?” (Tr. 3/30/04 at 168, 170-71.)

⁸*See, e.g.*, Tr. 3/31/04 at 87- 88 (“You may be in that room, depending on how long you feel it takes to arrive at *one of the two verdicts*.” (emphasis added)); Tr. 3/31/04 at 40 (“Every piece of evidence that is admitted, it will be your duty to review to decide *one of two choices, guilty or not guilty*.” (emphasis added)); Tr. 3/31/04 at 16 (“It will be the duty of the jury, and you if you sit on the jury, to determine whether the defendant is guilty or not guilty.” (addressing prospective jurors)); Tr. 3/30/04 at 166 (“But the verdict on the punishment must be unanimous just as your verdict of either guilty or not guilty.” (addressing prospective jurors)); Tr. 3/31/04 at 87. (“You stay in that room without leaving until you arrive at three verdicts of either guilty or not guilty.”); Tr. 3/31/04 at 96 (“It is your responsibility . . . to reach verdicts of guilty or not guilty based on the evidence.”); Tr. 4/2/04 at 201 (“You just stay up there until you arrive at three unanimous verdicts.”).

The declarations of Jurors Colbart and Nunez vividly demonstrate that the court “affirmatively misled” the jury as to its deliberative options and thereby violated Tremane’s constitutional rights. *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (holding that a constitutional violation would result from a jury being “affirmatively misled regarding its role in the sentencing process”); *see also Mills v. Tinsley*, 314 F.2d 311, 313 (10th Cir. 1963) (“To compel a jury to agree upon a verdict is a denial of a fair and impartial jury trial, and, hence is a denial of due process.”). Such coercion not only resulted in violations of Tremane’s Sixth Amendment and due process rights; it also resulted in a violation of his Eighth Amendment right to heightened reliability in death-penalty proceedings. *See Jones*, 527 U.S. at 381-82 (noting that “a jury cannot be ‘affirmatively misled regarding its role in the sentencing process.’” (citation omitted)); *see also Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (noting that “the penalty of death is qualitatively different from a sentence of imprisonment” and therefore “there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case”). “[S]entences of death must be absolutely, unquestionably fair.” *Hain v. State*, 852 P.2d 744, 753 (Okla. Crim. Ct. App. 1993). As to the context and circumstances of Tremane’s trial, “the record in this case reveals an ever-rising tide of coercion ultimately resulting in [a] unanimous death sentence[.]” *Hooks v. Workman*, 606 F.3d 715, 741 (10th Cir. 2010); *see also Gilbert v. Mullin*, 302 F.3d 1166, 1175 (10th Cir. 2002) (“[C]ourts should be wary of the potentially coercive effect of holding jurors late into the night and even into the early morning hours.”).

The taint of coercion is undeniable. *See Goff v. United States*, 446 F.2d 623, 626 (10th Cir. 1971) (“The court must avoid any indicia of coercion.”). If even one juror believed trial court was insisting on a unanimous verdict, that would be one juror too many. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 462 (1978) (holding that “the Court of Appeals would have been justified in reversing the convictions solely because of the risk that the foreman believed the court was insisting on a dispositive verdict”). Here there were two. Because Tremane’s constitutional rights were violated by the court’s improper and coercive comments to the jury, he is entitled to relief.

Proposition Two: Prosecutorial Misconduct During the State Court Proceedings Deprived Tremane of his Due Process Rights and Rendered his State Court Proceedings Unfair.

To succeed on a claim of prosecutor misconduct, Tremane must demonstrate either that the prosecutor’s misconduct prejudiced a substantive right, *see Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) (*citing Griffin v. California*, 380 U.S. 609 (1965)) (footnote omitted), or that the prosecutor’s misconduct rendered the trial fundamentally unfair, *see Berger v. United States*, 295 U.S. 78 (1935). *See also Williams v. State*, 2008 OK CR 19, ¶ 124, 188 P.3d 208, 230; Okla. const. Art. II-7.

Following Tremane’s capital trial this Court ordered a hearing on Tremane’s claim of ineffective assistance of trial counsel. Familial abuse was a central issue during these proceedings with Linda, Andre, and Jake Wood all offering testimony regarding abuse inflicted on Linda by Tremane’s father, Raymond Gross. In cross-examining defense

witnesses, the State created the impression that Linda's claims of abuse were untrue, with particular reference to an absence of medical or hospital records to support Linda's claims. (Tr. 2/23/06 at 170-71; Tr. 2/27/06 at 341.) At that time, the prosecutor had in its position medical records reflecting treatment Linda had received after various incidences of abuse, including contusions, abrasion and a broken tooth (Attachment 7 at 2), and for being hit in the chest and stomach (*Id.* at 1).

In a similar form, the State cross-examined Raymond Gross in a manner designed to suggest he was a law-abiding, non-violent man, who had not inflicted terror and abuse on his family. (*See, e.g.* Tr. 2/23/06 at 23-26.) The State conducted this cross-examination despite having records in its possession that painted a violent picture of Raymond, abusing and threatening his wife and children. (*See* Attachment 8.)

The prosecution's duty to turn over *Brady* material continued after trial. *Smith v. Roberts*, 115 F.3d 818 (820) (10th Cir. 1997) (*citing Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987)). Not only did the prosecution fail to turn over these records, it created the material misrepresentation that the Wood family's testimony regarding the abuse endured by Linda was simply false because it was unsupported by records, and because Raymond denied it. While the State did not present false testimony, the cross-examination it conducted, particularly in light of its knowledge of these medical records and the criminal offenses related to Raymond, created a materially false impression. The State's suppression of this evidence allowed it to effectively neutralize what would have been compelling support for

Tremane's claim of ineffective assistance of trial counsel, and to mislead the trial court (an independent act of misconduct that deprived Tremane of a fair hearing). *See Berger*, 295 U.S.

78. Considering the prosecutorial misconduct cumulatively, Tremane was deprived of his due process rights.

Proposition Three: Tremane Was Denied His Sixth and Fourteenth Amendment Right to the Effective Assistance of Trial Counsel Because Counsel Failed to Present Evidence Challenging the Testimony of the State's Forensic Expert.

In all cases, but more critically in capital cases, counsel has a duty to challenge the State's case against the defendant and, when necessary, employ experts to defend against the State's experts. *See* ABA Guideline 10.7, Commentary (noting that counsel has a duty "to scrutinize carefully the quality of the state's case" and "aggressively re-examine all of the government's forensic evidence"). In the instant case that did not happen. As a result, the testimony regarding the autopsy of the victim in this case went unchallenged. In failing to challenge the forensic testimony, counsel's performance fell below the objective standard of reasonableness—that is, it was outside the "wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). Had the defense presented expert testimony of a forensic pathologist, the jury would have heard evidence that could have ultimately made a difference in the guilt and/or penalty phase of Tremane's trial.

At trial, the jury heard virtually unchallenged testimony from the chief medical examiner Dr. Fred Jordan; he was not the doctor who actually performed the autopsy of the victim. (Tr. 4/2/04 at 6.) Dr. Jordan testified that the cause of death was from a five-inch

deep stab wound. (*Id.* at 14.) Had trial counsel retained an expert and presented such testimony the jury would have learned that Dr. Jordan's testimony was inaccurate. A defense expert could have demonstrated that the width of the wound was not as wide as the width of the knife. (*See* Report of Michael Iliescu, M.D., 6/27/11, Attachment 9, at 3-4.) Therefore, the entire length of the knife could not have been inserted into the victim's body.

Moreover, a defense expert could have attacked the autopsy report in several ways. First, the documentation of the stab wound was made after the body was autopsied. This is against the common practice in forensic pathology of documenting the injuries before the autopsy examination is performed. (*Id.* at 6.) Second, the stab wound should have been documented with the approximation of the edges of the wound (with the wound being closed), which was not done in this case. (*Id.* at 6-7.) Finally, an expert would have criticized the medical examiner for not taking photographs of the body before conducting the autopsy. (*Id.* at 6.)

Another problem with the State's autopsy report involved the toxicology. (*Id.* at 6.) The State's report says Ronnie had no drugs or alcohol in his system at time he died. (Tr. 4/2/04 at 11.) Ronnie's friend Kleinsasser testified that Ronnie was drinking (Tr. 3/31/04 at 121.) Codefendant Lanita Bateman also indicated that Ronnie was drunk. (Declaration of Lanita Bateman, attached as Attachment 10, at 2.) This information lends serious questions to the credibility of the autopsy.

Had this evidence been presented during the guilt phase of Tremane's trial, the State's

case would have been challenged regarding the circumstances surrounding the victim's death.

The jury could have determined that the autopsy report was not accurate and that there were problems with Dr. Jordan's testimony. Moreover, the jury could have also discredited the State's argument that the stab wound was five inches, which was repeatedly emphasized in support of the heinous, atrocious or cruel aggravating circumstance. (Tr. 4/5/04 at 8, 111, 112, 133, 157.) The State told the jury that it was "shockingly evil" to stab a man with a knife and "stick it five inches into his body." (*Id.* at 111.) This repeated reference to the depth of the wound portrayed a more graphic image to the jury that could have been discredited.

Here, had counsel performed under prevailing professional norms, the evidence regarding the crime in this case would have been challenged and effectively undermined. This would have impacted both the guilt and penalty phases of Tremane's trial. In particular, the jury may not have found the aggravating circumstance of heinous, atrocious, or cruel. Minimally, the State would not have been able to use these facts to bolster its case for death. (*See, e.g.* Tr. 4/5/04 at 8, 111, 112, 133, 157.) Resultantly, there is a likelihood that Tremane would not have been sentenced to death. In this case, counsel's failures "undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

Proposition Four: Tremane Was Denied His Sixth, Eighth, and Fourteenth Amendment Right to Counsel During his Post-Conviction Proceedings.

This Court has held that the state statutory right to post-conviction counsel in capital

cases carries with it a requirement that post-conviction counsel perform effectively. *Hale v. State*, 1997 OK CR 16,934 P.2d 1 100; *see also* OKLA. STAT. tit. 22, § 4-1356. *Hale* recognized the unfairness in providing a lawyer but not requiring that lawyer to be effective. This Court has recognized the right as arising under State law but it also has federal Due Process implications. *Evitts v. Lucev*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *Hicks v. Oklahoma*, 447 U.S. 343, 100 S. Ct. 2227, 65 L. Ed. 2d (1980); *Hatch v. Oklahoma*, 58 F.3d 1447, 1460 (10th Cir. 1995). In *Hale*, this Court held that a claim of ineffective assistance of post-conviction counsel was cognizable on a second post-conviction application, since this was the “first available opportunity” for the petitioner to raise such a claim. *Id.* at 1102. Similarly, in *Spears v. State*, No. PC-99-1099 (Oct. 13, 1999), this Court reached the merits of the petitioner's claim presented in a second post conviction that his first post-conviction counsel was ineffective. (Attachment 11.)

Strickland, 466 U.S. at 686-88, sets forth the standard for assessing ineffective assistance of appellate counsel. *Hale*, 934 P.2d at 1102-03. Tremane must demonstrate deficient performance and prejudice. *See id.* To establish prejudice postconviction counsel's failure to raise certain issues “undermines confidence in the appellate process.” *Id.* at 1103.

Tremane's postconviction counsel was ineffective for each instance, considered separately or cumulatively, in which counsel failed to raise the following issues: (1) failure to investigate and present relevant mitigating evidence in support of trial IAC for same; (2) failure to raise a claim of ineffective assistance of direct appeal counsel for failing to raise

trial IAC for not challenging death to two or more people; and (3) failure to hire a forensic pathologist to challenge the autopsy findings. (*See* Attachments 12, 14, 16-17.)

The claims counsel failed to raise were supported by the facts and the law. They were obvious errors counsel should have presented for appellate review:

(1) Postconviction counsel failed to assert appellate IAC for failing to investigate and present relevant mitigating evidence in support of ineffective assistance of trial counsel for same. (*See* Proposition Three.) Counsel indicates she did not collect medical records related to Tremane's mother, or conduct additional background investigation into Tremane's parents' families. She had no strategic reason for this failure. (*See* Declaration of Julie Gardner, 6/24/11, attached as Attachment 12, ¶¶ 7-8.)

(2) Postconviction counsel failed to assert appellate IAC for failing to argue trial counsel's ineffective assistance with respect to the allegation that Tremane knowingly created a knowing risk of great harm to two or more persons. This aggravating factor was not supported by the facts in evidence and was dismissed in Jake Wood's case. (*See* Z. Wood Tr. 2/28/05 at 23, attached as Attachment 13.) PCR counsel Julie Gardner indicates that she was unaware that this same aggravator was dismissed in Jake's case. (*See* Attachment 12, ¶12.)

(3) Postconviction counsel failed to assert trial and appellate IAC failure to hire a forensic pathologist to challenge the autopsy findings. Counsel should have consulted with a neutral forensic expert, which would have led counsel to discover real problems with this forensic evidence as outlined in Proposition Three (incorporated here by reference). Tremane

had a right to effective assistance of postconviction counsel. This right was violated by counsel's omissions.

Postconviction counsel had available compelling claims of IAC of both trial and appellate counsel. Trial and appellate counsel missed obvious errors—had either challenged the great risk of harm aggravator, it would have been successful. (See Z. Wood Tr. 2/28/05 at 23, attached as Attachment 13) (trial court dismisses great risk of harm aggravator at Jake's trial). Similarly, there were serious flaws with in Ronnie's autopsy, which led to inaccurate findings—most significantly, that the stab wound was five inches deep. A forensic expert would have revealed these flaws, and allowed Tremane to call into question the medical examiner's testimony. This would have drastically altered the State's repeated cry for the death penalty due to the depth of the wound inflicted on Ronnie.

There was a powerful story to be told in mitigation, and both trial and appellate counsel failed to tell the complete story. Postconviction counsel also could have asserted deficient performance and prejudice for failing to obtain present all relevant mitigation. Linda's medical records, which would have bolstered her claims of abuse, *cf. Skipper v. South Carolina*, 476 U.S. 1, 8 (1986), and additional information available regarding the families would have demonstrated that Tremane found no solace, no help outside of his immediate family—he was met with abuse and neglect inside, and outside, of his home. The additional witnesses available, as well as records created years before the crime would have bolstered Tremane's mitigation case. Prior counsel's failure to investigate and present such evidence

deprived the jury, and later the trial court, of a full understanding of the relevant, compelling mitigating factors.

With one aggravating circumstance gone, the State's graphic language now limited, Tremane's complete case in mitigation of the death penalty would have carried far more power. These failures were deficient performance that prejudiced Tremane, *Strickland*, 466 U.S. at 686-88, depriving Tremane of his due process and effective assistance of counsel rights. U.S. Const. amend. VI, XIV; Okla. Const. art. II-7, II-20. (See Attachments 12, 14, 16-17.) Representation which departs from prevailing professional norms constitutes sufficient cause for post conviction review of this claim in a second post conviction application. OKLA. STAT. tit. 22, § 1089(D)(4) (b)(2).

Proposition Five: The State Court 3.11 Proceedings Violated Tremane's Due Process Rights.

Trial counsel John Albert now indicates that, at the time of Tremane's 3.11 hearing, he "was in a very bad place in his life. [He] had hit rock bottom." (Attachment 14, ¶9.) At the time, Albert was "drinking excessively and using drugs." (*Id.* at ¶9.) In addition, Albert faced a pending bar investigation. (*Id.* at ¶10.) Ten days later, Albert entered rehab. (*Id.* at ¶9.) As a result of these circumstances, Albert describes himself as "very defensive" during his testimony at Tremane's 3.11 hearing. (*Id.* at ¶10.) He was "worried about the impact that being found ineffective would have on [his] license to practice law." (*Id.* at ¶10.)

Sober since he entered rehab (*Id.* at ¶9), Albert's declaration demonstrates he rendered deficient performance during Tremane's capital trial. Albert "simply did not have the time

to adequately represent Tremane in his capital trial.” (*Id.* at ¶3.) He failed to prepare witnesses, including Dr. Hand. (*Id.* at ¶7, “I did not prepare Dr. Hand for his testimony nor did I review any documents before providing them to Dr. Hand.”) Albert candidly admits to a lack of investigation, “I did not do the necessary investigation and preparation required to defend a capital client.” (*Id.* at ¶11.) And, he offers no strategic reasons for failing to investigate Tremane’s background, gather records, conduct relevant interviews or prepare Dr. Hand. (*Id.* at ¶11.) Moreover, Albert believes all of this would have made a difference. (*Id.* at ¶12.)

Albert’s defensive testimony deprived the Oklahoma courts of facts necessary to assess Tremane’s claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Rule 3.11 plays an important role in the Oklahoma direct appeal process. “As a matter of policy, Rule 3.11 requires criminal defendants to bring their *Strickland* claims on direct appeal rather than in post-conviction proceedings and to lay their evidentiary cards on the table before the OCCA.” *Wilson v. Workman* 577 F.3d 1284, 1304 (10th Cir. 2009) (en banc) (Tymkovich, J., dissenting).

Given the important role that Rule 3.11 proceedings play in Oklahoma’s direct appeal process, Albert’s defensive testimony created a fundamental flaw in the fact finding process, which deprived Tremane of his due process interest in those very proceedings. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *see also* Okla. Const. art. II-7. This is all the more so when the defendant’s “life” interest is at stake in the proceedings. *Ohio Adult Parole Auth. v.*

Woodard, 523 U.S. 272 (1998) (five Justices recognized a distinct “life” interest protected by the Due Process Clause in capital cases above and beyond liberty and property interests).

Proposition Six: Tremane’s Due Process Rights were Violated by the State Withholding Exculpatory Evidence.

Brandy Warden was on probation in Payne County, Oklahoma, at the time these offenses were committed. (Attachment 15; *see also* Exhibit 19B attached to Tremane’s First Amended Application for Post-Conviction Relief.) Yet she never faced charges in Payne County, Oklahoma for violating the terms of her probation. Any deal struck that relieved Warden of criminal charges in exchange for her testimony was material and exculpatory. *See Brady v. Maryland*, 373 U.S. 83 (1963). The State’s failure to turn over such evidence deprived Tremane of his due process rights. *Brady*, 373 U.S. 83; *Giglio v. United States*, 405 U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S.419 (1995); *see also* Okla. Const. art. II-7.

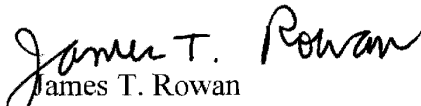
Proposition Seven: The Cumulative Impact of the Errors in this Case Requires Relief.

Assuming *arguendo*, any individual error in Tremane’s case is deemed insufficient to warrant relief, relief is nonetheless required due to a cumulation of errors. *United States v. Rivera*, 900 F.2d 1462 (10th Cir. 1990)(cumulative error analysis is an extension of the harmless error rule). None of the individual errors in this case can be deemed harmless. This Court should cumulate the errors identified here with each other and with the errors advanced previously on direct appeal and in Tremane’s initial post-conviction filing. Further, pursuant the Sixth, Eighth, and Fourteenth Amendments, claims that have equivalent prejudice or harmless error components should be considered together for purposes of prejudice or

harmless error review. *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003).

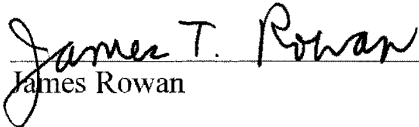
CONCLUSION

Tremane's convictions and death sentences were obtained in violation of his state and federal rights. This Court should exercise its power to do fundamental justice and grant relief. Alternatively, this Court should grant Tremane's request for discovery and order an evidentiary hearing in order to allow additional fact development.


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VERIFICATION OF COUNSEL FOR PETITIONER

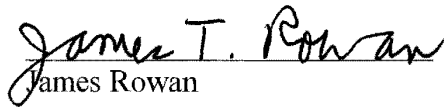
I, James Rowan, state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.


James Rowan

7 / 6 / 2011
Date

CERTIFICATE OF SERVICE

I certify that a copy of this Second Application for Post-Conviction Relief was served on the Attorney General of the State of Oklahoma by depositing a copy of the same with the Clerk of this Court on the date it was filed.


James Rowan

ATTACHMENT 3

246a

PART A: PROCEDURAL HISTORY

Petitioner, Tremane¹ Wood, appearing specially through undersigned counsel, submits his third application for post conviction relief under Section 1089 of Title 22. Pursuant to Rule 9.7(A)(3) of the Rules of the Oklahoma Court of Appeals, Title 22, Ch. 18, App., a copy of the amended (first) application for post conviction relief filed April 25, 2007, is appended to this third application as Attachment 1, and the second application for post conviction relief is appended to this third application as Attachment 2. The addendum and appendix of exhibits have not been attached, but are available should the Court find them necessary for its review of this application. The sentence(s) from which relief is sought are:

Count I – Death; Count II – Life; Count III - Life

1. (a) Court in which sentences were rendered: Oklahoma County District Court
(b) Case Number: CF-2002-46 Oklahoma County
2. Date of original sentence: April 2, 2004
3. Terms of sentences:
Murder in the First Degree - Death
Robbery with Firearms - Life
Conspiracy to Commit a Felony - Life
4. Name of Presiding Judge: Honorable Ray C. Elliott.
5. Petitioner is currently in custody at Oklahoma State Penitentiary, H-Unit.

¹ In many places in the state-court record Tremane Wood's first name is incorrectly spelled as "Termene."

Does Petitioner have criminal matters pending in other courts? Yes (X)* No ()

*Tremane has a habeas corpus petition pending in United States Court of Appeals for the Tenth Circuit under *Tremane Wood v. Terry Royal*, Case No. 16-6001. This is actually a civil or quasi-civil matter but Tremane mentions it here for the sake of completeness. More information is provided in the procedural history.

I. CAPITAL OFFENSE INFORMATION

6. Petitioner was convicted of the following crime for which a sentence of death was imposed: Murder in the First Degree

Aggravating factors alleged and found:

- a. The defendant knowingly created a risk of death to more than one person;
- b. The murder was especially heinous, atrocious, or cruel;
- c. At the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

Mitigating factors listed in jury instructions:

- a. The defendant is only 24 years old.
- b. The defendant's parents were divorced at a young age.
- c. The defendant has a family that loves him and will continue to support him in a prison environment and desperately wants to do so.
- d. The defendant has a son, Brendon, who is five (5) years old. He would like to see what his son becomes and hopefully be a positive influence on him in the future.
- e. The defendant has another son, Tremane, who is two (2) years old. He would like to see what his son becomes and hopefully be a positive influence on him in the future.
- f. The defendant had no father figure during his childhood, and little support from his natural father.

- g. The defendant's mother was absent during most of his childhood and was faced with substitute parenting.
- h. The defendant has a moderately severe mental health disorder.
- i. The defendant can live in a structured prison environment without hurting anyone.
- j. The defendant's previous felony conviction was non-violent. This is his first violent conviction.
- k. With increased age, the defendant could become a positive influence on others, even in prison.
- l. The defendant has been employed in the past.
- m. The defendant has had prior drug dependencies.
- n. The defendant spent time in foster care.
- o. The defendant took directions from older brother, Zjaiton Wood.
- p. The defendant is of educational potential.
- q. The defendant is of average intelligence.

Was Victim Impact Evidence introduced at trial? Yes (☒) No (☐)

7. Check whether the finding of guilty was made:

After plea of guilty (☐) After plea of not guilty (☒)

8. If found guilty after plea of not guilty, check whether the finding was made by:

A jury (☒) A judge without a jury (☐)

9. Was the sentence determined by (☒) a jury, or (☐) the trial judge.

II. NON-CAPITAL OFFENSE INFORMATION

10. Petitioner was convicted of the following offense(s) for which a sentence of less than death was imposed:

Robbery with Firearms – Life

Conspiracy to Commit a Felony – Life

11. Check whether the finding of guilty was made:

After plea of guilty () After plea of not guilty (X)

12. If found guilty after plea of not guilty, check whether the finding was made by:

A jury(X) A judge without a jury ()

III. CASE INFORMATION

13. Name of lawyers in trial court:

Johnny Albert
3001 NW Classen Blvd.
Oklahoma City, OK 73106

Lance Phillips
7 South Mickey Mantle Dr. Suite 377
Oklahoma City, OK 73104

14. Was lead counsel appointed by the court? Yes (X) No ()

15. Was the conviction appealed? Yes (X) No ()

To what court or courts? Oklahoma Court of Criminal Appeals, Case Nos.
D-2004-550 (dismissed Apr. 4, 2005 as untimely but granting permission to
file a new appeal out of time) and D-2005-171.

Date Brief in Chief filed: June 28, 2005

Date Response filed: July 22, 2005

Date Reply Brief filed: August 11, 2005

Date of Oral Argument (if set): November 28, 2006

Date of Petition for Rehearing: May 21, 2007

Has this case been remanded to the District Court for an evidentiary hearing on direct
appeal? Yes (X) No ()

If so, what were the grounds for the remand?

Ineffective assistance of trial counsel for (1) Failure to Investigate, Develop and Present Mitigation Evidence; and (2) Failure to Properly Impeach State's Witness Brandy Warden.

Is this petition filed subsequent to supplemental briefing after remand? Yes (X) No ()

16. Name and address of lawyers for appeal:

Perry Hudson
1315 N. Shartel Ave.
Oklahoma City, OK 73103

Jason Spanich
805 Northwest 8
Oklahoma City, OK 73106

17. Was an opinion written by the appellate court? Yes (X) No()

Wood v. State, 158 P.3d 467 (Okla. Crim. App. 2007).

18. Was further review sought? Yes (X) No()

Petition for writ of certiorari to the United States Supreme Court:

Denied: *Wood v. Oklahoma*, 552 U.S. 999 (Mem.) (2007).

Amended (First) Application for Post Conviction Relief, filed April 25, 2007.

Denied: *Wood v. State*, Case No. PCD-2005-143, Unpublished Order (Okla. Crim. App. June 30, 2010).

Second Application for Post Conviction Relief, filed July 6, 2011.

Denied: *Wood v. State*, Case No. PCD-2011-590, Unpublished Order (Okla. Crim. App. Sept. 30, 2011).

Petition for a Writ of Habeas Corpus, *Tremane Wood v. Anita Trammell*, Case No. 5:10-cv-00829-HE, United States District Court for the Western District of Oklahoma.

Denied by district court in unpublished opinion on Oct. 30, 2015. However, that decision has been appealed and that appeal is currently pending in United States Court of Appeals for the Tenth Circuit, *Tremane Wood v. Terry Royal*, Case No. 16-6001.

Issues raised in first post conviction application:

- Proposition I: Trial Court Erred by Excluding Testimony from Expert Witness
- Proposition II: Newly Discovered Evidence and New Law Renders Mr. Wood's Conviction and Sentence Suspect and Unreliable
- Proposition III: Petitioner Received Ineffective Assistance of Appellate and Trial Counsel in Violation of the Sixth, Eighth, and Fourteenth Amendments, and Article II, §§ 7, 9, and 20 of the Oklahoma Constitution
- Proposition IV: Prosecutorial Misconduct Resulted in Unfair Proceedings
- Proposition V: Error Occurred When Jurors Moved Vehicles after Being Sworn
- Proposition VI: The Cumulative Impact of Errors Identified on Direct Appeal and Post-Conviction Proceedings Rendered the Proceeding Resulting in the Death Sentence Arbitrary, Capricious, and Unreliable

Issues raised in second post conviction application:

- Proposition One: The Trial Court Violated Tremane's Sixth, Eighth, and Fourteenth Amendment Rights by Impermissibly Coercing the Jury
- Proposition Two: Prosecutorial Misconduct During the State Court Proceedings Deprived Tremane of his Due Process Rights and Rendered his State Court Proceedings Unfair
- Proposition Three: Tremane Was Denied His Sixth and Fourteenth Amendment Right to the Effective Assistance of Trial Counsel Because Counsel Failed to Present Evidence Challenging the Testimony of the State's Forensic Expert

Proposition Four: Tremane Was Denied His Sixth, Eighth, and Fourteenth Amendment Right to Counsel During his Post-Conviction Proceedings

Proposition Five: The State Court 3.11 Proceedings Violated Tremane's Due Process Rights

Proposition Six: Tremane's Due Process Rights Were Violated by the State Withholding Exculpatory Evidence

Proposition Seven: The Cumulative Impact of the Errors in this Case Requires Relief

Issues raised in Habeas Petition:

Claim One: Tremane Was Denied His Sixth and Fourteenth Amendment Right to the Effective Assistance of Counsel During the Penalty Phase of his Capital Murder Trial Because Counsel Failed to Investigate and Present Mitigating Evidence

Claim Two: Prosecutorial Misconduct During his Trial Deprived Tremane of his Due Process Rights

Claim Three: Tremane Was Denied His Fourteenth Amendment Right to Counsel During His Direct Appeal Proceedings

Claim Four: Because of Errors Regarding the Aggravating Factors in Tremane's case, His Death Sentence Is in Violation of His Fifth, Sixth, Eighth, and Fourteenth Amendment Rights

Claim Five: The Trial Court Violated Tremane's Sixth, Eighth, and Fourteenth Amendment Rights by Impermissibly Coercing the Jury

Claim Six: Tremane Was Denied His Sixth and Fourteenth Amendment Right to the Effective Assistance of Trial Counsel Because Counsel Failed to Present Evidence Challenging the Testimony of the State's Forensic Expert

Claim Seven: Prosecutorial Misconduct During the State Court Proceedings Deprived Tremane of His Due Process Rights and Rendered his State Court Proceedings Unfair

Claim Eight: Tremane Was Denied His Sixth, Eighth, and Fourteenth Amendment Rights to Counsel During His Post-Conviction Proceedings

Claim Nine: The State Court 3.11 Proceedings Violated Tremane's Due Process Rights

Claim Ten: Tremane's Due Process Rights Were Violated by the State Withholding Exculpatory Evidence

PART B: GROUNDS FOR RELIEF

19. Has a motion for discovery been filed with this application? Yes (X) No ()
20. Has a Motion for Evidentiary Hearing been filed with this application?
Yes (X) No ()
21. Have other motions been filed with this application or prior to the filing of this application? Yes () No (X)
22. List propositions raised

Proposition One: Newly discovered evidence establishes that the race of the victim combined with the race of Tremane Wood himself, greatly affected the likelihood that Wood would be sentenced to death in violation of Article II Sections 7, 9, 19 and 20 of the Oklahoma Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

PART C: FACTS

Preliminary Matters

References to the record will be made as follows:

1. The original trial record is referred to as (O.R.1 __ using the page number).
2. Transcripts of the jury trial will be referred to in this application as (Tr. __ at __ using the date of the transcript and the page number).

Procedural History

Tremane Wood, along with his older brother Zjaiton ("Jake") Wood, Jake's girlfriend Lanita Bateman, and Tremane's former girlfriend and mother of his child, Brandy Warden, were all charged with first-degree felony murder for the death of Ronnie Wipf that occurred around 3:30 a.m. on January 1, 2002. (O.R.1 79, 614-16.) Tremane

was also charged with one count of robbery with firearms and one count of conspiracy to commit felony (robbery). (*Id.*) A bill of particulars was filed alleging four aggravating circumstances: (1) that during the murder, the defendant knowingly created a great risk of death to more than one person; (2) that the murder was especially heinous, atrocious, or cruel; (3) that the murder was committed for purposes of preventing lawful arrest or prosecution; and (4) there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society. (*Id.* at 72.)

The jury found Tremane Wood guilty of all charges. (Tr. 4/2/04 at 214-15.) The jury found only three aggravating circumstances, rejecting the circumstance that the murder was committed for purposes of preventing lawful arrest or prosecution; the jury recommended life sentences on the non-capital counts and the death penalty on the capital count. (Tr. 4/5/04 at 163-64.) Wood was formally sentenced on May 7, 2004.

He appealed his conviction and sentences, which was denied. *Wood v. State*, No. D-2005-171 (Okla. Crim. Ct. App. Apr. 30, 2007).

Wood's first Application for Post Conviction Relief was filed on December 26, 2006. An amended application was filed on April 25, 2007. Relief was denied. *Wood v. State*, No. PCD-2005-143 (Okla. Crim. Ct. App. June 30, 2010).

Wood's Second Application for Post Conviction Relief was filed on July 6, 2011. An amended application was filed on April 25, 2007. Relief was denied. *Wood v. State*, Case No. PCD-2011-590 (Okla. Crim. App. Sept. 30, 2011).

Wood's Petition for Writ of Habeas Corpus (28 U.S.C. § 2254) was filed in the United States District Court for the Western District of Oklahoma on June 30, 2011. *Wood*

v. *Trammell*, No. 5:10-civ-0829-HE (W.D. Okla.). That petition was denied on October 30, 2015. Wood's appeal from that denial is currently pending in the United States Court of Appeals for the Tenth Circuit. *Wood v. Royal*, No. 16-6001 (10th Cir.).

Wood now pursues this Third Application for Post Conviction Relief.

The Record in this Proceeding

The record in this proceeding consists of the trial court and direct appeal record, the record in Wood's First and Second Applications for Post Conviction Relief and the Attachments submitted with this Application. An Appendix is filed contemporaneously with this Application containing:

1. Copy of Wood's Amended (first) Post Conviction Application, [Attachment 1].
2. Copy of Wood's Second Post Conviction Application, [Attachment 2].
3. Wood's documentation of In Forma Pauperis status, [Attachment 3].
4. Copy of Appendix IA: Race and Death Sentencing for Oklahoma Homicides, 1990-2012 (from the Okla. Death Penalty Review Comm'n, *The Report of the Okla. Death Penalty Review Comm'n* (Apr. 25, 2017), <http://okdeathpenaltyreview.org/the-report/>) [Attachment 4].

Factual Summary

On December 31, 2001, Ronnie Wipf and Arnold Kleinsasser, two young white men from Montana, were celebrating New Year's Eve at the Bricktown Brewery in Oklahoma City, Oklahoma. (Tr. 3/31/04 at 14-15, 102, 120-21, 264; Tr. 4/2/04 at 147.) While at the Bricktown Brewery the men met and socialized with Brandy Warden and Lanita Bateman. After the Bricktown Brewery closed, the women agreed to accompany

these men back to a motel, (*id.* at 120-24), which they did after talking to Tremane and Jake, (Tr. 4/1/04 at 146-47).

Once inside the room, the four agreed on \$210.00 in exchange for sex. (Tr. 3/31/04 at 125-27.) Lanita pretended to call her mother, but actually called Jake. (Tr. 3/31/04 at 129.)

Jake and Tremane came to the motel room, and Jake banged on the door. (Tr. 3/31/04 at 129; Tr. 4/1/04 at 165-66.) Lanita and Brandy ran out of the room, and Jake and Tremane ran in. (Tr. 4/1/04 at 168.)

Jake approached Arnold with the gun; Tremane approached Ronnie with the knife, and Ronnie put up a fight. (Tr. 3/31/04 at 133-35.) Jake left Arnold to go assist Tremane who had been struggling with Ronnie. (*Id.* at 135.) After Tremane demanded more money from Arnold, he returned to the struggle and Arnold fled the room. (*Id.* at 139.) Ronnie died from a single stab wound to the chest. (Tr. 04/02/04 at 11-12, 18.) Arnold was unable to identify who stabbed Ronnie. (Tr. 3/31/04 at 172.)

At trial, Jake testified during the first stage of trial that he and another man named “Alex” committed this crime. (Tr. 04/02/04 at 89, 91-95.) Jake testified he initially had the gun when he and Alex entered the motel room. (*Id.* at 94.) Jake explained that when he saw that the victim was getting the best of Alex, he went over and punched Ronnie in his head and body. (*Id.* at 94.) Jake grabbed the knife and stabbed Ronnie in the chest. (*Id.* at 94.) At the conclusion of the first stage, the jury found Tremane guilty on all counts. (*Id.* at 214-15.)

In the second stage, the State incorporated all the evidence from the first stage. In addition, evidence of a pizza place robbery committed by Tremane, Jake, Lanita, and Brandy, earlier on December 31, 2001, was also presented. (Tr. 04/05/04 at 17-18, 24-26.)

The defense called his mother Linda Wood, her friend Andre Taylor, and Dr. Ray Hand to testify to mitigating evidence. At the conclusion of the second stage, the jury recommended death on the murder charge and recommended the maximum sentence of life on the robbery and conspiracy counts. (*Id.* at 163-64.)

Facts Supporting Third Application for Post Conviction Relief

The relevant facts supporting Wood’s postconviction claims are adduced in the individual propositions raised and in the attachments to the Application referenced in those propositions.

PART D: PROPOSITIONS—ARGUMENTS & AUTHORITIES

Proposition One: Newly discovered evidence establishes that the race of the victim combined with the race of Tremane Wood himself, greatly affected the likelihood that Wood would be sentenced to death in violation of Article II Sections 7, 9, 19 and 20 of the Oklahoma Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

I. Introduction

On April 25, 2017, the Oklahoma Death Penalty Review Commission—a bipartisan group of eleven prominent Oklahomans from varied backgrounds—released a report entitled, “The Report of the Oklahoma Death Penalty Commission” (the Report). In the Report, Commissioners identified “volum[inous]” and “serious[.]” flaws in Oklahoma’s system of capital punishment—flaws that they concluded pose a significant

and unacceptable risk that innocent Oklahomans are presently facing execution. Okla. Death Penalty Review Comm'n, *The Report of the Okla. Death Penalty Review Comm'n*, vii-viii (Apr. 25, 2017), <http://okdeathpenaltyreview.org/the-report/>.

Appended to the Report is an independent and novel study entitled “Race and Death Sentencing for Oklahoma Homicides, 1990-2012,” (the Study).¹ (Attachment 4.) The Study demonstrates the way in which race plays a decisive role in who is sentenced to death in Oklahoma for homicides committed between 1990 and 2012. The comprehensive Study examines “the possibility that the race of the defendant and/or victim affects who ends up on death row.” (*Id.* at 212.)

Among the Study’s chief findings was the fact that “[h]omicides with white victims are the most likely to result in a death sentence.” (*Id.* at 217.) This new Study illustrates that, in Oklahoma, criminal defendants like Wood who are accused and convicted of killing white victims are nearly *two times* more likely to receive a sentence of death than if the victim is nonwhite. For homicides involving only male victims, a death sentence is approximately *three times* more likely in cases where the victim is white. *Id.* at 220.

That Wood faced a greater risk of execution because of the race of the victim offends the constitutions of the United States and the State of Oklahoma. U.S. Const. amends VI, VIII, XIV; Okla. Const. art. II, §§ 7, 9, 19, 20; *see also Furman v. Georgia*, 408 U.S. 238, 310, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Stewart, J., concurring)

¹ This study is attached hereto as Attachment 4. When citing the Attachment, the page numbers referenced are those printed on the bottom of the pages, which range from 211 to 222.

(stating that the “selection of [a] few to be sentenced to die” on the “basis of race” is “constitutionally impermissible”).

The invidious role that race played both in prosecutors’ decision to seek the death penalty against Wood in the first instance, and in his jury’s decision to impose that ultimate sanction, renders Wood’s sentence of death unconstitutional under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and under Article II, Sections 7, 9, 19 and 20 of the Oklahoma Constitution. This Court should therefore grant Wood relief from his unconstitutional sentence. Alternatively, as Wood has stated a more than colorable claim that his rights under the federal and state constitutions have been violated, this Court should grant Wood’s requests for discovery and an evidentiary hearing² to further factually develop and support this claim.

II. Wood satisfies the successor post-conviction requirements of Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) and Rule 9.7 of the Rules of the Oklahoma Court of Criminal Appeals.

Oklahoma’s Uniform Post-Conviction Procedure Act specifies that this Court “may not consider the merits of or grant relief” based on a subsequent application for post-conviction relief unless:

- b. (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date, and

² Wood is filing his Motion for Discovery and Motion for Evidentiary Hearing simultaneously herewith.

(2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.

Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b). Rule 9.7(G)(1) of the Rules of the Oklahoma Court of Criminal Appeals, meanwhile, allows this Court to entertain a subsequent application for post-conviction relief where it asserts claims “which have not been and could not have been previously presented in the original application because the factual or legal basis was unavailable.” Rule 9.7(G)(1), *Rules of the Okla. Court of Crim. App.*, Title 22, Ch. 18, App. Wood’s present application for post-conviction relief satisfies these requirements.

First, Wood’s claim—that the race of the victim who he was accused and convicted of killing operated to increase the likelihood that he would receive a sentence of death—was not previously raised either on direct appeal or in Wood’s initial post-conviction proceeding. Nor could it have been. As explained above, the factual basis for this claim became available only on April 25, 2017, with the preliminary publication of the Study, which provides new and compelling evidence that race indeed plays an invidious role in death-determinations throughout Oklahoma.³

The Study’s authors, Glenn L. Pierce, Michael L. Radelet, and Susan Sharp (alternatively, the researchers” or the authors), make the novelty of their undertaking clear. They explain that of the “race studies that had been published or released after 1990” that

³ The study that appears in the Report is only a draft. (Att. 4 at 211 n.1.) The final version will be published in the fall of 2017 in a Northwestern University law journal. (*Id.*)

examined the impact of a criminal defendant's and a crime victim's race on death penalty decisions, "none of these post-1990 studies focused on Oklahoma." (Att. 4 at 213-14.) Rather, the "only [] credible study" prior to this one that explored racial disparities in Oklahoma subsequent to the Supreme Court's decision in *Furman*, examined data from just a four-year time-period—August 1976 through December 1980—rendering them nearly forty years old. (*Id.* at 214.) Subsequent to this, "a second study of death sentencing in Oklahoma was published" in 2016. (*Id.*) The 2016 study "attempted to look at death sentencing in Oklahoma in a sample of 3,395 homicide cases over a 38-year time span, 1973-2010." (*Id.*) Pierce, Radelet and Sharp explain, however, that "some of the data presented by the authors in that paper [are] incorrect, so the paper is not useful."⁴ (*Id.*) Thus, the present Study is the first methodologically sound examination of the impact that race has upon death sentences in Oklahoma for homicides that occurred from 1990 through 2012.⁵

Moreover, even the raw data—the number of homicide cases, the race and gender of victims and defendants in those cases, and whether those cases resulted in death sentences in Oklahoma—that the authors utilized were not previously available or known.

⁴ "For example, in Appendix B we are told that 8 percent of the white-white homicides contained 'capital' or 'first-degree' (as opposed to 'second-degree' murder charges) (137/1,696), compared to 53 percent of the black-black cases (348/659). We are also told that the data set includes 1,030 cases 'charged capital' in which whites were accused of killing Native Americans, although the authors also report that there were only 42 white-Native American cases in their sample. In an email to Radelet dated August 18, 2016, lead author David Keys acknowledged that they undoubtedly received bad data from the State of Oklahoma." (Att. 4 at 214 (footnotes omitted).)

⁵ For a full discussion of the methodology employed by Pierce, Radelet, and Sharp in the present study, see pages 215-17 of Attachment 4.

They note that “there is no state agency, organization or individual who maintains a data set on all Oklahoma death penalty cases. We thus had to start from scratch in constructing what we call the ‘Death Row Data Set.’” (Att. 4 at 216.) The authors go on to detail the arduous and time-consuming task that they undertook in order to marshal the necessary data. (*Id.*) As a result, the factual basis for Wood’s present claim was unavailable and undiscoverable through the exercise of due diligence prior to April 25, 2017.

Second, as explained in detail in Section III below, the facts underlying Wood’s present claim are sufficient to establish that but for the unconstitutional consideration of race, he stood a far greater chance of having his life spared. *See* Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b)(2). Put differently, the Pierce, Radelet, and Sharp Study establishes by clear and convincing evidence that, but for the victim’s race, Wood would not have been sentenced to death.

Wood has therefore met all the requirements to have this Court consider his successor post-conviction application and grant relief.

III. Newly discovered evidence establishes that Wood faced a greater risk of execution by the mere fact that the victim who he was accused and convicted of killing was white.

The central question that researchers Pierce, Radelet, and Sharp set out to answer is whether race—either of homicide defendants and/or victims—“affects who ends up on death row” in Oklahoma. (Att. 4 at 212.) In order to answer this question, they studied all

homicides that occurred in Oklahoma from January 1, 1990 through December 31, 2012.⁶ (*Id.*) They then compared these cases to the subset of cases that resulted in the death penalty being imposed.⁷ (*Id.*) Importantly, the data set used by researchers included, in addition to the race and gender of the victim, information on “the number of homicide victims in each case” as well as “what additional felonies, if any, occurred at the same time as the homicide.” (*Id.* at 216.) Pierce, Radelet, and Sharp explain that “[t]hese variables are key” to the Study’s analysis and conclusions. (*Id.*)

Researchers found that, overall, 3.06 percent of homicides with known suspects, which occurred in Oklahoma between 1990 and 2012, resulted in the imposition of a death sentence. (*Id.* at 217.) Most troublingly, they also found that “[h]omicides with white victims *are the most likely* to result in a death sentence” in Oklahoma. (*Id.*) To be more specific: researchers found that 3.92 percent of homicides with white victims resulted in death sentences compared to just 1.88 percent of homicides that involved nonwhite victims. (*Id.*) In other words, a criminal defendant in Oklahoma is over *two times* more likely to receive a sentence of death if the victim he is accused of killing is white than if the victim is nonwhite.⁸

⁶ The authors explain that “[u]sing 23 years of homicide data allowed us to use a sample with enough cases in it to detect patterns.” (Att. 4 at 215.) Throughout this 23-year period, Oklahoma recorded “some 5,090 homicides, for an annual average of 221.” (*Id.*)

⁷ Out of the final sample size of 4,668 cases, researchers identified 153 death sentences imposed on 151 defendants for homicides committed between 1990 and 2012. (Att. 4 at 216.)

⁸ “The probability of a death sentence is [] 2.05 times higher for those who are suspected of killing whites than for those suspected of killing nonwhites.” (Att. 4 at 218.)

In addition to this, researchers found that of those homicides with exclusively male victims, 2.26 percent of cases with white male victims resulted in death sentences compared to just 0.77 percent of cases with black male victims. (*Id.* at 219-20.) That is, a defendant, like Wood, accused of killing a white male victim in Oklahoma is nearly *three times* more likely to receive a death sentence than if his victim were a black male. (*Id.*)

When looking at the combined effect of both a homicide suspect's and victim's races and ethnicities, researchers also discovered the following. The percentages of nonwhite defendant/nonwhite victim and white defendant/nonwhite victim cases ending with death sentences were 1.9 and 1.8 percent, respectively. In sharp contrast, 3.3 percent of the white-on-white homicides resulted in a death sentence compared to 5.8 percent of the nonwhites suspected of killing white victims. (*Id.* at 219.) In other words, nonwhites, like Wood,⁹ are nearly *three times* more likely to receive a sentence of death where the victim is white than if the victim is nonwhite. Moreover, in comparing cases with white victims, nonwhite defendants like Wood are nearly *twice* as likely to receive the death penalty as are white defendants. Wood's own race, when considered in conjunction with the victim's, is a significant factor in why he received the death penalty.

Even where researchers controlled for aggravating factors such as "the presence of additional felony circumstances and the presence of multiple victims," they found that cases like Wood's, which involve a white male victim, "are significantly more likely to end with a death sentence in Oklahoma than are cases with nonwhite male victims." (*Id.* at

⁹ Tremaine Wood and his brother were referred to at trial as black men with mixed-race heritage; his mother is white and his father was black. (Tr. 4/1/04 at 115; Tr. 4/5/04 at 90.)

221-22.) The researchers concluded that, when other variables were controlled, “[t]he odds of a death sentence for those with white male victims are 3.22 times higher than the odds of a death sentence a minority male victims.” (*Id.* at 221.) They found that increase in odds was nearly the same as the 3.44 times increased likelihood in a death sentence that occurred in cases that involved the existence of a circumstance *legally permissible* for the jury to consider: either multiple homicide victims or an additional felony circumstance. (*Id.*)

If the imposition of a death sentence is indeed supposed to reflect a “community’s outrage” at the crime that a defendant stands accused of committing, *Furman*, 408 U.S. at 303 (Brennan, J., concurring), this Study demonstrates that communities in Oklahoma—a majority-white state¹⁰—are significantly more outraged when white lives are lost than when nonwhite lives are forfeited. This is precisely the kind of race-based discrepancy in meting out death that is repugnant to the Constitutions of the United States and the State of Oklahoma. U.S. Const. amends. VI, VIII, XIV; Okla. Const. art. II, § 7, 9, 19, 20; *see also McCleskey v. Kemp*, 481 U.S. 279, 366, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987) (Stevens, J., dissenting) (noting that racial disparity in capital sentencing is “constitutionally intolerable”). In light of this, Wood’s death sentence cannot stand.

IV. Additional Relevant Facts

The race of the victims and the interracial nature of the crime was never far from the surface in Wood’s case. The prosecutors and the Court repeatedly emphasized that the

¹⁰ “Oklahoma is home to some 3.75 million citizens, of whom 75 percent are white, with the black, Native American, and Hispanic population each constituting about eight percent of the population.” (Att. 4 at 212.)

man killed, Ronnie Wipf, and his friend and lead witness, Arnold Kleinsasser, (who were both white) were two young men from rural Montana. (*See, e.g.*, Tr. 3/29/04 at 38; Tr. 3/31/04 at 102, 105.) The Court during voir dire repeatedly told prospective jurors that Wipf and Kleinsasser were “young men from Montana,” (*see, e.g.*, Tr. 3/29/04 at 38; Tr. 3/30/04 at 7, 90; Tr. 3/31/04 at 20, 54, 61), even referring to them more than once as “the Montana boys,” (Tr. 3/29/04 at 152; Tr. 3/30/04 at 26).

The prosecutor (a white man) also raised the specter of race when at least twice during the proceedings when a witness presented with an accent different than his, he told the jurors that he spoke only “red neck.” (Tr. 3/31/2004 at 120; Tr. 4/2/04 at 152 (“I don’t understand anything but red neck.”).) In contrast, the State asserted in closing arguments a witness staying at the motel must have overheard Wood and his brother at the motel because that witness heard “black voices.” (Tr. 4/2/04 at 151, 164.)

In describing Wipf and Kleinsasser the prosecutors often highlighted their rural Montana background and their background as Hutterites. (*See, e.g.*, Tr. 3/31/04 at 102, 105; Tr. 4/2/04 at 147.) At one point the prosecutor said that Kleinsasser was just “a rural kid from Montana Don’t judge him too harshly.” (Tr. 4/2/04 at 148.)

In addition, Judge Ray Elliott, who presided over Wood’s trial (OR1 756-57), displayed troubling attitudes towards people of color, which came to light in 2011. According to the affidavit of Michael S. Johnson, Judge Elliott was overheard referring to Mexicans as “nothing but filthy animals” who “deserve to all be taken south of the border with a shotgun to their heads” and “if they needed volunteers [to do so] that he would be the first in line.” Nolan Clay, *Attorney’s affidavit expands on claims of unfairness against*

judge in Ersland case, NewsOK (Jan. 7, 2011), <http://newsok.com/article/3530111>; *see also* Nolan Clay, *Judge in OKC pharmacist's case to announce ruling Monday*, NewsOK (Dec. 8, 2010), <http://newsok.com/article/3521788> (noting that Judge Elliott's former clerk, Isla Box, testified that "the judge also said ... [i]f they needed somebody to hold a shotgun to their heads to get them back across the border, he'd be the first to volunteer," and that Judge Elliott "has made other derogatory statements about Hispanics"). Judge Elliott admitted that he used the racial epithet "wetbacks" to refer to Mexicans. *Id.*; *see also* American Bar Association Journal, *Okla. Judge Admits 'Wetback' Comment, But Denies Calling Workers 'Filthy Animals'* (Jan. 7, 2011).

While Judge Elliot made these remarks in 2011, a number of years after Wood was sentenced to death, they are nonetheless troubling. Indeed, Judge Elliott's comments raise concerns both as to his attitude towards people of color at the time that he presided over Wood's case, and his impartiality as a judge in cases, like Wood's, in which racial issues are implicated.

Significantly, when the jury was polled after announcing the death sentence for the count of murder and asked if those were the verdicts, the jury foreperson, a black woman, said, "Yeah, besides the one. I didn't - - but everybody else did and so I - -" (Tr. 4/5/04 at 165.) When asked to repeat herself, she said: "I signed the one for death because everybody was waiting on me. I didn't want everyone to be here." (*Id.*) Judge Elliot, then said, "My question is are those your verdicts? . . . Because if they are not, I will send you back up. And you will keep going. Are those your verdicts?" (*Id.*) In response to the court, the jury foreperson said yes. (*Id.*)

All these circumstances demonstrate how racial dynamics loomed over this interracial case and infected the proceedings.

V. Law & Argument

A. Wood was sentenced to death in violation of the Eighth and Fourteenth Amendments to the United States Constitution, and Article II Sections 7 and 9 of the Oklahoma Constitution.

The United States Supreme Court has long recognized that race is among the factors that are “constitutionally impermissible” if not “totally irrelevant to the sentencing process.” *Zant v. Stephens*, 462 U.S. 862, 885, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983); *see also Rose v. Mitchell*, 443 U.S. 545, 555, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979) (“Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of criminal justice.”). Indeed, the Supreme Court recently reaffirmed a “basic premise of our criminal justice system,” which is that “[o]ur law punishes people for what they do, not who they are.” *Buck v. Davis*, 137 S. Ct. 759, 778, 197 L. Ed. 2d 1 (2017). For “[d]ispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle.” *Id.*; *see also Davis v. Ayala*, 135 S. Ct. 2187, 2208, 192 L. Ed. 2d 323 (2015) (explaining that racial discrimination “poisons public confidence in the evenhanded administration of justice”). This Court has likewise recognized that race is an “impermissible classification” that ought not to motivate sentencing determinations. *See Cuesta-Rodriguez v. State*, 241 P.3d 214, 235, 2010 OK CR 23 (Okla. Crim. App. 2010); *see also Williams v. State*, 542 P.2d 554, 585, 1975 OK CR 171 (Okla. Crim. App. 1975) (“When the law lays an unequal hand on those who have committed intrinsically the same quality of offense ... it has made as invidious a discrimination as if it had selected a

particular race or nationality for oppressive treatment” (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942) (internal quotation marks omitted)).

In *McCleskey v. Kemp*, the Supreme Court entertained an Eighth and Fourteenth Amendment challenge to a sentence of death that was brought by Warren McCleskey—a black prisoner on death row in Georgia at the time. 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987). The central question before the Court was “whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that petitioner McCleskey’s capital sentence is unconstitutional under the Eighth or Fourteenth Amendment.” *Id.* at 282-83.

In support of his constitutional challenges, Mr. McCleskey put before the Court a statistical study (the Baldus study) that demonstrated a stark disparity in the imposition of death sentences in Georgia “based on the race of the murder victim and, to a lesser extent, the race of the defendant.” *Id.* at 286. The Baldus study indicated that “defendants charged with killing white persons received the death penalty in 11% of the cases,” however “defendants charged with killing blacks received the death penalty in only 1% of the cases.” *Id.* Taking into account the races of both the defendant and victim, the study also demonstrated that “the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims.” *Id.* The Baldus study also determined that “prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white

victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims.” *Id.* at 287. In sum, “the Baldus study indicate[d] that black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty.” *Id.*

Based on this statistical data, Mr. McCleskey challenged the constitutionality of Georgia’s capital-sentencing statute generally as violating the Fourteenth Amendment’s Equal Protection Clause. *Id.* at 291. First, he contended that the evidence demonstrated that “persons who murder whites are more likely to be sentenced to death than persons who murder blacks, and black murderers are more likely to be sentenced to death than white murderers.” *Id.* Second, Mr. McCleskey argued that he, himself, was discriminated against as a black defendant accused of killing someone white. *Id.* at 292.

The Supreme Court articulated the standard that would guide its analysis of McCleskey’s Fourteenth Amendment claim as follows: “a defendant who alleges an equal protection violation has the burden of proving ‘the existence of purposeful discrimination.’” *Id.* (quoting *Whitus v. Georgia*, 385 U.S. 545, 550, 87 S. Ct. 643, 646, 17 L. Ed. 2d 599 (1967)). “Thus, to prevail under the Equal Protection Clause,” the Court explained, “McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose.” *Id.* (emphasis in original). The Court rejected McCleskey’s argument that the Baldus study, standing alone, “compel[ed] an inference that his sentence rest[ed] on purposeful discrimination.” *Id.* at 293.

The Court also rejected McCleskey’s argument that “the Baldus study demonstrates that the Georgia capital sentencing system violates the Eighth Amendment.” *Id.* at 299. In

the Court’s view, the statistics that McCleskey put forward “[a]t most ... indicate[] a discrepancy that appears to correlate with race.” *Id.* at 312. And rather than creating a constitutionally significant risk of racial bias influencing Georgia’s capital-sentencing scheme, this race-based discrepancy in sentencing is “an inevitable part of our criminal justice system,” the Court pronounced. *Id.* at 312.

In the thirty years since *McCleskey* was decided, it has become clear that racial disparities are not simply “an inevitable part” of the United States’ criminal justice system. Rather, these disparities persist so long as we as a society are willing to condone them. Jurisdictions around the country have rejected the “inevitability of racism” line of thinking stemming from *McCleskey* and, over the past three decades, have taken steps to confront and root-out the influence of race on criminal justice system outcomes.

Take, for example, Multnomah County, Oregon and Minnesota’s Fourth Judicial District. Both of these jurisdictions have reduced racial disparities in their criminal justice system by documenting and tracking racial biases that are inherent in the risk assessment instruments that are used for criminal justice decision-making. According to a 2015 Sentencing Project report entitled, “Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System,” Multnomah County developed and implemented new risk assessment technology that led to a “greater than 50% reduction in the number of youth detained and a near complete elimination of racial disparity in the proportion of delinquency referrals resulting in detention.”¹¹ The Sentencing Project, *Eliminating Racial*

¹¹ In order to weed out inherent racial biases in risk assessment instruments (“RAIs”), officials in Multnomah County “examined each element of their RAI through the lens of

Inequity in the Criminal Justice System 20 (2014), <http://www.sentencingproject.org/publications/black-lives-matter-eliminating-racial-inequity-in-the-criminal-justice-system/>. A similar review of risk assessment instruments was undertaken in Minnesota’s Fourth Judicial District. “Three of the nine indicators in the instrument were found to be correlated with race, but were not significant predictors of pretrial offending or failure to appear in court.” As a result, “these factors were removed from the instrument.” *Id.*

Meanwhile, in the Seattle suburb of Kent, Washington, the police department launched in 2015 an anti-bias training program for police officers called, “Fair and Impartial Policing.” Martin Caste, *Police Officers Debate Effectiveness of Anti-Bias Training*, NPR, Apr. 6, 2015, <http://www.npr.org/2015/04/06/397891177/police-officers-debate-effectiveness-of-anti-bias-training>. The program is geared towards “teach[ing] police officers to recognize their own implicit biases” in an effort to reduce the impact of race alone in law enforcement decisionmaking. *Id.*

The efforts underway in Oregon, Minnesota, and Washington are just a few examples of the admirable steps that numerous jurisdictions across the country are taking to finally confront and eradicate the invidious influence of race on criminal justice system outcomes. It is time for the judiciary follow suit by recognizing that the constitutions of the United States and the State of Oklahoma cannot tolerate, or treat as “inevitable,” racial

race and eliminated known sources of bias, such as references to ‘gang affiliation’ since youth of color were disproportionately characterized as gang affiliates often simply due to where they lived.” The Sentencing Project, *Eliminating Racial Inequity in the Criminal Justice System* at 20.

disparities—or *any* risk of racial bias—in the imposition of “the most awesome act that a State can perform”—that is, the deliberate taking of another life. *McCleskey*, 481 U.S. at 342 (Brennan, J., dissenting). *McCleskey* must therefore be overruled. Indeed, even Justice Powell, who provided the decisive vote against Mr. McCleskey and authored the majority opinion, has since recognized that his vote, and the reasoning that informed it, was wrong. John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.: A Biography* 451 (1994).

But even if *McCleskey* is not overruled, it still does not preclude the relief that Wood now seeks for several reasons. First, several states have, in the years since *McCleskey*, invalidated death sentences under state law based upon statistical evidence of racial discrimination in their systems of capital punishment. In 2012, for example, a North Carolina court commuted the death sentence of Marcus Robinson to life without parole based on statistical evidence of racial bias in jury selection in North Carolina over a twenty-year period. Cassy Stubbs, *A Case for Statistics and a Victory for Justice*, *HuffPost*, Apr. 20, 2012, http://www.huffingtonpost.com/cassy-stubbs/a-case-for-statistics-and_b_1440529.html?ref=politics#comments. Meanwhile, judges in Kentucky may determine whether race has influenced a decision to seek the death penalty. Ky. Rev. Stat. tit. L, Ky. Penal Code § 532.300. And at least one state court has explicitly rejected *McCleskey*’s notion that “[a]pparent disparities in sentencing are an inevitable part of our criminal justice system,” *McCleskey*, 481 U.S. at 312, instead holding that “our history and traditions would *never* countenance racial disparity in capital sentencing.” *State v. Marshall*, 130 N.J. 109, 207, 613 A.2d 1059 (N.J. 1992), *cert. denied*, 507 U.S. 929, 113

S. Ct. 1306, 122 L. Ed. 2d 694 (1993) (emphasis added). The New Jersey Supreme Court made the following observation:

New Jersey would not tolerate a system that condones disparate treatment for black and white defendants or a system that would debase the value of a black victim's life. Whether in the exercise of statutory proportionality review or our constitutional duty to assure the equal protection and due process of law, we cannot escape the responsibility to review any effects of race in capital sentencing.

Marshall, 130 N.J. 109 at 214.

Like the Supreme Court of New Jersey, this Court retains the power to set aside Wood's sentence of death under the Oklahoma Constitution based upon the new evidence that Wood has put forward which demonstrates that he was predisposed to receive a sentence of death merely because the victim who he was accused of killing was white. This is true notwithstanding the Supreme Court's decision in *McCleskey*, which rejected statistical evidence of racial disparities in death sentencing alone as sufficient to establish a violation of the Eighth and Fourteenth Amendments to the United States Constitution. *McCleskey*, however, said nothing about states' authority to consider, and to treat as dispositive, such evidence when evaluating race-based challenges to death determinations raised pursuant to their state constitutional guarantees.

McCleskey is no obstacle to the sentencing relief that Wood now seeks for an additional reason. Unlike the petitioner in *McCleskey* who relied on statistical evidence of racial disparities in Georgia's capital-sentencing system *alone* to establish a violation of his rights under the Eighth and Fourteenth Amendments, Wood is relying not just upon the new statistical Study demonstrating how race dictates capital sentencing outcomes in

Oklahoma. Rather, in addition to this new statistical evidence, Wood is also relying upon the ways in which “the decisionmakers in *his* case”—from prosecutors, judges, and police officers, to the jurors who ultimately sentenced him to die—“acted with discriminatory purpose.” *McCleskey*, 481 U.S. at 293. Indeed, Wood has set out above how race both infected and “cast[] a large shadow,” *Id.* at 321-22 (Brennan, J., dissenting), over his case.

The Supreme Court’s decisions since *Furman* have delimited “a constitutionally permissible range of discretion in imposing the death penalty,” *McCleskey*, 481 U.S. at 305, that is consistent with the Eighth Amendment guarantee against cruel and unusual punishment. First, the Court has required states to establish rational criteria that narrow the class of individuals eligible for the death penalty. *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S. Ct. 2909, 2932, 49 L. Ed. 2d 859 (1976) (“*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited to as to minimize the risk of wholly arbitrary and capricious action. It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner.”). Second, the Court has prohibited states from limiting a sentencer’s ability to consider “relevant facets of the character and record of the individual offender or the circumstances of the particular offense” that might warrant a sentence less than death. *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S. Ct. 2978, 2991, 49 L. Ed. 2d 944 (1976); *see also Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986). While, in all of these

cases, the Supreme Court has upheld the propriety of a capital sentencer's discretion to impose a sentence of death under the appropriate circumstances, it has unequivocally condemned race playing any role in a sentencer's exercise of this discretion. *Zant v. Stephens*, 462 U.S. 862, 885, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983) (noting that race is among those factors that are "constitutionally impermissible or totally irrelevant to the sentencing process"); *Buck v. Davis*, 137 S. Ct. 759, 778, 197 L. Ed. 2d 1 (2017) (explaining that "a basic premise of our criminal justice system" is that "[o]ur law punishes people for what they do, not who they are," and that "departure[s] from [this] basic principle" are "exacerbated" where "it concern[s] race"); *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S. Ct. 1993, 61 L. Ed. 2d 739 (1979) ("Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice."). Where race does play such a role, capital-sentencing determinations are rendered "arbitrary and capricious" in violation of the Eighth Amendment. *See McCleskey*, 481 U.S. at 306-07; *id.* at 323 (Brennan, J., dissenting) ("[A] system that features a significant probability that sentencing decisions are influence by impermissible considerations cannot be regarded as rational."); *see also Graham v. Collins*, 506 U.S. 461, 500, 113 S. Ct. 892, 122 L. Ed. 2d 260 (1993) (Stevens, J., dissenting) ("Neither the race of the defendant nor the race of the victim should play a part in any decision to impose a death sentence.").

As set forth above, the risk that racial considerations impacted Wood's ultimate sentence of death is "constitutionally unacceptable." *Turner*, 476 U.S. at 36 n.8; *see also McCleskey*, 481 U.S. at 323 (Brennan, J., dissenting) (explaining that since *Furman*, "the Court has been concerned with the *risk* of the imposition of an arbitrary sentence, rather

than the proven fact of one”); *Caldwell v. Mississippi*, 472 U.S. 320, 343, 105 S. Ct. 2633, 2647, 86 L. Ed. 2d 231 (1985) (observing that a sentence of death cannot withstand constitutional muster whenever the circumstances under which it has been rendered “creat[e] an unacceptable risk that ‘the death penalty [may have been] meted out arbitrarily or capriciously’ or through ‘whim or mistake’” (quoting *California v. Ramos*, 463 U.S. 992, 999, 103 S. Ct. 3446, 3452, 77 L. Ed. 2d 1171 (1983))). While Wood contends that he is entitled to sentencing relief on the record before this Court, if this Court disagrees and determines that further factual development is necessary, Wood submits that he is entitled to discovery and an evidentiary hearing. This is because he has set forth herein more than colorable allegations that his sentence of death violates his state and federal rights.

B. Wood was sentenced to death in violation of the Sixth and Fourteenth Amendments to the United States Constitution, and Article II, Sections 7, 19, and 20 of the Oklahoma Constitution.

The right to an impartial jury is a fundamental guarantee of both the Oklahoma Constitution and the United States Constitution. Okla. Const. art. II, § 20 (“In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury”); U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .”); *see also Irvin*, 366 U.S. at 722, 81 S. Ct. at 1642 (holding that the Fourteenth Amendment to the United States Constitution also guarantees a fair, impartial jury as “a basic requirement of due process” (internal quotation marks omitted)).

“‘Impartial,’ as applied to a jury, means not favoring a party or an individual because of the emotions of the human mind, heart, or affections.” *Tegeler v. State*, 1913 OK CR 87, 9 Okla. Crim. 138, 130 P. 1164, 1168 (Okla. Crim. App. 1913). Put another way, “an impartial jury means a jury not biased in favor of one party more than another; indifferent; unprejudiced; disinterested.” *Stevens v. State*, 94 Okla. Crim. 216, 224, 232 P.2d 949, 958 (Okla. Crim. App. 1951) (internal quotation marks omitted); *see also Irvin*, 366 U.S. at 722, 81 S. Ct. at 1642 (“In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors.”).

The United States Supreme Court has emphasized that, when it comes to jurors, racial bias must be especially guarded against. “Racial bias[is] a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice.” *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868, 197 L. Ed. 2d 107 (2017) (internal quotation marks omitted). “Permitting racial prejudice in the jury system damages both the fact and the perception of the jury’s role as a vital check against the wrongful exercise of power by the State.” *Id.* This Court has similarly recognized that “concerns regarding the risk of racial prejudice infecting a capital sentencing proceeding” are especially and uniquely important in ensuring the right to an impartial jury. *Frederick v. State*, No. D-2015-15, 2017 OK CR 12, ¶ 27, ___ P.3d ___ (Okla. Crim. App. May 25, 2017).

In *Turner v. Murray*, 476 U.S. 28, 106 S. Ct. 1683, 90 L. Ed. 2d 27 (1986), the United States Supreme Court vacated a defendant’s death sentence because the trial court prevented that defendant from asking prospective jurors in voir dire whether the fact that the defendant was black and the victim was white would affect their ability to be

impartial. The Court held “that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias.” *Turner*, 476 U.S. at 36-37, 106 S. Ct. at 1688.

In reaching that conclusion, four justices further recognized that, “[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected.” *Id.* at 35, 106 S. Ct. at 1687 (plurality opinion of White, J., joined by Blackmun, Stevens, and O’Connor, JJ.). Moreover, “[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence.” *Id.* Justice Brennan similarly concluded that “[t]he reality of race relations in this country is such that we simply may not presume impartiality, and the risk of bias runs especially high when members of a community serving on a jury are to be confronted with disturbing evidence of criminal conduct that is often terrifying and abhorrent.” *Id.* at 39, 106 S. Ct. at 1690 (Brennan, J., concurring in part and dissenting in part) (explaining that he would go further than the majority and vacate the conviction as well).

The Court in *Turner* hoped that questioning the jurors during voir dire about racial bias would serve to eliminate it from juries. But unfortunately, the Study by Pierce, Radelet, and Sharp demonstrates that there is significant racial bias in Oklahoma capital juries in cases involving nonwhite defendants and white victims that voir dire has failed to eradicate. “Asking prospective jurors about their racial attitudes was supposed to provide the tools necessary to rid juries of people whose decisions are likely to be influenced by race of the defendant or victim. But the tools are not working. . . . [W]hatever attempts

may have been made thanks to *Turner*, the risk of racial bias remains all too manifest.”

William J. Bowers et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant Is Black and the Victim Is White*, 53 DePaul L. Rev. 1497, 1532-33 (2004) [hereinafter *Crossing Racial Boundaries*].

Voir dire in a capital case may be inherently flawed because of the death-qualification process in which jurors are questioned about their willingness to sentence a convicted defendant to death. A recent study demonstrated that the “death qualification process results in jurors who are more racially biased, both implicitly and explicitly.” Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. Rev. 513, 568 (2014) [hereinafter *Devaluing Death*].

In addition, despite the hope of *Turner*, because of the stigma of admitting racial prejudice, attempts to question jurors on *explicit* racial biases, not only do not work, they likely strengthen the biases. *Peña-Rodriguez*, 137 S. Ct. at 869; *see also Crossing Racial Boundaries*, 53 DePaul L. Rev. at 1533 (“People are generally reluctant to admit that they hold racist attitudes or opinions or even to acknowledge this to themselves. Researchers find that racially prejudiced people will consciously attempt to avoid appearing to be racially biased.”).

Thus, death qualification in itself “actually exacerbate[s]” *implicit* racial biases “by the exclusion of less biased Americans through the death qualification process.” *Devaluing Death*, 89 N.Y.U. L. Rev. at 564. Significantly, “jurors who were death-qualified displayed higher levels of bias related to implicit racial worth,” i.e., they valued

the lives of white people more than that of black people. *Id.* at 559. In short, the capital-jury selection process does more to ensure biased jurors than guard against them.

Other aspects of jury selection that attempt to minimize explicit racial bias may also exacerbate implicit bias, such as the *Batson*-challenge process. U.S. District Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 150 (2010) (“[P]resent methods of addressing bias in the legal system—particularly in jury selection—which are directed primarily at explicit bias, may only worsen implicit bias.”).

But regardless of the reason, the demonstrated increased likelihood of being sentenced to death on the basis of victim’s race, raises the question posed by the plurality in *Turner*: “it is plain that there is some risk of racial prejudice influencing a jury whenever there is a crime involving interracial violence, the only question is at what point that risk becomes constitutionally unacceptable.” 476 U.S. at 36 n.8, 106 S. Ct. at 1688 n.8 (plurality opinion) (Justice Marshall’s opinion, joined by Justice Brennan, concurring in part and dissenting in part, agreed that with the plurality’s assessment of the “plain risk” of racial prejudice in any interracial crime involving violence).

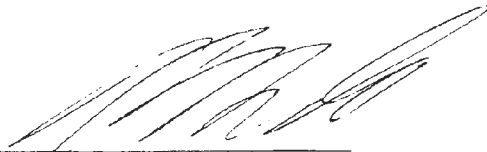
Here, “rather large disparities in the odds of the death sentence” in Oklahoma for those convicted of killing a white person as opposed to a victim of any other race, surpasses that tipping point. (Att. 4 at 222.) Where any jury judging Tremane Wood is two times more likely to sentence him to death just because of the race of the victim, he has not been sentenced by an impartial jury. Moreover, when the gender of the white victim is

male or the race of the defendant accused of killing the white victim is nonwhite, an Oklahoma jury is approximately three times more likely to be sentence a defendant to death—having nearly the same effect as legitimate aggravating factors. Oklahoma juries are therefore not impartial in issuing the death penalty.

A defendant “is . . . entitled to be tried before a jury whose minds are open on every issue and not embedded with any pre-conceived opinions.” *West v. State*, 1968 OK CR 112, 443 P.2d 131, 133 (Okla. Crim. App. 1968), *overruled on other grounds by McKay v. City of Tulsa*, 1988 OK CR 238, 763 P.2d 703 (Okla. Crim. App. 1988). Wood has not been afforded that right. The process of selecting capital jurors has failed to provide him with jurors able to cast aside their implicit or explicit racial biases. Accordingly, his sentence violates his right to an impartial jury under the Oklahoma and United States Constitutions.

CONCLUSION

Mr. Wood's sentence of death was obtained in violation of his state and federal constitutional rights. He asks that this Court exercise its power to correct this fundamental injustice and grant sentencing relief. Alternatively, Mr. Wood asks this Court grant his request for discovery and an evidentiary hearing in order to allow for the further factual development of his claims.



MARK BARRETT, OBA # 557
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Norman, Oklahoma 73070
405-364-8367
barrettlawoffice@gmail.com
ATTORNEY FOR PETITIONER

VERIFICATION OF COUNSEL

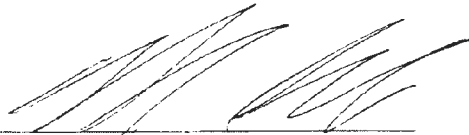
I, Mark Barrett, state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.



MARK BARRETT June 18, 2017

CERTIFICATE OF SERVICE

I certify that a copy of this document was served on the Attorney General of Oklahoma by depositing a copy with the Clerk of the Court of Criminal Appeals on the date that it was filed.



MARK BARRETT

ATTACHMENT 4

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TREMANE WOOD,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

Case No. _____

Oklahoma County
Case CF-2002-46

AFFIDAVIT IN FORMA PAUPERIS

I, TREMANE WOOD, state that I am a poor person without funds or property or relatives willing to assist me in paying for filing the within instrument. I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

Signed this 20th day of June, 2017 at MALESTON, PITTSBURGE, OKLA
(City, County, State)



Tremane Wood
Signature

TREMANE WOOD
Printed name

Signed and subscribed to before me this 20th day of June, 2017.

Kim A. Marks
Notary # 04006555
Exp. 07-20-2020

AFFIDAVIT IN FORMA PAUPERIS

I, TREMANE Wood, state that I am a poor person without funds or property or relatives willing to assist me in paying for filing the within instrument. I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

Signed this 20th day of June, 2017 at MALESTER, OK, PITTSBURG
(City, County, State)



Tremane Wood
Signature

TREMANE Wood
Printed name

Signed and subscribed to before me this 20th day of June, 2017.

Kim A. Marks
Notary # 04006555
Exp. 07-20-2020



IN THE DISTRICT COURT, SEVENTH JUDICIAL DISTRICT
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,
PLAINTIFF,

vs.

Termane Wood

DEFENDANT,

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

JUL 20 2004

PATRICIA PRESLEY, COURT CLERK

by

Deputy

CF-02-46

ORDER APPOINTING CONFLICT DEFENDER

NOW on this 2nd day of October, 2002, the Court, being fully advised
in the premises, finds that a conflict exists between this defendant and the Public
Defender and that a contracted Conflict Defender should be appointed for this defendant.

IT IS THEREFORE ORDERED by the Court that John Albert

is appointed as the attorney for the defendant Termane Wood.

Ray C. Elliott
Ray C. Elliott
District Judge

CERTIFIED COPY
AS FILED OF RECORD
IN DISTRICT COURT

JUN 22 2017

RICK WARREN, COURT CLERK
Oklahoma County

Rick Warren



IN THE DISTRICT COURT, SEVENTH JUDICIAL DISTRICT
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

JUL 28 2004

PATRICIA PRESLEY, COURT CLERK
by [Signature] Deputy

THE STATE OF OKLAHOMA,)

PLAINTIFF,)

vs.)

Termare Wood)

DEFENDANT,)

CF- 08-46

ORDER APPOINTING CONFLICT DEFENDER

NOW on this 24th day of October, 2002, the Court, being fully advised
in the premises, finds that a conflict exists between this defendant and the Public
Defender and that a contracted Conflict Defender should be appointed for this defendant.

IT IS THEREFORE ORDERED by the Court that Lance Phillips
_____ is appointed as the attorney for the defendant Termare Wood.

[Signature]
Ray C. Elliott
District Judge

CERTIFIED COPY
AS FILED OF RECORD
IN DISTRICT COURT

JUN 22 2017

RICK WARREN, COURT CLERK
Oklahoma County

[Signature]

1000860522

IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

SEP 03 2004

PATRICIA PRESLEY, COURT CLERK
Deputy

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA

Plaintiff,

vs.

TERMANE WOOD,

Defendant.

Case No. CF-2002-46

ORDER

NOW on this 2nd day of Sept, 2004, this matter comes on for consideration of the issue of payment of attorney fees for appointed counsel. The Court, being advised of the premises, finds that attorney of record, John B. Albert, was appointed on the 2nd day of October, 2002, and represented the above named Defendant by Order of the Court.

The Court is further advised that this was a Capital Murder in the First Degree case. Pursuant to contract with the Oklahoma County Public Defender's Office it is hereby ordered that the amount of TEN THOUSAND DOLLARS (\$10,000.00) be paid to John B. Albert for his services in the above styled case.

Anna D. Gurul
PRESIDING ADMINISTRATIVE JUDGE

APPROVED:

Robert A. Ravitz
ROBERT A. RAVITZ
PUBLIC DEFENDER OF OKLAHOMA COUNTY

John B. Albert
JOHN B. ALBERT
Attorney for Defendant, Marcus Cargie

CERTIFIED COPY
AS FILED OF RECORD
IN DISTRICT COURT

JUN 22 2017

RICK WARREN, COURT CLERK
Oklahoma County

STATE OF OKLAHOMA)
) ss:
COUNTY OF OKLAHOMA)

AFFIDAVIT

I, John B. Albert, of lawful age being first duly sworn upon oath, deposes and states as follows:

1. That I have incurred the following time in the case of State of Oklahoma v. Termane Wood, CF-2002-46, wherein I was appointed as Conflict Defender. The trial in said case was from March 29, 2004 through April 7, 2004, before Judge Ray C. Elliott.

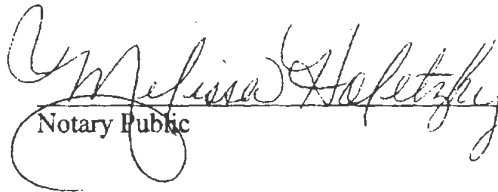
<u>Date:</u>	<u>Legal Work:</u>	<u>Time Spent:</u>
October 2, 2002	Pretrial Conference	2.00
January 7, 2003	Status Conference	1.00
February 12, 2003	Status Conference	1.00
March 3, 2003	Status Conference	1.00
March 19, 2003	Status Conference	1.00
April 16, 2003	Status Conference	1.00
May 28, 2003	Status Conference	1.00
July 16, 2003	Status Conference	1.00
August 6, 2003	Prepare Witness Statement	1.00
August 19, 2003	Motion Hearing	2.00
August 20, 2003	Motion Hearing	2.00
August 27, 2003	Status Conference	2.00
September 3, 2003	Motion to Continue Trial	1.00
February 23, 2003	Motion Hearing	2.00
March 5, 2004	Hearing – Amend Charges	1.00
March 29, 2004	Motion Hearing/Trial	8.00
March 30, 2004	Trial	8.00
March 31, 2004	Trial	8.00
April 1, 2004	Trial	8.00
April 2, 2004	Trial	8.00
April 5, 2004	Trial	8.00
April 6, 2004	2 nd Stage Trial	8.00
April 7, 2004	2 nd Stage Trial	8.00
May 7, 2004	Sentencing	2.00

FURTHER AFFIANT SAYETH NOT.



JOHN B. ALBERT

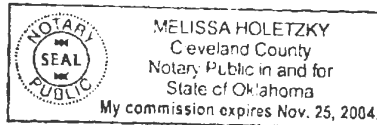
Subscribed and sworn to before me this 15th day of July, 2004.

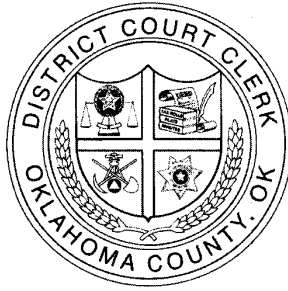


Notary Public

My Commission Expires:

11-25-2004
Comm # 00019389





RECEIVED
Federal Public Defender
JUL 03 2017
Capital Habeas Unit
Phoenix, Arizona

RICK WARREN COURT CLERK
OKLAHOMA COUNTY

June 27, 2017

FEDERAL PUBLIC DEFENDER
ATTN: SARA BURNHAM
850 W. ADAMS ST, STE 201
PHOENIX, AZ 85007-2730

**RE: REQUEST FOR CERTIFIED COPY OF
CF-99-4373, CF-02-46, CF-85-509**

Pursuant to your request for copy by letter received on, JUNE 19, 2017,
we are enclosing the copies requested.

Very truly yours,

RICK WARREN, COURT CLERK

DEPUTY

RW/KC
427

**IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA**

THE STATE OF OKLAHOMA,)

Plaintiff,)

v.)

TREMANE WOOD,)

Defendant.)

Appeal Case No. _____

District Court Case No. CF-02-46

TYPE OF APPEAL

☒ **Direct Appeal felony**

☐ Direct Appeal misdemeanor

☐ Post Conviction (Capital

only; use sections I & IV

of this form for the

Notice of Intent to Seek Review)

☐ Certiorari

☐ Revocation/Acceleration

☐ Termination from Drug Court

☐ State Appeal

☐ Juvenile – Adjudication

☐ Juvenile – Certification

☐ Juvenile – Reverse Certification

☐ Youthful Offender – Sentencing as Adult

☐ Other (specify)

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

FEB 22 2005

PATRICIA PRESLEY, COURT CLERK

By _____
Deputy

☒ **CAPITAL**

☐ **NON-CAPITAL**

**NOTICE OF INTENT TO APPEAL;
ORDER DETERMINING INDIGENCY, APPELLATE COUNSEL,
PREPARATION OF APPEAL RECORD, AND GRANTING TRIAL COUNSEL'S
MOTION TO WITHDRAW; COURT REPORTER'S ACKNOWLEDGEMENT; AND
NOTIFICATION OF APPROPRIATE APPELLATE COUNSEL, IF APPOINTED**

I. NOTICE OF INTENT TO APPEAL

The Defendant was sentenced on the 7th day of May, 2004 for:

<u>Crime(s)</u>	<u>Statute(s)</u>	<u>Sentence</u>
Ct. 1: Murder in the First Degree	Okla. Stat. tit. 21, § 701.7	Death
Ct. 2: Robbery with a Dangerous Weapon	Okla. Stat. tit. 21, § 801	Life
Ct. 3: Conspiracy to Commit Robbery with A Dangerous Weapon	Okla. Stat. tit. 21, §§ 801	Life

The sentences were ordered to run consecutively. The Defendant intends to appeal **(X)** all convictions arising from the trial had in the above captioned case, whether hereinabove specifically listed or not; or () only the following Counts: _____ to the Oklahoma Court of Criminal Appeals pursuant to Rule 2.1(E)(2). On Direct Appeal in D-2004-550 a Petition In Error was not timely filed, and through no fault of his own Defendant was denied an appeal. On February 2, 2005, Judge Ray C. Elliott recommended Post-Conviction Relief be granted, and by Order dated February 10, 2005, the Court of Criminal Appeals granted defendant a Direct Appeal Out of Time (see "Exhibit B").

This Notice of Intent to Appeal and the Designation of Record, attached as "Exhibit A," pursuant to Rule 2.1(E) of the *Rules of the Oklahoma Court of Criminal Appeals*, Ch.18, App., of Title 22, was filed with the clerk of the trial court within ten (10) days of the date of the Order Granting Direct Appeal Out of Time issued by the Court of Criminal Appeals, and constitutes a valid initiation of a direct appeal under the rules. The district court appointed the Oklahoma County Public Defender to represent the defendant on appeal. The defendant requests that the original record and transcripts be prepared in accordance with the completed Designation of Record, attached as Exhibit "A". The Defendant informs this Court that the Appellate record has previously been prepared and transmitted.

Perry Hudson

PERRY W. HUDSON – Counsel for Appellant

Assistant Public Defender

() Retained

(X) Appointed – **Conflict**

() Individual

() Oklahoma Indigent Defense System

() Oklahoma County Public Defender

() Tulsa County Public Defender

A true and correct certified copy of the Notice of Intent to Appeal and the Designation of Record with acknowledged receipt by the court reporter were hand delivered this 22nd day of February, 2005, to the Clerk of the Oklahoma Court of Criminal Appeals.

Perry Hudson

PERRY W. HUDSON

Attorney At Law

OBA# 17649

435 North Walker, Suite 102

Oklahoma City, OK 73102

(405) 557-7800

II. APPLICATION FOR DETERMINATION OF INDIGENCE

In accordance with Rule 1.14 of the Rules of the Court of Criminal Appeals, 22 O.S., Ch.18, App., the Defendant submits that he is indigent and cannot pay the costs of an appeal. Counsel states:

- (X) Indigence has been previously determined by this Court or its designee, and a pauper's affidavit in accordance with Rule 1.14(A) will be provided if this Court elects to review the Defendant's status.
- () Indigence has not been previously determined by this Court or its designee, and a pauper's affidavit in accordance with Rule 1.14(A) is attached as Exhibit "C".

It is requested that appropriate counsel be appointed and transcripts be prepared at the expense of the State.

Perry Hudson
PERRY W. HUDSON

III. DETERMINATION OF INDIGENCE

Pursuant to Rule 1.14 of the Rules of the Court of Criminal Appeals, Ch.18, App., of Title 22, this Court finds the Defendant (X)IS ()IS NOT currently indigent.

THE COURT ORDERS:

A. Preparation of the Appeal Record:

1. A record of this case (X)IS ()IS NOT to be prepared at public expense.
2. The court reporter(s) listed below (X)SHALL () SHALL NOT be reimbursed at public expense out of the Court Fund of Oklahoma County for preparation of this record

Name: Barbara Ross
Mailing Address: 321 W. Park Avenue
Okla. City, OK 73102

Transcript Type: Jury Trial *
Transcript Date: March 29 - April 5, 2004

Sentencing*
May 7, 2004

*** All transcripts have been prepared, filed and distributed to proper parties, and by order of the court are being held in D-2004-550.**

3. The return to the trial court clerk of all transcripts prepared at state's expense during the course of the trial proceedings. These transcripts shall be returned within ten (10) days from the date of sentencing. See Rule 3.2(E).

B. IF INDIGENT:

1. Perry W. Hudson, counsel for the Defendant, completed this Notice of Intent to Appeal and has timely filed a Designation of Record.

2. The court reporter(s) has been served with a copy of the Designation of Record.

3. Appropriate transcripts are ordered at public expense.

4. **Perry W. Hudson**()CHIEF, CAPITAL DIRECT APPEALS DIVISION OF THE OKLAHOMA INDIGENT DEFENSE SYSTEM (if the case was tried as capital, regardless of sentence imposed) ()CHIEF OF THE GENERAL APPEALS DIVISION OF THE OKLAHOMA INDIGENT DEFENSE SYSTEM (if the case was tried as non-capital) ()PUBLIC DEFENDER OF TULSA COUNTY ()PUBLIC DEFENDER OF OKLAHOMA COUNTY (X)A PRIVATE ATTORNEY APPOINTED AS CONFLICT COUNSEL FOR THE OKLAHOMA COUNTY PUBLIC DEFENDER'S OFFICE, **ADDRESS: 435 N. Walker, Suite 102, Oklahoma City, Oklahoma 73102; TELEPHONE: (405) 557-7800;** is appointed to represent the Defendant on appeal.

(The public defender of Tulsa County and Oklahoma County may only be appointed if that office represented the defendant at trial unless a conflict of interest exists as determined.)

5. Any Supplemental Designation of Record by the Oklahoma Indigent Defense System or other appellate counsel, pursuant to Section 1362 of Title 22 must be filed and served upon the appropriate court reporter(s) within thirty (30) days from the date of appointment, and the reporter's acknowledgement of service shall be filed in accordance with Rule 1.15(B); 2.1(B)(3).

6. N/A, counsel for the Defendant for the sole purposes of obtaining an appeal out of time and preparing documents to have the Public Defender of Oklahoma County appointed to represent Defendant on appeal, is permitted to withdraw as counsel of record.

7. **Cases in which death penalty imposed: Vicki Werneke, Chief of the Capital Post-Conviction Division of the Oklahoma Indigent Defense System, is appointed to represent the defendant on the filing of an application for post-conviction relief in accordance with the provisions of §§ 1089 and 1356 of Title 22.**

C. IF NOT INDIGENT:

1. N/A, appointed for the limited purpose of helping defendant to obtain an appeal out of time has timely completed this Notice of Intent to Appeal and has timely filed a Designation of Record.
2. The court reporter(s) has been served with a copy of the Designation of Record.
3. _____ has entered his/her appearance and will represent the Defendant on appeal as retained counsel.
4. _____, trial counsel for the Defendant, have filed a Motion to Withdraw as Counsel. The Motion is granted and trial counsel is permitted to withdraw as counsel of record.

IT IS SO ORDERED.

This Order signed this 22nd day of February, 2005.



RAY C. ELLIOTT, District Judge

NOTE: A NOTICE OF INTENT TO APPEAL AND DESIGNATION OF RECORD MUST BE FILED WITHIN TEN (10) DAYS FROM THE DATE THE SENTENCE IS PRONOUNCED IN OPEN COURT WITH THE CLERK OF THE TRIAL COURT. THIS NOTICE AND DESIGNATION IS JURISDICTIONAL AND FAILURE TO TIMELY FILE CONSTITUTES WAIVER OF THE RIGHT TO APPEAL. A CERTIFIED COPY OF THIS NOTICE AND DESIGNATION SHALL ALSO BE FILED BY TRIAL COUNSEL WITH THE CLERK OF THE COURT OF CRIMINAL APPEALS WITHIN TEN (10) DAYS FROM THE DATE THE NOTICE IS FILED IN THE TRIAL COURT. NO TRIAL ATTORNEY MAY BE GRANTED PERMISSION TO WITHDRAW, IF THE DEFENDANT DESIRES TO APPEAL, UNLESS THESE DOCUMENTS ARE FILED. IF THE DEFENDANT DOES NOT WISH TO APPEAL THIS CONVICTION, TRIAL COUNSEL MUST FILE AN AFFIDAVIT SIGNED BY TRIAL COUNSEL AND ACKNOWLEDGED BY THE TRIAL JUDGE WITH THE CLERK OF THE DISTRICT COURT, BEFORE TRIAL COUNSEL IS ALLOWED TO WITHDRAW, ASSERTING THAT THE DEFENDANT HAS BEEN FULLY ADVISED OF HIS/HER APPEAL RIGHTS AND DOES NOT WISH TO PURSUE AN APPEAL OF THE CONVICTION. See Rule 1.14(D).

CERTIFIED COPY
AS FILED OF RECORD
IN DISTRICT COURT

IV. ATTORNEYS STATEMENT

JUN 26 2017

RICK WARREN COURT CLERK
Oklahoma County


Transcripts have previously been prepared, filed and distributed to all parties and are currently on hold with the Court of Criminal Appeals by Order dated February 10, 2005. (See Exhibit B attached).

Perry Hudson
PERRY W. HUDSON

V. NOTIFICATION OF COUNSEL, IF APPOINTED

NOTE: No Designation of Record shall be accepted for filing by the trial court clerk unless it contains one of the following:

- A. A signed acknowledgement from the court reporter(s) who reported proceedings in a case indicating receipt of the request for transcript(s), the date received, and completed financial arrangements, or an order of the trial court directing the case be prepared at public expense; or,
- B. A signed statement by the attorney preparing the designation of record stating that transcripts have not been ordered and a brief explanation why. (Example, I, _____, attorney for the Appellant, hereby state that I have not ordered a transcript because: (1.) A transcript is not necessary for this appeal; (2.) No stenographic reporting was made.)

A true and correct certified copy of this Notice and Order and the Designation of Record were mailed this 22 day of July, 2005, to () the Capital Direct Appeals Division, Oklahoma Indigent Defense System, 1660 Cross Center Drive, Norman, Oklahoma 73019; () the General Appeals Division, Oklahoma Indigent Defense System, P.O. Box 926, Norman, Oklahoma 73070-0926; () Public Defender of Oklahoma County, 611 County Office Building, 320 Robert S. Kerr, Oklahoma City, Oklahoma 73102; () Public Defender of Tulsa County, 189 Courthouse, 500 South Denver Ave., Tulsa, Oklahoma 74103; (x) Perry W. Hudson, privately retained counsel.

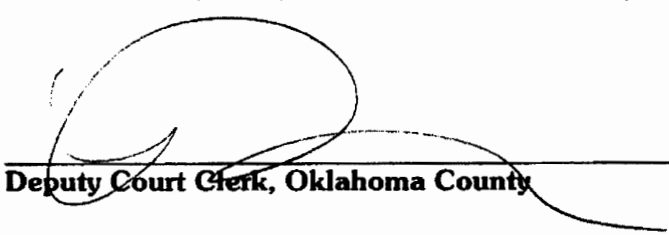

Deputy Court Clerk, Oklahoma County

EXHIBIT "A"

**IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA**

THE STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. CF-02-46
	)	
TREMANE WOOD,	)	
	)	
Defendant.	)	

DESIGNATION OF RECORD ON APPEAL
(Direct Appeal)

Defendant Tremane Wood, requests the Court Clerk to prepare the original record for purposes of lodging an appeal in the Court of Criminal Appeals. The appeal time is to start from the 10 day of February, 2005, the date the Order Granting Appeal Out of Time was issued by the Court of Criminal Appeals. Said original record shall contain the following material from the District Court file:

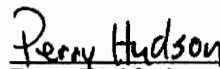
- 1) District Court Information (and all amendments);
- 2) All motions, applications, notices, and requests filed on behalf of the State or Defendant and any orders or rulings of the Court thereon;
- 3) All first and second stage jury instructions and verdict forms given by the Court and all requested jury instructions and verdict forms by the State or Defendant;
- 4) A copy of the Court's docket sheet in this case and any Court minutes referenced therein;
- 5) Judgment and Sentence and Summary of Facts on sentencing, and amendments thereto;
- 6) Notice of Intent to Appeal with Designation of Record attached as Exhibit "A"; Order Determining Indigence, Appellate Counsel, Preparation of Appeal Record, and Granting Trial Counsel's Motion to Withdraw; Court Reporter's Acknowledgement; and Notification of Appropriate Appellate Counsel, If

Appointed.

- 7) All Amended or Supplemental Designations of Record; and
- 8) All documentary exhibits, if any.
- 9) All correspondence filed in the district court between all parties and any and all correspondence of the court to any party; and
- 10) Transcript of the Preliminary hearing.

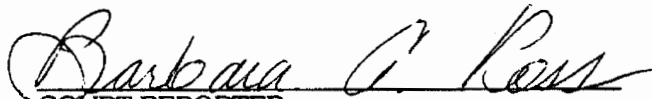
In addition to the above-numbered documents, the following portions of the record will be transcribed and assembled by the Court Reporter:

Including voir dire examination, all pre-trial motion hearings, all opening statements and closing arguments of counsel, all motion hearings, all in-camera hearings, and all in-chamber conferences, as well as all trial proceedings and evidence introduced at trial. The testimony of all witnesses both in the presence of the jury and out of the jury's presence; objections and exceptions, and arguments in support of the objections, exceptions and motions, as well as the sentencing transcript, and preliminary hearing transcript, all of the above being stenographically reported. All documentary, physical, and photographic exhibits, including audio and video tape recordings.


Perry W. Hudson

ACKNOWLEDGEMENT

I, Barbara Ross, Court Reporter for the above-styled and numbered case, do hereby acknowledge this request for transcript this 22nd day of February, 2005.


COURT REPORTER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Designation was served on the Oklahoma County District Attorney, and on Court Reporter Barbara Ross, who took said proceedings. Dated this 22nd day of February, 2005.

Perry Hudson
Perry W. Hudson

ATTACHMENT 5

Affidavit of Benito Bowie

I, Benito Bowie, state the following under oath:

1. I have been serving a life sentence since 2010 and am currently incarcerated at Dick Connor Correctional Center in Hominy, Oklahoma.
2. I first met attorney Johnny Albert, who I call "John," back in 1998. One day while I was watching my father's trial, John came up to me and said that I should give him a call if I ever needed a lawyer. I was 19 years old at the time. Shortly thereafter, I got into some trouble, and John became my lawyer.
3. John was connected with the Playboy Gangsta Crips since 1999/2000. This meant that John represented all the members of that gang and they looked out for John and gave him drugs.
4. During the almost decade I knew John, he did cocaine every day. John also drank regularly, probably daily.
5. John represented me on several cases, including the cases for which I am currently incarcerated.
6. At my preliminary hearing in May 2005, John showed up with his clothes a mess and reeking of booze. I could see cocaine in his nose hairs. John wasn't prepared for the hearing, and I knew that I needed a different lawyer.
7. In September 2007, John finally withdrew from my case, and I was appointed a new lawyer.

I state that the foregoing is true and correct to the best of my knowledge, information, and belief.

Signed this 19th day of April, 2022 at

Hominy, Osage OK
(City, County, State)



Benito Bowie Jr
(Signature of Affiant)

BENITO BOWIE JR
(Print Name of Affiant)

Subscribed and sworn to before me this 19th day of April, 2022.

Kim A. Marks
NOTARY PUBLIC

ATTACHMENT 6

Affidavit of Michael Maytubby

I, Michael Maytubby, state the following:

1. I first met attorney Johnny Albert in 2001. I was facing a negligent homicide case and needed a lawyer when someone introduced me to Johnny. I had heard good things about him and knew of his father's reputation as a great lawyer.
2. Johnny represented me in my case. Things started off well, and Johnny negotiated a deal on my behalf. He convinced the original judge to lessen the charges against me and to give me credit for time I had already served in jail. That judge died of cancer before the deal was completed, and it went away. My case ended up dragging on through 2007.
3. Johnny and I spent a lot of time together, even when he was not working directly on my case. We attended OU games, or he would come over to my place to hang out. We also hung out at bars and partied together. Starting in 2001, I knew Johnny drank regularly. He also took Oxycontin, Lortabs, and Xanax. I saw him take the pills while drinking alcohol. This occurred at various times throughout the day, including during the workweek and workday. I also spent time at Johnny's office where we would play pool and drink.
4. Starting in 2001, I heard that Johnny was using cocaine, in addition to drinking and using pills. I am sure Johnny was using cocaine in 2002 because I would give it to him as payment for legal fees.
5. By 2003, I saw Johnny use cocaine, including crack cocaine. Johnny really started to decline and was slipping during this period. Johnny would sometimes stop by my house and use cocaine, including in the morning before he had court.
6. In 2003, my younger brother, Cory Green, was facing a homicide case. My brother was in desperate need of help, so we hired Johnny to represent him. Johnny showed up to court drunk. I knew he was drunk and so did everyone else who was there. Johnny's abuse of drugs and alcohol while representing my brother contributed to his poor work on my brother's case. Johnny advised my brother to either take a blind plea or he would get the death penalty. Johnny said he knew Judge Ray Elliot and he wouldn't get more than 20 years if he took the blind plea. My brother received a life sentence even though he was only 18 years old. Johnny ended up blaming the loss on Judge Elliott.
7. By 2004 to 2005, Johnny's drug and alcohol abuse had gotten so bad that he looked like someone from the streets. I heard Johnny was also using "ice" (crystal meth) by that time.

I state under the penalty of perjury under the laws of Oklahoma that the foregoing is true and correct to the best of my knowledge, information, and belief.

Signed this 20 day of April, 2022 at Oklahoma City, OK.
(City, County, State)

Michael Maytabby
(Signature of Affiant)

Michael Maytabby
(Print Name of Affiant)

Subscribed and sworn to before me this 20TH day of April, 2022.

Kim A. Marks
NOTARY PUBLIC

My commission expires: July 20, 2024

Commission No. 04006555



ATTACHMENT 7

Affidavit of Roshanda Jackson

I, Roshanda Jackson, state the following:

1. I am a paternal cousin of Tremane Wood, who is about six months older than me. I spent time with Tremane and his brother Zjaiton "Jake" Wood while we were growing up and as young adults. I remember Tremane as fun and lovable.
2. On the evening of December 31, 2001, I was hanging out with my sister Ramona Robinson, as well as with my friend Sycheekia King and Tremane. Sycheekia and I were trying to convince him to celebrate New Year's Eve with us. Unfortunately, Jake came by and interrupted our plans.
3. I remember Jake saying things to Tremane like "let's go get this money" and "you gonna be a pussy?" It wasn't unusual for Jake to talk to Tremane like that. Jake was on Tremane particularly hard that night. I think that Tremane agreed to go with him because Jake had recently gotten out of prison after a few years and Tremane wanted to spend time with his brother. Jake always had a big influence on Tremane.
4. The next day on, January 1, 2002, Ramona and I went to our friend Passion's house. Tremane was already there. When Tremane came out of the room he was in, he was red in the face, shaking, and crying. He immediately hugged me when he saw me. He looked so shocked and scared.
5. Ramona and I took Tremane with us when we left. Ramona was sitting in the backseat of the car with Tremane, and I started out driving. Tremane screamed so loudly that I jumped and slammed on the brakes. I stopped the car, Ramona got in the driver's seat, and I moved to the back to sit with Tremane. He was crying and screaming and started squeezing me tightly. I started crying with him. I had never seen Tremane like that before, not even at a funeral. He kept saying he was sorry. I remember that day vividly because Tremane was so distraught that he threw up in the car and on me. When I asked him what was wrong he said, "No one was supposed to die!" He kept repeating that he loved us.
6. I know we dropped Tremane off someplace, but I don't recall where. I remember going back to Ramona's place after.

I state under the penalty of perjury under the laws of Oklahoma that the foregoing is true and correct to the best of my knowledge, information, and belief.

Signed this 11th day of June, 2022 at Del City, Oklahoma OK
(City, County, State)

Rashanda L. Jackson
(Signature of Affiant)

Rashanda L. Jackson
(Print Name of Affiant)

Subscribed and sworn to before me this 11th day of June, 2022.

Kim A. Marks
NOTARY PUBLIC

My commission expires: 04006555

Commission No. July 20, 2024



ATTACHMENT 8

Affidavit of Ramona Robinson

I, Ramona Robinson, state the following:

1. I am a paternal cousin of Tremane Wood. His father and my mother are siblings.
2. I spent time with Tremane and his brother Zjaiton "Jake" Wood growing up and into early adulthood. Jake and I were the same age. As children, we loved spending time with our grandmother, who we called "Granny." She was everything to us cousins. She was the matriarch of the family, and her home was a safe place for us during some very difficult times. We were heartbroken when she died in 1992.
3. In the early morning of January 1, 2002, I received a call from a cousin asking if I could come pick up Tremane and give him a ride somewhere. My sister Roshanda Jackson was with me and when we arrived, I could tell right away that something was wrong because of the way Tremane was crying. I had never seen him cry like that before.
4. When Tremane got into the car, my initial thought was that he might be high on drugs and tripping. I wanted to get him some place where he could come down. The longer we were in the car, I came to realize that there was something else going on.
5. It is hard for me to put into words the state Tremane was in. He was down on the floorboard in the backseat of the car sobbing uncontrollably and rambling. I had a hard time making out what he was saying. It felt surreal, like something out of a movie, and was an experience I'll never forget. I was so scared to see him that way. I had never experienced anything like it and haven't since.
6. While he was rambling, it felt like he was trying to say something that he couldn't get out or he couldn't articulate what was wrong. It was almost like a confessional. I was not aware of what had previously transpired on New Year's Eve. After I found out and reflected on how Tremane was acting, it seemed like he was in a state of disbelief and struggling to accept what had happened.
7. I was devastated when I learned about the crime, especially because Tremane had been doing so well. At that time, he and his girlfriend lived just a couple of streets over from me. They had their home, and he was taking care of his kids, trying to make a life for himself. Jake got out of prison and everything changed.
8. Jake was a ticking time bomb. You never knew what you'd get from him. He always seemed like two different people. He could be so sweet and loving to us—his family—and yet so mean and hateful to the world.

9. It is hard for me to accept the idea that Tremane could have killed someone. Unfortunately, I could see Jake doing something like that. The two of them were like night and day, and nothing alike.

I state under the penalty of perjury under the laws of Oklahoma that the foregoing is true and correct to the best of my knowledge, information, and belief.

Signed this 15 day of June, 2022 at Guthrie, Logan, Oklahoma
(City, County, State)

Ramona Robinson
(Signature of Affiant)

Ramona Robinson
(Print Name of Affiant)

Subscribed and sworn to before me this 15 day of June, 2022.

Candy M Ford
NOTARY PUBLIC

My commission expires: 01/29/2025

Commission No. 09001027



ATTACHMENT 9

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IN THE DISTRICT COURT OF OKLAHOMA COUNTY
FILED IN THE DISTRICT COURT
STATE OF OKLAHOMA OKLAHOMA COUNTY, OKLA.

APR 11 2008

JAMES T. FISHER,
Appellant,
vs.
THE STATE OF OKLAHOMA,
Appellee.

PATRICIA PRESLEY, COURT CLERK
By
Deputy

CASE NO. CF-1983-137
D-2005-460

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TRANSCRIPT OF CONTINUATION OF EVIDENTIARY HEARING
PROCEEDINGS HAD ON THE **21ST** DAY
OF **MARCH, 2008**, BEFORE
THE HONORABLE KENNETH C. WATSON

* * * * *

Reported by:

Tara Nixon, RPR, CRR
321 Park Avenue
Oklahoma County Courthouse
Oklahoma City, Oklahoma

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DISTRICT COURT OF OKLAHOMA - OFFICIAL TRANSCRIPT

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1 (Whereupon, the following transpired at
2 10:13 a.m.)

3 **THE COURT:** The Defendant-Appellant may call
4 your next witness. We concluded with Mr. Clayborne
5 yesterday, and are you all ready, prepared to go
6 forward?

7 **MS. BOX:** Yes, sir.

8 **MS. CHESLEY:** Yes, Your Honor. We would call
9 Dr. Ray Hand.

10 **THE COURT:** Raise your right hand.

11 DR. RAY HAND,
12 was called as a witness on behalf of the Appellant, and
13 having first been duly sworn, testified as follows:

14 **THE COURT:** Have a seat, please, sir.

15 DIRECT EXAMINATION

16 BY MS. CHESLEY:

17 **Q.** Would you state your name for the record,
18 please?

19 **A.** My name is Ray Hand.

20 **Q.** Can you give us an idea of your background,
21 start with your education starting with college?

22 **A.** I have a bachelors degree in English Literature,
23 masters degree in Guidance and Counseling, and a Ph.D.
24 degree in Counseling Psychology from the University of
25 Oklahoma. I have a one year clinical internship with the

1 Oklahoma State Department of Health and a post doctoral
2 supervision year satisfying the requirements of the
3 Oklahoma State Board of Examiners of Psychologists to
4 become a licensed psychologist in Oklahoma.

5 Q. And is that your current occupation?

6 A. I've been a licensed psychologist in Oklahoma
7 for 26 years.

8 Q. And what kind of practice do you have?

9 A. I have a private practice that focuses on
10 evaluations, individual, group and family therapy, as
11 well as some forensic work mostly in family court.

12 Q. Do you know James Fisher?

13 A. Yes.

14 Q. And how did you become involved in Mr. Fisher's
15 case?

16 A. Mr. Albert, Johnny Albert asked me to become
17 involved in his case to provide some mitigation related
18 information in a murder trial.

19 Q. Do you recall when it was that he asked you to
20 do that?

21 A. My records reflected December 2004 he got in
22 touch with me initially.

23 Q. And do you know when Mr. Fisher's case was set
24 for trial at that time?

25 A. I think it was set for trial on December 6th and

1 Mr. Albert asked me to be involved the week before, I
2 guess.

3 Q. Did you agree to perform that evaluation?

4 A. Well, I told him that I wouldn't be able to do
5 that without an opportunity to meet with Mr. Fisher,
6 evaluate him, conduct some background review, review
7 records. There's quite a bit to do in providing any kind
8 of mitigation testimony in a murder trial.

9 Q. It's not something you can do in just a couple
10 of days?

11 A. No. Even with the system as it works now is
12 very limited. To do a good job of providing this kind of
13 mitigation testimony is a lot of work and not something
14 typically... that that kind of time is not typically
15 available in a lot of cases, but we do what we can do. I
16 asked, was able to provide some kind of a document, a
17 letter to Mr. Albert explaining that I was engaged in the
18 case and would be willing to participate but needed more
19 time to prepare.

20 Q. So he asked you to write a letter to the judge
21 saying give me more time and --

22 A. Yes.

23 Q. -- it was part of his attempt to get a
24 continuance in the case?

25 A. I don't know what Mr. Albert's motives were.

1 Q. But you wrote in the letter, or I guess it was a
2 fax, that you needed additional time?

3 A. Yes. I told him I wouldn't be able to provide
4 information on the time schedule that existed when he
5 contacted me.

6 Q. But that you would be willing to conduct the
7 examination if you had more time?

8 A. Yes.

9 Q. What kinds of things do you need to have to
10 conduct that kind of investigation?

11 A. Well, the experts in the area who write about
12 sentencing mitigation, especially in death penalty cases,
13 talk about a pretty elaborate process involving a great
14 deal of time, hours and hours and hours getting to know
15 an individual so that they'll open up and talk a little
16 bit about their history and experience; some
17 psychological testing, hours and hours worth of time
18 doing traveling to do background investigations, hours
19 and hours of time involved in preparing displays and
20 information to present to a death penalty jury, because
21 of the gravity of the situation. So --

22 Q. Is it important for you to look at background
23 information like youth records and --

24 A. Sure.

25 Q. -- medical records, school records, things of

1 that sort?

2 A. You know, the idea in a mitigation process is to
3 develop as clear a picture as possible where an
4 individual comes from and the various factors that may
5 contribute to who they are; their personality, their
6 behavior, their interactions with others, their mental
7 health, overall intellectual functioning, all of the bio
8 psychosocial factors that modern mental health experts
9 expect to know about when they learn about someone or
10 make recommendations or attempt to provide some kind of
11 explanatory information about who that individual is.

12 Q. And when you do this kind of evaluation those
13 background records and things of that sort, are those
14 things that are typically provided to you by the
15 attorney?

16 A. It depends on how the process works. In our --
17 there's very limited amount of money to pay someone to do
18 this kind of work, in my experience, in Oklahoma County.
19 A fraction of the real amount of time that it would take
20 to do what the experts recommend is really available, but
21 what we try to do is get ahold of those records, many
22 records as we can, sometimes because the attorneys have
23 discovery and are available to, both the prosecution and
24 the defense have discovery and it's available and those
25 discovery documents and history, both the legal record is

1 important, the history of arrest and so forth, and legal
2 history as well as any mental health history, family
3 history, educational history, as much of that is
4 available because the limited amount of funds made
5 available to engage a psychologist or mental health
6 experts in these areas, the attorneys typically provide
7 the discovery information as well as whatever documents
8 they've been able to acquire to the psychologist and then
9 we find whatever else we can.

10 Q. Right, it's the start. You go from there and
11 see where the investigation takes you or the evaluation?

12 A. Well, sometimes it's the start, sometimes it's
13 the finish. But it certainly is a beginning, a point to
14 begin an evaluation.

15 Q. One of the things you said, it's important to
16 interview the client in Oklahoma County. Are there any
17 particular requirements you have to... any documents you
18 have to have to see a client who is incarcerated in the
19 Oklahoma County Jail?

20 A. In typical county cases if someone like me is
21 going to show up and attempt to do an assessment with
22 someone in jail they have to have a court order signed by
23 one of the local judges, county judges in order to allow
24 access. There are other ways to get into the jail.
25 Sometimes in the federal system a federal investigator

1 will escort a psychologist into the jail. But typically
2 state cases require a court order because it's really not
3 anybody available to do that kind of escorting.

4 Q. So Mr. Albert could have escorted you in or one
5 of the investigators, someone who was known to be working
6 on Mr. Fisher's case might have been able to escort you
7 in to visit with Mr. Fisher?

8 A. Well, it's possible. But the typical way that
9 that works is to, is for the defense attorney to prepare
10 a court order and have it signed, allowing access, and
11 have it signed by a judge and then --

12 Q. And that will allow you to go by yourself to --

13 A. Yes, and that's been the typical process.

14 Q. Now, was --

15 A. And I informed Mr. Albert about that, my need
16 for that, because otherwise you can't show up at the jail
17 and say let me in. They're not going to let you in. So
18 it's clear to me that that's, in terms of actual having
19 access to a defendant that's the absolute first place to
20 start.

21 Q. So Mr. Albert was certainly aware that you
22 needed that order?

23 A. From the beginning, and the few times that I've
24 done this I learned the first time and from then on it
25 became really clear to me that it wasn't worth starting

1 until you had the court order in hand.

2 Q. Now, did he give you an order like that in
3 December after he talked to you?

4 A. Eventually.

5 Q. But not in December, not when he first --

6 A. No, I -- I didn't hear back from him until March
7 of 2005, and then he told me that the trial was set for
8 April 11th after that delay from the December 6th.

9 Q. Did you ever try to contact him about that?

10 A. Mr. Albert?

11 Q. Yes. About your need for the order?

12 A. Well, sure. You know, contacting Mr. Albert's
13 sometimes difficult. You know, I had a cell phone and an
14 office phone and, you know, you leave messages and hope
15 someone will return the call and sometimes they do
16 hopefully and sometimes they don't. In this case, you
17 know, I had the word out to him to, you know, get me the
18 documents and, you know, let me have what he had in terms
19 of background information and discovery documents.

20 THE COURT: Excuse me. Was there a letter
21 written to Judge Caswell requesting that?

22 MS. CHESLEY: For the court order?

23 THE COURT: Well, the letter in December when
24 Dr. Hand was asked to send --

25 MS. CHESLEY: Yes, Your Honor.

1 **THE COURT:** Was it made a part of the record?

2 **MS. CHESLEY:** I don't believe that it is part of
3 the evidentiary hearing record.

4 **THE COURT:** But it's part of the court file?

5 **MS. CHESLEY:** Yes.

6 **THE COURT:** Okay. All right. Very good. You
7 may continue.

8 **MS. CHESLEY:** Well, now I'm not certain about
9 that.

10 **THE WITNESS:** I could clarify that.

11 **THE COURT:** Would you please?

12 **THE WITNESS:** My -- it was a last minute thing
13 in December and the quickest way to do something was
14 to send a fax to Mr. Albert. I, and my only -- what
15 my fax was about to him was yes I'd agree to be
16 involved and it would take more time.

17 **THE COURT:** So you didn't write a formal letter
18 to Judge Caswell?

19 **THE WITNESS:** No, no. I don't typically write
20 letters to judges.

21 **THE COURT:** Okay. Very good.

22 **MS. CHESLEY:** It's -- There was a fax that
23 Mr. Albert had that he presented to the Court on
24 December 6th --

25 **THE COURT:** Dr. Hand has already answered. He's

1 answered my question. You may continue.

2 Q. (By Ms. Chesley) Were you aware that Mr. Albert
3 told the Court in January, or actually in December that
4 you would be in within a couple of weeks to evaluate
5 Mr. Fisher?

6 A. I don't know what Mr. Albert told anybody.

7 Q. Okay. But when was it that he finally obtained
8 that order for you to visit with Mr. Fisher?

9 A. March 11th, 2005, so that was three, four weeks
10 before the trial.

11 Q. Three or four weeks before the trial and more
12 than three months since he had first told you that he
13 wanted you to evaluate Mr. Fisher?

14 A. Yes, I thought that was curious because I
15 thought he was in a hurry. And I'm not sure how many
16 times I called him, but it was clear to me that I had
17 made myself clear that I needed an order, to him, and so
18 I just was kind of stuck waiting till I got it.

19 Q. Right. Did Mr. Albert provide you with any
20 documents to prepare this evaluation?

21 A. I finally went to his office to pick up some
22 documents probably around the same time. I think the
23 order came around the same time that I went to his office
24 to pick up the documents, and that was... and then I know
25 that I started reviewing them in mid March.

1 Q. In mid March? Okay. What kind of documents did
2 you get from Mr. Albert?

3 A. A docket sheet; competency evaluation of
4 Mr. Fisher that came from Eastern State Hospital that was
5 from 2003; a report from the Tulsa County Sheriff's
6 office; Oklahoma County Jail records, incident reports
7 and so forth; a transcript of an evidentiary hearing from
8 1998 in another, I think in another case. There were
9 about 400 pages, so I reviewed those.

10 Q. Did he give you any school records or other
11 medical records related to Mr. Fisher?

12 A. I think that other than the evaluation from
13 Eastern State, which is now the Oklahoma Forensic Center,
14 I don't believe that -- I think they were in my file and
15 we listed 'em, and the ones I just read are the ones that
16 I have.

17 Q. Nothing from his youth in New York, his family
18 records related to his involvement with the juvenile
19 departments in New York?

20 A. No.

21 Q. What kind of direction did he give you on what
22 he wanted from you?

23 A. Well, he told me -- we had worked in a couple of
24 other cases and he said that he wanted a 30 or 40 minute
25 mitigation presentation like we had done in other cases.

1 And I --

2 Q. And --

3 A. Yes. Pardon me.

4 Q. What did that instruction really mean to you?

5 A. Well, it meant pretty much I was on my own to
6 come up with some kind of a presentation that was
7 relatively limited that would capture some of the
8 Defendant's history to present to a jury, and talk about
9 some of the complications of how that history affects an
10 individual's perceptions and judgments.

11 Q. Did you interview Mr. Fisher at the jail?

12 A. Yes.

13 Q. And do you recall when that was?

14 A. I saw him on March 18th, 2005, and again on
15 March 22nd, 2005. They were difficult interviews.
16 Mr. Fisher was frustrated and not particularly interested
17 in going through any of the psychological testing I
18 brought with me to do.

19 Q. What was he frustrated about?

20 A. Well, he was frustrated with the system in
21 general and --

22 Q. Did he express some concern that it had taken
23 three months to get you in there to see him?

24 A. Well, he was frustrated about the whole
25 situation and very angry about the whole situation.

1 Q. Was --

2 A. And he put most of his energy... was not
3 particularly interested in answering my questions at the
4 time, and put his energy into explaining to me how he...
5 his conceptualization of the entire situation, which is
6 part of the reason that it's so important in this kind of
7 a process to have lots and lots of time to spend with
8 somebody. It would easily take 10 or 15 or 20 hours
9 worth of contact or more to develop enough trust where
10 somebody would go, finish their kind of, kind of their
11 own expressiveness about what's going on and be available
12 to open up a little bit about their history.

13 It's hard to get somebody to talk about their
14 own vulnerabilities in this kind of a context, and part
15 of the mitigation process is to examine those
16 vulnerabilities in order to present a more humane picture
17 of the defendant to a jury.

18 Q. Right.

19 A. That's already convicted him of murder. It's a
20 complicated process.

21 Q. Absolutely. So these interviews were conducted
22 on March 18th and 22nd, and you reviewed all the
23 documents starting March 16th; this is just three weeks
24 before his trial is set to begin. How did that affect
25 your evaluation?

1 A. Well, puts limits on the amount of time that's
2 available because the truth is this is not the only thing
3 I do either and so, you know, there's time and a schedule
4 to do certain types of things. And, you know, I went to
5 the jail twice which even though it may only take, you
6 know, even though it may take a half a day or more to get
7 in an hour worth of interview after the wait time and so
8 forth at the County Jail, so we spent, I spent two or
9 three hours with him and it was pretty clear to me that
10 Mr. Fisher was frustrated and angry and that he... it was
11 going to take probably more time than was available for
12 me to really learn about him and gain his trust to the
13 point that he might talk to me about where he comes from,
14 and share some of his vulnerabilities.

15 Q. And if you had started this process back in
16 December when you were, when you first talked to Johnny
17 Albert, do you think you would have had more time to
18 develop that trust?

19 A. Well, that's a difficult question to answer.
20 This situation and mitigation is probably not why I'm
21 here to talk about this particular situation, but, you
22 know, the County allows a very limited amount of
23 resources available to do the kind of mitigation that the
24 experts suggest are reasonable and relevant in a death
25 penalty case. I think it would have been possible to

1 spend some more time but it would have been limited.

2 Q. Did you prepare a report of your evaluation of
3 Mr. Fisher?.

4 A. A brief -- I prepared a couple of pages, a
5 document that talked about my limited contacts with
6 Mr. Fisher. I also prepared a couple of demonstrative
7 displays that I've used, similar to other ones I've used
8 in the past for mitigation purposes that list some of the
9 factors that have an effect on how people turn out, from
10 a psychological perspective.

11 Q. Okay. I'm going to go back just a minute.
12 Mr. Fisher was uncooperative in the sense that he didn't
13 want to take your tests and he didn't really want to talk
14 about his family or things like that, but he wasn't -- he
15 didn't refuse to see you, did he?

16 A. No.

17 Q. And he did sit quietly with you? I mean, he
18 wasn't -- he was oriented, he knew what was going on and
19 he was trying to talk to you, he just had his own agenda
20 and it wasn't yours?

21 A. That's probably a reasonable reflection of what
22 I saw. He certainly wasn't aggressive with me. He was
23 fully conscious, fully oriented, clear about who I was,
24 but --

25 Q. He was just very frustrated about the fact that

1 this trial was just three weeks away and --

2 MS. BOX: Objection, Your Honor. That's --

3 THE COURT: Sustained from testifying. Thank
4 you.

5 MS. CHESLEY: May I approach the witness,
6 Your Honor?

7 THE COURT: Yes.

8 Q. (By Ms. Chesley) I'm going to hand you what's
9 been marked as Defendant's Exhibit 35, and ask if you've
10 seen that document before?

11 A. Yes, it's the brief letter I prepared for
12 Mr. Albert.

13 Q. What did you base this report on? I know you
14 weren't able to speak to Mr. Fisher as much as you would
15 have liked, but what did you base your report on?

16 A. I reviewed some of his family history, his
17 criminal history, records regarding the current offense.
18 I attempted to conduct interviews with available family
19 members, I interviewed Mr. Fisher on a couple of separate
20 occasions and reviewed the previous psychological
21 assessment, and based the presentation that I expected to
22 make, the brief presentation I expected to make, on some
23 of that developmental background.

24 Q. When it says that you reviewed Mr. Fisher's
25 family history that was part of the information that was

1 contained in that evidentiary hearing?

2 A. Yes.

3 Q. Mr. Albert didn't give you like some sort of
4 separate family history or school records or medical
5 records?

6 A. No. No. No. I gleaned what I could out of
7 that.

8 Q. You gleaned what you could out of what had been
9 presented in an evidentiary hearing in 1998 on behalf of
10 Mr. Fisher?

11 A. That's correct.

12 Q. Were you -- when did you give this report to
13 Johnny Albert?

14 A. On March 31st, that was within a week of the
15 time that I had seen him.

16 Q. And you had prepared some demonstrative exhibits
17 that you intended to present?

18 A. Yes, that was to the letter.

19 Q. Attached to your report there?

20 A. Yes.

21 Q. Were you prepared to testify about these matters
22 at Mr. Fisher's trial, were you willing to do that?

23 A. I was -- I hadn't heard from Mr. Albert. I was
24 prepared and got more and more anxious as the trial date
25 came, and actually one day came up to the... I remember

1 this real clearly because I was so frustrated about it,
2 the entire process, because frankly I had started it
3 December 6th agreeing to be a helper and had felt
4 thwarted throughout that couple, three months. Finally,
5 I knew there was something going on. I made phone call
6 after phone call to Mr. Clayborne and to Mr. Albert,
7 leaving messages, nobody returned my call.

8 I ultimately came up to the courthouse on the
9 date of the trial, during the trial, and bumped into
10 Mr. Clayborne out in the hallway and said, what's going
11 on? What'd you want from me? What are we doing? And he
12 said I don't know, and he left me hanging, and that's the
13 last I heard from them.

14 Q. Did you know they had actually told the Court
15 the first day that they weren't going to call you?

16 A. No, no one told me that.

17 Q. Did you ever tell Mr. Albert that you couldn't
18 testify because Mr. Fisher didn't want to talk to you
19 about the things you wanted to talk to him about?

20 A. Well, I don't believe so. I think I had
21 proceeded trying to create something to make some kind of
22 a presentation that might have some limited impact and
23 that's what I did.

24 Q. Did you feel like you at least had enough
25 background information from the prior evidentiary hearing

1 and the documents that Mr. Albert had given to you that
2 you could put together that 30 to 40 minute presentation
3 that he had asked you to prepare?

4 A. Doesn't take much to use up 30 or 40 minutes.

5 Q. Right.

6 A. And there were a number of factors from
7 Mister -- you know, there are a number of factors that
8 mitigation experts suggest play an important role. So
9 one of the simplest things to do in a matter like this is
10 to check off which of those factors appear to exist in a
11 particular defendant's background and that's something.
12 And if many of the factors exist then that's worth
13 talking about and that's what I did.

14 Q. And would you think that a 30 to 40 minute
15 presentation was really enough in a death penalty case?

16 A. No.

17 Q. I get the feeling though what you're telling me
18 is that you have constraints put on you by the lawyers
19 you're dealing with and by how much the County is willing
20 to pay for your expert services that make it really
21 difficult to do what you think should be done?

22 A. Well, it's a token.

23 Q. Thank you.

24 THE COURT: I've got a question.

25 MS. CHESLEY: No further questions.

1 **THE COURT:** Did anyone ever tell you that you
2 were not going to testify?

3 **THE WITNESS:** No.

4 CROSS-EXAMINATION

5 BY MS. BOX:

6 **Q.** Good morning, Doctor. When you saw Mr. Fisher
7 in the County Jail how long did you spend with him the
8 first time?

9 **A.** You know, I don't recall specifically, but since
10 I was there I'm sure it was an hour or so or more on two
11 occasions.

12 **Q.** And how much of that time did he spend talking
13 to you about his problems?

14 **A.** His -- I'm not quite sure when you say "his
15 problems."

16 **Q.** His perceptions of the world and how it treats
17 him.

18 **A.** An hour or so.

19 **Q.** Were you able to get a word in edgewise?

20 **A.** I may have gotten in a few words edgewise.

21 **Q.** And did you review what was available of
22 Mr. Fisher's past history in regards to his being
23 obsessed with this same thought all the time?

24 **A.** And again, I'm not quite sure what you mean by
25 that. I think that he was obsessed with his frustrations

1 with the system and I think that's been a long-term
2 issue, so maybe the answer is yes to your question.

3 Q. And if a person has spent 20 years pursuing that
4 sort of a mindset how long do you think it would take to
5 reach him?

6 A. You know, I couldn't predict. Longer than I had
7 I'm sure of that.

8 Q. Probably years?

9 A. Maybe never.

10 MS. BOX: I think that's all I have, Your Honor.

11 THE COURT: Dr. Hand, have you ever testified
12 prior in a mitigation stage, death penalty case?

13 THE WITNESS: Yes.

14 THE COURT: How many times?

15 THE WITNESS: God, I don't keep a count, but
16 maybe four or five times.

17 THE COURT: Anything further?

18 MS. BOX: No, sir.

19 THE COURT: May Dr. Hand be excused?

20 MS. CHESLEY: Yes, he may.

21 THE COURT: Thank you, Dr. Hand.

22 THE WITNESS: Thank you, Your Honor.

23 MS. CHESLEY: Your Honor, we'd move for
24 admission of Defendant's Exhibit 35.

25 MS. BOX: No objection.

1 **THE COURT:** Defendant's Exhibit 35 will be
2 admitted. Call your next witness.

3 **MS. CHESLEY:** Bryan Stevenson.

4 BRYAN STEVENSON,
5 was called as a witness on behalf of the Appellant, and
6 having first been duly sworn, testified as follows:

7 **THE COURT:** Take a seat, please.

8 DIRECT EXAMINATION

9 BY MS. CHESLEY:

10 **Q.** Would you state your name for the record,
11 please?

12 **A.** Yes, my name is Bryan Stevenson.

13 **Q.** Would you give us an idea of your educational
14 background starting probably with college?

15 **A.** Yes. I have a bachelors degree in Philosophy
16 and Political Science. I have a law degree from Harvard
17 Law School, masters degree in Public Policy from the
18 Harvard School of Government, that's my formal
19 educational background.

20 **Q.** What is your current position?

21 **A.** I currently direct a project called the Equal
22 Justice Initiative, it's a nonprofit law firm in
23 Montgomery, Alabama. We provide legal representation to
24 capital defendants, to death row prisoners across the
25 deep south, and I'm also a professor of law at the New

1 York University School of Law in New York, City.

2 Q. Have you had other teaching experience?

3 A. Yes, I've taught at University of Michigan Law
4 School, Cumberland Law School, Yale Law School. I've
5 been full-time, not full-time, I've been a... on the
6 faculty of NYU for the last ten years.

7 Q. Do you sometimes give lectures and train other
8 lawyers?

9 A. It's a big part of what I do. I do a lot of
10 training for lawyers around the country on capital
11 litigation, national training programs, regional training
12 programs. We also prepare materials for lawyers. I've
13 written several trial manuals that are used widely across
14 the country; The Capital Defense Trial Manual, collateral
15 manuals. Do a lot of training for advocates in various
16 phases of the capital litigation process and then we do
17 clinics and special programs for thinking through cases
18 for lawyers that are in active litigation.

19 Q. Okay. Now, have you actually tried capital
20 cases yourself?

21 A. Oh, yes. I've represented probably over a
22 hundred capital defendants or death row prisoners, it's a
23 big part of my practice. I've been doing this for 20
24 some years now and the bulk of what I've done is
25 represent capital defendants, people on death row. Our

1 project has a current docket of probably 60 cases right
2 now.

3 Q. How many at the trial level have you done,
4 capital trials?

5 A. We do a lot of work at the trial level in
6 various capacities. I've probably been lead counsel in
7 12 to 20 cases, consulted in 50, 60 cases. I've
8 testified as an expert several times as well.

9 Q. So you have testified before as an expert
10 witness?

11 A. Yes. I frequently testify for courts on issues
12 related to indigent defense and some other aspects of the
13 criminal justice system.

14 MS. CHESLEY: May I approach, Your Honor?

15 THE COURT: Yes.

16 Q. (By Ms. Chesley) I'm going to show you what's
17 been identified as Exhibit 31, and ask if you can
18 identify that document?

19 A. Yes, this is my resume.

20 Q. It basically goes through maybe in a little more
21 detail some of the things we have just discussed?

22 A. That's correct.

23 MS. CHESLEY: Your Honor, at this time we would
24 tender Mr. Stevenson as an expert in the area of
25 capital litigation.

1 MS. BOX: No objection.

2 THE COURT: That stipulation will be accepted.

3 MS. CHESLEY: Thank you.

4 Q. (By Ms. Chesley) Would you consider
5 representation of defendants charged with capital crimes
6 to be a specialized area of the law?

7 A. Yeah, I don't think there's any question.
8 Capital cases are unique for a variety of reasons but the
9 most obvious one is that they have a special set of
10 procedures that the court has created in the mid 1970's;
11 bifurcating the trial process. There are special laws
12 relating to aggravation, mitigation. And the big
13 challenge in a death penalty case is unlike a lot of
14 other criminal cases, the depth of investigation is very
15 complicated from pretrial litigation where you have to
16 preserve issues because the law is constantly changing,
17 to voir dire we have to do things like life qualification
18 and death qualification, to the first phase where you
19 have to have a theory of the case that can be reconciled
20 with the potential penalty phase. And then the special
21 penalty phase where the client's life is literally in
22 your hands, these cases are quite unique and very
23 challenging.

24 Q. Is there a difference in how the lawyer should
25 prepare for the guilt phase of the trial and the penalty

1 phase of the trial?

2 A. Well, there's not a difference in the sense that
3 you have to do a lot of investigation and preparation,
4 but yes, there is a difference in terms of recognizing
5 that this is essentially two trials. You've got to
6 establish that your client is not culpable for capital
7 murder, and at the same time be prepared to present a
8 case if the jury finds your client guilty of capital
9 murder, and that means you've got to do all of that in
10 advance; you've got to think that through, you've got to
11 have a theory of the case. The ABA Guidelines which
12 would have been presented on this thing, on this issue,
13 have documented the particular need to have a lot of
14 planning and a team to help you organize and prepare.

15 It's my view that it's impossible for one lawyer
16 working alone to adequately represent capital defendants
17 without a lot of time and a lot of resources, and that's
18 why the guidelines are so dependent on teams and experts
19 and specialists because of the complexity of these cases.

20 Q. And what kind of team is it that you're supposed
21 to have?

22 A. Well, you're going to have to investigate the
23 case thoroughly. Unlike other criminal cases where you
24 can sometimes do some things in the courtroom, a capital
25 case because the client's life is at risk requires a full

1 first phase investigation, that's particularly true in
2 retrial cases. A lot of the cases that I have done are
3 cases where the client have been previously convicted and
4 sentenced to death, those cases present special
5 challenges because usually there's a time and there are
6 these other, kind of appearance problems, but you've got
7 some opportunities as well in the investigation of what's
8 been laid out before is among the top of those things,
9 but yes, in talking to every witness; investigating
10 what's in the police reports; exploring with your client
11 theories of the crime; self-defense, alibi, whatever it
12 is, investigating those.

13 In capital cases in particular because the
14 stakes are so high many people accused of crimes will
15 become quite desperate and they'll say this happened and
16 that happened and this happened. And in a capital case
17 you really have to investigate those things, go back to
18 the client and say, you know, I can't prove that because
19 the people said this to me. And it's only through that
20 process that you actually get to the point where you're
21 having good conversations with the client about how to
22 prepare the case. And so unlike a lot of other cases
23 that kind of investigation has to happen far in advance
24 of the trial, then you develop a theory of the case of
25 the first phase, and you start trying to reconcile that

1 with the penalty phase. In every death penalty case
2 you're going to have to do a complete life history.
3 You're going to have to understand who this person is, if
4 they're presenting problems and difficulties you're going
5 to have to understand why; you're going to have to
6 document them objectively with records, school records,
7 employment records. Military records are really
8 important sources, but you're also going to have to
9 animate them with testimony, with witnesses. It's the
10 client's life and no one is going to presume that that
11 life has value or meaning unless you present that, and
12 that's an incredibly challenging responsibility but
13 absolutely critical in death penalty cases.

14 We know from the work we do and jurors tell us
15 this all the time, if they get a sense of the person, if
16 they understand who the person is, if they have some
17 context for evaluating the person's crime the chance of
18 succeeding in preventing a death sentence goes way up, in
19 the absence of that a death sentence becomes very, very
20 likely.

21 Q. Is there a difference in the standard for
22 constitutionally acceptable conduct of an attorney in
23 Oklahoma as opposed to Alabama where you are, or New
24 York, or any other state?

25 A. No. The United States Supreme Court has

1 established the standards that govern this kind of
2 litigation and they are the same nationwide. People in
3 Oklahoma are not entitled to less effective
4 representation than people in New York or California or
5 Alabama and vice versa. So the standards are fairly well
6 established.

7 They have been codified in a variety of
8 publications, the ABA Guidelines being the most well
9 known. And the effort, the intent is to kind of deal
10 with the problem we've been having in getting adequate
11 services to people in capital trials that the court has
12 recognized. So standardizing some of this has become a
13 real norm, nationwide norm, it's also why there is so
14 much training. There's lots and lots of training
15 programs available to kind of help get lawyers up to
16 these standards.

17 Q. And there are training --

18 A. I --

19 Q. How often a year do you think there would be
20 training for a capital defendant, defender?

21 A. Well I probably -- yeah, I probably lecture 20,
22 25 times a year at training programs around the country
23 and, obviously, I'm not at every one. And so there's,
24 you know, the National Legal Aid and Defender Association
25 conducts them, the National Criminal Defense College

1 conducts them, the American Bar Association conducts
2 them. There are law schools and universities that have
3 special programs conducting them, the Bureau of Justice
4 is now funded training programs that are being conducted.
5 There are a range of specialized practitioners who are
6 conducting them, so they're pretty available all across
7 the country with an emphasis on training people from
8 different states and different regions.

9 Q. So there's a recognition that such training is
10 really necessary to do a capital case?

11 A. Absolutely. I think it's -- the law and the
12 science surrounding this is evolving in such a way that
13 without access to experts who are talking about the
14 latest developments, without training on how to put
15 together a mitigation case for somebody who has sexual
16 abuse in their history or physical abuse, or someone who
17 is difficult or someone who is mentally ill or someone
18 who is reluctant to talk about these things, or someone
19 who doesn't want mitigation, these are all familiar
20 problems that the trainings are designed to help lawyers
21 who wouldn't ordinarily have any experience with these
22 issues, confront and overcome.

23 Q. So it's not necessarily unusual for a capital
24 defendant to be upset with his lawyer or be --

25 A. In all of my cases -- I mean, when the State

1 threatens to kill you it's pretty unnerving and for many
2 people who get into these situations where they're on
3 trial for their life, they come with poor deficits and
4 reasoning, emotional problems, mental health problems.
5 Most of the clients I've represented have come with a lot
6 of problems that had to be managed, challenged,
7 confronted, overcome, it's just the norm, particularly
8 with young... my clients have gotten younger and younger
9 in the last 20 years, and I found particularly with
10 younger clients, people under the age of 21, 25, there's
11 always a set of issues that you have to kind of work
12 through. It's why we say that the attorney-client
13 relationship is perhaps the most critical component to
14 effective representation. You absolutely will not
15 succeed unless you get your client to trust you at a
16 level where you can do your job. And so you spend a lot
17 of time on that, you invest a lot of energy in that if
18 you're going to try to do effective work.

19 Q. Now, the question that we're actually addressing
20 today is whether this defendant, James Fisher, received
21 constitutionally effective assistance of counsel at his
22 trial. Have you reviewed materials related to
23 Mr. Fisher's 2005 trial?

24 A. Yes, I have.

25 Q. What kind of information did you review?

1 A. I reviewed the trial transcript from his 2005
2 case. I reviewed pretrial pleadings, competency
3 hearings, *Faretta* hearings, all of the pleadings that
4 were transcribed leading up to his trial transcript.
5 I've reviewed the appellate pleadings, I've reviewed
6 affidavits that are presented in this court, reviewed
7 essentially all of the documents that I could identify
8 relating to his prosecution for the 2005 case.

9 Beyond that, I also had previously reviewed
10 Mr. Fisher's original 1983 trial because I testified as
11 an expert in that case as well, so I reviewed those
12 pleadings and the materials that were presented and
13 gathered in challenging his original conviction.

14 Q. I know you weren't able to be here yesterday,
15 but have you received a summary of the testimony that's
16 been presented in this proceeding, in this evidentiary
17 hearing?

18 A. Yes, I did receive a summary of evidence that
19 was presented and the evidence that supported that at
20 yesterday's hearings.

21 Q. And all of that together is what has formed your
22 opinion?

23 A. Yes, my opinion is based on all of the documents
24 that I have reviewed that relate to Mr. Fisher; his
25 history and the trial of this case.

1 **Q.** A lot of the testimony has been about how
2 Mr. Fisher and Mr. Albert had a very difficult
3 relationship. What effect does that relationship between
4 Mr. Fisher and Mr. Albert have on the case?

5 **A.** Well, again, I think effective communication
6 between the attorney and the client is absolutely
7 essential because you can't get to the things that are
8 absolutely critical to do effective work without that. I
9 think, my opinion, that the representation in this case
10 was objectively unreasonable and ineffective is primarily
11 situated, at least first situated on the poor
12 attorney-client relationship.

13 **THE COURT:** Let me ask you a question. Have you
14 spoken -- have you ever spoken to Johnny Albert
15 about this case?

16 **THE WITNESS:** No, I have not, Your Honor.

17 **THE COURT:** All right.

18 **Q.** (By Ms. Chesley) Is there anything in particular
19 about Mr. Fisher's background that might make it
20 difficult for him to have a relationship with his
21 attorney?

22 **A.** Well, I think all capital defendants have reason
23 to be fearful and to be distrusting because the process
24 is a pretty intimidating one. Mr. Fisher had some
25 particular reasons to be fearful and distrustful largely

1 owing to his experience with his original counsel in this
2 case that was also very contentious and difficult, and
3 that lawyer admitted to a real animosity toward
4 Mr. Fisher because of his perceived sexual orientation.
5 He admitted to a lot of animosity toward Mr. Fisher on
6 other grounds as well and that creates a very difficult
7 framework and foundation on which to build an
8 attorney-client relationship. So there were particular
9 problems that made Mr. Fisher especially needy, and he's
10 got a long history of emotional and mental health
11 problems that you would factor in. But in my view the
12 biggest problem in this case is that Mr. Albert engaged
13 in what I would characterize as unquestionably
14 unreasonable conduct shortly after he began
15 representation of Mr. Fisher, when he threatened him in
16 court and basically promised to hurt him.

17 The incident where he reacted to perceived
18 threats by Mr. Fisher against him and his family and
19 called Mr. Fisher names, asked the bailiff to take the
20 handcuffs off of him so he could fight him, so he could
21 whip him, in front of other people, in my view, was
22 objectively unreasonable conduct that was so
23 unprofessional and so unethical that it became a very
24 serious obstacle to expect any client to get past. In a
25 death penalty case you can't take the role of helping the

1 client when their life is on the line and then promise to
2 hurt them prior to doing that. It's just hard to expect
3 anybody to get past that, it's especially hard to expect
4 Mr. Fisher to get past that.

5 In my own view is that creates the kind of
6 breakdown in the attorney-client relationship that
7 requires change, that requires some new response. You're
8 not likely going to recover from that. It's also the
9 kind of objectively unreasonable behavior that makes me
10 question the fitness of the advocate. As frustrated as
11 I've gotten with clients, with people, with prosecutors,
12 with judges, with everybody, I know that my obligation is
13 to interact professionally with all of those folks, once
14 I can't do that I can't be an effective advocate. And
15 calling Mr. Fisher, as the affidavits that were presented
16 to me report, "a little bitch" threatening to "whip his
17 ass," threatening to have the handcuffs removed so he
18 could hurt him is way outside the norms of professional
19 conduct and I think creates a kind of conflict in
20 developing a loyal trusting relationship that aren't
21 likely to be overcome. It would take a lot of skills, a
22 lot of time, a lot of effort to get past something like
23 that and there was no evidence of that in this case.

24 Q. What duty does a lawyer have in a capital case
25 to investigate the case and to prepare the case for

1 trial?

2 **A.** It's the lawyer's first duty. What we've
3 recognized in capital cases, that investigation
4 preparation is the absolute core of effective assistance.
5 And I guess the second thing that I would characterize as
6 objectively unreasonable in a way that is pretty stunning
7 is Mr. Albert's failure to carefully and thoroughly
8 examine the records that had been developed leading up to
9 this trial. There were mental health reports and
10 assessments by experts who could have helped Mr. Albert
11 understand who Mr. Fisher is, how to approach him, how to
12 think about him. Lawyers had successfully worked with
13 Mr. Fisher, engaged, reviewing their records and notes
14 was absolutely critical, in my judgment. And then there
15 was the State's case which had been laid out in a prior
16 trial that I believe you have to review, and there's no
17 evidence that Mr. Albert did any of that in this case,
18 and in a death penalty case I would characterize that as
19 just objectively unreasonable.

20 **Q.** Is that something that the ABA Guidelines
21 address on what sort of investigation should be done?

22 **A.** Yes, the ABA Guidelines make it clear that
23 review of all documents, all materials that are related
24 to the case have to be thoroughly examined, thoroughly
25 reviewed, and thoroughly evaluated and to be adequately

1 prepared for capital litigation.

2 Q. And that's not just going to the prosecutor but
3 looking at other things as well?

4 A. That's right; crime witnesses, police reports,
5 witnesses provided by the client, medical records, school
6 records, employment records, all of those records. In
7 this case there was a wealth of evidence about
8 Mr. Fisher, in particular social history, family history,
9 mental health history, but there were also a great deal
10 of evidence about the crime that would, obviously,
11 warrant close attention; evidence relating to Mr. Neal's
12 prior behavior, to witnesses who saw these men on the
13 street, to police accounts that were supportive of a
14 theory that helps Mr. Fisher.

15 Q. We've talked a lot about the boxes of material
16 that were delivered to Mr. Albert, what would be the
17 importance of going through those?

18 A. Well, again, to understand what the State's
19 case -- I mean, I've done... I've been in that situation.
20 It's the one upside to these retrials, you get to see the
21 entire case, unlike a lot of trials where you come in
22 with no clear understanding of what the State is going to
23 do. You have that here so you always want to access
24 that, but beyond that every witness that you're going to
25 be facing or most of those witnesses have previously

1 testified. It's just the first thing you would do is to
2 get their prior testimony to be prepared to cross-examine
3 to impeach them, to evaluate how that testimony holds up
4 in comparison to their current testimony. Without that
5 you're just giving up a very powerful tool to help you in
6 challenging the case.

7 In this case what was also really important is
8 that there was a very powerful mitigation case.
9 Witnesses from Mr. Fisher's family had previously
10 testified. You didn't have to guess what they could say
11 and how they would perform in court. You didn't have to
12 speculate about what you could do to make a very
13 persuasive mitigation case, it was all laid out there for
14 you, you just have to review it and then take advantage
15 of that. And all of that work, these mental health
16 histories, these evaluations were simply ignored in ways
17 that I think greatly prejudiced Mr. Fisher at his trial.

18 Q. Even in a case that was 20 years old would it be
19 important to look at the physical evidence that was
20 involved in that case?

21 A. No question. Because the way the case is being
22 presented to the jury is back in 1983. The presentation
23 of the evidence isn't 20 years old in the sense that
24 you're talking about what the witnesses see at the time,
25 what did the medical report show, what does this forensic

1 evidence establish, and you're getting into the mind of
2 those witnesses at that time and so you have to review
3 those records, obviously, to be effectively prepared for
4 that.

5 Q. Is it something where you'd actually want to go
6 down to the police department or wherever they're stored
7 and see the actual physical evidence that exist --

8 A. Oh, at a minimum.

9 Q. -- in the case?

10 A. Oh, at a minimum you would get all of those
11 files, but beyond that you'd go talk to the witnesses. I
12 mean, obviously, any good defense lawyer knows that you
13 don't rely on the police account of what a witness says
14 to inform you what that witness can say. And you can't
15 get to that unless you go talk to that witness. For
16 example, there were lots of people identified who were on
17 the street that night that had a different account than
18 the account given by Mr. Johnson about what happened,
19 very powerful stuff, really important stuff. Same is
20 true for the history of the decedent and his prior
21 interactions with people and his propensity for violence,
22 all of that very critical that you'd have to go explore,
23 but you're not going to get to that unless you go through
24 those boxes and look at those records.

25 Q. How about, how important is it to have an

1 investigator on your case?

2 A. I can't imagine in a case like this trying to do
3 it without an investigator. I mean, in part because you
4 do have some time problems, so there are dozens of
5 witnesses in this case that have to be, you know,
6 interviewed. And most experienced lawyers are going to
7 need the help of an investigator to help prepare those
8 interviews, to help do the initial interviews. A lot of
9 these people are going to have to be interviewed more
10 than once. Prior witness was talking about the need for
11 building trust with the client, that's absolutely true,
12 but you also have to build trust with the client's family
13 members. In our country, in our culture it's very hard
14 to talk about things like physical abuse, sexual abuse,
15 domestic violence, abandonment, neglect to the first
16 stranger who comes into the door. And so that requires
17 multiple interviews, it requires a lot of time and that's
18 why the ABA Guidelines insist that there be mitigation
19 specialists, investigators who can help with that.

20 You've got four investigations going on in this
21 case. You've got an investigation into what happened on
22 the street that night between Mr. Johnson, Mr. Fisher,
23 Mr. Neal and all of the witnesses connected to that;
24 you've got an investigation into how likely it is that
25 Mr. Neal did something that would have made the act of

1 the accused in this case not called capital murder, not
2 murder at all but something less than that; manslaughter,
3 self-defense, whatever, and that's a separate
4 investigation into the likelihood that Mr. Neal did
5 something based on prior conduct that would make
6 provocation, self-defense, et cetera, a reasonable
7 theory.

8 Then you've got an investigation going on into
9 the circumstances following that incident. Mr. Johnson
10 was initially charged with murder and then the murder
11 charges dismissed, that's a very powerful fact you want
12 to develop. Mr. Johnson flees the jurisdiction as soon
13 as he is released from the, by the police department.
14 That evidence of flight, that flight is very important
15 suggesting that he's not a credible witness. Mr. Johnson
16 gets to a juvenile facility and physically assaults a
17 guard, that history of violence is important to an
18 investigation that looks at the behavior of these
19 witnesses, these people post incident is important
20 because it help shape who do you believe; Mr. Johnson or
21 Mr. Fisher; what's reasonable? And that kind of
22 presentation, again, is going to require a lot of
23 investigation.

24 And then finally, the fourth area is this
25 incredibly difficult mitigation investigation, because

1 Mr. Fisher is not from Oklahoma City he's got history,
2 family history, personal history in several states;
3 Pennsylvania, New York, in multiple communities, that's
4 going to require a lot of time. But you're going to have
5 to get to Buffalo, you're going to have to get to
6 Harrisburg, you're going to have to get to places where
7 he's lived to document the steps in his life to
8 understand how he was out on the streets roaming around
9 at the time this incident took place, at a very young
10 age. And because he's younger you've got to rely on a
11 lot of other people to help put that together.

12 So all of those things, in my judgment,
13 absolutely require a lot of investigative assistance. I
14 just don't know how you could reasonably engage in
15 accomplishing all of that. Even if you were working on
16 the case full-time by yourself for a year it would be
17 very difficult.

18 Q. Well, we're talking about a very complicated
19 kind of process, is it something that you could
20 accomplish if you had a substance abuse problem?

21 A. Well, I guess that's the third thing I found
22 just really hard to reconcile --

23 MS. BOX: Judge, I object. That's speculative.

24 THE COURT: It is speculative. I'm going to
25 sustain it.

1 **MS. CHESLEY:** I think that he can talk about the
2 thought processes that are required.

3 **THE COURT:** I think we have beat that horse, and
4 through -- I'm going to sustain the objection.

5 **MS. CHESLEY:** Thank you.

6 **THE COURT:** And I'm sustaining it because I've
7 heard from Mr. Albert. I've got a clear view of how
8 it affected his... so to compound it from the
9 horse's mouth really doesn't add anymore fuel to it.
10 Mr. Albert has already said, he's talked about it in
11 detail and I, you know --

12 **MS. CHESLEY:** Well, Mr. Albert and --

13 **THE COURT:** And I recognize his expertise and I
14 know exactly what he's going to say, and I agree
15 with him that, you know, it has, just by
16 Mr. Albert's own words and then my 30 plus years of
17 practicing law I know that. So just, we can move
18 on. We've beaten Mr. Albert up enough in here.

19 **MS. CHESLEY:** Well, I do understand. And I
20 don't want to beat Mr. Albert.

21 **THE COURT:** I know.

22 **MS. CHESLEY:** But I think that Mr. Albert to
23 some degree and certainly Mr. Palumbo seem to think
24 that even when he's drinking he can go in
25 on-the-fly, he's such a good trial attorney he can

1 get past that.

2 MS. BOX: Your Honor, I object to her telling
3 what other people think. She has no more ability to
4 do that than he --

5 MS. CHESLEY: I believe that's what they
6 testified to yesterday.

7 MS. BOX: No, you were talking about what you
8 think they meant, not what he said.

9 THE COURT: That's sustained.

10 MS. CHESLEY: All right. We'll move on.

11 THE COURT: Thank you.

12 Q. (By Ms. Chesley) So what is the importance of
13 going through all these police records and the physical
14 evidence even in a case that's more than 20 years old?

15 A. Well, to get to a theory of the defense you have
16 to understand what all the information is. You can't
17 make informed decisions about how to present the case,
18 what witnesses to call, how to shape the voir dire
19 process, the pretrial motions, the arguments until you
20 have all that information in front of you and you, you
21 know, you think through it. I guess what's very
22 troubling in this case is that the work was made a lot
23 easier by the 12 volumes of work that had been done
24 previously and Mr. Albert simply did not access or take
25 advantage of that information.

1 Q. Now, you talked a little bit about Fadjo
2 Johnson, the other young boy that was involved with this.
3 Now, Mr. Fisher was a young man at the time that this
4 happened as well, wasn't he?

5 A. Yes, that's right. I mean, you're talking about
6 two teenagers involved in this incident.

7 Q. What would be the importance of looking into
8 that background of Fadjo Johnson?

9 MS. BOX: Objection, Your Honor. This is
10 repetitious. We've already gone through all of
11 this.

12 THE COURT: It is. It really is, but I'm going
13 to overrule it and I'm going to allow it.

14 THE WITNESS: Well, I'll just try to be quick.
15 My review of the record makes it clear to me that
16 the evidence pointing to Mr. Fisher's culpability
17 for capital murder largely came down to the
18 testimony of Fadjo Johnson, he is the critical
19 witness. And so you want to access and avail
20 yourself of all information that might make a jury
21 believe that his testimony on that issue is
22 unreliable, and so that would be the importance of
23 it, and there was a lot out there that would have
24 allowed Mr. Albert to do that, in part Mr. Johnson's
25 own vulnerability on these charges and that would be

1 the traditional and the critical component of
2 impeaching that evidence.

3 **Q.** (By Ms. Chesley) Mr. Fisher was not present at
4 his trial, how do you think that affected the case? And
5 it was Mr. Fisher's choice not to be there. How would
6 Mr. Albert, how should he have handled that?

7 **A.** Well, it's an incredibly unusual circumstance.
8 In all of my years of looking at lots and lots of these
9 cases I don't remember ever seeing a case where a client
10 was absent during an entire trial where the client had
11 not done something in the trial process itself that
12 created an absolute security risk. To me, you completely
13 undermine the ability to get an adequate verdict where
14 you have the unexplained absence of a client in a capital
15 trial. It just creates this presumption that the client
16 is either too dangerous, too indifferent, or too guilty
17 to matter to the process, and so you have one of two
18 options.

19 You require the client to be there and that's a
20 challenging... but something that lawyers sometimes have
21 to confront or you explain it. And what I guess I found
22 so troubling is that there's a really compelling
23 explanation. This is somebody with serious mental health
24 problems, with a long history of behavioral problems that
25 you could present. I mean, it would be an opportunity to

1 call Dr. O'Carroll, to call the competency doctors, to
2 call these people to explain why is it that you don't see
3 Mr. Fisher in the courtroom; cause he's schizophrenic,
4 because he has these problems. And those problems mean
5 that he can't protect himself in this process and so,
6 ladies and gentlemen of the jury, we're going to ask you
7 to protect his rights even if he's not there.

8 But to have it presented in the absence of any
9 explanation I find objectively unreasonable. It's asking
10 a lot for a juror to presume the innocence of someone
11 they never see, to presume and to find the humanity of
12 someone they never encounter and to hear nothing about
13 that that is explanatory. You can go either way if any
14 court or lawyer chooses to kind of do it this way, fine,
15 but then the lawyer has an obligation to advocate, to
16 make up for that, and that just didn't happen here. And
17 I think it really rendered a fair verdict, very, very
18 difficult. Very, very difficult.

19 You know, there are other concerns because
20 Mr. Fisher is the person who is advocating for himself in
21 this capacity, which is another problem, it's objectively
22 unreasonable to ask a client with his history to prove to
23 the Court he can or cannot be in court, and that's the
24 lawyer's job. The lawyer is supposed to be advocating
25 for Mr. Fisher in that capacity. And again, there was

1 none of that. The transcripts on that part of the trial
2 I found especially sad because Mr. Fisher desperately
3 needed an advocate. He needed someone to help present
4 who he is and explain him to these proceedings and there
5 was no evidence of that.

6 Q. Did you review the voir dire process in this
7 case?

8 A. Voir dire in a capital case is really important
9 because of the complexities of life and death
10 qualification. I think it was unreasonable for
11 Mr. Albert to not do something to create some foundation.
12 His voir dire was very short. There were very few
13 pretrial motions. We think of pretrial motions as in a
14 critical part in the death penalty process because you do
15 have to begin to advocate for your client to create an
16 environment where your client has a fair trial, I think
17 that was deficient. The cross-examination of witnesses,
18 there was so much that could have been done with the
19 medical experts about critical components.

20 State introduces a witness who testifies that
21 Mr. Fisher allegedly claimed to have raped the man in
22 this case. Well, there is physical evidence, medical
23 evidence that absolutely would have disputed that, that's
24 not developed. The prior history of the decedent, none
25 of that comes out during cross-examination. So at every

1 critical stage, it's my opinion, that there was deficient
2 performance; pretrial motions, voir dire,
3 cross-examination, advocacy for the client at the first
4 phase, and then certainly advocacy for the client at the
5 penalty phase.

6 Q. What about the requesting instructions and --

7 A. Again, there were no written instructions
8 prepared by Mr. Albert. In a death penalty case we train
9 lawyers that's absolutely critical, one because the law
10 in these cases is a little more complicated and judges
11 need that assistance, but two, your ability to get those
12 instructions is going to require some notice, some
13 planning and some thinking, so if you want a manslaughter
14 instruction or you want an accomplice instruction or you
15 want some lesser you've got to build that into the
16 presentation, and you need to know that, obviously,
17 before the trial begins, which is why we always ask that
18 those instructions be written, prepared, presented to the
19 Court, so you know before you're going into it whether
20 you have the opportunity to develop those defenses.

21 Q. Did Mr. Albert request, file any written
22 proposed instructions in this case?

23 A. None.

24 Q. Are you aware of whether there was an accomplice
25 instruction given?

1 A. There was not.

2 Q. And would Fadjo Johnson have been considered an
3 accomplice in this case?

4 A. Oh absolutely. I mean, anyone who is indicted
5 for murder and then admits to being present under these
6 circumstances is someone around whom you want to at least
7 create the consciousness that they are an accomplice and
8 there are a lot of ways of characterizing him as a
9 potential suspect.

10 Q. What about this pre-mortem photograph of the
11 victim in this case?

12 A. There was a lot of evidence introduced that we
13 would certainly instruct lawyers to challenge. You know,
14 the trial is about whether Mr. Fisher is guilty or not
15 guilty, is he culpable or not culpable, not do we feel
16 empathy for this person, that person, et cetera. And so
17 anything that distracts the jury from that is going to be
18 something that is objectionable. And so not objecting to
19 that, not objecting to a lot of the instructions and a
20 lot of the argument, all of those things will be part of
21 a calculus that evaluates the performance of counsel.

22 Q. On painting the picture of Fadjo Johnson as a
23 baby face kid, is --

24 A. You would, obviously, want to challenge that,
25 that he's innocuous, that he's unbiased if he is also a

1 victim and that's why his assaults of guards, his flight
2 from the community, his initial indictment and charge on
3 murder would all be relevant. I mean, he was more
4 actively engaged in prostitution on the streets than
5 Mr. Fisher was, according to the evidence available to
6 Mr. Albert.

7 Q. Does the fact that a state court may have, you
8 know, ruled on whether a state statute is constitutional
9 mean that counsel should just give up the challenge to
10 that?

11 A. No. Unfortunately, in death penalty cases the
12 law changes quite a bit. You know, initially there was
13 no requirement that there be voir dire of life
14 qualification, that is you could ask about automatic
15 death penalty jurors. Then the court says that there is
16 that requirement but you only get the benefit of that if
17 you've been objecting, the same is true for certain kinds
18 of instructions. And so in these areas, until the U.S.
19 Supreme Court says yes this is permissible conduct you
20 have to keep making those objections. All of the federal
21 circuits in this country are active on these issues and
22 are constantly passing judgments; the Tenth Circuit, the
23 Eleventh Circuit, the Fifth Circuit. And so you have to
24 kind of preserve those issues for that purpose. But also
25 the U.S. Supreme Court, this is the most active area of

1 the U.S. Supreme Court's docket, capital cases, they do
2 eight, nine a year.

3 Q. In fact, there was one that came out this week?

4 A. Constantly coming out. Another one just came
5 out this week on *Batson*. They've got several up there on
6 a range of issues related to capital litigation, and
7 lawyers have to know about them to know that they have to
8 be making these objections, because people like
9 Mr. Fisher are absolutely prejudiced if they don't do
10 that and the law evolves.

11 Q. How do you feel Mr. Fisher was prejudiced by
12 these failures that we've talked about?

13 A. It's clear that the jury was given nothing at
14 either phase. At the first phase, you know, this is not
15 a strong, in my judgment, case for capital murder. The
16 circumstances of the crime are very, very murky. It's
17 largely circumstantial and so a theory, I think, would
18 have absolutely created a reasonable probability of a
19 different outcome. It's not that it's impossible or
20 unlikely, it's quite likely that a reasonable juror would
21 conclude that this is not first degree murder. I mean,
22 Mr. Fisher was not, according to the evidence, out
23 prowling for someone to intentionally kill. He was
24 invited into the victim's home. There was clearly
25 evidence of solicitous behavior. There are circumstances

1 that really raised questions about who initiated what.
2 It's very, very, to me, it's a very triable case, it's a
3 very winnable case on the question of culpability at the
4 first stage. And then obviously --

5 Q. And that's actually from the worst case
6 scenario. The best case scenario with the two witnesses
7 who indicate that it might be Fadjo Johnson that went off
8 with the victim --

9 A. Absolutely, you could, as the Tenth Circuit has
10 pointed out, absolutely flip the testimony and the
11 testifying witnesses in this case and get the same
12 outcome for Mr. Fisher that Mr. Johnson got, vice versa.
13 At the penalty phase I think it's even more dramatic, but
14 there's a very compelling history.

15 Mr. Fisher has had a very tragic life that's
16 been characterized by a lot of abandonment, a lot of
17 abuse, a lot of neglect. He's developed mental and
18 emotional problems that have been well documented, that
19 are tragic and have some disturbing features that,
20 obviously, when you present them to a sentencer who is
21 thinking about the laws that applies to these issues
22 creates a reasonable outcome that they could consider and
23 impose a sentence less than death.

24 In my view it's a very strong mitigation case
25 the problem is it just wasn't presented at Mr. Fisher's

1 trial.

2 Q. Well, there were a number of witnesses who were
3 presented against him.

4 A. No question. I mean, one of the things that
5 happens, and I've had to deal with this myself, is when
6 you have a client who's been on death row for many years
7 they're developing an institutional history and
8 frequently that institutional history can become an
9 aggravating factor. In all of those cases you've got to
10 be prepared for that and to contextualize that
11 institutional behavior. It goes both ways. There's a
12 case, Skipper vs. South Carolina, that says when clients
13 do well that can be mitigating evidence, when clients do
14 poorly it can be aggravating, it was used as aggravating
15 in this case. So putting on the context of that is
16 really important.

17 Mr. Fisher is someone who has always struggled
18 with people who are disrespectful, people who he sees as
19 threatening, people who are menacing, circumstances and
20 conditions that are difficult and dehumanizing, and
21 that's been his story and his history for the last 23
22 years. So it's absolutely important that you
23 contextualize this.

24 The account of these guards is not a neutral
25 account. These are very difficult, violent, disruptive

1 conditions and until you contextualize that you're not
2 going to be able to do much. But even if that's not
3 something you can do a lot with it just increases the
4 need for mitigation and for compelling mitigation for
5 bringing in a lot of family members, a lot of people who
6 can speak to this; mental health people, experts, et
7 cetera, and unfortunately none of that was done.

8 Q. Would you say even an expert on that
9 institutional behavior would be important?

10 A. Standard operating procedure when you've got
11 somebody who's been on the row for these years is to have
12 an expert who will talk about the institutional
13 experience of the client.

14 Q. And when you know that those witnesses are going
15 to be presented it's not a surprise, you've been informed
16 that they're going to be presented, is that --

17 A. Absolutely. Yeah, you're on good notice that
18 you're going to need that.

19 THE COURT: Are you close to a place where we
20 can take a break?

21 MS. CHESLEY: I am. Yes, I believe we can.

22 THE COURT: Why don't we break for about 10
23 minutes, 10 or 15 minutes. Then I'll entertain your
24 objection, Ms. Box.

25 (A recess was here had at 11:28 a.m.)

AFTER RECESS

(Whereupon, the following transpired at 11:36 a.m.)

THE COURT: Are we ready to resume?

MS. CHESLEY: We don't have James.

(An off the record discussion was here had.)

THE COURT: Ms. Box, you had an objection?

MS. BOX: Yes, sir. Just that I think, again, it's ground we've been over.

THE COURT: I'm going to overrule it, but we --

MS. CHESLEY: Your Honor, I'm really going to cut to the chase right now.

THE COURT: Okay.

CONTINUING DIRECT EXAMINATION

BY MS. CHESLEY:

Q. Based on all the information that you've been provided in your review of that record and the summary of the testimony presented in this trial that you have looked at, have you reached conclusions regarding this case?

A. Yes, I have.

Q. And what are those?

A. That Mr. Albert's conduct was objectively unreasonable, that his performance was deficient at the first phase of the trial and prejudicial and that his

1 performance at the penalty phase was also deficient and
2 prejudicial and that constitutes ineffective assistance
3 under the Sixth Amendment.

4 Q. How was it prejudicial?

5 A. The prejudice at the first phase was by not
6 developing the kind of attorney-client relationship that
7 you need to develop evidence. He was not able to develop
8 the kind of evidence that was required. He couldn't
9 present a defense for Mr. Fisher based on fact and
10 witnesses because communication was so limited and
11 constrained. It was also deficient because he didn't
12 develop reliable evidence, available evidence to help
13 explain Mr. Fisher's absence from experts who testified
14 at the competency hearing, experts who had previously
15 evaluated Mr. Fisher, experts who could have again
16 contextualized his absence. It was prejudicial in the
17 sense that he did not create a meaningful option for the
18 jury of a verdict other than first degree murder. They
19 were forced to choose between first degree murder and
20 acquittal, and in a case like this where there is very
21 compelling evidence to support lessers that required
22 written instructions, that required evidence and
23 witnesses who were available and had been identified, I
24 think that was deficient performance and highly
25 prejudicial.

1 I think there is a reasonable probability based
2 on the known evidence that a jury could have found
3 Mr. Fisher not guilty of first degree murder.

4 At the penalty phase the same deficiencies
5 undermined his effectiveness. He couldn't develop the
6 kind of mitigation. The lawyers didn't know basic things
7 like whether Mr. Fisher's father was still alive.
8 Mr. Fisher's father presented very compelling evidence.
9 Siblings were available to present compelling evidence.
10 Experts, even besides Dr. Hand were available to present
11 very compelling evidence who had completed successful
12 interviews with Mr. Fisher about his mental health
13 problems. All of that, I think, was highly prejudicial
14 and there's a reasonable probability that a jury would
15 have returned a verdict of life had that been presented.

16 **MS. CHESLEY:** No further questions.

17 **THE COURT:** Cross-examination.

18 CROSS-EXAMINATION

19 BY MS. BOX:

20 Q. Sir, you said that you were provided with
21 documents about what occurred in this case; is that
22 correct?

23 A. Yes.

24 Q. And what documents were those?

25 A. I received the trial transcript, I received the

1 appellate record, pleadings filed to the appellate
2 courts. I received the pleadings that were filed in this
3 court, affidavits that were attached to those pleadings.
4 I received the records from the post conviction process
5 prior to this case. I received records relating to the
6 pretrial process relating to the trial and the competency
7 hearings, et cetera, and then I received, I had the trial
8 transcript from the first case and the litigation around
9 that issue, both the issues in that case as well.

10 Q. Well, one thing that puzzles me is when you were
11 talking about the Defendant's confession you said that it
12 was alleged that he confessed.

13 A. Well, I guess that may have just been the
14 defense attorney in me. But it was a statement by a
15 third party where they're quoting something that he said
16 and I guess the circumstances of that are always
17 critical, the reliability of that is always critical and
18 where in this case there was no testing of that by
19 Mr. Albert it leaves, I think, really important questions
20 unanswered and that's what I mean by alleged, that as you
21 test statements by third party people that are not signed
22 by the client, that are not deemed entirely reliable
23 based on the Miranda standards, et cetera, through an
24 examination of those witnesses and that didn't happen
25 here.

1 So we can't, in my judgment, fully rely on those
2 statements until that testing has taken place, and that
3 didn't happen in this case.

4 Q. Well, that third party was a police officer,
5 correct?

6 A. It is correct but that in no way, in my
7 judgment, increases its reliability in a capital
8 prosecution.

9 Q. Well, how do you convince a jury that a police
10 officer would get up on the stand and perjure himself?

11 A. Well, I wouldn't -- I don't think it's an either
12 or to be perfectly honest. I think a lot of witnesses
13 motivated by results say things that are less reliable
14 without intending to perjure themselves. But at the same
15 time you've got to do the examination that test the
16 authenticity, the reliability, the veracity of that
17 statement even if it was said, and I guess that's what
18 didn't happen here. The statement about raping the
19 defendant.

20 We know from physical evidence and the State has
21 never asserted that there was a rape in this case and the
22 medical evidence, the Medical Examiner's report which
23 found no sperm, which found no evidence of that kind of
24 sexual assault would have been really important to
25 utilize in testing whether that assertion was something

1 that the jury should actually assign significance to, and
2 that didn't happen here. But once you throw it out there
3 it's very inflammatory, it's very prejudicial but not
4 supported by the evidence and not very reliable, and
5 that's something that the jury can decide after it has
6 that evidence but in this case they didn't have that
7 evidence and so that's what I found to be deficient and
8 problematic.

9 Q. Where did you find it was ever alleged the
10 Defendant was raped?

11 A. There's a statement introduced by a witness
12 saying that Mr. Fisher claimed to have "raped the honky"
13 or something, words to that effect. So word "rape" was
14 used to assign culpability to Mr. Fisher by a witness and
15 it puts in the mind to the jury that this was something
16 that was done by Mr. Fisher, so you've got to challenge
17 that. Once it's out there you can't kind of claim well
18 that's not what we're really trying to prove. It's
19 prejudicial. And so you want to then present evidence
20 that's available to you to suggest that whether he said
21 it or not it's not true, and that didn't happen here.

22 Q. Are you talking about Fadjo Johnson?

23 A. Yes. No. I'm talking about a witness who gave
24 a statement allegedly by, from Mr. Fisher, that was made
25 by Mr. Fisher to a third party.

1 **Q.** Did you know that Mr. Fisher is always talking
2 about raping people?

3 **A.** Well, I know that Mr. Fisher --

4 **MS. CHESLEY:** Objection, Your Honor. There is
5 no evidence --

6 **THE COURT:** Overruled. Overruled.

7 **THE WITNESS:** I know that Mr. Fisher makes a lot
8 of statements against his interest all the time, but
9 in my judgment that's all the more reason to
10 contextualize those statements. The reason why you
11 want the jury to understand you can't take that as
12 an admission of guilt that implicates his
13 culpability in this crime, to me that's a helpful
14 fact, frankly.

15 **Q.** (By Ms. Box) You think it's helpful that he
16 makes up lies and he is abusive to people?

17 **A.** Well, I don't think it's helpful or useful to be
18 abusive to people, but to the extent that he's made a
19 statement that we think is not true, that the jury should
20 not rely on that's against his own interest I think it's
21 useful to explain that that statement is not the only
22 statement because it suggests rather a point of view, a
23 perspective, a disability, an illness, this is someone
24 who is not capable of reliably protecting themself from
25 this process. And so that's the way it gets used.

1 Making statements against self interest is
2 something that is frequent in cases involving clients
3 with emotional and mental health problems, we see it all
4 the time. You have to document that those statements
5 don't mean the person is actually culpable or
6 responsible, it means that they're mentally ill and
7 that's how you use them.

8 Q. Well, but in Mr. Fisher's case he has always
9 been consistent about that for the last 20 years.
10 Everybody he comes into contact with all he wants to talk
11 about is he's angry at the world, totally he's angry at
12 the world.

13 A. Again, I don't find that surprising. He is
14 angry at the world and he has kind of reason for feeling
15 that way. He's not alone. There are a lot of people
16 with his background, his pathology, his experiences that
17 get demoralized to the point where anger is the primary
18 manifestation. I've represented lots of those kind of
19 folks. They require a lot of attention, they require a
20 lot of help but it's a disability, it is a state of mind
21 that frankly is where he is. And so you have to kind of
22 take that and do something with it. And, unfortunately,
23 you know, particularly in capital cases, you know, it's
24 just not uncommon to find people who have an orientation
25 that is very frustrated, very angry, marginalized,

1 complicated by mental illness and schizophrenia and
2 disability. It's a difficult situation. These cases are
3 hard, but that's the norm rather than the exception, in
4 my experience. And so you take it and you do something
5 with it to try to protect their interest.

6 Q. Well, but the jury in this case knew that that
7 statement about rape was not truly what happened because
8 the Defendant in his confession detailed what happened?

9 A. Well, again, I think it's asking a lot of a jury
10 without evidence to take one statement and use it to kind
11 of discount another statement without some advocacy. In
12 the absence of that I think you're right that that could
13 have been an outcome, but without advocacy I don't think
14 it's, in my judgment, possible to presume that the jury
15 understood that and knew that, because there was nothing
16 done to kind of get them to that point, and that's the
17 reason why you want a lawyer in court doing strong things
18 to protect the client's interest.

19 Q. Yes. But one doesn't want an advocate that
20 alienates the jury, does one?

21 A. No, you don't want to alienate the jury.

22 Q. And so if a lawyer stands up and every single
23 witness that speaks on the stand, if he stands up and
24 tries to portray them as a liar that might create
25 hostility between himself and the jury?

1 A. Well, it might but I think it really depends on
2 whether their testimony is truthful or not. Obviously,
3 defense lawyers frequently have to challenge witnesses
4 that are called by the State. You do it in a way that
5 attempts not to alienate the jury but protects your
6 client's interest. You don't not impeach or
7 cross-examine witnesses on a fear that that makes you
8 look bad. You do it in a way hopefully that that doesn't
9 create alienation. There are lots of witnesses in this
10 case where that wasn't even an issue. There were some
11 witnesses as I recall that weren't cross-examined to
12 create a consciousness on the part of the jury that
13 alienation was not the goal. But there are critical
14 witnesses; Mr. Johnson, Medical Examiner, some of these
15 folks where I don't believe you have the option of saying
16 I'm not going to examine, I'm not going to cross-examine.

17 Q. Sir, in regards to the Medical Examiner, are you
18 referring to the report that talked about not finding any
19 spermatozoa?

20 A. Yes, that's one of the points that came out of
21 that report, yes, that's the report.

22 Q. Well, sir, that was explained. Mr. Albert
23 during that trial said that all that proved was
24 Mr. Fisher had not achieved ultimate sexual
25 gratification.

1 **A.** I guess the problem that I had with it he didn't
2 present the whole report that actually allowed the jury
3 to see the other problems with this evidence. He only
4 had that witness testify about that, didn't get the whole
5 report in, wasn't able to use that report to effectively
6 rebut any notion that something more severe had taken
7 place, didn't use a report to establish that there
8 weren't injuries or bloodstains or other things that
9 suggest the kind of struggle that would be consistent
10 with a more violent assault. All that is just the way in
11 which you contextualize this incident consistent with
12 provocation with some lesser and not consistent with
13 first degree murder.

14 **Q.** Yes, sir. But in this particular case the
15 victim was virtually decapitated.

16 **A.** Well, again, that's a characterization that, you
17 know, a prosecutor could make but I think there is strong
18 evidence to challenge that, to suggest that the... you
19 would try to suggest that the injuries were not the
20 conduct consistent with first degree murder and whether
21 the jury believes that or not is up to the jury, but
22 there is certainly evidence in that report to suggest
23 that a motivation that was provocation was very powerful.

24 **Q.** The man had defensive cuts all over his hands.

25 **A.** Again, all of that is something that a State

1 could argue, but again, there's always another side.
2 This is not a case where there's a weapon involved that
3 Mr. Fisher is bringing into this place, it's a bottle.
4 And yes, you can do, obviously, horrible lethal damage
5 with that, but it creates a different kind of story
6 narrative than the person that's coming into a home with
7 a knife, with a gun and using that in a way that's
8 clearly designed to create an intentional killing.

9 Q. Well, I'm sure you know probably better than
10 anyone intent only takes an instant.

11 A. Well, that's right, and that's why it's so
12 important to kind of define and present all of the things
13 that are going on in this environment, both with
14 Mr. Fisher's mental state and emotional state and with
15 the likely provocation to evaluate whether that instant
16 was actually accomplished.

17 Q. Well, Mr. Fisher, by his own statements, had
18 said that he was a hustler, had been hustling the streets
19 for quite some time. And we know that he was picked up
20 by Mr. Neal just on a chance encounter, and however they
21 both knew what was going on, what kind of transaction
22 they were making, in other words Mr. Neal was going to
23 take Mr. Fisher to his residence with expectations of
24 having sex and once he got there they did have sex, had
25 consensual sex?

1 A. I guess, again, I don't know that there's
2 anything in dispute about that. I guess the question in
3 my mind as a defense advocate would be is that the
4 source, the nature of the sex and its consensual features
5 is coming from Mr. Johnson who arguably has a reason to
6 lie, so you just want to explore that carefully. But I
7 don't think there's any credible dispute that Mr. Fisher
8 was picked up by Mr. Neal, that there was a sexual
9 dynamic to that, that he was brought to the house,
10 invited to the house by Mr. Neal, that there was an
11 expectation of sex, that there was time together. I
12 don't think those facts are in dispute. But I also don't
13 think they're dispositive of first degree murder in a way
14 that you don't challenge what that's, where that's
15 heading, where that could go, whether there's going to be
16 provocation that could then make this violent act
17 something other than first degree murder.

18 Q. Well, the provocation that I guess has been
19 alluded to is perhaps you were told that the victim
20 Mr. Neal became physically aggressive when he wanted to
21 have sex.

22 A. Well, there were witness statements that
23 supported that, where that accusation was made, that
24 there was a history of that and that's certainly relevant
25 in a case like this.

1 Q. Yes. Mr. Neal was portrayed as being persistent
2 about his demands and he would get more and more and more
3 pushy verbally if someone did not acquiesce, however --

4 **MS. CHESLEY:** Your Honor, I'm going to object.
5 Ms. Box is doing the testifying here, and it's not
6 just the leading question she's putting in facts
7 that are not necessarily in evidence. It's her own
8 view of what happened at trial and it's not
9 necessarily consistent with the record.

10 **THE COURT:** Well, I think Mr. Stevenson has
11 reviewed the record. I think he knows pretty much
12 what -- if there are inconsistencies in his mind as
13 to what the District Attorney is talking about then
14 I think he will correct that. So it's overruled.

15 Q. (By Ms. Box) As I was saying, there were people,
16 most especially a close relative of his that when the
17 issue came up as to whether or not Mr. Neal would ever
18 resort to violence if there was a fight would he join in
19 a fight they said absolutely not he would back off.

20 A. I guess there are witnesses that could have been
21 called, a half dozen. There were relatives, there was a
22 couple, there were people this man met at gay bars, there
23 were witnesses who could be called to support the
24 proposition that Mr. Neal was someone who could become
25 aggressive, violent, had a hard time with no and that

1 when combined with alcohol and in a sexual situation he
2 became a difficult person. If that's all you prove
3 you've proved something really important in a case like
4 this for the jury to believe that Mr. Fisher didn't go to
5 that house with the intent to kill anybody, didn't want
6 to hurt anybody. He was there for this encounter but
7 things got ugly and if things got ugly in that house and
8 he felt threatened with his history that there could be
9 violence, but that violence is not the kind of first
10 degree murder that we punish with the death penalty, it's
11 the kind of violence we recognize as criminal, we hold
12 the person culpable, but it's not first degree murder.

13 Just with those witnesses I think you're in a
14 position to make an argument to the jury that says do not
15 convict my client of first degree murder. Now you've got
16 to do some work previous to that you, you got to get your
17 instructions together, you got to file some pretrial
18 motions, but you're beginning to make a defense. I'm not
19 disputing the limits of some of that evidence, but the
20 problem with this case is Mr. Fisher's lawyer,
21 Mr. Albert, presented none of this. Those witnesses
22 didn't testify. None of that evidence came in.

23 The opportunity to present that evidence with
24 cross-examination with Detective Andrews that didn't
25 happen either. So the jury didn't have this perspective

1 on Mr. Neal, the perspective that was necessary to
2 support. The Judge didn't even give the lesser because
3 of the absence of that evidence. That's why you do that.
4 And you will argue one thing, the defense lawyer will
5 argue the other, the jury will have to decide. What's
6 problematic in this case is the jury didn't get to decide
7 because they didn't hear but that one side and I think
8 that's the problem here.

9 I'm not suggesting that you absolutely will win.
10 You don't automatically win because you have these facts.
11 There are some difficult facts for Mr. Fisher to confront
12 but the standard, in my view, is there a probability and
13 I think there is, and in the absence of that evidence I
14 think it's unquestionably deficient performance that it's
15 prejudicial.

16 Q. Well, the Defendant, as I said all they were
17 doing is having a verbal dispute but the Defendant when
18 he got frustrated picked up a wine bottle, broke it off,
19 stabbed the victim in the neck several times and then
20 twisted the wine bottle in his neck. The entire attack
21 was estimated to have lasted two minutes. It takes one
22 moment, he had 120 moments.

23 THE COURT: Hold on.

24 THE WITNESS: Again --

25 THE COURT: Is that a question? I mean, what

1 is -- Was that a question or?

2 MS. BOX: Yes, it is a question.

3 THE COURT: What's the question?

4 Q. (By Ms. Box) Well, the question is he certainly
5 had enough time in two minutes of repeatedly stabbing
6 someone, as I said before virtually decapitating him, to
7 stop but he didn't. He had that intent every single
8 second, the intent to kill. Don't you think that that
9 could be determined, too?

10 A. I guess I don't accept your facts. You're
11 relying on facts that are entirely the presentation of
12 Fadjo Johnson, who I think there's a real question to
13 doubt that. The forensic evidence certainly doesn't
14 support how long this incident took place, and so it's an
15 argument about what could have happened. But in my
16 judgment, no, that's not a fact, that it's highly
17 contested whether that was the circumstance of this
18 incident.

19 We know that Mr. Neal died. We know what caused
20 that death. We know that he was hit with a bottle, but
21 the dynamics around that we only know from Mr. Johnson
22 who I think becomes a critical witness that you have to
23 cross-examine, which Mr. Albert didn't do, in my
24 judgment, and that's the only way you get to the truth.
25 We don't know. That come from Fadjo Johnson. It's not a

1 clear fact until you present that out there. You give
2 them theories and then the jury decides. But no, there's
3 nothing about the record that absolutely establishes that
4 the time of crime is X in a reliable way and that intent
5 absolutely had to be established to accomplish that.

6 You take a gun, you put it in the back of
7 somebody's head, you shoot them four times, yes. Taking
8 a bottle and hitting somebody over the head, even if
9 you're trying to cut them with it is a very different
10 circumstance, and you argue about it, you may not win but
11 you've got stuff to argue with. That didn't happen here
12 because of lack of evidence. And that's the reason why
13 you wanted the medical stuff, you wanted people to kind
14 of look at that more carefully, and Mr. Albert just
15 didn't do that.

16 Q. But the Defendant was not hitting him over the
17 head, he was stabbing him in the neck. Now, isn't that
18 somewhat the same as someone who intentionally shoot
19 someone four times?

20 A. No, not in my judgment. No. And again, I don't
21 accept that we absolutely know what the Defendant did.
22 We know only what Mr. Johnson asserts. That's all we
23 know. And even what Mr. Johnson asserts, in my judgment,
24 does not so clearly demonstrate intentional murder that
25 it would be folly for a lawyer to develop an

1 investigation that attempts to establish that this is
2 something other than first degree murder. I think it's
3 quite the contrary.

4 Q. But Fadjo Johnson told that story before anyone,
5 well, certainly he even know what the autopsy results
6 might be. So don't you think a jury might question why
7 someone could accurately depict a crime and have that
8 evidence corroborated by an independent professional such
9 as the medical examiner?

10 A. That's not my recollection. I mean, my
11 recollection is that Mr. Johnson gave very inconsistent
12 accounts of what happened, first denying any involvement,
13 first implicating Mr. Fisher only generally. His
14 testimony was not consistent.

15 Yes, I do think that there are reasons for the
16 jury to doubt that. He was charged with murder. He's
17 then released and he flees the jurisdiction. They had to
18 go get him and bring him back and hold him. I think
19 those are very powerful facts. He's got a history of
20 violence. Why not Mr. Johnson as the source of all of
21 this conduct? Mr. Johnson is not going to say I did it.
22 If he's trying to protect himself he's going to say James
23 Fisher did it. All of those are reasonable questions for
24 a jury to explore and think about in assessing guilt.
25 They're not definitive facts that are etched in stone

1 somewhere that we have to just take and accept. That's
2 the heart of the trial.

3 And my only point is that unless you do the
4 investigation, unless you present an evidence, unless you
5 present a theory we can't get to a fair judgment. They
6 may conclude at the end of it that that's what happened,
7 but in the absence of a full presentation, a fair
8 presentation of what else might have happened, what could
9 be going on that's not dependent on Fadjo Johnson's
10 testimony we don't get that reliable outcome, and that's
11 the law.

12 Q. Yes, but the Defendant fled the jurisdiction
13 that same night, sir.

14 A. Makes them equally potential culpable suspects
15 in this case. They both did things that suggest
16 culpability, both of them.

17 Q. But Mr. Johnson is the person who took the TV,
18 went through the victim's pockets, took what was ever in
19 there and took the victim's car.

20 THE COURT: You mean Mr. Fisher?

21 MS. BOX: Yes. I'm sorry. Mr. Fisher.

22 THE WITNESS: Again, all of that is according to
23 Mr. Johnson, right? And so it gets down to, as the
24 Tenth Circuit recognize, who do you believe? And
25 again, my only point is not that you can't believe

1 that but that you need the other story before you
2 can make an informed decision about what to believe,
3 and that didn't happen here.

4 The evidence by these witnesses who weren't
5 called suggest that Mr. Fisher got out of the car
6 when Mr. Johnson got in the car, that Mr. Fisher was
7 on the passenger side, that Mr. Fisher was not the
8 person who was connected to this decedent. All of
9 that suggest that Johnson is as likely a suspect.
10 So it's a question of who do you believe, but it's
11 not a question of we got it on video, these are
12 objective facts, you have to just deal with it and
13 accept them. And that's, you know, obviously, why
14 we have an adversarial system. You put out this
15 other theory. The other theory then is presented to
16 the jury, the jury decides. You can't get to a fair
17 decision is my only point, until you have that other
18 side, and that didn't happen here, and that's the
19 problem.

20 Q. (By Ms. Box) Well, I think the other side in
21 this particular case was the fact that the Defendant when
22 he was first encountered and Mirandized, properly
23 Mirandized and was asked did Fado Johnson do this, he
24 said no the kid didn't do it, I did it. He just happened
25 to be there.

1 A. Well --

2 MS. CHESLEY: Objection. That's not the --

3 THE COURT: Overruled. Overruled. And
4 objection is noted.

5 THE WITNESS: Counsel, now, it is not my
6 recollection that that was the evidence presented.
7 Mr. Fisher made statements to try to exculpate
8 himself and Mr. Johnson initially. There were
9 statements made that ultimately were more
10 inculpatory but none of that precludes the
11 development of the kind of defense that I'm talking
12 about.

13 There was testimony given at the last trial by
14 Mr. Fisher, it was what appellate courts observed as
15 who do you believe. That was the presentation. And
16 so, you know, none of that precludes the
17 presentation of a defense. There are times
18 obstacles but I, in all of my years, never had a
19 case where I said well, there is no defense here.
20 And there's a lot of cases with a lot of very strong
21 evidence of guilt, dramatically stronger than what
22 we have in this case and where we've had to come up
23 with a defense. So I guess I'm not sure.

24 Yes, there are problems with the case. There is
25 evidence implicating Mr. Fisher. There is evidence

1 inculcating Mr. Fisher and you have to deal with all
2 of it, but you put on a defense and if you can't put
3 on a defense you find somebody who can. You don't
4 say gosh, Fadjo Johnson said he killed him. Case
5 over. You put on a defense and you challenge that.
6 And in a case like this there's so much stuff to use
7 to challenge it, even accepting those facts. Was
8 there provocation? Because if there was provocation
9 then perhaps he is not guilty of first degree
10 murder.

11 Was there mental health and disabilities? Was
12 there voluntary intoxication? Is this accomplice
13 testimony that you have to discount in a certain
14 way? All of those things are really important but
15 they didn't happen in this case. You may get to
16 this conclusion that we get to in this case, but in
17 the absence of that presentation I don't think you
18 have a fair trial, I don't think you have adequate
19 performance by counsel, I don't think you have the
20 kind of reliability that the law requires.

21 Q. (By Ms. Box) You told the Judge earlier that you
22 have not spoken to Mr. Albert about this case, correct?

23 A. That's correct. And I just want to -- not that
24 I'm aware of. I mean, I do a lot of training so if I
25 encountered him at a training, you know, five years ago

1 or something I just wouldn't... not that I'm aware of. I
2 certainly didn't talk to him the last... since I've been
3 involved in this litigation.

4 Q. Well, Mr. Albert testified in regards to what
5 you said about trying to do something to show
6 provocation. Mr. Albert testified that his strategy was
7 to try and get a manslaughter instruction, that was his
8 strategy all during the first part of the case. So that
9 was a good strategy, sir, wasn't it?

10 A. Well, it's a good strategy but it's not a good
11 strategy unless you investigate and come up with evidence
12 to support it. It's not a good strategy unless you do
13 the work to make the manslaughter charge available, which
14 he didn't. It's not a good strategy unless you go get
15 these witnesses that were available and present them. He
16 had mental health experts who could have given evidence
17 about Mr. Fisher's state of mind that would make
18 manslaughter more likely an outcome, but he didn't do
19 that. You can't just go into court and say I want this
20 and expect the judge to give a charge, which the judge
21 didn't do here, and you can't expect the jury to accept
22 it. You've got to prove it. I mean, it's a case. You
23 can't just come in and say this is what I want you to
24 think. You prove it.

25 And there are witnesses that you use to prove

1 it. That's the problem, it's not that that's a bad
2 strategy, it's just that it's not really a strategy
3 unless you implement it. It's an idea. It's an idea
4 that's presented kind of in court for the first time
5 because none of the pretrial pleadings, none of the
6 pretrial advocacy is designed to support that, and that's
7 the problem with this presentation. You've got to
8 support these things.

9 He could have said he's not guilty by reason of
10 insanity. He's mentally ill. But until you present some
11 evidence to support that it's not a strategy, it's just
12 an idea. And you're not going to be very persuasive
13 until you have that idea expressed. And I guess that's
14 the problem here, not that he said I want a manslaughter
15 outcome, that's totally de-sensible but it's not
16 meaningful unless it's supported by evidence and
17 presentation and investigation.

18 Q. Well, yes, sir. But Mr. Albert also said that,
19 told the jury that the Defendant was extremely mentally
20 ill, and I think that was supported in the record in this
21 particular trial by the testimony about his upbringing.

22 A. Well, you're talking about testimony that was at
23 the penalty phase. The jury didn't hear any of that
24 until they had already pronounced Mr. Fisher guilty, so
25 that's not helping him on the culpability question. He

1 did have available evidence to him. The people who had
2 just evaluated him previously in the competency hearing
3 had given testimony that he is schizophrenic, that he
4 have severe mental illness, that he couldn't work with
5 lawyers. All of that would have been really important if
6 he was trying to get the jury to understand that, and he
7 just didn't use it.

8 Dr. O'Carroll was available, Dr. Hand was
9 available. There were lots of experts who could have
10 helped make that. Having the Defendant's mother testify
11 at the penalty phase is not, in my judgment, going to
12 establish mental illness in the way that we think about
13 mental illness in capital cases. You need experts, you
14 need documentary evidence. You don't need family
15 anecdotal testimony for that point in a way that's going
16 to be persuasive. So if that's your goal you've got to
17 do a lot more. You can't, again, just say it.

18 Q. Well, in this particular case those people that
19 might have painted Terry Neal as a violent person, the
20 witnesses that perhaps you're saying he should have gone
21 out and gotten, they were all family members or very
22 close friends of Mr. Neal. Now, what is the likelihood
23 that they would have come into the courtroom and said no
24 my loved one, my good friend, he's the one that caused
25 this?

1 A. Well, again, you can't make a decision about
2 that until you talk to them. Again, my problem is, is
3 that Mr. Albert didn't talk to them, he didn't have time
4 with them. He's presuming things the way you're
5 presuming things, without any knowledge. You go and talk
6 to them and then you make a judgment. Maybe they know
7 other people who are not family members. Not all of
8 those witnesses were family members.

9 The bartender at the gay bar, the people who
10 knew him in some of these encounters, there were other
11 hustlers who could identify him. All of those people are
12 out there, and even if they can't testify maybe they can
13 identify someone who can. The idea that you could
14 develop a record on this is quite available. There are
15 even family members who concede that some of these
16 behaviors exist, and that was available even with the
17 detective who he never cross-examined, who had talked to
18 Mr. Neal's wife about some of this.

19 Yes, they're family members but they're
20 acknowledging certain behavioral problems. Doesn't mean
21 that they don't love him. Doesn't mean that they don't
22 care for him. Mr. Albert didn't have to prove to the
23 jury that they don't love or care for him, they just had
24 to prove that this propensity, this history of violence
25 was a real feature to this man's existence, because

1 that's all we're trying to establish here.

2 But bottom line on that is you don't make those
3 judgments until you go and investigate. You can't make
4 informed decisions about whether to use them or not until
5 you've developed it and Mr. Albert didn't do that here.

6 Q. So Mr. Albert when he got this case was
7 presented with a man who had already been convicted of
8 this crime back in 1984 and had been in the system, so to
9 speak, over 20 years, and as you said that is when he
10 developed this institutionalization state that caused him
11 to be destructive, aggressive, and really be his own
12 worst enemy; is that correct, sir?

13 A. Well, no. I guess my characterization of it,
14 Mr. Albert got a case where Mr. Fisher had been illegally
15 convicted and sentenced to death in 1983. The upside is
16 that you've now got a lot of information to understand
17 exactly what the case is. Before Mr. Fisher was put into
18 death row, the facilities here, he had a history of
19 mental illness, emotional problems that had to be
20 addressed, they're certainly exacerbated by time on death
21 row, that you have to deal with. But that, to me, that's
22 the nature of the case that you're going to have to deal
23 with. There's nothing about that that forecloses a life
24 verdict. I think this is a very triable case. I think
25 it's, in my own opinion, it's a very winnable case.

1 I don't think -- I think Mr. Fisher is someone
2 about whom you could absolutely say despite his mental
3 illness and disability he should not be executed. This
4 is -- you know, he is more than this offense and that
5 there is something there that would justify a sentence
6 less than life. I also think this is a case about which
7 you could say this is not first degree murder that
8 deserves a capital conviction, that there are
9 circumstances around it that make it a compelling case
10 for something less than that. And there's nothing about
11 his time on death row, there's nothing about the prior
12 conviction in my mind that undermines your ability to
13 effectively advocate for him at both phases. If anything
14 I think that history and that record make successful
15 advocacy slightly more likely.

16 And I've done some of these retrial cases and
17 there's a lot more to work with under those circumstances
18 that I think can be helpful.

19 Q. Well, and you talked about the attorney-client
20 relationship, you said that that's very important.

21 A. It is, yes.

22 Q. And given the fact that this defendant was in
23 such a frame of mind that he on a daily basis was brought
24 into the courtroom, asked if he would stay and be present
25 every single day and he refused, that's a very hard

1 barrier, isn't it, sir?

2 A. It's a challenging barrier, but I have no doubt
3 that Mr. Fisher can work effectively with lawyers who
4 work effectively with him. I've observed him sitting in
5 this courtroom all morning totally, in my judgment,
6 appropriately. In the prior experience I had with this
7 case that was his demeanor and participation. He's
8 effectively and successfully worked with counsel in these
9 proceedings and prior proceedings. I don't think
10 Mr. Fisher is such a flawed damaged person that no lawyer
11 can effectively represent him. He has been effectively
12 represented in some of these proceedings.

13 A lawyer who threatens him, says I'm going to
14 hurt you, threatens to beat him up is not such a lawyer.
15 But I don't think that's unique to Mr. Fisher. I think
16 that's unique to -- I mean, I think it's true for most of
17 us, but he's clearly someone who can be effectively
18 assisted by counsel and can, you can work with. It's
19 challenging. His disabilities are not somebody else's.
20 I've got clients who can't speak coherently, who got
21 language issues, got all kinds of issues. But you don't
22 not represent them effectively because of that, you just
23 work around it. And I think there's no evidence, no
24 doubt in my mind he is someone with whom you can work
25 effectively even though there are going to be challenges

1 and obstacles and he's going to work against his
2 interest, most, frankly, in my experience, clients do
3 from time to time.

4 Q. Were you present in the courtroom when Dr. Hand
5 testified this morning?

6 A. I was, yes.

7 Q. Do you recall me asking him how long it might
8 take to break the barriers down with Mr. Fisher and he
9 said quite a long time maybe never?

10 A. I heard that testimony. Actually, I don't agree
11 with that. I mean, my own experience, and I think the
12 record in this case shows that many experts have
13 effectively evaluated Mr. Fisher, gotten very powerful
14 and compelling mitigation stories, several in the course
15 of just this case. Dr. O'Carroll did it, Dr. Powers did
16 it, the competency experts did it. You know, I don't
17 think, I don't think actually this was a case where even
18 with consultation with Mr. Fisher you couldn't put
19 together something compelling. Without spending any time
20 with Mr. Fisher the documentary history is so compelling
21 you could make a strong mitigating case and so I guess in
22 that respect I don't think that's possible.

23 Getting the client to trust you to the point
24 where they'll follow you anywhere is not the goal. You
25 just want them to be able to talk to you about their

1 life. To me it is revealing and helpful that he's
2 frustrated. Okay. Well, what does that mean? Even if
3 he's not talking about his history he's talking to you
4 about something that is useful for the mitigation
5 purpose. So I didn't hear Dr. Hand's testimony to mean
6 that you could not effectively work with a client like
7 this or present compelling mitigation. I didn't hear
8 that.

9 Q. Mr. Albert had 180 days only to forge that kind
10 of a relationship, and given the fact that in the
11 beginning they got off to a good start and Mr. Albert and
12 he were communicating and then things started to go
13 downhill because the Defendant refused to talk about his
14 background, his past, anything of that nature, all he
15 would do is talk about his animosity toward other people
16 and the court system.

17 A. I'm confused. Are you talking about Dr. Hand or
18 you're talking about Mr. Albert?

19 Q. Mr. Albert.

20 A. Mr. Albert? Yeah. I guess my recollection is,
21 is that it's about two months after he gets appointed
22 that this incident in court takes place where he
23 threatens to hurt Mr. Fisher and threatens to beat him
24 up. In my judgment that was a defining moment in the
25 attorney-client relationship and it was going to be

1 difficult after that moment to recover in any meaningful
2 way to the kind of trust relationship that we're talking
3 about. That was almost a year before the trial, and so
4 the constrain, in my judgment, yes, you had a client who
5 was difficult but you're not going to solve that
6 difficulty by threatening to whip him, that's just not
7 going to help.

8 Q. Doctor, if you had taken that case how long a
9 period of time do you think it would have taken you to
10 establish such a relationship with Mr. Fisher?

11 A. Well, until I start working with Mr. Fisher it's
12 hard to know that. But I've noted that his appellate
13 counsel and post conviction counsel have in a reasonable
14 period of time developed working relationships. I would
15 try to replicate what they've already done.

16 Q. Yes, sir. But you've never spoken to Mr. Fisher
17 about any of this, have you?

18 A. I've not had direct communication with
19 Mr. Fisher. We talked briefly the last time I was in
20 court, but beyond that no. I guess what I would say is
21 my own history and experience with clients Mr. Fisher is
22 not at the top of people who are difficult to manage and
23 to work with, in my judgment, based on the
24 representations that I've seen in the record, not even
25 close to the top, in my experience.

1 **MS. BOX:** Well, there are people who will
2 disagree, Doctor, but I appreciate your opinion.

3 **THE COURT:** Redirect.

4 **MS. CHESLEY:** No further questions.

5 **THE COURT:** I've got just a couple of questions.
6 In the 1983 trial, what was the extent of the second
7 stage mitigation evidence?

8 **THE WITNESS:** None. The lawyer didn't put on
9 anything, didn't make a closing argument, did
10 absolutely nothing.

11 **THE COURT:** No family members?

12 **THE WITNESS:** No. No, sir.

13 **THE COURT:** None means none, then?

14 **THE WITNESS:** Yeah.

15 **THE COURT:** When was the Defendant evaluated at
16 Eastern State Hospital, was it before the first
17 trial?

18 **THE WITNESS:** Yes, actually, Judge, there were
19 several evaluations. There were a bunch of
20 evaluations that actually took place while he was in
21 the custody of the Department of Youth Services in
22 New York that were the first indication. He was
23 placed in foster care by his father basically and so
24 there were evaluations done then that began, that
25 started the initial documentation of his history.

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1 Then he had no further evaluations at the trial.
2 After the trial, prior to the post conviction
3 hearing --

4 **THE COURT:** After the '83 trial?

5 **THE WITNESS:** After the '83 trial there were
6 several evaluations done, the most significant one
7 was by Dr. O'Carroll who diagnosed him with mental
8 illness, schizophrenia. The post conviction counsel
9 developed a pretty extensive social history that
10 talked about his life, being abandoned by his
11 mother, difficulties with his father, you know,
12 complex relationships with his half siblings, going
13 into the Navy, having problems with the Navy,
14 abusing drugs and alcohol, being on the streets.
15 All of that was done after the 1983 trial before the
16 1998 post conviction hearing in Federal Court, so
17 between '83 and '98 all of that was developed.

18 **THE COURT:** Was that used in the evidentiary
19 hearing in Federal Court?

20 **THE WITNESS:** Yes, sir, it was.

21 **THE COURT:** Was it available in those boxes?

22 **THE WITNESS:** Yes. Yes. That's the problem
23 with not looking at it. Not only was that available
24 but there was a complete social history, witnesses
25 who had been -- you know, Mr. Fisher's father's

1 testimony was there, testimony from his brother,
2 testimony from his sister was there, Dr. O'Carroll's
3 testimony was there, all of it was in the box.

4 THE COURT: Okay. Anyone have any follow-up
5 questions on that?

6 MS. BOX: No, sir.

7 THE COURT: Do you have any follow-up questions?

8 MS. CHESLEY: Excuse me?

9 THE COURT: Do you have any follow-up questions
10 on --

11 MS. CHESLEY: No, I don't.

12 THE WITNESS: Thank you, Judge.

13 THE COURT: Call your next witness.

14 MS. CHESLEY: Are we going to go straight
15 through? Are we going to have lunch?

16 THE COURT: No.

17 MS. CHESLEY: I'm fine. Whatever you want. I
18 just realized it's getting --

19 THE COURT: How many witnesses do you have left?

20 MS. CHESLEY: Just one.

21 THE COURT: Okay.

22 MS. CHESLEY: Dr. Craig Haney.

23 DR. CRAIG HANEY,
24 was called as a witness on behalf of the Appellant, and
25 having first been duly sworn, testified as follows:

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1 **MS. CHESLEY:** Your Honor, may I have just one
2 moment?

3 **THE COURT:** Yes.

4 (Whereupon, a brief pause was here had.)

5 **THE COURT:** Back on the record. Counsel, you're
6 ready to proceed?

7 **MS. CHESLEY:** Yes, Your Honor.

8 **THE COURT:** Witness has been sworn.

9 DIRECT EXAMINATION

10 BY MS. CHESLEY:

11 **Q.** Can you state your name for the record, please?

12 **A.** Yes. My name is Craig Haney. H-A-N-E-Y.

13 **Q.** Can you tell us about your educational
14 background starting with college?

15 **A.** Yes. I have a bachelors degree from the
16 University of Pennsylvania in Psychology. I went to
17 graduate school in Psychology at Stanford. I have an
18 M.A. and a Ph.D. in Psychology from Stanford. While I
19 was there I got interested in psychology and law or the
20 application of psychological principles to legal issues,
21 so I went to Stanford Law School and have a J.D. degree
22 as well.

23 **Q.** What is your area of specialization, or first
24 let's get to, what is your current occupation?

25 **A.** I'm a professor of Psychology at the University

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1 of California at Santa Cruz.

2 Q. And what is your area of academic specialization
3 there?

4 A. I specialize in a broad area called psychology
5 and law, which, as I said a minute ago, is an application
6 of psychological research in principles to legal issues.
7 Within that broad area concentrated or focused on a
8 couple or separate specific topics.

9 Q. And what are those? I mean, how are they
10 relevant to what we're talking about today?

11 A. Well, I've been studying the psychological
12 effects of prison conditions and confinement in
13 institutional environments really since I was in graduate
14 school, beginning in 1971. I also have developed
15 expertise in analyzing and trying to understand the role
16 of social history and helping to understand and explain
17 criminal behavior. And then eventually I developed an
18 expertise in capital cases, the development and
19 presentation of mitigation using social historical
20 information and evidence to understand the factors and
21 the influences that might shape someone's life and that
22 might provide a pattern of mitigation in their life as
23 well.

24 Q. Have you had experience in evaluating the
25 background and social history of defendants, is this

1 something you've done before?

2 A. Yes, I started doing this in the late 1970's and
3 I have probably done this well over a hundred times
4 mostly in conjunction with capital cases, actual pending
5 cases, sometimes cases that are in the posture that this
6 case is in where there's a trial or an appeal and --

7 MS. BOX: State would stipulate he's an expert,
8 Your Honor.

9 THE COURT: Are you offering Dr. Haney as an
10 expert?

11 MS. CHESLEY: Yes, Your Honor. And I suppose we
12 can -- Let me approach the witness and we can
13 probably just use this CV for the Court to see.

14 Q. (By Ms. Chesley) I will show you what's marked
15 as Defendant's Exhibit 30, and ask if you recognize that
16 document?

17 A. Yes, I do.

18 Q. And what is that?

19 A. It's my professional curriculum vitae.

20 Q. And does it go through in more detail some of
21 the things that we have talked about here?

22 A. Yes, probably in too much detail, but it covers
23 pretty much everything.

24 Q. You have a great deal of experience in looking
25 at this mitigating kind of evidence --

1 **THE COURT:** Are you offering Defendant's Exhibit
2 30?

3 **MS. CHESLEY:** Yes, I'm sorry. Offer --

4 **THE COURT:** Defendant's Exhibit 30 will be
5 admitted without objection. And Dr. Haney will be
6 accepted, that stipulation will be accepted.

7 **MS. CHESLEY:** As an expert in the area of
8 mitigation and institutional adjustment.

9 **THE COURT:** Thank you.

10 **Q.** (By Ms. Chesley) Okay. Were you retained as an
11 expert in this case?

12 **A.** Yes, I was.

13 **Q.** What is it you were asked to do here?

14 **A.** You asked me to do several things. The first is
15 to review and analyze a collection of materials that your
16 office had assembled that pertained to Mr. Fisher's
17 background and to use those materials and anything else
18 that I needed to compile a social history of Mr. Fisher,
19 that included his institutional history. And then to
20 reach some conclusions about the significance of the
21 social and institutional history in Mr. Fisher's life,
22 how the various factors in his life helped to influence
23 and shape the direction or the course or path of that
24 life.

25 You also asked me to review the penalty phase

1 proceeding or second stage proceeding in his most recent
2 capital trial, the trial in 2005, and to evaluate and
3 form an opinion about whether what was done in that trial
4 met professional standards and whether also if what had
5 been done, what I had done had been done in that case
6 would have, there was a reasonable likelihood that there
7 would have been a different outcome or result.

8 Q. What kind of information did you have, were you
9 provided with to help you form this opinion?

10 A. Well, your office sent me several boxes of
11 materials, and I won't go through them in detail, just to
12 summarize by saying there were materials that pertain to
13 Mr. Fisher's background beginning in New York. There
14 were Department of Youth Services or Department of Youth
15 I believe in New York it's called, records that pertain
16 to his teenage years, the various institutions and homes
17 that he was housed in as he passed through his teenage
18 years. There were some psychological evaluations and
19 opinions also that were included in those records and
20 they were pertinent and important.

21 I was provided with and reviewed his Oklahoma
22 Department of Corrections records. In addition you
23 provided me with extensive transcript material so I saw
24 some material that pertained to various proceedings which
25 had addressed Mr. Fisher's background and social history,

1 including a proceeding that you conducted in 1998 in
2 which a number of experts and other witnesses testified,
3 including family members that Mr. Stevenson alluded to
4 just a moment ago. And then there was a transcript of
5 the second stage proceeding of the 2005 trial, which I
6 also reviewed.

7 Q. Did you also talk to Mr. Fisher?

8 A. Yes, I traveled to Oklahoma in July of, I
9 believe it was 2006, and I toured the Oklahoma State
10 Penitentiary, including H Unit where Mr. Fisher is
11 currently housed. I also on a subsequent day toured the
12 Oklahoma County Jail and saw the areas in that jail where
13 Mr. Fisher had been housed, and I interviewed Mr. Fisher
14 when I was in H Unit on the day that I toured that
15 facility.

16 Q. And have you talked to Mr. Fisher since that
17 time?

18 A. Yes, I saw him in the Oklahoma County Jail just
19 night before last.

20 Q. Using all this information that you gathered did
21 you prepare a report on your findings?

22 A. I did.

23 MS. CHESLEY: May I approach the witness,
24 Your Honor?

25 THE COURT: Yes.

1 Q. (By Ms. Chesley) I want to show you what's been
2 marked as Defendant's Exhibit 29, and ask if you
3 recognize that document?

4 A. Yes, I do recognize it.

5 Q. And what is that document?

6 A. It is the affidavit that I prepared reporting my
7 findings in response to the test that you asked me to
8 conduct.

9 MS. CHESLEY: Your Honor, we would offer
10 Defendant's Exhibit 29.

11 MS. BOX: No objection.

12 THE COURT: Defendant's Exhibit 29 will be
13 admitted without objection.

14 Q. (By Ms. Chesley) I think you have your own copy
15 of that report, would you rather work from that?

16 A. It's a little easier to read if that's okay with
17 you.

18 Q. Okay.

19 A. Because it's in a notebook form.

20 Q. Dr. Haney, what is the importance of examining
21 an individual's social history?

22 A. Well, the important -- there are several levels
23 to its importance. There's a psychological level to the
24 importance of the social history. Psychologists and
25 other mental health professionals understand that

1 people's past affects their present and their future, and
2 to understand in essence the factors and influences that
3 have shaped someone's life you have to understand the
4 elements of that life, the things that have happened in
5 their background or their past that help to direct the
6 course of their life.

7 We now understand this in very elaborate ways.
8 We understand the way in which certain kinds of events
9 that take place in someone's background can have a
10 profound impact on their life, not just shortly after
11 those events occur but even in the long term that, for
12 example, things that happened to us when we're children
13 can shape who we are as adults and influence and effect
14 our behavior as adults. So any effective comprehensive
15 analysis or set of insights about who someone is and how
16 and why they function the way they do we now understand
17 has to begin with an understanding of the life that
18 they've lived, where they come from and what things
19 happened to them in the course of that life.

20 There's another level to this as well in a
21 context like this and it's a legal level. Because those
22 insights that are developed on the basis of the social
23 history are so critical to understanding who someone is,
24 the courts have recognized that capital cases must have a
25 social history developed and presented as part of at

1 least the preparation for mitigation that gets presented
2 in a trial, and the courts have become very explicit
3 about this and talking about and using, in fact, that
4 term "social history" as a critical part of what a
5 capital litigation team or capital defense team has to
6 compile as almost the starting point for understanding a
7 client and for beginning to understand how the
8 explanation of who that client is and what his life has
9 been like and perhaps why he's acted the way he's acted
10 at different points in time in his life, can be and will
11 be explained to the jury. And so in a legal context
12 social histories become critically important because they
13 are now required for attorneys to conduct.

14 There's even a third level to this which is a
15 combination of those two things. A capital jury really
16 can't understand a capital defendant, they really can't
17 weigh the value of his life and really appreciate issues
18 of culpability without having the psychological
19 information that a social history provides. So for all
20 of those reasons people who do capital trial work and
21 proceedings like this understand that social historical
22 analyses are essential to this kind of proceeding or a
23 capital trial proceeding more particularly.

24 Q. What did you find out about James Fisher's
25 social history in your examination of all these

1 materials?

2 A. Well, let me summarize it and not do justice to
3 it because it's a very long, in a very long report. But
4 let me say that in summary that there were a very
5 significant number of what we understand to be called
6 risk factors. These are things, events, experiences
7 which happen to people earlier in their life which effect
8 their life later on and it's part of how we frame and
9 organize a social history in the context of trying to
10 identify and present mitigation. Around these particular
11 issues, around these particular events and experiences
12 that there is now a wealth of research to document the
13 importance or significance of. So as I said a moment ago
14 we now understand that certain kinds of events and
15 experiences that happen to people in childhood have a
16 profound impact on who they are and what they become, not
17 just as what they become as older children or not even
18 what they become as adolescents, but the kind of life
19 that they may lead or the kinds of things that they're
20 predisposed to even as adults.

21 Now I've been doing this for a long time and
22 I've done many of these things and I've identified in
23 James's life many of, many of the kinds of risk factors
24 that we know have a profound impact, negative impact in
25 shaping somebody's life course. In some respects his

1 life was similar to other risk factor filled lives that
2 I've examined and evaluated, in certain areas his life
3 was even more problematic and more traumatic and more
4 troubled than most of the clients whose lives I've
5 evaluated. So there was a tremendous amount of
6 information, a tremendous amount of important
7 information. And by way of a general statement there
8 were lots and lots of risk factors in James's life which
9 I can talk about briefly if you want, one at a time or
10 however you'd like me to address it.

11 Q. Well, as you say we do have a very detailed
12 report and I'm not certain we need to get into
13 everything, but there were certain particular things.
14 What was James's life like when he was living with his
15 father? I mean, what about that was significant to you?

16 A. Well, what was significant about his life with
17 his father was in part what that life was like and in
18 part also what preceded it. He came to his father under
19 circumstances that he didn't choose, under circumstances
20 that had been, by his account, very positive. His very
21 early life had been filled with instability and turmoil.

22 When he was an infant, as you know, his parents
23 separated, so he never really got to know his father very
24 well, when he was very young. While still a toddler he
25 spent it, he ended up spending a lot of his time living

1 with his mother's mother. His mother, as you may know,
2 was undergoing some difficulty of her own when James was
3 very young, and eventually James was sent to live with
4 his paternal grandparents in Harrisburg, Pennsylvania.
5 And this was, the estimate is he was around four years
6 old when this happened. And the next five or six years
7 of his life were periods of relative stability, he
8 reports it and this is documented not just in his
9 conversation with me but other things he said to other
10 people. He said this was a period of stability, that he
11 had a good life with his paternal grandparents.

12 But his grandmother, when James was 10 his
13 grandmother died, and his grandfather who was quite
14 elderly at that point could not care for him. And so
15 James was fairly abruptly sent to live with his father
16 who he really didn't know very well. His father had a
17 new life, a new family, there were stepchildren in the
18 family. And James reported not just to me but he
19 reported very early on in this experience feeling
20 unwelcome there, feeling like an outsider, feeling like
21 he hadn't been accepted.

22 He told social workers, who he talked to in the
23 New York Department of Youth, that he felt he was
24 disfavored in the family and that his father didn't
25 really want him there.

1 Q. Now this, was this information that just came
2 from James or did his father admit to some of this?

3 A. His father was quite open about it. Even at the
4 time his father took James -- James came to live with
5 this family, his father and his father's new wife and
6 their children when, as I said, when James was about 10.
7 When James was 12 and a half his father took him to the
8 Department of Youth and basically attempted to give him
9 to the Department of Youth, to say basically we can't
10 care for him anymore, he should be in a home, please take
11 him and this is documented in the records at the time
12 this happened. And the Department of Youth did
13 eventually, when James was 13 years old, take custody of
14 him.

15 **THE COURT:** Excuse me. This information that
16 you are relaying did this come out of those records
17 over there?

18 **THE WITNESS:** Yes, Your Honor, it did. It was
19 all in those records. My conversation with James
20 simply corroborated this, but all of this is very
21 well documented in those records.

22 **THE COURT:** Okay.

23 **THE WITNESS:** So James' perception of himself as
24 not being welcome in the family and his father
25 having, at best, some ambivalence about keeping him

1 there was acknowledged by his dad. His dad also
2 acknowledged that he physically mistreated James,
3 this too is documented in the records, that he --
4 James said at the time that when he was 12 and 13
5 and continuously after that, that his dad physically
6 mistreated him and in the records his father
7 acknowledged having done this. And, in fact, at
8 some point said that he felt that James should be
9 turned over to juvenile authorities because, and
10 this is almost an exact quote, he was afraid he
11 might harm him. He, Mr. Fisher, James' father was
12 afraid he might harm James.

13 And for pretty much the next three years of
14 James's life there followed a succession of abrupt
15 transitions, even though he was in the Juvenile
16 Justice System in New York, not for having committed
17 any offenses incidentally. He has no juvenile
18 record. He was simply brought to juvenile
19 authorities by his father because --

20 Q. (By Ms. Chesley) So there is no -- he was never
21 charged with a crime, he was never accused of a crime to
22 get him involved with that Division of Youth Services?

23 A. Absolutely not, and there's no evidence of
24 crimes while he was in the Division of Youth Services,
25 either. He was in their custody because his father would

1 not maintain custody of him. There's a succession, as I
2 started to say, these very abrupt transitions one after
3 another after another.

4 He goes, and I'm going to refer to my notes here
5 because there are too many of them for me to simply
6 recall. But in a period of, from July 1977 to
7 December 1979 James goes from living with his father to
8 being taken to Youth Services, to having a foster care
9 placement that lasted for about a year and then a brief
10 period of time when the foster care parent contact was
11 terminated. He lived briefly with his father, then he
12 went to an emergency juvenile facility, a youth camp, a
13 very brief return to the first foster family, placement
14 at the Buffalo Boys Town, a short stay at the Youth
15 Detention Center, a return to an emergency youth
16 facility, a return to the youth camp, a short period of
17 time in Cleveland that he lived with his mother, and a
18 return to Buffalo in a different foster care placement.

19 And he finally ended up in an emergency foster
20 care home in December of 1979. He's there Christmas Eve,
21 December 24th, 1979, and his stay there is about to
22 terminate. They have kept him up to the maximum time
23 they were supposed to keep him. And there's a note in
24 the file that says it's Christmas we don't really feel
25 comfortable moving him somewhere else, we're not even

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1 sure where we're going to move him. Let's let him stay
2 here for a few extra days, and they do. But on the
3 27th of December he's moved again. I mean, that's in a
4 period of between July 1977 through December 1979.

5 Q. So we're talking two and a half years that many
6 movements and 16 years old in a facility on Christmas Eve
7 1979 and they can't find anyone to take him?

8 A. He's just turned 16, his birth, as you know, is
9 in November. He's just turned 16. There are -- now
10 throughout this period there are documented evaluations
11 in which as you might imagine James is manifesting some
12 problems. No one could go through these kinds of
13 experiences or have the history he had even before this
14 odyssey began, without experiencing some emotional
15 difficulty and psychological problems, and that's
16 documented as well in the youth file, not just that he
17 went through, he went to all these different places but
18 that he has a number of problems. And they're exactly
19 the kinds of problems that you would expect given the
20 risk factors that he's been exposed to.

21 He's depressed at times. He doesn't trust
22 people. He has a difficult time with authority. He has
23 some problems with impulse control. Exactly the kinds of
24 things that the literature suggest that children as James
25 was who had the experiences that he's had would manifest.

1 The Department of Youth makes recommendations
2 that he receive therapy. There is no indication in the
3 file that he received that therapy. So what they
4 typically would do is have an outside evaluator come in,
5 that person would evaluate James, document these
6 problems. Often times quite sympathetically and often
7 times tying his problems directly in the instability in
8 his life saying given his history, given what he's been
9 through it's not surprising that he doesn't trust adults,
10 it's not surprising he's having these problems with
11 authority figures or that he has anger problems. He
12 needs therapy. He needs help. And then the file is
13 silent on the help. He doesn't get it. He's in another
14 facility, another one of these evaluations is done.
15 They're very similar in form, they're done by different
16 evaluators, and he simply goes through this process of
17 being placed in one after another of these facilities.

18 Sometimes his adjustment is poor so, I mean, I
19 want to be clear, make sure that I present this in a
20 balanced way. As you would expect and often times as the
21 evaluators themselves say he is developing patterns in
22 his behavior that are problematic. We need to help this
23 young man, we need to give him therapy, we need to give
24 him treatment because of what he's been through. We need
25 to break this cycle. We need to address some of the

1 misbehavior. It doesn't happen.

2 Q. And when you talked about misbehavior and anger
3 I want to make sure that we're clear again. None of this
4 really involves violence, does it?

5 A. No. No. The worst thing that is alluded to in
6 this youth file is that there is an occasional fight that
7 takes places, which is common in these kinds of juvenile
8 facilities. James again is never charged with a crime,
9 violent or nonviolent crime during this period of time.
10 And he -- there are -- and there are periods where he
11 makes a good adjustment and there are positive comments
12 in the file. But then for whatever reason, bureaucratic
13 reasons or because he's, the particular placement time at
14 this particular facility has expired he's moved to
15 somewhere else. And when he's 16 years old there are
16 very clear indications throughout the file that James is
17 a person, a young boy who needs structure, he needs
18 guidance, in addition to the counseling he needs
19 structure. He needs to be counseled about limits and so
20 on and so forth and he needs to learn to internalize that
21 structure because that's not -- given the chaos in his
22 life that's not something that he's developed very
23 effectively.

24 For reasons, and I read this file, this
25 particular portion of the file four times to try to

1 discern the logic of this, the Department of Youth in New
2 York decides after having repeatedly said that, that he
3 needs structure, he needs guidance, they decide to
4 certify him for independent living status which means
5 they take this 16-year-old young man with all these
6 problems and all this history of chaos and all this
7 documented emotional difficulty and they --

8 Q. And need for structure?

9 A. And need for structure and need for guidance,
10 and they put him on the streets and they give him a
11 stipend, they set him up in an apartment basically, on
12 his own. It is -- and as I say, I've searched the
13 records for the logic to this. I -- there must have been
14 logic in someone's mind, it's not documented in the file
15 and I can't speculate on what it could have been except
16 that it's hard to imagine something given the file and
17 given the profile that was painted at the time something
18 more wrongheaded.

19 Q. How did he do in independent living?

20 A. He did okay at first and then as you might
21 imagine he began to have problems. And so again there is
22 this record of there were caseworkers and they would
23 visit him and they'd say he's beginning to have problems.
24 He needs help, he needs therapy, but they didn't provide
25 it.

1 And in June of 1980, now he's still 16 years
2 old, they declare him an emancipated adult and they no
3 longer, they relinquish jurisdiction over him and they
4 provide him with welfare benefits because he has no means
5 of support. And so he is a 16-and-a-half-year-old boy
6 with this history of chaos and disarray in his life and
7 mistreatment and other things we haven't talked about and
8 this history of having gone through the system in the way
9 that he went through and needing therapy, documented need
10 for therapy, documented need for structure, et cetera, et
11 cetera, he's alone on the streets now without even a
12 caseworker to oversee him and, you know, not --

13 Q. Anyone to help him get the assistance he needs?

14 A. Yes.

15 Q. How did he support himself?

16 A. Or check in on him. Well, he has welfare
17 benefits. They provide him with welfare benefits because
18 he has no other way to obtain housing or food, and he's,
19 you know, he's living in a poor area of Buffalo and he,
20 you know, he quite openly told me he learned the streets
21 as a way of supplementing his income, as a way of
22 learning how to survive. He was surrounded by crime and
23 criminality and drug use, with no parental involvement or
24 structure or limits being placed on him and, you know, he
25 fell prey to all the influences that you would imagine.

1 And that was -- so that's his childhood history and
2 that's documented, it's all documented very clearly,
3 official records. What I've said to you, you know, is
4 corroborated by James certainly but it comes directly out
5 of those files.

6 Q. How does this type of social history effect his
7 behavior as an adult or how does it pose a risk I suppose
8 to his development and behavior as an adult?

9 A. Let me underscore the obvious things. When
10 people have bad childhoods, when they have been
11 physically abused, when they have been neglected, when
12 they have been abandoned, when they have been exposed to
13 that kind of chaos they grow up with a whole range of
14 very predictable emotional problems, not surprisingly
15 often times given this kind of history of abandonment and
16 being moved from one placement to the next they develop
17 profound deep-seated problems with trust.

18 James learned early on that adults in his world
19 couldn't be trusted. This was not something, it wasn't a
20 belief he chose to learn, this was a belief he learns
21 from experience. He saw it happen. He was buffeted
22 about by adult decision makers who, whatever their
23 intention, created a very difficult life for him, a very
24 difficult environment, didn't follow through on the
25 things they said they were going to do, didn't give him

1 the therapy that they said he needed. And basically,
2 when push came to shove, as a 16-and-a-half-year-old they
3 simply, I don't think it's melodramatic to say they
4 abandoned him to the streets, they put him out of the
5 system.

6 And so this distrust he comes by honestly
7 because he's had experiences which generate that kind of
8 mistrust in people.

9 Q. So what happened to him after he was put out on
10 the streets at 16 and a half, what came next in his life?

11 A. He lives on the streets for awhile. He decides
12 he needs to get some... he needs a visible means of
13 support. He joins the Navy and he's in the Navy for a
14 relatively short period of time and he, his adjustment in
15 the Navy as you would expect is not satisfactory. He has
16 a hard time with it. It's not disastrous. You know, the
17 military file suggest that there were some unexcused
18 absences. James himself told me that he was found with
19 marijuana in his possession or possession in the area
20 where he was living and this was a time when the Navy was
21 cracking down on marijuana use. And so he was fairly
22 quickly generally discharged from the Navy.

23 And then he kind of developed a transient
24 lifestyle. I mean, he was out of the Navy at around age
25 17, and as you know he ended up in Oklahoma and was tried

1 and convicted in this case, sent to prison, entered
2 Oklahoma State Penitentiary as a 19-year-old. So --

3 Q. So there was not a long time there. I mean, he
4 was -- there's not that much time between when he's
5 thrown out on the streets and when he ends up here in
6 Oklahoma, I mean, in the scheme of things?

7 A. No, there's not, and I think it's important to
8 emphasize -- you asked me a moment ago what the effects
9 of this are. One important effect is that James didn't
10 really go through a normal adolescence. He -- these
11 transitions and these, this sort of chaotic odyssey
12 through the New York Juvenile System took place during
13 his adolescent years. So he ends up being younger
14 emotionally than he is chronologically, if you understand
15 what I mean by that.

16 He -- because he didn't go through the normal
17 developmental stages and he really is a more immature
18 19-year-old than many other 19-year-olds. Now even
19 though he's -- it's often times confusing because
20 sometimes people who live the kind of lifestyle that he
21 was living become streetwise and they appear to be quite
22 mature, but, in fact, they're not, because maturity
23 doesn't come about as a result of simply learning how to
24 survive on the streets, it comes about as a result of
25 being in safe and secure environments where people teach

1 you things where you learn the connection between act and
2 consequence, where you learn that there are people around
3 you who you can trust, who you can go to when you have
4 problems, who will nurture you, who care about you, so on
5 and so on, so that you can grow and develop in an
6 emotionally normal and natural way.

7 That process was circumvented in his case and it
8 left him with some lingering emotional problems and scars
9 from the times that he endured these experiences, and
10 they were present in him at age 19 when he entered the
11 Oklahoma Department of Corrections as well.

12 Q. And at age 19 with this history is when he was
13 incarcerated on this crime and he's been incarcerated
14 ever since?

15 A. Yes, he has.

16 Q. For the next 25 years. How would you
17 characterize his institutional history in this case?

18 A. In several ways. His institutional history was
19 in certain respects predictable, that is to say given
20 that kind of background it is not at all surprising that
21 he had a difficult time in institutional settings,
22 correctional settings. Those problems incidentally began
23 to manifest themselves, that is to say his problems in an
24 institutional setting, a correctional setting manifest
25 themselves even in New York when he's first arrested on

1 the charges related to this case in New York he has a
2 very difficult time adjusting.

3 I said a moment ago that was predictable.
4 Predictable because many people who have had experiences
5 that James has had have a difficult time in institutional
6 settings. They come to those settings with deep-seated
7 trust issues, suspicion, and they're placed in an
8 environment where they have more things to be concerned
9 about than they ordinarily would in the world outside of
10 a correctional institution. So the suspicion is sort of
11 amplified by the nature of the environment that they're
12 in.

13 Many people have had the kind of histories that
14 he's had come with, particularly when they're still
15 young, problems with authority figures, because they
16 don't trust older adults because they feel that they have
17 been lied to or betrayed by adults in positions of
18 authority, they have a difficult time accepting that
19 authority and so that creates adjustment problems when
20 they're placed in a total institutional setting.

21 They're also -- they also often times carry
22 around with them a lot of anxiety, something I didn't
23 talk about, but which is very, very important. They
24 don't believe that the world is a predictable and
25 trusting place so they become easily upset. They often

1 times fear the worst. They're anxious a lot, and not
2 surprisingly James is described as fear ridden in the New
3 York jail where he's being kept. He comes to the
4 attention of the mental health authorities even in that
5 jail and they provide him with some treatment and they
6 counsel him and there's a mental health record that
7 begins not in Oklahoma but it actually begins back in
8 that correctional system in New York.

9 And then his institutional adjustment here is
10 problematic, that's another way to describe it. I said
11 it was predictable a moment ago, it's problematic as
12 well. He has a difficult time adjusting, particularly to
13 the severe conditions of confinement that he confronts on
14 death row in the Oklahoma State Penitentiary. This is a
15 very severe environment and it's an environment that not
16 everybody can adjust to well. Many people can,
17 fortunately. I say fortunately, otherwise the prisons
18 wouldn't function, but not everybody can.

19 And there are people who, for various reasons
20 and in James' case I've just described some of those
21 reasons, have a difficult time in particularly very
22 severe particularly solitary confinement or isolation
23 type environments where --

24 Q. And -- I'm sorry. Is the Oklahoma State
25 Penitentiary one of those environments?

1 A. It is. He was -- the death row unit that he was
2 on was as many death row units are, a very restrictive
3 environment. Even the old death row that he first
4 entered a very, very restrictive environment. The
5 prisoner's movement was very restricted. They were kept
6 separated from the other prisoners in almost all of their
7 routines and respects. And the other thing, in many ways
8 the most important thing even about an environment like
9 that is there are no programs, no real activities for
10 prisoners to engage in.

11 So it has the feel of an isolation unit even
12 though the prisoners may not be technically isolated from
13 one another around the clock because there are no
14 collective activities for them to engage in the way other
15 prisoners, even in maximum security prisons have. They
16 may have education, they may have work that they do, they
17 have outside yard activity on a much more generous basis,
18 and so on.

19 Prisoners in the death row unit in Oklahoma even
20 the old death row had very limited opportunities to
21 engage in any activities outside of their cell. When in
22 1991 they moved to H Unit they really moved into an
23 environment that is for all intents and purposes what we
24 now refer to as a super max prison. It is a really
25 classic modern isolation unit run on basic super max

1 principles.

2 Prisoners get an hour a day of exercise in a
3 concrete exercise yard with a great overhead so that they
4 have no, even no sight of the surrounding area, and no
5 activity. They're locked in their cells at all other
6 time. They have no contact visits with people. They
7 visit over the phone and through glass. So a person like
8 James will not have touched another human being with
9 affection for however many years they're in that
10 environment and in James' case we're now 24, 25 years
11 into that kind of confinement.

12 Now, not everyone can take that, not every --
13 part of my academic research is studying what happens to
14 people who are placed in those kind of environments, not
15 even people with James' emotional and psychological
16 history, but just the general group of prisoners who end
17 up in super max environment, some predictable number of
18 those people break down in that environment. They
19 psychologically break down in the face of the rigors of
20 that kind of isolation and those kinds of severe
21 restrictions.

22 You take somebody like James who has these
23 preexisting problems, this preexisting mental health
24 history and you put him in an environment like that,
25 again, predictably he had a very difficult time. There

1 were times when his behavior was stabilized and there
2 were many other times when it was not. His adjustment
3 was rocky and rough throughout the period of time he was
4 in that environment. Nothing that I saw surprised me
5 given what I know about the nature of that environment
6 and given what I know about him.

7 There were a couple of additional things in his
8 case, however, that I think exacerbated the problems that
9 he confronted. The first is that when he began to
10 manifest psychological problems this, too, is documented
11 in the record. He had what were documented in the file,
12 now I wasn't there I didn't see it but I saw the
13 documentation of it, full blown psychotic breakdown.

14 Dr. O'Carroll describes him in 1989 as paranoid
15 schizophrenic as operating at the most profoundly
16 disturbed psychiatric level. But he's in an environment
17 where he can't really be moved out of that environment
18 into a place where he can receive the appropriate
19 psychiatric treatment. So he's retained in H Unit and
20 he's retained in H Unit because that's where death row
21 is.

22 I can't think of another circumstance where a
23 prisoner in a super max type unit who is diagnosed the
24 way and described the way that Dr. O'Carroll diagnosed
25 and described him would have been retained in that

1 environment. I mean, I'm in these units all the time,
2 this is part of what I study, and that kind of flagrant
3 emotional breakdown, really, really profound disability
4 that James was undergoing would have been responded to,
5 but for the fact that he was in H Unit on death row would
6 have been responded to I would believe in any
7 compassionate or even effective system by taking him out
8 of that environment and providing him with treatment.
9 But that didn't happen. So he's described in that way
10 Dr. O'Carroll sees him, and incidentally that was not the
11 only time he's been described as psychiatrically
12 disturbed while incarcerated.

13 He's been described by staff members in Oklahoma
14 Department of Corrections and the Oklahoma City Jail as
15 having adjustment disorder with depression and anxiety,
16 schizotypo personality disorder, depressive disorder and
17 anxiety disorder. These are staff psychologists and
18 psychiatrists describing him in that way. I mentioned
19 Dr. O'Carroll describes him as paranoid schizophrenic at
20 a severe level and severely regressed in 1989.

21 He's described by Dr. Fisher as not being able
22 to separate his inner and outer reality and regressing
23 into psychotic-like thinking in 1996. He's described --
24 again Dr. O'Carroll comes back and sees him later on and
25 in 2000 describes him as having psychosis not otherwise

1 specified, borderline personality, recommends a whole
2 series of psychotropic medications.

3 In a proceeding that I believe your office
4 participated in, in 2003, competency proceeding, he's
5 described as suffering from clinical depression, as being
6 delusional, deteriorating due to long incarceration,
7 having a paranoid personality disorder. One doctor
8 recommends that he should go to Eastern State Hospital
9 where he can get appropriate treatment.

10 With respect to treatment he, over the course of
11 the years that he was confined in the Department of
12 Corrections, he was prescribed and took Haldol, Paxil,
13 Sinequan, Zoloft, Restoril, Wellbutrin, Depakote and
14 Thorazine. So my description of him as having problems
15 and having those problems exacerbated by the conditions
16 of confinement were corroborated periodically throughout
17 his file.

18 And clearly, as I was describing earlier, these
19 conditions which were so severe really for anybody to
20 deal with month after month and year after year, the kind
21 of severe restrictions that people are placed under in a
22 unit like H Unit, when they begin to deteriorate
23 psychologically and psychiatrically it becomes even more
24 difficult for them to adjust and adapt in an environment
25 like that.

1 Q. Have you looked at the misconduct reports that
2 have been filed over the years against James?

3 A. Yes, I have.

4 Q. How would you describe those? What type of
5 infractions are we talking about in those hundred and 20
6 or 40 or 60 misconducts against him?

7 A. Well, the misconducts run the gamut. First of
8 all, there are many of them, as the number you cited
9 indicates. There are many of them. The overwhelming
10 majority of them are nonviolent infractions, fortunately.
11 There are some, however, where James is written up for
12 physical confrontation with correctional officers.
13 There's about ten or so of those where there's actual
14 physical contact between them. They tend to be
15 eruptions, they tend to be spontaneous interactions that
16 take place between James and a correctional officer.
17 Often times James perceives there to be provocation. He
18 told me this, it's in the file. I'm in no way to judge
19 what exactly -- I'm in no position to judge what exactly
20 happened. But he's convicted of these, he's convicted of
21 these offenses and they appear in his file. He's, of
22 course, punished for them. The punishment is very severe
23 in H Unit, and he has endured in addition to the almost
24 25 years he's been incarcerated continuously under
25 conditions like the conditions that I described, with the

1 exception of the times when he comes to County Jail where
2 the conditions are a bit different but also severe, he
3 spent almost 40 percent of his time in prison in a
4 special security lockup unit or max unit which is even
5 more severe than the actual conditions of confinement in
6 H Unit.

7 This is a double doored unit where prisoners are
8 placed for disciplinary reasons and it has, it's a
9 self-contained unit where prisoners, prisoners in H Unit
10 like most super max units, are taken out of their cells
11 for showers. They're fed in their cells and they get to
12 exercise about an hour a day, but they have to be taken
13 to showers because the showers are common showers. There
14 are only so many showers on the unit, so in order for
15 prisoners to be showered they have to go from their cell
16 to the shower. In high max unit, the disciplinary unit
17 in H Unit the shower is in the cell so that you don't
18 even leave your cell to go out to shower. The shower is
19 inside the cell, so there's an interior cell and the
20 cells are small, they're about half the regular size of
21 the cells in the H Unit, and then there's a door and then
22 there's a kind of ante area where there's a shower and
23 then there's another door so that when the prisoners are
24 locked in their cell as they are, you know, virtually
25 around the clock, they are behind a double door. And it

1 is -- it's an arrangement that's unusual, in my
2 experience, and I go through these kinds of facilities
3 all the time.

4 I'm almost every month in a different super max
5 prison somewhere in the country, and this is a unique,
6 it's -- H Unit is in some ways a unique facility, but
7 that particular arrangement is unique, in my experience.
8 And when I toured it, the day I toured it I asked the
9 correctional officers to close the doors so I could see
10 what the experience would be like for someone like James,
11 who is in there behind those two, those double doors.
12 And I, just for the brief period of time that I was there
13 I found it an extraordinary experience, a claustrophobic
14 experience just for a few minutes. James has spent about
15 seven years in that particular environment and so that
16 has an impact or an effect on people. Again, the
17 strongest person would have a difficult time with that
18 kind of an environment.

19 Now, you know, from the correctional
20 department's perspective, did he earn his way into that
21 experience? From their perspective, yes he did. But
22 there's a counterproductiveness to handling somebody like
23 James with this kind of documented history of psychiatric
24 and emotional problems, who continues to act out in ways
25 that are counterproductive, not just for the staff, and

1 they're clearly counterproductive for the staff. And I'm
2 not trying to minimize that at all, but counterproductive
3 for him.

4 Q. In what way?

5 A. Well, he gains virtually nothing from these
6 disciplinary infractions. I mean, this is not somebody
7 who -- I've seen and heard the word "manipulative" used
8 in this proceeding. He's not someone who has manipulated
9 himself to anything in particular. He manipulates
10 himself into this cave like little cell and this is a
11 pattern that you sometimes see in correctional settings.
12 And, in fact, I won't say it's common but it is, it's
13 identifiable and there's actually an expression for it
14 among correctional psychologists and correctional
15 officials, which is they would describe this kind of
16 behavior as the behavior of a disturbed and disruptive
17 prisoner.

18 The disruptions come in large part out of James'
19 disturbed perspective on the environment that he's lived
20 in, a disturbed perspective that comes in part from
21 psychological problems that he came with, and part from
22 the effect of being in this environment for so long
23 without any respite, without any real treatment of any
24 kind. And in part also as a result of a factor or an
25 influence that I haven't mentioned and I think

1 exacerbates these problems for him, which is that he's
2 lived in that environment, he lived in that environment
3 for 19 years believing himself to be wrongly placed in
4 that environment, that is that his conviction, the
5 conviction that sent him there in the first place was
6 illegal, unfair, unjust, and that's fueled, that fueled
7 much of his resentment and his anger. And indeed, in a
8 certain sense, as you know, in 2002 that belief on his
9 part was vindicated by the courts by saying that indeed
10 that conviction was unjust.

11 So his feeling during this period of time under
12 these circumstances was that he shouldn't be there, that
13 he shouldn't be in that environment, that he had not been
14 treated fairly by the justice system and sure enough,
15 although it took 19 years for the courts to vindicate
16 that view, the view was vindicated. So that, too, adds
17 to the distrust, it adds to the anger, it adds to the,
18 really adds to the anxiety that the system is not going
19 to treat you fairly, and that I think at times it's
20 created even a kind of a panic reaction in him. He's
21 quick to see injustice, doesn't have confidence that that
22 injustice is going to be remedied, and it's created a
23 kind of a cycle. And again, this is -- he's not the
24 first prisoner who's been caught in a cycle like this.
25 I've seen this a number of times in units like this.

1 Typically the response is you take the prisoner
2 out of that unit, if he's got documented psychiatric
3 problems you provide him with treatment, you may or may
4 not put him back in a unit like that if he's shown that
5 he can't handle that kind of environment. You might put
6 him in some other kind of unit. But you at least provide
7 a respite of a period of months where he's in an
8 environment where his mood can be stabilized and so on.
9 You might address it by working on programs with him and
10 so on and so forth, to try to get him into activities and
11 so on.

12 But it's not a cycle that will break itself and
13 that, unfortunately, sympathy for the people who tried to
14 manage this because they're limited in terms of the
15 numbers of options they've had, but they've continued to
16 handle him in more or less the same way with more or less
17 the same result and the result hasn't been -- there are
18 times when he's managed to stabilize but then there are
19 times when his behavior and even his mental state has
20 deteriorated and a lot of the clustering of his
21 disciplinarian infractions are connected to those times
22 when he's having these kinds of mental problems, when
23 he's beginning to have these kinds of breakdowns, and you
24 can see it in the record.

25 I mean, Dr. O'Carroll goes to see him in 1989

1 and it's at the end of a period of time during which he's
2 had some of the most severe problems in this institution
3 that you can imagine, and what Dr. O'Carroll sees is a
4 person who is profoundly psychiatrically disturbed. He
5 gets stabilized and his behavior improves but then it
6 begins to deteriorate again and he's seen by a number of
7 other doctors in late 1998 up to around 2000 and again
8 they perceive some of these same kinds of problems in
9 him. So his psychiatric problems are not independent of
10 the disciplinary infractions, they are very much
11 interconnected.

12 Q. You said that these infractions often hurt him
13 more than help him, can you describe that a little bit
14 more?

15 A. Well, yes. I mean, they virtually always result
16 in added punishment and so he loses privileges, he loses,
17 you know, he's -- H Unit prisoners have the opportunity
18 to have televisions. He hasn't had a television until a
19 year ago in large part because he's on a disciplinary
20 status or he hasn't achieved that level in H Unit where
21 he has the opportunity to have a television. He's been
22 on, he's had restricted canteen status for most of the
23 time he's been in H Unit, again, because of his
24 disciplinary status. He -- One of the clear ways that he
25 actually engages in disruptive behavior, but disruptive

1 behavior which gains him nothing at all except additional
2 punishment and pain is in order to get the attention of
3 the authorities, typically, either a sergeant or a
4 lieutenant or maybe just a correctional officer in the
5 unit. To press a grievance he has often, and many of his
6 disciplinary write-ups involve this, he sticks his hands
7 out what's called the bean hole and in these lockup units
8 they, prisoners, there's a slot on the door where
9 prisoners are fed, that's where their food trays go and
10 that's also when they have to put handcuffs on them they
11 can cuff them up at that slot.

12 Well, James has often put his hands out there
13 and refused to take his hands out of the bean hole to
14 requesting and sometimes demanding to see the lieutenant
15 or somebody to talk about a problem he's had, a
16 confrontation, an injustice that, real or imagined, that
17 he feels he's experienced. Well, often times what
18 happens is that he ends up getting injured and because
19 he, in order to physically remove his hands from the bean
20 hole, which he will not do, officers, you know, they have
21 a job to do, they have rules to enforce, they'll take a
22 night stick or they'll take a flashlight or they'll use
23 the bean hole door itself to jam his hands up and he's
24 experienced injuries in this way.

25 He had an arm broken five, maybe 2000 I think it

1 was. So he's -- and, you know, this is, this particular
2 action, which is very disruptive for the correctional
3 officers, also puts him in physical vulnerability because
4 he not only can be but often times has been physically
5 hurt in the course of doing this.

6 Now, this is not by way of saying there is
7 nothing wrong with this or not by way of saying this is
8 not problematically disruptive, it's by way of saying
9 it's rational manipulative behavior which gains him
10 anything in particular except more punishment. And when
11 you see that, when a correctional psychologist sees that
12 is or a sophisticated correctional manager sees that they
13 realize that this is a person who is not functioning well
14 in this environment and whose misbehavior may very well
15 stem from some kind of underlying emotional disorder.
16 And I think this pattern in James' case is very much like
17 that.

18 And again, he's gone all these years starting
19 back when he was 13 years old with a documented need for
20 counseling therapy treatment and there's no evidence in
21 the file that he's received it, even as a middle-age man
22 that he is now.

23 Q. Would you say that that's a theme that runs
24 throughout his life, that people recognize he has these
25 problems they document them but then no one ever does

1 anything about it?

2 A. Yes.

3 Q. Have you read the second stage testimony in
4 Mr. Fisher's case?

5 A. I did.

6 Q. There were 27 guards and other correctional
7 officials who testified against him, how could you combat
8 that?

9 A. Well, the only way you could combat it is by
10 putting it in the context that I just put it in. I mean,
11 you needed, someone needed to talk about how that all
12 started. Somebody certainly needed to talk about how his
13 life began, what his life was like, what his documented
14 problems were when he got to the Oklahoma Department of
15 Corrections, what was his mental state, what was his
16 emotional state at the time, and why was he in that
17 state.

18 I think it would have been useful and effective
19 for somebody to talk about the conditions of confinement
20 to which he was being subjected. Not to suggest that
21 these conditions of confinement drive everyone crazy,
22 they clearly don't, but when somebody has preexisting
23 psychological disorders it is now widely accepted
24 psychologically and psychiatrically, as well as legally,
25 that people who have preexisting psychological disorders

1 break down in these environments are damaged and harmed
2 by being placed in these severe isolated segregated
3 conditions.

4 Many states have rules that will not allow
5 people who have these kinds of disorders to even be in
6 those units. So that context needed to be established.
7 These infractions were taking place in a context which
8 even normal healthy people find very difficult to adjust
9 to and somebody with James' problems would have found
10 even more difficult. And then somebody needed to address
11 the issue of, and what I just said up till this point is
12 somewhat speculative in the sense that they're general,
13 they're general positions and points of view. Somebody
14 like James probably would have had these problems, but
15 the record was very clear, not only would somebody like
16 James have had these problems, James did have his
17 psychiatric problems exacerbated by being in this
18 environment, as well documented in the record.

19 All the diagnoses I read you, all the
20 psychotropic medications I read you, he did, in fact,
21 experience this psychological trauma in this environment,
22 part of which includes the fact that there are periods of
23 time during which he is not in control of his behavior.

24 He acts out in ways as I described a moment ago
25 are ultimately counterproductive. This is not somebody

1 who manipulated his way to some cushy, you know, therapy
2 environment or so on. He manipulates his way to either
3 having his hands, you know, beaten in the bean slot or
4 manipulates his way up to this cave like disciplinary
5 cell, and that behavior needed to be understood and put
6 in context; not to excuse it, not to say that it doesn't
7 matter, not to say that it's okay or that all the guards
8 should have just looked the other way, but to say there
9 are reasons why this happened and those reasons are
10 rooted in the things that he had been through, the things
11 that he was experiencing and the things that he really,
12 frankly, never got any help with that would have enabled
13 him to overcome those very problematic counterproductive
14 patterns that he's fallen into.

15 Q. In your opinion, was there a good case to be
16 made for mitigation that could combat that aggravating
17 evidence that was presented at James' trial?

18 A. I think there was -- this is, in my opinion, and
19 I've done many, many of these cases, a very powerful case
20 in mitigation, a very powerful case. The combination of
21 the life history, the really, in lots of ways tragic
22 social history, and I talked only brief about it, it's
23 discussed in much more detail in my report, and the
24 consequence of that tragic social history and the way in
25 which that social history created problems which were

1 never addressed, problems which were exacerbated by his
2 conditions of confinement in the Department of
3 Corrections, not by intention.

4 I'm not suggesting anybody intended to
5 exacerbate these problems, but they were exacerbated by
6 the conditions and by the failure to provide treatment.
7 It helps put his life in context, that is what mitigation
8 is. It is providing an explanation that's rooted in
9 somebody's life, rooted in the experiences that they have
10 had. This mitigation case, in my opinion, is a very
11 powerful one.

12 Q. In your opinion, did Mr. Albert do anything to
13 put that kind of case together?

14 A. He did virtually nothing. There was one, a
15 single witness presented, James' mother, and a not
16 unimportant witness but the tip of an iceberg. There
17 were so many things that went on in James's life that
18 unfortunately his mother didn't even know about, was not
19 a party to, could not possibly testify about, not the
20 least of which was the whole odyssey in the New York
21 Department of Youth that she was unaware of.

22 She couldn't have provided evidence of that.
23 She couldn't have provided evidence of psychological and
24 emotional problems that he had. She couldn't have
25 provided evidence of the treatment that was recommended,

1 was never provided, certainly was in no position to talk
2 about the nature of his psychological problems, how he
3 had been mistreated by his father, and on and on and on.

4 So she was not irrelevant but she was the
5 beginning of a story that should have gone on for much,
6 much longer and should have had many, many more
7 witnesses, including expert witnesses to tell it
8 effectively.

9 Q. Is that an unusual thing to do in a capital
10 trial, to put on a mitigation expert?

11 A. It's standard operating procedure. It's part of
12 the ABA Guidelines that there has to be a mitigation
13 specialist on the team, and frequently not just an expert
14 testifies but several experts will testify in a case. In
15 a case like this, for example, there could have and
16 should have been family members as Bryan Stevenson
17 described just a little while ago, a whole range of
18 family members who were available and could have
19 testified and should have testified, in my opinion, about
20 some of the things I've touched on.

21 There were officials from the New York
22 Department of Youth who could have and should have been
23 contacted. Those reports that I talked about had names
24 at the bottom of them, some were very sympathetic
25 psychological evaluations written of James that were

1 signed by people who in the normal course of events
2 mitigation experts and investigators would have found and
3 brought into court and testified not secondhand the way I
4 just did, but have said essentially, no, I -- you know,
5 this is my report and this young man needed X, Y and Z
6 therapy, and he didn't get it and I don't know why, but
7 he certainly needed it at the time I saw him.

8 There could have been a series of those
9 witnesses presented, presumably some of them could have
10 been found. There was no attempt to find any of them.
11 People could have testified about the, as I did, about
12 risk factors, and what unaddressed risk factors in
13 somebody's life would mean and the implications of those
14 things for somebody when they were a young adult, a
15 19-year-old.

16 Psychiatrists or psychologists could have talked
17 about how difficult it would be for a 19-year-old with
18 those problems to enter that prison system. A
19 corrections expert could have come in and talked about
20 the severity of conditions of confinement in these kinds
21 of super max solitary confinement units. I'm not the
22 only person who studies that issue. There are a number
23 of people throughout the country who study that
24 particular kind of issue and could have put James'
25 disciplinary write-ups in a context.

1 Dr. O'Carroll who had provided a series of
2 psychiatric evaluations who saw James in 1989 while he
3 was in H Unit saw him again in 2000, could have come in
4 and testified about what he saw, connected it to the
5 experiences James was having in prison. There were
6 prison employees, prison doctors who said this man is
7 suffering as a result of the long period of incarceration
8 that he's enduring, that would have been useful for the
9 jury to hear.

10 Q. Even people in the prison recognize that this
11 environment was not making it better even for them?

12 A. Absolutely. Their jail, an occasional jail
13 psychologist in Oklahoma City Jail who said he's been
14 subjected to isolation for a very long period of time and
15 its having an adverse effect on him. This kind of
16 reduced stimulation over a long period of time adversely
17 effects people. It's in his jail file, with the name of
18 the person who held that opinion in the jail file.

19 So this is the kind of thing that an effective
20 attorney could have and would have easily done typically
21 with the help on an investigator, but even, I mean, even
22 in this case because a number of these entries are local,
23 in-state people, it would have been a simple matter even
24 an attorney could have simply made the phone call and
25 identified the people whose entries in that record were

1 readily apparent, and I can think of no reason why it
2 wouldn't be done.

3 Q. Would this kind of information have been
4 important to Mr. Fisher's jury in making their decision?

5 A. It would have been critically important. These
6 are the kinds of things jurors tell you they want, they
7 need, they can't make a reasoned decision without. They
8 needed to understand who James Fisher was, none of that
9 was presented. All that was presented about him
10 essentially was the crime and his involvement or his
11 alleged involvement or his varying degrees of possible
12 involvement in the crime and nothing else.

13 His mom got to present a little glimpse, a
14 little part of his life. And again, without diminishing
15 the significance of it, it was the tip of an iceberg,
16 certainly not enough for them, any juror to understand
17 him, to be able to understand all the things that I have
18 been talking about, all the things that are documented in
19 my report, which were never presented, which the jury
20 never heard. They could not possibly have understood
21 James Fisher as a person, they couldn't have understood
22 him as a prisoner, they couldn't have understood him as a
23 person whose life was in the balance in the case.

24 Q. Based on all the information that you've read
25 and the testimony that you've heard here through this

1 hearing and the research, the general background that he
2 had, have you reached a conclusion regarding whether
3 Mr. Fisher received effective assistance of counsel?

4 A. Yes.

5 Q. And what is that opinion?

6 A. It is that what was done in the second stage of
7 this trial, which is what you asked me to focus on, fell
8 far below what I understand to be professional standards
9 anywhere in the country, and that had an attorney, the
10 attorney in this case had done even some of the things
11 that I have described there is a reasonable likelihood
12 that the outcome would have been different in this case.

13 MS. CHESLEY: Thank you.

14 THE COURT: Cross-examination.

15 MS. CHESLEY: Your Honor, could we take about a
16 five minute break for Mr. Fisher?

17 THE COURT: Yes, that's fine.

18 (A recess was here had.)

19 AFTER RECESS

20 THE COURT: Ms. Box, back on the record.

21 CROSS-EXAMINATION

22 BY MS. BOX:

23 Q. Good afternoon, Doctor.

24 A. Good afternoon.

25 Q. The jury in this particular case, as you know,

1 reached a finding that they believed that Mr. Fisher was
2 a continuing threat to society.

3 A. Yes.

4 Q. Is that your opinion, sir?

5 A. No.

6 Q. And are you saying that you think that he could
7 be released out into society and would not be a threat to
8 other people?

9 A. Well, I don't think that would be true
10 necessarily this minute. I think but with the
11 appropriate kinds of treatment, with the appropriate
12 kinds of opportunities and experiences I don't see any
13 reason why he couldn't be. You know, we're not there
14 yet, I don't think. And I think he is still very much,
15 or at least was, in the throws of this kind of pattern
16 that I talked about earlier. And this is a man who
17 hasn't had treatment or therapy for these longstanding
18 problems that I've been talking about.

19 Q. Well, if indeed the trial, the one that
20 Mr. Albert tried, if he had been seen at that trial and
21 the jury could have seen him as a person, you think the
22 outcome might have been different?

23 A. Well, I don't know that that in and of itself
24 would have made a complete difference, would have changed
25 the outcome, if that was the only thing that was

1 different. I think that would have helped, I think that
2 would have been important. But I also think that James'
3 absence from the trial didn't occur in a vacuum and so I
4 think part of the problem is that in his relationship
5 with his attorney, as well some of these same kinds of
6 issues that I've been talking about came up, and,
7 unfortunately, they weren't resolved, they weren't
8 resolved correctly or effectively.

9 Q. Well, virtually -- well, I won't say virtually
10 all, but a great number of attorneys that have worked
11 with Mr. Fisher have found him just to be not
12 cooperative, to be detrimental to himself, and to really
13 take the courage out of a lawyer trying to represent
14 someone like that. So how do we fix that?

15 A. Well, you know, that's a really good question.
16 You encounter this a lot in capital litigation. I can
17 tell you that -- let me set aside for a moment my
18 relationship with Mr. Fisher and his current lawyer's
19 relationship with him. But just by looking at the record
20 and looking at this history that you have referred to,
21 he's by no means the most difficult client I've
22 encountered, as well I heard Bryan Stevenson say that
23 earlier and I simply had to nod my head, because many
24 capital defendants come to these cases because of the
25 nature of the case and the nature of the charges against

1 them and the pressure that's on them as these cases are
2 being brought to trial, in very tense, difficult,
3 emotional state and they present challenges.

4 I would venture to say most of them present
5 challenges in terms of attorney-client and even
6 expert-client relationships, and so part of what you have
7 to learn when you do this kind of work, when you go to
8 these training sessions that Mr. Stevenson was talking
9 about, is how to deal with difficult clients. And so --
10 and there are very straightforward predictable things
11 that need to be done. And in a case like this one with
12 Mr. Fisher, one of the very, very important things that
13 has to be done, and this is sort of lesson one in a
14 session of dealing with difficult clients is don't
15 promise your client something that you're not going to
16 do, don't make representations to a client that you're
17 not going to be able to meet, precisely because many
18 people have histories, not necessarily as traumatic as
19 Mr. Fisher's, but not unlike that, where they have
20 learned over the years because they have been mistreated
21 by a number of people, sometimes starting early in
22 childhood, sometimes by juvenile justice institutions
23 they learn to be distrustful. And if they begin to get
24 the sense that the lawyer is saying things that aren't
25 true, is making representations that they don't intend to

1 follow through on, then the beginning of the
2 deterioration of that relationship, the seeds have been
3 sewn. And so you could see it in -- and I was in the
4 courtroom yesterday and I listened to Mr. Albert's
5 testimony, and I could certainly understand how and why
6 this relationship began to break down.

7 I can tell you that Mr. Fisher's relationship
8 with his current attorneys is a working relationship.
9 You see him here in court. I saw him when I interviewed
10 him. He's been very cooperative with me. I interviewed
11 him for about four hours. He was forthcoming with me.
12 We got along well. He, you know, I didn't promise him
13 things I couldn't do. I tried to make it clear to him
14 what I could do, what I couldn't do, what my view of this
15 or that or the other thing was. He understood it, he
16 didn't always agree with it. We had a good working
17 relationship and conversation, that appears to me to be
18 the case with the attorneys that he's working with now.

19 Is he a challenging client? I suspect so
20 because I know the history that you've alluded to, but I
21 think there are ways you have to go about relating to
22 somebody who's had the kind of past history that he's had
23 so that you don't begin to, you don't begin to mobilize
24 his fears that you're another person who is going to
25 abuse or mistreat or somehow treat him unjustly, because

1 he's had many, many of these experiences, and to a
2 certain extent he comes by that suspicion honestly, even
3 though it's dysfunctional and even though there are
4 sometimes when he distrusts people who he ought to trust,
5 it's not because he just chooses to be distrustful willy
6 nilly.

7 Q. What do you think Mr. Fisher's ultimate
8 expectations are?

9 A. Well, his ultimate expectations are to get
10 justice. I mean, I think he's hopeful that his case will
11 be heard effectively, that it will be presented
12 effectively to a jury by attorneys who care about him,
13 who are going to present the evidence that exist in the
14 case, that they're going to put together a team of people
15 the way virtually every effective defense team in the
16 country puts together a team to present the case
17 effectively, the mitigation if there's a second stage,
18 and he wants justice, and it's not an unreasonable
19 expectation.

20 Q. No one can promise him that either, can they,
21 what he believes justice to be?

22 A. They can --

23 MS. CHESLEY: Your Honor, I'm --

24 THE COURT: Overruled.

25 MS. CHESLEY: -- not sure --

1 **THE COURT:** Overruled.

2 **THE WITNESS:** I think what he wants is, what he
3 wants is the process. What he wants is to see
4 people working hard on the case and caring and doing
5 the things that he knows. He's been around the
6 system a lot now. He's sort of self educated on
7 these issues, but he certainly knows enough to know
8 when attorneys are working on his case, when experts
9 are working on his case, when they're doing the
10 things that he's learned, that he's learned that
11 people ought to be doing.

12 And when he says he wants justice that's what he
13 means. Obviously, no one can guarantee an outcome,
14 but we can and we should be able to guarantee a
15 process. We can and we should be able to guarantee
16 him that we're going to work effectively on his
17 case. That wasn't done in the earlier trial.

18 **Q.** (By Ms. Box) But there comes a time in every
19 client's life between he and his attorney that he says
20 what do you think is going to happen, what are my
21 chances, and if he gets a frank answer he doesn't like is
22 he going to not attend the trial again?

23 **A.** Well, I don't believe -- I don't believe that's
24 why he didn't attend the trial. My reading of the record
25 and my interpretation of the testimony that I heard

1 yesterday suggested that's not what his failure to come
2 to court was about. It was about a relationship that had
3 broken down very early in the process because he had lost
4 faith in his attorney's willingness and ability to do the
5 work that needed to be done in the case and had lost
6 faith in his attorney's relationship with him, connection
7 to him, trust with him.

8 You know, if you're asking me if that were to
9 happen again would Mr. Fisher have a similar kind of
10 reaction, I think maybe he would. If he got an attorney
11 that wasn't effective, that didn't care about his case,
12 that wasn't doing the work, I think he would be
13 frustrated. He cares about... He cares about his life.
14 He cares about his fate and he wants people working on
15 his case, and it's perfectly reasonable.

16 I mean, this is the kind of client you want in a
17 case like this. You want a client who hasn't given up,
18 who wants to work with you on his case. At no point in
19 any of this did he ask me what... could I guarantee what
20 was going to happen. I didn't -- you know, I didn't gain
21 his trust by saying don't worry we can fix this for you.
22 I said, like his current lawyers have said, I'm going to
23 work hard on this case for you, and I did. And if I
24 hadn't he would have had every reason to be upset with me
25 and he probably would have been.

1 And I think that, you know, that will be the
2 case with the next round of lawyers he gets, if that's
3 the course of events. But I don't see him as
4 unreasonable around the issue of what he expects for
5 people who are working on the case. That's not been my
6 experience of him and that's not my observation of the
7 way he's working with his current attorneys.

8 Q. Perhaps he expects his version of the perfect
9 dream team, isn't that so, Doctor?

10 A. No, I don't think so. You know, I think he
11 would, I think he'd be satisfied with a team and in terms
12 of a trial he hasn't had a team. He hasn't had anything
13 that remotely resembles a team. And so I don't think
14 he's asked for a dream team. I don't think that's his
15 expectation. I think he'd like a team that's working
16 effectively on his case. I don't believe that's what he
17 had the last time, by any stretch of the imagination.

18 Q. Well, it seems that Mr. Fisher also -- because
19 he did try very hard to represent himself in court, do
20 you think that he could really be guided by lawyers' best
21 advice even --

22 A. I've seen him guided by his lawyer's advice in
23 this case. I've seen it happen in this case. I've
24 participated in -- he -- I've had discussion with him the
25 other night in which he, we talked about things, he

1 listened to me. He had a somewhat different view when we
2 began the conversation. He was polite, he was
3 respectful. We communicated with each other. He
4 understood my logic. It wasn't necessarily his, but he
5 went along. He went along. He agreed. I mean, he
6 agreed that the things, that things would unfold the way
7 I was suggesting that I would testify.

8 I mean, I told him what I was going to say and
9 he was quite communicative about it. So I don't find
10 him, I don't find him to be impossible or so challenging
11 to work with that a reasonably competent set or
12 reasonably effective set of lawyers or a team of people
13 could work with him. I have no doubt that that could be
14 done and would be done.

15 Q. Well, at this stage of the process, of course,
16 there is a trial, if there is another one, is a long time
17 coming.

18 A. Yes.

19 Q. And as it gets closer to perhaps his possible
20 trial the tension is going to increase on him a lot,
21 isn't it? He's going to get more worried about his fate?

22 A. Well, that would be reasonable, that would be
23 reasonable for any one of us in that situation. He's
24 been through this before and I think he's learned from
25 it. I think he's learned from it. I think he's learned

1 from it just in this process. So I would expect him to
2 be able to handle that tension, which I agree with you
3 will be there, to handle it differently, to handle it
4 better.

5 I'd also certainly advise his attorneys, if and
6 when there's a new trial, to get people involved in the
7 case early on who can talk to him, who can help explain
8 things to him, counsel him, explain his reactions to him.
9 I mean, here's a man who has been locked up for as many
10 years as he's been locked up, never had effective
11 therapy, never had treatment to deal with any of these
12 kinds of problematic cycles of behavior that he finds
13 himself in, and I think he's open to discussing these
14 things. He's been open to talking with me about them.
15 And he can talk about them intelligently.

16 Now, the problem is he has to get to the point
17 where he can control his behavior, and I think he's
18 working on that. And I think you see him here in this
19 proceeding perfectly appropriate, acting in a perfectly
20 appropriate manner and I'd expect with the appropriate
21 people around him that exactly the same kinds of things
22 will happen in the future.

23 Q. But it seems like for the last 20 years he's not
24 been able to control his behavior at all.

25 A. Well, Counsel, that's -- I could see why you

1 would say that. But, in fact, if you look at his record
2 there actually are periods of time during which he has
3 been fine. There's a long stretch of, a period of years
4 while incarcerated under these conditions that I've been
5 describing where he's had few, if any, disciplinary
6 write-ups, where his behavior has been stabilized.

7 I alluded to this a little bit earlier when I
8 was talking about Dr. O'Carroll saw him in 1989 and he
9 was at perhaps the worst stage of his psychological or
10 emotional problems. But whether Dr. O'Carroll did
11 something with him or whether simply having an
12 opportunity to talk to somebody about his problems or
13 some other thing in his environment changed he stabilized
14 for a period of about four or five years, and there are
15 virtually no write-ups over that four- or five-year
16 period of time.

17 But then as is often the case his behavior began
18 to deteriorate and he began to have problems again. And
19 sure enough, in the midst of that deterioration he's
20 evaluated by people who again describe these kinds of
21 psychological problems. So it's not a matter of -- I
22 mean, sometimes there's a kind of spontaneous remission
23 and people can stabilize their behavior, whether there's
24 a change in the unit or there's a change in the way a
25 prisoner starts looking at his life, and so on, he can

1 stabilize himself. But unless that stability is shored
2 up with some insight and some counseling and so on, or in
3 Mr. Fisher's case some treatment, it's not necessarily
4 going to last. And so he didn't get that and so it's not
5 surprising that he began to deteriorate again.

6 But I think it's possible for you to look at his
7 record and realize that it is actually not an
8 uninterrupted stream of disciplinary infractions, that
9 he's had bad periods and some of those periods have been
10 quite bad and they've coincided with those periods where
11 he's been unraveling psychologically or psychiatrically,
12 and then there have been periods where he's stabilized
13 and that's when he's been more psychologically,
14 psychologically strong and the stabilization and the
15 behavior reflects that.

16 Q. But given his mental condition what you said
17 that you believe it to be, is it much more likely he will
18 revert to his normal conduct, be disruptive, not be
19 cooperative with anybody?

20 A. Well, I guess we disagree about what his normal
21 conduct is. I think a person's conduct is always a
22 function both of who they are and the circumstances in
23 which they're acting or conducting themselves, and I
24 think if he were to be placed in an environment under
25 which he feels himself to be surrounded by people who he

1 can't trust and in an environment which is threatening
2 and frightening and where he has nobody to turn to,
3 nobody to talk to about it, no counseling, and hasn't
4 been given any insight about how to control his behavior
5 in the face of that, then there's a probability that he
6 would revert to that kind of behavior.

7 If he were in a different environment, in an
8 environment where he had activities where he had
9 programming, where he had an opportunity for counseling,
10 where he'd be given some insight with the kind of good
11 behavior he's engaged in now, get stabilized, I think no.
12 I mean, I think the prognosis for him would be very good,
13 that he would give up those patterns of behavior.
14 Because ultimately, as I was saying a few minutes ago,
15 they're self-destructive, they don't gain him anything.

16 And so when you have a prisoner who's in a
17 situation like that where they engage in self-destructive
18 behavior they need a pathway out of it and so he needs to
19 be shown how his life will be better if he gives up that
20 self-destructive behavior. And that's really not what's
21 happened to him yet.

22 Q. But he's shown, exhibited these traits since he
23 was a child; never obeying the rules, arguing, wanting to
24 have his own way, going so far as to leave the house if
25 he doesn't get it, doesn't he?

1 A. No. See, I think that's, I think, perhaps
2 unintentional mischaracterization, certainly where I sit.
3 You know, his behavior -- and there's no evidence that
4 his behavior when he was in Harrisburg was problematic or
5 that he was running away from home, that he was leaving.
6 He's got -- there's no juvenile record in Harrisburg.
7 Now, admittedly he was a young child, but there's no
8 Youth Services involvement. He had elderly grandparents
9 who were taking caring of him. There was no evidence
10 that he had any problems when he was in the right kind of
11 an environment.

12 Now, the problems that he had when he moved to
13 Buffalo, by his father's own admission, were at least as
14 much his father's fault as they were James' fault, and
15 that's just not, that's not just my opinion, that's his
16 dad talking to the Department of Youth in New York saying
17 we've got to get him out of the house because this is not
18 good for him either, and if he stays here any longer I
19 might hurt him. So this is not -- the dad's not saying
20 he's willful, he'll never... he won't obey any rules, et
21 cetera, et cetera. He's saying he's causing a disruption
22 in my family and I'm not handling it well, I'm not taking
23 good care of him.

24 If you look at his record in the youth
25 facilities that he was in, in some instances they're very

1 good adjustments. I mean, many of these evaluations of
2 him say this young man has great potential. He just
3 needs the right kind of treatment. He just needs the
4 right kind of environment to be in. Some of them even
5 say his prognosis is good if he gets what he needs. The
6 sad thing is he doesn't get what he needs. He doesn't
7 get what even those evaluators say he ought to be
8 provided with.

9 So I don't see him as having set out on a path
10 of misbehavior as a very young boy and stubbornly
11 refusing to get off of it. I see him as a young man
12 who's struggled with a lot of bad things that happened to
13 him, forces well beyond his control, beginning to
14 experience totally predictable problems that were
15 identified by other people, never getting the help that
16 those same people said he needed, and him not being able
17 to have the resources to pull himself out of that cycle,
18 as few people do.

19 And so, I mean, part of what has happened now is
20 he's older. I mean, that's an important issue as well,
21 that people do mature over time, they develop a certain
22 amount of wisdom, they age out. And I think that aging
23 out process combined with some stable contact from people
24 around him who can begin to talk him through some of
25 these issues and talk him out of some of this

1 dysfunctional and ultimately self-destructive patterns
2 make the prognosis for him once again very good.

3 Q. But there are some people who either won't or
4 can't be helped, aren't there?

5 A. Hypothetically, yes. Of course, I'm sure that's
6 true.

7 Q. There are people who really won't follow the
8 rules, will they, won't follow the law?

9 A. Again, hypothetically, yes, I'm sure that's
10 true. I don't think he happens to be one of them, but
11 there are such people.

12 MS. BOX: Well, sir, 24 different citizens of
13 this county have disagreed with you. Thank you.

14 THE COURT: Redirect examination.

15 REDIRECT EXAMINATION

16 BY MS. CHESLEY:

17 Q. Have those 24 different citizens heard the type
18 of information you have provided today?

19 A. Not one of them.

20 Q. Do you think their decision would be different
21 if they had heard that kind of information?

22 MS. BOX: Objection. Speculative.

23 THE COURT: You've already asked that question.
24 I think he's already answered it. But if you --

25 THE WITNESS: Yes, of course, I do. Yes.

1 MS. CHESLEY: That's all.

2 MS. BOX: Nothing further.

3 THE COURT: May the doctor be excused?

4 MS. CHESLEY: Yes.

5 THE WITNESS: Thank you.

6 THE COURT: Uh-huh. Call your next witness.

7 MS. CHESLEY: Your Honor, that concludes the
8 Appellate's case.

9 THE COURT: State have any witnesses?

10 MS. BOX: No, sir. The State rest.

11 THE COURT: I really don't need any closing
12 arguments. I've heard it all, but, you know, I will
13 afford you the opportunity to do it, but I don't
14 need it.

15 MS. CHESLEY: No, Your Honor. I don't believe
16 that that's necessary.

17 MS. BOX: No. I think we've talked about it --

18 THE COURT: Okay. Very good. What this court
19 will do is I'm going to give you a decision on
20 Monday morning at 9 o'clock.

21 MS. CHESLEY: This Monday?

22 THE COURT: This Monday, Monday morning.

23 MS. CHESLEY: We'll be here.

24 THE COURT: 9 o'clock. Is there anything else
25 on behalf of Defendant-Appellant?

1 **MS. CHESLEY:** I'm sorry. Yes?

2 **THE COURT:** Anything additional?

3 **MS. CHESLEY:** No, Your Honor. I just would like
4 to make certain that all of -- I believe that most
5 of the exhibits that we have introduced do have that
6 MJP or JBA or OCD.

7 **THE COURT:** Well, you can check them. They're
8 all here.

9 **MS. CHESLEY:** Those were all admitted through
10 our stipulation. I just want to make sure that
11 there's not something else that we....

12 (An off the record discussion was here had.)

13 **THE COURT:** Is there anything else?

14 **MS. CHESLEY:** No, Your Honor.

15 **THE COURT:** Ms. Box?

16 **MS. BOX:** But if she finds they have not all
17 been admitted if she wants to reopen on Monday or
18 whatever, that's fine.

19 **THE COURT:** Very good.

20 **MS. QUICK:** Your Honor, I'm sorry. I have one
21 thing. Mr. Fisher just wants to be sure that he
22 would be able to return for your decision on Monday
23 morning.

24 **THE COURT:** Why wouldn't he?

25 **THE DEFENDANT:** I just wanted to make sure.

DISTRICT COURT OF OKLAHOMA - OFFICIAL TRANSCRIPT

1 **THE COURT:** I am not talking to you.
2 **MS. QUICK:** Thought he might be sent back --
3 **THE COURT:** Pardon me?
4 **MS. QUICK:** -- to OSP.
5 **THE COURT:** He has to be released to go back to
6 OSP, doesn't he?
7 **MS. CHESLEY:** I think you have to release him.
8 Yes.
9 **THE COURT:** He'll be here Monday. There's no
10 reason why you couldn't be here.
11 **THE DEFENDANT:** I'll be here Monday, sir? Okay.
12 I appreciate it.
13 **THE DEPUTY:** He'll be here till we get a writ
14 control.
15 **MS. CHESLEY:** I heard that.
16 **THE COURT:** Anything else?
17 **MS. BOX:** No, sir.
18 **MS. CHESLEY:** No, Your Honor.
19 **THE COURT:** We stand adjourned.
20 **MS. CHESLEY:** Thank you.
21 (Whereupon, proceedings concluded at 2:23 p.m.)
22
23
24
25

DISTRICT COURT OF OKLAHOMA - OFFICIAL TRANSCRIPT

1 IN THE DISTRICT COURT OF OKLAHOMA COUNTY
2 STATE OF OKLAHOMA
3

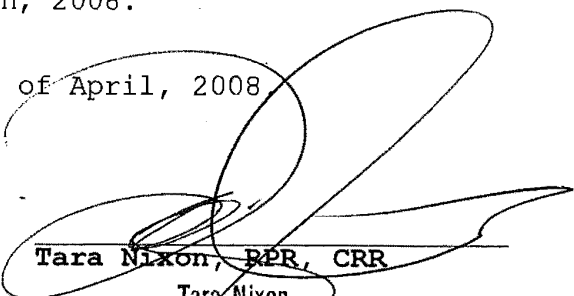
4 JAMES T. FISHER,)
5 Appellant,)
6 vs.)
7 THE STATE OF OKLAHOMA,)
8 Appellee.)

CASE NO. CF-1983-137
D-2005-460

9
10 **CERTIFICATE**
11

12 I, Tara Nixon, Certified Shorthand Reporter,
13 Registered Professional Reporter, Certified Realtime
14 Reporter, and Official Court Reporter for Oklahoma
15 County, do hereby certify that the foregoing
16 transcript in the above-styled case is a true,
17 correct, and complete transcript of proceedings had
18 on the 21st day of March, 2008.

19 Dated this 11th day of April, 2008.
20

21
22 
23 Tara Nixon, RPR, CRR

24 Tara Nixon
25 Oklahoma Certified Shorthand Reporter
 Certificate No. 1542
 Exp. Date: December 31, 2008

APPENDIX F

APPENDIX F

**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

TREMANE WOOD,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

PCD Case No.

Capital Postconviction Proceeding

Third Postconviction No. PCD-2017-653
Second Postconviction No. PCD-2011-590
First Postconviction No. PCD-2005-143
Direct Appeal Nos. D-2004-550; D-2005-171
Oklahoma County No. CF-2002-46
Tenth Circuit Court of Appeals No. 16-6001
U.S. District Court, Western District of
Oklahoma No. 5:10-cv-829-HE

Motion for Discovery

Petitioner Tremane Wood respectfully requests an order authorizing discovery pursuant to 22 O.S. § 1089(D)(3) and Rules 9.7(D)(2) and (D)(4) of the Rules of the Oklahoma Court of Criminal Appeals. Mr. Wood concurrently submits this motion and a request for an evidentiary hearing with his fourth application for postconviction relief. This Court may issue any appropriate discovery orders to facilitate review of Mr. Wood's application. *See Bland v. State*, 1999 OK CR 45, 991 P.2d 1039. All averments and supporting attachments presented in Mr. Wood's application are hereby incorporated by reference.

Mr. Wood has raised a colorable claim that new evidence establishes that his conviction and death sentence are unlawful under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and under Article II, Sections 7, 9, and 20 of the Oklahoma Constitution. He has alleged that newly discovered evidence that his trial lawyer, John Albert, suffered from a serious drug and alcohol addiction throughout the period that Albert represented Mr. Wood in his capital case establishes that he received ineffective assistance of trial counsel in violation of his state and federal rights.

Mr. Wood supports his allegations with the affidavits of Benito Bowie and Michael Maytubby who, in sworn statements, provide firsthand accounts of Albert's addiction to cocaine and abuse of alcohol and pills throughout the period he represented Mr. Wood. While these affidavits are sufficient to entitle Mr. Wood to relief for the reasons set forth in his application, discovery will aid this Court's review of the allegations raised therein.

Mr. Wood respectfully asks this Court to issue an order unsealing Volume II of a trial transcript of the March 9, 2006, contempt proceeding against John Albert in Oklahoma County Case No. CF-2004-6139. In support of Mr. Wood's first application for postconviction relief, he moved this Court for discovery of this information based on Albert's admissions during the unsealed portion of the March 9 hearing "that he has a problem, which appears to involve alcohol and possibly even drugs." Motion for Discovery at 1, *Wood v. State*, No. PCD-2005-143 (Okla. Crim. App. Dec. 26, 2006). He further argued that "the evidence from this hearing reveals a concern by a district court as to Mr. Albert's representation of his clients and the fact that he has not even seen one of his clients in close to two years." *Id.* This Court denied the request because it concluded that Mr. Wood's ineffective-assistance claim—as presented at that time—was "[w]ithout proof trial counsel was suffering from his addiction during Wood's trial[.]" Opinion at 5, 19, *Wood*, No. PCD-2005-143 (Okla. Crim. App. June 30, 2010) (emphasis added). Mr. Wood has now presented this Court with that proof, as set forth in his application, which warrants the foregoing discovery to aid this Court's review of the allegations raised in his application.

Respectfully submitted:

June 17, 2022.

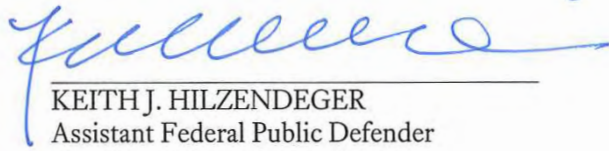
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CERTIFICATE OF SERVICE

I certify that on June 16, 2022, I caused the foregoing document to be filed with the Court by sending the original and 10 copies to the Clerk of the Appellate Courts by FedEx overnight delivery. I further certify that a copy of this document was served on the Attorney General by depositing a copy with the Clerk of the Appellate Courts at the time of filing.



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APPENDIX G

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**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

TREMANE WOOD,

Petitioner,

vs.

STATE OF OKLAHOMA,

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PCD Case No.

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Third Postconviction No. PCD-2017-653
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Oklahoma County No. CF-2002-46
Tenth Circuit Court of Appeals No. 16-6001
U.S. District Court, Western District of
Oklahoma No. 5:10-cv-829-HE

Motion for an Evidentiary Hearing

Petitioner Tremane Wood respectfully requests an evidentiary hearing on any controverted, previously unresolved issues of fact that may arise in connection with his fourth application for postconviction relief, filed simultaneously with this motion. All averments and supporting attachments presented in Mr. Wood's application are hereby incorporated by reference.

In his application, Mr. Wood raises one proposition which involves issues of fact. He alleges that newly discovered evidence that his trial lawyer, John Albert, suffered from a serious drug and alcohol addiction throughout the period that Albert represented Mr. Wood in his capital case establishes that he received ineffective assistance of trial counsel in violation of his state and federal rights. That proposition could not have been previously raised because the grounds on which it relies became available for the first time on April 19, 2022, when Benito Bowie agreed to sign an affidavit attesting under oath to his firsthand knowledge of Albert's substance abuse during the period Albert represented Mr. Wood in his capital case.

While the application itself presents sufficient evidence to warrant relief, if this Court should find the evidence presented creates controverted, previously unresolved factual issues then an evidentiary hearing is required. *See* 22 O.S. § 1089(D)(4)-(5). If this Court grants a hearing, in addition to the information presented in the attachments to his application, Mr. Wood requests permission to bring forth other evidence as needed to further support the proposition raised in his application.

Respectfully submitted:

June 17, 2022.

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APPENDIX H

APPENDIX H



FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN 29 2022

JOHN D. HADDEN
CLERK

No. PCD-2022-550

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TREMANE WOOD,

Appellant,

-vs-

THE STATE OF OKLAHOMA,

Appellee.

**RESPONSE TO PETITIONER'S FOURTH APPLICATION FOR POST-
CONVICTION RELIEF
FROM OKLAHOMA COUNTY DISTRICT COURT
CASE NO. CF-2002-46**

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JUNE 29, 2022

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**IN THE COURT OF CRIMINAL APPEALS
FOR THE STATE OF OKLAHOMA**

TREMANE WOOD,	)	
	)	
Petitioner,	)	
	)	
-vs-	)	Case No. PCD-2022-550
	)	
THE STATE OF OKLAHOMA,	)	DEATH PENALTY CASE
	)	
Respondent.	)	

**RESPONSE TO PETITIONER'S FOURTH
APPLICATION FOR POST-CONVICTION RELIEF**

COMES NOW Respondent, the State of Oklahoma, by and through undersigned counsel, and responds to the claim raised in Petitioner's fourth application for post-conviction relief.

STATEMENT OF THE CASE

Petitioner was tried and convicted by a jury in Oklahoma County District Court Case No. CF-2002-46 of one count of First Degree (Malice Aforethought) Murder, in violation of 21 O.S.2001, § 701.7(A), one count of Robbery with a Firearm, After Former Conviction of a Felony, in violation of 21 O.S.2001, § 801, and one count of Conspiracy to Commit a Felony, After Former Conviction of a Felony, in violation of 21 O.S.2001, § 421. The jury found the existence of three aggravating circumstances with respect to the murder: (1) Petitioner knowingly created a great risk of death to more than one person; (2) the murder was especially heinous, atrocious, or cruel; and (3) the existence of a probability Petitioner would commit criminal acts of violence that would pose a continuing

threat to society. Petitioner was sentenced to death for the murder and to imprisonment for life for his other two crimes.

Petitioner brought a direct appeal to this Court. This Court affirmed Petitioner's convictions and sentences in a published opinion filed on April 30, 2007. *Wood v. State*, 2007 OK CR 17, 158 P.3d 467. This Court denied Petitioner's petition for rehearing. The Supreme Court declined to review the case. *Wood v. Oklahoma*, 552 U.S. 999 (2007).

Petitioner filed an application for post-conviction relief in this Court on February 16, 2005, in Case Number PCD-2005-143. This Court denied relief in an unpublished opinion. *Wood v. State*, No. PCD-2005-143 (Okla. Crim. App. June 30, 2010) (unpublished and attached as Exhibit A).

Petitioner filed a second application for post-conviction relief in this Court on July 6, 2011, in Case Number PCD-2011-590. This Court again denied relief in an unpublished opinion. *Wood v. State*, No. PCD-2011-590 (Okla. Crim. App. Sept. 30, 2011) (unpublished and attached as Exhibit B).

Petitioner thereafter sought habeas corpus relief in the United States District Court for the Western District of Oklahoma, Case Number CIV-10-0829-HE. The district court denied relief in a Memorandum Opinion on October 30, 2015. *Wood v. Trammell*, Case No. CIV-10-0829-HE, 2015 WL 6621397 (W.D. Okla. Oct. 30, 2015).

Petitioner appealed the federal district court's decision to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit subsequently denied

relief in a published opinion. *Wood v. Carpenter*, 899 F.3d 867 (10th Cir. 2018), *opinion modified and superseded on denial of rehearing*, 907 F.3d 1279 (10th Cir. 2018).

Petitioner sought to appeal the Tenth Circuit's decision to the United States Supreme Court but was denied certiorari. *Wood v. Carpenter*, 139 S. Ct. 2748 (2019).

While his federal habeas claims were being litigated, Petitioner filed a third application for post-conviction relief in this Court on June 23, 2017. This Court denied relief yet again in an unpublished opinion. *Wood v. State*, No. PCD-2017-653 (Okla. Crim. App. Aug. 28, 2017) (unpublished and attached as Exhibit C). Petitioner sought appellate review of that decision in the United States Supreme Court but was denied a writ of certiorari. *Wood v. Oklahoma*, 139 S. Ct. 938 (2019).

Three years later, Petitioner filed the instant fourth application for post-conviction relief in this Court.

STATEMENT OF THE FACTS

This Court found the following facts on direct appeal:

¶ 2 Appellant Tremane Wood and three others were involved in and charged with the murder of Ronnie Wipf and the robbery of Arnold Kleinsasser. Clarity requires us to set forth the relationship between these defendants and the outcome of their cases. In addition to Tremane Wood, the defendants include Tremane's older brother Zjaiton Wood, Zjaiton's girlfriend Lanita Bateman, and the mother of one of Tremane's sons, Brandy Warden.³ Brandy Warden entered into a plea agreement, cooperated with the State and testified

against her co-defendants. She pled guilty to Accessory After the Fact and Conspiracy.⁴ Zjaiton and Lanita were each found guilty in separate trials of felony murder, robbery with firearms, and conspiracy.⁵

FN3. Brandy had previously dated Tremane, but was not in a romantic relationship with him at the time this crime was committed.

FN4. The district court sentenced her to 45 years for accessory after the fact and 10 years for conspiracy.

FN5. Zjaiton Wood was sentenced to life imprisonment without the possibility of parole for felony murder and 60 years imprisonment for robbery and conspiracy. This Court affirmed his convictions in *Wood v. State*, Case No. F-2005-246 (Okla.Cr., Dec. 20, 2006) (unpublished opinion). Lanita Bateman was sentenced to life imprisonment for felony murder, 101 years imprisonment for robbery and 10 years imprisonment for conspiracy. This Court affirmed her convictions in *Bateman v. State*, Case No. F-2003-647 (Okla.Cr., April 19, 2004) (unpublished opinion).

¶ 3 On New Years Eve 2001, Ronnie Wipf and Arnold Kleinsasser went to the Bricktown Brewery in Oklahoma City where Zjaiton, Tremane, Lanita and Brandy were celebrating. Near closing time, Wipf and Kleinsasser met Lanita and Brandy believing they were two ordinary girls celebrating the new year together. Lanita and Brandy agreed to accompany Wipf and Kleinsasser to a motel on the pretext of continuing to celebrate the new year. Brandy, Lanita, Tremane, and Zjaiton then made a plan whereby the women would pretend to be prostitutes and the brothers Wood would arrive at the motel later and rob Wipf and Kleinsasser.

¶ 4 Once in their room at a Ramada Inn, Lanita made a telephone call to Zjaiton to let him know where they were, ending her conversation by saying, "Mom, I love you" so the victims would not be suspicious. The call to

"Mom" was followed by some general conversation among the four which included a discussion of what each did for a living. Lanita told Kleinsasser that "this" is what she did and he realized that she meant she earned her living by having sex with men. That revelation was followed by a negotiation whereby the two women agreed to have sex with Wipf and Kleinsasser for \$210.00. Since neither man had that much money, Brandy drove Kleinsasser to a nearby ATM. He gave her the money he withdrew and they returned to the room.

¶ 5 Back at the motel, the women went into the bathroom together, and shortly after, someone pounded on the door and called out, "Brandy, are you in there? Brandy, are you ready to go home?" Wipf refused to open the door and urgently told Kleinsasser to call the police. Before he could reach the phone, Lanita picked it up and pretended to call the police. Since it was now clear that the women were not going to have sex with them, Wipf demanded the return of their money. After a brief period of pandemonium in the room, Wipf opened the door and the women ran out. Recognizing a white car as the one Zjaiton and Tremane were driving, they got in and waited. Meanwhile, two masked men rushed into the motel room, a larger man, subsequently identified as Zjaiton Wood, holding a gun and a smaller man, subsequently identified as Tremane Wood, brandishing a knife.⁶ Zjaiton pointed the gun at Kleinsasser's head and demanded money. Kleinsasser gave him the rest of the money in his wallet. Zjaiton then joined Tremane in his attack on Wipf. As the three struggled, Kleinsasser heard one of the intruders say, "Just shoot the bastard" and then a gunshot. Tremane then turned his attention to Kleinsasser, demanding more money. Kleinsasser showed him his empty wallet, and Tremane hit him on the head with the knife. Tremane rejoined the struggle with Wipf and the fight moved into the bedroom area. Kleinsasser could see Wipf was bleeding and knew that he was seriously injured. While the two intruders struggled with Wipf, Kleinsasser escaped and sought help from the motel office. Before anyone could unlock the office door and help him, however, Kleinsasser fled to a nearby

apartment complex to hide. From his vantage point there, he watched the motel and saw a white car leave the parking lot. He saw people come and go throughout the night, but, with no sense of whom they were, remained in hiding. It was 6:00 a.m. before he returned to the scene of the attack and learned of Wipf's death from a police detective.

FN6. Kleinsasser could not identify his attackers because they remained masked throughout the entire incident so he described the men's actions distinguishing the men by their size. Zjaiton is the larger of the Wood brothers. According to their mother's estimates, Zjaiton is the taller of the two brothers and outweighs Tremane by some 50 pounds, making him easily distinguishable from Tremane.

¶ 6 The medical examiner concluded that Wipf died as the result of a stab wound to the chest. There was no evidence he had sustained any kind of gunshot wound. Surveillance videotape from the motel's camera showed Brandy and Lanita renting the room with Wipf and Kleinsasser. The motel's phone records showed that three calls were made from the room to Zjaiton's pager and one to the house where Tremane lived. Surveillance videotape from a local Wal-Mart showed Brandy, Lanita, Zjaiton, and Tremane buying ski masks and gloves earlier in the evening.⁷ As part of her plea bargain, Brandy testified against Tremane detailing the events of the evening from buying the masks and gloves through their actions the morning after the murder.

FN7. Prior to going to the Bricktown Brewery, Zjaiton and Tremane robbed a local pizza restaurant and attacked the owner, wearing the masks and gloves they had just purchased and using the gun and knife that they later used in the robbery-murder at the Ramada Inn. According to the restaurant owner, the smaller man had the knife and the larger man had the gun.

¶ 7 Zjaiton testified for the defense, against the advice of counsel. He said that it was he who stabbed Wipf, aided in the crime by a man named Alex. Zjaiton claimed that he took the knife from Alex and stabbed Wipf with it. He testified that Tremane was not involved in the crime.

Wood, 2007 OK CR 17, ¶¶ 2-7, 158 P.3d at 471-72.

INTRODUCTION

Petitioner's claim is barred by *res judicata*. In his first application for post-conviction relief, filed in early 2005, he argued to this Court—as he does now—that newly-discovered evidence rendered his conviction and death sentence suspect and unreliable. At the heart of that claim was Petitioner's contention that his trial counsel, Johnny Albert, rendered ineffective assistance due to Albert's substance abuse issues. This Court rejected Petitioner's claim then, determining that Petitioner had failed to prove that Albert was struggling with his substance-abuse issues at the time of Petitioner's trial in the Spring of 2004.¹

Petitioner now presents this Court with affidavits from two individuals, Benito Bowie and Michael Maytubby, to support an identical claim. In light of their statements, Petitioner suggests that Albert's substance abuse actually started long before the date this Court determined in Petitioner's first application for post-conviction relief; Petitioner suggests this Court missed the starting point

¹ In denying Petitioner relief, this Court stated that the evidence before it showed that Albert's "substance abuse disorder began in earnest in March 2005" and "peaked in March 2006." *Wood v. State*, No. PCD-2005-143, slip op. at 5-6, n.5.

of Albert's substance abuse by as much as *seven* years and claims that the abuse impacted Albert during the time of Petitioner's trial.

But by relying on this information pertaining to an issue which was first assessed by this Court in 2005, Petitioner's claim is also waived by his failure to comply with 22 O.S.2021, § 1089(D)(8). That section prohibits consideration of a second or subsequent post-conviction application unless it is based on either a previously unavailable legal basis, or a previously unavailable factual basis. Petitioner does not rely on any new law. Accordingly, he was required to include in his application "sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously . . . because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date...." 22 O.S.2021, § 1089(D)(8)(b)(1). While Petitioner asserts his evidence could not have been discovered with reasonable diligence any sooner, there is no support for this self-serving claim. Petitioner fails to set forth even a single "specific fact[]" establishing that the factual basis for his claims could not have been ascertained and considered by this Court when his first post-conviction application was filed. Because Petitioner does not comply with § 1089(D)(8)(b)(1), this Court "may not consider the merits of or grant relief" for his petition.

Indeed, Petitioner's claims are the type of claims to which procedural bars are regularly applied. See *Coddington v. State*, 2011 OK CR 21, ¶ 2, 259 P.3d 833, 835; *Conover v. State*, 1997 OK CR 39, ¶¶ 5-6, 942 P.2d 229, 231-32

(finding ineffective assistance of trial counsel claim waived); *Carter v. State*, 1997 OK CR 22, ¶¶ 6-7, 936 P.2d 342, 345 (same). As Petitioner has failed to present any unique or compelling circumstances, this Court should not overlook his failure to properly present his claims.

ARGUMENT AND AUTHORITY

PROPOSITION

PETITIONER'S INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIM IS PROCEDURALLY BARRED.

In his sole proposition of error, Petitioner claims his trial attorney, Johnny Albert, was ineffective because Albert was struggling with substance abuse issues at the time of Petitioner's trial in late April and early May of 2004. Petitioner raised an identical claim in his first application for post-conviction relief. As such, his claim is barred by *res judicata*. Petitioner's claim also suffers from the defect of failing to demonstrate that the evidence upon which he now relies could not have been discovered through reasonable diligence sooner and included in his first application for post-conviction relief. Regardless of the avenue by which this Court disposes of Petitioner's claim, it is clear that it should not be considered by this Court.

A. Petitioner's Claim Is Barred by *Res Judicata*.

As noted above, Petitioner argues that Albert rendered ineffective assistance during Petitioner's capital trial due Albert's substance abuse issues. 4th PC at 14-41. Petitioner contends that had Albert not been under the

influence of illegal substances at the time of Petitioner's trial, Albert would have presented a more complete and forceful challenge to the State's case against Petitioner in both the first and second stages of trial. 4th PC at 17-40.

But this claim was previously presented to this Court in Petitioner's first application for post-conviction relief, filed in 2005. *Compare* 4th PC at 14-41 *with* 4th PC, Att. 1 at 2-6. Petitioner framed his argument in his first application for post-conviction relief by claiming that "newly discovered evidence and new law renders [Petitioner]'s conviction and sentence suspect and unreliable." 4th PC, Att. 1 at 2. Then, just as he does in his current application, Petitioner pointed this Court to Albert's "problem," which Petitioner stated "appears to involve alcohol and possibly even drugs." 4th PC, Att. 1 at 3. Much like he does now, Petitioner noted Albert's contempt proceedings in Oklahoma County District Court, his suspension from the practice of law since that time, as well as this Court's remand of the case in *Littlejohn v. State* for an evidentiary hearing regarding Albert's performance as trial counsel in that case. 4th PC, Att. 1 at 3-4.

As such, Petitioner's current claim that Albert rendered ineffective assistance at Petitioner's trial due to his substance abuse issues is barred by *res judicata*. *See Coddington*, 2011 OK CR 21, ¶ 2, 259 P.3d 833, 835 (explaining that *res judicata* and waiver applied in the post-conviction context where claims either were, or could have been, previously presented). The fact that Petitioner has added new evidence to his claim does not transform an old issue into a new

one in order to bypass *res judicata*. See *Turrentine v. State*, 1998 OK CR 44, ¶ 12, 965 P.2d 985, 989 (“That post-conviction counsel raises the claims in a different posture than that raised [previously to this Court] is not grounds for reasserting the claims under the guise of ineffective assistance of appellate counsel.”); *Smallwood v. State*, 1997 OK CR 25, ¶¶ 9-10, 937 P.2d 111, 115 (finding the petitioner’s ineffective assistance claim was not based on facts which were not available at the time he previously raised the issue before the court); *Plantz v. State*, 1997 OK CR 23, ¶ 2, 936 P.2d 339, 340 (“All grounds for relief must be raised in the original, supplemental or amended application unless the petitioner shows sufficient reason why a ground for relief was not previously asserted or that a ground for relief was inadequately raised in a prior application.”); *Woodruff v. State*, 1996 OK CR 5, ¶ 3 & n.2, 910 P.2d 348, 350 & n.2 (finding the petitioner’s claim which were previously raised but relied upon new evidence was still barred by *res judicata*); *Williamson v. State*, 1993 OK CR 24, ¶ 4, 852 P.2d 167, 169 (“[D]efendants may not obtain review of an issue raised previously by presenting it in a slightly different manner on post-conviction.”). As such, Petitioner’s claim is barred from review now.

B. Petitioner’s Claim Is Waived Because His Factual Basis Was Previously Available.

Section 1089(D)(8) and this Court’s Rule 9.7(G) govern the filing of a subsequent application for post-conviction relief. 22 O.S.2021, § 1089(D)(8); Rule 9.7(G), *Rules of the Oklahoma Court of Criminal Appeals*, Tit. 22, Ch. 18, App. (2021). This statute and this rule both work to prevent unreasonable delays

in presenting this Court with a petitioner's grounds for relief. *See id.*; *see e.g., Valdez v. State*, 2002 OK CR 20, ¶¶ 5, 11, 46 P.3d 703, 705, 707. One of the requirements placed upon a subsequent application is that it must contain:

sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application filed under his section, because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date....

22 O.S.2021, § 1089(8)(b)(1).

With the presentation of the affidavits from Bowie and Maytubby, the defendant has failed to comply with this statute.

As noted above, this exact issue was presented to the Court in 2005. Given the seriousness of the issue and the fact that its implications warranted death-sentence relief in two other cases, *see Littlejohn v. State*, 2008 OK CR 12, ¶¶ 25-28, 181 P.3d 736, 744-45 (vacating death sentence and remanding for resentencing); *Fisher v. State*, 2009 OK CR 12, ¶¶ 6-25, 206 P.3d 607, 609-14 (reversing conviction and death sentence and remanding for new trial), Petitioner's delayed presentation is inexcusable.

Petitioner contends that the "new" factual predicate for his claim only became available on April 19, 2022. 4th PC at 41. Petitioner claims it was only on that date when "Bowie agreed to give information about Albert's substance abuse...." 4th PC at 41. Through Bowie, Petitioner says he was able to locate Maytubby and develop the facts that make up Maytubby's affidavit. 4th PC at

41. Astonishingly, Petitioner was able to locate Maytubby and obtain the executed affidavit merely one day later on April 20, 2022. 4th PC, Att. 6 at 1-2.

But these affidavits and their dates do not indicate an ongoing effort by Petitioner to obtain the information he desperately needed to make his case before this Court. A simple review of Albert's case files in 2005, when Petitioner's first post-conviction application and both *Littlejohn* and *Fisher* were pending before this Court, would have yielded both men as possible witnesses to the substance abuse Petitioner claims Albert suffered in 2004.

And if Bowie, who served as the link to Maytubby, had proven difficult to find at that time (2005), it is clear from his own affidavit that he has been an easy individual to locate since 2010, as he has been confined at the Dick Connor Correctional Center in Hominy, Oklahoma since that time. 4th PC, Att. 5 at 1.

Furthermore, Bowie's affidavit does not suggest the same tight-lip on the subject of Albert and his substance abuse issues as Petitioner leads this Court to believe in his application.² Nor does Petitioner's application provide any explanation why it took multiple years to locate Bowie in the first place.

It is not enough to simply claim a factual basis was not available at some earlier date. Petitioner must *show* this Court that this claim could not have been raised on direct appeal or in his first post-conviction application because its

² Petitioner claims "the factual basis for this claim became available only on April 19, 2022, when Benito Bowie agreed to give information about Albert's substance abuse...." 4th PC at 41. Furthermore, it makes no sense for Bowie, who remains incarcerated, to have reservations about expressing his true feelings about his representation by Albert in 2005 considering Albert has since passed away.

factual basis was “not ascertainable through the exercise of reasonable diligence on or before that date[.]” 22 O.S. § 1089(D)(8)(b)(1); *accord Slaughter v. State*, 2005 OK CR 2, ¶ 6, 105 P.3d 832, 834. Petitioner has not, and cannot, make this showing.

Similarly, with Rule 9.7(G), “[a] subsequent application for post-conviction relief shall not be considered, unless it contains claims which have not been and could not have been previously presented in the original application because the factual or legal basis was unavailable. Rule 9.7(G)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Tit. 22, Ch. 18, App. (2021). All of Petitioner’s evidence was discoverable more than sixty days before the fourth post-conviction application was filed. See Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (“[n]o subsequent application for post-conviction relief shall be considered by this Court unless it is filed within sixty (60) days from the date the *previously unavailable* legal or factual basis serving as the basis for a new issue is announced or discovered.”) (emphasis added). Bowie’s affidavit, if taken as true, indicates that he was aware of Albert’s substance abuse issues as early as 1998 or 1999.³ 4th PC, Att. 6. Petitioner fails to explain what prohibited him from identifying Bowie as a potential witness for him on this

³ Bowie’s affidavit states that he “first met attorney Johnny Albert, who I call ‘John’ back in 1998” and further provides that “[d]uring the almost decade I knew John, he did cocaine every single day. John also drank regularly, probably daily.” 4th PC, Att. 6. Bowie further attests that Albert represented members of the Playboy Gangsta Crips beginning in 1999 and that members of the gang would pay Albert for his services in drugs. 4th PC, Att. 6 at 1.

claim more than sixty days before his filing here. Accordingly, Petitioner's claim is untimely.

Should this Court choose to bar Petitioner's claim pursuant to Rule 9.7(G)(3), Respondent respectfully requests that this Court explicitly state that the claim is *also* barred pursuant to sections 1086 and 1089(D). This Court's bar of claims not raised in an initial post-conviction application is well-established in federal court, while some questions remain about whether the federal courts will honor the bar found in Rule 9.7(G)(3). *See Banks v. Workman*, 692 F.3d 1133, 1145-47 (10th Cir. 2012) (applying Oklahoma's bar of claims not raised in an initial post-conviction application); *Black v. Workman*, 682 F.3d 880, 916-19 (10th Cir. 2012) (same); *Thacker v. Workman*, 678 F.3d 820, 835-36 (10th Cir. 2012) (same); *compare DeRosa v. Workman*, 679 F.3d 1196, 1235 (10th Cir. 2012) (applying Rule 9.7(G)(3)) *with Douglas v. Workman*, 560 F.3d 1156, 1172 (10th Cir. 2009) (refusing to apply Rule 9.7(G)(3) where the petitioner alleged it was not regularly applied by this Court and the State failed to defend the adequacy of the bar).

Petitioner bypassed four prior opportunities to raise this claim, with this factual basis, to this Court.⁴ He makes little effort to demonstrate that the claim was not previously available, when—given the implications it had in other cases

⁴ As noted above, Petitioner has brought a direct appeal and three prior applications for post-conviction relief before this Court.

and the availability of Bowie and the claim was, in fact, previously available. For all of these reasons, Petitioner's claim is waived.

**RESPONSE TO PETITIONER'S APPLICATION
FOR EVIDENTIARY HEARING**

Petitioner has also filed a separate application for an evidentiary hearing in conjunction with his fourth application for post-conviction relief. This Court may grant an evidentiary hearing in a post-conviction proceeding *only* if the claims could not have been previously raised and relief is not otherwise foreclosed by the Post-Conviction Procedure Act. 22 O.S.2021, §§ 1089(D)(4) & (5). As set forth above, each of Petitioner's claims could have been raised previously and relief is foreclosed by the Post-Conviction Procedure Act. As Petitioner is not entitled to relief, even if the facts are as he alleges, he is not entitled to an evidentiary hearing.

RESPONSE TO PETITIONER'S MOTION FOR DISCOVERY

Finally, Petitioner requests that this Court grant him discovery in light of Bowie and Maytubby's affidavits in an effort to establish evidence which could have been known more than a decade ago. This Court may only order discovery "[s]ubject to the specific limitations of" the Post-Conviction Procedure Act. 22 O.S.2021, § 1089(D)(3). Those limitations include the requirement that—except for the limited circumstances where the legal or factual basis for a claim was previously unavailable—all claims be brought on direct appeal or in a first post-conviction application. *Hatch v. State*, 1996 OK CR 37, ¶ 53, 924 P.2d 284, 295. Thus, supplementation of the record in capital post-conviction proceedings is

limited to those materials which were not and could not have been raised in an earlier appeal. Rule 9.7(D)(1)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App (2021). As shown, Petitioner's claim does not satisfy this requirement.

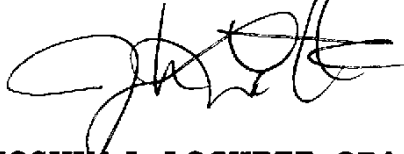
Several routes were available to Petitioner when this issue first came to light in 2005. Among them was a simple search of the Oklahoma County District Court dockets for all cases in which Albert had entered an appearance. The affidavits of Bowie and Maytubby both indicate multiple associations with Albert from the late 1990s/early 2000s until around 2007 when Albert withdrew from both of their cases. 4th PC, Att. 5 at 1, Att. 6 at 1. This means Albert was *still* representing these two individuals at the time he filed his first application for post-conviction relief, making them all the easier to locate. As the factual predicate for Petitioner's current claim was not previously unavailable, he is not entitled to discovery.

CONCLUSION

Respondent has shown that Petitioner's claims on post-conviction are procedurally barred or waived. Therefore, Respondent respectfully requests this Court deny Petitioner's post-conviction application, application for an evidentiary hearing, and motion for discovery in their entirety.

Respectfully submitted,

**JOHN M. O'CONNOR
ATTORNEY GENERAL OF OKLAHOMA**

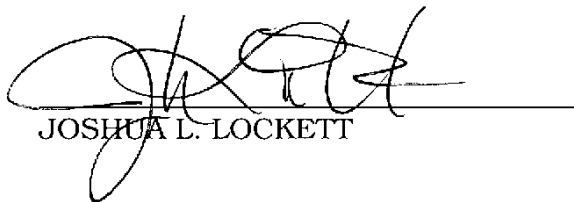


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CERTIFICATE OF SERVICE

On this 29th day of June 2022, a true and correct copy of the foregoing was mailed to:

John M. Sands
Federal Public Defender
&
Keith J. Hilzendeger
Assistant Federal Public Defender
850 West Adams Street, Suite 201
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JOSHUA L. LOCKETT

DEATH PENALTY

8LS

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

TREMANE WOOD,

Petitioner,

-vs-

STATE OF OKLAHOMA,

Respondent.

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NOT FOR PUBLICATION

No. PCD-2005-143

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IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

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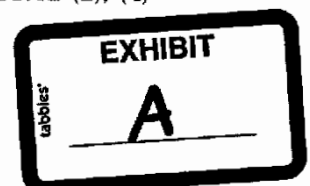
MICHAEL S. RICHIE
CLERK

OPINION DENYING APPLICATION FOR POST-CONVICTION RELIEF

A. JOHNSON, VICE-PRESIDING JUDGE:

Before the Court is Petitioner Tremane Wood's original application for post conviction relief. Wood was convicted by jury in the District Court of Oklahoma County, Case No. CF-2002-46, of Count 1 - First Degree Felony Murder in violation of 21 O.S.2001, § 701.7(B), Count 2 - Robbery with Firearms, After Former Conviction of a Felony in violation of 21 O.S.2001, § 801, and Count 3 - Conspiracy to Commit a Felony, After Former Conviction of a Felony in violation of 21 O.S.2001, § 421. The jury recommended the death penalty on Count 1.¹ The jury fixed punishment on Counts 2 and 3 at life imprisonment. The Honorable Ray C. Elliott, who presided at trial, sentenced Wood accordingly and ordered the sentences to be served consecutively. We affirmed Wood's Judgment and Sentence in *Wood v. State*.

¹ Wood's jury found three aggravating circumstances: 1) that Wood knowingly created a great risk of death to more than one person; 2) that the murder was especially heinous, atrocious, or cruel, and that Wood posed a continuing threat to society. See 21 O.S.2001, §§ 701.12 (2), (4) and (7).



2007 OK CR 17, 158 P.3d 467. The United States Supreme Court denied certiorari in *Wood v. Oklahoma*, 552 U.S. 999, 128 S.Ct. 507, 169 L.Ed.2d 355 (2007).

Wood raises six propositions of error in his application for post-conviction relief. Under the Capital Post-Conviction Procedure Act, the only claims that may be raised are those that “[w]ere not and could not have been raised in a direct appeal” and that also “[s]upport a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent.” 22 O.S.Supp.2006, § 1089(C)(1) and (2). “This Court will not consider issues which were raised on direct appeal and are barred by *res judicata*, or issues which have been waived because they could have been, but were not, raised on direct appeal.” *Cummings v. State*, 1998 OK CR 60, ¶ 2, 970 P.2d 188, 190. The burden is on the applicant to show that his claim is not procedurally barred. See 22 O.S.Supp.2006, § 1089(C).

1. Error at the Evidentiary Hearing

While Wood’s case was pending on direct appeal, this Court remanded the case to the district court for an evidentiary hearing on Wood’s claim of ineffective assistance of trial counsel. The district court concluded, and we agreed, that Wood was not denied effective assistance of counsel at trial. See *Wood*, 2007 OK CR 17, ¶ 38 and ¶ 44, 158 P.3d at 479 and 481. He now claims on post-conviction that the district court erred in excluding expert testimony during the evidentiary hearing.

The evidentiary hearing on Wood's claim of ineffective assistance of counsel was held before this Court heard oral argument in the direct appeal and decided Wood's case. Both parties were provided an opportunity to submit supplemental briefs after the evidentiary hearing prior to oral argument. Wood chose not to raise any claim in his supplemental brief about the judge's ruling excluding his expert's testimony. Accordingly, this claim is waived because Wood could have raised it on direct appeal.

2. Newly Discovered Evidence

Wood claims that he is entitled to post conviction relief because newly discovered evidence shows that his trial attorney was ineffective. He further claims that he is entitled to post-conviction relief because other newly discovered evidence, namely a report by Dr. Kate Allen, supports a finding that the outcome of his trial would have been different had the new evidence been admitted. And lastly, Wood claims he is entitled to post-conviction relief because his jury was not instructed on the 85% Rule.

This Court rejected Wood's claim of ineffective assistance of trial counsel on direct appeal; he now argues on post-conviction that newly discovered evidence not previously presented to this Court warrants a different finding on the issue and a new trial in this case. To support his claim, he points to: 1) a transcript showing that trial counsel was involved in direct contempt proceedings regarding counsel's performance in several unrelated cases two weeks after trial counsel was a witness at the evidentiary hearing investigating

his performance in Wood's case; and 2) an affidavit showing that trial counsel was suspended indefinitely from the practice of law within two months following the evidentiary hearing in this case. Wood has further provided for this Court's review materials related to the 2006 disciplinary proceedings involving trial counsel and the grievances filed against him.² Wood has also furnished the Court with the Findings of Fact and Conclusions of Law from hearings conducted in two other death penalty cases investigating trial counsel's performance in those matters.³ Wood maintains such evidence is "critical" in deciding whether trial counsel rendered ineffective assistance in Wood's case.

Wood appears to claim that these materials show that trial counsel's representation was so deficient as to give rise to prejudice per se under *United States v. Cronic*, 466 U.S. 648, 658-61, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) (noting that there are circumstances when a presumption of prejudice is appropriate, but requiring the defendant in that case to demonstrate that his trial counsel had made specific errors).⁴ We disagree and fail to see how trial

² Trial counsel had a number of grievances filed against him from April 2005 to March 2006.

³ This Court ultimately granted relief in each case based on ineffective assistance of counsel. See *Littlejohn v. State*, 2008 OK CR 12, ¶¶ 25-28, 181 P.3d 744-45 (reversed for a new sentencing proceeding); *Fisher v. State*, 2009 OK CR 12, ¶¶ 6-25, 206 P.3d 607, 609-14 (reversed for new trial).

⁴ The circumstances warranting a presumption of prejudice include: 1) the complete denial of counsel, in which the accused is denied the presence of counsel at a critical stage; 2) when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and 3) when counsel is placed in circumstances in which competent counsel very likely could not render assistance. *Cronic*, 466 U.S. at 659-60, 104 S.Ct. at 2047.

counsel's appearance at a contempt proceeding involving unrelated cases almost two years after acting as counsel at Wood's 2004 death penalty trial proves counsel was ineffective. Nor do we see how the fact that trial counsel was suspended from the practice of law two years after Wood's trial proves that trial counsel was ineffective. The Findings of Fact and Conclusions of Law from Keary Littlejohn's case indicate that trial counsel's secretary noticed an increase in trial counsel's consumption of alcohol around the time of Wood's trial. Trial counsel's client neglect, abuse of drugs and alcohol and emotional instability, however, appear to have begun—based on the materials provided by Wood—after Wood's death penalty trial had been completed.⁵ Without proof trial counsel was suffering from his addiction during Wood's trial, evidence of trial counsel's subsequent struggles with substance abuse and other difficulties does not prove or show that he was more than likely incapacitated or ineffective during Wood's trial.

The aspects of counsel's performance challenged by Wood are plainly of the same sort as other specific attorney errors subject to the performance and prejudice test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As noted above, Wood raised an ineffective assistance of counsel claim on direct appeal, primarily challenging trial counsel's investigation and presentation of mitigating evidence or lack thereof.

⁵ Evidence adduced during trial counsel's disciplinary proceeding showed that his problems with alcohol and substance abuse peaked in March 2006 and trial counsel himself recalled that

This Court remanded the matter for an evidentiary hearing and ultimately concluded that trial counsel was not ineffective. We found that the substance of material testimony from credible witnesses not called at trial was nonetheless presented to Wood's jury during the penalty phase of his trial and that Wood failed to show that the outcome of his case would have been different had the credible evidence developed at the evidentiary hearing been presented during his capital sentencing proceeding. *Wood*, 2007 OK CR 17, ¶ 44, 158 P.3d at 481. Nothing in the materials provided by Wood about his trial counsel's subsequent personal and professional difficulties calls into doubt our prior finding that trial counsel rendered effective assistance of counsel to Wood or convinces us to revisit that decision and order a new trial.

Next, Wood contends that a supplemental report by Dr. Kate Allen, the expert whose testimony was excluded from the evidentiary hearing, is newly discovered evidence that entitles him to post-conviction relief. To determine if a defendant is entitled to a new trial on the basis of newly discovered evidence, we consider: (1) whether the evidence is material; (2) whether the evidence could have been discovered before trial with reasonable diligence; (3) whether the evidence is cumulative; and (4) whether the evidence creates a reasonable probability that, had it been introduced at trial, it would have changed the outcome. *Ellis v. State*, 1992 OK CR 45, ¶ 50, 867 P.2d 1289, 1303.

his substance abuse disorder began in earnest in March 2005, a year after Wood's death penalty trial.

Information contained in Dr. Allen's report is not newly discovered, but a new assessment of previously presented and discovered evidence.⁶ On direct appeal, we noted that trial counsel presented evidence about Wood's troubled background and about his childhood growing up in an abusive household with little parental supervision and absent parents. *Wood*, 2007 OK CR 17, ¶ 43, 158 P.3d at 481. We found that evidence of Wood's chaotic home life and background was presented for the jury to consider in balancing the aggravating circumstances against the mitigating evidence. *Id.* at ¶ 44, 158 P.3d at 481. The information cited by Wood does not meet the criteria of this Court's test for newly discovered evidence and thus we deny Wood post-conviction relief on that basis.

Lastly, Wood argues he is entitled to post-conviction relief because his jury was not instructed on the 85% Rule in 21 O.S. 2001, § 13.1.⁷ This claim is waived because Wood failed to raise this issue on direct appeal. This Court's rules provide that a party may file a supplemental brief to raise new propositions of error "on an issue of first impression decided after an appellant's brief-in-chief is filed but before the appellant's case is decided by this Court." Rule 3.4(F)(2), *Rules of the Oklahoma Court of Criminal Appeals*,

⁶ Dr. Allen found that Wood's father failed him and continues taking no responsibility for the abuse he inflicted on the family, that domestic violence shaped Wood, that Wood's family had 11 of the 14 known indicators of domestic violence likely to end in death, and that Wood is remorseful.

⁷ Under the "85% Rule," persons convicted of crimes enumerated in 21 O.S., § 13.1 are required to serve at least 85% of their sentences before they can be considered for parole.

Title 22, Ch. 18, App. (2005). Wood's post-conviction claim is predicated on our decision in *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273 decided on February 22, 2006. Wood's brief-in-chief was filed on June 28, 2005, but his case was not decided until April 30, 2007. This claim could have been raised under our rules on direct appeal and is therefore waived.

3. Ineffective Assistance of Counsel

Wood's third proposition of error is a protracted complaint detailing numerous allegations of ineffective assistance of his trial and appellate counsel. This Court reviews claims of ineffective assistance of counsel *de novo*, to see whether counsel's constitutionally deficient performance, if any, prejudiced the defense so as to deprive the defendant of a fair trial with reliable results. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Davis v. State*, 2005 OK CR 21, ¶ 7, 123 P.3d 243, 246. Under this test, Wood must not only overcome the presumption of competence but show that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Head v. State*, 2006 OK CR 44, ¶ 23, 146 P.3d 1141, 1148. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* We need not determine whether counsel's performance was deficient if the claim can be disposed of on the ground of lack of prejudice. See *Ball v. State*, 2007 OK CR 42, ¶ 59, 173 P.3d 81, 96.

A. Ineffective assistance of appellate counsel for failing to supplement the record

Wood claims that his appellate counsel should have supplemented the direct appeal record with evidence that trial counsel was involved in contempt proceedings in 2006 due to client neglect and a substance abuse problem and that trial counsel was suspended from the practice of law. As discussed above, evidence of trial counsel's involvement in a contempt proceeding in unrelated cases and his suspension from the practice of law two years after Wood's conviction does not prove that trial counsel was ineffective during Wood's trial. For this reason, Wood cannot show that the outcome of his appeal would have been different had appellate counsel supplemented the record with this material.

B. Ineffective assistance of appellate counsel at evidentiary hearing

Wood claims that appellate counsel provided ineffective assistance at the evidentiary hearing investigating trial counsel's performance. Wood contends that appellate counsel failed to impeach trial counsel and clarify the number of cases that trial counsel had lost, resulting in a death sentence. Trial counsel testified at the evidentiary hearing that he had tried fifteen capital murder cases in which he estimated three resulted in the imposition of the death penalty. Records provided by Wood show that trial counsel was incorrect and that the death penalty had been imposed in seven cases. The accuracy of trial counsel's testimony about his success rate in other cases has no bearing on whether he rendered effective assistance in Wood's case. Neither the trial

court's findings of fact and conclusions of law finding counsel effective nor this Court's affirmation of the trial court's findings and conclusions rest in any way on trial counsel's win-loss record. Because it has no bearing, Wood cannot show that the outcome of the evidentiary hearing or his appeal would have been different had appellate counsel impeached trial counsel with evidence the death penalty had been imposed in seven of the fifteen capital cases trial counsel had tried.

Wood argues next that appellate counsel should have impeached trial counsel with his statement in second stage opening statement, listing the three witnesses he intended to present in mitigation. He contends the transcript would have contradicted trial counsel's testimony at the evidentiary hearing that the defense was going to call other mitigation witnesses until Wood told trial counsel not to call any other family members after his mother's emotional testimony. Wood suggests that trial counsel's testimony was nothing more than a self-serving attempt to avoid being found ineffective and that had counsel been impeached with his opening statement, trial counsel would have been forced to admit he never intended to call any other family members.

Appellate counsel confronted trial counsel at the evidentiary hearing about Wood's alleged request not to call additional family members following his mother's testimony. Appellate counsel emphasized that Wood's request pertained only to family members and did not include friends, mentors or workers from the Office of Juvenile Affairs. Appellate counsel further elicited

that trial counsel did not have any other witnesses present and ready to testify in mitigation except the ones called. The point Wood claims should have been made—that trial counsel failed to investigate other witnesses and to present their testimony—was made. In addition, both the trial court and this Court have reviewed the mitigating evidence Wood claimed trial counsel failed to uncover and present. We found that the substance of material testimony from credible witnesses not called at trial was nonetheless presented to Wood's jury in deciding his fate. Wood cannot show that the outcome of the evidentiary hearing or his direct appeal would have been different had appellate counsel impeached trial counsel with his opening statement in second stage.

Wood argues appellate counsel should have reminded the trial court of its concern about trial counsel's preparation by asking trial counsel about a pre-trial exchange with the trial court on the subject. This claim is based on a mistaken memory and is without merit. Prior to jury selection, the trial judge asked trial counsel about his preparation time because the judge recalled trial counsel stating at an earlier status conference that trial counsel would be in trial the week before Wood's trial was set to begin. The trial judge inquired, in light of his memory, whether trial counsel had adequate time to prepare. Trial counsel explained that the trial court was confusing a co-defendant's lawyer's statement with his, that he had plenty of time to prepare, and that he was ready to proceed. We find no prejudice in appellate counsel's failure to point out this exchange at the evidentiary hearing.

Wood also claims appellate counsel failed to present evidence at the evidentiary hearing in support of Wood's claim that his father, Raymond Gross, Jr., was abusive to his wife and children. Wood contends appellate counsel should have used documents related to Wood's parents' divorce and to Gross' criminal conviction for feloniously pointing a weapon at Wood's mother to corroborate Wood's mother's testimony of abuse and to discredit Gross' testimony.

The documents Wood provides now and claims should have been used at the evidentiary hearing are insufficient to convince us that appellate counsel was ineffective. The divorce petition filed by Wood's mother contained nothing more than allegations that Ms. Wood was seeking a divorce in part because of Mr. Gross' "extreme cruelty" and stated that he was a "violent man." The divorce decree shows the divorce was granted on the grounds of incompatibility; it notes only that Ms. Wood was entitled to a permanent restraining order against Gross without listing any facts or reasons for the provision. Ms. Wood's requests for protective orders offer no proof that abuse occurred as they memorialize only her allegations in support of her petition. The fact that emergency protective orders were issued is of little consequence since such orders are routinely issued upon complaints; the orders were rendered practically meaningless here because all were later dismissed for failure to prosecute. We fail to see how the allegations of abuse contained in

these documents would have bolstered Ms. Wood's testimony or changed the trial court's findings of fact or the outcome of the evidentiary hearing.

Wood appears to argue also that appellate counsel was ineffective for failing to point out to this Court the fact trial counsel had previously signed an affidavit purporting to admit ineffective assistance that trial counsel did not explicitly repudiate at the evidentiary hearing. Appellate counsel questioned trial counsel about his performance and the affidavit in depth at the evidentiary hearing. Appellate counsel did, in fact, put trial counsel's performance and the affidavit in issue.

Wood argues that appellate counsel was ineffective for failing to cite all of the factual inaccuracies he asserts exist in the trial court's findings of fact and conclusions of law. Appellate counsel filed a ten page supplemental brief after the evidentiary hearing in accordance with this Court's order remanding the case for evidentiary hearing. Appellate counsel went through each question this Court asked the district court to consider and explained why the district court's findings and conclusions were wrong. Appellate counsel outlined as many inconsistencies within the limitations imposed by the page constraint set by this Court allowed. Wood has not shown that appellate counsel's decision about what to include in his limited space was anything but a sound strategic

decision. We will not second-guess that decision.⁸ See *Hanson v. State*, 2009 OK CR 13, ¶ 37, 206 P.3d 1020, 1032.

Wood contends appellate counsel was ineffective for failing to raise a claim in the supplemental brief about the exclusion of the defense mitigation expert at the evidentiary hearing. Wood concedes that appellate counsel preserved the claim by admitting the expert's report for appeal, but argues he failed to present the claim in his brief and failed to "provide what she [the expert] would have testified to had she been allowed." As noted above, appellate counsel went through the questions the district court considered and addressed the district court's findings and conclusions. Appellate counsel chose to utilize the ten page limit to challenge the trial court's decision that trial counsel was effective with evidence presented at the hearing rather than attack the trial court's decision excluding his expert. This was a reasonable strategy. Furthermore, appellate counsel did provide this Court with the expert's findings by admitting the expert's report below. This claim, like Wood's other claims, must fail, because he can show neither deficient performance nor prejudice.

Wood argues that appellate counsel was ineffective in failing to obtain a handwriting exemplar from one of the State's witnesses. Wood maintains that he was prejudiced by this failure because, if he had been able to conclusively

⁸ We note that appellate counsel in the supplemental brief raised complaints that the trial court's finding that trial counsel had all the records was erroneous and that the trial court's findings concerning the testimony of a former juror was wrong.

prove the witness wrote two letters she denied writing, her trial testimony would have been impeached. We rejected a similar claim on direct appeal, finding that, because the witness admitted making statements similar to those in the letters, trial counsel was able to impeach the witness as effectively as she could have been had it been proven conclusively that she had authored the letters. *Wood*, 2007 OK CR 17, ¶ 45, 158 P.3d at 481-82. Because we have already held that Wood was not prejudiced by the failure to impeach the witness with proof that she had written the letters, he cannot have been prejudiced by appellate counsel's failure to obtain a handwriting exemplar from the witness for the evidentiary hearing. This claim is denied.

Wood argues that appellate counsel should have introduced a videotape at the evidentiary hearing entitled "Gangs in Stillwater." The videotape, apparently made by the Stillwater Police Department, depicts gang graffiti on buildings in Stillwater, some Stillwater gang members with blurred faces to conceal their identities, and some weapons confiscated from these gang members. Wood contends the tape would have proved what a former parole and probation officer was not allowed to testify about, namely how the police viewed the Wood brothers and the community's low tolerance for biracial people. This tape had no specific connection to Wood. Its message was that the Stillwater community should take measures to address problems associated with street gangs. Wood fails to convince us that the videotape was relevant and that he was prejudiced by counsel's failure to offer it. We cannot,

therefore, find appellate counsel ineffective for failing to offer the videotape at the evidentiary hearing.

Finally, Wood argues appellate counsel was ineffective in failing to present evidence at the evidentiary hearing that Brandy Warden, Wood's former girlfriend and accomplice-turned-State's-witness, had her sentence reduced after she testified against him and may have received lenient treatment in other cases.⁹ The trial court knew that Warden had not been charged with the robbery of a local pizza restaurant along with the other defendants in this case because she admitted this fact at trial. The trial court was also aware that her sentence on charges related to Wood's case had been reduced over the strenuous objection of the State because the trial court had ordered it and presided over the other defendants' proceedings. There is nothing in the record to suggest that Warden testified against Wood to receive a sentence reduction. Because the trial court was aware of the rewards Warden had received for testifying and had ordered her sentence reduction after Wood's trial, we cannot find that appellate counsel was ineffective for failing to present evidence of Warden's sentence reduction at the evidentiary hearing.

⁹ Warden was sentenced to 45 years imprisonment for accessory to murder and 10 years for conspiracy, running concurrently. After Wood's trial, the trial court reduced her 45 year sentence to 35 years.

C. Failure of Appellate Counsel to present additional reasons in support of Wood's ineffective assistance of trial counsel claim

Wood raises ten complaints about trial counsel's performance not included in appellate counsel's ineffective assistance of trial counsel claim on direct appeal.¹⁰ According to Wood, he received ineffective assistance of appellate counsel on direct appeal based on appellate counsel's failure to include these issues.

A review of Wood's complaints shows that he can neither show that counsel's decision on which claims to include on direct appeal was unsound strategy nor that the outcome of his appeal would have been different had appellate counsel raised these issues. Appellate counsel has a duty to raise relevant issues for this Court's consideration, but there is no obligation to raise every available non-frivolous issue. *See Martinez v. State*, 1999 OK CR 47, ¶ 22, 992 P.2d 426, 432. It appears to us that appellate counsel presented to this Court those claims, he believed, in light of his professional judgment, had the best chances for success that would fit within this Court's page limitation in a capital case. Appellate counsel raised seven propositions of error that

¹⁰ The complaints include:

1. Trial counsel failed to present available evidence to support his defense.
2. Trial counsel failed to list a crucial mitigating circumstance.
3. Trial counsel failed to request a *Harjo* hearing.
4. Trial counsel failed to challenge the admissibility of DNA evidence.
5. Trial counsel failed to object to handwriting exemplars.
6. Trial counsel failed to object to improperly excused jurors.
7. Trial counsel failed to object when jurors moved their vehicles.
8. Trial counsel failed to request an instruction on the 85% Rule and for a definition of life imprisonment with the possibility of parole.
9. Trial counsel failed to request proper jury instructions.
10. Trial counsel failed to object to prosecutorial misconduct.

filled his allotted 100 pages of brief space, dedicating more than a quarter of his brief to a claim of ineffective assistance of trial counsel. Appellate counsel's efforts resulted in this Court remanding the matter for an evidentiary hearing to investigate the ineffective assistance of trial counsel claim. On this record, we cannot find that Wood has shown that his appellate counsel's performance in presenting ineffective assistance of trial counsel claims was deficient or that he was prejudiced thereby. For this reason, his claim that appellate counsel was ineffective must be denied.

4. Other Crimes Evidence and Prosecutorial Misconduct

Wood argues that he was denied a fair trial by the introduction of improper other crimes evidence and prosecutorial misconduct. Wood's claims are all record-based claims that could have been raised previously on direct appeal. Accordingly, this claim is waived.

5. Jury Sequestration

Wood argues that he was denied a fair trial because jurors were allowed to separate to move their cars at the conclusion of both first and second stage after being sworn but before deliberations began. He also argues he was denied a fair trial because the bailiff may not have been sworn in his case. Again, these claims are record-based claims that could have been previously raised on direct appeal and are waived.

6. Cumulative Error

Wood claims in his final proposition that the accumulation of error on appeal and in post-conviction requires relief. "No authority allows this Court to consider, on post-conviction, errors raised on direct appeal which were not also raised as error in the post-conviction claim." *Harris v. State*, 2007 OK CR 32, ¶ 20, 167 P.3d 438, 445. We have determined that Wood is not entitled to a new trial on the basis of newly discovered evidence. We have further found that neither trial nor appellate counsel were ineffective. There is no cumulative error to consider.

DECISION

Having reviewed Wood's application for post-conviction relief, we conclude: (1) there exist no controverted, previously unresolved factual issues material to the legality of Wood's confinement; (2) Wood's grounds for review have no merit or are barred from review; and (3) the Capital Post-Conviction Procedure Act warrants no relief in this case. Accordingly, Wood's Application for Post-Conviction Relief is **DENIED**. Because Wood's claims can be disposed of on the materials provided, his motions for discovery and an evidentiary hearing are **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2010), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

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C. JOHNSON, P.J.: Concur
LUMPKIN, J.: Concur
LEWIS, J.: Concur

RA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

SEP 30 2011

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

TREMANE WOOD,

MICHAEL S. RICHIE
CLERK

Petitioner,

NOT FOR PUBLICATION

-vs-

No. PCD-2011-590

STATE OF OKLAHOMA,

Respondent.

**OPINION DENYING SECOND APPLICATION FOR
POST-CONVICTION RELIEF, MOTION FOR DISCOVERY AND
MOTION FOR EVIDENTIARY HEARING**

A. JOHNSON, PRESIDING JUDGE:

Before the Court are Petitioner Tremane Wood's second application for post-conviction relief,¹ motion for discovery and motion for evidentiary hearing.² A jury convicted Wood in 2004 in the District Court of Oklahoma County, Case No. CF-2002-46, of the robbery and first degree murder of Ronnie Wipf and sentenced him to death.³ Since then Wood has challenged

¹ Wood has filed a motion to amend his application with pages 13 through 15 that were mistakenly omitted when the application was filed. The motion is GRANTED and the omitted pages are part of Wood's second post-conviction application.

² Wood's first name is spelled inconsistently throughout the record as either "Termene" or "Tremene." Wood's petition and motions are captioned with the name "Termene." Wood notes, however, that the state court record incorrectly spells his name "Termene" when his name is "Tremene." In our opinion of Wood's direct appeal, we adopted the spelling "Tremene" and do so again here. See *Wood v. State*, 2007 OK CR 17, ¶ 1 n.1, 158 P.3d 467, 470 n.1.

³ Wood was convicted of Count 1-First Degree Felony Murder in violation of 21 O.S.2001, § 701.7(B), Count 2-Robbery with Firearms, After Former Conviction of a Felony in violation of 21 O.S.2001, § 801, and Count 3-Conspiracy to Commit a Felony, After Former Conviction of a Felony in violation of 21 O.S.2001, § 421. The jury recommended the death penalty on Count 1 after finding that Wood knowingly created a great risk of death to more than one person, that the murder was especially heinous, atrocious, or cruel, and that Wood posed a continuing threat to society. See 21 O.S.2001, §§ 701.12(2), (4) and (7). The jury fixed his punishment on Counts 2 and 3 at life imprisonment and he was sentenced accordingly.



his Judgment and Sentence on direct appeal⁴ and in collateral proceedings in this Court.⁵ Wood presently has a habeas corpus proceeding pending in federal court.⁶ All of Wood's previous challenges before this Court have proved unsuccessful.

The Post-Conviction Procedure Act [hereafter Act] governs post-conviction proceedings in this State. 22 O.S.Supp.2006, §§ 1080-1089. The post-conviction process is not a second appeal and the doctrines of *res judicata* and waiver will apply where a claim either was, or could have been, raised in the petitioner's direct appeal or original post-conviction application. See *Coddington v. State*, 2011 OK CR 21, ___P.3d___. Few issues may be reviewed in a subsequent post-conviction application. The Act provides in relevant part:

8. . . . if a subsequent application for post-conviction relief is filed after filing an original application, the Court of Criminal Appeals may not consider the merits of or grant relief based on the subsequent . . . application unless:

a. the application contains claims and issues that have not been and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the legal basis for the claim was unavailable, or

⁴ This Court affirmed Wood's Judgment and Sentence in *Wood v. State*, 2007 OK CR 17, 158 P.3d 467. Certiorari was denied by the United States Supreme Court in *Wood v. Oklahoma*, 552 U.S. 999, 128 S.Ct. 507, 169 L.Ed.2d 355 (2007).

⁵ Wood's original application for post-conviction relief was denied in an unpublished opinion. See *Wood v. State*, Case No. PCD-2005-143 (unpublished)(June 30, 2010).

⁶ Wood is seeking a writ of habeas corpus in the United States District Court for the Western District of Oklahoma. See *Wood v. Workman*, No. CIV-10-0829-HE (W.D.Okla.).

b. (1) the application contains sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application or in a previously considered application filed under this section, because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date; and

(2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.

22 O.S.Supp.2006, § 1089(D)(8). Moreover, this Court's rules impose a time bar for claims raised in second and subsequent post conviction applications. Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App (2011)("[n]o subsequent application for post-conviction relief shall be considered by this Court unless it is filed within sixty (60) days from the date the previously unavailable legal or factual basis serving as the basis for a new issue is announced or discovered").

Wood raises seven claims of error, all but conceding that the time limits on these claims raised have expired.⁷ In order to overcome any procedural bar,

⁷ Proposition 1: The trial court violated Tremane's Sixth, Eighth, and Fourteenth Amendment rights by impermissibly coercing the jury;
Proposition 2: Prosecutorial misconduct during the state court proceedings deprived Tremane of his due process rights and rendered his state court proceedings unfair;
Proposition 3: Tremane was denied his Sixth and Fourteenth Amendment right to effective assistance of trial counsel because counsel failed to present evidence challenging the testimony of the State's forensic expert;
Proposition 4: Tremane was denied his Sixth, Eighth, and Fourteenth Amendment right to counsel during his post-conviction proceeding;
Proposition 5: The state court 3.11 proceedings violated Tremane's due process rights;
Proposition 6: Tremane's due process rights were violated by the State withholding exculpatory evidence; and

he argues that the failure of this Court to review his current claims on the merits would create a miscarriage of justice under *Valdez v. State*, 2002 OK CR 20, ¶ 28, 46 P.3d 703, 710-11.⁸

The claims raised in Propositions 1, 2, 3, 5 and 6 are waived because they could have been raised either on direct appeal or in Wood's original application for post-conviction relief. The law favors the legal principle of finality of judgment and Wood has not shown that his claims are reviewable at this time. The information contained in the affidavits in support of Wood's claims was discoverable through the exercise of reasonable diligence well before now. Under our rules, Wood's claims are procedurally barred.

Nor do we find that failure to review these claims at this time would create a miscarriage of justice. We cannot find on the record before us that Wood has suffered or will suffer a miscarriage of justice if we decline review of these claims. For that reason we decline to exercise our inherent power to grant relief when other avenues are barred.

Wood claims in his fourth proposition that he received ineffective assistance of post-conviction counsel. *Hale v. State*, 1997 OK CR 16, ¶ 9, 934 P.2d 1100, 1102 (A claim of ineffective assistance of post-conviction counsel may be raised for the first time on a subsequent post-conviction application). A

Proposition 7: The cumulative impact of the errors in this case requires relief.

⁸ Under *Valdez*, this Court may exercise its power to grant relief when an error complained of has resulted in a miscarriage of justice or constitutes a substantial violation of a constitutional or statutory right.

claim of ineffective assistance of post-conviction counsel is appropriate for post-conviction review in a second or subsequent application if it has a factual basis that could not have been ascertained through the exercise of reasonable diligence on or before the time of previous proceedings. 22 O.S.Supp.2006, § 1089(D)(8). We review post-conviction claims of ineffective assistance using United States Supreme Court precedents. *Coddington*, 2011 OK CR 21, ¶ 3, ___P.3d___; *Davis v. State*, 2005 OK CR 21, ¶ 6, 123 P.3d 243, 245-46. Wood must show that counsel's performance was deficient, and that he was so prejudiced by that performance that he was deprived of a fair trial with a reliable result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). We will not find counsel ineffective if Wood was not prejudiced by counsel's act or omission. *Coddington*, 2011 OK CR 21, ¶ 3, ___P.3d___ . A finding of prejudice requires a showing of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Smith v. State*, 2010 OK CR 24, ¶ 19, 245 P.3d 1233, 1239; *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. "The likelihood of a different result must be substantial, not just conceivable." *Coddington*, 2011 OK CR 21, ¶ 3 quoting *Harrington v. Richter*, 131 S.Ct. 770, 790, 792, 178 L.Ed.2d 624 (2011). There is a strong presumption that counsel's conduct is within the wide range of reasonable professional conduct. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Wood must show "that counsel's representation was unreasonable under prevailing professional

norms and that the challenged action could not be considered sound trial strategy.” *Davis*, 2005 OK CR 21, ¶ 7, 123 P.3d at 246. “A strong presumption exists that, where counsel focuses on some issues to the exclusion of others, this reflects a strategic decision rather than neglect.” *Coddington*, 2011 OK CR 21, ¶ 3.

Wood claims post-conviction counsel was ineffective for failing to (1) investigate and present mitigating evidence in support of a claim of trial counsel ineffective assistance of counsel; (2) challenge appellate counsel’s failure to attack trial counsel’s effectiveness in not litigating the applicability of the aggravating circumstance that Wood created a great risk of death to more than one person; and (3) challenge appellate and trial counsel’s failure to hire a forensic pathologist to challenge the autopsy findings. The issue before the Court is whether post-conviction counsel’s failure to raise these issues raises a substantial likelihood that the result of the proceeding would have been different. *Coddington*, 2011 OK CR 21, ¶ 6. In other words, is there a substantial likelihood that Wood’s conviction or death sentence would have been affected had post-conviction counsel raised these omitted claims. *Id.*

Wood challenged trial counsel’s effectiveness on direct appeal and in his original post-conviction application. He also argued in his original post-conviction application that appellate counsel was ineffective, among other things, for failing to use documents to corroborate Wood’s mother’s claims of domestic abuse and to discredit Wood’s father’s denials of abusive behavior.

Insofar as portions of Wood's claims were raised and decided on direct appeal and in his original post-conviction proceeding, they are barred. *Smith*, 2010 OK CR 24, ¶ 38, 245 P.3d at 1243. Wood argues that appellate counsel should have raised trial counsel's failure to contest the applicability of the aggravating circumstance that Wood created a great risk of death to more than one person as ineffective assistance of trial counsel. The claim could have been raised in his original post-conviction application and, therefore, is waived. *Coddington*, 2011 OK CR 21, ¶ 15. Wood argues that post-conviction counsel should have included more and different claims of ineffective assistance of both trial and appellate counsel. As noted above, post-conviction review is not intended to serve as a second appeal. "We will not allow a defendant to subdivide claims in order to relitigate an issue in an application for post-conviction." *Harris*, 2007 OK CR 32, ¶ 13, 167 P.3d at 443, quoting *Browning v. State*, 2006 OK CR 37, ¶ 4, 144 P.3d 155, 157; *Davis*, 2005 OK CR 21, ¶ 17, 123 P.3d at 248. These additional claims by Wood have been waived. *Coddington*, 2011 OK CR 21, ¶ 17. And the record does not support Wood's claims that post-conviction counsel was ineffective for failing to raise additional, now waived, claims of ineffective assistance of trial and appellate counsel.

Wood's claim that post-conviction counsel was ineffective for failing to raise trial and appellate counsel ineffectiveness based on a failure to hire a forensic pathologist to challenge the autopsy report also fails because he

cannot show a reasonable probability that the outcome of his trial would have been different had post-conviction counsel done so.

Wood claims in his final proposition that the accumulation of error on appeal and in post-conviction requires relief. "No authority allows this Court to consider, on post-conviction, errors raised on direct appeal which were not also raised as error in the post-conviction claim." *Harris v. State*, 2007 OK CR 32, ¶ 20, 167 P.3d 438, 445. We have determined all but one of Wood's claims is waived and not reviewable on the merits. We have further found that post-conviction counsel was not ineffective. There is no error to accumulate. *Coddington*, 2011 OK CR 21, ¶ 22. The resolution of Wood's claims makes discovery and an evidentiary hearing unnecessary.

CONCLUSION

After reviewing Wood's second application for post-conviction relief, we conclude that he is not entitled to relief. Wood's second application for post-conviction relief is **DENIED**. Further, his motions for an evidentiary hearing and discovery are denied. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

ATTORNEY ON POST CONVICTION

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OPINION BY: A. JOHNSON, P.J.

LEWIS, V.P.J.: Concur

LUMPKIN, J.: Concur in Results

C. JOHNSON, J.: Concur

SMITH, J.: Concur

RA

ORIGINAL



IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
AUG 28 2017

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

TREMANE WOOD,	)	
	)	
Petitioner,	)	NOT FOR PUBLICATION
	)	
-vs-	)	No. PCD-2017-653
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

**ORDER DENYING THIRD APPLICATION FOR POST-CONVICTION RELIEF
AND RELATED MOTIONS FOR DISCOVERY AND EVIDENTIARY HEARING**

Before the Court is Petitioner Tremane Wood's third application for post-conviction relief and related motions for discovery and an evidentiary hearing. A jury convicted Wood in 2004 in the District Court of Oklahoma County, Case No. CF-2002-46, of the robbery and first degree murder of Ronnie Wipf and sentenced him to death.¹ Since then Wood has challenged his Judgment and Sentence on direct appeal² and in collateral proceedings in this Court.³ All of

¹ Wood's jury convicted him of Count 1-First Degree Felony Murder in violation of 21 O.S.2001, § 701.7(B), Count 2-Robbery with Firearms, After Former Conviction of a Felony in violation of 21 O.S.2001, § 801, and Count 3-Conspiracy to Commit a Felony, After Former Conviction of a Felony in violation of 21 O.S.2001, § 421. The jury recommended the death penalty on Count 1 after finding that Wood knowingly created a great risk of death to more than one person, that the murder was especially heinous, atrocious, or cruel, and that Wood posed a continuing threat to society. See 21 O.S.2001, §§ 701.12(2), (4) and (7). The jury fixed his punishment on Counts 2 and 3 at life imprisonment and he was sentenced accordingly.

² This Court affirmed Wood's Judgment and Sentence in *Wood v. State*, 2007 OK CR 17, 158 P.3d 467. The United States Supreme Court denied certiorari in *Wood v. Oklahoma*, 552 U.S. 999, 128 S.Ct. 507, 169 L.Ed.2d 355 (2007).

³ This Court denied Wood's original and second applications for post-conviction relief in unpublished opinions. See *Wood v. State*, Case No. PCD-2005-143(Okl.Cr., June 30, 2010) (unpublished); *Wood v. State*, Case No. PCD-2011-590(Okl.Cr., Sept. 30, 2011) (unpublished).



Wood's previous challenges before this Court have proved unsuccessful. Wood presently has a habeas corpus appeal pending in federal court.⁴

Wood now claims that newly discovered evidence of a "greater risk of execution" due to his race and/or the race of the victim violates his rights under the Sixth, Eighth, and Fourteenth Amendments, and parallel provisions of the Oklahoma Constitution. Wood relies principally on the findings of Glenn L. Pierce, Michael L. Radelet, and Susan Sharp, authors of "Race and Death Sentencing for Oklahoma Homicides, 1990-2012," a draft study of the impact of race, gender, and other factors on the likelihood of capital punishment. The study was publicly released on April 25, 2017 as Appendix IA to *The Report of the Oklahoma Death Penalty Review Commission*.⁵ In his related motions, Wood requests court-ordered discovery and an evidentiary hearing to explore "whether and to what degree race—both of Wood and that of his victim—impacted" various decision makers in his case. He seeks the Oklahoma County District Attorney's office policies and procedures for seeking the death penalty; extensive race and gender data for homicides from 1990 to 2012; data for all first degree murder cases prosecuted for the same period; data for all cases from 1990 to 2012 in which the death penalty was sought; the race,

⁴ The United States District Court denied a petition for writ of habeas corpus in *Wood v. Trammell*, No. CIV-10-0829-HE, 2015 WL 6621397 (W.D.Okla. 2015). Wood's appeal of the denial of his writ of habeas corpus is pending in the United States Court of Appeals for the Tenth Circuit. See *Wood v. Royal*, No. 16-6001.

⁵ <https://drive.google.com/file/d/0B-Vtm7xVJVWONmdNMmM5bzk3Qnc/view>

gender, and names of victims in these cases; and the ultimate sentence imposed.

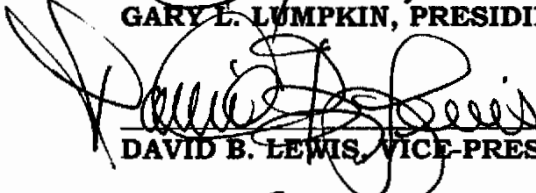
This Court recently rejected an almost identical claim in a second capital post-conviction appeal in *Sanchez v. State*, 2017 OK CR 22, ___P.3d___. Sanchez argued “that newly discovered evidence of a ‘greater risk of execution’ due to his race and/or the race and/or gender of the victim violates his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments, and parallel provisions of the Oklahoma Constitution.” *Id.* at ¶ 3. Sanchez relied on the same study as Wood for newly discovered evidence to support his claim. *Id.* We held that Sanchez’s claim was procedurally barred under 22 O.S.Supp.2016, § 1089(D)(8)(b)(1), (b)(2) because he neither showed that the factual basis for his claim was unascertainable through the exercise of reasonable diligence on or before the filing of his original post-conviction application nor showed that the factual basis of his current claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the improper influence of race and/or gender discrimination, no reasonable fact finder would have found him guilty or rendered the penalty of death. *Id.* at ¶¶ 8 & 11.

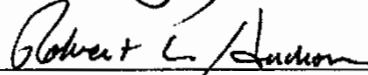
Sanchez is dispositive and controls our decision in this case. For the reasons explained in *Sanchez*, we find Wood’s claim is procedurally barred. Wood’s third application for post-conviction relief and related motions for discovery and evidentiary hearing are therefore **DENIED**.

IT IS SO ORDERED.

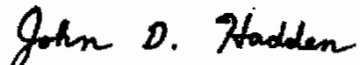
WITNESS OUR HANDS AND THE SEAL OF THIS COURT ON THIS 28th
DAY OF August, 2017.


GARY L. LUMPKIN, PRESIDING JUDGE


DAVID B. LEWIS, VICE-PRESIDING JUDGE


ROBERT L. HUDSON, JUDGE

ATTEST


Clerk

APPENDIX I

APPENDIX I

**IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA**

TREMANE WOOD,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

No. PCD-2022-550

Capital Postconviction Proceeding

Third Postconviction No. PCD-2017-653
Second Postconviction No. PCD-2011-590
First Postconviction No. PCD-2005-143
Direct Appeal Nos. D-2004-550; D-2005-171
Oklahoma County No. CF-2002-46
Tenth Circuit Court of Appeals No. 16-6001
U.S. District Court, Western District of
Oklahoma No. 5:10-cv-829-HE

**REPLY IN SUPPORT OF
FOURTH APPLICATION FOR POSTCONVICTION RELIEF
DEATH PENALTY CASE**

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INTRODUCTION

Petitioner Tremane Wood has proffered newly discovered evidence that his trial counsel, John Albert, suffered from a serious addiction to alcohol, prescription painkillers, Xanax, and cocaine while he was handling Mr. Wood's capital murder trial. In its response to Petitioner's Fourth Application for Post-Conviction Relief, the state does not dispute that this evidence—affidavits from two witnesses who describe firsthand knowledge of Albert's substance abuse during the relevant time period—is both newly discovered and credible. Nor does the state dispute that this evidence establishes that Albert's substance-abuse problem contributed to his numerous failures to subject the prosecution's case against Mr. Wood to meaningful adversarial testing and to investigate, develop, and present mitigating evidence. In fact, the state goes so far as to acknowledge "the seriousness of the issue" and appears to concede that, with this evidence, Mr. Wood's case is indistinguishable from two other cases in which the "implications [of Albert's substance abuse] warranted death-sentence relief[.]" (Resp. at 12 (citing *Littlejohn v. State*, 2008 OK CR 12, ¶¶ 25–28, 181 P.3d 736, 744–45; *Fisher v. State*, 2009 OK CR 12, ¶¶ 6–25, 206 P.3d 607, 609–14).)

Instead, the state argues that this Court should not reach the merits of Mr. Wood's claim because it is procedurally barred on *res judicata* and diligence grounds. (Resp. at 7–8). The state is mistaken. Mr. Wood's present claim relies on newly discovered evidence that renders it materially different from the ineffective-assistance claim raised in his first postconviction proceeding. And because this materially different claim has never been previously raised or adjudicated, it is not barred by *res judicata*. See *Smith v. State*, 2013 OK CR 14, ¶ 14, 306 P.3d 557, 564 ("The doctrine of *res judicata*, or claim preclusion, bars the re-litigation of claims once they have been finally adjudicated."). The state's contention that Mr. Wood was not diligent in investigating and developing evidence pertaining to Albert's substance abuse likewise fails. (Resp. at 11–16.) The record demonstrates that Mr. Wood diligently investigated and attempted to develop evidence of Albert's substance abuse at every available juncture, including by

requesting discovery and a hearing in support of his first postconviction application which the state opposed (*see generally* PCR1 Dkt. 35) and which this Court denied (PCR1 Dkt. 42 at 19). The state's arguments in opposition to Mr. Wood's accompanying requests for evidentiary development are similarly without merit and must be rejected. Accordingly, Mr. Wood asks that the Court reverse his conviction and sentence of death or, alternatively, grant his requests for discovery and an evidentiary hearing.

ARGUMENT

1. Mr. Wood's present claim is not procedurally barred by *res judicata* because it was not raised or adjudicated previously.

"*Res judicata* precludes the relitigation of any issue that was necessarily decided in a prior proceeding." *Mitchell v. State*, 2010 OK CR 14, ¶ 46, 235 P.3d 640, 652. This Court looks to the "record of the prior proceeding" to see which issues were "necessarily decided" there. *Id.*

The state first argues that Mr. Wood's claim is barred by *res judicata* because he "raised an identical claim in his first application for post-conviction relief." (Resp. at 9.)* But the claims are not identical. While Mr. Wood previously raised a claim that Albert's substance abuse established that he received ineffective assistance at trial, this Court denied that claim because he did not have "proof [that] trial counsel was suffering from his addiction *during Wood's trial*." (PCR1 Dkt. 42 at 5 (emphasis added).) By contrast, Mr. Wood's present claim relies on newly discovered evidence showing that beginning in 1999 or 2000, Albert represented all the members of the Playboy Gangsta Crips, who provided him with drugs that fueled his addiction during the period he represented Mr. Wood. (Application, Attach. 5 ¶ 3.) The present claim is further supported by evidence establishing that, in the year leading up to Mr. Wood's trial, Albert was using cocaine, in addition to alcohol and pills, and he "really started to decline and was slipping

* The state variously contends that Mr. Wood's claim is both waived and barred by *res judicata*. Mr. Wood confines his arguments to addressing the *res judicata* bar, as that is the main thrust of the state's argument. *Cf. Slaughter v. State*, 2005 OK CR 2, ¶ 4, 105 P.3d 832, 833 (explaining that "claims that could have been raised in previous appeals but were not are generally waived; claims previously raised on direct appeal are *res judicata*").

during this period.” (Application, Attach. 6 ¶¶ 3–5.) Because this claim, as presented here, relies on evidence that this Court said was missing from prior proceedings (*cf.* PCR1 Dkt. #42 at 5–6), *res judicata* poses no bar to this Court reaching the merits. *See Thacker v. State*, 2005 OK CR 18, ¶ 9, 120 P.3d 1193, 1195 (suggesting that a claim that was not “adequately raised” on direct appeal was not subject to *res judicata* bar).

The state counters that “[t]he fact that Petitioner has added new evidence to his claim does not transform an old issue into a new one in order to bypass *res judicata*.” (Resp. at 10–11.) But the cases the state cites do not support this assertion. Rather, this Court’s caselaw supports Mr. Wood’s contention that his present claim is materially different from the claim he litigated in his initial postconviction proceeding. In *Turrentine v. State*, the Court determined that “further argument on post-conviction would not render the issue meritorious” because the claims “as raised on direct appeal, contained relevant legal arguments *supported by pertinent facts* and legal authority[,]” which “was sufficient to enable the Court to consider the issues” on direct appeal. 1998 OK CR 44, ¶ 13, 965 P.2d 985, 989–90 (emphasis added). Here, by contrast, the pertinent facts that could have rendered the claim raised in Mr. Wood’s first postconviction proceeding meritorious—*i.e.*, proof that Albert was impaired by his addictions throughout the period he represented Mr. Wood—were *not* presented during the prior proceeding, notwithstanding Mr. Wood’s diligent attempt to develop this evidence.

Nor is *Smallwood v. State*, 1997 OK CR 25, ¶ 8, 937 P.2d 111, 115, an obstacle to Mr. Wood’s airing of his present claim before the Court. There, this Court procedurally barred a postconviction claim about juror misconduct because the petitioner’s newly discovered facts “were available to Petitioner’s direct appeal attorney and thus could have been presented on direct appeal.” As a result, this Court deemed the claim barred. *Id.* Here, however, Mr. Wood’s present claim required factfinding outside of the record and relies on newly discovered evidence that has not been presented or adjudicated previously.

Meanwhile, in *Plantz v. State*, 1997 OK CR 23, 936 P.2d 339, this Court held that the district court erred in finding that an ineffective-assistance claim challenging trial counsel's failure to adequately question witnesses and to present mental health evidence "was *res judicata* based upon [this Court's] rejection of the ineffective assistance of counsel claim for failing to make the requisite showing for a state funded expert." *Id.* ¶ 5, 936 P.2d at 340. In so holding, the Court reasoned that although the postconviction claim involved ineffective assistance of trial counsel, it "is different in nature from that raised on direct appeal." Likewise here, the newly discovered evidence supporting Mr. Wood's present claim renders it "different in nature" from the claim raised in his first postconviction proceeding.

The state cites *Woodruff v. State*, 1996 OK CR 5, 910 P.2d 348, in support of the proposition that a claim which was previously raised but relies on new evidence is still barred by *res judicata*. (Resp. at 11.) In *Woodruff*, this Court determined, without further explanation, that a claim in which "*Petitioner asserts he has newly discovered evidence Greg Meyers was given a 'deal' undisclosed to the defense in exchange for his testimony*" was barred by *res judicata* because it was raised on direct appeal. *Id.* ¶ 3 & n.2, 910 P.2d at 350 & n.2 (emphasis added). Mr. Wood has done more than merely *assert* that he has newly discovered evidence—he has presented that new evidence to this Court in support of his present postconviction application. Mr. Wood's present claim is properly raised collaterally because it relies on newly discovered evidence outside of the record. *See id.* ¶ 9, 910 P.2d at 351 ("Only if the claim is supported by evidence outside of, and therefore not contained within, the record, can the claim be properly raised collaterally.")

Finally, in *Williamson v. State*, 1993 OK CR 24, 852 P.2d 167, this Court held that "defendants may not obtain review of an issue raised previously by presenting it in a slightly different manner on post-conviction." *Id.* ¶ 4, 825 P.2d at 169. But Mr. Wood's present claim is materially different because it relies on new evidence establishing Albert's severe drug addiction during the period he handled Mr. Wood's capital murder case and which, as even the state

concedes (Resp. at 12), would have rendered the prior claim meritorious. *Cf. Fairchild v. Workman*, 579 F.3d 1134, 1145, 1147 (10th Cir. 2009) (finding that substance of claim presented in federal court “differs materially” from that presented in state court because evidence supporting federal claim was far more “specific and probative”). Mr. Wood has never previously presented both the present legal claim for relief and all of its supporting facts for adjudication to any Oklahoma court. *Res judicata* does not bar this Court from considering them now.

2. Despite Mr. Wood’s diligence, the factual basis of the present ineffective-assistance claim was not previously available to him, and so this Court is not barred from considering it.

The state next argues that Mr. Wood’s present claim is waived because he failed to sufficiently explain why its factual basis was not previously available. (Resp. at 11–16.) The state suggests that 22 O.S. § 1086 governs whether this Court can reach the merits of the present claim. (*See* Resp. at 15.) That statute limits the relief available on a subsequent postconviction application to claims for which the petitioner has provided a “sufficient reason” why the claim “was not asserted or was inadequately raised in the prior application.” 22 O.S. § 1086.

The present claim was not raised in Mr. Wood’s first postconviction proceeding because Albert concealed the fact that his substance abuse began prior to 2005 and existed throughout the period he represented Mr. Wood. (*See* PCR1 Dkt. 42 at 5 & n.5; PCR1 Dkt. 32-1, Doc. 10 at 4.) Albert concealed the extent and duration of his substance-abuse problem because he “had a pending bar investigation, and I was worried about the impact that being found ineffective would have on my license to practice law.” *See Wood*, No. PCD-2011-590, Attach. 14 ¶ 10). Although Mr. Wood diligently attempted to develop this evidence in support of his first postconviction application—including by proffering evidence that Albert was suspended from the practice of law, subject to contempt proceedings, and his substance abuse impaired his representation of other capital clients (PCR1 Dkts. 20, 21, 26)—he did not have evidence that Albert’s substance-abuse problems predated and persisted throughout his trial until Benito Bowie agreed to give such information under oath on April 19, 2022. (*See* Application at 41.) Mr. Wood has therefore

provided a sufficient reason why the present claim was not raised in his initial postconviction application. *See Johnson v. State*, 1991 OK CR 124, ¶ 9, 823 P.2d 370, 373 (sufficient reason requires, at minimum, “attempt[ing] to present reasons to this Court why none of the arguments were raised in [the] first application for postconviction relief”); *Maines v. State*, 1979 OK CR 71, ¶ 8, 597 P.2d 774, 776 (sufficient reason requires articulating special circumstances explaining failure to raise claim earlier); *Ellington v. Crisp*, 1976 OK CR 63, ¶ 6, 547 P.2d 391, 393 (sufficient reason requires explaining why issue was not raised previously).

To the extent that 22 O.S. § 1089(D)(8)(b) applies instead, the parties agree that Mr. Wood must show that (1) the factual basis of his claim was unavailable because it was not previously ascertainable through the exercise of “reasonable diligence” and (2) but for the alleged error, no reasonable fact finder would have found him guilty of the underlying offense or would have rendered a death verdict. The state does not dispute that Mr. Wood satisfies this second requirement—that is, had Mr. Wood been represented by competent counsel, no reasonable fact finder would have sentenced him to death.

The state argues only that Mr. Wood did not make a reasonably diligent effort “to obtain the information he desperately needed to make his case before this Court.” (Resp. at 13.) In support, the state contends that “[a] simple review of Albert’s case files in 2005, when Petitioner’s first post-conviction application and both *Littlejohn* and *Fisher* were pending before this Court, would have yielded both men as possible witnesses to the substance abuse Petitioner claims Albert suffered in 2004.” (Resp. at 13.) This argument is true only insofar as the search the state posits would have yielded the identities of Bowie and Maytubby as Albert’s *clients*. *But see* Okla. R. Prof’l Cond. 1.6(a) (pertaining to confidentiality of client information). Searching those client *files* would not have been possible, however, because of the attorney-client privilege. And even if it were feasible, nothing in the other evidence surrounding Albert’s misconduct suggests that he would have kept a written record of receiving cocaine as payment from a client.

The state also says that Mr. Wood should have searched “the Oklahoma County District Court dockets for all cases in which Albert had entered an appearance.” (Resp. at 17.) But the

state cites no case to support its novel suggestion that diligence required Mr. Wood to suspect that Albert's former clients witnessed him abusing substances. Nor is it apparent how the publicly available court docket would contain evidence of counsel's substance abuse. Mr. Wood diligently discovered and relied on the 2006 attorney disciplinary proceedings against Albert in support of his initial postconviction application—and that proceeding involved grievances filed by no fewer than *ten* of Albert's former clients. (PCR1 Dkt. 32-1, Doc. 10 at 5–16.) Those clients complained of Albert's neglect, refusal to communicate, and demonstrated incompetence, which Mr. Wood also experienced. (*Id.*) But none of those clients—who all took the initiative to file grievances against him—reported having witnessed his drug use. (*Id.*) The reason that Bowie and Maytubby had first-hand knowledge of Albert's cocaine abuse was not because they were his clients; it is because their relationship extended beyond being attorney and client. For example, Bowie revealed Albert's association with a gang who supplied him with drugs. (Application, Attach. 5 ¶ 3.) Maytubby gave cocaine to Albert as payment for legal fees and they regularly “hung out... and partied together.” (Application, Attach. 6 ¶¶ 3–4.) Contacting each and every one of Albert's clients simply would not have been a feasible method of gathering the information this Court said was missing from Mr. Wood's prior presentation. *See Fue v. Biter*, 842 F.3d 650, 654 (9th Cir. 2016) (en banc) (equating diligence requirement with “reasonable diligence,” not “maximum feasible diligence”) (quoting *Holland v. Florida*, 560 U.S. 631, 653 (2010)).

Mr. Wood demonstrated reasonable diligence by raising this issue in his first postconviction proceeding (PCR1 Dkt. 26 at 2–6), and again raising it in his federal habeas proceedings (Pet. for a Writ of Habeas Corpus, *Wood v. Workman*, No. 5:10-cv-00829-HE (W.D. Okla. June 30, 2011), ECF No. 35 at 10–68), marshalling supporting facts from outside of the trial record (*e.g.*, PCR1 Dkt. 17, Exs. 4–5; PCR1 Dkt. 32-1; PCR1 Dkts. 36, 37), and specifically requesting discovery and an evidentiary hearing in both state and federal court (PCR1 Dkt. 20; Mot. for Evidentiary Hr'g, *Wood v. Workman*, No. 5:10-cv-00829-HE (W.D. Okla. Aug. 31, 2011), ECF No. 49 at 10 (noting that “Albert's ability to testify openly and honestly [at the Rule 3.11 evidentiary hearing] was hampered by his then-present substance abuse problem and

concern over being disbarred”). And the state implicitly concedes that there are personal reasons why it took years for Bowie to agree to give information about Albert’s substance abuse. “[I]t makes no sense for Bowie, who remains incarcerated, to have reservations about expressing his true feeling about his representation by Albert in 2005 considering Albert has since passed away.” (Resp. at 13 n.2.) But the state overlooks the fact that Albert did not pass away until 2018—after *all* of Mr. Wood’s prior postconviction proceedings had concluded. And although Bowie is currently serving a life sentence, he recently sought commutation of his sentence, which was denied last year. *See* Oklahoma Pardon & Parole Board, *June 2021 Stage Commutation Docket Results*, at <<https://bit.ly/3uHUFmc>>. Thus, based on the state’s own logic, it *does* make sense that Bowie did not agree to sign an affidavit until after his commutation application was denied.

Maytubby also had reservations about speaking ill of Albert before his death because they had a personal relationship: “Johnny [Albert] and I spent a lot of time together, even when he was not working directly on my case.” (Application, Attach. 6 ¶ 3.) Nor is it surprising that Maytubby, who is not currently incarcerated, would be reluctant to admit that he gave cocaine to Albert as payment for legal fees. (Application, Attach. 6 ¶ 4.) Therefore, the factual basis of Mr. Wood’s present claim was previously unavailable and undiscoverable notwithstanding his counsel’s exercise of due diligence. *See United States v. Dean*, Nos. 91-6209, 91-6250, 1992 WL 207941, at *8 (6th Cir. Aug. 27, 1992) (noting “that even due diligence is unlikely to uncover evidence that witnesses, known or unknown, refuse to reveal”).

Nor does the fact that Bowie’s and Maytubby’s affidavits were signed within a day of each other suggest a lack of diligence. (*Cf.* Resp. at 13.) Mr. Wood never asserted that he first located Bowie and Maytubby on the dates they signed their affidavits. Both witnesses needed time to decide to attest to sensitive information about themselves and Albert under oath. Because Mr. Wood was required to attach his supporting evidence to his application, the factual basis of this claim did not become available until Bowie signed his affidavit on April 19, 2022. *See* 22 O.S. § 1089(D)(2); Rule 9.7, *Rules of the Oklahoma Court of Criminal Appeals*; *cf. Slaughter v. State*, 2005 OK CR 2, ¶ 21, 105 P.3d 832, 836 (holding claims barred as to which no evidence was

submitted in successive postconviction proceedings); Opinion at 3, *Jones v. State*, No. PCD-2017-1313 (Okla. Crim. App. June 11, 2018) (“Jones’s failure to attach supporting evidence [to his postconviction application] bars review of this claim.”). Accordingly, Mr. Wood has shown that the instant application was filed within 60 days from the date that his new evidence about Albert’s substance abuse could reasonably have been discovered, and the Court may consider the merits of his claim. See Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*.

In any event, this Court has made clear that it retains the power to grant a successive postconviction application “when an error complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right.” *Valdez v. State*, 2002 OK CR 20, ¶ 28, 46 P.3d 703, 710. In *Valdez*, the Court considered the merits of a claim that trial counsel was ineffective for failing to discover evidence relating to the petitioner’s social, mental, and health history, and for failing to inform him that financial, legal, and investigative assistance was available from his home country’s consulate, even though the legal basis of the claim was previously available. *Id.* at ¶¶ 23–27, 709–10. This Court recently explained that “[t]he probability of a miscarriage of justice in *Valdez* concerned a serious substantive issue underlying the finding of ineffective assistance of counsel”—the lack of consular involvement. Opinion at 7, *Smith v. State*, No. PCD-2021-981 (Okla. Crim. App. July 7, 2022). That Mr. Wood’s court-appointed counsel was impaired by his addiction to alcohol, prescription painkillers, Xanax, and cocaine throughout his representation of Mr. Wood in a capital murder case is a similarly substantive issue. Indeed, this Court acknowledged as much when it granted relief on similar facts to two other capital defendants whom Albert represented at the same time he represented Mr. Wood. See *Fisher*, 2009 OK CR 12, ¶ 13, 206 P.3d at 611 (explaining that “the damaging result of the lack of trust relationship and/or the substance abuse problem was that trial counsel failed to properly investigate, prepare and present relevant and readily available evidence at trial” and in mitigation of a death sentence); *Littlejohn*, 2008 OK CR 12, ¶ 26 n.7, 181 P.3d at 744 n.7 (discussing evidence indicating that during his representation of Littlejohn, Albert “was suffering from substance abuse problems which contributed to his ability to run his practice,” and noting

that the state conceded that Albert's performance in the punishment stage was deficient). Thus, refusing to hear Mr. Wood's claim on the merits would result in a grave miscarriage of justice. This Court should reject the state's procedural defenses.

3. Mr. Wood is entitled to evidentiary development.

Finally, the state argues that Mr. Wood is not entitled to discovery or an evidentiary hearing on the sole ground that the factual basis of his claim was previously available. (Resp. at 16-17.) This argument fails for the reasons discussed above.

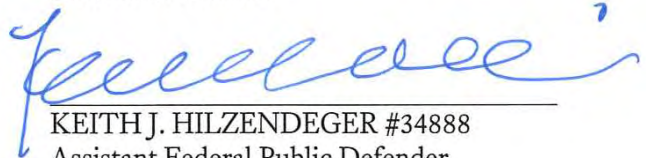
CONCLUSION

The state concedes the seriousness of the issue before this Court and advances no meritorious argument in opposition to Mr. Wood's Fourth Application for Postconviction Relief and to his accompanying requests for discovery and an evidentiary hearing. The newly available evidence that Mr. Wood has put before this Court is compelling, and illustrates that his convictions and sentence of death violate his state and federal constitutional rights. Mr. Wood thus asks that this Court exercise its power to correct this fundamental injustice and grant relief. Alternatively, Mr. Wood asks that this Court grant his requests for discovery and an evidentiary hearing in order to allow for the further factual development of his claim.

Respectfully submitted:

July 13, 2022.

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CERTIFICATE OF SERVICE

I certify that on July 12, 2022, I caused the foregoing document to be filed with the Court by sending the original and 10 copies to the Clerk of the Appellate Courts by FedEx overnight delivery. I further certify that a copy of this document was served on the Attorney General by depositing a copy with the Clerk of the Appellate Courts at the time of filing.



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