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DEATH PENALTY CASE

Case No. D-2004-1010

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BRENDA EVERS ANDREW

Appellant,

vs.

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

Appellee.

Appeal from the
District Court of Oklahoma

BRIEF OF APPELLANT

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February 21, 2006

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BRIEF OF APPELLANT

This brief is submitted on behalf of Brenda Ever Andrew, the defendant in Oklahoma County District Court, who will be referred to by name or as Appellant. Appellee will be referred to as such, or as the State, or as the prosecution. Numbers in parentheses refer to pages from the original record (O.R.) and transcripts of preliminary hearing (PH), motion hearings (__/__/__ M.Tr.), jury trial (Tr.), and sentencing proceedings (S.Tr.).

STATEMENT OF THE CASE

Appellant, Brenda Evers Andrew, was charged by Information, along with co-defendant James Dwight Pavatt,[1] with one count of first degree (malice) murder, in violation of 21 O.S. 2001, § 701.7 (A), and one count of conspiracy to commit a felony (to wit: murder), in violation of 21 O.S.2001, § 421, in Oklahoma County District Court Case No. CF-2001-6189 (O.R. 1-4, 657-61) The jury found Ms. Andrew guilty of first degree murder and sentenced her to death after finding the murder was aggravated by two aggravating circumstances – that the murder was committed for remuneration and that the murder was especially heinous, atrocious, or cruel. (O.R. 2844) The jury also convicted Ms. Andrew of conspiracy to commit a felony and assessed her punishment at ten years imprisonment and a $5000.00 fine. (O.R. 2841, 2845) The judge formally imposed the jury's judgment and sentence on September 22, 2004. (O.R. 2883-88)

STATEMENT OF THE FACTS

This case concerns the murder of Robert Andrew in the garage of his home at 6112 Shaftsbury Road in Oklahoma City, Oklahoma, at around 6:15 p.m. on November 20, 2001. Andrew was killed by two shotgun blasts.

Robert and Brenda Andrew were married with two children – Tricity and Parker,

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[1] The joint charges were eventually severed, and Mr. Pavatt was tried separately on August 25, 2003, to September 16, 2003. (O.R. 3016-17, 3051-52) His conviction and sentence are currently pending appeal before this Court in case number D-2003-1186.

ages approximately 11 and 7 at the time of the homicide. Robert Andrew was a senior vice president of an advertising firm known as Jordan and Associates, and Brenda Andrew was a full time housewife. (Tr. 440-441, 572, 2954) Appellant had a history of having extramarital affairs. In the years proceeding the homicide she had been involved first with a man named Norman Richard (Rick) Nunley, and then another man named James Tracy Higgins. (Tr. 245-250, 362, 367) However, Brenda Andrew's most serious affair was with her co-defendant, James Pavatt. Robert and Brenda Andrew met James Pavatt through North Point Baptist Church, where they taught Sunday school together. (Tr. 125, 202-203, 437-439) Pavatt worked for Prudential Life Insurance Company and Prudential Financial, the investment side of the insurance company, and became the Andrews' insurance agent and financial advisor. (Tr. 1273-1274, 1276-1280, 13443-1344; St. Exh. 26)

Pavatt had been married to a woman named Suk Hui, but he divorced her in August of 2001.[2] Pavatt had an adult daughter through a former marriage named Janna Larson (Tr. 671, 2953) According to Larson, in the summer of 2001 Pavatt told her that he was having an affair with Brenda Andrew. (Tr. 2953-2956) During the autumn of 2001 several events occurred which may or may not be relevant to the homicide on November 20, 2001. Appellant and Pavatt were asked to step down from their teaching positions at North Point Baptist Church. (Tr. 126-131, 172, 188-189, 441-442, 447) On September 20 or 21, 2001, Appellant told Robert Andrew to move out of the house. (Tr. 448, 500-501, 2847) Around October 1, 2001, Brenda Andrew initiated divorce proceedings against Robert Andrew. (Tr. 448) On October 26, 2001, someone apparently cut the front brake lines to Robert Andrew's car. (Tr. 713-716 , 720, 725-726, 733) A hearing was held in the divorce case on November 1, 2001. However, even before the hearing there had been a continuing dispute between Brenda and Robert

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[2] She returned to South Korea at the time of the divorce, but came back to Oklahoma City in October of 2001. (Tr. 613-619; St. Exhs. 1 and 2).

Andrew over the ownership of the $800,000.00 Prudential life insurance policy on Robert Andrew's life.[3] (Tr. 1179-1180, 1184-1189, 1195, 1261-1262; St. Exhs. 24, 25, 28-32, and 33) These matters will be discussed in greater detail when relevant. On November 14, James Pavatt purchased a H&R .22 revolver at the H&H Gun Range in Oklahoma City. (Tr. 2803-07, 2812-13, 2820)[4] Robert Andrew owned a single shot sixteen gauge shotgun his parents had given to him when he was in his early teens. (Tr. 2261-62) Robert Andrew complained to friends that after he moved out Brenda Andrew would not let him remove the shotgun from the house. (Tr. 486-87, 1082-83)

On November 20, 2001, Pavatt's daughter, Janna Larson, took her mother's car to work and left her car in her apartment parking lot. When Larson got home from work at about 5:30 p.m. she discovered that her car was gone. Her father had a key to her car and occasionally borrowed it but not without asking. (Tr. 2971-73)

Robert Andrew was supposed to pick up the children on the afternoon of November 20, 2001, and take them to his parents' home in Enid for the Thanksgiving holiday. (Tr. 492) The children had never been gone from home that long and Brenda was upset about the length of their visit with Robert. (Tr. 262-63, 372) Around 6 p.m. Robert Andrew called his friend Ronnie Stump and told him he was sitting in his car in the driveway of Brenda's house waiting on the kids. Brenda had called him asking

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[3] James Pavatt, the family's Prudential agent, had handled the transaction, and the insurance policy was signed on March 25, 2000. Originally, Robert Andrew was designated as the owner, and Brenda Andrew was the beneficiary with the children listed as secondary beneficiaries. (Tr. 1349-50; St. Exh. 33) During the pendency of the divorce proceedings Brenda Andrew was to claim ownership of the insurance policy under the terms of a Prudential "Request for Parallel Ownership Beneficiary Arrangements" form (State's Exhibit 24), purportedly dated March 22, 2001, through which Robert Andrew had transferred ownership of the policy to Appellant. (Tr. 1184, 1186-89) In the trial of this case, David Parrett, the State's document examiner, testified that the purported signature of Robert Andrew on the change of ownership application (St. Exh. 24), was not the signature of Robert Andrew, but was instead a simulation of his signature. (Tr. 1596-97)

[4] A search of Pavatt's residence after the homicide did not uncover any firearms, but did reveal a ledger in which Pavatt listed all of his firearms and stocks of ammunition. (Tr. 2414-16; St. Exh. 173) The firearms include long guns, a 12 gauge shotgun, and a Marlin Model 60, .22 caliber firearm. Among the kinds of ammunition listed is .22 caliber Stinger ammunition. (Tr. 2417-18)

for more time and that is why he was waiting. Robert and Stump then continued their conversation until Stump heard the garage door opening. Andrew then said he had to go because they were coming out. Stump never heard from Andrew again. (Tr. 493-94)

At approximately 6:20 p.m. the Oklahoma City Communications Center for 911 calls received a 911 call from Brenda Andrew reporting that two persons had come into her garage and shot her husband and herself.[5] The police were dispatched to the scene and three officers – Warren, Ramsey, and Frost[6] – arrived at the residence virtually simultaneously. The garage door was open and a black Nissan was parked in the driveway and a red van was parked inside the garage. (Tr. 1794) When Officer James Ramsey[7] entered the garage he noticed that the garage light was on, and saw a white male lying prone on the garage floor and a very distraught white female – Brenda Andrew – kneeling beside him holding a telephone and still talking to the dispatcher. (Tr. 3401-04) The white male was deceased and had been shot. Ramsey asked Appellant to step away from the body and he sat her down on the doorstep to the house. At that time he noticed that she had been shot in the arm. When asked what had happened, she told him that they were lighting the pilot light when two masked men came in and shot her husband. Appellant was concerned about her children and told Ramsey that they were in the master bedroom. Ramsey went to the bedroom and asked the children if they had heard anything. They both shrugged their shoulders, and Ramsey took them out of the house. (Tr. 3407-09)

Officer Frost escorted Brenda Andrew to the curb to get her away from the crime scene. As the paramedics, who had just arrived, were treating her gunshot wound, she

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[5] Actually two calls were made, the first having been interrupted. The time separating the calls was about ten seconds. (Tr. 1774-77; St. Exh. 34)

[6] Officer Roger Frost had observed the Andrew residence earlier that afternoon at around 5:15 when he had stopped a lady for a traffic citation near the entrance of Shaftsbury Drive. At that time the garage door to the Andrew home was down and no car was in the driveway. (Tr. 788-90)

[7] Ramsey was to testify at trial as a defense witness.

told him two men in black and of average height had come into the garage and shot her husband, and one of them had shot her as she turned to call for help. They had then run out of the garage. One ran out through the garage door and the other through the side garage door that led toward the greenbelt behind the house. (Tr. 1796-1801)

The children were left temporarily at the Shadids' residence next door, and Brenda Andrew was loaded up in the ambulance and taken to Baptist Hospital. Frost and another officer, crime scene investigator Teresa Bunn, also went to the hospital in order to get more information from Appellant. (Tr. 1814-19, 2017-2019, 2027) At the hospital it was determined that Brenda Andrew had been shot in the back of her left arm from back to front. The shot had apparently been at close range because there was gunpowder on her shirt and gunpowder residue around the wound. (Tr. 1829, 1836-39, 3191; St. Exh. 85) A projectile consistent with the characteristics of a .22 rim fire Stinger .22 cartridge was subsequently removed from the door leading from the garage into the Andrew home. (Tr. 3053, 3188-89) The gunshot wound in Brenda Andrew's arm was consistent with having been inflicted by .22 caliber revolver. (Tr. 3193) After Brenda Andrew was released from the hospital, Frost transported her to the police station for questioning. (Tr. 1841-42) At this time the police had still not informed Brenda her husband was dead, and they were noticing that she was not asking them about his condition and appeared to be too calm.[8] (Tr. 1826, 1828-29, 1842, 2029-31)

Detective Garrett interviewed Brenda Andrew in the interview room of the homicide office. (Tr. 2280, 2282-83) The entire interview was video tape recorded. (Tr.2286, 2298; St. Exh. 204A) The first thing Garrett did was tell Appellant that her husband had died. (Tr. 2285) When the subject changed to what had happened, Appellant said that Rob (Robert Andrew) was supposed to be there at six to get the

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[8] What Frost and Bunn did not know was that in the ambulance on the way to the hospital Brenda Andrew was distraught and inconsolable, and had asked about Robert's status as well as her children. (Tr. 3420-22; Def. Exh. 84 p. 2)

kids but she had moved the time back a few minutes and he agreed to come at 6:15. When he got there, she came out the front door and put a pet carrier in the car. Then she went back inside and opened up the garage door. He came into the garage to get some roller blades and to light the pilot light on the heating unit that had been going out. They were at the heating unit when some people came from nowhere and said five or six words she could not understand. She and Rob turned and one of the assailants fired a shot. (Tr. 2287) After being shot Rob spun around and grabbed a bag of aluminum cans and she heard another shot which either hit her or him. She heard the third shot about the same time as the second. They both fell to the ground. She got up and went into the house to get the phone and went down to check on the kids. By the time she got back to the garage the suspects were gone. She described one of the suspects as wearing all black, including black masks and black shirts. She did not see any gun and couldn't describe what the second suspect was wearing and did not know if he had fired a shot. (Tr. 2288) Appellant also told Garrett that Rob had a hunting gun, and she did not know if he had taken it or not. If it was in the house it would have been in the entry way closet or the bedroom closet. (St. Exh. 204A) Garrett was subsequently unable to find Robert Andrew's gun that night, and the police were never able to find the shotgun. (Tr. 2362)

After the interview Officer Frost transported Brenda Andrew to the residence of Cynthia Balding, a friend of Brenda's, where Brenda and the children spent the night.[9] (Tr. 1845-46, 2671-72) Appellant returned to her home in the afternoon of the following day. (Tr. 2677-78)

A subsequent autopsy revealed that the cause of Robert Andrew's death was massive bleeding from two shotgun wounds, each independently fatal. (Tr. 2225, 2227, 2243) One shotgun blast entered Andrew's left neck area. The other entered the right

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[9] The children had been brought over to the Balding home earlier that evening. (Tr. 2666)

chest. (Tr. 2222-24) Andrew could have maintained consciousness after both wounds, but only for a few minutes. (Tr. 2255)

At the crime scene an expended sixteen gauge shot gun shell was found lying on the roof of the maroon Chrysler Minivan parked in the garage directly across the garage from Andrew. (Tr. 2091, 2123; St. Exh. 42) What was later identified as a .22 bullet was discovered in the open door leading into the house. (Tr. 2107-08, 3053, 3188-89; St. Exh. 42) The face plate of the heating unit had been removed and a box of matches and a flashlight were on the floor inside the heating unit closet. (Tr. 2119-20) A white cordless telephone was found to the left of the victim's head. (Tr. 2065-66) The only blood discovered on the telephone was on the earpiece. (Tr. 2104-05) The police claimed to have observed no blood anywhere in the house other than in the garage. (Tr.2089-91) At trial the State's crime scene expert Tom Bevel opined the absence of a blood trail in the house and on the telephone was evidence that Brenda Andrew had never gone into the house or handled the telephone after she was shot. (Tr. 3232-33)[10] Bevel also concluded from his observations of her wound that Brenda Andrew could not have shot herself in the back of her left arm. (Tr. 3268) More details of Bevel's testimony will be discussed when relevant.

On the morning after the homicide Janna Larson found that her car had been returned to her apartment parking lot. She made this discovery at some point between 6:45 and 7:30 that morning. (Tr. 2975)

At around 5 p.m. on November 21, 2001, the day after the homicide, Brenda Andrew and her son Parker were seen in the waiting room at Baptist Hospital in the company of James Pavatt. Pavatt had a camera with him. (Tr. 2715-22) At some point

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[10] However, it must be noted that no photographs of the interior of the residence, other than in the garage, were presented at trial. (Tr. 2192-93) There is no testimony about the use of luminol or hemostix, or any other kind of presumptive testing for blood anywhere in the house. As for the telephone, Officer Ramsey testified that he saw Brenda Andrew using the telephone when he entered the garage, thus proving that she handled the phone after she was shot. (Tr. 3403)

that same evening Pavatt called his friend Curtis Jones and told him about the homicide, which he described as a home invasion. (Tr. 3123) Pavatt then spent a few days with Jones that included Thanksgiving. (Tr. 3126, 3146-49) During that visit Pavatt told Jones that he had been talking to his attorney and that his attorney had told him that Argentina did not extradite, and the court system often found innocent men guilty. (Tr. 3121-22) Pavatt indicated he might be interested in going to Argentina and used Jones' computer to research banks in that country. (Tr. 3126-27)

On Sunday, November 25th, Pavatt met with Suk Hui Pavatt and exchanged his white pickup truck for her red 1992 Barretta GT. (Tr. 628-30) Pavatt unloaded his truck, and, among other things, removed the case that he used to carry his shotgun or hunting gun. (Tr. 630-33) That afternoon James Pavatt and Brenda Andrew and her children met at Janna Larson's apartment and then departed for Mexico. (Tr. 2975-79) The trip caused them to miss Robert Andrew's funeral on Monday. (Tr. 494-95) They decided to make the trip in Suk Hui's red Barretta.[11]

On Sunday evening Dean and Judy Gigstad, Brenda Andrew's next door neighbors, returned to their residence at 6108 Shaftsbury from a trip to Kansas. (Tr. 432, 2860-2861) For the last several years they had let Brenda Andrew have a key to their home so that she could pickup their mail while they were on trips. (Tr. 2852, 2854) That night the Gigstads found a shotgun shell sitting on its base in front of the closet door in their spare bedroom and discovered other disturbances in their home that cause them to contact the police. (Tr. 2861-63) The police subsequently recovered an expended sixteen gauge shotgun shell from the bedroom and three live .22 rounds from the Gigstads' attic. (Tr. 2864, 2914-15, 2918-19, 2936-37, 2930-49; St. Exh. 134, 137, 145, 146) The expended shotgun shell was determined to have been fired

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[11] Pavatt and Brenda were using this vehicle when they were arrested at the border on February 28, 2002. (Tr. 2334, 3068-3069) Brenda's red mini-van was found abandoned at an apartment complex in Moore, Oklahoma, and was impounded on June, 19, 2003. (Tr. 3069)

from the same shotgun as the expended 16 gauge shell found on the roof of the Andrew's van in the garage after the homicide. Tr. 3185-87)

On November 27, 2001, Janna Larson met with the police on the advice of her mother and her attorney. She was interviewed by Detectives Garrett and Damron and turned over to them a bullet she found in the passenger floorboard of her car after her car had been returned to her apartment on the morning following the homicide. (Tr. 2973-75) The ballistics examiner later determined the projectile taken from the door leading into the Andrew home from the garage (St.'s Exh. 183) was the same type of bullet as the live .22 round from Janna Larson's car (St. Exh. 171). (Tr. 3049-53, 3188-89) At some point Larson passed on to the police some comments that her father, James Pavatt, made about Brenda Andrew. Larson claimed that Pavatt told her that Brenda was a "nuttier than a fruitcake woman" who had asked him to kill her husband, or if he knew of someone who would do it for her. (Tr.2966)

First degree murder charges were filed against Brenda Andrew and James Pavatt on November 29, 2001. (O.R. I 103) Three months later on February 28, 2002, Brenda Andrew and James Pavatt were taken into custody at the Mexican American border at Hidalgo Texas. (Tr. 2334, 3065)[12] While in Mexico Pavatt had written a letter, addressed to Tricity, in which he stated he and another man had committed the homicide, with the other man shooting Robert Andrew while he shot Brenda Andrew. Pavatt said Andrew's shotgun, which he had previously taken from the home, was used to shoot the victim. The State obtained a copy of this letter from the defense and introduced it into evidence. (Tr. 1503, 1531-36, 1743-44; St. Exh. 222; Def. Exh. 15)

After Brenda Andrew's arrest and incarceration in the Oklahoma County Jail, she came into contact with another inmate named Teresa Sullivan. (Tr. 2742-43) Sullivan testified that Brenda Andrew confessed to her that she and Pavatt had

[12] The children were with Brenda's sister, Kim Bowlin, and her husband James Bowlin at the border. (Tr. 2540-41)

murdered Robert Andrew for the money, the house, the children, and each other. (Tr. 2745) Sullivan denied receiving any incentives from the prosecution in return for providing this testimony. (Tr. 2748)[13]

The State rested its case on July 7, 2004, after presenting the evidence summarized above along with other evidence and copious exhibits. (Tr. 3302) The defense case began on the following day. The defense was not allowed to present critical testimony from several of its witnesses. The proffered testimony of these witnesses will be discussed in Proposition I *infra.*

Appellant was able to present the testimony of Richard Hull, a heating and air conditioning technician who testified that the pilot light in the Andrews' heating unit was prone to blow out (Tr. 3348, 3353-56, 3361); Bill Shadid, Brenda Andrew's neighbor, who testified that he, not James Pavatt, was the person who intervened in the altercation between a plumber named David Head and Brenda Andrew shortly after Labor day of 2001 (Tr. 990-93, 997-99, 3363, 3367-68); Officer James Ramsey, one of the first officers at the scene, (Tr. 3401-02); EMSA paramedic Sally Appleton Wallace who sponsored the EMSA report (Def. Exh. 84), which indicates that Brenda Andrew asked about her husband as well as her children during the trip to the hospital (Tr. 3414, 3416-18, 34-3422; Def. Exh. 84, p. 2); Elaine Kimmel, the funeral director for Robert Andrew's funeral, who testified about Appellant' participation in making Robert Andrew's funeral arrangements and the fact that she brought the children to view their father prior to the funeral (Tr. 3428-34, 1347-48; Def. Exh. 214); and Angela Burk, a Department of Corrections inmate, who testified that Appellant stayed to herself and would not talk to anyone in the jail (Tr. 3487-88, 3491-92), and who described Sullivan as being a known snitch who admitted to Burk that she was

[13] On September 21, 2005, Appellant filed with this Court her Motion for New Trial on Newly Discovered Evidence presenting evidence that Sullivan had indeed been offered inducements by the State to testify and had been released from federal prison in return for her testimony.

testifying to get some benefit. (Tr. 3943, 3499)

Appellant's last witness was Ross Gardner, a crime scene and blood stain expert. (Tr. 3512-28) He opined that certain patterns of blood on the left shin of Appellant's jeans were spatter probably from the second shot fired into Robert Andrew. (Tr. 3582-87, 3696-97, 3727, 3756) He explained the absence of a blood trail in the house by pointing out the extensive absorption of blood on Appellant's shirt and the absence of blood in other areas, such as the door stoop to the entryway to the house where the police had seated her. (Tr. 3593-95, 3612) His explanation for the absence of a lot of blood on the telephone was that Brenda Andrew held it with one hand that did not yet have blood on it. (Tr. 3626) Gardner determined that the shot into Brenda Andrew could not have been self-inflicted. (Tr. 3635) Gardner concluded his direct testimony by stating that Brenda Andrew's statement to the police was consistent with his crime scene analysis in every major respect. (Tr. 3636-37)

The defense rested at the conclusion of Gardner's testimony, and the State presented no rebuttal testimony. (Tr. 3790, 3798) The jury convicted Appellant of both murder and conspiracy to commit murder and sentenced appellant to the penalty described above for conspiracy.

In the capital sentencing stage of the trial, the State incorporated the evidence from the first stage of the trial, presented the victim impact testimony of Robert Andrew's father and brothers (Tr. 4172-73, 4177, 4182-98), and called as its final witness another Oklahoma County Jail inmate named Brandy Warden, who testified that Brenda Andrew had endangered her by deliberately exposing her as a snitch in another homicide case in front of other inmates. (Tr. 4200-06) The defense called family members and friends as mitigation witnesses. (Tr. 4219-99) The defense also called on Psychologist Teresa Hall. After extensive testing, Hall determined that Appellant had no mental illness and represented an extremely low risk for future violence. (Tr. 4251-58, 4261-62) At the conclusion of the punishment stage of the trial the jury found that

the murder was committed for remuneration and was especially heinous, atrocious, or cruel, and affixed Appellant's punishment at death. (Tr. 4506)

PROPOSITION I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO PERMIT THE DEFENSE TO PRESENT THE TESTIMONY OF WITNESSES WHOSE TESTIMONY WAS CRITICAL TO THE DEFENSE. THE COURT'S ACTIONS VIOLATED APPELLANT'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7, 9, AND 20 OF THE OKLAHOMA CONSTITUTION.

Appellant was not permitted to present critical testimony from her witnesses when she attempted to put on her defense. Appellant's first witness was Officer Larry Ron Northcutt, a sergeant in the Oklahoma City Police Department. (Tr. 3332) Northcutt also worked for the Lansbrook Housing Association for which he and other officers conducted neighborhood patrols. (Tr. 3334-36) The defense attempted to ask Northcutt about the security patrol and his contacts with Appellant, but the trial court sustained the State's objections and cut off Appellant's direct examination. (Tr. 3336) In her subsequent offer of proof, Appellant's trial counsel explained that Northcutt would have testified that Appellant had asked him for extra patrols around her home because she was afraid Robert Andrew would come around and try to take things from her home. The security patrols were random and unpredictable. Northcutt knew Robert drove a black Nissan. Northcutt would also have testified that he passed this information and Brenda's request along to other officers, including Roger Frost, and that Brenda never asked for the extra patrols to be cancelled. (Tr. 3782-85) Given that Appellant was on trial for a murder involving a conspiracy that had gone on for months, such testimony was of great value to the defense, who wanted the jury to ponder why a woman who was planning to murder her husband at home in an open garage would want the police around. (Tr. 3786) Nevertheless, the trial court precluded Appellant from eliciting this testimony on the grounds of insufficient notice

to the prosecution.[14] (Tr. 3332, 3336, 3785)

Appellant's next witness was Oklahoma City Police Officer Roger Frost, who had testified previously for the prosecution. He also did off-duty security work for the Lansbrook Association. (Tr. 3337-38) Frost was allowed to testify that patrol times were random and not made public (Tr. 3345), and that while he had not received information about a request for extra security, Officer Northcutt had. However, when he was asked what Northcutt had told him and whether this information involved Appellant, the State's hearsay objections were sustained. (Tr. 3346-47) Again, there had also been notice objections. (Tr. 3338) In his subsequent offer of proof, trial counsel stated Frost if allowed would have testified to information he had already provided in his preliminary hearing testimony. (Tr. 3737) At the preliminary hearing Frost stated that he knew the Andrews were separated because he had talked to another officer who told him that Brenda Andrew had requested an extra patrol at the house to keep Robert Andrew away. Because of this information he and other officers in the neighborhood patrol knew to watch out around the Andrew home. (PH 787-88; Tr. 3788) This testimony was not offered to prove the truth of the facts asserted, but instead to show why Frost and other officers were conducting extra patrols around the Andrew home. This Court has not treated this kind of testimony, which is explanatory of police conduct, as hearsay. *Powell v. State*, 995 P.2d 510, 532 (Okl.Cr. 2000); *Greer v. State*, 763 P.2d 106, 108 (Okl.Cr. 1988), *rev'd in part on other grounds, Mayes v. State*,

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[14] Other grounds asserted by the prosecutors were remoteness in time and relevance. The offer of proof indicates that Brenda Andrew's request was made during the divorce proceedings after Robert Andrew had moved out of the house and was attempting to recover property. This is the time frame of the murder conspiracy, which the trial court had already found was September 1 through November 20, 2001. (Tr. 470) Therefore Northcutt's testimony was not about remote matters, but was timely. Malice murder and conspiracy to commit murder are specific intent crimes. *See* 21 O.S. 2001, § 701.7 (A); 21 O.S. 2001, § 421). Evidence that Brenda Andrew had sought additional random patrols from the police, and that she had no reason to believe that such patrols were not being carried out on the day of the homicide, is strong evidence contradicting the State's assertion that she planned to murder her husband on that day. This evidence was relevant to her intent and was admissible. 12 O.S. 2001, §§ 2401-02.

887 P.2d 1288, 1301 (Okl.Cr. 1994); *Dick v. State*, 596 P.2d 1265, 1268 (Okl.Cr. 1979); 12 O.S. Supp. 2002, § 2801 (A) (3). Nevertheless, this testimony was kept from the jury.

The defense attempted to present the testimony of Lisa Gisler and Carol Shadid, neighbors of Appellant, regarding what they heard at the time of the homicide. Based upon the State's objections to lack of notice, the trial court effectively barred both witnesses from testifying to the things they heard. (Tr. 3369-78) In his offer of proof trial counsel stated Lisa Gisler would have testified that when she got home around 6:15 that evening she saw that the garage door to the Andrew residence was open, a van was parked in the garage, and lights were on in the house. Once Gisler was inside she heard a loud noise. (Tr. 3769-70) Carol Shadid would have testified that at some point between 6:00 and 6:30 on the evening in question she heard three concussions sounding like shotgun blasts, followed by a woman's scream. She then called her husband but was afraid to look outside. (Tr. 3771) The testimony of these women, with one hearing one loud noise while the other heard three followed by a scream, suggests the shots were in rapid succession. This evidence tends to corroborate Appellant's version of events as set forth in her video taped statement (St. Exh. 204A), in which she has the shots all fired in a matter of seconds, with the second shot to Robert and the shot into her arm occurring almost simultaneously.

Appellant next called Oklahoma City Police Officer Ronald Warren but was not allowed to present his testimony again because of lack of pretrial notice to the State. (Tr. 3388-95) In Appellant's offer of proof, counsel stated that Warren would have testified that when he entered the garage he saw Brenda Andrew kneeling at her husband's side, and when she saw Warren she asked him to help her husband. From what he saw of Robert Andrew's injuries, he concluded that Andrew was dead. Warren noticed that Brenda was shot, but she did nothing to call attention to her wound. (Tr. 3779-81) Given the testimony of officers Frost, Bunn, and Garrett that Brenda seemed unconcerned about her husband and failed to make inquiries about him, Warren's

testimony was important to the defense. First, it showed that she was attentive to her husband and asked Warren to help him while drawing no attention to her own wound. Second, Warren's observations indicated that by then Robert Andrew was obviously dead, a fact Brenda probably picked up from Warren's reactions. Accordingly, it was reasonable from that point on her inquiries would focus on her children rather than Robert Andrew.

Another witness the defense wished to present was Donna Tyra, a detention officer in the Oklahoma County Jail. The court barred her testimony because she had been listed as a second stage witness and accordingly could not testify in the first stage. (Tr. 3478-81) In an offer of proof trial counsel explained that during the months of March, April, and May of 2001, Tyra worked in the jail pod that housed Brenda Andrew and Teresa Sullivan, the inmate who testified that Brenda Andrew confessed to her. Tyra would have testified that Sullivan was not allowed to have contact with Brenda Andrew and that Brenda Andrew could not have talked to Sullivan through the door or by notes. Tyra would also have testified that Sullivan was known in the pod as a snitch and that no one would have talked to her. Tyra would further have explained that Sullivan could easily have learned the facts of the Andrew murder from newspapers that were available in the pod. (Tr. 3776-78)

As is obvious from the foregoing, Appellant was precluded from presenting much of her defense because the court would not permit her witnesses to testify. The issue here is whether Appellant's alleged failure to comply with the Oklahoma Criminal Discovery Code justified exclusion of the defense witnesses. The sanction provision of the discovery code does not mandate exclusion of a witness in the event of a failure to comply with discovery. The code reads in pertinent part as follows:

> Failure to Comply with a Request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the

circumstances.

22 O.S.2001, § 2002 (E) (2). Appellant submits that the trial court's insistence on the most drastic remedy available was an abuse of discretion.

The right of the accused to confront the prosecution's witnesses and to present her own witnesses to establish a defense is a fundamental element of due process of Law. *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967); *White v. State*, 973 P.2d 306, 310-11 (Okl.Cr. 1998). Excluding a material witness as a discovery sanction could also be a violation of the Compulsory Process Clause of the Sixth Amendment. *See Taylor v. Illinois*, 484 U.S. 400, 408-09, 108 S.Ct. 646, 652-53, 98 L.Ed.2d 798 (1988). This Court has found that in capital cases the exclusion of defense witnesses is too severe a sanction for discovery violations. *White*, 973 P.2d at 311-12; *Allen v. State*, 944 P.2d 934, 937 (Okl.Cr. 1997); *Wisdom v. State*, 918 P.2d 384, 396 (Okl.Cr. 1996); *Morgan v. District Court of Woodward County*, 831 P.2d 1001, 1005 (Okl.Cr. 1992). This Court has stated:

> Excluding a material witness is appropriate only where the discovery violation is "willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence."

Allen, 944 P.2d at 937 (quoting *Taylor*, 484 U.S. at 415, 108 S.Ct. at 656). In determining whether or not the conduct in question was willful, this Court has indicated it will consider whether the defendant was personally involved in the misconduct: "It would be inappropriate to exclude defense witnesses from testifying in a death penalty case ... when the actions of defense counsel, and not the defendants, have prevented compliance with the Trial Court's [discovery] order." *Morgan*, 831 P.2d at 1005; *see also Wisdom*, 918 P. 2d at 396.

None of the witnesses discussed above had been kept secret from the State. All of these witnesses had been listed as defense witnesses long before the trial. (O.R. 1832, 1834-35, 1837, 2315, 2319, 2321, 2323, 2335, 2341, 2345, 2347, 2349, 2361, 2429-30,

2434, 2436, 2440). With the exception of Donna Tyra, all of these witnesses had been endorsed by the State in its informations and witness lists. (O.R. 2-3, 660-61, 823, 866-67, 870, 876, 885-86, 889, 892, 895, 923-26, 1655-56, 1659, 1662, 1666) Northcutt, Frost, and Warren were police officers, and Tyra was a detention officer in the Oklahoma County Jail. Accordingly, the State had easy access to all of these witnesses and could question them any time it wanted. Shadid and Gisler were Appellant's neighbors and had been questioned by the police in the initial stages of the investigation and were therefore also easily accessible to the prosecution.

The only issue here concerned the arguable inadequacy of the summary of the witnesses' testimony set forth in defense witness lists. In the case of Frost, Gisler, Shadid, and Warren, claims along these lines are frivolous. In its final witness list, the defense dealt with Shadid and Gisler by listing the addresses, thus establishing that they were Brenda's neighbors, then stating that they would testify as to their observations on November 20, 2001, the day of the homicide, and then stating that they would testify about the Andrew family and Brenda Andrew's character. (O.R. 2434, 2436) The State's final witness summaries for these witnesses were no more detailed. Regarding Carol Shadid, the State's notice states: "Same as Nabeal Shadid." The State's summary regarding Mr. Shadid simply recited his address and said he would testify consistently with the police report previously provided. (O.R. 1659) In Gisler's case, the State's final summary likewise stated her address and that her testimony would be consistent with the report previously provided. (O.R. 1662) No summaries more detailed than these appear in the original record in this case. Defense counsel's offer of proof showed that the testimony from these witnesses involved nothing more than what they heard at the time of the offense. (Tr. 3769-71) Counsel specifically mentioned that Shadid would testify consistently with her police report. (Tr. 3771) The State already knew about this evidence from these witnesses from its own investigation and would have suffered no surprise if these witnesses had been allowed

to testify. What is surprising is the State did not call them as witnesses.

The State's final summary of Officer Ronald Warren's testimony stated that he was one of the first officers on the scene and would testify consistently with the report previously provided. (O.R. 1655) Appellant's final witness list states that Warren would testify regarding his investigation into the matter. (O.R. 2429) Appellant's offer of proof indicated the defense only wanted Warren to testify about his observations at the crime scene. (Tr. 3779-81) The State knew what Gisler, Shadid, and Warren had to say and would have suffered no prejudice if they had been permitted to testify.

In its final witness list the defense states that Officer Roger Frost would testify consistently with his reports and his preliminary hearing testimony. (O.R. 2430) The State's last summary of Frost's testimony is virtually identical, stating that he was one of the initial officers on the scene and that he would testify consistently with his reports, his preliminary hearing testimony, and his testimony at Pavatt's trial. (O.R. 1656) Accordingly, both parties were on notice that Frost could be expected to testify about anything he said at the preliminary hearing. The testimony that the defense sought to elicit from Frost concerning the extra patrols around Brenda Andrew's home came directly from the preliminary hearing. (PH 787-88; Tr. 3788)

The trial court appears to have been more concerned about the absence of meticulous notice than about the fairness of the trial. (Tr. 3385-95) At one point defense counsel asked the court if she had found that the defense had violated the Discovery Code, and the judge replied that she was not saying that, but instead that the notice was insufficient. (Tr. 3385) This statement is troubling. If there had been no violation of the Discovery Code, then there is no statutory authority for excluding the witness's testimony. *See* 22 O.S.2001, § 2002 (E) (2). The court then spent more time explaining her ire at the insufficiency of the notices. (Tr. 3386-87) At that point defense counsel suggested that the State be granted a continuance if they were claiming surprise regarding these witnesses. In response, the court stated flatly that

there would be no continuances for anything, and that the State had objected on the grounds of notice. (Tr. 3387-88) Later the judge indicated that the State's notices were also inadequate, and that she did not know why the defense had not objected to many of their witnesses on these grounds. (Tr. 3394)

The two defense witnesses that were to testify to matters not covered in the summaries of their testimony were Ron Northcutt and Donna Tyra.[15] The prosecutors should not have been shocked that Brenda Andrew had asked Northcutt for help. The State knew from Frost that she had asked for extra patrols, and it should have been no secret that Northcutt did off-duty security work for the Lansbrook Association. Nor should the State have been surprised that Tyra would know something about Sullivan's ability to communicate with Brenda Andrew and the existence of newspapers in the jail. The prosecutors knew Tyra was a detention officer in the jail and the defense notices established she knew Appellant well enough to consider her a model prisoner. Whatever mild surprise the State suffered could easily have been taken care of with a continuance, a remedy mentioned in 22 O.S.2001, § 2002 (E) (2).

However the State never sought a continuance. As this Court pointed out in *Hooks v. State*, 19 P.3d 294, 306 (Okl.Cr. 2001), "As Hooks notes , we routinely require defendants in these circumstances to request a continuance for adequate time to prepare .... We should hold the State to the same requirement." This trial had already gone on for weeks. It would have been better for all concerned if the State had been given a day or two to overcome any genuine surprise problems with Appellant's witnesses, as opposed to wholesale exclusion of defense witnesses.

This Court has upheld capital convictions in cases where a defense witness's

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[15] In its final witness list the defense summary of Northcutt's testimony stated that he would testify regarding information previously provided by OCPD, and did not mention that he was the officer that Brenda Andrew had approached to ask for additional patrols. (O.R. 2440, item 128) The Defense listed Donna Tyra as both a first and second stage witness, (O.R. 2335, 2361, 2455) These notices mention Brenda Andrew's character and that she was a model prisoner, but do not provide any information about Teresa Sullivan.

testimony was excluded on the grounds of notice violations. However, such cases involved situations where the excluded evidence was found to be immaterial, *Short v. State*, 980 P.2d 1081, 1094 (Okl.Cr. 1999), or, in light of the other evidence presented at trial, the evidence could not have affected the jury's verdict, *Hooks v. State*, 126 P.3d 636, 643 (Okl.Cr. 2005); *Hooks*, 19 P.3d at 307. In the case at issue, the excluded evidence was material and vital to the defense. Northcutt and Frost were to provide evidence Appellant sought and obtained additional police protection for her home, a fact that undermined the State's claim that she conspired to murder her husband at that location. Warren's testimony undermined the State's assertion that Appellant had no concern for her husband. Shadid and Gisler's testimony tended to support Appellant's claims that all of the shots were fired in rapid succession and to rebut the State's theory of staging. Tyra's testimony that Sullivan and Andrew could not have communicated cast doubt on Sullivan's claim that she and Appellant had several conversations with Brenda eventually confessing.

The State never claimed, nor did the trial court find, that this evidence was immaterial. Neither did the court ever find the notice violations "'willful and motivated by a desire to obtain a tactical advantage...'" *Allen*, 944 P.2d at 937. In fact at one point the trial judge attributed the defense team's problems to its failure to prepare for trial (Tr. 3391-92), not a deliberate scheme to gain an advantage. Of course there was not a shred of evidence that Appellant had done anything to encourage her lawyers to provide inadequate notice to the State. It appears that the court simply had a thing about elaborate witness summaries, and the prosecution knew it.[16] Accordingly, time and again the prosecutors used the court's mechanistic

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[16] There were times when the trial court did not bar prosecution testimony even though the State had committed similar errors with its pretrial notice. The trial judge overruled the defense's objections to the testimony of State's witness Judy Gigstad on the grounds that the State's pleadings had not provided any notice of her actual testimony. (Tr. 427-31) The court overruled a similar defense objection to certain parts of Barbara Murcer-Green's testimony. (Tr. 586-90)

approach to discovery to bar vital defense testimony without seeking any less drastic remedy. This was gamesmanship and it had no place in a capital murder trial. "A criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The State's pursuit is justice, not a victim." *Giles v. Maryland,* 386 U.S. 66,100, 87 S.Ct. 793, 810, 17 L.Ed.2d 737 (1967).

Many courts have held preclusion of defense evidence is appropriate only when conduct of defense counsel or the defendant constitutes bad faith or willful misconduct. *See Taylor*, 484 U.S. at 413-17, 108 S.Ct. at 655-57; *Bowling v. Vose*, 3 F.3d 559, 562 (1st Cir. 1993); *United States v. Peters*, 937 F.2d 1422, 1426 (9th Cir. 1991); *Escalera v. Coombe*, 852 F.2d 45, 48 (2d Cir. 1988); *State v. Killean*, 907 P.2d 550, 560-61 (Ariz. 1995); *People v. Edwards*, 22 Cal.Rptr.2d 3, 12 (1993); *People v. Richards*, 795 P.2d 1343, 1346 (Colo.App. 1989). The Supreme Court has held that state law rules that prevent the defendant from presenting evidence or calling witnesses in her behalf must yield before her right to present a full defense. *See Rock v. Arkansas*, 483 U.S. 44, 47-48, 54-56, 107 S.Ct. 2704, 2707, 2711, 97 L.Ed.2d 37 (1987); *Crane v. Kentucky*, 476 U.S. 683, 690-91, 106 S.Ct. 2142, 2146-47, 90 L.Ed.2d 636 (1986); *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1044, 35 L.Ed.2d 297 (1973); and *Washington v. Texas*, 388 U.S. 14, 21-23, 87 S.Ct. 1920, 1924-25, 18 L.Ed.2d 1019 (1967). This constitutional principle has been violated here, where gratification of the State's demand for the most strident application of state discovery sanctions has been elevated over every other consideration. As a result we have an unjust verdict which must be vacated.

PROPOSITION II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PERMITTING A TORRENT OF HEARSAY STATEMENTS FROM THE DECEASED THAT PERVADED THE PROCEEDINGS AND VIOLATED APPELLANT'S RIGHT TO CONFRONT THE WITNESSES AGAINST HER UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7, 9, AND 20 OF THE OKLAHOMA CONSTITUTION.

Throughout the first stage of the trial the jury was subjected to a constant barrage of statements purportedly made by Robert Andrew before his death. While some of these statements may have been admissible under the provisions of the Oklahoma Evidence Code, most were not. Many were nothing but narrative statements allegedly made by Robert Andrew to friends, associates, and the police. Others were obtained from the files of Robert Andrew's personal computer. Statements made out of court and introduced for the truth of the facts asserted are of course hearsay and inadmissible except for certain exceptions. 12 O.S. Supp. 2002, §§ 2801 (A) (3), 2802.

In a pretrial notice of its intent to offer the statements of Robert Andrew into evidence, the State announced that these statements were admissible under the state of mind exception, § 2803(3), and the residual exception, § 2804.1, to the hearsay rule.[17] (O.R. 1653-54) Oklahoma does have a state of mind exception to the hearsay rule; however, this Court has made it clear there is an important class of antecedent statements by crime victims that are not admissible under this exception. These are statements that go beyond illustrating the deceased's state of mind, and are instead recitals of prior acts of the defendant or other past facts. *See Welch v. State*, 2 P.3d 356, 370 (Okl.Cr. 2000); *Williamson v. State*, 812 P.2d 384, 404 (Okl.Cr. 1991); *Kiser v. State*, 782 P.2d 405, 410 (Okl.Cr. 1989); *Moore v. State*, 761 P.2d 866, 871 (Okl.Cr. 1988);

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[17] Appellant subsequently filed a motion in limine regarding Robert Andrew's statements, but her motion was overruled. (O.R. 2107-11, item 25; 5/18/04 M.Tr. 103-06) Appellant renewed her objections at a pretrial hearing on the first day of the trial (6/7/04 M.Tr. 6/7/04), and again on the first day that testimony was taken. (Tr. 159-61)

Wadley v. State, 553 P.2d 520, 524-25 (Okl.Cr. 1976).

This principle was established long ago by the United States Supreme Court in *Shepard v. United States*, 290 U.S. 96, 103-05, 54 S.Ct. 22, 25-26, 78 L.Ed. 196 (1933), where the Court reversed the conviction of an Army officer for the murder of his wife based in part on testimony that his wife, while ill but not near death, had said that the defendant had poisoned her. After finding that the victim's statement was not admissible as a dying declaration, the Supreme Court considered the government's contention that it was admissible as a declaration evincing an unhappy state of mind. The Supreme Court rejected this argument:

> [The government] did not use the declarations by Ms. Shepard to prove her present thoughts or feelings, or even her thoughts or feelings in times past. It used the declarations as proof of an act committed by some one else, as evidence that she was dying of poison given by her husband. This fact, if fact it was, the government was free to prove, but not by hearsay declarations.

Id. at 104, 54 S.Ct. at 25. In other words, the prosecution cannot use the deceased as the defendant's accuser, relying upon the decedent's antecedent accusations of misconduct as evidence upon which to obtain a conviction. The Supreme Court was not unmindful of the fact that antecedent accusations by the homicide victim usually also reflect some evidence of the victim's state of mind. However, the Court rejected the notion that tangential evidence of state of mind could salvage hearsay recitals of the past acts of the defendant:

> Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. . . . When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out. . . .

Id. Other courts have similarly found it necessary to reverse murder convictions due to admission of such hearsay statements. *See Dorsey v. State*, 24 S.W.3d 921, 928-30 (Ct.App.Tex. 2000); *Commonwealth v. Bond*, 17 Mass.App.Ct. 396, 399, 458 N.E.2d 1198,

1200-01 (1984); *Love v. State*, 581 S.W.2d 679, 680-81 (Ct.App.Tex. 1979).[18]

Oklahoma does have a residual exception to the hearsay evidence rule. *See* Section 2804.1 *supra*. However, for hearsay to be admissible under this exception, there must be a showing of "particularized guarantees of trustworthiness" which "must come from the 'totality of the circumstances that surround the making of the statement and that render the declarant particularly worthy of belief' and 'must be at least as reliable as evidence admitted under a firmly rooted hearsay exception.'" *Mitchell v. State*, 120 P.3d 1196, 1206 (Okl.Cr. 2005) (quoting *Paxton v. Ward*, 199 F.3d 1197, 1211 (10th Cir. 1999)).

The following examples from the record of the trial in this case show that the prosecution used the statements of Robert Andrew not to evince his state of mind, but to make assertions of fact regarding Appellant's past acts, acts which the State was to rely upon to obtain a conviction and a sentence of death. The record also shows that there are no circumstances surrounding the making of any of these statements that show any particularized guarantees of trustworthiness.

The most damaging of these hearsay statements are those that tend to implicate Brenda Andrew in the homicide and a previous conspiracy to do harm to Robert Andrew. Some of the more prejudicial statements concern Robert Andrew's sixteen gage shotgun, the weapon that Pavatt stated in his letter to Tricity was used to kill Andrew. (State's Exhibit 222) In her statement to the police Brenda Andrew said that she was not sure where the shotgun was but that if it was in the house it was either in the bedroom closet or the entry way closet. (St. Exh. 204 A) The police have never been able to find this shotgun. To caste doubt on the veracity of Appellants' statements, and to establish a suspicious link between her and the shotgun, the State

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[18] Even if a victim's statement does indicate his state of mind, to be admissible this expression of his state of mind must still be relevant to some issue in the case. *See State v. Leming*, 3 S.W.3d 7, 17-19 (Ct.App.Tenn. 1998); *State v. Machaldo*, 111 N.J. 480, 484-85, 545 A.2d 174, 177-78 (1988).

presented statements allegedly made by Robert Andrew.

Ronnie Stump quoted a lot of things Andrew said. In particular, he quoted Andrew as saying, shortly after moving out of the house, that Brenda had finally found someone who would kill him, referring to Jim Pavatt. (O.R. 447-48) Later that fall Stump has Andrew asking him to help break into the house so that he can get his shotgun. (Tr. 487, 508) Finally, Stump testified that about a week before the murder Robert Andrew had wanted to get his shotgun to take on a hunting trip but Brenda would not let him back into the house. (Tr. 488) Rod Lott later gave similar testimony. He said that Andrew told him he had asked Brenda for the shotgun but she would not let him have it. (Tr. 1082-83) According to Bill Andrew, Robert made the same complaint to him in a telephone call about a week and a half before the homicide. (Tr. 2259-61)

Andrew's statements about Brenda's refusal to allow him to obtain his shotgun are not expressions of his state of mind. They are narratives about Appellant's prior conduct, and as such they are pure hearsay. *Shepard,* 290 U.S. at 104, 54 S.Ct. at 25; *Welch*, 2 P.3d at 370; *Wadley,* 553 P.2d at 524-25. They are highly prejudicial because without this hearsay evidence, there was nothing in the record showing that Brenda Andrew did anything suspicious regarding the shotgun or that it was even in the house at the time of the homicide.[19] Of course Robert Andrew could not be effectively impeached because he was not available for cross-examination.

According to prosecution witnesses, Robert Andrew told people he believed that Brenda Andrew and James Pavatt were responsible for cutting his brake lines. Some of his most devastating opinions are in the tape recordings of his telephone conversations with Prudential employees on the day of the brake line incident. These

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[19] The non-cumulative nature of the hearsay regarding the shotgun is a fact of great significance showing that its introduction was not harmless error. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438, 89 L.Ed.2d 674 (1986).

were admitted into evidence over defense objections. (Tr. 1350-60; St. Exh. 28 and 29) In State's Exhibit 28, Robert Andrew twice states that an attempt has been made on his life and that his wife and insurance agent are trying to kill him. In State's Exhibit 29, a conversation with Brenda Andrew is put on hold, and one Prudential employee tells another that Robert Andrew has said that his wife was trying to kill him to get the insurance and therefore they were simply trying to stall Brenda Andrew while their corporate office figured out what to do. *Id.* These hearsay expressions of guilt were irrelevant, invade the province of the jury, and are inadmissible. *See Dunham v. State*, 762 P.2d 969, 973 (Okl.Cr. 1988); *Daniels v. State*, 554 P.2d 88, 94-95 (Okl.Cr. 1976); *Devore v. Territory*, 2 Okl.562, 37 P. 1092, 1093 (1894). *See* Proposition IV, *infra*.

Andrew purportedly made statements along these lines to Officer Klika and Detective Niles in the course of their investigations of that offense. (Tr. 801, 803-04, 814, 879-82) This opinion testimony was irrelevant, and since it was given in the context of police questioning it was testimonial and therefore inadmissible under *Crawford v. Washington*, 541 U.S. 36, 51-52, 68, 124 S.Ct. 1354, 1364, 1374,158 L.Ed.2d (2004). However, one part of Robert Andrew's narrative was even more prejudicial than his opinions because they involve damaging statements of fact. Detective Niles testified that in the course of his interview with Robert Andrew on November 19, 2001, Andrew told him that on the day following the brake line incident Brenda called him and told him that she had seen or read that his brake lines had been cut. Andrew told Niles that this was unusual because he had not told her about the brake lines and that there was no way that she should have known about them. (Tr. 880-81) This evidence, if believed, indicates that Brenda Andrew had knowledge of the cutting of the brake lines that she could have obtained only from the person who cut them. Robert Andrew's statement to Niles is the only evidence that Brenda had guilty knowledge of

the cutting of the brake lines on the day after that incident.[20] It is therefore is highly prejudicial. The problem is that it is a narrative of past acts and had nothing to do with Andrew's state of mind. *Shepard,* 290 U.S. at 104, 54 S.Ct. at 25; *Welch,* 2 P.3d at 370; *Wadley,* 553 P.2d at 524-25. Moreover, it consists of statements made to a police officer gathering evidence to use in court, and is therefore testimonial. *Crawford,* 541 U.S. at 51-52, 68; 124 S.Ct. at 1364.

Another area that went beyond state of mind concerned Robert Andrew's narratives of communications with Brenda Andrew and James Pavatt on October 26, 2001, the day the brake lines were cut. Robert Andrew's attorney, Craig Box, was allowed to testify over hearsay objections about Robert's description of a series of telephone calls between Robert and Brenda and Robert and Pavatt on that date. Box testified that Andrew called him after discovering his brake lines had been cut and that he and Andrew decided Andrew should change the beneficiary of his life insurance policy. (Tr. 1203) According to Box, when Andrew started making calls to Prudential, he then received upsetting calls from Brenda Andrew and James Pavatt. Box was allowed to describe what Andrew told him about the telephone calls. Andrew told Box that he could not figure out how they were getting the information about his calls so quickly. Andrew said that Brenda called him and demanded to know why he was changing his beneficiary to his brother, that he could not make such a change, and that this was fraud and that he could go to jail. At some point she also told him that he could not change the beneficiary of the policy because she owned the policy. Prudential personnel had been telling Andrew that he was the owner. In addition, Andrew told Box that Pavatt then called him and demanded to know what Andrew had

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[20] In her statement to Detective Garrett, Brenda Andrew corroborated Andrew's statement that he did not tell her about the brake lines, but not his claim that she knew about the brake lines on the day after the incident. Appellant told Garrett that she found out about an unspecified "attempt on his [Robert Andrew's] life" through James Pavatt, and that when she asked Robert about it he would not tell her anything and told her to call the police. She called the police but and was unable to get any information. (St. Exh. 204A)

told his supervisor and that if he thought Brenda was mean he should just wait until he messed with him, Pavatt. (Tr. 1204-06)

In his narrative to Box, Andrew is setting forth as historical fact his claim that these conversations occurred, and his version of them, which includes ugly threats. Andrew's version of the calls from Brenda and Pavatt implies cooperation between them coupled with extreme animosity toward him. This evidence provides evidentiary support for the charge of conspiracy and the claim that the motive for murder was to collect life insurance. However, it was inadmissible hearsay. *Shepard,* 290 U.S. at 104, 54 S.Ct. at 25; *Welch,* 2 P.3d at 370; *Wadley,* 553 P.2d at 524-25. In the absence of evidence that anyone overheard these conversations, Robert Andrew is the only witness who testified to them, albeit indirectly through Mr. Box, and therefore this evidence is unique and non-cumulative.

In another hearsay statement on the same subject matter, prosecution witness E. Daniel Powers testified, over objections, that Andrew told him he was having difficulty changing the beneficiary to his life insurance policy because Brenda's boyfriend was also his insurance agent. (Tr. 1064, 1066) Andrew also told Reverend Bobby McDaniel, who then told the jury, over objections, that Pavatt told Andrew he could not change the beneficiary to his insurance policy. (Tr. 1158-60)

Of course Andrew's attempt to change the beneficiary of his insurance policy with Prudential (St. Exh. 33) was thwarted because of the production of a change of ownership form (St. Exh. 24), which purported to make Brenda Andrew the owner of the policy. The State's document examiner testified that the purported signature of Robert Andrew on this form was a simulation. (Tr. 1596-97) When the State needed evidence to explain how the document could have been forged, the prosecutors again consulted Robert Andrew, again through his attorney Craig Box. Box told the jury that Andrew had told him Brenda handled the household finances and bank accounts and bragged that she could sign his name better than he could. (Tr. 1201, 1262)

The record contains other narratives from Robert Andrew that were conveyed to the jury through his friends and neighbors that do not link Brenda Andrew to the homicide but do make her look very bad. Ronnie Stump testified that Andrew told him a few days after Andrew moved out that Brenda had kicked him out of the house and hidden their money and he was having to look for a place to stay. (Tr. 500-01) Stump also testified that on the night before Andrew was murdered, Andrew told him Brenda no longer thought that Andrew was having affair with a woman, but instead had said she thought Andrew was gay and having an affair with Stump. (Tr. 503) Rod Lott testified about Andrew's description of Brenda Andrew's affair with Rick Nunley. Lott has Andrew telling him that he and Brenda had taken a trip to Jamaica with Nunley and his wife, and that after the trip Brenda and Nunley had started spending a lot of time together. Andrew started to find Nunley in his house when he came home, and on one occasion he had followed Brenda to Nunley's house. Brenda told him he was being silly and immature when he confronted her with these facts. Lott also told the jury that Andrew claimed not to have had sex in years and was upset that Brenda would never wear for him the lingerie he found in her bedroom. (Tr. 1001-03) Craig Box, Andrew's attorney, informed the jury that Andrew had told him that Brenda Andrew had changed the locks on the doors to the house and that she was refusing to let him see his children. (Tr. 1181)

Unfortunately, this litany of complaints was greatly expanded upon in State's Exhibit 205, approximately three-and-a-half inches of documents downloaded from James Pavatt's and Robert Andrew's computers. These documents were sponsored by Officer Jack Suellentrop, a computer specialist for the Oklahoma City Police Department. (Tr. 3154-55) This information was admitted over defense objections to hearsay, relevance, and cumulativeness. (Tr. 3156-57, 3167) This material is so voluminous that Appellant cannot possibly discuss this documentation in detail and comply with the page limitations of this brief. However, Appellant will mention some

of the more prejudicial items.

One of the more objectionable items was a journal supposedly written by the deceased, beginning on September 20, 2001, and ending November 20, 2001, at 5:40 p.m.[21] This document is a narrative log of Robert Andrew's activities and contacts with Brenda Andrew and others, including Jim Pavatt. It is written from his point of view and is unflattering of Brenda Andrew from the beginning. In the September 20 entry, Andrew describes how she pried the keys from his fingers when she announced that he was moving out, and in the September 22 entry, he claims that she hit him across the face and yelled at him as he was loading his car. On the September 30 entry, he has her wrongfully accusing him of having an affair with a Shannon Stone from his office. There are a series of entries for October 3 and 4 which indicate that Brenda and Robert had met with a pastor and that Brenda had actually agreed to call off her attorney for a while. But then Brenda, apparently hearing some gossip, explodes and says he is going to pay and that his parents will not believe what they are going to have to provide. In the October 11 entries, Andrew describes the incident at the office where Brenda stormed in and interrupted a meeting and took things from his office, and in an October 13 entry, Andrew claims he had her escorted out of his office and threatened to call the police on her. An October 15 entry describes a meeting in which Andrew was informed by his office manager that a formal complaint had been filed against him because Brenda had threatened Shannon Stone. This document goes on and on with similar entries.

The entries in the narrative log for October 26 again provide Rob Andrew's version of the brake line incident and all of the conversations with the other persons that he talked to about it, including the police, Brenda Andrew, and the insurance

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[21] At trial the prosecutors referred to this item as State's Exhibit 208. (Tr. 3165-66) However, the exhibits supplied to Appellant do not include a separate State's Exhibit 208, nor does the list of Exhibits prepared by the Court reporter include any such separate exhibit.

company. In a 4 p.m. entry Andrew has Pavatt threatening him for what he had told his boss and letting him know that he would get back at him. Then he has Brenda calling him threatening to have him put in jail for fraud because he was attempting to change the beneficiary to his life insurance policy. This of course was cumulative to Box's testimony and merely repeated the hearsay already testified to, but these entries again give only Robert Andrew's version of the conversations. In a November 5 entry, Robert has an individual named Duane Adair calling him and telling him that Jim Pavatt was at Brenda Andrew's house on the previous evening going over insurance papers. This of course was not cumulative and was double hearsay. In a November 9 entry, Andrew describes Brenda's complaints about the problems he and his attorney are inflicting on Pavatt, such as slandering him and possibly getting him fired from work. The message makes it clear that in Andrew's opinion, Brenda is in sympathy with Pavatt. The November 16 entries include Andrew's version of the squabble during the children's visitation with him that night that led him to call 911. Of course there are many other documents in the mass of material besides the above described log. Another document was entitled "Attorneys" and consisted of a log of Robert Andrew's conversations with other persons about attorneys and included double hearsay disparaging trial counsel, Greg McCracken. Appellant could go on and on explaining this copious volume of material. Suffice it to say, it includes many narratives from a deceased person that are highly derogatory of Appellant and are all hearsay and were inadmissible. *Shepard,* 290 U.S. at 104, 54 S.Ct. at 25; *Welch*, 2 P.3d at 370; *Wadley,* 553 P.2d at 524-25.

The State will attempt to argue that this mass of hearsay was admissible under the residual exception as set forth in 12 O.S. Supp. 2804.1. However, as Appellant has previously noted, for hearsay to be admissible under this exception, there must be a showing of particularized guarantees of trustworthiness coming from the totality of the circumstances surrounding the making of the statements which render them

particularly worthy of belief. *Mitchell*, 120 P.3d at1206. None of the statements cited above were made under circumstances that rendered the declarant's statements particularly worthy of belief. On the contrary, it is hard to imagine circumstances more prone to promote falsehood, exaggeration, and omission of embarrassing facts than those surrounding the statements of an embittered, angry man about the woman who is divorcing him and who he believes is leaving him for another man. Common sense dictates that statements and accusations by a man in such circumstances to his close friends, his lawyer, and to the police when telling his side of the story cannot be accepted at face value. In these circumstances cross-examination is crucial. The mere fact that such statements are useful to the State and fill in evidentiary gaps does not make them admissible. If hearsay statements are not made under circumstances which provide a basis for rebutting the presumption they are not worthy of reliance at trial absent cross-examination, the confrontation clause requires their exclusion. *Paxton v. Ward*, 199 F.3d 1197, 1211 (10th Cir. 1999) (citing *Idaho v. Wright*, 497 U.S. 805, 818, 110 S.Ct. 3139, 3148, 111 L.Ed. 2d 638 (1990)); *Mitchell*, 120 P.3d at1206.

As is clear from the above examples, Appellant's right of confrontation has been violated. Reversal is required unless the Court can determine that it is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). Given the sheer volume of hearsay from the deceased victim in this case, the Court should not make that finding. Appellant acknowledges that trial counsel did not register a contemporaneous objection to each and every example of hearsay described above. However, counsel made clear Appellant's objections to endless testimony concerning the statements of the deceased, telling the court before the trial:

> I think it's going to be problematic in this trial if the Court continually allows any and everything Mr. Andrew ever said to anyone to testify [sic], and then they're going to be asking almost, virtually every witness they put up there what did he feel like? What did he act like? What was his demeanor, And these people are going to be able to make comments and testify about that, and we want to

renew that objection also.

(6/7/04 M.Tr. 9-10) The trial court had ample warning of the State's intent to saturate the case with statements of the victim and chose to permit this to go on. This massive violation of the Confrontation Clause violated Appellant's substantial rights essential to her defense and therefore is plain error. *Simpson v. State*, 876 P.2d 690, 695 (Okl.Cr. 1994). Appellant could not have a coherent defense in the face of continual accusations from a deceased person who could not be confronted. Accordingly, Appellant's convictions and sentences should be reversed.

PROPOSITION III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING THE STATE TO INTRODUCE EVIDENCE OF OTHER CRIMES AND BAD ACTS WHICH HAD NOTHING TO DO WITH THE OFFENSE CHARGED, VIOLATING APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7 AND 9 OF THE OKLAHOMA CONSTITUTION.

This Court has long held that a defendant is to be convicted, if at all, by evidence which shows he is guilty of the offense for which he is on trial, and evidence suggesting his guilt for other, unconnected offenses or bad acts must be excluded. *Lott v. State*, 98 P.3d 318, 334 (Okl.Cr. 2004); *Coates v. State*, 773 P.2d 1281, 1284 (Okl.Cr. 1989); *Freeman v. State*, 767 P.2d 1354, 1355-56 (Okl.Cr. 1988); *Hall v. State*, 698 P.2d 33, 37 (Okl.Cr. 1985); *Burks v. State* 594 P.2d 771, 772 (Okl.Cr. 1979), *overruled in part on other grounds, Jones v. State*, 772 P.2d 922, 925 (Okl.Cr. 1989). The Oklahoma Evidence Code specifically prohibits the introduction of evidence of other crimes merely to show the character of the accused:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

12 O.S.2001, § 2404(B). Our case law closely follows this language. *See Burks*, 594 P.2d at 773.

To be admissible, evidence of other crimes must be probative of a disputed issue

> of the crime charged, there must be a visible connection between the crimes, evidence of the other crime(s) must be necessary to support the State's burden of proof, proof of the other crime(s) must be clear and convincing, the probative value of the evidence must outweigh the prejudice to the accused and the trial court must issue contemporaneous and final instructions.

Lott v. State, 98 P.3d at 334-35. In this case the proceedings were pervaded with highly prejudicial and irrelevant other crime and bad act evidence that does not meet these criteria and should not have been admitted.

A. The cutting of the brake lines of Robert Andrew's automobile: The State presented evidence showing that somebody probably cut the brake lines to Robert Andrew's automobile at some point either late in the evening of October 25 or in early morning hours of October 26, 2001, and that Andrew discovered the damage to his brakes when he attempted to use his car to drive to work that morning. (Tr. 713-38) A lot of this evidence was hearsay from Robert Andrew. (Tr. 132, 135, 194, 204-05, 207, 236-38, 798-806, 852-57, 878-82, 1065-66, 1113-14, 1772-73) Both before and during the trial the defense objected to this evidence but her objections were repeatedly overruled. (O.R. 2142-44; 5/18/04 M.Tr. 93-97; 6/7/04 M.Tr. 24-34, 44-47; Tr. 198-99, 204, 887-89, 1064, 1067, 1107, 1772) No direct evidence indicates who cut the lines. There is evidence that on the morning of that event James Pavatt used his daughter, Jana Larson, to make telephone calls to Robert Andrew telling him Brenda was in Norman Regional Hospital and he should go there immediately. (Tr. 2967-70) One is free to speculate that Pavatt wanted to lure Robert Andrew into driving his disabled car to Norman and become involved in a fatal car crash in the process. However, since Pavatt was having an affair with Brenda Andrew by that time, Pavatt may have had other reasons to want Robert Andrew out of town that morning. No one knows.

The evidence supposedly connecting Brenda Andrew to the brake line cutting consists only of Robert Andrew's hearsay statement to Detective Niles on November 19, 2001, that Brenda had indicated to Andrew that she knew about the brake lines being cut before she could have innocently acquired that information. (Tr. 880-81)

This statement was testimonial hearsay to a police officer and is inadmissible. *Crawford v. Washington*, 541 U.S. 36, 51-52, 68, 124 S.Ct. 1354, 1364, 1374,158 L.Ed.2d (2004). Robert Andrew's statements to the police and his friends in which he opines that his wife and Pavatt were involved the incident are nothing but speculation and prove nothing. There was a plethora of telephone calls between Brenda Andrew and Pavatt on October 26, 2001. (Tr. 688-89) We now know there was a reason for a lot of telephone traffic besides a plan to kill Robert Andrew by cutting his brake lines. That morning Craig Box, Robert Andrew's lawyer, had recommended that Andrew remove Brenda Andrew as the beneficiary to his Prudential life insurance policy, and Andrew called Prudential that morning after it was confirmed his brake lines had been cut. (Tr. 1203-04) Most of the calls between Pavatt and Brenda Andrew were made in the afternoon and evening of October 26th and could well have been about Robert Andrew's attempt to change the beneficiary of his Prudential policy.[22] Box's testimony regarding hearsay statements from Robert Andrew about phone calls he received from Brenda Andrew and Pavatt (Tr. 1204-06), and the tape recordings of the telephone conversations that Brenda and Pavatt had with Prudential employees that day, indicate that the quarrel over the insurance policy was the subject that was on Brenda Andrew's mind. (St. Exh. 28-32) An unemployed housewife with small children does not have to be plotting murder just because she is upset at the prospect of being removed as the beneficiary of her husband's life insurance policy. If he were to die of natural causes and could therefore no longer pay child support, the insurance proceeds could be the only source of income that she would have.

One of the most significant but under-litigated guidelines from *Burks* is guideline (5) which states: "The evidence of the defendant's commission of the other

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[22] On October 26, 2001, James Pavatt called Brenda Andrew's cell phone ((405) 641-2523) 18 times before noon, and 29 times that afternoon and evening. (St. Exh. 12) Brenda Andrew called Pavatt's cell phone ((405) 590-0596) ten times before noon and 24 times that afternoon and evening. (St. Exh. 13)

crimes need not be established beyond a reasonable doubt, but the proof must be clear and convincing." *Burks*, 594 P.2d at 775. The need for this kind of proof is obvious. The other crime proves nothing about the accused if the accused did not commit the other crime, but the jury will assume that there must be some connection between the defendant and the other crime because otherwise the prosecution would have no reason to present the evidence to them. Appellant can find only one Oklahoma case where this evidentiary requirement was addressed, and that is *Roubideaux v. State*, 707 P.2d 35 (Okl.Cr. 1985), where the defendant was convicted for the murder of a small child. The Court found that the evidence of the previous kidnaping of a baby was sufficient to meet this standard because the State's evidence placed Roubideaux at the scene of the abduction only a few hours before, showed Roubideaux had made menacing comments against the baby's father who had hired another babysitter, and showed that Roubideaux was sufficiently familiar with the victim's home to know she could enter through an exterior door that would not lock, and thereby avoid a forced entry. These facts coupled with the similarities between the earlier abduction and the facts of the homicide in question persuaded the Court that evidence was admissible to prove the identify of the perpetrator. *Id.* at 37-38. Here, no evidence places Brenda Andrew anywhere near the apartment parking lot where Robert Andrew claimed the brake lines were cut, and the circumstances of the shotgun shooting in Brenda Andrew's garage and those of the cut brake lines manifest no similarities whatsoever.

Appellant has been able to find some cases on this issue from Texas and Florida. *See Acevedo v. State*, 787 So.2d 127, 129-30 (Fla.App. 2001); *Smith v. State,* 743 So.2d 141, 143-44 (Fla.App. 1999); *Audano v. State,* 641 So.2d 1356, 1359-60 (Fla.App. 1994); *Tippins v. State*, 530 S.W.2d 110, 111 (Tex.App. 1975). In all of these cases the convictions were reversed because of the introduction of evidence of other crimes the prosecution could not show were committed by the defendant. In discussing the clear and convincing evidence standard, the court in *Acevedo* explained: "'[I]n order for the

evidence [of a collateral act] to be admissible there must be proof of a connection between the defendant and the collateral occurrences. *In this respect mere suspicion is insufficient.* The proof must be clear and convincing.'" *Acevedo*, 787 So.2d at 130.

No evidence has been presented that shows either Brenda Andrew or James Pavatt were seen near Robert Andrew's car during the night and morning of October 25-26, 2001, or that Brenda Andrew possessed any unique knowledge that would facilitate the cutting of brake lines. Pavatt arranged to have his daughter, Jana Larson, make calls to Andrew to get him to drive to Norman, but there is no evidence Brenda Andrew knew about Pavatt's scheme. However, there is evidence that she did not. Pavatt lied to Larson, telling her that Brenda was in Norman Regional Hospital having a mental breakdown. (Tr. 2967-69). Brenda Andrew inadvertently exposed these lies to Larson by walking into Larson's bank shortly after Larson made the calls to Robert Andrew, presenting herself to Larson, and asking about telephone communications that Larson could have been having with Robert Andrew. (Tr. 892, 2969-70, 2992-96, 3012) If Brenda Andrew had been a knowing participant in Pavatt's plan, she would not have gone to the bank and proved she was not in the hospital.

In short, the State failed to present anything remotely resembling "clear and convincing" evidence that Brenda Andrew was involved in the cutting of the brake lines of Robert Andrew's car. The defense raised this very problem before the trial, but to no avail. (6/7/04 M.Tr. 39-40) Perhaps sensing that it could not prove her personal involvement, the State resorted to the argument that the brake line cutting was part of the overall conspiracy between Brenda and Pavatt to murder Robert Andrew. Under this theory, Brenda Andrew was responsible for the statements and actions of James Pavatt, her co-conspirator, even if she did not know anything about them. *See Matthews v. State*, 45 P.3d 907, 921 (Okl.Cr. 2002). Unfortunately the trial judge was receptive to this argument. (M.Tr. 6/7/04 pp. 29-34, 39-40) As will be argued more fully in Proposition V, there is no evidence that the conspiracy, if any, began until November

14, 2001, the date of the first overt act – Pavatt's purchase of a .22 pistol – alleged by the State. (O.R. 657) An agreement alone does not commence a conspiracy. The conspiracy begins at the time of the firs overt act following the agreement. *Omalza v. State,* 911 P.2d 286, 296 (Okl.Cr. 1995). Therefore, according to the State's own calculations, there was no conspiracy in existence in at the time of the cutting of the brake lines. Without proof of a conspiracy, Brenda Andrew was not responsible for the acts of James Pavatt.

The admissibility of other crimes evidence is dependant upon there being a logical connection between the other crimes and the crime charged, and the evidence of the other crime or crimes must be necessary to support the State's burden of proof. Such evidence is not admissible when it is not probative of any issue at trial. *Sattayarak v. State*, 887 P.2d 1326, 1331-32(Okl.Cr. 1994). Previous alleged assaults against the victim which were not similar in character to the shooting in question are not admissible if proof of such offenses in no way proved the crime on trial. *See Knighton v. State*, 912 P.2d 878, 890 (Okl.Cr. 1996); *Hammon v. State*, 898 P.2d 1287, 1302 (Okl.Cr. 1995); *Lalli v. State*, 870 P.2d 175, 177 (Okl.Cr. 1994). Without proof that Brenda Andrew was involved in the brake line incident, this evidence was not probative of any issue in her trial but drowned her defense in a sea of prejudice.

B. Appellants' affairs with James Tracy Higgins and Richard Nunley: Over defense objections the State elicited testimony from James Tracy Higgins and Richard Nunley regarding their sexual affairs with Brenda Andrew in the years preceding the homicide of Robert Andrew. (Tr. 246-52, 361-62, 367) Over defense objections other witnesses gave testimony alluding to the affair with Richard Nunley. (Jennifer Jones – Tr. 335-39, 342-54; Ronald Stump – Tr. 444-45; Cynthia Balding – Tr. 2652-55) The defense had also raised objections to this testimony before the trial but her objections were overruled. (O.R. 2148-51; 5/18/04 M.Tr. 77-84; 6/7/04 M.Tr. 24-34)

While Brenda Andrew's affair with James Pavatt was arguably relevant, her

affairs with Nunley and Higgins were not. There is no evidence that Higgins or Nunley were involved in Robert Andrew's homicide. The additional factual evidence they provided could easily have been presented without the State forcing them to admit that they had previously had affairs with Appellant. Brenda Andrew's affairs with Nunley and Higgins may not have been criminal violations per se, but they were bad acts and were not admissible under § 2404(B). *See Freeman*, 767 P.2d at 1355-56. However, Brenda Andrew did not kill her husband after having these affairs, and therefore they do not prove any *modus operandi* on her part. That Brenda Andrew had once had affairs with these men provided no evidence of her motive, opportunity, intent, preparation, plan, knowledge, identify as a perpetrator, or the absence of mistake or accident on her part. On the contrary, the State presented this evidence only to show that Brenda Andrew was a bad person because she had affairs. It was pure character evidence and was inadmissible. 12 O.S.2001, § 2404 (A). *Walker v. State*, 841 P.2d 1159, 1163 (Okl.Cr. 1992).

Apparently realizing the problems with this evidence, the State argued at one point that it was admissible to impeach Brenda Andrew's statements in her interview with Detective Garrett in which she had denied having any affairs. (5/18/04 M.Tr. 83-84) Evidence of Appellant's affair with Co-defendant Pavatt was all that was needed to prove she lied on this point. Bringing in past affairs that had nothing to do with the case was overkill. Even when the credibility of a witness is at issue, impeachment is normally limited to evidence of a character for truthfulness or untruthfulness, and specific traits of character cannot be proven extrinsically. Such specific character traits may, in the court's discretion, be gone into on cross-examination where they are probative of truthfulness or untruthfulness. 12 O.S. 2001, § 2608 (B). In this instance Brenda Andrew was not a testifying witness who was subject to cross-examination. The State was simply impeaching her pre-trial statement.

Whatever probative value the affairs with Nunley and Higgins may have had

regarding the issue of Brenda Andrew's truthfulness or untruthfulness was outweighed by the danger of unfair prejudice. Even impeachment evidence is subject to exclusion if it is more unfairly prejudicial than probative. *Martinez v. State*, 984 P.2d 813, 823 (Okl.Cr. 1999). Even otherwise truthful witnesses are reluctant to admit past love affairs that they feel are not anyone else's business and are not pertinent to the issues at hand. Impeachment such as this is considered to be impeachment on collateral matters and is not permitted. *See State v. Gaytan,* 972 P.2d 356, 358-59(Okl.Cr. 1998); *Rouse v. State*, 594 P.2d 787, 792-93 (Okl.Cr. 1979); *Barks v. Young*, 564 P.2d 228, 230 (Okl.Cr. 1977). When a prior contradictory statement is not independently admissible for any reason other than impeachment, it is generally not admissible for impeachment either. *Barks*, 564 P.2d at 230. Put simply, the trial court committed error when it permitted the State to introduce otherwise inadmissible bad character evidence under the guise of impeachment.

C. Additional bad act and other crime evidence: The prosecution succeeded in introducing additional evidence that did nothing but show bad aspects of Brenda Andrew's character. James Tracy Higgins testified that his wife told him that their sons had complained that Brenda Andrew had come on to them when they were helping build a deck for her. Appellant's request to strike this testimony was denied. (Tr. 278) Over objections David Ostrowe testified about Appellant's behavior on an occasion where Ostrowe and his wife met Robert and Brenda Andrew for dinner. Ostrowe told the jury her dress was too short and she showed too much cleavage and pointed out that someone in the restaurant referred to her as a "hoochie." He did not like the way she talked about her family's vacations in Mexico or how she liked the workman at her house and how she let them babysit when she ran errands. (Tr. 321-26) Why Ostrowe's opinions on such things are relevant in this case is not clear, but his testimony served purposefully to humiliate Brenda Andrew.

Over hearsay and relevancy objections, Ronnie Stump testified on one occasion

Brenda Andrew asked his wife what hair color he liked on women, and his wife told Brenda he liked red hair. The next time he saw Brenda Andrew, she had died her hair red. (Tr. 498-99) Stump apparently concluded that Brenda Andrew wanted to please him. Over objections Barbara Mercer-Green testified about an incident at Robert Andrew's office in which Brenda had interrupted a meeting and caused a scene. (Tr. 577-78, 581-82) Green further testified that after this incident somebody sent a cut-up picture of her husband to Robert Andrew. (Tr. 582-83) Then Green opined that Brenda must have been stalking Robert Andrew because she had seen Brenda Andrew's car parked in front of her house during bible studies. (Tr. 585)

David Head, a plumber who did some work at the Andrew home, was allowed to testify over objections about an altercation in which Brenda Andrew allegedly threatened to kill him. (Tr. 983-84, 997-98) William Burleson, the minister at Robert Andrew's funeral, testified over objections about Brenda's behavior during a visit he had with her to plan the funeral. Burleson testified that Brenda was cold, flat, unemotional, and uncommunicative, and that in twenty-five years of ministry her responses to his inquiries were the most bizarre that he had ever experienced. (Tr. 2576-78, 2580-82) Cynthia Balding, supposedly Brenda's friend, also shared some bad things about Brenda with the jury. Over objections she testified that Brenda told her that she had moved some money so that Robert could not find it. (Tr. 2648-51) Balding provided additional testimony in which she opined that Brenda Andrew was attempting to influence the custody dispute over the children by telling Tricity that her puppy needed its mother. (Tr. 2660-62) Over objections Janna Larson opined that Brenda Andrew had lied to her father, James Pavatt, when she told him that she had not slept with any men other than Pavatt and her husband Robert. She further testified that when she asked her father if he was concerned that Brenda's children might tell their father about his relationship with Pavatt, Pavatt replied that he was not concerned because Brenda had the children well trained. (Tr. 2956-59)

None of this evidence about what Brenda Andrew said and how she acted around these witnesses had anything to do with homicide in question. It was pure bad character evidence intended to humiliate and dehumanize Brenda Andrew and to reduce her to a venal caricature in the eyes of the jury. Such evidence has long been held to be inadmissible. *Martinez*, 984 P.2d at 823; *Coates v. State*, 773 P.2d 1281, 1285 (Okl.Cr. 1989); *Millet v. State*, 39 Okl.Cr. 309, 253 P. 1039, 1040 (1927).

D. Conclusion. Even if some of this evidence was minimally relevant, its probative value was far outweighed by its prejudicial effect, and its introduction consequently constitutes error. *See Blakely v. State*, 841 P.2d 1156, 1159 (Okl.Cr. 1992). The sheer volume of other crime/bad act evidence in this case made the trial more a referendum on Appellant's life than a meaningful attempt to determine her guilt for malice murder. Because Ms. Andrew's conviction and sentence of death was based upon this inadmissible and unfairly prejudicial evidence in violation of the Eighth and Fourteenth Amendments, they must be reversed and remanded for a new trial. *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988); *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

PROPOSITION IV

APPELLANT'S TRIAL WAS INFECTED THROUGHOUT WITH IMPROPER AND INADMISSIBLE OPINION TESTIMONY WHICH INVADED THE PROVINCE OF THE JURY AND DENIED HER A FAIR TRIAL AND THE DUE PROCESS OF LAW SECURED TO HER BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE 2, SECTIONS 7, 19, AND 20 OF THE OKLAHOMA CONSTITUTION.

Admission of opinion testimony is carefully guided by statue. *See* 12 O.S.2001, §§ 2701-04. Lay opinion testimony is admissible only if rationally based on the witness's perception, helpful to the jury, and not based on scientific, technical, or other specialized knowledge. § 2701. Under Section 2702, the opinion testimony of a properly qualified expert is admissible if based on "scientific, technical or other

specialized knowledge" which "will assist the trier of fact to understand the evidence or to determine a fact in issue." *See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *Taylor v. State*, 889 P.2d 319 (Okl.Cr. 1995). As with all evidence, moreover, opinion testimony must meet the minimal standard of relevance under Section 2401 and is subject to the probative versus prejudice balancing of section 2403. *Daubert*, 509 U.S. at 595; 113 S.Ct. at 2789; *Taylor*, 889 P.2d at 339.

Despite clear governing standards, improper opinion testimony was admitted at every turn of the State's case against Brenda Andrew, resulting in a verdict that was clearly influenced by prejudice against her. Witnesses were repeatedly allowed to express their personal opinions of Ms. Andrew's guilt. Police officers were allowed to give "expert" opinions without qualification, and other opinions were admitted without regard to actual relevance to any material issues in the case. The combined effect of these improper and highly prejudicial personal opinions of the witnesses denied Appellant the fair trial to which she was entitled as a core value of due process.

A. The Trial Court Erred in Allowing Prosecution Witnesses to Express Their Personal Opinions of Appellant's Guilt.

Determination of the defendant's guilt or innocence is *solely* a question for the trier of fact, and this Court has made it quite clear that witnesses may not offer their opinion, whether lay or expert, that the defendant is guilty. *See McCarty v. State*, 765 P.2d 1215, 1218-19 (Okl.Cr. 1988) (citing *State v. Carlin*, 700 P.2d 323, 325 (Wash. Ct. App. 1985)); *Dunham v. State*, 762 P.2d 969, 973 (Okl.Cr. 1988); *Daniels v. State*, 554 P.2d 88, 94-95 (Okl.Cr. 1976). Opinions which merely tell the jury what result to reach are inadmissible, because they invade the province of the jury. *See Littlejohn v. State*, 989 P.2d 901, 907 (Okl.Cr. 1998); *Romano v. State*, 909 P.2d 92, 109 (Okl.Cr. 1995); *McCarty*, 765 P.2d at 1218-19.

This rule has a long pedigree and seems to be fairly universal. *See, e.g.*, 1

McCormick on Evidence § 12, at 51 (5th ed. 1999) ("There is no necessity for this kind of evidence; to receive it tends to suggest that the judge and jury may shift responsibility for the decision to the witnesses."); *see also, e.g., Commonwealth v. Cavanaugh*, 823 N.E.2d 429, 433 (Mass. App. Ct. 2005); *Commonwealth v. Russell*, 322 A.2d 127, 129 (Pa. 1974); *Mowbray v. State*, 788 S.W.2d 658, 668 (Tex. Ct. App. 1990); *Curl v. State*, 898 P.2d 369, 274 (Wyo. 1995). Appellant's trial was nevertheless infected with opinions of her guilt from a variety of sources on the witness stand, including the dead victim himself.

Over objection, Rod Lott was allowed to testify that he dislikes Appellant because he believes she is responsible for Robert Andrew's death. (Tr. 1097) Similarly, Ronald Stump, Robert Andrew's best friend, was allowed to testify that when he first heard that Robert Andrew had been murdered, his response was to turn to his wife and say that "the sons of a bitches killed him." He then explained to the jury that he meant Appellant and James Pavatt. (Tr. 496) Stump was then further allowed to give his opinion that Appellant hated Robert Andrew, that she wanted custody of the children and his life insurance, and that he did not know anyone else but Appellant and Pavatt who wanted Robert Andrew dead or who had any motive to kill him.[23] (Tr. 501-02)

As Appellant has already pointed out in Proposition II of this brief, the star witness against her was her own deceased husband. In addition to being hearsay, much of Robert Andrew's "testimony" against Appellant also amounts to improper opinion testimony and sheer speculation. Stump was allowed to relay to the jury Mr. Andrew's opinion that Appellant had "finally" found someone to kill him, meaning James Pavatt. (Tr. 447-48) Over defense objections, audio tapes of Robert Andrew accusing Appellant and James Pavatt of cutting his brake lines were admitted into

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[23] Inexplicably, trial counsel failed to interpose any objections to Stump's opinion testimony in this regard. While Appellant submits that the admission of this clearly improper testimony rises to the level of "plain error," Appellant alternatively submits that trial counsel was plainly ineffective for failing to object to this testimony. *See* Proposition VI, *supra*.

evidence and played for the jury. (Tr. 1350-60; St. Exh. 28 & 29) Officer Mike Klika testified that Mr. Andrew made it clear to him that he thought Appellant and Pavatt were responsible for the brake lines being cut. (Tr. 801) Michael Fetters also relayed, over defense objections, that Robert Andrew was convinced that Appellant was involved in cutting his brake lines. (Tr. 236-38) Similarly, Mark Sinor testified that Robert Andrew believed and was fearful as early as November 1, 2001, that Appellant and Pavatt were planning to murder him. (Tr. 194)

There is no justification for admitting Robert Andrew's opinions of Appellant's guilt, opinions which could not be subjected to the crucible of adversarial testing to ensure their reliability and accuracy. These statements go far beyond merely advising the jury of Robert Andrew's state of mind,[24] but invaded the province of the jury with his unfounded and speculative opinions. He would not have been allowed to testify to these opinions in person, there should be no reason why these inadmissible opinions could come in through surrogates.

B. The Trial Court Erred in Allowing Irrelevant and Unqualified "Expert" Opinions Prejudicial to Appellant.

While police officers necessarily have a broad range of training and experience, they are not experts on every subject under the sun, and not every opinion is necessarily admissible. Indeed, special attention must be paid to the opinion testimony of police officers to ensure that prosecutorial argument is not presented to the jury in the guise of specialized "knowledge." *See, e.g., United States v. Nersesian*, 824 F.2d 1294, 1308 (2nd Cir. 1987); 12 O.S.2001, § 2702.

Officer Roger Frost was allowed to testify that, in his opinion, Appellant's inability to remember what the intruders who shot her and her husband said to them was strange, because in prior robbery cases he has worked the victims remembered

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[24] *See, e.g., Washington v. State*, 989 P.2d 960, 973 (Okl.Cr. 1999); *but see* Proposition II, *supra*.

what the robbers had told them. (Tr. 1799-1800) He was also allowed to testify that Appellant was acting unusually calm, compared to "most people" who, according to Frost, are so hysterical that it takes ten to fifteen minutes just to calm them down before they are able to provide any information.[25] (Tr. 1801) Over objections, Officer Frost was allowed to express his opinion that Appellant's calm demeanor later at the hospital was significant to him because she supposedly had not gone through the phase of being hysterical the way people do when they are the victims of crimes. (Tr. 1827) He similarly was allowed to opine that it was unusual for Appellant not to ask about her husband at the hospital. (Tr. 1828-29)

Officer Teresa Bunn also testified cumulatively to these same opinions. She was allowed over objection to testify that Appellant was unusually calm at the hospital, that most people are frantic, excited, emotional, distraught, and disturbed by the violence that has been done to them and hard to interview. (Tr. 2030-31) Bunn added, however, in commentary on the credibility of Appellant's post-crime statements, that it was unusual for Appellant not to know how close the shooter was when she was shot, given that it was at close range. (Tr. 2055)

Even non-scientific expert testimony, relying upon "technical or other specialized knowledge," must meet the *Daubert* standards of reliability and relevance in order to be admitted at trial. *See Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999); *Gilson v. State*, 8 P.3d 883 (Okl.Cr. 2000). Neither Frost's nor Bunn's opinions – which appear to be more expressions of "personal" rather than "expert" opinions, and which border upon opinions of guilt – were proper subjects of expert testimony. Neither witness provided any foundation for this specialized knowledge, other than to draw negative inferences against Appellant based on how her conduct differed from that of other people Frost and Bunn

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[25] Conveniently for the State, both Appellant's *ability* to provide information and her *inability* to do so are suspicious by Frost's reckoning.

have come across during their careers as police officers.

Under the doctrine of *res inter alios acta*, evidence of the conduct of third parties is generally considered irrelevant and inadmissible. *See* 1 WHARTON'S CRIMINAL EVIDENCE § 103 (14th ed. 1985). This Court has similarly found evidence of third-party conduct irrelevant in various contexts. *See, e.g., Sellers v. State*, 809 P.2d 676, 683 (Okl.Cr. 1991) (evidence purporting to show presence and influence of Satanism in Oklahoma City held not relevant to any fact of consequence in case); *Hooker v. State*, 887 P.2d 1351, 1367 (Okl.Cr. 1994) (defense expert could not testify about effect on defendant's children of death sentence compared to life without parole, where expert had neither met nor examined the children); *Hanson v. State*, 72 P.3d 40, 56 (Okl.Cr. 2003) (Lumpkin, J., concur in result) (questioning relevance of expert testimony without showing how that evidence relates directly to case). Other states have similarly condemned such specious "expert" testimony. *See State v. Percy*, 507 A.2d 955, 958-61 (Vt. 1986) (reversible error in allowing expert testimony "that rapists typically claim either consent or amnesia"); *State v. Maule*, 667 P.2d 96, 99 (Wash. Ct. App. 1983) (reversible error to admit expert testimony concerning the general characteristics of child sexual abuse, particularly testimony that majority of cases involved a male parent figure, the relevance of which was "not discernible" to the court); *State v. Pittman*, 496 N.W.2d 74, 82 (Wis. 1993) (expert's research information on sleep held irrelevant because the expert "could not tailor this information to [the victim's] individual traits").

Additionally, Officer Frost was allowed over objection to testify that it was significant Appellant was shot at close range. (Tr. 1836-37) Frost never actually said what that significance was, but in the context of the prosecutor's questioning, asking him to compare his observations to Appellant's statements, the clear implication was that Appellant was not telling the truth to him, providing further circumstantial proof that Appellant was involved in shooting her husband. There is no evidence, however,

that Frost was qualified, as required Section 2702, as an expert in firearms or ballistics analysis. His testimony on this point should not have been allowed.

Finally, Officer Mike Klika and Detective Roland Garrett were permitted to give irrelevant and speculative opinions that were prejudicial to the defense. Officer Klika was allowed to testify that in his opinion, Appellant was involved in the cutting of the brake lines. More particularly, the prosecutor read to him his testimony at preliminary hearing detailing the reasons he believed Appellant cut Robert Andrew's brake lines, and he confirmed that this was his testimony then and his belief now. (Tr. 852-55) Detective Garrett was allowed to opine that Pavatt was moving in to the Andrew home, based apparently on the fact that he moved his washer and dryer into Appellant's garage for storage. The trial court denied the defense's motion to strike and to admonish the jury. (Tr. 2568-69) Opinions such as this, which merely tell the jury what result to reach, invade the province of the jury and are improper. *See Romano v.* State, 909 P.2d 92, 109-10 (Okl.Cr. 1995); *Hooks v. State*, 862 P.2d 1273 (Okl.Cr. 1993).

C. **Conclusion.**

The cumulative effect of all this improper expert evidence was to deny Appellant a fair trial. The province of the jury was repeatedly invaded, as witness after witness provided the jury with opinions of Appellant's guilt. This is not a case of "overwhelming" admissible evidence of guilt, and the nature and sheer volume of the improper opinion testimony presented in this case so infected the trial with such unfairness as to make the resulting conviction a denial of due process. *See Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Appellant's convictions and sentences must therefore be reversed.

PROPOSITION V

INADMISSIBLE HEARSAY WAS IMPROPERLY ADMITTED AGAINST APPELLANT AS "COCONSPIRATOR HEARSAY," DEPRIVING APPELLANT OF HER RIGHTS OF CONFRONTATION AND CROSS EXAMINATION, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS WELL AS ARTICLE II, SECTION 20 OF THE OKLAHOMA CONSTITUTION.

Over defense objection, (Tr. 2961-65), Janna Larson, the daughter of Appellant's co-defendant, James Pavatt, was allowed to testify as follows:

> [Pavatt] said to me – How it started out, the conversation was he said you're never going to believe what that **nuttier than a fruit cake woman** asked me to do. And then he told me that she asked him if he would kill her husband or if he knew someone that could do it. And I said, "You're kidding." And he said again, and I said she . . . I can't remember the exact words how it was, but that's what it was.

(Tr. 2966) (Emphasis Added) If Pavatt actually made this statement, it is nothing more than hearsay from a non-testifying co-defendant inculpating Brenda Andrew for soliciting her husband's murder while exonerating himself with the implication that he turned down the solicitation from this "nuttier than a fruitcake woman." Such self-serving claims from accomplices are inadmissible hearsay. *Lilly v. Virginia,* 527 U.S. 116, 133-34, 119 S.Ct. 1887, 1898-99, 144 L.Ed.2d 117 (1999). At trial the prosecutors successfully masqueraded Pavatt's supposed statements to Larson as "coconspirator hearsay" and the court erroneously admitted it on those grounds. However, as will be shown below, these hearsay statements and the circumstances surrounding them do not meet the strict criteria for the co-conspirator hearsay exception.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." 12 O.S.2001, § 2801(A)(3). Such evidence "is not admissible except as otherwise provided by an act of the legislature." § 2802. The Oklahoma Legislature has provided for admission against a party the statements of her coconspirators made "during the course and in furtherance of the conspiracy." § 2801(B)(2)(e). Pursuant to *Laske v. State,* 694 P.2d 536, 538 (Okl.Cr. 1985), and *Harjo v. State,* 797 P.2d 338, 343-

45 (Okl.Cr. 1990), the trial judge is required to make a threshold determination as to the admissibility of coconspirator hearsay statements. Such statements are admissible only where the trial court finds:

> [1] a conspiracy existed; [2] both the defendant and the alleged coconspirator declarant were parties to the conspiracy; [3] the statements were made during the duration of the conspiracy; and [4] the statements furthered the goals of the conspiracy.

Omalza v. State, 911 P.2d 286, 296 (Okl.Cr. 1995) (citing *Harjo*, 797 P.2d at 345). As will be shown, the evidence in this case fails at every prerequisite.

The existence of a conspiracy must be proved by a preponderance of the evidence. *Omalza*, 911 P.2d at 296. As this Court has recently re-affirmed, the elements of a conspiracy are: "(1) an agreement to commit the crime(s), and (2) an overt act by one or more of the parties in furtherance of the conspiracy, or to effect its purpose." *McGee v. State*, – P.3d – , 2005 OK CR 30 at ¶ 3 (Jan. 5, 2006) (citing OKLA.STAT. tit. 21, §§ 421, 423 (2001); *Hackney v. State*, 874 P.2d 810, 813 (Okl.Cr. 1994); *Davis v. State*, 792 P.2d 76, 81 (Okl.Cr. 1990)). The existence of a conspiracy may be proved by circumstantial evidence, *State v. Davis*, 823 P.2d 367, 370 (Okl.Cr. 1991), and the trial court may consider the content of alleged hearsay statements in reaching its decision, *Omalza*, 911 P.2d at 296. Here, however, there was no evidence of any agreement to commit a crime. Indeed, the statement itself, if believed, actually *disproves* any conspiracy theory, as Pavatt declined the alleged solicitation by Appellant, whom he described as "nuttier than a fruitcake." (Tr. 2966; PH 978)

Nor were these statements made *during the course of* any conspiracy. Based solely on the State's averments in the criminal Information filed in the case,[26] the trial

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[26] At the *Harjo* hearing, the trial court indicated: "In my opinion, if you say September that will be September the 1st through November the 20th, I believe, is what's listed on Count 2." (Tr. 469) She was clearly referring here to the criminal Information filed by the State, which baldly asserted a conspiracy "beginning in September 2001." (O.R. 657) A short time later, the trial court stated on the record: "Okay. The time frame is, **according to the State**, September the 1st of 2001 through November the 20th of 2001." (Tr. 469) (emphasis added).

court decided that the alleged conspiracy began on September 1, 2001, and concluded on November 20, 2001, the date of the homicide. This arbitrary start date for the alleged conspiracy is both legally and factually incorrect. As this Court has made quite plain, "[b]ecause agreement alone does not create a conspiracy, a conspiracy begins with the first overt act following the agreement." *Omalza*, 911 P.2d at 296 (citing 21 O.S.2001, § 423). The Information alleging a conspiracy beginning in September alleges three overt acts: (1) co-defendant Pavatt's purchase of a handgun on November 14, 2001; (2) Appellant's allegedly arranging to provide Pavatt access to the neighbor's home to hide from police on November 20, 2001; and (3) Appellant's act of inviting Mr. Andrew into the garage, also on November 20, 2001. Assuming *arguendo* that any of these acts constitutes a valid "overt act," the earliest date for the conspiracy, according to the State's own allegations, would be November 14, 2001.

No evidence in the record, either at trial or preliminary hearing, suggests any overt act occurred on September 1, 2001. The earliest possible overt act for which there is evidence in this record is the brake line incident on October 26, 2001.[27] (Tr. 132, 204-05, 713-16, 801, 813, 879-81, 890, 2967-69) This is critical, because Janna Larson's testimony indicates that Pavatt's alleged statements to her occurred *before* the brake line incident.[28] Therefore, Pavatt's statements to Ms. Larson were not made

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[27] Appellant maintains that no evidence connects her to this incident. *See* Proposition III, *supra*.

[28] Frankly, Ms. Larson's testimony, at trial and at the preliminary hearing, is not precisely clear about the timing of these statements. She refers to this conversation with her father as having occurred "around the end of October" and refers to her father's conversations with her on the day of the brake line incident as having occurred "in late October." (Tr. 2966-67) No clear order of events can be deduced from such ambiguous language. However, as the proponent of this evidence, the burden was on the State of Oklahoma to establish its admissibility. *See, e.g., Twyman v. GHK Corp.*, 93 P.3d 51, 57 (Okla. Ct. App. 2004). Accordingly, the burden should have been on the State of Oklahoma to prove that this statement occurred "during the course ... of the conspiracy," which would require proof that the statement was made after the first overt act in furtherance of the alleged conspiracy. *See, e.g., State v. Zeno*, 742 So.2d 699, 707(La. Ct. App. 1999) (statement not admissible under coconspirator theory where evidence did not demonstrate when statement was made). The State simply failed to meet this burden, but rather was relieved of its responsibility by the trial court's arbitrary and erroneous decision to date the conspiracy back to September 1, 2001, based only on the State's averment that the conspiracy began in September. Indeed, the more

"during the course ... of the conspiracy," and were therefore inadmissible.

More fundamentally, the hearsay testimony at issue fails the requirement that the hearsay be made "in furtherance of the conspiracy." § 2801(B)(2)(e); *Omalza*, 911 P.2d at 296. As Professor Whinery has explained, this requirement "is narrowly drawn to authorize only the admission of statements which advance, as distinct from statements which relate, but do not necessarily advance, the objects of the conspiracy." 2 WHINERY, OKLAHOMA EVIDENCE: COMMENTARY ON THE LAW OF EVIDENCE § 29.22, at 624 (West 1994). Indeed, the legislative history of this requirement "reflects an intent to protect parties from the dangers posed by the admission of gossip, or misreported or fabricated information, of co-conspirators." *Id.*

Clearly, Pavatt's alleged statements to Ms. Larson were nothing more than inadmissible "idle chatter." *See United States v. Johnson*, 927 F.2d 999, 1002 (7th Cir. 1991); *See, e.g., United States v. Shores*, 33 F.3d 438, 444 (4th Cir. 1994) (statements "intended to be nothing more than idle chatter or casual conversation about past events" are not admissible). Because Pavatt's alleged statements did not "further[] the goals of the conspiracy," *Omalza*, 911 P.2d at 296, 306, they were hearsay and inadmissible. *See, e.g., State v. Gilchrist*, 536 S.E.2d 868, 869 (S.C. 2000) (statement of alleged coconspirator, moments before shooting, that defendant was going to kill victim, held inadmissible because there was no independent evidence of a conspiracy and because the alleged statement did not advance or further the conspiracy); *State v. Heflin*, 15 S.W.3d 519, 522-23 (Tenn. Crim. App. 2000) (hearsay statement of victim's wife that she was going to have victim killed for his insurance money held not made in

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logical deduction from the evidence presented is that the alleged statements were made *prior* to the brake line incident. Both times that Ms. Larson testified to these statements, she related these statements first then went on to relay her testimony about the morning of the brake line incident. (PH 978, 980; Tr. 2966-67) At no time did Ms. Larson indicate that she was aware of the brake line incident at the time Mr. Pavatt told her that Ms. Andrew asked him to kill her husband. In any event, even if it could be said that the statements were made *after* the brake line incident, this poses the additional problem of possibly placing the agreement *after* the overt act, a logical impossibility.

furtherance of conspiracy but was "merely a declaration of her intent that did absolutely nothing to advance or aid the conspiracy in any way); *Speer v. State*, 890 S.W.2d 87, 94-95 (Tex. Ct. App. 1994) (declarant's statements regarding whether defendant would participate in murder held not in furtherance of conspiracy).

The trial court's erroneous admission of James Pavatt's out-of-court statements deprived Appellant of her fundamental right to confront and cross-examine this witness against her. *See Mattox v. United States*, 156 U.S. 237, 242-43, 15 S.Ct. 337, 338-39, 39 L.Ed. 409 (1895). Because these statements do not fall within any "firmly rooted exception to the hearsay rule," and otherwise lack adequate "indicia of reliability," their admission in evidence violated the Sixth Amendment to the United States Constitution. *See White v. Illinois*, 502 U.S. 346, 353, 112 S.Ct. 736, 743, 116 L.Ed.2d 848 (1992); *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980), *overruled in part by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (leaving intact the *Roberts* formulation for "non-testimonial hearsay").

Such constitutional violations require reversal unless the State can prove that the error complained of was "harmless beyond a reasonable doubt." *Simpson v. State*, 876 P.2d 690, 701 (Okl.Cr. 1994) (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967)). This burden cannot be met by mere rote recitation of the "overwhelming evidence" mantra but requires proof that there is no reasonable probability that the error contributed to the verdict. *Chapman*, 386 U.S. at 23, 87 S.Ct. at 827 (questioning value of "overwhelming evidence" standard, which has been "overemphasi[zed]"); *Fahy v. Connecticut*, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230, 11 L.Ed.2d 171 (1963). In a case such as this, built upon weak circumstantial evidence, rampant speculation and hearsay, and a spurious "confession" to a jailhouse snitch of questionable credibility,[29] evidence that Appellant had actually solicited the man who

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[29] *See, e.g.*, Appellant's Motion for New Trial on Newly Discovered Evidence and Brief in Support, filed in this Court on September 21, 2005.

ultimately killed her husband to commit that very crime would have been very powerful to the jury. It cannot be said beyond a reasonable doubt that this error, viewed alone or in combination with the numerous other prejudicial errors that permeated Ms. Andrew's trial, did not contribute to the verdict, and Appellant's convictions and death sentence must therefor be vacated.

PROPOSITION VI

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7, 9, AND 20 OF THE OKLAHOMA CONSTITUTION.

A. TRIAL COUNSEL'S FAILURE TO PROVIDE ADEQUATE PRE-TRIAL NOTICE OF DEFENSE WITNESSES TO THE PROSECUTION RESULTED IN THE TRIAL COURT'S BARRING OF CRITICAL DEFENSE TESTIMONY.

In Proposition I of this Brief, Appellant argued that the trial court's decision to bar critical defense testimony because the defense failed to provide what the trial court believed were adequate written summaries of the anticipated testimony of these witnesses was error. Appellant stands by her previous arguments. However, in the alternative, Appellant submits that trial counsel, in allowing this situation to arise in the first place, failed to provide adequate assistance of counsel.

In *Strickland v. Washington*, 466 U.S. 668, 681, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), the Supreme Court held that a conviction cannot stand if defense counsel's performance falls below the standards required by the Sixth Amendment and this deficient performance creates a reasonable probability that the defendant did not receive a fair trial, that is a trial whose result is reliable. Appellant has not been able to find cases exactly on point with this situation. However several cases hold that counsel is expected to know routine procedural rules and failure to comply with them to his client's detriment is ineffective assistance of counsel. *See Stouffer v. Reynolds*, 214 F.3d 1231, 1233-34 (10th Cir. 2000) (counsel's failure to lay proper foundations for the introduction of relevant evidence); *Dorsey v. State*, 156 S.W.3d 825, 828-30, 832-33

(Mo.Ct.App. 2005) (filing motion for new trial seven days late and including inadequate argument and evidence); *McCalvin v. Yukins*, 351 F. Supp. 2d 665, 670-72 (E.D. Mich. 2005) (failing to follow rule requiring motions to suppress to be filed before trial and not attempting to suppress the evidence until after jury had heard it); *Aycox v. State*, 702 P.2d 1057, 1058 (Okl.Cr. 1985) (failure to object to inadmissible evidence).

The Oklahoma Discovery Code provides that upon the request of the State, the defense should disclose the "the names and addresses of witnesses which the defense intends to call at trial, together with . . . significant summaries of any oral statement." 22 O.S.Supp. 2002, § 2002(B)(1)(a). In a pretrial hearing the prosecution complained that the defense had not provided summaries of the defense witnesses' statements but was instead merely describing the subject matter of the witnesses' testimony and then referring back to police reports or some other prosecution source for the content of the testimony. In response to the State's complaint the court ordered the defense to prepare summaries of the testimony. (5/18/04 M.Tr. 130-32) However, despite being on notice that this trial judge, rightly or wrongly, was a stickler for summaries of testimony, three days after this hearing, on April 21, 2004, defense counsel filed a "final" witness list which did not include summaries of the anticipated testimony of the witnesses whose testimony was later going to be barred or severely restricted when the defense presented its case at trial. (O.R. 2429-30, 2434, 2436, 2440, 2455) The notices regarding these witnesses did little more than describe the subject matter of the witnesses' testimony. Counsel could have provided meaningful summaries for the testimony of these crucial witnesses. In their subsequent offer of proof after these witnesses had been barred, counsel demonstrated their ability to succinctly summarize the testimony of these witnesses. (Tr. 3764-88)

As Appellant has argued in Proposition I, the State's complaints regarding most of these witnesses were frivolous because the prosecutors had known of the content of their testimony for years. However, the evidence supporting Appellant's claim that

in October of 2001 she had sought and obtained extra police patrols around her residence was new. Counsel had hoped to present this evidence to the jury through the testimony of Oklahoma City Police officers Ron Northcutt and Roger Frost. (Tr. 3782-88) Defense notices regarding Northcutt and Frost do not mention this anticipated testimony. (O.R. 2430, 2440) Given the fact that the State was claiming that Brenda Andrew was involved in an elaborate conspiracy to murder her husband beginning back on September 1, 2001 (O.R. 657; Tr. 470), evidence that Appellant sought and obtained extra police patrols around her home would have destroyed the State's claim that she planned to use her house as the location of the murder and thereby would have severely damaged the whole notion of an elaborate conspiracy. That this testimony was lost because counsel did not want to write a few sentences is a tragedy for Brenda Andrew.

The loss of Donna Tyra's testimony was also a serious blow for the defense. Again, the subject matter had not been previously disclosed by police investigation. Tyra, a detention officer in the jail, could have testified that Teresa Sullivan, the jail house informant who testified that Brenda Andrew confessed to her, was not allowed to have any contact with Brenda Andrew in the jail and that there had been no communications between them either through the cell doors or via notes. (Tr. 3776-77) The notice of Tyra's testimony does not even mention this subject matter but instead references Andrew's conduct as a prisoner. (O.R. 2335, 2361, 2455)

Appellant can think of no legitimate trial strategy that would justify defense counsel's failure to write summaries of defense witness testimony, especially with regard to new testimony that had not been previously generated by prosecution investigation. The fact that prosecution discovery notices were no better than Appellant's does not justify counsel's omissions. Brenda Andrew was facing conviction and execution. The prosecutors were not.

B. TRIAL COUNSEL FAILED TO PRESERVE THE RECORD FOR APPELLATE REVIEW BY FAILING TO MAKE CONTEMPORANEOUS OBJECTIONS TO MANY DAMAGING HEARSAY STATEMENTS AND IRRELEVANT OPINIONS FROM THE MURDER VICTIM AND OTHER WITNESSES..

In Proposition II of this brief, Appellant cited the many examples of the introduction of hearsay statements by the deceased and argued that the injection of all of this hearsay into the trial deprived Appellant of her constitutional rights to due process and to confront the witnesses against her. Understanding the prejudicial nature of this evidence, trial counsel filed a pre-trial motion in limine regarding Robert Andrew's statements, but this motion was overruled. (O.R. 2107-11; 5/18/04 M.Tr.103-06) Counsel renewed his objections at a pretrial hearing on the first day of the trial (6/7/04 M.Tr. 9-10), and again on the first day that testimony was taken. (Tr. 159-61)

In Proposition IV Appellant has argued that many improper opinions of guilt or implying guilt were erroneously admitted into evidence. Before the trial counsel filed a motion in limine to preclude the admission of opinions from persons not qualified to make them. (O.R. XI 2138-41)

However, at trial counsel failed to register timely, relevant objections to the introduction of many some of the most prejudicial hearsay statements allegedly made by Robert Andrew and some of most damaging opinions.[30] Without objection Ronald Stump testified that Andrew told him that he was afraid that Brenda Andrew had finally found somebody that would kill him. According to Stump, the person Andrew was referring to was Jim Pavatt. (Tr. 447) Stump and Rob Lott testified without hearsay objections that Robert Andrew told them Appellant had locked him out of the house and would not let him have his shotgun to take to Enid for his Thanksgiving hunting trip. (Tr. 487-88, 1082-83) Without objections Stump was allowed to testify

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[30] Motions in limine are advisory in nature and do not relieve a party of the obligation to make an objection during the trial at the time the objectionable evidence is introduced in order to preserver the error. *Odum v. State*, 651 P.2d 703, 706 (Okl.Cr. 1982); *see also Lavicky v. State*, 632 P.2d 1234, 1238 (Okl.Cr. 1981).

that Robert Andrew told him that Brenda Andrew had kicked him out of the house and hidden their money. (Tr. 500-01)

Officer Mike Klika testified without objections that Andrew told him that his wife and his good friend James Pavatt were somehow responsible for the brake lines being cut. (Tr 801) This statement was both hearsay and an inadmissible opinion of guilt. Klika also testified without objections that Andrew told him that he received three telephone calls from two females and a male telling him that his wife was in a bad accident and was in Norman Regional Hospital and that when he got to the hospital his wife was not there. (Tr. 813) Counsel made no objections when Detective Barry Niles testified that Robert Andrew told him that Brenda Andrew called him the day after the brake line incident and said that she had heard that his brake lines had been cut. Niles further testified, without objections, that Andrew told him Brenda should not have known about the brake lines because he had not told her and he had not told anybody who would have told her. (Tr. 880-81) This of course was highly prejudicial hearsay because it implied that Brenda Andrew had guilty knowledge about the cutting of her husband's brake lines.

Counsel failed to make hearsay objections to statements that Robert Andrew supposedly made to his lawyer, Craig Box. Without a timely hearsay objection, Box testified that Andrew told him Brenda bragged that she could sign his name better than he could and that he was in the dark about financial questions because Brenda Andrew controlled the bank accounts and the household finances. (Tr. 1200-01) In cross-examination of Box, counsel caused Box to agree, in front of the jury, that Robert Andrew had told him he never would have knowingly signed the change of ownership form, and that he was seventy-five percent sure he did not sign it. (Tr. 1261-62)

Ronald Stump was allowed to testify without objections that when he heard that Robert Andrew had been murdered, he turned to his wife and said that "the sons of bitches killed him." Stump testified that he meant Brenda Andrew and Jim Pavatt.

(Tr. 496) This was a devastating opinion of guilt. Counsel then allowed Stump to testify without relevant objections that he believed Brenda Andrew wanted custody of the children and Robert Andrew's insurance policy, and that he did not know of anybody else who wanted Robert Andrew dead or had any motive kill him. (Tr. 501-02)

Counsel then allowed the police officers to give half-baked opinions beyond their expertise without relevant objections. Frost testified without objections that it was strange that Appellant could not remember what the intruders said . (Tr. 1799-1800) Frost and Bunn testified without relevant objections that was unusually calm for persons who have been through such a traumatic experience. (Tr. 1801, 2030-31) Officer Klika testified without objections to the reasons why he believed that Brenda Andrew was involved in cutting the brake lines to Robert Andrew's car. (Tr. 852-55) This Court held long ago that trial counsel is ineffective if he fails to object to blatantly inadmissible evidence that severely prejudices his client. *Aycox v. State*, 702 P.2d 1057, 1058 (Okl.Cr. 1985) Failure to object to blatant hearsay that constitutes the only evidence on critical fact questions is ineffective assistance of counsel. *Collis v. State*, 685 P.2d 975, 977-78 (Okl.Cr. 1984). Other courts have arrived at the same conclusion. See *In re Jones*, 917 P.2d 1175, 1186 (Cal. 1996); *People v. Flewellen*, 652 N.E.2d 1316, 1319-20 (Ill.App.Ct. 1995); *Jolly v. State*, 443 S.E.2d 566, 568 (S.C. 1994); *Ex Parte Welborn*, 785 S.W.2d 391, 395-96 (Tex.Crim.App. 1990). Given counsel's pretrial efforts to preclude the admission of hearsay and irrelevant opinions, Appellant can discern no viable trial strategy in leaving her in a position where such serious errors can be ruled to have been waived for purposes of appellate review.

C. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO ADEQUATELY INVESTIGATE AND PRESENT ADDITIONAL EVIDENCE OF INNOCENCE.

In this subproposition Appellant asserts that her trial counsel was ineffective for failing to adequately investigate, present, and otherwise deal with evidence in three critical areas to be discussed below. Affidavits presenting new evidence in support of

these claims have been filed with this Court as exhibits to Appellant's Application for an Evidentiary Hearing (hereinafter referred to as the Application) filed contemporaneously with this Brief.

1. **Blood patten evidence:** The first area of concern is the identity of the donor of the patterns of blood on the jeans worn by Brenda Andrew at the time of the homicide. In their first and second stage closing arguments the prosecutors argued that certain patterns of blood on the jeans were back spatter and provided powerful forensic evidence that Brenda Andrew had fired at least the second shotgun shot into Robert Andrew. (Tr. 4081, 4083-87, 4089-90, 4126, 4483) This argument is premised upon the assumption that the patterns of blood in question were back spatter resulting from a shotgun shot into Robert Andrew and therefore consisted of Robert Andrew's blood. Evidence presented in Appellant's Application will show that the blood in these stains is the blood of Brenda Andrew, and therefore the prosecutor's arguments are erroneous and highly prejudicial.

As will be shown in greater detail in Appellant's Application, the defense bears much responsibility for this erroneous argument because the defense, by failing to have the appropriate DNA testing conducted, and then presenting the testimony of defense expert Ross Gardner without the results of such testing, provided the prosecution with the evidentiary basis, albeit erroneous, for the arguments cited above. (Tr. 3573-79, 3582-87, 3677-78, 3691-92, 3747-49, 3762-63) Until the defense presented Gardner's testimony, the prosecutors had no basis for their arguments. (*See* Bevel's testimony – Tr. 3223-26, 3286-87, 3290-96) Trial counsel is ineffective if, through lack of thorough preparation, he accidentally elicits evidence that is damaging to his client, especially when counsel brings out evidence the State did not otherwise have linking his client to the crime. *Fisher v. Gibson*, 282 F.3d 1283, 1294-96 (10th Cir. 2002) Lapses in preparation of this magnitude cannot be considered sound trial strategy. *Id.*

2. **New evidence concerning the signatures of Robert and Brenda Andrew on**

State's Exhibit 24: The State's theory at trial, as presented through the States' forensic document examiner David Parrett, was that the purported signature of Robert D. Andrew on State's Exhibit 24, the change of ownership form, was a forgery accomplished by freehand simulation. He also testified that this type of forgery requires practice and a working knowledge of the signature. He further opined that the model for the simulated signature was a signature that Robert Andrew had used earlier in life. (Tr. 1595-97, 1599-1604) This testimony, coupled with other testimony that Brenda Andrew had bragged she could sign her husband's name better than he could (Tr. 583, 1201), constituted a persuasive circumstantial case that Brenda Andrew forged her husband's name on the change of ownership form to make herself the owner of the policy. Both the prosecution and the defense simply assumed that the two purported signatures of Brenda Andrew on this form were in fact hers.

New evidence presented in Appellant's Application will show that not only Robert Andrew's signature but also both of Brenda Andrew's signatures on State's Exhibit 24 were physically transferred from two Prudential annuity applications, those being Defense Exhibits 184A and 184B. This evidence establishes that neither Brenda Andrew nor any one else simulated Robert Andrew's signature to State's Exhibit 24, and also establishes the possibility that she had nothing to do with the creation of State's Exhibit 24.

Additional evidence presented in Appellant's Application will show the defense could have uncovered all of the evidence concerning the cut-and-pasted signatures during the trial and in time to use the evidence at trial if trial counsel had not curtailed the defense investigation into the signatures on State's Exhibit 24.[31] Appellant submits failure to fully investigate and develop evidence for which counsel already had viable

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[31] Since this evidence was newly discovered during the trial, the Oklahoma Discovery Code would not automatically bar its use if the prosecution had been promptly notified of its existence and given an opportunity to prepare for its admission. *See* 22 O.S. 2002 Supp, §§ 2002 (C),(D), (E)(2); *Dodd v. State*, 100 P.3d 1017, 1036 (Okl.Cr. 2004).

leads amounted to ineffective assistance . *See Williamson v. Ward,* 110 F.3d 1508, 1517-19 (10th Cir. 1997); *Patterson v. State,* 45 P.3d 925, 929-30 (Okl.Cr. 2002).

3. **Corroborating witnesses:** Evidence presented in Appellant's Application will show that trial counsel had at his disposal witnesses who could have provided support for Brenda Andrew's version of the homicide, in particular her version of the sequencing of the three shots fired in the garage (St. Exh. 204A; Tr. 2287-88), corroboration for the written confession of co-defendant James Pavatt (St. Exh. 222; Def. Exh. 15), and evidence impeaching the testimony of Herman Roggow, who claimed he saw Brenda Andrew at a shooting range where he later recovered sixteen gauge shotgun shells. (Tr. 2624-25, 2627-2636, 2642, 2645)

This Court has been critical of trial counsel's failure to use available evidence beneficial to the defendant. *Patterson v. State,* 45 P.3d 925, 929-30 (Okl.Cr. 2002); *Jennings v. State,* 744 P.2d 212, 214-15 (Okl.Cr. 1987) *Galloway v. State,* 698 P.2d 940, 941-42 (Okl.Cr. 1985); *Smith v. State,* 650 P.2d 904, 906-07 (Okl.Cr. 1982). Given counsel's strategy of asserting his client's actual innocence of this homicide, Appellant can see no legitimate strategy in not calling these defense witnesses. Given the numerous errors of trial counsel discussed above, Appellant submits that her convictions and sentence of death should be reversed.

PROPOSITION VII

ADMISSION OF IRRELEVANT BUT HIGHLY PREJUDICIAL EVIDENCE VIOLATED APPELLANT'S DUE PROCESS RIGHTS UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7 AND 9 OF THE OKLAHOMA CONSTITUTION.

During the first stage of the trial the State introduced several categories of evidence that either were irrelevant or at least more prejudicial than probative and, accordingly, were inadmissible. 12 O.S.2001, §§ 2401-03.

1. **Evidence that was used to cast an unwarranted veil of suspicion over Appellant and distract and confuse the jury.** Evidence which does not place the

defendant near the scene of the crime, nor in any way indicate the defendant's guilt is inadmissible because such evidence does nothing but cover the defendant with an unwarranted veil of suspicion and distract the jury. *Morris v. State*, 603 P.2d 1157, 1159 (Okl. Cr. 1979); *see also Dunagan v. State*, 734 P.2d 291, 294 (Okl. Cr. 1987); *Stanley v. State*, 513 P.2d 1330, 1333 (Okl. Cr. 1973); *Pierce v. State*, 495 P.2d 407, 410 (Okl. Cr. 1972); *Rousek v. State*, 93 Okl. Cr. 366, 228 P. 668, 672 (1951); *Sturgis v. State*, 2 Okl. Cr. 362, 102 P. 57, 71 (1909).

Over objections the prosecution succeeded in introducing documents showing that in the months before the homicide Pavatt made Brenda Andrew a primary beneficiary of two life insurance policies on his life. (St. Exh. 303-05; Tr. 1395-1405) The State's ostensible reason for presenting this evidence was to again illustrate the relationship between Pavatt and Brenda Andrew and that Brenda Andrew could manipulate men. (Tr. 1396-98) Additional evidence about the relationship cumulative as will be seen below. The argument that this evidence showed Brenda Andrew could manipulate men carries with it the suggestion that at some point she planned to kill him also to collect the insurance proceeds.

The State presented no evidence that Brenda Andrew knew about these policies or that she had asked Pavatt make her the beneficiary of his policies. Pavatt was depicted as being a poor man who created substantial credit card debt for Suk Hui, his wife (St. Exh. 1; Tr. 628-29); had to borrow money from Brenda Andrew to send his wife Korea (Tr. 619); and returned to the United States from Mexico penniless, (Tr. 2521-22). That being the case, how could Pavatt have maintained the premiums on these policies after he fled to Mexico? There is no evidence that these policies were still in force when Pavatt wrote his confession letter to Tricity Andrew. (Tr. 1503, 1531-36; St. Exh. 222) The introduction of these insurance policies is a classic example of evidence that is either utterly irrelevant, or more prejudicial than probative. This evidence simply opened the door to endless speculation and confusion. Evidence that serves no

purpose but to confuse the issues and mislead the jury is inadmissible. *See* § 2403; *Copeland v. Tela Corp.*, 79 P.3d 1128, 1129-30 (Okla.Ct.App. 2003); *Williams v. State*, 22 P.3d 702, 721 (Okl.Cr. 2001); *Naum v. State*, 630 P.2d 785, 788 (Okl.Cr. 1981).

The State introduced State's Exhibit 285A, a tape recording of additional telephone conversations that Brenda and Robert Andrew had in the days before the homicide. The exhibit was played to the jury over defense objections. (Tr. 3054, 3056, 3061-62, 3102, 3114-15) Among the recorded conversations are two telephone calls Tricity Andrew made to her father on the night before the homicide. In both calls Tricity asks Robert Andrew to come home to see her new dog. The State persuaded the court that the recorded conversations were relevant to show that Brenda whispered instructions to Tricity during the calls. (Tr. 3094-01) Any whispering in the background is exceedingly difficult to hear, if it exists at all and is not merely background noise. However difficulty in detecting the whispering did not prevent the prosecutor from asserting in closing argument that Brenda was trying to use Tricity to lure Robert to the house so that she could murder him that night. The prosecutor asserted that Ronnie Stump saved Robert's life by going with him that evening . (Tr. 4060-63) The prosecutor forgot to mention that Robert went back to the house for a second visit without Stump and was not murdered. (Tr. 490-92) Again, the prosecutor used irrelevant evidence to spin a theory which could not be proven but was highly damaging to Brenda Andrew.

Included in the luggage Brenda and Pavatt brought back from Mexico were two mystery books by Agatha Christie, one entitled *Murder is Easy* and the other *Sparkling Cyanide*. (St. Exh. 213 & 215) Handwritten book reports for both of these books were also found in the luggage. (St. Exh. 214 & 216; Tr. 2342-49). The defense objected to these items, but the prosecution convinced the trial court to admit them on the grounds that they rebutted the testimony put on by the defense through Richard Nunley that Brenda Andrew was a good mother. (Tr. 2343-47) In the punishment stage

of the trial the prosecutor actually asks Kimberly Bowlin, Appellants' sister, if she thought a good mother would have her children write book reports about murder mysteries after their father had been murdered. (Tr. 4312) Apparently, the State was in all seriousness arguing that permitting Tricity Andrew to read Agatha Christie books was evidence that Brenda Andrew was a bad mother.

After Brenda Andrew and Pavatt were taken into custody at the border the 1992 Baretta they had used to drive to Mexico was impounded. It was later searched by Oklahoma City police officers who found, among other things, a Kansas title and registration for a 1997 Dodge SD showing the owners to be Kimberly Bowlin and Jennifer Rose Bowlin. The police also discovered a window sticker for a 2000 Dodge Caravan, a minivan. (St. Exh. 294; Tr. 3066, 3068) The defense objected to the introduction of these documents, arguing that these documents from the Bowlin's vehicle could have been mixed up with the Baretta documents when both vehicles had been previously inventoried.[32] The State succeeded in persuading the court to admit the documents with the theory that they were evidence that Brenda and Pavatt had been planning on switching cars with the Bowlins so they could make a run for it and avoid arrest. (Tr. 3066-67) So now Brenda Andrew and James Pavatt were planning to escape in the Bowlins' vehicle. The only thing is, the cars were not switched. Brenda and Pavatt drove to the border in the Baretta. Once again, as with the insurance policies on Pavatt's life, the State used irrelevant evidence to caste a veil of suspicion caste over Brenda Andrew about a crime that never happened. This evidence that served no purpose other than to confuse the issues and mislead the jury and was inadmissible. *See* Section 2403, *supra*.

2. Cumulative evidence of Brenda Andrew and James Pavatt's relationship.

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[32] Kimberly Bowlin, Brenda's sister, and Kimberly's husband, James, went to the border at Hidalgo Texas to meet Brenda when she and Pavatt. The agents at the border released Brenda and Pavatt's luggage to the Bowlins, who had Brenda's children with them at the time. (Tr. 2540-51)

Janna Larson, Pavatt's daughter, established beyond any question that James Pavatt and Brenda Andrew were romantically involved and departed to Mexico together with Brenda's children on November 25, 2001. (Tr. 2953-56, 2975-79) Her testimony was supported by evidence of heavy telephone traffic between Brenda Andrew and James Pavatt (St. Exh. 12, 13, and 13A). There was no need to belabor this point with additional evidence that did nothing more than emphasize their romantic relationship in the months before the homicide, but the State was determined to present such evidence and succeeded in having it admitted. Evidence that constitutes the needless presentation of evidence that is cumulative to other evidence at trial should excluded. § 2403; *see Sellers v. State*, 809 P.2d 676, 683 (Okl.Cr. 1991); *President v. State*, 602 P.2d 222, 226 (Okl.Cr. 1979).

Over objections the State introduced a birthday card to Pavatt from Brenda and her children. (St. Exh. 157; Tr. 2308-09) Over defense objections the prosecution introduced a series of photographs of Brenda Andrew, Pavatt, and the children on a trip in Texas. These pictures were provided to the police by Pavatt's friend, Curtis Jones. (St. Exh. 185, 186, 188-91, 193, 194; Tr. 3134-37) Again over defense objections Jones was allowed to elaborate on what he characterized as Pavatt's "Twitterpated" relationship with Brenda Andrew, in which Jones lamented that Pavatt had become so infatuated with Brenda Andrew that he lost weight and all interest in hunting and fishing that fall. (Tr. 3131-33)

The State succeeded in admitting the luggage that Brenda Andrew and James Pavatt brought back from Mexico. (St. Exh. 309-14, 316-18) The defense objected to the admission of this evidence on the grounds of relevancy to no avail. (Tr. 2353-59) The luggage apparently included Brenda Andrew's underwear. In closing argument the prosecutor picked up some of her underwear in the suitcases while he argued to the jury that these items of clothing showed that she had intended to frolic on the beach, not grieve for her husband. (Tr. 4101, 4103) No evidence was presented to show when

Appellant bought this underwear, much less that she bought it to please Pavatt. Since all women must have underwear whether they are grieving or not, the underwear and the use to which it was put by the prosecutor served no purpose other than to humiliate Brenda Andrew. The State's overkill with this evidence was highly prejudicial because it provoked an emotional response from the jurors as opposed to a reasoned verdict based upon the relevant evidence, and as such was reversible error. *See President*, 602 P.2d at 226.

3. Evidence which served no purpose other than to arouse sympathy for the victim. In the first stage of the trial the State introduced a letter to from Robert Andrew to Ronald Stump. (St. Exh. 288) Stump sponsored the letter and cried in front of the jury when he identified it. Defense counsel objected both to the letter and to Stump's behavior and moved for a mistrial, but his objections were overruled and the letter was admitted. (Tr. 483-85) The letter was read word for word into the record. It contained no relevant information and consisted instead of a self-serving recitation of how much pain Robert Andrew was going through, his expression of gratitude for Stump's prayers and counseling, his expression of love for Stump and his family. (Tr. 485-86) Questioning that is designed to bring out information that has no relevance to the State's case in chief but has a high potential for inflaming the emotional prejudices of the jury is improper. *President*, 602 P.2d at 224.

The prosecution also succeeded in introducing a series of tape recordings of telephone conversations between Brenda Andrew and Robert Andrew and, sometimes, the children which had no relevance to the issues at trial but cast Robert Andrew in a sympathetic light. State's Exhibits 281, 282, 283, and 284 were admitted over defense objections to authenticity and violation of *Burks v. State* 594 P.2d 771, 772 (Okl.Cr. 1979), *overruled in part on other grounds, Jones v. State*, 772 P.2d 922, 925 (Okl.Cr. 1989). (Tr. 456-61) These tapes provided no probative information. They showed Brenda and Robert had arguments over child custody, divorce counseling, Brenda's

belief Robert was not supporting her in her squabble with their church (St. Exh. 281), and Brenda's belief that Robert had a girl friend. (St. Exh. 281, 283, 284) One tape includes angry exchanges in a telephone call primarily concerned with Brenda's attempt to get Robert to tell her where she can find some mousetraps. (St. Exh. 282)

Finally, the State introduced State's Exhibit 285A, which has been discussed above. In addition to Tricity's calls to Robert Andrew on the night before the homicide, the tape recording includes other telephone conversations between Brenda and Robert and the children in the days before the homicide. One set of exchanges are those between Brenda, Robert, and Tricity on an evening during the weekend before the homicide when the kids were staying with Robert. The State persuaded the court that these arguments were relevant to show Brenda and Robert were not reconciling. (Tr. 3103-04) Reconciliation or the lack thereof is never explicitly discussed. Married couples have horrible arguments and then reconcile.

In the tapes of the telephone conversations, all we have are the sad, pointless, private arguments of these people. Brenda Andrew, not knowing she is being recorded during most of her conversations with Robert, sounds shrewish at times. Robert Andrew, who is recording the conversations on his telephone, sounds reasonable. These one-sided recordings were primarily intended to make Brenda Andrew look bad and cause the jury to have sympathy for Robert Andrew. The emotional nature of the calls is not probative in this case. The State has never argued that Brenda Andrew killed her husband in an emotional rage, but instead has insisted that the homicide was a well planned conspiracy going back to September 20, 2001. (O.R. 657; Tr. 469-70) In fact, apparently no one on the prosecution side of this case stopped to think that a woman, involved in long planning to murder her husband for insurance, would not cause herself to be tape recorded in a 911 call (St. Exh. 285A) in a confrontation with her husband when she is planning on murdering him a few days later in her own garage with his shotgun Tape recordings, being demonstrative evidence, should not be admitted when

they tend to inflame the trier of fact and their probative value, if any, is clearly outweighed by their prejudicial effect. *See James v. State Farm Mut. Auto. Ins. Co.*, 810 P.2d 365, 370-71 (Okl. 1991); *see also Chaney v. State*, 612 P.2d 269, 276 (Okl.Cr. 1980). These tape recordings have no probative value and served only to emotionally inflame the jury against Appellant, and therefore were inadmissible.

In addition to the above mentioned evidence, the trial record contains many hearsay statements from the deceased victim Robert Andrew to his friends and to his attorney. The State introduced States' Exhibit 205, a collection of Robert Andrew's writings downloaded from his personal computer. These statements have been outlined in Proposition II of this brief. These recitals are not only hearsay, but are also utterly irrelevant to the fact issues in this case, and, like the evidence outlined above, were introduced solely to stir up sympathy for the victim and inflame the jury against Brenda Andrew.

In this case the jury was inundated with so much irrelevant evidence that Appellant's convictions must be reversed. The prosecutor's reincorporation of the first stage evidence in his second stage case resulted in all of this irrelevant evidence being reconsidered for purposes of sentencing and undoubtedly tainted the sentence as well as the verdict of guilt. Accordingly, Appellant's death sentence should also be reversed. *See Browning v. State*, 648 P.2d 1261, 1264 (Okl.Cr. 1982); *Wright v. State*, 617 P.2d 1354, 1357 (Okl. Cr. 1979). Moreover, the impact of all of the above described irrelevant evidence rendered the sentencing procedure too unreliable to meet the standards of the Eighth Amendment. See *Caldwell v. Mississippi*, 472 U.S. 320, 340, 105 S.Ct. 2633, 2645-46, 86 L.Ed.2d 231 (1985); *Woodson North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). Accordingly, the Appellant's convictions should be reversed and her sentence of death vacated.

PROPOSITION VIII

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING CERTAIN AUDIO TAPE RECORDINGS OF TELEPHONE CONVERSATIONS INTO EVIDENCE WITHOUT AUTHENTICATION.

In the first stage of the trial the prosecution sought and obtained the admission of State's Exhibits 28-32, audio cassette tape recordings of telephone calls to Prudential Insurance Company call centers on and in the days following October 26, 2001, the date of the brake line incident. The calls were supposedly made by Robert Andrew, James Pavatt, and Brenda Andrew, and were made to various employees of Prudential at call centers around the country. (Tr. 1350-52) These calls included accusatory hearsay allegations by Robert Andrew (*See* Proposition II *supra),* and calls by a woman claiming to be Brenda Andrew insisting that she, not Robert Andrew, owned the life insurance policy on his life. (St. Exh. 28 and 29) In light of David Parrett's testimony that the purported signature of Robert Andrew on the change of ownership form (State's Exhibit 24) was a forgery by simulation (Tr. 1596-97), the recordings suggest this woman was defrauding the insurance company.

No person who knew Robert Andrew, Brenda Andrew, or James Pavatt testified that the voices on State's Exhibits 28-32 sounded like the voices of James Pavatt and Brenda and Robert Andrew. No party to any of the conversations testified that the conversations on the tape recordings sounded like the ones in which they had participated. The witness sponsoring the exhibits was Lawrence Frotten, the manager of Prudential Financial's Corporate and Investigative Division. He testified it was the policy of Prudential to record business calls concerning insurance policies and that he was the custodian of the such recordings. (Tr. 1339-40) He testified that these tape recordings were generated from Prudential's business records, and that he had heard them played at the previous trial of James Pavatt. (Tr. 1350-51) Frotten did not testify that any type of forensic examination had been conducted to ensure that the tape

recordings were complete and unedited or that no portions of any of them had been accidentally taped over, etc. Defense counsel strenuously objected to the introduction of the tapes, pointing out that Frotten had not participated in any of the conversations, did not know any of the participants, and could not identify anyone's voice. Counsel also pointed out that Frotten had not testified to the completeness of the conversations in the tapes or how the tapes were made. Counsels's objections were overruled. (Tr. 1351-52)

Voices in telephone calls and telephone calls themselves are not self-authenticating. Voices in telephone calls can be authenticated by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker. 12 O.S. 2001, § 2901 (B)(5). Examples of how a telephone call, as opposed to a voice in the conversation, can be authenticated are set forth in 12 O.S. 2001, § 2901(B)(6)(a) & (b). If a call is shown to have been made to a number assigned by the telephone company to a particular person or business, it is authenticated if: (a) in the case of a person, the circumstances show the person answering is in fact the one who was called; or (b) in the case of a business, there is evidence showing the call was made to a place of business and the conversation related to business reasonably transacted over the telephone. In the past, Oklahoma courts have held that telephone calls, or other electronically recorded conversations, are sufficiently authenticated when the voices of the speakers can be identified directly by persons who are familiar their voices (*see Collins v. State*, 758 P.2d 340, 342 (Okl.Cr. 1988); *Hall v. State*, 753 P.2d 372, 373-74(Okl.Cr. 1988)); or if the caller cannot be directly identified, when a party to the conversation can testify the call was made and relate circumstances that indicate the identity of the caller (*see Hooper v. State*, 947 P.2d 1090, 1102-03 (Okl.Cr. 1997); *Gore v. State*, 735 P.2d 576, 578 (Okl.Cr. 1987); *Gutowsky v. Halliburton Oil Well Cementing Company*, 287 P.2d 204, 205-07 (Okl. 1955)).

In the present case, all we have is the testimony from the custodian of Prudential

records that the tape recordings were found among Prudential's records. Any records keeper will not do for purposes of authentication. For authentication, the evidence must be sponsored "by someone who could testify that the report was in fact made at or near the time an by, or from information transmitted by, a person with knowledge of the circumstances reported." *Jones v. State*, 660 P.2d 634, 642-43 (Okl.Cr. 1983). If all the sponsoring witness knows is that a particular record happened to be in a file, it is error to admit the record without more. *Id.*; *See also Matter of H.H.*, 580 P.2d 1006, 1007 (Okl.Cr. 1978). Frotten had no personal knowledge of when or by whom any of these calls were made, or whether they were made or transmitted by a "person with knowledge of the circumstances reported." *See Jones,* 660 P.2d at 642-43.

In this case telephone deception was employed by James Pavatt, who arranged to have his daughter, Jana Larson, make anonymous calls to Robert Andrew to cause him to drive to Norman in response to the lie that Brenda Andrew was in Norman Regional Hospital having a mental breakdown. (Tr. 2967-69) Brenda Andrew inadvertently exposed these lies to Larson by walking into Larson's bank and presenting herself to Larson shortly after Larson made the calls to Robert Andrew, something Appellant would not have done if she was in on the scheme. (Tr. 892, 2969-70, 2992-96, 3012) With no evidence identifying the voices or the conversations, and with the record showing that Pavatt resorted to such trickery without the knowledge of Brenda Andrew, the Court cannot be confident that every female in the disputed telephone calls who claimed to be Brenda Andrew actually was Brenda Andrew. *See Marlin Oil Corporation v. Barby Energy Corporation*, 55 P.3d 446, 451 (Okl. 2002) (trial court properly refused admission of handwritten notes on the margin of a letter when the handwriting was not identified).

Oklahoma law entitled Brenda Andrew to have documentary evidence produced against her authenticated. 12 O.S. 2001, § 2901. The admission of State's Exhibits 28-32 without a proper showing of authentication denied her that right, thereby depriving her

of due process of law. *See Hicks v. Oklahoma*, 447 U.S. 343, 346, 100 S.Ct. 2227, 2229, 65 L.Ed.2d 175 (1980); *Golden v. State*, 2006 OK CR 2, ¶ 13, ___P.2d ___ (Okl.Cr. 2006). Accordingly, Appellant's convictions and sentence of death should be vacated.

PROPOSITION IX

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED THE PROSECUTION TO INTRODUCE APPELLANT'S STATEMENTS TO THE POLICE GIVEN AT THE POLICE STATION BECAUSE AT THE TIME APPELLANT WAS IN POLICE CUSTODY AND HAD NOT BEEN ADVISED OF, OR WAIVED, HER CONSTITUTIONAL RIGHTS.

In a *Jackson v. Denno*[33] hearing held prior to the trial, Appellant asserted that she was in custody when she gave a statement at the Oklahoma City police station. Evidence given at the hearing established that when Appellant was released from the hospital she was taken into custody and transported to the police station by Sergeant Frost who told her that the officer in charge of the investigation wanted to further question her about Rob's death. (6/7/04 M.Tr. 113) Upon reaching the station, she was interrogated by Detective Garrett. Her interview was taped and no *Miranda*[34] warnings were given at that time. During the interrogation, Appellant made several statements which the prosecution later argued were untruthful or contradictory in light of other evidence.[35] Ultimately, the court found that Appellant had volunteered for the interview and it was not a custodial interrogation. (6/7/04 M. Tr. 156)

The police are not required to give *Miranda* warnings until "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966);

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[33] *Jackson v. Denno*, 378 U.S. 368. 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

[34] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[35] The prosecutor argued that she had lied about her boyfriends and affairs, lied when she denied knowing of Robert Andrew had any enemies, lied when she claimed the life insurance policy was not a big deal, lied when she claimed she knew nothing about the shotgun that she was in fact refusing to let her husband take from the house. (Tr. 4064-68) The prosecutor also argued Appellant was not showing sufficient emotion to actually be a grieving widow who had been planning to reconcile with her husband who had just been murdered. (Tr. 4069-70)

see also California v. Beheler, 463 U.S. 1121, 3519, 103 S.Ct. 3517, 3519, 77 L.Ed.2d 1275 (1983). Custody occurs if the suspect is deprived of his freedom of action in any significant way or is led to believe, as a reasonable person, that he is so deprived. *Beason v. State*, 453 P.2d 283, 284, Syllabus 2 (Okl.Cr. 1969). The ultimate inquiry is whether there is a formal arrest or restraint on the individual's freedom of movement to the degree associated with a formal arrest. *Stansbury v. California*, 511 U.S. 318, 322, 114 S.Ct. 1526, 1529, 128 L.Ed.2d 293 (1994); *Crawford v. State*, 840 P.2d 627, 635 (Okl. Cr. 1992). The initial determination of custody "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury, supra*, 511 U.S. at 323, 114 S.Ct. at 1529. "'[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.'" *Id.* at 324, 114 S.Ct. at 1529, *citing Miranda, supra*, 468 U.S. at 442, 104 S.Ct. at 3151.

In this case, the totality of the circumstances surrounding Appellant's interrogation shows that a reasonable person in her place would have considered herself to be in custody. At the crime scene and initially at the hospital, Appellant voluntarily provided information to the police. In fact, custody began at the point in the hospital when the police denied her requests to call her children and to wash the blood off of her hands (6/7/04 M.Tr. 139) and then checked her out of the hospital. Appellant testified regarding Officer Frost's presence at the hospital as "I felt like they were watching me. That I heard him say that he had to stand on me, he couldn't leave the room. . . . I felt that I had to do what they said." (6/7/04 M.Tr. 138) When Officer Frost took her discharge papers and prescriptions she believed "they were in charge and I had to do what they said." (6/7/04 M.Tr. 140) She then testified that she went with Officer Frost because "they told me that I had to go with them . . . . That I had to go down to the police station." (6/7/04 M.Tr. 138)

The evidence is clear that Appellant was not given a choice about going to the

police station and being interrogated by Detective Garrett. Officer Frost testified that he took custody of Appellant and her discharge papers and written prescriptions. (6/7/04 M. Tr. 108, 119) He also admitted that when she left the hospital Appellant was dressed in only a hospital gown and booties notwithstanding the fact that it was November. (6/7/04 M.Tr.121-22) Her protestations that she wanted to go home and see her children were also rejected by Detective Frost as he escorted her in the back seat of a police car (equipped with a screen) to the police station. (M.Tr, 6/7/04 p. 119-121)

An examination of the tape and testimony from Officer Frost established Appellant was held in a closed room with no windows and door. (6/7/04 M.Tr. 124; St.Exh. 204A) During the interview Detective Garrett, armed with a gun and carrying handcuffs, repeatedly interrogated Appellant about facts relating to **her** and not to Rob's death. Most telling was that Detective Garrett continued his interrogation even after Appellant asked to be taken to her children.[36] (6/7/04 M.Tr. 145; St.Exh. 204A)

One of the most decisive issues in a custody determination is the suspect's freedom of movement. When visible restrains on the suspect's freedom of movement become obvious, this Court has found that the suspect is in custody. *See Williams v. State*, 673 P.2d 164, 165 (Okl.Cr. 1983) (homicide suspect not free to leave crime scene residence when being interrogated by officers who admitted that they would not have let him leave); *Gravett v. State*, 509 P.2d 914, 915-916 (Okl.Cr. 1973) (police blocking egress from a field with their patrol car when approaching individuals who were suspected of attempting to steal a bulldozer by loading it on a semitrailer truck). A reasonable person in Appellant's position could not have helped but notice that she was either in a vehicle or a room controlled by the police at all times. Furthermore, she was dressed in garments that would not allow her to travel freely in the general public. Accordingly, a reasonable person observing these obvious restraints on her movement

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[36] At trial, Detective Garrett admitted that he would not let her go when she asked to leave to see her children because he wanted more information. (Tr. 2396-97)

would have believed she was not free to leave, and would certainly have known it after the interview turned accusatory and it became obvious that she was suspected of murder. *See Valdez v. State*. 900 P.2d 363, 371 (Okl.Cr. 1995).

Regardless of the police officers' assertions, Appellant was never treated as a victim or a witness. Clearly the police thought she was a suspect in the crime regardless of Detective Garrett's claims to the contrary. (6/7/04 M.Tr. 66). Officer Bunn testified that when she was at the hospital she listed Appellant as a suspect in all of her reports. (6/7/04 M.Tr. 82-85) Officer Frost testified that he viewed Appellant as a suspect beginning at the hospital. (6/7/04 M.Tr. 112-13, 117) After escorting Appellant to the station, he informed Detective Garrett that she might be involved in Rob's death. Officer Frost testified that Detective Garrett responded that "we're looking into that . . . ." (6/7/04 M.Tr. 113-14) Officer Frost also gave Detective Garrett the police reports about the incident involving the brakes in Rob's car. (6/7/04 M.Tr. 114-15) As evidenced by the interview tape, Detective Garrett's interrogation practice involved leaving the suspect in custody alone for long periods of time. If, in fact, Appellant was actually viewed to be a victim or a witness who was not in custody, there was plenty of time during her interview to make a simple phone call and assuage her worry about her children. Moreover, as a victim/witness Appellant would likely have at least been granted the decency of calling a friend to bring appropriate clothes.

Appellant's statements to the police were damaging because the State's evidence showed that they were not truthful in all respects. The questions that arose were what else was she lying about and what did she have to hide. Thus, the admission of this evidence cannot be harmless. The United States Supreme Court has held that even though the admissions of improperly obtained confessions can be harmless error, a reviewing court should exercise extreme caution before finding the admission of such a confession to be harmless. *See Arizona v. Fulminante*, 499 U.S. 279, 296, 111 S.Ct. 1246, 1258, 113 L.Ed.2d 302 (1991). In any event, it is the State's burden to prove

beyond a reasonable doubt that the introduction of the confession did not contribute to the defendant's conviction. *Id.* at 296, 111 S.Ct. at 1257; *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Simpson v. State,* 876 P.2d 690, 701 (Okl.Cr. 1994). Since the State cannot meet this burden, it follows that Appellant's conviction must be reversed.

PROPOSITION X

THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR CHANGE OF VENUE FORCED HER TO BE TRIED IN A COURT AND COMMUNITY PERVADED BY PREJUDICIAL PRETRIAL PUBLICITY, WHICH DEPRIVED HER OF HER SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS GUARANTEED BY THE UNITED STATES CONSTITUTION AND ARTICLE II, §§ 7, 9, 19, & 20 OF THE OKLAHOMA CONSTITUTION.

Prior to trial, counsel for Appellant filed a Motion for Change of Venue due to extensive pretrial publicity. (O.R. 771-78) Attached to the motion, pursuant to 22 O.S.2001, § 561, were the affidavits of eighteen Oklahoma County residents attesting to their beliefs that Appellant could not get a fair trial in Oklahoma County. Additionally, counsel provided to the trial court copies of numerous local newspaper articles, a catalogue of television reports showing that more than one thousand stories had been run about this case on local television, videotape copies of stories run nationally on *20/20* and *America's Most Wanted,* and the results of a public opinion survey showing a very high degree of recognition of this case among the community as well as the prevalence of opinion that Ms. Andrew was guilty. Hearings were held on January 9th and 21st of 2003, at the conclusion of which, the trial court denied Appellant's motion to change venue. (1/21/03 M.Tr. 109; O.R. 795)

The Sixth Amendment to the United States Constitution, as well as Article II, § 7 of the Oklahoma Constitution, guarantees the right to an impartial jury, which includes the right to a trial by a jury free from outside influences such as pretrial publicity. *Sheppard v. Maxwell,* 384 U.S. 333, 342-63, 86 S.Ct. 1507, 1512-23, 16 L.Ed.2d 600 (1966). The constitutional standard of fairness requires that a defendant have a

"panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961). Due process requires a change of venue where a trial judge may be unable to seat a fair and impartial jury due to prejudicial pretrial publicity or an inflamed community atmosphere. *Rideau v. Louisiana*, 373 U.S. 723, 726, 83 S.Ct. 1417, 1419, 16 L.Ed.2d 751 (1961). Prejudice is presumed when the influence of the news media, either in the community at large or in the courtroom itself, saturated or pervaded the proceedings. Appellant must show "actual exposure to the publicity and resulting prejudice by clear and convincing evidence." *Shultz v. State*, 811 P.2d 1322, 1329 (Okl.Cr. 1991); *Brown v. State*, 871 P.2d 56, 62 (Okl.Cr. 1994).

Appellant's documentation supporting a change of venue – including the affidavits of eighteen Oklahoma County residents, copies of numerous newspaper articles, and the results of a public opinion survey – clearly demonstrated "actual exposure to the publicity and resulting prejudice," *Shultz*, 811 P.2d at 1329. Between November 20, 2001, the date of the homicide, and January 4, 2003, days before the hearing on the motion for change of venue, more than 1500 news stories ran on the local news programs in the Oklahoma City viewing area. (1/9/2003 M.Tr. 131; Def. Exh. 3; O.R. 771-78) Additionally, at least 60 news articles had appeared in *The Daily Oklahoman*, or its Sunday edition, since the date of the homicide. (1/21/2003 M.Tr. 27-56, 63-66; Def. Exh. 16; O.R. 771-78) The effect of this pervasive media spotlight upon this case was that 87% of potential jurors in Oklahoma County had heard of the case, and of those willing to express an opinion, 90.6% believed Ms. Andrew was guilty. Even if those who refused to offer an opinion were counted, then still 62% of potential jurors who knew about the case believed she was guilty. The opinion of Ms. Andrew's guilt was strong, as well as pervasive, with 78% of those who expressed an opinion of her guilt indicating that it would be difficult to believe she was innocent. Additionally, more than one in four (27%) already believed that the death penalty was the appropriate punishment in this case. (1/9/2003 M.Tr. 236-52; Def. Exh. 7; O.R. 771-78)

Understandably disturbed by the prospect of facing a jury drawn from a cross-section of this jury pool, Ms. Andrew sought to appeal the trial court's denial of her motion for change of venue by filing in this Court an Application for Court to Assume Original Jurisdiction & Petition for Writ of Mandamus &/or Prohibition in Case No. MA-2003-164 on February 14, 2003. On March 6, 2003, a majority of this Court (over one dissent and one judge not participating) denied the petition, indicating that Appellant had an adequate remedy, if convicted, through the direct appeal process. With all due respect, a direct appeal after being convicted by a jury drawn from this hostile environment is not an "adequate" remedy under circumstances such as these. The standard of review changes from pre-trial – where discretion dictates a change of venue "where a reasonable possibility of prejudice is shown to exist, concerning wide-spread pre-trial publicity, and it's possible effect on the jury," *Scott v. State*, 448 P.2d 272, 274 (Okl.Cr. 1968) – to direct appeal, where Appellant is required to show by clear and convincing evidence that she was denied a fair trial before an impartial jury, *see Mayes v. State*, 887 P.2d 1288, 1296 (Okl.Cr. 1994).

Here, the proper pre-trial standard clearly dictated a change of venue, but the trial judge made it quite clear that she would not adhere to this standard, instead applying her own standard which could not possibly be met except during the voir dire process, where prospective jurors get to decide whether they think they can give the defendant a fair trial. (1/21/2003 M.Tr. 106, 108) This standard violates 22 O.S.2001, § 561, providing for a change of venue "before the trial is begun," as well as the fundamental principle that mere assurances of individual jurors they can be fair and impartial are not dispositive. *See Murphy v. Florida*, 421 U.S. 794, 798-800, 95 S.Ct. 2031, 2035-36, 44 L.Ed.2d 589 (1975); *Tegeler v. State*, 130 P. 1164, 1168, 1172 (Okl.Cr. 1913); *see also United States v. McVeigh*, 918 F.Supp. 1467, 1472 (W.D. Okla. 1996) (noting existence of prejudice "may go unrecognized in those who are affected by it").

There can be no doubt that the influence of the media in this case was

overwhelming, and Appellant submits that this is one of those rare cases in which prejudice should be presumed. *See, e.g., Brecheen v. State*, 835 P.2d 117, 120 (Okl.Cr. 1992) ("If the media involvement in the case is rampant, prejudice is presumed.") Under these facts and circumstances, it was an abuse of discretion and a denial of Appellant's fundamental constitutional rights to overrule Appellant's motion for change of venue. Appellant's convictions and sentences must therefore be reversed.

PROPOSITION XI

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO INSTRUCT THE JURY ON ALL SALIENT FEATURES OF THE LAW RAISED BY THE EVIDENCE YET IMPROPERLY INSTRUCTING THE JURY ON "FLIGHT."

Trial courts have a statutory obligation to instruct the jury on all salient features of the law raised by the evidence, regardless of whether the defendant specifically requests such instructions. OKLA.STAT. tit. 22, § 856 (2001); *see Gilson v. State*, 8 P.3d 883, 917 (Okl.Cr. 2000); *Atterberry v. State*, 731 P.2d 420, 422 (Okl.Cr. 1986); *Wing v. State*, 280 P.2d 740, 747 (Okl.Cr. 1955); *Daniel v. State*, 67 Okl.Cr. 174, 93 P.2d 47, 49 (1939). Here, the trial court erroneously denied requested instructions regarding jailhouse informant testimony, improperly instructed the jury on "flight," and failed to instruct the jury on the lesser offense of accessory after the fact and proper use of "other crimes" evidence. Appellant was thereby deprived of her due process right to a properly instructed jury.

A. Failure to Instruct the Jury on Jailhouse Informant Testimony.

In building its otherwise entirely circumstantial case against Ms. Andrew, the State of Oklahoma relied in part on the testimony of jailhouse informant Theresa Sullivan, who claimed that, of all the people in the universe, Appellant confided in her that she conspired to kill her husband for the insurance money. (Tr. 2745-46) Accordingly, one of the instructions requested by the defense was Instruction No. 9-43A, OUJI-CR(2d). (Ct. Exh. 5) Instruction 9-43A was promulgated by this Court in *Dodd v. State*, 993 P.2d 778, 784 (Okl.Cr. 2000), in response to the "insidious reliability

problems" inherent in the testimony of jailhouse informants, "most [of whom] relay incriminating statements to the state in expectation of benefit in exchange." This instruction would have informed the jury of the need to examine and weigh Theresa Sullivan's testimony more carefully than that of other witnesses and would have pointed out specific factors to consider in evaluating her testimony, including *inter alia* any benefit received in exchange for her testimony, her criminal history, and other evidence[37] relevant to her credibility.

Instruction No. 9-43A is *supposed* to be given whenever a jailhouse informant testifies. *Dodd*, 993 P.2d at 784. Despite the absence of specific and detailed evidence in the trial record of the benefit that Sullivan was to receive,[38] there was nevertheless some evidence that Sullivan was expecting to be rewarded for her testimony. Contrary to Sullivan's assertions on the stand (Tr. 2748), she had bragged to fellow inmate Angela Burk that she was in fact testifying against Brenda Andrew in exchange for a benefit. (Tr. 3498-99)[39] Accordingly, there was no legal excuse for refusing to so instruct Appellant's jury. Neither the prosecutor's facile answer that "[s]he's not an informant," (Tr. 3843), nor Ms. Smith's coy insistence that she did not have the power to give Ms. Sullivan any benefit in exchange for her testimony,[40] (Tr. 2748), make this

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[37] Such as contrary evidence that Ms. Sullivan could not possibly have spent as much time as she suggested in Appellant's company, that Ms. Andrew refused to talk to anyone about her case, that no one on that pod trusted Sullivan, a known "snitch," enough to discuss their cases with her, and that television and newspapers were available to the inmates, from which Ms. Sullivan could have gotten much of the information she attributed to Ms. Andrew. (Tr. 3490-93, 3499)

[38] *See* Appellant's Motion for New Trial on Newly Discovered Evidence and Brief in Support, filed in this Court on September 21, 2005.

[39] We do not know the particulars of that benefit, because the trial court sustained the State's objection to any further inquiry along these lines. This is yet another example of how the prosecutors' actions, and the trial court's arbitrary rulings, deprived Appellant of her fundamental right to present a defense. *See, e.g.*, Proposition I, *supra*.

[40] *See* the evidence presented in Appellant's Motion for New Trial on Newly Discovered Evidence which shows that Ms. Smith could and did assist Ms. Sullivan.

evidence go away, or change the fact that Ms. Sullivan was a "jailhouse informant" within the plain meaning of that phrase. *See, e.g.,* BLACK'S LAW DICTIONARY 783 (7th ed. 1999) (defining *informant* as "[o]ne who informs against another"); *but see Wright v. State*, 30 P.3d 1148, 1152 (Okl.Cr. 2001) (declining to apply *Dodd* where statements to witness "were not made while he was incarcerated"). The trial court clearly abused its discretion when it denied Appellant's timely request for this instruction. (Tr. 3843; Ct. Exh. 5)

Ms. Sullivan was precisely the kind of professional snitch for whom the *Dodd* instruction was intended. Angela Burk testified that Sullivan was a known snitch. (Tr. 3933)[41] The trial court's refusal to administer instructions dictated by *Dodd* cannot be sustained on this record.

B. The Trial Court Erred in Instructing the Jury on "Flight."

Over defense objection, the trial court instructed the jury on the doctrine of "flight," relating to Appellant's departure from Oklahoma to Mexico with James Pavatt and her two children. (Tr. 3813-24, 3846; O.R. 2815) The giving of this instruction improperly burdened Appellant's presumption of innocence, unnecessarily invaded the province of the jury, and therefore requires reversal of Appellant's convictions for murder and conspiracy to commit murder.

At the outset, Appellant would urge this Court to reconsider its injudicious approval of the practice of instructing juries to infer guilt from departure. *See, e.g., Mitchell v. State*, 876 P.2d 682, 687-88 (Okl.Cr. 1993) (Chapel, J., specially concurring). The probative value of "flight evidence" has long been a matter of great doubt. *See, e.g., Wong Sun v. United States*, 371 U.S. 471, 483 n.10, 83 S.Ct. 407, 415 n.10, 9 L.Ed.2d 441 (1963) ("[W]e have consistently doubted the probative value in criminal trials of

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[41] *See* Exhibit 1-F, Appellant's Motion for New Trial on Newly Discovered Evidence, filed in this Court on September 21, 2005. This evidence provides the details of how she had already obtained leniency from federal authorities for informing upon co-defendants.

evidence that the accused fled the scene of an actual or supposed crime."); *Alberty v. United States*, 162 U.S. 499, 511, 16 S.Ct. 864, 868, 40 L.Ed. 1051 (1896) ("It is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as a witness."); *United States v. Robinson*, 475 F.2d 376, 384 (D.C. Cir. 1973) ("[E]vidence of flight tends to be only marginally probative as to the ultimate issue of guilt or innocence.").

There are certainly reasons to doubt the probative value of "flight evidence." In the first place, the entire concept unacceptably relies upon circular reasoning of the worst kind. To say a defendant fled with "a consciousness of guilt" assumes the fact of guilt. *See, e.g., Mitchell*, 876 P.2d at 684 (acknowledging that "the instruction does assume the defendant to have committed the crime"). Thus, the jury is asked first to infer a consciousness of guilt from the assumed fact of guilt, and then to infer guilt from that very consciousness of guilt.[42] Secondly, the instruction ignores the fact that departure after a crime is every bit as consistent with innocence as it is with guilt. *See, e.g., Fenelon v. State*, 594 So.2d 292, 295 (Fla. 1992) (quoting *Merritt v. State*, 523 So.2d 573, 574 (Fla. 1988)). Ms. Andrew's travel to Mexico is just as easily explained by her fear of being wrongfully tried and convicted as by an assumed "consciousness of guilt." *See, e.g., Alberty*, 162 U.S. at 511, 16 S.Ct. at 868.

Moreover, evidence of flight impermissibly relies upon burden shifting for its minimal probative value. *See, e.g., State v. Jefferson*, 524 P.2d 248, 250 (Wash. Ct. App. 1974) ("The rationale which justifies the admission of evidence of 'flight' is that, *when*

[42] In fact, taken as a whole, the uniform instruction on flight makes no logical sense. The instruction directs the jury that it must find, beyond a reasonable doubt, not only the fact of departure, but also that it was done with a consciousness of guilt in order to avoid arrest. *See* Instruction No. 9-8, OUJI-CR(2d). Only when the jury finds "beyond a reasonable doubt that the defendant was in flight" are they permitted to consider the evidence of flight in determining the defendant's guilt. *Id.* Because a finding beyond a reasonable doubt of "consciousness of guilt" necessarily presupposes a concomitant finding of guilt beyond a reasonable doubt, no further utility can thereafter be derived from the finding thus made as it relates to guilt.

unexplained, it is a circumstance which indicates a reaction to a consciousness of guilt.") (emphasis added) (citing 29 AM. JUR. 2D *Evidence* § 280 (1967); 1 C. TORCIA, WHARTON'S CRIMINAL EVIDENCE § 214, at 450 (13th ed. 1972)). This is so because this Court has never required the State to present *independent* evidence, such as contemporary incriminating statements by the defendant, to "prove" flight.[43]

Because of all these very serious problems, a number of states have discontinued instructing juries on "flight."[44] The recurring theme of these cases is that a special

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[43] Perhaps the only "consciousness of guilt" evidence immune from all these very serious problems is witness elimination. Unlike "flight," one may fairly infer a consciousness of guilt from a person's attempt either to kill or to solicit another to kill the witnesses against her. Any "innocent" explanation for such conduct would, at best, be purely theoretical. (An innocent person may flee for fear of wrongful prosecution, but to commit murder therefore is an entirely different thing altogether.) However, would this Court allow an instruction and argument on witness elimination as consciousness of guilt in *every* case in which a witness dies under suspicious circumstances based on an *assumption*, without actual proof, that the defendant was involved in or responsible for the witness's death? Perhaps if the State had contemporaneous comments from the defendant that she was leaving the jurisdiction to avoid being caught, then a strong argument could be made that her "flight" evinced a consciousness of guilt. However, without such evidence, or at least evidence similar to it, instructing on flight in this instance is tantamount to instructing the jury that a potential witness's unexplained death or other absence from trial may be considered in determining whether the defendant is guilty.

[44] *See, e.g., Fenelon v. State*, 594 So.2d 292, 295 (Fla. 1992); *Renner v. State*, 397 S.E.2d 683, 686 (Ga. 1990); *Dill v. State*, 741 N.E.2d 1230, 1232-33 (Ind. 2001); *State v. Cathey*, 741 P.2d 738, 748-49 (Kan. 1987); *Fugate v. Commonwealth*, 445 S.W.2d 675, 681 (Ky. 1969), *overruled on other grounds by Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983); *State v. Wilson*, 725 S.W.2d 932, 933 (Mo. 1987); *State v. Hall*, 991 P.2d 929, 937 (Mont. 1999); *People v. Williams*, 488 N.E.2d 832, 833 (N.Y. 1985); *State v. Stilling*, 590 P.2d 1223, 1230 (Or. 1979); *State v. Grant*, 272 S.E.2d 169, 171 (S.C. 1980); *State v. Jefferson*, 524 P.2d 248, 251 (Wash. Ct. App. 1974); *Hadden v. State*, 42 P.3d 495, 496 (Wyo. 2002). *See also* New Mexico Rules Annotated, Uniform Jury Instructions - Criminal, 14-5030 (Flight), Use Notes ("No instruction on this subject shall be given."); Illinois Pattern Jury Instructions Criminal - **3.03 Flight** (4th ed. 2000) ("The Committee recommends that no instruction be given on this subject.") (quoted in *Hadden*, 42 P.3d at 508); 1 Potuto, Saltzburg, Perlman, Federal Criminal Jury Instructions, Part One, Chapter 3: Closing Instructions § 3.51, FLIGHT AND RELATED EVIDENCE (2nd ed. with 1993 Supp.) ("Arguments concerning the probative value of flight and the defendant's conduct should be left to the parties in their closing arguments to the jury.") (quoted in *Hadden*, 42 P.3d at 508). Indeed, our own state Supreme Court countenances *against* giving a flight instruction in civil cases, where the burden of proof is, of course, lower than in criminal cases. *See* Instruction No. 3.9, OUJI-CIV, Notes on Use ("A 'flight from accident as evidence of negligence' instruction should not be given. This is a subject of argument for the jury; moreover, an instruction of this type would unduly single out particular evidence."). Several other states, while not completely forbidding the giving of a flight instruction, have expressed reservations about its utility. *See, e.g., People v. Larson*, 572 P.2d 815, 817 (Col. 1977); *State v. Wrenn*, 584 P.2d 1231, 1233 (Idaho 1978); *State v. Bone*, 429 N.W.2d 123, 125-27 (Iowa 1988); *State v. Oates*, 611 N.W.2d 580, 584 (Minn. 2000); *Tran v. State*, 681 So.2d 514, 519 (Miss. 1996); *State v. Menard*, 424 N.W.2d 382, 384 (S.D. 1988).

instruction unfairly singles out and overemphasizes "flight evidence" to the exclusion of all other circumstantial evidence in the case. *See, e.g., Fenelon*, 594 So.2d at 294 (flight instruction "provides an exception to the rule that the judge should not invade the province of the jury by commenting on the evidence or indicating what inferences may be drawn from it"); *Renner v. State*, 397 S.E.2d 683, 685 (Ga. 1990) ("Whether it is fair for a trial court to identify and explain the possible consequence of one circumstance, such as flight, and not others, which might even point to innocence, is a matter which has been debated by members of this court on more than one occasion."); *Dill v. State*, 741 N.E.2d 1230, 1232 (Ind. 2001) ("[I]nstructions that unnecessarily emphasize on particular evidentiary fact, witness, or phase of the case have long been disapproved."). After all, no uniform instruction informs the jury it can consider the defendant's decision *not* to flee the scene of the crime as circumstantial evidence of *innocence*. *Cf. Fisher v. State*, 291 N.E.2d 76, 83 (Ind. 1973). Trial judges' words carry great weight with juries. Accordingly, "[t]he interest of justice is perhaps best served if [the matter of "flight evidence"] is reserved for counsel's argument, with little if any comment by the bench." *Robinson*, 475 F.2d at 384.

If nothing else, the multitude of problems inherent in instructing juries on the doctrine of flight should cause this Court to be carefully circumspect about those cases in which it approves the use of the flight instruction. This Court has held that it is reversible error to instruct the jury on flight where the defendant has not *offered evidence* either explaining or denying flight. *See Mitchell*, 876 P.2d at 685; *Rivers v. State*, 889 P.2d 288, 291 (Okl.Cr. 1994). Isolated questioning of a police witness whether Ms. Andrew broke any laws by leaving the jurisdiction cannot seriously be considered evidence explaining or denying flight, and the trial court abused her discretion in instructing the jury on flight for that reason. (Tr. 3815-23) Though the probative value of flight evidence is but slight, the fact that Ms. Andrew left for Mexico with Mr. Pavatt and her two children was perhaps the most *persuasive* evidence against her.

Emphasizing that evidence with an unnecessary instruction on flight impermissibly pierced Ms. Andrew's presumption of innocence and thereby deprived her of a fair trial.

C. Failure to Instruct the Jury on the Lesser Offense of Accessory After the Fact.

Even if evidence of Appellant's "flight" to Mexico after the crime can logically be considered evidence of her "consciousness of guilt," the question necessarily arises, "Guilt of what?" If the jury believed from this evidence that Ms. Andrew had guilty knowledge of the crime, nothing indicates whether she had this guilty knowledge before or after the crime. An every bit as rational inference from her flight to Mexico is that she learned *after the crime* that it was Pavatt and some other accomplice of his who killed her husband, so that her flight to Mexico shows only her intent knowingly to aid Pavatt in avoiding arrest. *See* OKLA.STAT. tit. 21, § 173 (2001). The trial court should have instructed the jury accordingly.

An instruction on the lesser related offense of accessory can be appropriate in a given case. *See Glossip v. State*, 29 P.3d 597 (Okl.Cr. 2001). This Court has held that "[t]he trial court has a duty to instruct on all lesser-included or lesser-related offenses which are supported by the evidence." *Id.* at 603-04 (citing *Childress v. State*, 1 P.3d 1006, 1011 (Okl.Cr. 2000); *Shrum v. State*, 991 P.2d 1032, 1036 (Okl.Cr. 1999)). The question is "whether the evidence [would have] allow[ed] a jury to acquit the defendant of the greater offense and convict him of the lesser." *Harris v. State*, 84 P.3d 731, 750 (Okl.Cr. 2004) (citing *Cipriano v. State*, 32 P.3d 869, 873 (Okl.Cr. 2001)).

Here, the State had a weak circumstantial case against Ms. Andrew. The only "direct" evidence of her guilt was the dubious testimony of an untrustworthy snitch who lied about her motives, and the benefit she would receive, for testifying against Ms. Andrew.[45] The State's case was certainly not so compelling as to render an acquittal objectively unreasonable. Indeed, evidence offered by the defense demonstrated that

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[45] *See* Appellant's Motion for New Trial on Newly Discovered Evidence and Brief in Support, filed in this Court on September 21, 2005.

Pavatt himself had admitted to committing the crime, not with Ms. Andrew, but with an unnamed accomplice. (St. Exh. 222) Accordingly, evidence existed in this case that would have permitted a jury rationally to acquit her of first degree murder and, if they were determined to punish her for her "flight" to Mexico, convict her instead of the lesser related offense of accessory. The trial court's failure to instruct the jury on accessory, even without a defense request, thus contributed to the denial of Appellant's due process right to a properly instructed jury.

D. Failure to Provide Proper Limiting Instructions to the Jury on the Proper Use of "Other Crimes" Evidence.

Virtually every unsavory act Ms. Andrew committed within a several-year period preceding the death of her husband was presented against her at trial.[46] Yet, the trial court stubbornly refused the defense's request to instruct the jury on the proper use of such evidence. (Tr. 3835-36; Ct. Exh. 5) There is no doubt that a defendant is entitled, upon request, to have the jury instructed on this point. *See Burks v. State*, 594 P.2d 771, 775 (Okl.Cr. 1979), *overruled in part on other grounds by Jones v. State*, 772 P.2d 922, 925 (Okl.Cr. 1989); *Anderson v. State*, 992 P.2d 409, 416-17 (Okl.Cr. 1999).[47] The trial court offered no explanation for denying the defense request, just as the State of Oklahoma offered no explanation for its objection to this uniform jury instruction.[48] From the defense's response to the State's objection, it appears that the difficulty may have had to do with an argument by the State that certain instances of bad conduct by the defendant were technically part of the *res gestae* of the crime. (Tr. 3836) Whatever

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[46] *See* Proposition III, *supra*.

[47] Originally, in *Burks*, this Court required the jury to be instructed in every case, regardless of a request by the defense. *Burks*, 594 P.2d at 775. In *Jones*, the Court overruled that portion of *Burks* that required *sua sponte* instructions. *Jones*, 772 P.2d at 925; *see also Powell v. State*, 995 P.2d 510, 527 (Okl.Cr. 2000). In the present case, however, the defense specifically requested Instruction No. 9-9, OUJI-CR(2d).

[48] *See* OKLA.STAT. tit. 12, § 577.2 (2001) (uniform instructions *shall* be used); OKLA.STAT. tit. 22, § 856 (2001) (trial court *must* instruct on all matters of law necessary to jury's determination of a verdict).

merit this argument may have had with respect to *some* instances of misconduct occurring during the course of the alleged conspiracy, there can be absolutely no doubt that the State's presentation of other evidence not relating directly to the alleged conspiracy,[49] necessitated a proper instruction to the jury.

Given the sheer volume of character evidence presented in this case, together with the weak nature of the State's case against Appellant, there is no doubt the trial court's refusal to instruct the jury on the use of that evidence prejudiced Appellant and, particularly in combination with numerous other serious errors, denied her a fair trial. *See, e.g., People v. Mitchell*, 566 N.W.2d 312, 314 (Mich. Ct. App. 1997) ("The potential to prejudice defendant's right to a fair trial by influencing the jury to convict on the basis of ... prior bad acts is unacceptably high without the limiting instruction, which is a simple matter to accomplish."); *Marshall v. Commonwealth*, 361 S.E.2d 634, 640 (Va. Ct. App. 1987) (court's failure to instruct jury in clear and specific terms violated defendant's right to fair trial); *see also, e.g., State v. Brown*, 874 So.2d 318, 331-32 (La. Ct. App. 2004); *State v. Ellis*, 656 A.2d 25, 31-32 (N.J. Super. Ct. App. Div. 1995); *People v. Greene*, 306 A.D.2d 639, 642-43 (N.Y. App. Div. 2003).

E. Conclusion.

Appellant had a right to have the jury properly instructed on the legal principles governing its consideration of the evidence. *See* OKLA.STAT. tit. 22, § 856 (2001). Though the determination of which instructions to give lies within the sound discretion of the trial court, this deferential rule presupposes that "the instructions as a whole, accurately state the applicable law." *Cipriano v. State*, 32 P.3d 869, 873 (Okl.Cr. 2001). The trial court's instructional errors here failed, on the one hand, to channel the jury's

[49] These instances include, but are not limited to: (1) Appellant's extra-marital affairs with Richard Nunley and Tracy Higgins, (Tr. 246-52, 361-62, 367); (2) that Appellant supposedly came on to Tracy Higgins's sons, (Tr. 278); (3) that she acted and dressed inappropriately at a dinner with another couple, (Tr. 321-26); (4) that she supposedly changed her hair color to "please" Ronald Stump, (Tr. 498-99); (5) that she interrupted an office meeting and caused a scene at Rob Andrew's work, (Tr. 577-78, 581-82); and (6) that she supposedly threatened to kill plumber David Head, (Tr. 983-84, 997-98).

consideration of highly prejudicial evidence of "other crimes or bad acts," while on the other hand encouraging the misuse (by presuming guilt) of equally prejudicial evidence of "flight." The result is a verdict secured in violation of Appellant's rights to due process and a fair jury trial secured to her by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. *See, e.g., Hicks v. Oklahoma,* 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980); *see also Darden v. Wainwright,* 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); *Donnelly v. DeChristoforo,* 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Her convictions and sentences must therefore be reversed.

PROPOSITION XII

APPELLANT WAS DENIED HER RIGHT TO A FAIR SENTENCING PROCEEDING WHEN THE COURT FAILED TO GIVE CORRECT AND PERTINENT SECOND STAGE INSTRUCTIONS STATING THE APPLICABLE LAW.

At trial instructional errors occurred which resulted in a judgment and sentence that was imposed in an arbitrary and capricious manner and denied Appellant of her right to a fair trial. *See Gregg v. Georgia,* 428 U.S. 153, 189, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976) ("Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action").

A. The Trial Court Failed to Instruct the Jury of the Necessary Elements for Murder for Remuneration.

In the Bill of Particulars, the State alleged that the homicide was committed for the purpose of remuneration or promise of remuneration. (O.R. 662); *See* 21 O.S. § 701.12(3)(2001). During the hearing on proposed second stage instructions, defense offered an instruction defining the remuneration in this context:

> The State has alleged that the defendant committed the murder for remuneration or the promise of remuneration. This aggravating circumstance is not established unless the State proves beyond a reasonable doubt that :
>
> First: the murder was committed by the defendant for the purpose of her financial gain.

> Second: the defendant was in a position to receive financial gain by the act of murder at the time the homicide occurred.

(Tr. 4146-47; Ct. Exh. 6) The trial court refused to give defense's instruction notwithstanding the lack of an instruction defining remuneration in the Oklahoma Uniform Jury Instructions. She stated that "I'm always hesitant to strike a new ground and propose instructions to the Court of Criminal Appeals." (Tr. 4149) The court's decision left the jury not only uninformed about the definition of remuneration but also the evidence necessary to prove remuneration. As such, each juror was left to create his own definition for remuneration and determine what evidence was necessary to prove the aggravator.

Murder for remuneration normally applies where a defendant has been hired or has hired another person to commit murder. *See Johnson v. State,* 665 P.2d 815, 824 (Okl.Cr. 1982). Murder for remuneration has been applied to situations where the murder was committed to obtain the proceeds of an insurance policy or an inheritance. *Id.* It has even been found to apply when a defendant attempted to extort ransom from a kidnap victim's family. *See Chaney v. State*, 612 P.2d 269, 282 (Okl.Cr. 1980). However, this Court has rejected a definition of remuneration that encompasses all killings for monetary gain. *See Boutwell v. State*, 659 P.2d 322, 329 (Okl.Cr. 1983).

Because the act of committing murder for remuneration is limited to several scenarios, it was crucial that the jury receive adequate instructions setting forth the elements necessary to find the aggravator. This was especially important in Appellant's case where the parties were divorcing and squabbling about the proceeds of an insurance policy which was considered a marital asset. (Tr. 3967-68; Tr. 4142-44; Tr. 4173) Since this evidence was intertwined with the evidence alleged to prove the aggravator, it was imperative that the jury was instructed to find the aggravator only if the murder was "motivated **primarily** to obtain proceeds from an insurance policy. . . . (Emphasis added). *Johnson v. State*, 665 P.2d at 824; *see also Plantz v. State*, 876

P.2d 268, 281 (Okl.Cr. 1994) ("the crime was motivated by financial gain").

Since fighting with a spouse over an insurance policy during a divorce proceeding is not necessarily the type of evidence envisioned by the Legislature for proving a "financial gain," the trial court should have granted defense counsel's request. Counsel stated:

> I think *Ring* [50]requires that we instruct the jury as to exactly what it is they have to find and therefore instructing them on every aggravator that's being alleged in the Bill of Particulars requires us to set forth something for them to find. And under *Plantz*[51] I believe this is the state law and I believe this is the proper instruction to be given as to that aggravator.

(Tr. 4149-50) Moreover, the court's error allowing the aggravator to be found by a jury not given adequate instructions denigrates the heightened standards of reliability in capital cases imposed by the Eighth and Fourteenth Amendments. *See Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Accordingly, Appellant's death sentence must be vacated.

B. The Trial Court's Response to the Jury's Question About Life Without Parole Failed to Adequately Answer the Question.

After the presentation of the second stage evidence the court sent the jury home for the evening. The jury returned the next morning and began deliberations at 9:35 a.m. (Tr. 4503) At 4:25 p.m., the jury sent out a note asking the judge, "Is life without parole mean incarceration in prison until her natural death?"[sic][52] The court responded that "life without the possibility of parole is self-explanatory." At 5:01 p.m., the jury returned to the courtroom and published it's verdict – death. (Tr. 4505-06)

In *Littlejohn v. State*, 85 P.3d 287 (Okl.Cr. 2004), the Court recognized a recurrent problem where jurors routinely sent out notes to the trial courts expressing confusion

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[50] *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

[51] *Plantz v. State*, 876 P.2d 268, 281 (Okl.Cr. 1994).

[52] It should be noted that Appellant filed numerous motions prior to trial asking to have the jury fully instructed on the definition of Life Without Parole. (O.R. 1879-80, 1891-97, 1907-09) The trial court overruled those motions. (5/18/04 M.Tr. 27-28, 30, 31)

about whether a defendant would ever get out of prison. The Court stated,

> Because of the qualitative difference of death from all other punishments, we are especially concerned with providing capital sentencing juries with accurate sentencing information so the jury is capable of a reasoned moral judgment whether death, rather than some lesser sentence, ought to be imposed. The actual duration of the defendant's prison sentence and whether release through parole will be available is indisputably relevant in making the capital sentencing decision.

Id. at 293. The Court decided that in future cases the trial courts had several options for instructing juries about parole eligibility for offenders sentenced to Life Without Parole. Since questions from juries came in a "myriad of the forms," the Court held that the trial courts could select options that only "refer the jury back to the instructions," or "tell the jury that the punishment options are self explanatory." *Id.* at 293-94. The Court, however, set forth a third option that would "alleviate some obvious concerns of the jurors more effectively." *Id.* at 294. The Court urged the trial courts to instruct juries "that the punishment options are to be understood in their plain and literal sense and that the defendant will not be eligible for parole if sentenced to life imprisonment without the possibility of parole. . . ." *Id.*

In this case the judge used the life-without-the-possibility-of-parole-is-self-explanatory option mentioned in *Littlejohn*. However, the fact that the jury came back with a sentence of death within thirty minutes raises a doubt whether the judge's response adequately answered the jury's question. In *Littlejohn*, this Court essentially admitted that this option did not provide accurate sentencing information. "We are concerned the jury's question here illustrates a recurring misconception with Oklahoma juries regarding the effective application of a life imprisonment without the possibility of parole sentence, which in turn **casts some doubt on our premise that the punishment options are self-explanatory**." (Emphasis added) *Id.* at 293.

Moreover, an examination of the jury's question shows that the jury was asking the trial court to tell them what did Life Without Parole "mean." (Tr. 4505-06) The third option proposed in *Littlejohn* was the only option that actually answers the jury's

question in this case and gave it enough guidance to consider less than death as a viable alternative. Accordingly, because the trial court failed to provide the jury with " accurate sentencing information," Appellant requests that this Court reverse the jury's finding of the death. *Id. See Gregg v. Georgia,* 428 U.S. at 193, 96 S.Ct. at 2934 ("When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations"); *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (Appellant's sentence fails to meet the heightened standards of reliability in capital cases imposed by the Eight and Fourteenth Amendments).

C. The Trial Court Failed to Ensure that the Jury Was Instructed In Line with *Lockett v. Ohio*,"

Oklahoma Uniform Jury Instruction CR(2d)4-78 defines mitigating circumstances as factors which "in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame." Defense counsel objected to this instruction in a pre-trial motion, which was overruled. (O.R. 1886; 5/18/04 M.Tr. 28)During closing argument the prosecutor capitalized on the language in the instruction and told the jury over defense counsel's objections that there was a two-prong test for determining a mitigating circumstance. First, is it true? Second, does that circumstance extenuate or reduce the degree of moral culpability for the murder she committed? Applying this test, the prosecutor argued that the jury could not find any mitigating circumstances because none of the proposed circumstances could extenuate or reduce the degree of Appellant's moral culpability or blame. (Tr. 4391-4400)

In *Lockett v. Ohio*, the Court held that "the eighth and fourteenth amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438

U.S. 586, 604, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973 (1978) (footnotes omitted) (emphasis in original). *See also, Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982). Despite this broad definition, OUJI-CR(2d)4-78, impermissibly narrows application of mitigation to exclude evidence warranting a sentence less than death simply because such evidence does not lessen her moral culpability or blame for the crime of which she has been convicted.

The concept of reducing moral culpability or blame evokes considerations of guilt or justification for the crime of murder, much like an affirmative defense.[53] By second stage, the jury in a capital case has already made a determination that the defendant is guilty of first degree murder. Requiring the jury to only consider the level of Appellant's guilt in order to ascertain the existence of mitigating circumstances completely distorts the mitigation process. Mitigation is primarily supposed to focus on the characteristics of the defendant. *See Gregg v. Georgia* 428 U.S. 153, 197, 96 S.Ct. 2909, 2937 (1976) ("the jury's attention is focused on the characteristics of the person who committed the crime .... Are there any special facts about this defendant that mitigate against imposing capital punishment ..."). Essentially, the wording of the instruction and the prosecutor's "two-prong test" prevented the jury from considering evidence of Appellant's character as mitigating evidence.[54] *See Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) (Juries cannot be instructed in such a way that precludes them from considering all pertinent mitigation).

There is no question that the jury displayed a misunderstanding of what evidence to consider as mitigation. During deliberations the jury sent out a note "What is the

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[53] Circumstances that tend to extenuate or reduce the defendant's degree of moral culpability or blame, such as an *Enmund/Tison* issue in a felony murder case, can be *a* mitigating factor. However, to define *all* mitigating circumstances in this language inappropriately limits consideration of the vast majority of evidence generally offered by a defendant as a basis for a sentence less than death.

[54] All of Appellant's mitigating circumstances dealt with her character and record . (O.R. 2836)

legal definition of extenuate mean?" (Tr. 4503; Ct. Exh. 7) Recognizing that the jury was having problems with the instruction on mitigating circumstances, the trial court, over objections from defense counsel, gave a definition from the Sixth Edition of Black's Law Dictionary that extenuate was "to lessen; to pallitate; to mitigate." (Tr. 4503) This was a circular definition that failed to clarify the language that "a mitigating circumstances may extenuate or reduce the degree of moral culpability or blame." The fact was the jury was still left with an instruction and a "two-prong test" that focused on the "circumstances of the offense" and which failed to instruct the jury "to consider any aspect of a defendant's character or record" as a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. at 604, 98 S.Ct. at 2964-65.

When jury instructions create two alternatives and only one is constitutional and proper, the verdict cannot be upheld because the jury may have relied on the invalid alternative. *Mills v. Maryland,* 486 U.S. 367, 376-77, 108 S.Ct. 1860, 1865-66, 100 L.Ed.2d 384 (1988); *LaFvers v. State,* 897 P.2d 292, 301 (Okl.Cr. 1995). Further, a violation of the eighth amendment occurs if a reasonable likelihood exists that the jury could understand an instruction in an unconstitutional manner. *Boyde v. California,* 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). Here, a reasonable likelihood exists that jurors understood OUJI-CR (2d) 4-78 as foreclosing consideration of evidence which did not tend to reduce Appellant's moral culpability or blame for the crime of which she had been convicted thereby depriving her the ability to present mitigation. As such, the instruction "create[d] the risk that the death penalty [was] imposed in spite of factors which may call for a less severe penalty." *Lockett v. Ohio,* 438 U.S. at 608, 98 S.Ct. at 2966. Accordingly, Appellant's death sentence should be vacated.

PROPOSITION XIII

PROSECUTORIAL MISCONDUCT DENIED APPELLANT A FAIR TRIAL AND RELIABLE SENTENCING HEARING.

The prosecution exceeded the bounds of proper prosecutorial advocacy in second

stage indicating "an apparent prosecution strategy to put as much before the jury as possible, admissible or not." *Omalza v. State*, 911 P.2d 286, 309 (Okl.Cr. 1995) The result of the prosecution's misconduct was a sentencing procedure that did not meet the heightened standard of reliability required by the Eighth and Fourteenth Amendments. *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). The prosecutor's prejudicial conduct was illustrated in reference to Tricity's testimony on the stand. The issue of Tricity testifying was litigated out of hearing of the jury with Tricity's psychologist recommending that she not testify and defense counsel stating that he had to ask Tricity if she wanted her mother to get the death penalty. (Tr. 4356-57, 4360) In response to defense counsel's statement, the court asked "Are you actually going to ask her that .... Are you going to put that question to that 13-year-old." (Tr. 4360) Counsel responded that "her mother's life is on the line here." The court allowed counsel to ask the question even though "this is going to devastate this kid." (Tr. 414)

When defense counsel called Tricity to the stand she was crying and had difficulty testifying. (Tr. 4363-64) Counsel only asked her to identify several letters she wrote Appellant and then released her because he didn't "want to put her through any more of this." (Tr. 4365) In closing, the prosecutor told the jury "I'm sure you noticed from the witness stand, Tricity didn't beg for her mother's life." (Tr. 4478) After taking advantage of counsel's largesse with Tricity, the prosecutor perversely attacked counsel's decision to call Appellant's 15-year-old girl niece, who tearfully asked the jury spare Brenda's life. The prosecutor asked the jury, "Would you put your 15 -year-old niece on the stand to do that? I wouldn't. (Tr. 4485) This Court, quoting the American Bar Association's Standard for Criminal Justice for standards relative to the function of the prosecution, stated: "[t]he prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to *misstate the evidence or mislead the jury as to the inference it may draw.*" *Lewis v. State*, 569 P.2d 486, 488 (Okl.Cr. 1977) (emphasis supplied); *see also Paxton v. Ward*, 199

F.3d 1197, 1218 (10th Cir. 1999).

The prosecutor also argued that Appellant wasn't a good mother because she brought men into the home when her children were there and her husband was at work. (Tr. 4394) There was no evidence presented in either stage that Appellant exhibited inappropriate behavior with men in her home and in front of her children. Arguing such an antiquated belief about the "appropriate behavior" of women was an inflammatory, derogatory and prejudicial attack on Appellant. *See President v. State*, 602 P.2d 222, 224-25 (Okl.Cr. 1979); *Davis v. State*, 413 P.2d 920, 923-24 (Okl.Cr. 1966).

The prosecutor's statement that "Rob Andrew's parents would like to visit him in prison . . . . The only place they get to visit is his grave" is one that has been roundly criticized by this Court. (Tr. 4396) Moreover, that Appellant proposed that her family would visit her in prison as a mitigating circumstance did not invite the prosecutor's prejudicial statement. (Tr. 4395) *See Abshier v. State* 28 P.3d 579, 616 (Okl.Cr. 2001).

The prosecutor's statement, "Appellant murdered a fine human being, a decent man, one who was content to love his wife and family and to be content with the love of God and the love of his family. That's all he wanted out of life" (Tr. 4402), improperly urged sympathy for the victim. *See Coulter v. State*, 734 P.2d 295, 302 (Okl.Cr. 1987); *Tobler v. State*, 688 P.2d at 354, 356, (Okl.Cr. 1984). In contrast, she attacked defense counsel stating, "Mr. McCracken says when Jesus was on the cross he said forgive them for they know not what they do. . . . Mr. McCracken wants to try to lay a guilt trip on you, the jury, who have been summoned here to do your duty" (Tr. 4480), and Appellant, "She's different. She's a cold-blooded, heartless killer. (Tr. 4494). *See Hager v. State*, 612 P.2d 1369, 1374 (Okl.Cr. 1980); *Robinson v. State*, 574 P.2d 1069, 1071 (Okl.Cr. 1978); *Lewis v. State*, 569 P.2d at 488-89); *see also Hammon v. State*, 898 P.2d 1287, 1306-1307 (Okl.Cr. 1995).

The prosecutor also improperly argued facts not in evidence. She asked the jury, "what do you believe his last words were when he was laying there trying to talk? Was

it goodby, I love you, Brenda? Was it I forgive you? Was it take care of my children?" (Tr. 4492) There was also no evidence that the victim's mother could not make it to the witness stand in order to give a victim impact statement as the prosecutor claimed. (Tr. 4409) Although the victim's father testified that he would do everything in his power so that those responsible for his son's death would "never, ever walk free again" (Tr. 4186), the prosecutor argued that this was a request for the death penalty by *all* of the victim impact witnesses by saying "Did they have to say it? Wasn't it conveyed? Wasn't their message conveyed to you what punishment they want." (Tr. 4484) *See Howell v. State*, 882 P.2d 1086, 1094 (Okl.Cr. 1994); *McCarty v. State*, 765 P.2d 1215, 1220, (Okl.Cr. 1988).

The prosecutor evened misstated the law in her zeal to assure the jury that the family wanted the Appellant to receive death. "Mr. Miskovsky said twice to you well you didn't hear the victim's family ask for the death penalty. They're prohibited by law from asking for a specific punishment." *See* 22 O.S. 2001, §984 ("'Victim impact statements' means ... opinion of a recommended sentence ... "). The prosecutor also told the jury they could give Appellant the death penalty because she wanted the custody of the children (Tr. 4475) and because that the victim would have forgiven her for her actions. (Tr. 4479) These circumstances are not enumerated aggravators. In addition, the prosecutor misrepresents the duty of the jury in the sentencing procedure by commenting that "She's done nothing to earn anything less than the death penalty and you should reward her for what she has done" and by making numerous requests for justice. (Tr. 4401-03, 4412, 4414, 4489-4490, 4492, 4494-95) *See Deason v. State,* 576 P.2d 778, 782 (Okl.Cr. 1978) (When the argument by the State's attorney is "grossly improper and unwarranted" on a point that may affect the rights of the defendant, reversal of the case is required).

Although some of the improper prosecutorial tactics discussed herein were met with contemporaneous objections by defense counsel, none of the above instances of misconduct constitute a fair comment on the evidence. Lack of an objection does not

preclude the Court from reviewing improper comments. *See, e.g., Atterberry v. State*, 731 P.2d 420, 423 (Okl.Cr. 1986). When a defendant is deprived of a fair trial because of the prosecutor's misconduct, due process is violated and reversal is warranted. *See United States v. Gabaldon*, 91 F.3d 91, 93 (10th Cir. 1996) (citing *Greer v. Miller*, 483 U.S. 756, 765, 107 S.Ct. 3102, 3108-09, 97 L.Ed.2d 618 (1987)).

PROPOSITION XIV

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE.

Appellant's sentence of death is based in part upon the jury's finding of the existence of the Especially Heinous, Atrocious, or Cruel aggravating circumstance. (O.R. 2844) The evidence shows that Robert Andrew was killed by two shotgun blasts, both independently fatal, and that he could not have remained conscious for more than a few moments, if at all. (Tr. 2255, 2227, 2234, 2255) This Court had repeatedly held that the momentary pain of being shot to death, without more, cannot support the existence of this aggravating circumstance. *See Cheney v. State*, 909 P.2d 74, 81 (Okl.Cr. 1995); *Marquez v. State*, 890 P.2d 980, 987 (Okl.Cr. 1995); *Davis v. State*, 888 P.2d 1018, 1020-21 (Okl.Cr. 1995); and *Brown v. State*, 753 P.2d 908, 913 (Okl.Cr. 1988). Accordingly, Appellant's sentence of death should be vacated.

PROPOSITION XV

THE ACCUMULATION OF ERROR IN THIS CASE DEPRIVED MS. ANDREW OF DUE PROCESS OF LAW AND A RELIABLE SENTENCING PROCEEDING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, § 7 AND 9 OF THE OKLAHOMA CONSTITUTION.

Even if none of the previously discussed errors can, when viewed in isolation, necessitate reversal of Ms. Andrew's conviction and death sentence, the combined effect of these errors deprived her of a fair trial and requires that her convictions be reversed. *See Skelly v. State*, 880 P.2d 401, 407 (Okl.Cr. 1994); *Peninger v. State*, 811 P.2d 609, 613 (Okl.Cr. 1991); *Gooden v. State*, 617 P.2d 248, 249-250 (Okl.Cr. 1980). At the very least, the combined effect of these errors should result in the modification of Ms.

Andrew's sentence to life imprisonment with the possibility of parole. *See Suitor v. State*, 629 P.2d 1266, 1268-1269 (Okl.Cr. 1981); *see also Barnett v. State*, 853 P.2d 226, 234 (Okl.Cr. 1993) (death sentence modified to straight life imprisonment).

CONCLUSION

Based on the preceding errors, discussion of facts, arguments and citations of legal authority, the record before this Court and any errors that this Court may note *sua sponte*, Ms. Andrew respectfully asks the Court to reverse the Judgment and Sentence imposed against her or order any other relief as justice requires.

Respectfully submitted,

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By:

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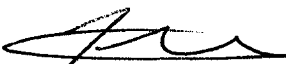
Appellate Defense Counsel



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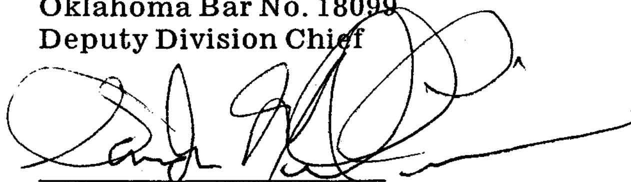

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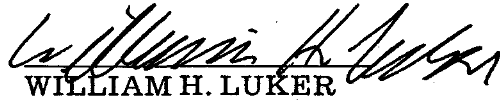
CERTIFICATE OF SERVICE

I certify that on the date of filing the above and foregoing instrument, a true and correct copy of the same was delivered to the Clerk of this Court with instructions to deliver said copy to the office of the Attorney General of the State of Oklahoma.



WILLIAM H. LUKER