No. 22A________

IN THE
Supreme Court of the United States

TREMANE WOOD,
Petitioner,

vs.

STATE OF OKLAHOMA,
Respondent.

ON APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

APPENDIX TO APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

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Wood v. State of Oklahoma

APPENDIX TO APPLICATION FOR AN EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Appendix 1	Oklahoma Court of Criminal Appeals Order Denying Fourth Application for Postconviction Relief and Related Motions for Discovery and Evidentiary Hearing, August 18, 2022
Appendix 2	Affidavit of Benito Bowie, April 19, 2022
Appendix 3	Affidavit of Michael Maytubby, April 20, 2022
Appendix 4	Petitioner's Fourth Application for Postconviction Relief, June 17, 2022
Appendix 5	Petitioner's Motion for Discovery, June 17, 2022
Appendix 6	Petitioner's Motion for Evidentiary Hearing, June 17, 2022

APPENDIX 1

Oklahoma Court of Criminal Appeals Order Denying Fourth Application for Postconviction Relief and Related Motions for Discovery and Evidentiary Hearing, August 18, 2022

ORIGINAL

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

AUG 18 2022

JOHN D. HADDEN
CLERK

IN THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

TREMANE WOOD,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

NOT FOR PUBLICATION

Case No. PCD-2022-550

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 appeal[2] 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

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[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 (Okl.Cr., June 30, 2010) (unpublished); *Wood v. State,* Case No. PCD-2011-590 (Okl.Cr., Sept. 30, 2011) (unpublished), *Wood v. State,* Case No. PCD-2017-653 (Okl.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

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[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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KEITH J. HILZENDEGER
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OPINION BY: ROWLAND, P.J.
HUDSON, V.P.J.: Concur
LUMPKIN, J.: Concur
LEWIS, J.: Concur
MUSSEMAN, J.: Concur

APPENDIX 2

Affidavit of Benito Bowie, April 19, 2022

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)

[signature]
(Signature of Affiant)

BENITO BOWIE JR
(Print Name of Affiant)

Subscribed and sworn to before me this 19th day of April, 2022.

[signature]
NOTARY PUBLIC

APPENDIX 3

Affidavit of Michael Maytubby, April 20, 2022

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 Maytubby
(Signature of Affiant)

Michael Maytubby
(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

APPENDIX 4

Petitioner's Fourth Application for Postconviction Relief, June 17, 2022

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 Tremane[1] 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)

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

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

Tremane Wood, along with his older brother[1] Zjaiton ("Jake") Wood, Jake's girlfriend Lanita Bateman, and Tremane'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, Termane [*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 [Tremane'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 Tremane'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[e]nt 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 Tremane 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. Cronic*, 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 *Cronic*, 466 U.S. at 658–59). The first circumstance "is the complete denial of counsel." *Cronic*, 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 (1697)). 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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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 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 5

Petitioner's Motion for Discovery, June 17, 2022

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.

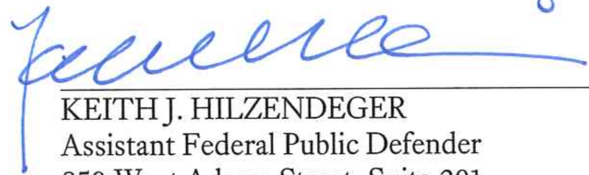
Mr. Wood supports his allegations with the affidavits of Benito Bowie and Michael Maytubby who, in sworn statements, provide firsthand accounts of Albert's addiction to cocaine and abuse of alcohol and pills throughout the period he represented Mr. Wood. While these affidavits are sufficient to entitle 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.

JON M. SANDS
Federal Public Defender,
District of Arizona



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APPENDIX 6

Petitioner's Motion for Evidentiary Hearing, June 17, 2022

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 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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