Capital Case

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN FITZGERALD HANSON,
Petitioner,

v.

STATE OF OKLAHOMA,
Respondent.

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

PETITIONER'S APPENDIX
TO PETITION FOR A WRIT OF CERTIORARI
Pgs. 1a – 222a

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June 11, 2025

LIST OF ATTACHMENTS

ORIGINAL 1a

106187 1332

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JOHN FITZGERALD HANSON,	)	
	)	
Petitioner,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**Case No. PCD-2025-440**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUN 10 2025
JOHN D. HADDEN
CLERK

OPINION DENYING FIFTH APPLICATION FOR CAPITAL POST-CONVICTION RELIEF AND RELATED MOTIONS FOR DISCOVERY, AN EVIDENTIARY HEARING, AND EMERGENCY STAY OF EXECUTION

ROWLAND, JUDGE:

Before the Court is death row inmate John Fitzgerald Hanson's fifth application for capital post-conviction relief and accompanying motions for discovery, an evidentiary hearing, and an emergency stay of execution. Because Hanson had exhausted his appeals, this Court scheduled his execution for June 12, 2025 for the first degree murder of Mary Bowles.[1] In this application, Hanson claims that newly

[1] *Hanson v. State,* 2003 OK CR 12, 72 P.3d 40 (affirming Hanson's Tulsa County convictions for one count of First Degree Malice Aforethought Murder (Count 1) and one count of First Degree Felony Murder as well as his sentence of life imprisonment without the possibility of parole on Count 2, but vacating his death sentence and remanding Count 2 for resentencing); *Hanson v. State,* 2009

discovered evidence shows the State withheld material evidence favorable to the defense of a key prosecution witness's incentive to testify for the State in violation of his right to due process under the Fourteenth Amendment to the United States Constitution, and Article II, Sections 7 and 20 of the Oklahoma Constitution. *Brady v. Maryland,* 373 U.S. 83 (1963). According to Hanson, the hidden evidence consists of the suppression of a deal the prosecution made with Rashad Barnes[2] to dismiss a pending felon in possession of a firearm charge against Barnes's best friend, Michael Cole, in exchange for Barnes's testimony against Hanson and Hanson's co-defendant,

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OK CR 13, 206 P.3d 1020 (affirming Hanson's death sentence following resentencing); *Hanson v. Oklahoma,* 558 U.S. 1081 (2009) (denying certiorari from resentencing direct appeal); *Hanson v. State,* Case No. PCD-2002-628 (Okl.Cr. June 17, 2003) (unpublished) (dismissed because of disposition of direct appeal); *Hanson v. State,* Case. No. PCD-2006-614 (Okl.Cr. June 2, 2009) (unpublished) (denying post-conviction relief); *Hanson v. State,* Case No. PCD-2011-58, (Okl.Cr. March 22, 2011) (unpublished) (denying successive application for post-conviction relief); *Hanson v. Sherrod,* Case No. 10-CV-113-CVE-TLW (N.D. Okla July 1, 2013) (unpublished) (denying federal habeas relief); *Hanson v. Sherrod,* 797 F.3d 810 (10th Cir. 2015) (affirming denial of federal habeas relief); *Hanson v. Sherrod,* 578 U.S. 979 (2016) (denying certiorari from affirmance of denial of federal habeas relief); *Hanson v. State,* Case No. PCD-2020-611 (Okl.Cr. Sept. 9, 2021) (unpublished) (finding jurisdiction claim barred).

[2] Rashad Barnes testified for the prosecution at Hanson's original trial in May 2001. He stated that Hanson confessed to shooting Bowles shortly after the murders and provided vivid details of the murder corroborated by other evidence. Barnes died before Hanson's resentencing trial and his testimony from Hanson's original trial was read into the record.

Victor Miller, at their respective capital murder trials. Hanson contends this evidence could have been used to impeach Barnes's trial testimony and to call his credibility into question. Hanson further maintains that the prosecutors' knowing presentation of false testimony from Rashad Barnes regarding the reasons for his cooperation also violated his right to due process under the Fourteenth Amendment to the United States Constitution, and Article II, Sections 7 and 20 of the Oklahoma Constitution. *See Napue v. Illinois,* 360 U.S. 264 (1959). Hanson insists the cumulative effect of these constitutional errors, when combined with other constitutional errors previously raised and rejected in other appeals, renders his conviction and sentence fundamentally unfair, unreliable, and infirm.

Our review of post-conviction claims in capital cases is extremely limited under 22 O.S.Supp.2022, § 1089. Applicants have very few grounds on which to challenge their conviction and sentence:

> The only issues that may be raised in an application for post-conviction relief are those that:
>
> (1) Were not or could not have been raised in a direct appeal; and

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

22 O.S.Supp.2022, § 1089(C). Furthermore, claims raised in a successive post-conviction application will not be considered by this Court unless:

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

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

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

22 O.S.Supp.2022, § 1089(D)(8). Additionally, under our court rules, a successive post-conviction application will not be considered unless (1) it contains claims which were not and could not have been previously presented in the original application because the factual

or legal basis for the claim was unavailable, and (2) it is filed "within sixty (60) days from the date the previously unavailable legal or factual basis serving as the basis for a new issue is announced or discovered." Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2025).

1. *BRADY* CLAIM

Hanson submits an affidavit from Rodney Worley, Rashad Barnes's father, signed June 5, 2025, stating that District Attorney Tim Harris told his son he would drop the gun charge against Cole if Barnes testified against Hanson and Miller. (Attachment 5) To support Worley's claim, Hanson submits the docket sheet showing the dismissal of Cole's gun charge on March 29, 2000, over a year before Hanson's murder trial. (Attachment 7) The affidavit of Michael Cole, signed May 30, 2025, states that he was arrested for drug possession during the murder investigation and that Barnes contacted District Attorney Tim Harris and made a deal to testify against Hanson and Miller if Harris agreed to forego charging Cole with drug possession. (Attachment 8)

Hanson fails to provide sufficient explanation why this evidence could not have been discovered until now.[3] Nothing suggests Worley or Cole were unknown or missing and could not have been interviewed before now and their claims made the subject of one of Hanson's previous appeals rather than in this successive post-conviction application filed days before Hanson's scheduled execution. He fails to explain what investigatory steps revealed the information and why such steps could not have been, and were not, conducted years ago as his various attorneys and investigators have continued to investigate his case and attack his conviction.

We observe that Worley's and Cole's affidavits concerning the alleged undisclosed deal for Barnes's testimony are inconsistent, with Worley claiming the agreement was to dismiss Cole's gun charge and Cole claiming the deal was to forego charging him with drug

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[3] Hanson states the factual basis of this claim only became available last week, when Worley agreed to sign a sworn statement documenting the alleged deal between his son and the prosecution which corroborated the related statement provided by Cole a few days earlier. Hanson states the information was uncovered "in the course of the routine investigation undertaken prior to capital clemency proceedings and a scheduled execution." The alleged deal was made prior to Hanson's first trial making the factual predicate of this claim available for decades. Hanson confuses the discovery of a factual predicate with when its discovery could have occurred with the exercise of reasonable diligence. The State, in its response, questions why the materials were not included in Hanson's clemency process if discovered during preparation for the clemency proceeding that was held on May 7, 2025.

possession.[4] That the prosecution dismissed Cole's gun charge over a year before Hanson's murder trial and quashed his subsequent pre-trial drug arrest with nothing but the hope that Barnes would follow through on his deal to testify against Hanson and Miller strains credulity. Moreover, the evidence against Hanson, irrespective of Barnes's testimony, was compelling. The trial evidence revealed:

> Hanson and Miller drove Bowles's car [after the murder] to the Oasis Motel. Hanson asked the price of a room, then left. He returned shortly, explained that his car wouldn't start, and asked to borrow tools. The desk clerk gave him a screwdriver and followed him out. The clerk saw Hanson and another black man working on Bowles's car. Eventually the two gave up and returned the screwdriver and Hanson rented a room. He filled out and signed the registration card, and showed the clerk his driver's license. The clerk never saw either man again, and the car remained parked in the motel lot. Hanson and Miller robbed a liquor store on September 3, and robbed a federal credit union on September 8. On September 9 Miller's wife made an anonymous phone call telling police that Hanson and Miller, the credit union robbers, were in the Muskogee Econolodge. Also on September 9, a patrol officer saw Bowles's car parked at the Oasis. The officer discovered Hanson had rented a room and left the car there. Law enforcement officials from various jurisdictions coordinated this information and served warrants on Miller and Hanson at the Econolodge. Miller came out immediately. Hanson stayed in the room until driven out by tear gas. While he was alone in the room Hanson hid the murder weapons and extra ammunition in the toilet

[4] We observe that neither Worley nor Cole disavow Barnes's testimony that Hanson confessed to killing Bowles.

> tank. Hanson's fingerprint was found on the driver's seat belt latch in Bowles's car, and Miller's fingerprint was on the front passenger seat belt latch.

Hanson v. State, 2003 OK CR 12, ¶ 3, 72 P.3d 40, 45–46.

For these reasons, we find Hanson's *Brady* claim is barred.[5] He has not proven, via sufficient specific facts, that the factual basis for his claim was unavailable until now because he has not shown the information was not ascertainable through the exercise of reasonable diligence at the time of filing a prior application. 22 O.S.Supp.2022, § 1089(D)(8)(b)(1). Nor has he established that the facts underlying the claim, if proven and viewed in light of the evidence as a whole, are sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found him guilty or imposed a death sentence. 22 O.S.Supp.2022, § 1089(D)(8)(b)(2).

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[5] Hanson claims to the extent that Section 1089(D)(8)(b)(2) imposes a more stringent standard for obtaining relief on the merits of a Fourteenth Amendment Due Process claim raised under *Brady* and progeny, it is unconstitutional. We need spend little time on this contention because it is not well developed and is included in Hanson's substantive *Brady* claim which is entirely separate from this procedural attack on the Capital Post Conviction Act. Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2025). Nevertheless, we observe that Section 1089(D)'s requirements are like the requirements in the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254. *See Brown v. Muniz,* 889 F.3d 661, 674-75 (9th Cir. 2018) (comparing requirements of *Brady* claim and with successive claims raised under AEDPA).

2. *NAPUE* CLAIM

We find Hanson's *Napue* claim is likewise procedurally barred for the same reasons cited in his *Brady* claim as they share the same factual basis.

3. CUMULATIVE ERROR

We also reject Hanson's cumulative error claim, which combines the propositions in this application with issues raised in previous applications. We have held that only claims argued in the current application may be combined under a cumulative error claim. *Coddington v. State,* 2011 OK CR 21, ¶ 22, 259 P.3d 833, 840. His cumulative error claim must therefore be denied.

DECISION

Petitioner Hanson's Successive Application for Post-Conviction Relief and related motions for discovery, an evidentiary hearing and an emergency stay of execution are **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2025), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

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OPINION BY: ROWLAND, J.
LUMPKIN, P.J.: CONCUR
MUSSEMAN, V.P.J.: RECUSED
LEWIS, J.: CONCUR
HUDSON, J.: CONCUR

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

JOHN FITZGERALD HANSON,

Petitioner,

v.

THE STATE OF OKLAHOMA,

Respondent.

Subsequent Post-Conviction
Case No. PCD 2025 440

District Court of Tulsa County Case
No. CF-1999-4583

Direct Appeal
Case No.: D-2006-126

Original Post-Conviction Case No.
PCD-2002-628

Second Post-Conviction
Case No. PCD-2006-614

Third Post-Conviction
Case No. PCD-2011-58

Post-Conviction (Indian Country)
Case NO. PCD-2020-611

EXECUTION DATE JUNE 12, 2025

SUBSEQUENT APPLICATION FOR POST-CONVICTION RELIEF
-DEATH PENALTY-

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COUNSEL FOR JOHN FITZGERALD HANSON
June 6, 2025

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SUBSEQUENT APPLICATION FOR POST-CONVICTION RELIEF
DEATH PENALTY

PART A: PROCEDURAL HISTORY

Petitioner John Fitzgerald Hanson, through undersigned counsel, submits this application for post-conviction relief under Section 1089 of Title 22. This is the fifth time an application for post-conviction relief has been filed.[1]

The sentence from which relief is sought is: Death Sentence

1. (a) Court in which sentence was rendered: Tulsa County District Court

   (b) Case Number CF-1999-4583

2. Date of resentencing: February 7, 2006 (originally sentenced June 8, 2001)

3. Terms of sentence: Death by Lethal Injection

4. Name of Presiding Judge: Honorable Caroline E. Wall (resentencing); Honorable Linda G. Morrissey (original trial), Tulsa County District Court Judge

5. Is Petitioner currently in custody? Yes (X) No ( )
   Where? Oklahoma State Penitentiary, 1301 N. West Street, McAlester, Oklahoma, 74501

   Does Petitioner have criminal matters pending in other courts? Yes ( ) No (X) If so, where? N/A List charges: N/A

   Does Petitioner have sentences (capital or non-capital) to be served in other states/jurisdictions? Yes (X) No ()
   If so, where? Petitioner was serving a federal sentence of life plus 984 years for multiple crimes ranging from conspiracy to bank robbery, Case No. CR-99-125-C, United States District Court of the Northern District of Oklahoma. He was recently moved from United States Penitentiary in Pollock, Louisiana, to Oklahoma State Penitentiary for execution.

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[1] Pursuant to Rule 9.7(A)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2023), copies of Mr. Hanson's post-conviction application in Case No. PCD-2002-628 and subsequent post-conviction applications in Case Nos. PCD-2006-614, PCD-2011-58, and PCD-2020-611 are appended as Atts. 1-4. Mr. Hanson has not included the attachments to the prior applications for postconviction relief due to their large volume. However, he will promptly make those attachments available to the Court if deemed necessary to the resolution of any issues raised herein. Mr. Hanson remains indigent. *See* O.R. 66 (Sept. 28, 1999 order appointing the Oklahoma Indigent Defense System).

I. CAPITAL OFFENSE INFORMATION

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

(a) First Degree Murder, in violation of Okla. Stat. tit. 21, § 701.7(C)

Aggravating factors alleged:

(a) The defendant was previously convicted of a felony involving the use or threat of violence to the person;
(b) The defendant knowingly created a great risk of death to more than one person;
(c) The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and
(d) The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

Aggravating factors found:

(a) The defendant was previously convicted of a felony involving the use or threat of violence to the person;
(b) The defendant knowingly created a great risk of death to more than one person;
(c) The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution.

Mitigating factors listed in jury instructions:

a. The defendant's emotional history;

b. The defendant's family history;

c. The defendant's life history while incarcerated;

d. The defendant has an eleven-year-old-son;

e. The defendant has never taken another person's life;

f. No direct evidence other than Rashad Barnes has been presented that the defendant even pulled the trigger on any gun the day that Mrs. Bowles was killed;

g. Direct evidence has been presented that Victor Miller was the person who shot Mrs. Bowles and not the defendant;

h. The defendant is currently serving a life sentence in federal prison;

i. A sentence of life without parole is a significant punishment;

j. The defendant was dominated by Victor Miller; and

k. The defendant was a follower.

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

7. Check whether the finding of guilty was made: After plea of guilty ( ) After plea of not guilty (X)

8. If found guilty after plea of not guilty, check whether the finding was made by: A jury (X) A judge without a jury ( )

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

II. NON-CAPITAL OFFENSE INFORMATION

10. Petitioner was also convicted of one count (Count II) of first-degree felony murder. He received a sentence of life without parole.

11. Check whether the finding of guilty was made: N/A

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

III. CASE INFORMATION

13. Name and address of lawyer and all co-counsel in trial court:

Jack Gordon (original trial and resentencing)
111 S. Muskogee
Claremore, Oklahoma 74017

Steven M. Hightower (co-counsel resentencing)
2 West Sixth St.
Tulsa, Oklahoma 74119

Eric Stall (co-counsel original trial)
1924 S. Utica
Tulsa, Oklahoma 74104

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

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

To what court or courts? Oklahoma Court of Criminal Appeals

Mr. Hanson's death sentence was vacated and a resentencing was authorized in *Hanson*

v. State, 2003 OK CR 12, 72 P.3d 40. After being resentenced to death, Mr. Hanson appealed to the OCCA. The death sentence was affirmed on April 13, 2009. *Hanson v. State*, 2009 OK CR 13, 206 P.3d 1020.

16. Name and address of lawyer for appeal:

James H. Lockard (original appeal)
Jamie D. Pybas (original and resentencing appeal)
Kathleen M. Smith (resentencing appeal)
Capital Direct Appeals Division
Oklahoma Indigent Defense System
P.O. Box 926
Norman, OK 73070-0926

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

Hanson v. State, 2003 OK CR 12, 72 P.3d 40 (original appeal)
Hanson v. State, 2009 OK CR 13, 206 P.3d 1020 (resentencing appeal)

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

Hanson v. State, Case No. PCD-2002-628, Order Dismissing Application for Post-Conviction Relief as mooted by resolution of first direct appeal (June 17 2003) (unpub).

Hanson v. Oklahoma, 130 S. Ct. 808 (Dec. 7, 2009) (certiorari denial from resentencing direct appeal)

Hanson v. State, Case No. PCD-2006-614, Order Denying Application for Post-Conviction Relief (March 22, 2011) (unpub).

Hanson v. Sherrod, Case No. 10-CV-113-CV-TLW (N.D. Okla. July 1, 2013) (unpub) (denying federal habeas relief)

Hanson v. Sherrod, 797 F.3d 810 (10th Cir. Aug. 13, 2015) (denying federal habeas relief)

Hanson v. Sherrod, 136 S. Ct. 2013 (May 16, 2016) (certiorari denied).

PART B: GROUNDS FOR RELIEF

19. Has a motion for discovery been filed with this application? Yes (X) No ( )

20. Has a motion for evidentiary hearing been filed with this application? Yes (X) No ( )

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

If yes, specify what motions have been filed: Motion for Stay of Execution

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

Proposition One: **The State Withheld Material Evidence Favorable to the Defense of Key State Witness Rashad Barnes' Incentive for Cooperation, Violating Mr. Hanson's Right to Due Process Under the Fourteenth Amendment to the United States Constitution and Article II, Sections 7 and 20 of the Oklahoma Constitution.**

Proposition Two: **The State Knowingly Presented False Testimony from Rashad Barnes, Thus Violating Mr. Hanson's Right to Due Process Under the Fourteenth Amendment to the United States Constitution and Article II, Sections 7 and 20 of the Oklahoma Constitution.**

Proposition Three: **The Cumulative Effect of all the Constitutional Errors that Accrued at Mr. Hanson's Capital Trial and Sentencing Proceeding Render Those Proceedings, and His Resulting Convictions and Death Sentence, Fundamentally Unfair and Unreliable in Violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article II, Sections 7, 9, and 20 of the Oklahoma Constitution.**

PART C: FACTS

1. CITATIONS TO THE RECORD

Consistent with Rule 3.5(A)(4), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2021), references to the record and transcripts in this case will be cited using the following abbreviations:

Tr. The thirteen-volume consecutively paginated transcripts of the jury trial held May 7-23, 2001, Case No. CF- 1999-4583, followed by the page number(s);

Res.Tr. The eleven-volume consecutively paginated transcripts of the resentencing trial held January 9-24, 2006, Case No. CF-1999-4583, followed by the page number(s);

O.R. The nine-volume consecutively paginated original record in Tulsa County District Court Case No. CF-1999-4583 encompassing both the original 2001 trial and 2006 resentencing proceedings;

Att. Attachment to this Subsequent Application for Post-Conviction Relief and Motion

for Evidentiary Hearing, followed by the attachment number.

Any additional record in this post-conviction proceeding, not otherwise mentioned above, also consists of the "record on appeal" as defined by Rule 1.13(f), and the same shall be considered to be incorporated herein by reference and by operation of the Rules.

2. PROCEDURAL HISTORY

Mr. Hanson was charged by information in the District Court of Tulsa County with the murders of Mary Bowles and Jerald Thurman. Mr. Hanson was charged jointly with codefendant Victor Miller. The two counts were charged alternatively as malice aforethought or felony murder. O.R. 53-58; 95-101. Mr. Hanson and co-defendant Miller's cases were severed for trial. The Honorable Linda G. Morrissey, District Judge, presided over Mr. Hanson's original trial, which was held from May 7 through 23, 2001. Mr. Hanson was convicted of both counts. O.R. 523, 524, 525. In Count I, Mr. Hanson was sentenced to death for the malice aforethought murder of Mary Bowles.[2] O.R. 544. Also, with respect to Count I, the jury found the following aggravating factors: (1) Mr. Hanson was previously convicted of a felony involving use or threat of force; (2) that there existed a probability that Mr. Hanson would pose a continuing threat to society; and (3) that Mr. Hanson knowingly created a great risk of death to more than one person. O.R. 542. In Count II, Mr. Hanson was sentenced to life without the possibility of parole for the felony murder of Jerald Thurman. O.R. 548. Despite finding Mr. Thurman's death was aggravated by two factors, prior violent felony convictions and continuing threat, the jury still imposed a non-death sentence. O.R. 544.

[2] Mr. Hanson's jury was given specific verdict forms with respect to each count and each theory of murder. As for Count I, the jury found Mr. Hanson guilty of both malice murder and felony murder. O.R. 523, 525. In this circumstance, the conviction is construed as being for malice murder. *Alverson v. State*, 1999 OK CR 21, ¶ 83, 983 P.2d 498, 521.

This Court affirmed Mr. Hanson's conviction and sentence for Count II; however, while affirming his conviction on Count I, it reversed the death sentence and remanded for a new sentencing trial. *See Hanson v. State*, 2003 OK CR 12, 72 P.3d 40. Mr. Hanson's death sentence was reversed for a host of reasons, including, *inter alia*, trial court error in excluding expert witness testimony; trial court error in not allowing the defense to *voir dire* jurors on whether death penalty would be automatically imposed; trial court error in not removing a juror for cause; the jury was not instructed on the continuing threat aggravating circumstance; the trial court refused to instruct the jury on Mr. Hanson's proffered list of mitigating circumstances; and improper victim impact evidence was admitted. *Id.*

At the time of the OCCA's reversal of his death sentence, Mr. Hanson was engaged in state collateral proceedings and had a pending Application for Post-Conviction relief on file with the OCCA. This application was dismissed by this Court as being mooted by its disposition of the direct appeal case. O.R. 1270-71, *Order*, No. PCD-02-628 (June 17, 2003). Just before the re-sentencing was set to begin, the State disclosed new evidence that co-defendant Miller had confessed to shooting victim Mary Bowles. In response to the new evidence, trial counsel filed an Application for Post Conviction relief and Brief in Support of New Trial, which resulted in Mr. Hanson being granted a new trial. O.R. 1252-64, 1352-53.

The State appealed and moved for a writ of prohibition against the trial court's grant of a new trial, and this Court vacated the trial court's order as void for lacking jurisdiction. O.R. 1418-20. The trial court then commenced the re-sentencing hearing, and Mr. Hanson was sentenced to death on Count I. O.R. 1560. The re-sentencing jury found the existence of the following aggravating factors: (1) Mr. Hanson was previously convicted of a violent felony; (2) Mr. Hanson created a great risk of death to more than one person; and (3) the murder was committed for

purpose of avoiding arrest or prosecution. O.R. 1563.

Mr. Hanson appealed his death sentence to this Court, which struck the jury's finding of the great risk of death aggravating circumstance but affirmed his sentence nonetheless. *See Hanson v. State*, 2009 OK CR 13, 206 P.3d 1020. Mr. Hanson then sought certiorari in the United States Supreme Court, which was denied. *Hanson v. Oklahoma*, 130 S.Ct. 808 (Dec. 7, 2009) (cert. denied). Mr. Hanson additionally sought state collateral relief by filing an Application for Post Conviction Relief, which this Court denied in an unpublished opinion. *Hanson v. State*, No. PCD-2006-614 (June 2, 2009).

In 2013, Mr. Hanson was denied federal habeas corpus relief. *Hanson v. Sherrod*, No. 10-CV-0113-CVE-TLW, 2013 WL 3307111 (N.D. Okla. July 1, 2013) (unpublished). The United States Court of Appeals for the Tenth Circuit affirmed the district court's decision denying Mr. Hanson's petition for writ of habeas corpus. *Hanson v. Sherrod*, 797 F.3d 810, 824 (10th Cir. 2015). The United States Supreme Court denied a writ of certiorari. *Hanson v. Sherrod*, 578 U.S. 979 (2016). On April 1, 2025, this Court set Mr. Hanson's execution date for June 12, 2025.[3]

3. FACTS RELATING TO THE OFFENSE

On Tuesday, August 31, 1999 at 3:51 p.m., Mary Bowles left her job as a volunteer at St. Francis Hospital in Tulsa, Oklahoma. Res.Tr. 1244. Ms. Bowles was last observed by another hospital worker, Lucille Neville, at approximately 4:10 or 4:15p.m. on a freeway service road as Ms. Bowles was presumably driving home. *Id.* at 1233. Ms. Bowles kept a regular routine and would often get exercise by walking inside the Promenade Mall in the evenings after going home from work. *Id.* at 1238-39.

[3] Litigation regarding Mr. Hanson's Indian Country claim and regarding his transfer from federal to state custody are not pertinent here and are omitted from this history.

On August 31, 1999, Jerald Thurman placed a cell phone call at 5:50 p.m. to his nephew and employee James Moseby.[4] Res.Tr. 1261. Mr. Thurman owned and operated a trucking business that would deliver dirt from his dirt pit in Owasso, Oklahoma. Tr. 1260. Mr. Thurman called his nephew to report that a vehicle was inside the dirt pit. *Id.* at 1261. Mr. Moseby arrived at the dirt pit about 10 minutes after the phone conversation and observed Mr. Thurman to be unconscious having sustained multiple gunshot wounds. *Id.* at 1262,1268. Mr. Thurman never regained consciousness and died 14 days later. O.R.1272. James Lavendusky lived across the road from the entrance to Mr. Thurman's dirt pit. *Id.* at 1249. At about 5:45p.m. while working outside on his boat, Mr. Lavendusky heard gunshots coming from the dirt pit and then observed a dark grey or silver car exiting the dirt pit. *Id.* at 1250, 1253.

On September 7, 1999, Tim Hayhurst was driving down "Peanut Road," which is not far from Mr. Thurman's dirt pit, and observed what he thought to be a person along the side of the road. Res.Tr. 1279-81. Mr. Hayhurst reported the body to the Owasso Police Department. *Id.* at 1281. The body was identified as Mary Bowles. *Id.* at 1298. Ms. Bowles' body was in an advanced state of decomposition and the cause of death was determined to be multiple gunshot wounds. *Id.* at 1565-66, 1585.

The State's theory of the case was predicated upon the testimony of Rashad Barnes. Barnes testified at Mr. Hanson's first trial; however, by the time of Mr. Hanson's resentencing, Barnes had been killed in an unrelated incident. *See* Tr. 1153-87. Barnes' 2001 trial testimony was read into the record at the re-sentencing trial via a question and answer format. Res.Tr. 1338-76. According to Barnes, sometime in late August or early September 1999, Mr. Hanson showed up in Barnes' yard acting nervous and talking about how something went "bad." *Id.* at 1342, 1346.

[4] Mr. Moseby's name is improperly spelled as "Moseley" in the trial transcripts. *See id.* at 1259.

Mr. Hanson allegedly told Barnes how he and co-defendant Victor Miller had carjacked a lady at Promenade Mall and drove her out to North Tulsa to let her out, but were confronted by Jerald Thurman, whom co-defendant Miller shot, after which Miller instructed Mr. Hanson that "You know what you have to do" and drove a short distance from the dirt pit where Mr. Hanson shot Mary Bowles. *Id.* at 1347-50. Barnes further testified he was told that Mr. Hanson and co-defendant Miller then drove Bowles' car to the Oasis Motel where it broke down. *Id.* at 1350. Ms. Bowles' vehicle was later recovered from that motel by police. *Id.* at 1381, 1388. The parties stipulated that Mr. Hanson had checked into the Oasis Motel between 6:05 and 6:30p.m. on August 31, 1999. *Id.* at 1483, 1485. Mr. Hanson's fingerprint was found on the driver's seatbelt latch of Ms. Bowles' vehicle. *Id.* at 1486-87, 1595-96.

Mr. Hanson and co-defendant Miller were apprehended at the Econolodge Hotel in Muskogee, Oklahoma on September 9, 1999. *Id.* at 1443. Phyllis Miller, the wife of codefendant Miller, had called authorities and reported that Mr. Hanson and co-defendant Miller had robbed a credit union on September 8 and were at the Econolodge. *Id.* at 1426. Codefendant Miller was no stranger to criminal activity, having been previously convicted of murder in 1982. *Id.* at 1832. The Federal Bureau of Investigation, the Tulsa Police Department, and the Muskogee Police Department all converged on the hotel and eventually arrested co-defendant Miller and Mr. Hanson. *Id.* at 1430-33, 1434, 1443. Guns consistent with those used in the murders of Jerald Thurman and Mary Bowles, a five-shot .38 caliber revolver and a 9 millimeter semiautomatic pistol, were found inside of the Muskogee hotel room. *Id.* at 1451-54, 1462, 1594-95.

Specific facts pertaining to the ground for relief raised in this Application will be discussed as necessary.

PART D: ARGUMENTS AND AUTHORITIES

Proposition One: The State Withheld Material Evidence Favorable to the Defense of Key State Witness Rashad Barnes' Incentive for Cooperation, Violating Mr. Hanson's Right to Due Process Under the Fourteenth Amendment to the United States Constitution and Article II, Sections 7 and 20 of the Oklahoma Constitution.

A. Due Process Requires Prosecutors to Disclose Evidence Favorable to the Accused and Material to Guilt or Punishment.

A fundamental principle of American justice is that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This principle—effectuated through the Fourteenth Amendment's Due Process guarantee—requires prosecutors, as the "architect[s] of a proceeding" in a criminal case to disclose to the criminally accused evidence favorable to the defense and "material either to guilt or to punishment[.]" *Id.* at 87-88. Favorable evidence "includ[es] evidence that would impeach the credibility of the State's witnesses." *Harris v. State*, 2019 OK CR 22, ¶ 138,450 P.3d 933, 950; *Giglio v. United States*, 405 U.S. 150, 154 (1972) (internal citations and quotation marks omitted) ("When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general [*Brady*] rule."); *United States v. Bagley*, 473 U.S. 667, 676-77 (1985) ("This Court has rejected any such distinction between impeachment evidence and exculpatory evidence.").

"To establish a *Brady* violation" based on the State's suppression of evidence, a defendant must "show that the evidence had exculpatory or impeachment value, and that it was material, such that there is a reasonable probability that its omission affected the outcome of the proceeding." *Harris*, 2019 OK CR 22, ¶ 138. Importantly, the materiality standard under *Brady* is not outcome determinative. In other words, "a showing of materiality does not require

demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not implicate the defendant)." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Rather, "[t]he question is whether, absent the non-disclosed information, the defendant received a fair trial resulting in a verdict worthy of confidence." *Harris*, 2019 OK CR 22, ¶138; *Kyles*, 514 U.S. at 434 ("A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'") (quoting *Bagley*, 473 U.S. at 678)).

Nor is *Brady*'s materiality standard "a sufficiency of the evidence test." *Id.* at 434. That means "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Id.* at 434-35. Rather, a defendant must "show[] that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435.

Here, the newly discovered evidence of Rashad Barnes' incentive to cooperate with the State meets all three of *Brady*'s criteria. *See Brown v. State*, 2018 OK CR 3, ¶ 104, 422 P.3d 155, 175 (noting a *Brady* claim requires a defendant to show that "the evidence was: 1) suppressed by the prosecution, 2) favorable to the accused, and 3) material as to guilt or punishment[,]" and recognizing that "evidence favorable to an accused includes impeachment as well as exculpatory evidence").

B. The State Suppressed Material Evidence Impeaching Key Witness Rashad Barnes.

1. The State Suppressed Its Deal with Rashad Barnes to Dismiss a Pending Charge Against His Best Friend Michael Cole in Exchange for Barnes' Cooperation Against Mr. Hanson.

On June 5, 2025, Rashad Barnes' father, Rodney Worley, provided previously undisclosed

evidence that his son had cooperated in Mr. Hanson's prosecution in return for the State's promise to drop a felony charge of possession of a firearm while under the supervision of DOC/after former conviction of a felony against Barnes' best friend, Michael Cole. Att. 5, Affidavit of Rodney Worley, at ¶¶ 2-3, 9-11. As Worley also makes clear, Mr. Hanson is not his friend. *Id.* at ¶ 12. Mr. Hanson was the one-time friend of Worley's now-deceased son, over two decades ago. Worley has no reason to suddenly invent this very specific memory.

No evidence was presented to the jury, or exists anywhere on the record, regarding this incentive for Barnes' cooperation. To the contrary, as presented *infra*, Section I(3), the State in prosecuting Mr. Hanson repeatedly put forth Barnes' motive for testifying as simply due to the gravity of the crime; his personal risk in being labeled a snitch in doing so; and the lack of any reason to doubt his credibility. Mr. Hanson's lead trial counsel, Jack Gordon, now affirms he was unaware of any such impeachment evidence against Barnes. Att. 6, Declaration of Jack Gordon, at ¶6.

About three months after Barnes' testimony at Mr. Hanson's preliminary hearing on December 16, 1999, Cole's gun charge was dismissed. Att. 7, *State v. Cole*, CF-1999-4210 (Tulsa Cnty. Dist. Ct.). This supports the version of events Barnes' father has now disclosed.

Cole has provided supportive evidence bolstering the presence of this undisclosed *quid pro quo* as well: he recalls another instance, after "being arrested for possession of CDS again,"[5] in which Tulsa County dropped the charge following a call from Barnes to the Tulsa County District Attorney's Office. Att. 8, Affidavit of Michael Cole, at ¶¶ 7-8; Att. 9, Oklahoma State Bureau of Investigation Criminal History for Michael Antwuan Cole.[6] The statements from Worley and from

[5] He had previously been arrested on a felony drug sale charge in 1998. *See* Att. 9.

[6] This timing lines up with the March 2002 CDS arrest, which occurred directly before Barnes testified in Victor Miller's April 2002 trial. Barnes. *See* Att. 9. Because the State suppressed this

Cole, taken together, demonstrate a State's witness who had become comfortable calling the District Attorney's Office to ask for a favor for his troubled best friend.

2. The Suppressed Evidence Is Favorable to Mr. Hanson.

Had the evidence that Barnes was incentivized to cooperate with the State by a deal to dismiss a felony gun charge against his best friend not been suppressed, Mr. Hanson's "defense might have used [that] information to impeach" Barnes "by showing bias or interest." *Bagley*, 473 U.S. at 676. "Such evidence is evidence favorable to an accused, so that if disclosed and used effectively, it may make the difference between conviction and acquittal." *Id.* (cleaned up); *see also Napue*, 360 U.S. at 269 ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."). *See also* Att. 6 at ¶3, 6 (trial counsel affirming he would have used this evidence to impeach Barnes).

In *Binsz v. State*, 1984 OK CR 28, 675 P.2d 448, this Court reversed a capital conviction and death sentence where prosecutors suppressed evidence of a deal with a prosecution witness whose "credibility as a witness was an important issue in the case." *Id.* at ¶ 11. This Court found that "[h]ad the jury been appraised of the true facts, it might well have concluded that [the prosecution witness] had fabricated testimony in order to curry favor with the district attorney's office." *Id.* at ¶ 12.

Brady evidence, Mr. Hanson and the relevant witnesses are now in the position of having to piece together these details from distant memory, rather than reveal them via cross-examination contemporaneously with their occurrence. The evidentiary hearing Mr. Hanson requests would provide opportunity to elucidate the precise timeline and extent of all deals.

If the State's concealment of a deal with a key prosecution witness was enough to compel this Court in *Binsz* to reverse a death sentence and order a new trial, then surely promises to Barnes to dismiss a felony charge against his best friend to ensure he would testify against Mr. Hanson, without being impeached as testifying following any deal or incentive, would have been favorable to Mr. Hanson's defense at the guilt/innocence and penalty phases of his capital trial. *See LaCaze v. Warden Louisiana Corr. Inst. for Women*, 645 F.3d 728, 735-38 (5th Cir. 2011) (finding all *Brady* prongs satisfied where witness testified pursuant to undisclosed promise not to prosecute witness's son); *Mays v. State*, 1979 OK CR 27, ¶ 10, 594 P.2d 777 (in reversing conviction and remanding for new trial, finding that "the knowledge of that bargain [between witness and State] was vital to the jury for a proper evaluation of the weight and credibility to be given to his testimony. Public policy in our view, demands full disclosure to the jury of the terms of such bargain[]").

3. The Suppressed Evidence Is Material.

Here, the resentencing judge; this Court; and both parties have all made clear at various points that Barnes' testimony was vital to the State's pursuit of both a conviction and a death sentence for Mr. Hanson. In the context of overturning co-defendant Victor Miller's conviction in part due to the violation of Mr. Miller's due process rights attendant to introducing Barnes' statement against Mr. Miller, this Court called "Hanson's confession to Barnes [] the most critical evidence in the State's case." *Miller v. State*, 2004 OK CR 29, ¶ 47, 98 P.3d 738, 748. *See also* O.R. 1716 footnote (Resentencing Capital Felony Report of the Trial Judge) ("It appeared from the verdicts in each Defendant's first trials that Barnes' testimony was indeed significant to both guilt and punishment."). *See also* Att. 6 at ¶3 (trial counsel recalling the significance of Barnes to the State's case).

a. The Suppressed Evidence Is Material to Mr. Hanson's Conviction.

The State relied heavily on Barnes in its guilt-phase case against Mr. Hanson, previewing the evidence that would come from Barnes in its opening argument. Tr. 1005-06 (referring to what "witnesses" would detail regarding Mr. Hanson's specific role in the crime though describing evidence to come only from Barnes); *id.* at 1015-17. Meanwhile, the defense, in opening argument, attempted to paint Barnes both as lacking credibility due to the timeline of his cooperation, *id.* at 1030-31, and as the actual perpetrator in Mr. Hanson's place. *Id.* at 1031-32. The defense turned back to these themes in cross-examining Mr. Barnes, *id.* at 1178-79, 1185, but had no actual evidence with which to impeach Barnes' credibility or motives. Though Barnes denied being present, by introducing Mr. Hanson's supposed detailed confession of the events of the crime, he assumed a quasi-eyewitness role and served as the only direct evidence that Mr. Hanson had been the triggerperson in Ms. Bowles' shooting. *Id.* at 1160-64. In doing so, he provided damning evidence of the details of the crime that appeared nowhere else in the evidence, such as what Mr. Hanson allegedly said to Ms. Bowles and violence towards her before her shooting. *See id.* at 1163.

The State then turned back to Barnes in closing argument, emphasizing the facts known only through Barnes and Barnes' supposed lack of any incentive to cooperate:

> The instructions tell you to consider the credibility of the witnesses, and it also tells you to consider the corroborating evidence, so let's consider the credibility of the witnesses.
> Rashad Barnes came to tell you that sometime early September he was in his back yard when this guy shows up and starts talking to him. He says, "Man, we carjacked some old lady at the Promenade Mall. We had to carjack her 'cause we needed a car for a robbery. We took her out to some road to dump her and some guy in a dump truck saw us. Vic got out and killed the guy," showing him how he killed the guy. He tells Rashad, Vic later gets in the car and tells him, "You know what you got to do now." Tells Rashad, "We drove somewhere to some other road, dragged her out of the car, and I killed the old lady."
> **What stakes does Rashad have in this? None. For his testimony he's been labeled a snitch. He told you he was scared to testify. He has nothing in this except to tell what he knows of what happened and what that defendant told**

him.

Tr. 1724 (emphasis added). The State's final guilt-phase closing argument then focused almost entirely on Barnes, concluding, again, with allegations of brutality and cruelty in the crime's commission that would have been absent from the trial entirely without Barnes' testimony:

> Rashad Barnes, who came in here from his neighborhood, not much different than my neighborhood or some of your neighborhoods, where the last thing you do is open your mouth and be a snitch. They want you to think that sounds crazy because he's big. That ain't crazy, folks, that's life.
> And he got up there and he raised that hand, and he didn't just tell you the truth, he became the third victim in all this. There's two in the ground. He's out there in north Tulsa with the label of snitch around his neck and with them trying to convince you he was involved. . .
> They got her because she was old and weak, and that's where even Rashad Barnes has to draw the line. He's not a man that comes forward to give it up on people. But he's got a line that says, I can't take that. That's what he told you, because that's what's true.
> He let this guy live in his car behind his house where his Momma was, where his sisters were. This guy that could stand over an old lady and pump smoking rounds into her chest lived right outside his house. Could have been his Momma. That's where he drew the line. And he came in here with more guts than a lot of people I know that folks stand in line to shake their hands. And he told you the truth, and he told you what he told you.
> And we know that's true because Phyllis Miller said after the homicide, after that 31st when all that stuff happened, I drove him up there. I drove him up there.
> So what if he thinks it may have been the 31st. So what if he doesn't know the exact date. Folks, this was 1999. He's telling you the best he can recall. He ain't lying. If he was lying, he would tell you the exact time and place to make it look --
> MR. GORDON: Objection, bolstering.
> THE COURT: Overruled.
> MR. SMITH: He told you what he remembered as best as he could, but they don't like it because it puts him in the place of standing with this pistol over a little old lady that he had laid on top of. He felt her frail little body under his. He smelled her hair. He talked to her. And when she was reaching out in love, he reached out in violence, because he knew he was going to kill her. She was already dead. She just didn't know it.

Tr. 1746-48.

While there was evidence connecting Mr. Hanson to the crime scene, and circumstantially to being the triggerperson based on the type of gun he was said to carry, evidence impugning the

credibility and cooperation motive of this star witness, as the single source of the evidence he provided, would have "put the whole case in such a different light as to undermine confidence" in either the malice or felony murder verdicts. *Kyles*, 514 U.S. at 435. Whether there "would [] have been enough left to convict," *id.*, had the jury disregarded Barnes' testimony due to this impeachment, is not the question. Here, there is at least a reasonable probability that, given the centrality of Barnes to the State's case against Mr. Hanson, "had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682.

b. The Suppressed Evidence Is Material to Mr. Hanson's Death Sentence.

At Mr. Hanson's 2006 resentencing trial, the State read in Barnes' testimony from Mr. Hanson's 2001 proceeding, as Barnes was by then deceased and no longer available to testify. Res.Tr. 1338-75. As in Mr. Hanson's first trial, the State relied heavily on evidence stemming only from Barnes regarding details of the crime in its opening statement. *See, e.g.*, *id.* at 1176 ("When John Hanson jumps on top of Mary Bowles in the back of her car, keeping her subdued during the kidnapping and the robbery of her vehicle, Victor Miller takes of (sic) driving."); 1180-81; 1192-93; 1203. In closing argument, the State highlighted not only Mr. Hanson's confession as introduced via Barnes, but Barnes' unimpugned credibility. *Id.* at 1902 (emphasis added) ("Rashad Barnes doesn't have a criminal history. Rashad Barnes hasn't been impeached. Rashad Barnes hasn't been shown to tell a lie. None of that stuff. They have previous transcripts. You've heard the previous transcript. **Rashad has consistently told the truth and has never been impeached.**").

Though only the question of the appropriate sentence was before the jury in 2006, there is no question that Barnes' testimony—supplying the only direct evidence of Mr. Hanson's specific participation in and culpability for Ms. Bowles' murder, and his reported violence preceding the

shooting—was relevant to the resentencing jury's vote for a death verdict. *See also* O.R. 1716 (Capital Felony Report of Trial Judge) ("It was significant to me that the first juries did in fact appear to weigh each Defendant's individual level of participation when each first jury determined punishment. Although both Miller and Hanson were convicted of Malice Murder in count one, only Hanson was sentenced to death on count one, while Miller was sentenced to Life without Parole.").

C. This Claim Satisfies the Successor Postconviction Requirements of Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) and Rule 9.7 of the Rules of the Oklahoma Court of Criminal Appeals.

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

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

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

Mr. Hanson's present application for postconviction relief satisfies these requirements. First, the factual basis for this claim became available only on June 6, 2025. It was on that date that the new evidence which forms the factual basis of this *Brady* claim was first discovered: the father of the State's star witness against Mr. Hanson agreed to sign a sworn statement documenting

his son's hidden deal with Mr. Hanson's prosecutors and corroborating a related statement provided by Cole himself a few days prior. In compliance with Rule 9.7(G)(3), this Application is being filed within 60 days of counsel's discovery of this new evidence.

While this claim satisfies Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b)(l) and Rule 9.7(G), it is nevertheless the case that claims raised under *Brady*, *Giglio*, and *Napue* do not require defendants to seek out evidence which the State has an affirmative constitutional duty to disclose. *See Fontenot v. Crow*, 4 F.4th 982, 1066 (10th Cir. 2021) (noting the Supreme Court "has never required a defendant to exercise due diligence to obtain Brady material") (citation omitted); *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (rejecting rule that "prosecutor may hide, defendant must seek" as "not tenable in a system constitutionally bound to accord defendants due process"); *Douglas v. Workman*, 560 F.3d 1156, 1173 (10th Cir. 2009) (internal citation omitted) (duty to disclose does not end once trial is over, but "continues throughout the judicial process"). Here, Mr. Hanson uncovered *Brady* evidence in the course of the routine investigation undertaken prior to capital clemency proceedings and a scheduled execution. He has filed the instant pleading as quickly and diligently as possible, and he should not be penalized for the State's successful long-term suppression of this evidence.

Second, as the discussion *supra* demonstrates, the facts underlying this claim are sufficient to establish by clear and convincing evidence that Mr. Hanson's convictions and death sentence were obtained in violation of his Due Process rights under the United States and Oklahoma Constitutions; and they establish that, had prosecutors not suppressed favorable and material evidence of Rashad Barnes' incentive to cooperate, no reasonable fact finder would have either found Mr. Hanson guilty of first-degree malice murder, or sentenced him to death. *See* Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b)(2).

However, to the extent that Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b)(2) imposes a more stringent standard for obtaining relief on the merits of a Fourteenth Amendment Due Process claim raised under *Brady*, *Kyles*, *Napue*, and *Giglio*, it is unconstitutional. *See Montgomery v. Louisiana*, 577 U.S. 190, 204-05 (2016) ("If a state collateral proceeding is open to a claim controlled by federal law, the state court has a duty to grant the relief that federal law requires.") (quoting *Yates v. Aiken*, 484 U.S. 211, 218 (1988)); *but compare* Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b)(2) (requiring that "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death"), *with Kyles*, 514 U.S. at 419, 434 (holding that under *Brady* "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal[,]" rather it requires showing "[a] 'reasonable probability' of a different result"—i.e., that "the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" (quoting *Bagley*, 473 U.S. at 678)).

Mr. Hanson has satisfied the necessary requirements for this Court to consider this claim, order discovery and a hearing on his colorable allegations, and/or grant relief.

Proposition Two: The State Knowingly Presented False Testimony from Rashad Barnes, Thus Violating Mr. Hanson's Right to Due Process Under the Fourteenth Amendment to the United States Constitution and Article II, Sections 7 and 20 of the Oklahoma Constitution.

A. Due Process is Violated When the State Solicits False and Material Testimony or Allows It to Go Uncorrected.

"[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." *Napue v. Illinois*, 360

U.S. 264, 269 (1959). False evidence includes "false testimony [that] goes only to the credibility of the witness." *Id.* This is because "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Id.*

This Court has applied a three-part test to establish a due process violation under *Napue*: "First, whether a key portion of the State's case was presented with information affecting its credibility intentionally concealed; second, whether the prosecution knew or had reason to know of the concealment and failed to bring it to the attention of the trial court; and, third, whether the trier of fact was prevented from properly trying the case against the defendant as a result of the concealment." *Binsz*, 1984 OK CR 28, ¶ 10 (citing *Runnels v. State*, 1977 OK CR 146, ¶ 30, 562 P.2d 932, 936); *see also United States v. Garcia*, 793 F.3d I 194, 1207 (10th Cir. 2015) ("A Napue violation occurs when (1) a government witness committed perjury, (2) the prosecution knew the testimony to be false, and (3) the testimony was material."). In other words, when a prosecutor knows, or should know, that a witness testifies falsely, he or she has a duty to correct the false impression; failure to do so requires reversal "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976), *holding modified by United States v. Bagley*, 473 U.S. 667, 678 (1985).

B. The Trial Prosecutors Knowingly Solicited and Failed to Correct Testimony from Rashad Barnes Regarding His Motivation for Cooperating.

In a lengthy back-and-forth with District Attorney Tim Harris, Barnes insisted he didn't "enjoy being here and testifying today," but that he was not a "snitch" for doing so, due to his personal objection to the nature of the crime Mr. Hanson had been charged with.

Q. I want you to tell the jury what your concerns were regarding you and

you your family after defendant Hanson had told you what he said in your backyard.
MR. GORDON: Objection, irrelevant.
THE COURT: Mr. Harris?
MR. HARRIS: It goes to there's been an accusation made against Mr. Barnes. I think he has a right not only to give his state of mind as to why he did the things he did.
THE COURT: Overruled.
THE WITNESS: I didn't want him around my family.
Q. (By Mr. Harris) Why?
A. 'Cause he just told me he killed a old lady.
Q. After you talked to Detective Nance and after you testified at the grand jury, did you also come in here in State court and testify at the preliminary hearing back in December?
A. Yes.
Q. Mr. Barnes, did you have anything to do with the death of this old lady?
A. No, sir.
Q. Did you have anything to do with a robbery of a credit union?
A. No, sir.
Q. And you understand what it means to take an oath?
MR. GORDON: Objection. That's all self-serving.
THE COURT: Mr. Harris?
MR. HARRIS: Goes --
THE COURT: I think the last question is self-serving, and the objection is sustained.
Q. (By Mr. Harris) Mr. Barnes, do you enjoy being here and testifying today?
A. No.
Q. Why not?
A. 'Cause for two years I've been called a snitch, and I don't feel I'm a snitch.
MR. GORDON: I'm sorry, I didn't hear the answer.
THE WITNESS: For two years I've been being called a snitch, and I don't feel I'm a snitch.
Q. (By Mr. Harris) Why is it that you don't think you're being a snitch?
A. He told me he killed a old lady. That's not – that's not what we call something that's supposed to be just okay with everybody.
MR. STALL: I'm sorry, what was that answer, Judge?
Q. (By Mr. Harris) Can you repeat your answer, Mr. Barnes? Why isn't that okay?
A. I mean, she couldn't defend herself. There's a number of reasons.
Q. I'm asking you to tell us what the number of reasons are.
A. She couldn't defend herself. She was a elderly lady. They took advantage of her, overpowered her. That's not something I see as being a man, having respect for anyone. Call me what you want.

Tr. 1170-72. Contrary to this testimony, Barnes' cooperation stemmed not from concern for his family or for doing the right thing, but from the external incentive of dismissal of a charge against his best friend.

Given the State's deal with Barnes for his cooperation, *see* Proposition I, *supra*, there is no question that the State was aware of the falsity of Barnes' testimony otherwise and knowingly failed to correct this testimony.

C. There is a Reasonable Likelihood that Barnes' False Testimony Affected the Jury's Decision to Convict Mr. Hanson and Sentence Him to Death.

In *Napue,* the United States Supreme Court held that "[a] new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'" *Giglio,* 405 U.S. at 154 (quoting *Napue,* 360 U.S. at 271). The materiality standard for *Napue* violations is less demanding than *Brady* violations. *See Garcia,* 793 F.3d at 1207-08 ("There is a reason that the materiality standard for *Napue* violations is more easily satisfied. A defendant may have a *Brady* claim if the witness unintentionally gave false testimony or the prosecution did not correct testimony that it should have known was false . . . A prosecutor's knowing use of perjured testimony is misconduct that goes beyond the denial of a fair trial, which is the focus of *Brady.* It is misconduct that undermines fundamental expectations for a 'just' criminal-justice system."); *see also Reis-Campos v. Biter,* 832 F.3d 968, 975-76 (9th Cir. 2016) (maintaining that "[t]he *Napue* materiality standard is less demanding than *Brady*"). Courts have consistently held that a violation of *Napue* is "presumptively material 'unless failure to disclose it would be harmless beyond a reasonable doubt.'" *Smith v. Sec'y, of New Mexico Dep't of Corr.,* 50 F.3d 801, 826 n.38 (10th Cir. 1995) (quoting *Bagley,* 473 U.S. at 680). The justification for this presumption is that "by affirmatively using perjured testimony, or by passively failing to correct what is known to be

perjured testimony under *Napue,* the prosecution is participating in a 'corruption of the truth-seeking function of the trial process.'" *Id.* (quoting *Agurs,* 427 U.S. at 104).

Mr. Hanson easily satisfies this standard. As set forth *supra*, Proposition I(B)(3), Barnes was a central, crucial witness for the State. His false testimony ensured the jury had no reason to question his incentive, potential bias, and resulting potential fabrication of any part of his testimony, in cooperating against Mr. Hanson. There is at least a "reasonable likelihood" that the juries' judgments in finding Mr. Hanson guilty, and in voting for a death sentence at his resentencing proceeding, were each affected by Barnes' false testimony regarding his motivation for cooperation.

D. This Claim Satisfies the Successor Postconviction Requirements of Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) and Rule 9.7 of the Rules of the Oklahoma Court of Criminal Appeals.

For the same reasons that Proposition One satisfies the requirements of Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) and Rule 9.7(G), which Mr. Hanson expressly incorporates by reference, this claim satisfies those requirements as well.

Proposition Three: The Cumulative Effect of all the Constitutional Errors that Accrued at Mr. Hanson's Capital Trial and Sentencing Proceeding Render Those Proceedings, and His Resulting Convictions and Death Sentence, Fundamentally Unfair and Unreliable in Violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article II, Sections 7, 9, and 20 of the Oklahoma Constitution.

"The cumulative error doctrine applies when several errors occurred at the trial court level, but none alone warrants reversal. Although each error standing alone may be of insufficient gravity to warrant reversal, the combined effect of an accumulation of errors may require a new trial." *Tafolla v. State*, 2019 OK CR 15, ¶ 45, 446 P.3d 1248, 1263; *see also Mitchell v. State*, 2006 OK CR 20, ¶ 107, 136 P.3d 671, 712 (noting that "multiple errors or irregularities during a trial" requires reversal if the "cumulative effect" is "to deny the defendant a fair trial").

Mr. Hanson has previously raised the following constitutional errors in his convictions and death sentence, which this Court has denied based on lack of prejudice or as harmless error:

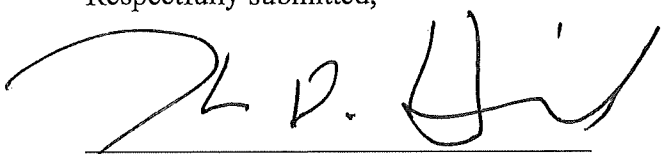
- Mr. Hanson received ineffective assistance of counsel at his resentencing hearing in violation of the Sixth Amendment to the United States Constitution, and Article II, Sections 7 and 20 of the Oklahoma Constitution. *See Hanson v. State*, 2009 OK CR 13, ¶ 36, 206 P.3d 1020, 1031 ("Hanson has not shown under these circumstances that the outcome of his resentencing proceeding would have been different had counsel provided the report to shield Dr. Russell from impeachment.")
- Mr. Hanson's right to due process and a fair resentencing trial under the Fourteenth Amendment to the United States Constitution and Article II, Section 7 of the Oklahoma Constitution were violated by multiple instances of prosecutorial misconduct. *See Hanson*, 2009 OK CR 13, ¶ 20 ("We are not convinced that the prosecutor's argument here rendered Hanson's resentencing trial unfair."); ¶ 21("It is clear that any argument by the prosecutor in regard to the bank teller did not affect the outcome here."); ¶ 25 ("We cannot determine on this record that Hanson was prejudiced by improper argument.")
- Mr. Hanson was entitled to a new trial on the basis of newly discovered evidence of his co-defendant's confession to another inmate that he had killed a woman. *See Hanson v. State*, PCD-2006-614, at *8 (Okla. Crim. App. June 2, 2009) ("[W]e find no reasonable probability that, had Miller's statement been introduced in the first stage of Hanson's trial, the outcome would have been any different.").

Although this Court did not grant relief on any of these claims individually, Mr. Hanson respectfully asks this Court to consider the cumulative prejudice to his fair trial rights stemming

from the totality of the constitutional errors in his case, including those raised previously and in this Application. Doing so is in keeping with "the ultimate focus of our inquiry . . . 'the fundamental fairness of the proceeding whose result is being challenged.'" *Childress v. State*, 2000 OK CR 10, ¶ 48, 1 P.3d 1006, 1010 (quoting *Strickland v. Washington*, 466 U.S. 668, 670 (1984)).

Mr. Hanson could not have presented this claim in his prior post-conviction applications, and it satisfies the requirements of Okla. Stat. Ann. tit. 22, § 1089(D)(8) and Rule 9.7, for the same reasons set forth in Propositions One and Two, which are expressly incorporated for this proposition as well.

Respectfully submitted,



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COUNSEL FOR JOHN FITZGERALD HANSON

VERIFICATION OF COUNSEL FOR PETITIONER

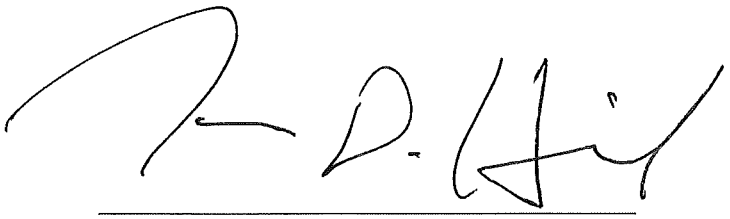
I, Thomas D. Hird, state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

6/6/25
Date

Thomas D. Hird, OBA#13580

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 2025, a true and correct copy of the foregoing Subsequent Application for Post-Conviction Relief, along with a separately bound Appendix of Attachments to the Subsequent Application for Post-Conviction Relief and Application for Evidentiary Hearing were delivered to the Clerk of this Court, with one of the copies being for service on the Attorney General, counsel for Respondent.



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IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

JOHN FITZGERALD HANSON, ***Petitioner,*** ***-vs-*** **THE STATE OF OKLAHOMA,** ***Respondent.***	**Subsequent Post-Conviction Case No. _____** **District Court of Tulsa County Case No. CF-1999-4583** **Court of Criminal Appeals Direct Appeal Case No. D-2006-126** **Original Post-Conviction Case No. PCD-2002-628** **Second Post-Conviction Case No. PCD-2006-614** **Third Post-Conviction Case No. PCD-2011-58** **Post-Conviction (Indian Country) Case No. PCD-2020-611**

SUBSEQUENT APPLICATION FOR POST-CONVICTION RELIEF

- DEATH PENALTY -

APPENDIX TO ATTACHMENTS IN SUPPORT OF THE SUBSEQUENT APPLICATION FOR POST-CONVICTION RELIEF

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June 6, 2025

COUNSEL FOR JOHN FITZGERALD HANSON

APPENDIX TO SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF

OF JOHN FITZGERALD HANSON

Att. #	Document
1	Application for Post-Conviction Relief, Case No. PCD-2002-628
2	Application for Post-Conviction Relief, Case No. PCD-2006-614
3	Application for Post-Conviction Relief, Case No. PCD-2011-58
4	Application for Post-Conviction Relief, Case No. PCD-2020-611
5	Affidavit of Rodney Worley
6	Declaration of Jack Gordon
7	*State v. Cole*, Case No. CF-1999-4210 (Tulsa Cnty. Dist. Ct.) Docket Sheet
8	Affidavit of Michael Cole
9	Oklahoma State Bureau of Investigation (OSBI) Criminal History Report of Michael Cole

IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

John Fitzgerald Hanson,	**Tulsa Co. District Court Case No. CF-99-4583**
Petitioner,	
-vs-	**Court of Criminal Appeals Direct Appeal Case No. D-2001-717**
State of Oklahoma,	
Respondent.	**Post Conviction Case No. PCD-2002-628**

COURT OF CRIMINAL APPEALS FORM 13.11A

ORIGINAL APPLICATION FOR POST- CONVICTION RELIEF – DEATH PENALTY CASE

PART A: PROCEDURAL HISTORY

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

The sentence from which relief is sought is:

Murder in the First Degree – Death

Murder in the First Degree – Life without Parole

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

1. Court in which sentence was rendered:

   (a) Tulsa County District Court

   (b) Case Number: CF-99-4583

   (c) Court of Criminal Appeals: Direct Appeal Case No. D-2001-717

2. Date of sentence: June 8, 2001

3. Terms of sentence: Death and Life without Parole

4. Name of Presiding Judge: Honorable Linda G. Morrissey

5. Is Petitioner currently in custody? Yes.

   Where? United State Penitentiary, Beaumont, Texas.

   Does Petitioner have criminal matters pending in other courts? N/A

   If so, where?

   List charges:

   Does Petitioner have sentences (capital or non-capital) to be served in other states or jurisdictions? Yes.

   If so, where? Federal – Northern District of Oklahoma

   List convictions and sentences:

   Convictions: 1 count of Conspiracy; 24 counts of Interference with Interstate Commerce and Aiding and Abetting; 42 counts of Possession of a Firearm During a Crime of Violence and Aiding and Abetting; 14 counts of Bank Robbery and Aiding and Abetting; and 17 counts of Possession of Firearm After Former Conviction of a Felony.

   Sentence: Life plus 984 months.

I. CAPITAL OFFENSE INFORMATION

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

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

Aggravating factors alleged:

(a) The State alleged:

1. The defendant, prior to the murder, was convicted of a felony involving the use of threat or violence to the person;

2. During the commission of the murder, the defendant knowingly created a great risk of death to more than one person;

3. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution.

4. At the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

Aggravating factors found:

(a) The Jury found 3 of the aggravating circumstances alleged by the State in the Bill of Particulars, to-wit:

1. The defendant, prior to the murder, was convicted of a felony involving the use of threat or violence to the person;

2. During the commission of the murder, the defendant knowingly created a great risk of death to more than one person;

3. At the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

(O.R. Vol. II at 360).

Mitigating factors listed in jury instructions:

The trial court gave instruction No. 36 to the jury which "lists" mitigating circumstances. The mitigation evidence submitted to the jury was as follows:

Evidence has been introduced as to the following mitigating circumstances:

the defendant's age

the defendant's character

the defendant's emotional/family history

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

(OR. Vol. II, at 353).

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

7. Check whether the finding of guilty was made:

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

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

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

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

II. NON-CAPITAL OFFENSE INFORMATION

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

    (a). Murder – 1st degree – life without parole.

11. Check whether the finding of guilty was made:

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

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

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

III. CASE INFORMATION

13. Name and address of lawyer in trial court:

    Jack Elliott Gordon Jr.
    P.O. Box 1167
    Claremore, OK 74017
    918-341-7322

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

    Eric Warren Stall
    1924 S. Utica Ave Ste. 700
    Tulsa, OK 74104
    918-743-6201

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

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

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

Date Brief In Chief filed: July 2, 2002.

Date Response filed: October 30, 2002.

Date Reply Brief filed: November 18, 2002.

Date of Oral Argument: February 11, 2003.

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

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

If so, what were the grounds for remand? N/A

Is this petition filed subsequent to supplemental briefing after remand?

Yes ( ) No (X).

16. Name and address of lawyers for appeal?

James Lockhard
Oklahoma Indigent Defense System
Capital Direct Appeals Division
P.O. Box 926
Norman, OK 73070
(405) 325-3633

Jamie Pybas
Oklahoma Indigent Defense System
Capital Direct Appeals Division
P.O. Box 926
Norman, OK 73070
(405) 325-3633

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

If "yes," give citations if published:

If not published, give appellate case no.:

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

If "Yes," state when relief was sought, the court in which relief was sought, the nature of the claims(s) and the results (include citations to any reported opinions).

PART B: GROUNDS FOR RELIEF

19. Has a motion for discovery been filed with this application? Yes ( ) No (X).

20. Has a Motion for Evidentiary Hearing been filed with this application?
Yes (X) No ( ).

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

If yes, specify what motions have been filed:

First verified application for extension of time to file original application for post-conviction relief and related motions filed February 12, 2003.

Second verified application for extension of time to file original application for post-conviction relief and related motions filed March 17, 2003.

Verified application for extension of time to file original application for post-conviction relief and related motions until June 9, 2003. In the alternative, petitioner requests a show cause hearing filed May 9, 2003.

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

PROPOSITION ONE

TRIAL AND APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND THE OKLAHOMA CONSTITUTION BY FAILING TO ADEQUATELY INVESTIGATE, DEVELOP AND PRESENT MITIGATING EVIDENCE, INCLUDING FAILURE TO PRESENT ADEQUATE BACKGROUND AND EXPERT TESTIMONY ON THE LONG TERM EFFECTS OF INCARCERATION.

PROPOSITION TWO

TRIAL COUNSEL AND APPELLATE COUNSEL WERE INEFFECTIVE FOR FAILING TO OBJECT AND ARGUE THAT THE EVIDENCE OF MR. HANSON'S HANDWRITING WAS A VIOLATION OF HIS RIGHT TO COUNSEL. IN ADDITION, TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE FOR FAILING TO REQUEST A *DAUBERT/KUMHO* HEARING ON HANDWRITING EXEMPLARS.

PROPOSITION THREE

APPELLATE COUNSEL WERE INEFFECTIVE IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §20 OF THE OKLAHOMA CONSTITUTION FOR FAILING TO RAISE THE TRIAL COURT'S FUNDAMENTAL ERROR IN REFUSING TO INSTRUCT THE JURY ON SECOND DEGREE MURDER.

PROPOSITION FOUR

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT A CRITICAL FACTOR IN THE SENTENCING STAGE HAD TO BE FOUND BEYOND A REASONABLE DOUBT DEPRIVED MR. HANSON OF A FAIR SENTENCING DETERMINATION IN VIOLATION OF THE OKLAHOMA CONSTITUTION AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

PROPOSITION FIVE

THE CUMULATIVE IMPACT OF ERRORS IDENTIFIED ON DIRECT APPEAL AND POST- CONVICTION PROCEEDINGS RENDERED THE PROCEEDING RESULTING IN THE DEATH SENTENCE ARBITRARY, CAPRICIOUS, AND UNRELIABLE. THE DEATH SENTENCE IN THIS CASE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND A DENIAL OF DUE PROCESS OF LAW AND MUST BE REVERSED OR MODIFIED TO LIFE IMPRISONMENT OR LIFE WITHOUT PAROLE.

PART C: FACTS

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

1. CITATIONS TO THE RECORD

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

Application: the instant Original Application for Post-Conviction Relief

OR: the Original Record in Case No. CF-1999-4583.

PH: the transcripts of the preliminary hearing held December 16-17, 1999.

TR: the sequentially paginated thirteen volumes of transcripts of the jury trial held May 7-23, 2001.

MH: the transcript of the motion hearing held November 28-29, 2000.

Any additional record in this post-conviction proceeding, not otherwise mentioned above, also consists of the "record on appeal" as defined by Rule 1.13 (f), and the same shall be considered to be incorporated herein by reference and by operation of the rule. References to the *Appendix of Exhibits In Support of the Application For Post-Conviction Relief* will indicate the exhibit number, followed by the notation "Appendix," e.g., "Exh. 1, Appendix." Citations to briefs filed on direct appeal will be referenced by party, "Aplt." or "Aple," by identification of the brief as chief or reply, and page number, e.g., "Aplt. Brf., at 22," "Aple. Brf., at 15," "Aplt. Rpl. Brf., at 40." All citations will be separated from the regular text of the brief by

parentheses.

2. PROCEDURAL HISTORY

Mr. George John Fitzgerald Hanson was first charged by Information in the District Court of Tulsa County, Case No. CF-1999-4583. He was charged with two counts of First-degree Murder in violation of 21 O.S. § 701.7 In a bill of particulars, the State further alleged that the murders were attended by the following statutory aggravating circumstances: (1) The defendant, prior to the murder, was convicted of a felony involving the use of threat or violence to the person; (2) During the commission of the murder, the defendant knowingly created a great risk of death to more than one person; (3) The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and (4) At the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society.

Mr. Hanson pled not guilty to the charges and requested a jury trial. Mr. Hanson was tried by a jury before the Hon. Linda Morrissey in Tulsa County District Court. The jury returned a verdict finding Mr. Hanson guilty of malice murder and felony murder on Count One. The jury returned a verdict of guilty on felony murder on Count Two. After the sentencing stage of the trial, the jury returned a verdict finding the existence of three of the four aggravating circumstances alleged by the State and imposed the death sentence for Count One and life without parole on Count Two. The District Court pronounced formal judgment and sentence on the

verdicts on June 8, 2001.

Counsel appointed to represent Mr. Hanson timely appealed the judgments and sentences in Hanson v. State, Case No. D-2001-717. That proceeding is fully briefed as of the filing of this Application. Pursuant to 22 O.S.Supp.1996 § 1089 and Rule 9.7 of the Rules of the Court of Criminal Appeals, 22 O.S.Supp.1997 Ch. 18., Mr. Hanson files this original verified application for post-conviction relief.

3. FACTS RELATING TO THE OFFENSE

Facts from the direct appeal brief are hereby incorporated into the post-conviction application. Additional relevant facts will be detailed and developed in the following Propositions.

PART D: PROPOSITIONS – ARGUMENTS AND AUTHORITIES

PROPOSITION ONE

TRIAL AND APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND THE OKLAHOMA CONSTITUTION BY FAILING TO ADEQUATELY INVESTIGATE, DEVELOP AND PRESENT MITIGATING EVIDENCE, INCLUDING FAILURE TO PRESENT ADEQUATE BACKGROUND AND EXPERT TESTIMONY ON THE LONG TERM EFFECTS OF INCARCERATION.

According to 22 O.S. § 1089 (1999)(D)(4)(b)(2) in order for a convicted capital defendant to prevail on a claim of ineffective assistance of counsel, he must show (1) that counsel actually committed the act or omission challenged as ineffective (2) that counsel's performance was deficient, and (3) that but for counsel's deficient performance the outcome of the trial would have been different. **Strickland v. Washington**, 466 U.S. 668, 687, 104 S.Ct. 2052, 2059 (1977); **Walker v. State**, 1997 OK CR 3 ¶ 11, 933 P. 2d 327, 333. "The very focus of a **Strickland** inquiry regarding performance of appellate counsel is upon the merits of omitted issues..." **Cargle v. Mullin**, 317 F.2d 1196,1202 (10th Cir. 2003).

The required showing is satisfied due to the fact that the claim was "obvious from on the record, and must have leaped out upon even a casual reading of the transcript." **Matire v. Wainwright**, 811 F.2d 1430, 1438 (11th Cir. 1987). Appellate counsel failed to raise this claim in the brief in chief, thus satisfying the first prong of the test. (Aplt. Brf.). The factual basis for such a claim was available to appellate

counsel but was not reasonably pursued. Thus, it is appropriate for post-conviction review.

Mr. Hanson's trial and appellate counsel failed to investigate, develop and present the mitigating evidence of "institutionalization", thus denying Mr. Hanson the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 2, §§ 7 and 20 of the Oklahoma Constitution. Counsel's ineffective performance at trial and on direct appeal also deprived Mr. Hanson of a fundamentally fair, reliable and individualized sentencing proceeding as required by the Eighth Amendment to the United States Constitution and Article 2, § 9 of the Oklahoma Constitution. **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); **Eddings v. Oklahoma**, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

After the jury convicted Mr. Hanson of first degree murder, defense counsel surely knew that a finding of one of the four alleged aggravating circumstances, prior conviction of a violent felony, was all but certain. Mr. Hanson had prior convictions for robbery and assault with a deadly weapon with intent to kill convictions from 1983, and his federal convictions. Each of these was prima facie evidence of the "prior violent felony" aggravator. Trial counsel was also certainly aware that the prosecutors would argue vigorously that the prior history of violence supported their allegation that Mr. Hanson would probably commit future acts of

violence that made him a "continuing threat to society." Given this *prima facie* evidence making Mr. Hanson eligible for the death penalty, a reasonably effective trial counsel would know that a compelling mitigation defense was necessary to save Mr. Hanson from a death sentence.

Despite the fact that the defense did present two witnesses during the sentencing proceeding, this presentation was incomplete at best. The overall effect of defense counsel's case clearly showed that trial counsel was unprepared to present mitigating evidence in an effective manner. (Tr. Vol. XII, 1859-1864, 1909-1936) (*See also* Aplt's Brf at 15-37, Aplt's Application for an Evidentiary Hearing at 1-32).[1]

The first witness called by the defense during the sentencing proceeding was Mr. Hanson's sister, Charmyn Clariett. Through Ms. Clariett's testimony, counsel presented limited information that was very basic and underdeveloped. Counsel's questions failed to fully develop any constant theme in Mr. Hanson's life. (Tr. Vol. XII, 1909-1922). Trial counsel's next witness was Mr. Hanson's mother, Charlotte Ward. Ms. Ward testified about Mr. Hanson's basic upbringing and about his juvenile case circumstances. (Tr. Vol. XII,1922-1936). Trial counsel's elicitation of

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[1] The defense hired Dr. Gilda Kessner to do a actuarial risk assessment analysis on Mr. Hanson to show that if incarcerated, Mr. Hanson would not be a continuing threat to society. Trial counsel failed to ask for a *Daubert* hearing, failed to ask for an offer of proof of her testimony, and failed to call her as a general mitigation witness. (Tr. Vol. XII, 1859-1864, 1909-1936; Aplt's Brf at 15-37, Aplt's Application for an Evidentiary Hearing at 1-32).

mitigation evidence took only twenty-seven pages of a capital murder trial encompassing over one thousand, nine hundred pages.

Trial counsel's clear unpreparedness and poor presentation of this testimony further denied Mr. Hanson's right to counsel and individualized sentencing determination required by the Eighth and Fourteenth Amendments. Unfortunately for Mr. Hanson, a defendant's ability to present mitigation largely depends upon the effectiveness of his counsel. It has long been recognized that the Sixth and Fourteenth Amendments safeguard this right by requiring that counsel's investigation and presentation of mitigating evidence must be reasonably effective. **Strickland v. Washington**, 466 U.S. 648, 104 S. Ct. 2039, 80 L.Ed. 2d 674 (1984). In **Mayes v. Gibson**, 210 F.3d 1284, 1288 (10th Cir. 2000), the Court held

> [t]he presentation of mitigation evidence affords an opportunity to humanize and explain--to individualize a defendant outside the constraints of the normal rules of evidence. Indeed, in capital cases, where the need for individualized sentencing is most critical, the right to present mitigating evidence to the jury is constitutionally protected. **Williams v. Taylor**, --- U.S. ----, 120 S.Ct. 1495, 1512-13, 146 L.Ed.2d 389 (2000). *See also* **Lockett v. Ohio**, 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) ("The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases."). We are therefore compelled to insure the sentencing jury makes an individualized decision while equipped with the "fullest information possible concerning the defendant's life and characteristics," and must scrutinize carefully any decision by counsel which deprives a capital defendant of all mitigation evidence. **Lockett**, 438 U.S. at 603, 98 S.Ct. 2954 (quoting **Williams v. New York**, 337 U.S. 241, 247, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949)).

In Mr. Hanson's case, the jury was deprived of much mitigation evidence.

Although some of this mitigation evidence was developed by appellate counsel, both appellate counsel and trial counsel failed to adequately develop evidence of the effects of Mr. Hanson's incarceration in juvenile facilities,[2] filled with abuse and neglect, and the nearly ten years incarceration in the adult prison system. Appellate counsel raised strong arguments on trial counsel's failure to challenge the trial court's denial of Mr. Hanson's expert, trial counsel's failure to call the defense expert as a general mitigation witness, and trial counsel's failure to fully investigate, prepare, and present mitigation evidence from Mr. Hanson's family as a claim of ineffectiveness on direct appeal. (*See,* Case No. D-2001-717, Application for an Evidentiary Hearing filed 7/2/2002). However, at the time of the filing of this post-conviction application, the Court of Criminal Appeals has not made a decision concerning Mr. Hanson's direct appeal case. In addition, trial and appellate counsel both ignored or failed to investigate and present the extensive and profound effects of Mr. Hanson's long term incarceration in both juvenile and adult facilities and the role that these facts may have played in the offenses.

Trial counsel failed to obtain successfully the testimony of a prepared and knowledgeable expert to present the extensive mitigation case available on Mr. Hanson's behalf. Direct appeal counsel presented the arguments that trial counsel

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[2] Mr. Hanson was placed in DHS custody on June 23, 1980. He was sent to Oklahoma Children Center on June 25, 1980. He was later sent to Boley on July 22, 1980 and then paroled February 23, 1981. In August, 1981 he was sent to Helena.

should have made to Judge Morrissey in order to have Dr. Gilda Kessner testify about the risk assessment evidence as well as mitigation evidence from Mr. Hanson's family and friends. (Aplt's Brf at 15-37, Aplt's Application for an Evidentiary Hearing at 1-32). However, both trial and appellate counsel failed to develop the issue of "institutionalization" and the possible effects that this phenomenon may have had on Mr. Hanson's behavior at the time of the offense. Institutionalization is the term used to describe the psychological impact upon a person as a result of years of incarceration. Dr. Craig Haney, a lawyer and psychologist, is an expert in this phenomenon. In January, 2002, Dr. Haney presented a paper[3] describing institutionalization. In his paper he states:

> The adaptation to imprisonment is almost always difficult and, at times, creates habits of thinking and acting that can be dysfunctional in periods of post-prison adjustment. Haney, at 79.
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> At the very least, prison is painful, and incarcerated persons often suffer long-term consequences from having been subjected to pain, deprivation, and extremely atypical patterns and norms of living and interacting with others. Id.
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> ...for at least some people, prison can produce negative, long-lasting change. And most people agree that the more extreme, harsh, dangerous, or

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[3] Dr. Craig Haney describes the phenomenon of "institutionalization" in a paper entitled The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment. This paper was presented at the "From Prison to Home" Conference on January 30-31, 2002.

otherwise psychologically-taxing the nature of confinement, the greater number of people who will suffer and the deeper the damage that they will incur. Id. at 79-80.

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However, in the course of becoming institutionalized, a transformation begins. Persons gradually become more accustomed to the restrictions that institutional life imposes. The various psychological mechanisms that must be employed to adjust (and, in some harsh and dangerous correctional environments, to survive) become increasingly "natural," second nature, and, to a degree, internalized. Id. at 80.

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The process of institutionalization is facilitated in cases in which persons enter institutional settings at an early age, before they have formed the ability and expectation to control their own life choices...younger inmates have little if anything to revert to or rely upon if and when institutional structure is removed. Id.

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Among other things, the process of institutionalization (or "prisonization") includes some or all of the following psychological adaptations: a) dependence on institutional structure and contingencies, b) hypervigilance, interpersonal distrust and suspicion, c) emotional over-control, alienation, and psychological distancing, d) social withdrawal and isolation, e) incorporation of exploitative norms of prison culture, f) diminished sense of self-worth and personal value, and g) post-traumatic stress reactions to the pains of imprisonment. Id. at 81-84.

There is a reasonable probability that the timely retention of an expert such as Dr. Haney would have permitted the evaluation and development of a more persuasive mitigation case.[4]

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[4] Due to circumstances beyond post-conviction's control, Dr. Haney was not able to do an personal evaluation and report case specific to Mr. Hanson's case. The

Counsel's failure to develop this important mitigation evidence by adequate investigation and presentation denied Mr. Hanson his rights under the Sixth, Eighth and Fourteenth Amendments. **Battenfield v. Gibson**, 236 F.3d 1215 (10th Cir. 2001); **United States ex rel. Emerson v. Gramley**, 883 F. Supp. 225 (N.D. Ill. 1995), *aff'd* 91 F.3d 989 (7th Cir. 1996) (Failure to investigate and present relevant mitigation was ineffective assistance of counsel.); **Commonwealth v. Smith**, 675 A.2d 1221 (Pa. 1996) (Death sentence was unconstitutional where relevant mitigating evidence was readily discoverable but neither investigated nor pursued by counsel.); **Harvey v. Dugger**, 656 So.2d 1253 (Fla. 1996); **Hill v. Lockhart**, 28 F.3d 832 (8th Cir. 1994).

A defense attorney in a capital case has a duty to investigate and present available evidence relevant to mitigating circumstances as well as in rebuttal of the State's aggravating circumstances. **Wade v. Calderon**, 29 F.3d 1312 (9th Cir. 1994). In this case, both trial and appellate counsel failed to bring before the jury and this Court significant and vital mitigating evidence that could have affected the outcome of the trial and direct appeal. Therefore, both trial and appellate counsel rendered ineffective assistance of counsel in violation of Mr. Hanson's Sixth and

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Oklahoma Indigent Defense System approved the funding for Dr. Haney, but post-conviction counsel was unable to retain Dr. Haney's services. Dr. Haney was too busy to do an evaluation and report on Mr. Hanson. However, Dr. Haney has discussed the long-term psychological effects of incarceration on a person in general. (Exh. 3, App.).

Fourteenth Amendment rights and rights guaranteed by Article 2, §§ 7 and 20 of the Oklahoma Constitution. **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); **Evitts v. Lucey**, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); **Banks v. Reynolds**, 54 F.3d 1508 (10th Cir. 1995).

As a result of defense counsel's clear lack of preparation and investigation, significant mitigation evidence was never heard by the jury, thus depriving Mr. Hanson of effective assistance of counsel.

Therefore, this Court should grant post conviction relief by reversing and remanding Mr. Hanson's case for a new penalty trial or in the alternative modify Mr. Hanson's sentence to life imprisonment or life without parole. At the very least, this Court should remand Mr. Hanson's case for an evidentiary hearing on the issue of "institutionalization" as mitigation evidence for Mr. Hanson and the ineffectiveness of counsel to present this evidence.

PROPOSITION II

TRIAL COUNSEL AND APPELLATE COUNSEL WERE INEFFECTIVE FOR FAILING TO OBJECT AND ARGUE THAT THE EVIDENCE OF MR. HANSON'S HANDWRITING WAS A VIOLATION OF HIS RIGHT TO COUNSEL. IN ADDITION, TRIAL AND APPELLATE COUNSEL WERE INEFFECTIVE FOR FAILING TO REQUEST A *DAUBERT/KUMHO* HEARING ON HANDWRITING EXEMPLARS.

After Mr. Hanson's arrest in Muskogee, he was in the Tulsa County jail awaiting adjudication on federal charges as well state charges. The Information was filed on September 22, 1999. His initial appearance was September 24, 1999. On September 24, 1999, the Oklahoma Indigent Defense System filed a Notice of Invocation of Rights. On Septmeber 28, 1999, the Tulsa County Public Defender's Office withdrew because they were representing Mr. Hanson's co-defendant, Victor Miller. The Oklahoma Indigent Defense System contracted with Mr. Jack Gordon and Mr. Eric Stall to represent Mr. Hanson. Mr. Gordon entered his appearance as Mr. Hanson's attorney on September 30, 1999, the same day a warrant was issued to collect handwriting samples from Mr. Hanson. (O.R. 40-44). Although Mr. Hanson was represented by counsel, neither Mr. Gordon nor Mr. Stall was present when Mr. Hanson complied with the warrant.

During the execution of the search warrant, police asked Mr. Hanson to verify his handwriting on certain documents obtained by the police. (Tr. Vol. VIII, 1425). Police interrogated Mr. Hanson without advising him of his rights and without the presence of appointed counsel. He was represented by counsel.

Although counsel does not have to be present during the execution of a warrant, before any custodial questioning of a suspect, law enforcement must inform the suspect of his rights. **Miranda v. Arizona,** 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed. 2d 694 (1966). Detective Nance asked Mr. Hanson incriminating questions and asked him to confirm his handwriting on documents obtained by law enforcement. (Tr. Vol. VIII, 1425). Detective Nance's questioning was a violation of the Fifth Amendment because Mr. Hanson was authenticating potential evidence without the presence of counsel. **Andresen v. Maryland**, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976). In **Miller v. State**, 2001 OK CR 17, 29 P.3d 1077,1080, this Court stated

> The Sixth Amendment right to counsel attaches at arraignment, and a defendant has a right to counsel at any post-arraignment questioning. **Pickens v. State,** 1994 OK CR 74, ¶¶ 5, 885 P.2d 678, 681, *reversed in part on other grounds,* **Parker v. State,** 1996 OK CR 19, 917 P.2d 980; *see also* **Battenfield v. State,** 1991 OK CR 82, ¶¶ 17, 816 P.2d 555, 561 ("The right to counsel under the Sixth Amendment extends to post arraignment interrogations.") The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. **Michigan v. Jackson,** 475 U.S. 625, 632, 106 S.Ct. 1404, 1408, 89 L.Ed.2d 631 (1986).

Counsel objected to Detective Nance's questioning and execution of a warrant on Mr. Hanson without the presence of counsel. (Tr. Vol. VIII, 1425-1429). The trial court admitted this evidence against Mr. Hanson.

In addition, Mr. Hanson was forced to physically construct evidence against himself in violation of the his Fifth Amendment right against self-incrimination and

his Sixth Amendment right to counsel. Although handwriting samples have been treated similarly to taking blood, the two types of evidence are not similar in respect to scientific analysis. DNA or other properties of blood cannot be changed by the subject involved in the investigation. For instance, a person cannot alter his DNA pattern; however, a person can change his handwriting. Objective scientific analysis is used to determine a person's DNA, whereas to determine the source of unknown handwriting is a subjective opinion.

Although trial counsel did object to the unlawful questioning of Mr. Hanson during the execution of the search warrant, trial counsel failed to move for suppression of the evidence obtained against Mr. Hanson in violation of this Fifth and Sixth Amendment rights. Trial counsel also failed to object to the testimony given by Detective Nance concerning the handwriting exemplars being identical to the signature card obtained from the Oasis Motel. (Tr. Vol. VIII, 1425). Detective Nance is not a questioned document examiner and his characterization that the signatures matched was outside his expertise. At the very least, trial counsel should have objected and requested a *Daubert/Kumho*[5] hearing on the issue. (Tr.

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[5] **Daubert v. Merrell Dow Pharmaceuticals**, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993) held that there are four factors to be considered by the trial court in order to assist a trial court to determine whether the analysis underlying the expert or scientific testimony is valid. These factors are whether the expert's theory can be or has been tested, whether the testing has been subjected to any type of peer review and/or publication, whether the testing or result has a known or potential rate of error, and whether the testing or theory is generally accepted in the relevant scientific community. **Kumho Tire Co. v. Carmichael**, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed. 2d 238 (1999) case expanded the *Daubert* analysis to the

Vol. VIII, 1421-1431).

After Detective Nance had told the jury that Mr. Hanson's samples of his signature matched the signature on the Oasis Motel registration card, the state called Mr. Gary Szabo. Mr. Szabo was a questioned document examiner for the Tulsa Police Department. Instead of asking the State to go through Mr. Szabo's qualifications as an expert or asking for permission to voir dire the witness to determine his expertise, trial counsel stipulated to Mr. Szabo's qualifications as a question document examiner. (Tr. Vol. VIII, 1525). This stipulation deprived Mr. Hanson of his right to test and inquire into the State's expert. Trial counsel also stipulated that the questioned document was indeed Mr. Hanson's handwriting. (Tr. Vol. VIII, 1527).

The issue of handwriting uniqueness is being questioned in other courts in this country. In **United States v. Julio Hidalgo Sr.**, et al, 229 F. Supp.2d 961, 967,(D.Ariz.,2002), [6] the Court held that the theory that handwriting is unique is

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evidence given by non-science experts. In some cases before evidence can be admitted, the trial court holds a *Daubert/Kumho* hearing on the proffered evidence to determine if the evidence, theory, or result complies with the enumerated *Daubert* factors.

[6] As of November 6, 2002, four courts have determined that the forensic document examiner's testimony was not based on sufficiently reliable principles and methodologies under *Daubert/Kumho*. These courts fully excluded the expert's testimony. **United States v. Lewis**, 220 F.Supp.2d 548 (S.D.W.Va.2002); **United States v. Brewer**, 2002 WL 596365 (N.D.Ill. 2002); **United States v. Saelee**, 162 F.Supp.2d 1097 (D.Alaska 2001); **United States v. Fujii**, 152 F.Supp.2d 939 (N.D.Ill.2000). Three courts allowed the forensic document examiner to testify to particular similarities and dissimilarities between the documents, but excluded the

unproven and thus it fails to satisfy **Daubert**.

> We therefore find and conclude that the principle of uniqueness of handwriting or handprinting fails to satisfy a *Daubert/Kumho* analysis. If the principle of uniqueness could be proven, then one would know how to analyze handwriting or handprinting with an error rate of zero percent.
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> The foundation for a document examiner's identification between a known document and a questioned document is the principle of uniqueness. Because the principle of uniqueness is without empirical support, we conclude that a document examiner will not be permitted to testify that the maker of a known document is the maker of the questioned document. Nor will a document examiner be able to testify as to identity in terms of probabilities. **Id.** at 967.
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> *See also* Lynn C. Hartfield, *Daubert/Kumho Challenges to Handwriting Analysis*, 26 November Champion 24, 25 (2002) handwriting analysis is a discipline in which expertise is largely self-declared, and no attempt has been made to develop a system for verifying the accuracy of any given document examiner's work.
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> [T]here are no standards governing what qualifies as a "similarity," or how many similarities need be present to declare a match. A determination that a letter or word is written similarly on the questioned and known documents is entirely subjective. Compounding the problem is the fundamental premise that people do not write the same on different occasions, with different instruments, or in different positions relative to the paper. Hartfield, at 25.

Mr. Szabo, the Tulsa Police Departments's questioned document examiner, testified that there was no difference between the hotel registration card and the samples of writing from Mr. Hanson. (Tr. Vol. VIII, 1532). He also said "[I]t's my

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ultimate opinion as to authorship. **United States v. Rutherford**, 104 F.Supp.2d 1190 (D.Neb.2000); **United States v. Santillan**, 1999 WL 1201765 (N.D.Cal. 1999); **United States v. Hines**, 55 F.Supp.2d 62 (D.Mass.1999).

conclusion that this is all written by the same writer." (Tr. Vol. VIII, 1534). Both Detective Nance and Mr. Szabo testified to the ultimate conclusion that it was Mr. Hanson's handwriting on the signature card of the Oasis Motel. Any basis for their opinions was not tested by the trial court. Their testimony was a violation of Mr. Hanson's Fifth and Sixth Amendment rights as well as his right to a fair trial. Mr. Hanson's case should be reversed and remanded for a new trial. At the very least, this Court should remand Mr. Hanson's case for an evidentiary hearing on this issue and the ineffectiveness of counsel to object to this evidence.

PROPOSITION III

APPELLATE COUNSEL WERE INEFFECTIVE IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE II, §20 OF THE OKLAHOMA CONSTITUTION FOR FAILING TO RAISE THE TRIAL COURT'S FUNDAMENTAL ERROR IN REFUSING TO INSTRUCT THE JURY ON SECOND DEGREE MURDER.

Mr. Hanson's trial counsel requested numerous instructions for the jury to consider in its deliberations. One of which was for the jury to be instructed on second degree murder as a lesser included offense.[7] However, the trial court

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[7] The Oklahoma Uniform Jury Instructions– Criminal Ch. 4 No. 91 (OUJI 4-91) for

MURDER IN THE SECOND DEGREE

BY IMMINENTLY DANGEROUS CONDUCT - ELEMENTS

No person may be convicted of murder in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the death of a human;

Second, caused by conduct which was imminently dangerous to another/other person(s);

Third, the conduct was that of the defendant(s);

Fourth, the conduct evinced a depraved mind in extreme disregard of human life;

Fifth, the conduct is not done with the intention of taking the life of any particular individual.

You are further instructed that a person evinces a "depraved mind" when he engages in imminently dangerous conduct with contemptuous and reckless disregard of, and in total indifference to, the life and safety of another.

You are further instructed that "imminently dangerous conduct" means conduct that creates what a reasonable person would realize as an immediate and extremely high degree of risk of death to another person.

summarily denied these requests. Counsel made argument to the trial court, but the arguments were not preserved on record, only the request. (Tr. Vol. X, at 1705).

Appellate counsel did not preserve Mr. Hanson's request for jury instructions on second degree murder by raising the issue on direct appeal. This failure

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OUJI-CR 4-92

MURDER IN THE SECOND DEGREE

BY FELONY MURDER - ELEMENTS

No person may be convicted of murder in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

First, the death of a human;

Second, occurring as a result of an act or event which happened in the commission of a felony;

Third, caused by [the defendant(s)]/[a person engaged with the defendant(s)] while in the commission of a felony;

Fourth, the elements of the [Specify Underlying Felony] defendant(s) is/are alleged to have been in the commission of are as follows:

[Give Elements of Underlying Felony]

and

OUJI-CR 4-93

MURDER IN THE SECOND DEGREE BY FELONY MURDER -

IN THE COMMISSION OF DEFINED

A person is in the commission of [Specify Underlying Felony] when he/she is performing an act which is an inseparable part of [Specify Underlying Felony], or which is necessary in order to complete the course of conduct constituting [Specify Underlying Felony], or when he/she is fleeing from the immediate scene of a/an [Specify Underlying Felony].

constitutes ineffective assistance of appellate counsel. *See* **Matire v. Wainwright**, 811 F.2d 1430, 1438 (11th Cir. 1987). (The omitted issue is "obvious from on the record, and must have leaped out upon even a casual reading of the transcript.") "The very focus of a **Strickland** inquiry regarding performance of appellate counsel is upon the merits of omitted issues..." **Cargle v. Mullin**, 317 F.2d 1196,1202 (10th Cir. 2003).

Oklahoma statutes authorize instructions on lesser included offenses when appropriate. 22 O.S. 1991, §§ 837, 916. In a capital murder prosecution, the trial court must instruct the jury on every degree of homicide where the evidence would permit the jury to find the defendant guilty of a lesser offense instead of the greater offense. **Childress v. State**, 2000 OK CR 10, 1 P.3d 1006; **Shrum v. State**, 1999 OK CR 41, 991 P. 2d 1032. When one is charged with first degree murder all lesser forms of homicide are necessarily included and instructions on lesser forms of homicide should be given if they are supported by the evidence. **Childress v. State**, 2000 OK CR 10, ¶ 21,1 P.3d at 1012; **Shrum v. State**, 1999 OK CR 41, 991 P. 2d at 1035. Moreover, where there is any evidence tending to reduce the crime charged from murder to a lesser degree of homicide, the trial court should give the defendant the benefit of a doubt and instruct the jury on the lesser offense. **Tarter v. State**, 1961 OK CR 18, 359 P.2d 596, 597.

Under Oklahoma law, the trial court has a duty to instruct the jury on any

lesser included offense supported by the evidence, whether requested or not. *See* **Stanley v. State**, 1988 OK CR 151, 762 P.2d 946, 949; **Walton v. State**, 1987 OK CR 227, 744 P.2d 977, 978; **Tarter v. State**, 1961 OK CR 18, 359 P.2d 596, 597, 600-601. In this case, trial counsel did request jury instructions on second degree murder, but the trial court overruled the request. (Tr. Vol. X, 1705).

In a capital case, the trial court is required to look at the evidence that might allow the jury to acquit the defendant of the greater offense, in this case felony murder and/or malice murder. **Hogan v. Gibson**, 197 F. 3d 1297, 1305 (10th Cir. 1999). The Supreme Court case of **Beck v. Alabama**[8] requires a court to consider whether there is sufficient evidence to warrant instructing the jury on a lesser included offense, not whether there is sufficient evidence to warrant conviction on the greater offense. **Hogan v. Gibson**, 197 F.3d at 1305. In Mr. Hanson's case there was evidence supporting second degree murder; however, the jury was not allowed to consider second degree murder as an option. There was evidence to support instructing the jury with either Murder in the Second Degree Murder as a result of imminently dangerous conduct or Murder in the Second Degree Murder as a result of felony murder. Concerning Murder in the Second Degree Murder by Imminently Dangerous Conduct, there was evidence presented that Mr. Hanson did not intend for Mr. Thurman to die, but that his conduct was imminently dangerous

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[8] 447 U.S. 625, 627, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980).

and evinced a depraved mind in extreme disregard of human life. (Tr. Vol. VII, 1161-1162). In regards to Murder in the Second Degree Murder by felony murder, there was evidence presented that the murder of Ms. Bowles occurred as a result of the robbery or the murder of Mr. Thurman. (Tr. Vol. VII, 1161-1163).

Because of the trial court's refusal to instruct on second degree murder, the jury was forced to make a choice between acquittal or guilt of first degree murder. *See also* **Spaziano v. Florida**, 468 U.S, 447, 455, 104 S. Ct. 3154, 82 L.Ed 2d 340 (1984). Petitioner submits that this was fundamental error and warrants plain error review. Neglecting to instruct the jury on the appropriate lesser included offenses constituted a serious violation of due process of law.[9] Accordingly,Petitioner has not received a fair trial, and his conviction should be reversed and remanded. At the very least, this Court should remand Mr. Hanson's case for an evidentiary hearing on the issue of ineffectiveness of appellate counsel for failing to raise the issue that the jury in Mr. Hanson's case should have received instructions on murder in the second degree.

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[9] *See* **Hicks v. Oklahoma**, 447 U.S. 343, 345-346, 100 S.Ct. 2227, 2229- 65 L.Ed.2d 175 (1980) (holding that an arbitrary denial of rights provided by State law, in that case the right to have the jury decide punishment, is a violation of due process of law).

PROPOSITION IV

THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT A CRITICAL FACTOR IN THE SENTENCING STAGE HAD TO BE FOUND BEYOND A REASONABLE DOUBT DEPRIVED MR. HANSON OF A FAIR SENTENCING DETERMINATION IN VIOLATION OF THE OKLAHOMA CONSTITUTION AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Oklahoma, a person convicted of capital murder has the sentence determined by a jury, unless the right to a jury trial is waived. 21 O.S. 2001 § 701.10. In order for a death sentence to be imposed, the jury must make three findings of fact: 1) the person must be found guilty of first degree murder beyond a reasonable doubt; 2) at least one aggravating circumstance must be found beyond a reasonable doubt; and 3) the aggravating circumstance or circumstances must outweigh the mitigating evidence presented at trial. 21 O.S. 2001 § 701.11; *See* **Grant v. State**, 58 P.3d 783, 801 n. 1. (Okla. Crim. App. 2002) (Chapel, J. dissenting).

Juries in Oklahoma are instructed, as was the jury in Mr. Hanson's case, the only fact in the second stage that must be found beyond a reasonable doubt is whether the State has proved an aggravating circumstance. The jury in this case was given the following instructions concerning its sentencing authority:

> Aggravating circumstances are those which increase the guilt or enormity of the offense. In determining which sentence you may impose in this case, you may consider only those aggravating circumstances set forth in these instructions.

> Should you unanimously find that one or more aggravating circumstances existed beyond a reasonable doubt, you are authorized to consider imposing a sentence of death.
>
> If you do not unanimously find beyond a reasonable doubt that one or more of the aggravating circumstances existed, you are prohibited from considering the penalty of death. In that event, the sentence must be imprisonment for life without the possibility of parole or imprisonment for life with the possibility of parole.

Instruction 33. (O.R. Vol II. at 350; Exh. 4, Appendix).

> If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, the death penalty shall not be imposed unless you also unanimously find that any such aggravating circumstance or circumstances outweigh the finding of one or more mitigating circumstances.

Instruction 37. (O.R. Vol. II at 354; Exh. 5, Appendix).

The jury was informed it had two critical facts to determine: 1) whether one or more of the aggravating circumstances exist, and 2) if one or more aggravating circumstances were found to exist, whether those outweighed the mitigating circumstances. The jury was instructed that only the first fact had to be found "beyond a reasonable doubt." The failure to inform the jury the second critical fact had to likewise be found "beyond a reasonable doubt" renders the resulting death sentences unconstitutional and unreliable in violation of the Sixth, Eighth, and Fourteenth Amendments. See **Apprendi v. New Jersey**, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); **Ring v. Arizona**, 536 U.S. 584, 122 S. Ct. 2428,

153 L. Ed. 2d 556 (2002).

In **Jones v. United States**, 526 U. S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999), the Supreme Court held "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." **Id.**, 526 U.S. at 243, n. 6. 119 S. Ct. at 1224 n.6. In **Apprendi**, the Supreme Court held "[t]he Fourteenth Amendment commands the same answer [as **Jones v. U.S.**] in this case involving a state statute." **Id.**, 530 U.S. at 476, 120 S.Ct. at 2355.

In **Ring**, the Supreme Court affirmed **Jones** and **Apprendi** and made the Constitutional principles enunciated within applicable to capital cases. **Ring**, 536 U.S. at 607, 122 S. Ct. at 2442 ("We see no reason to differentiate capital cases from all others in this regard."). In so holding, the Court reaffirmed, again, the principle that

> [i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no mater how the State labels it - must be found by a jury beyond a reasonable doubt.

Id., 536 U.S. at 602, 122 S. Ct. at 2439. Justice Scalia, in his concurring opinion, stated:

> I believe that the fundamental meaning of the jury-trial guarantee of the

> Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives - whether the statute calls them elements of the offense, sentencing factors, or Mary Jane - must be found by the jury beyond a reasonable doubt.

Id., 536 U.S. at 610, 122 S. Ct. at 2444.

Because of the nature of Oklahoma's capital sentencing scheme, **Jones, Apprendi**, and **Ring**, require the capital jury be instructed it must find the aggravating circumstances outweigh any mitigating circumstances *beyond a reasonable doubt* before it may impose the punishment of death.[10] The trial court's failure to instruct the jury in this manner violated Mr. Hanson's state and federal constitutional rights. Because the jury's critical factual determination of whether the aggravating circumstances outweigh any mitigating circumstances is just such a "fact that increases the penalty for a crime beyond the prescribed statutory maximum." **Apprendi**, 530 U.S. at 490, 120 S. Ct. at 2362-63. The trial court's Instructions No. 33 and 37, which failed to define properly the required burden of

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[10] The United States Supreme Court reiterated its holding in **Ring** in **Sattazahn v. Pennsylvania,** 537 U.S. 101,123 S.Ct. 732, 739, 154 L.Ed.2d 588 (2003),

> [W]e held that aggravating circumstances that make a defendant eligible for the death penalty operate as the functional equivalent of an element of a *greater offense. Id.,* at ----, 122 S.Ct. at 2443 (emphasis added). That is to say, for purposes of the Sixth Amendment's jury-trial guarantee, the underlying offense of "murder" is a distinct, lesser included offense of murder plus one or more aggravating circumstances: Whereas the former exposes a defendant to a maximum penalty of life imprisonment, the latter increases the maximum permissible sentence to death. Accordingly, we held that the Sixth Amendment requires that a jury, and not a judge, find the existence of any aggravating circumstances, and that they be found, not by a mere preponderance of the evidence, but beyond a reasonable doubt. *Id.,* at , 122 S.Ct. at 2442-2443. (Internal quotations omitted).

proof, run afoul of the Sixth and Fourteenth Amendments.

In Oklahoma, after a jury finds all the elements of first degree murder beyond a reasonable doubt, the maximum punishment a defendant is exposed to upon a guilty verdict is life imprisonment without parole. The minimum punishment is life imprisonment. This is made clear in the text of 21 O.S. § 701.11, which provides in part:

> Unless at least one of the statutory aggravating circumstances enumerated in this act is so found or if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed. If the jury cannot, within a reasonable time, agree as to punishment, the judge shall dismiss the jury and impose a sentence of imprisonment for life without parole or imprisonment for life.

The jury's finding the elements of first degree murder have been proved beyond a reasonable doubt does not authorize a death sentence at all. Under Oklahoma law, the death sentence is expressly forbidden unless the jury makes two further, unanimous findings: 1) one or more aggravating factors; and 2) the aggravating factors outweigh all mitigating factors.

The instructions given to the jury in this case bear witness to the actual way in which sentencing authority is conferred in capital cases. After the finding of guilt, the jury is instructed it must find one or more aggravating factors before it is authorized to consider, not impose, increasing the penalty to death. As the trial court instructed the jury in Instruction 33: "Should you unanimously find that one or more aggravating circumstances existed beyond a reasonable doubt, you are

authorized to consider imposing a sentence of death." (O.R. Vol. II at 350).

Instruction 37 further circumscribes the sentencing authority of the jury, prohibiting a sentence of death unless the jury makes the further finding: "If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, the death penalty shall not be imposed unless you also unanimously find that any such aggravating circumstance or circumstances outweigh the finding of one or more mitigating circumstances." (O.R. Vol. II at 354). The cases of this Court have also read the statutes to this effect. In **Paxton v. State**, 867 P.2d 1309, 1322 (Okl. Cr. 1993), the Court stated, "only when the aggravating circumstances clearly outweigh the mitigating may the death penalty be imposed."

The reasoning of **Jones**, **Apprendi**, and **Ring** demonstrate the trial court's instructions failed to comport with the Sixth Amendment's requirement that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." **Apprendi**, 530 U.S. at 490, 120 S. Ct. at 2362-63; also **Ring**, 536 U.S. 602, 122 S. Ct. at 2439. The trial court's instructions did require the jury to find the alleged aggravating circumstances only upon proof beyond a reasonable doubt. Yet the jury was not instructed the weighing determination, the most critical factual inquiry and the one which actually authorizes the jury to return a verdict of death, must also

be proved to its satisfaction beyond a reasonable doubt.

This omission is plain error of constitutional magnitude. Like other errors denying a defendant's right to an instruction concerning the finding of the essential elements of an offense beyond a reasonable doubt, the error infects the very structure in which the capital sentencing proceeds, and can never be harmless. **Cage v. Louisiana**, 498 U.S. 39, 111 S.Ct. 328, 112 L. Ed. 2d 339 (1990); **Sullivan v. Louisiana**, 508 U.S. 275, 113 S.Ct. 2078, 124 L. Ed. 2d 182 (1993).

The jury's decision whether the aggravating circumstances outweigh mitigating circumstances is clearly a finding of "fact" for purposes of the Constitutional rule announced in **Ring**. In the closing instruction, the jurors were told:

> In arriving at your determination as to what sentence is appropriate under the law, you are authorized to consider only the evidence received here in open court presented by the State and the defendant during the sentencing phase of this proceeding.
>
> ***
>
> You determine *the facts*. The importance and worth of the evidence is for you to decide.
>
> ***

Instruction 40. (O.R. Vol. II at 358; Exh. 6, Appendix). (emphasis added). The failure to instruct the jury properly concerning the rigorous burden of proof therefore renders the death sentence imposed against Mr. Hanson unconstitutional. The trial court's error in its instructions resulted in a sentence which violates Mr. Hanson's

Sixth and Fourteenth Amendment rights recognized by the Supreme Court in **Ring**, and further violates his right to due process of law and a fair and reliable capital sentencing proceeding in violation of the Eighth Amendment.

For the reasons stated, counsel for Mr. Hanson respectfully submits the death sentence imposed against Mr. Hanson is unconstitutional. This Court should vacate the death sentence. The Court could modify his sentences to life imprisonment, or remand for a new sentencing determination with a properly instructed jury.

PROPOSITION V

THE CUMULATIVE IMPACT OF ERRORS IDENTIFIED ON DIRECT APPEAL AND POST- CONVICTION PROCEEDINGS RENDERED THE PROCEEDING RESULTING IN THE DEATH SENTENCE ARBITRARY, CAPRICIOUS, AND UNRELIABLE. THE DEATH SENTENCE IN THIS CASE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND A DENIAL OF DUE PROCESS OF LAW AND MUST BE REVERSED OR MODIFIED TO LIFE IMPRISONMENT OR LIFE WITHOUT PAROLE.

In **United States v. Rivera**, 900 F. 2d 1462 (10th Cir. 1990), the Tenth Circuit held the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. **Rivera,** 900 F. 2d at 1469. *See* **Walker v. Engle**, 703 F.2d 959, 963 (6th Cir. 1983). A valid death sentence must be free of any passion, prejudice or arbitrary factors that taint the reliability of the outcome. The decision to impose a death sentence must reflect a reasoned moral judgment as to the defendant's actions and character in light of the offense and the defendant's background. **Penry v. Lynaugh**, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

Failure to adhere to these constitutional mandates at every stage of the capital sentencing and review process creates a risk that a death sentence will be based on considerations that are constitutionally impermissible and totally irrelevant to the offender and the crime. In order to maintain the integrity of the criminal justice system and public confidence in the reliability of its results, it is of vital importance that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice or emotion. **Gardner v. Florida**, 430 U.S.

349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977),

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of the qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. at 305, 96 S.Ct at 2991, 49 L.Ed.2d 944 (1977).

According to the Tenth Circuit,

> Cumulative error analysis is an extension of harmless error, *see* **Rivera**, 900 F.2d at 1469, and [the court should] conduct the same inquiry as for individual error, *id.* at 1470, focusing on the underlying fairness of the trial, *id.* at 1469 (quoting *Van Arsdall*, 475 U.S. at 681); *see also* **United States v. Wood**, 207 F.3d 1222, 1237 (10th Cir.2000). [T]he cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. *Hooper*, 314 F.3d at 1178; (quoting **Duckett v. Mullin**, 306 F.3d 982, 992 (10th Cir.2002), *petition for cert. filed*, (U.S. Feb. 25, 2003) (No. 02-9257); *see also* **Rivera**, 900 F.2d at 1469. As in assessing the harmlessness of individual errors, therefore, this court evaluate[s] whether cumulative errors were harmless by determining whether a criminal defendant's substantial rights were affected. **Moore v. Reynolds**, 153 F.3d 1086, 1113 (10th Cir.1998). A cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless. Unless an aggregate harmless determination can be made, collective error will mandate reversal, just as surely as will individual error that cannot be considered harmless. **Rivera**, 900 F.2d at 1470; *see* **Duckett**, 306 F.3d at 992; **Willingham**, 296 F.3d at 935. **Darks v. Mullin**, 323 F.3d 1001, 1018 (10th Cir. 2003) (Internal quotations omitted).

See also **United States v. Toles**, 297 F.3d 959, 972, 1207 (10th Cir.2002)

(quotation omitted); *see* **United States v. Rivera**, 900 F.2d 1462, 1470 (10th Cir.1990)(en banc), *see* **Cargle v. Mullin,** 317 F.3d 1196, 1206-1207 (10th Cir. 2003).

Also, in **Cargle v. Mullin**,317 F.3d 1196, at 1200, the Court held

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

The Tenth Circuit reiterated this holding of **Cargle v. Mullin** in **Darks v. Mullin**, 323 F.3d 1001, 1018 (10th Cir., 2003), "In assessing cumulative error, only first stage errors are relevant to the conviction, but all errors are relevant to the sentence." Therefore, even though each instance of error alone would not require reversal, some or all errors combined may warrant reversal.

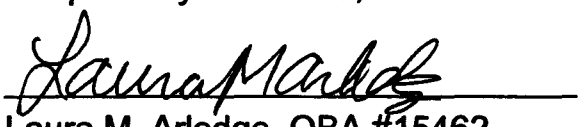
The ineffectiveness of trial and appellate counsel, the errors enumerated by appellate counsel and post-conviction counsel, and the failure of the court to properly instruct the jury denied Mr. Hanson substantial statutory and constitutional rights. His death sentence was obtained in violation of the Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution and Article 2, §§ 7, 9, and 20 of the Oklahoma Constitution.

Mr. Hanson should therefore be granted a new trial, or in the alternative, his death sentence should be modified to life imprisonment or life imprisonment without parole.

PRAYER FOR RELIEF

Wherefore, John Fitzgerald Hanson respectfully requests that this Court enter an order vacating the conviction and death sentence and imposing a sentence of life imprisonment or life imprisonment without parole, or in the alternative, remand this case for a full and fair evidentiary hearing on the issues presented.[11]

Respectfully submitted,



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[11] Mr. Hanson's motion for evidentiary hearing, and all attachments thereto, filed in this case contemporaneously with this original application, is hereby incorporated by reference as if fully set forth.

VERIFICATION OF COUNSEL FOR PETITIONER

Laura M. Arledge, after being duly sworn, states that she is the duly appointed counsel of the Petitioner, John Fitzgerald Hanson; that she has read the foregoing application for post-conviction relief, its argument and authorities; and the statements of fact contained therein, and the documents appended to this application, are true and correct to the best of her knowledge and belief.

Laura M. Arledge, OBA #15462

Subscribed and sworn before me on this 9th day of June, 2003, by the person known to me as Laura M. Arledge.

Notary Public

My commission expires: 9-11-04

My commission number: 00014061

CERTIFICATE OF SERVICE

By my signature below, I certify that a copy of the foregoing was served on the Attorney General of the State of Oklahoma by depositing a copy of the same with the Clerk of the Court of Criminal Appeals this 9th day of June, 2003.

Laura M. Arledge, OBA #15462
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(405) 325-3331
Attorney for Mr. Hanson

IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

JOHN FITZGERALD HANSON, *Petitioner,* *-vs-* STATE OF OKLAHOMA, *Respondent.*	Tulsa County District Court Case No. CF-1999-4583 Court of Criminal Appeals Direct Appeal Case No. D-2006-126 **Post Conviction Case No.** **PCD-2006-614**

APPLICATION FOR POST-CONVICTION RELIEF DEATH PENALTY

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COUNSEL FOR PETITIONER JOHN HANSON

June 30, 2007

IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

JOHN FITZGERALD HANSON,	**Tulsa County District Court Case No. CF-1999-4583**
Petitioner,	
-vs-	**Court of Criminal Appeals Direct Appeal Case No. D-2006-126**
STATE OF OKLAHOMA,	
Respondent.	**Post Conviction Case No. PCD-2006-614**

APPLICATION FOR POST-CONVICTION RELIEF – DEATH PENALTY

PART A: Procedural History

Petitioner, John Fitzgerald Hanson, through counsel, submits his application for post-conviction relief pursuant to Section 1089 of Title 22.

The present application follows a resentencing hearing. Accordingly, a previous application for post-conviction was filed on Mr. Hanson's behalf in Case No. PCD-2002-628 on June 9, 2003. The 2003 application was dismissed following this Court's issuance of the direct appeal opinion in Case No. D-2001-717 which, *inter alia,* vacated Mr. Hanson's penalty of death and authorized a new sentencing hearing. See Hanson v. State, 2003 OK CR 12, 72 P.3d 40. Thus, while not literally so, this application remains an "original application" as that term is contemplated by this Court's rules. See O.R. (2006) V. VI at 1020-21 (Order dismissing initial application but noting that "Hanson may re-file his

Application for Post-Conviction Relief, along with any appropriate accompanying motions, after the resentencing hearing is concluded. At that time Hanson may raise all post-conviction issues allowed under the Post-Conviction Procedure Act, including issues resulting from the guilt-innocence, or conviction phase of the trial as well as those raised in the resentencing hearing").

The sentence from which relief is sought is: Death

1. (a) Court in which sentence was rendered: District Court of Tulsa County, Oklahoma

   (b) Case Number: CF-1999-4583

   (c) Court of Criminal Appeals: Direct Appeal Case Numbers: D-2006-126 (following resentencing); D-2001-717 (following original trial).

2. Formal sentencing, following the remand, occurred on February 7, 2006. Mr. Hanson was originally sentenced on June 8, 2001.

3. Mr. Hanson received a sentence of death for one count of first degree murder. (Count One of the Information).[1] Additionally, he received a sentence of life imprisonment without the possibility of parole for a separate count of first degree felony murder. (Count Two of the Information). The judgment and sentence imposed on Count Two was previously affirmed by this Court.

4. The Honorable Caroline E. Wall, Associate District Judge, presided over the resentencing proceedings. The Honorable Linda G. Morrissey, District Judge, presided over the original trial.

5. Mr. Hanson is currently in the custody of the United States Bureau of Prisons. In January 2000, following a jury trial in the United States District Court for the Northern District of Oklahoma, Mr. Hanson was convicted of various

[1]Pursuant to Rule 9.7(A)(3)(d), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (hereinafter "Rule ___"), the Judgment and Sentences and the Death Warrant are provided in the Appendix to this application as Exhibits 1 and 2, respectively.

crimes ranging from conspiracy to bank robbery. In June 2000, Mr. Hanson was formally sentenced to life imprisonment followed by 984 months of incarceration. See State's Ex. 83 (the Judgment in Case No. 99-CR-125-002-C). On July 26, 2001, in an unpublished Order issued in Case No. 00-5149, the United States Court of Appeals for the Tenth Circuit affirmed the judgments and sentences. Mr. Hanson is currently serving the first of these sentences in the United States Penitentiary at Pollock, Louisiana. He has no other criminal matters pending in any other courts.

I. Capital Offense Information

6. Mr. Hanson was convicted of the following crime for which a sentence of death was imposed: One Count of First Degree Malice Aforethought (and/or Felony) Murder in violation of Oklahoma Statute, Title 21, Section 701.7.

With regard to each of the two counts of first degree murder, the state alleged the following statutory aggravating circumstances:

A. The defendant was previously convicted of a felony involving the use or threat of violence to the person;

B. The defendant knowingly created a great risk of death to more than one person;

C. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and

D. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

O.R. (2001) V. I at 68; O.R. (2006) V. I at 108. See 21 O.S. § 701.12 (1), (2), (5) and (7), respectively.

As to Count One, the count for which the death penalty was imposed, the resentencing jury found the presence of the "prior violent felony," "risk of death to more than one person" and the "avoid arrest" aggravating factors. O.R. (2006) V. IX at 1563. As to Count Two, the original jury found the presence of the "prior violent felony" and "continuing threat" aggravating

factors but declined to impose the death penalty. O.R. (2001) V. II at 361, 366.

The following mitigating factors were provided to the resentencing jury:

1. The defendant's emotional history;

2. The defendant's family history;

3. The defendant's life history while incarcerated;

4. The defendant has an eleven year old son;

5. The defendant has never taken another person's life;

6. No direct evidence other than Rashad Barnes has been presented that the defendant ever pulled the trigger on any gun the day that Mrs. Bowles was killed;

7. Direct evidence has been presented that Victor Miller was the person who shot Mrs. Bowles and not the defendant;

8. The defendant is presently serving a life sentence in federal prison;

9. A sentence of life without parole is a significant punishment;

10. The defendant was dominated by Victor Miller; and

11. The defendant was a follower.

Instruction No. 23, O.R. (2006) V. IX at 1586.

Victim impact testimony was not presented at the resentencing trial.

7. The finding of guilt was made after a plea of not guilty.

8. The finding of guilt was made by a jury.

9. The sentences imposed were recommended by the jury.

II. Non-Capital Offense Information

10. The original jury convicted Mr. Hanson of a count of first degree felony murder (Count Two of the Information) for which he was sentenced to a term of life imprisonment without the possibility of parole. O.R. (2001) V. II at 342, 344, 366, 380-82. This conviction and sentence was affirmed in Hanson v. State, 2003 OK CR 12, 72 P.3d 40, the direct appeal opinion that followed the original trial.

11. The finding of guilt was made after a plea of not guilty.

12. The sentence imposed was recommended by the jury.

III. Case Information

13. Trial Counsel:

Mr. Jack E. Gordon
111 S. Muskogee
Claremore, Oklahoma 74017

Co-counsel was provided by

Mr. Steven M. Hightower
2 West Sixth Street
Tulsa, Oklahoma 74119

14. Counsel were appointed by the court.

15. Following the resentencing hearing and the imposition of the death sentence, Mr. Hanson appealed. The Brief in Chief was filed on August 28, 2007. The Response Brief was filed on December 26, 2007. A Reply Brief was filed on January 15, 2008. Oral argument, as of the time this application was filed, has not yet been held.

16. Appellate Counsel:

Ms. Jamie D. Pybas
Ms. Kathleen M. Smith
Capital Direct Appeals Division
Oklahoma Indigent Defense System
P.O. Box 926
Norman, Oklahoma 73070

17. As of the filing of this application, the Court has not issued an opinion and Mr. Hanson's direct appeal remains pending. As such, further review relative to direct appeal has not been sought.

PART B: GROUNDS FOR RELIEF

18. A Motion for Leave to Supplement the Original Application for Post-Conviction Relief has been filed with this application.

19. Other motions have preceded the filing of this application:

An entry of appearance was filed by Ms. Laura M. Arledge on June 5, 2006;

A motion to hold proceedings in abeyance was filed on February 6, 2008;

An entry of appearance was filed by Mr. Robert W. Jackson on April 16, 2008.

21. Propositions raised:

PROPOSITION ONE: EVIDENCE DISCOVERED AFTER MR. HANSON'S ORIGINAL TRIAL AND PRIOR TO THE RESENTENCING HEARING ENTITLES HIM TO A NEW PROCEEDING ENCOMPASSING BOTH THE ISSUES OF GUILT/INNOCENCE AND PUNISHMENT.

PROPOSITION TWO: THE ABSENCE OF ANY ASSURANCE THAT THE JURY UNANIMOUSLY AGREED ON THE SAME "PREDICATE CRIME" TO SUPPORT THE "AVOID ARREST" AGGRAVATING CIRCUMSTANCE RENDERS THE FINDING OF THE CIRCUMSTANCE INVALID.

PROPOSITION THREE: MR. HANSON SHOULD BE AFFORDED RELIEF DUE TO THE CUMULATIVE IMPACT OF ERRORS IDENTIFIED IN THIS APPLICATION AND IN HIS DIRECT APPEAL BRIEF.

PART C: FACTS

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

1.
CITATIONS TO THE RECORD

Consistent with Rule 9.7(D)(1)(a), the record and transcripts in this case will be cited using the following abbreviations:

"O.R. (2001) V. ___ at ___":	the year, volume number and page of the original record of the initial trial, consisting of three volumes, in Tulsa County District Court Case No. CF-1999-4583;
"O.R. (2006) V. ___ at ___":	the year, volume number and page of the original record of the resentencing trial, consisting of nine volumes, in Tulsa County District Court Case No. CF-1999-4583;
"P.H. Tr. at ___":	the transcript of the preliminary hearing held on December 16-17. 1999;
"Tr. (2001) V. ___ at ___ :"	the transcripts of the original trial held from May 7, 2001 through May 23, 2001 and consisting of thirteen volumes;
"Tr. (2006) V. ___ at ___":	the transcripts of the resentencing proceedings held from January 9, 2006 through January 24, 2006 and consisting of eleven volumes;
"M.Tr. (date) at ___":	the date and page number of various motion hearings and status conferences held in conjunction with the proceedings; and
"S.Tr. at ___":	the transcript of the sentencing hearing held on February 7, 2006.

Any additional record in this post-conviction proceeding, not otherwise referenced above, consists of the "record on appeal" as defined by Rule 1.13(f), and is considered to be incorporated herein by operation of the Rule. References to the *Appendix of Exhibits In Support of the Application for Post-Conviction Relief* will indicate the exhibit number, followed by the notation "Appendix," e.g., "App., Ex. 1."

2.
PROCEDURAL HISTORY

John Hanson was charged by Information in the District Court of Tulsa County, Case No. CF-1999-4583, with two counts of first degree malice aforethought and/or felony murder in violation of 21 O.S. § 701.7(A) and/or (B). O.R. (2001) V. I at 27-30, 50-55, 60-65; O.R. (2006) at 53-58, 85-86, 95-101. The Honorable Linda G. Morrissey, District Judge, presided over the original trial. The jury found Mr. Hanson guilty of both counts[2] and assessed punishment on Count One at death after finding three aggravating circumstances: 1) that the defendant was previously convicted of a felony involving the use or threat of violence; 2) that the defendant knowingly created a great risk of death to more than one person, and; 3) that there existed a probability that the defendant would pose a continuing threat to society. O.R. (2001) V. II at 360, 362; O.R. (2006) V. III at 542, 544. As to Count Two, the jury found the presence of two aggravating circumstances – prior violent felony and continuing threat

[2]Mr. Hanson's jury was given specific verdict forms covering the alternative charges of malice and felony murder. As to Count One, the jury found Mr. Hanson guilty of both malice and felony murder. O.R. (2001) V. II at 341, 343; O.R. (2006) V. III at 523, 525. As to Count Two, the jury found Mr. Hanson guilty of felony murder but not guilty of malice murder. O.R. (2001) V. II at 342, 344; O.R. (2006) V. III at 524, 526.

– but nevertheless sentenced Mr. Hanson to life imprisonment without the possibility of parole. O.R. (2001) V. II at 361, 366; O.R. (2006) at 543, 548.

On June 11, 2003, in Hanson v. State, 2003 OK CR 12, 72 P.3d 40, this Court affirmed Mr. Hanson's conviction and sentence on Count Two and affirmed the conviction on Count One but reversed and remanded the death sentence for a new sentencing hearing after finding the type of constitutional errors identified by, inter alia, Morgan v. Illinois, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) (entitling a capital defendant to "life qualify" prospective jurors) and Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 91986) (error to restrict a capital defendant's presentation of relevant evidence in mitigation). See Hanson 72 P.3d at 46-49, 50-54.

A resentencing trial was conducted before the Honorable Caroline E. Wall, Associate District Judge, on January 9-24, 2006. The state was represented by Assistant District Attorneys Doug E. Drummond and William J. Musseman. Mr. Hanson was represented by Jack E. Gordon, Jr. and Steven M. Hightower. The resentencing jury found the existence of three aggravating circumstances – prior violent felony, threat to more than one person and that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution and returned a death verdict. O.R. (2006) V. VIII at 1560; O.R. (2006) V. IX at 1563. The death sentence was formally imposed on February 7, 2006. O.R. (2006) V. VIII at 1646-48; S.Tr. at 2.

Counsel appointed to represent Mr. Hanson timely appealed the sentence in Case No. D-2006-126. That proceeding is fully briefed, with the Reply Brief being filed on January 15, 2008. Pursuant to Title 22, Section 1089 and Rule 9.7, Mr. Hanson files this application for post-conviction relief.

3.
FACTS RELATING TO THE OFFENSE

The facts of the case were set forth in detail in the Brief in Chief presently on file with this Court. See id. at 2-19. For post-conviction purposes, Mr. Hanson is content to rely upon the factual account presented in the opening brief. Of course, facts pertaining to a particular proposition of error raised in this application will be discussed in the claim of error to which they relate.

PROPOSITION ONE

EVIDENCE DISCOVERED AFTER MR. HANSON'S ORIGINAL TRIAL AND PRIOR TO THE RESENTENCING HEARING ENTITLES HIM TO A NEW PROCEEDING ENCOMPASSING BOTH THE ISSUES OF GUILT/INNOCENCE AND PUNISHMENT.[3]

A. Standard of Review.

Whether the trial court had jurisdiction to decide Mr. Hanson's post-conviction application is an issue subject to a de novo standard of review. See Stidham v. Special Indemnity Fund, 2000 OK 33, 10 P.3d 880, 885 ("Once an issue is identified as jurisdictional, it calls for de novo review"). Statutory interpretation, involving a question of law, also demands a de novo review standard. Arrow Tool & Gauge v. Mead, 2000 OK 86, 16 P.3d 1120, 1122-23. See Baptist Medical Center v. Pruett, 1999 OK CIV APP 39, 978 P.2d 1005, 1008 ("Matters involving legislative intent present questions of law which are examined independently and without deference to the trial court's ruling").

To the extent the district court did properly exercise jurisdiction over the post-conviction application, the district court's decision to grant relief, in the form of a new trial, is subject to the "abuse of discretion" standard of review. United States v. Gabaldon, 91 F.3d 91, 93-94 (10th Cir. 1996). See United States v. Draper, 762 F.2d 81, 82 (10th Cir. 1985)

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[3]The substance of this claim was presented on direct appeal. See *Brief of Appellant*, Proposition II at 36-50. However, the state has contended that this claim, because it concerns issues of guilt/innocence, is not properly raised on a direct appeal that follows a resentencing trial and "[t]hat [the] question may be, and must be raised if at all, in a proper application for post-conviction relief in this Court pursuant to 22 O.S.2001, § 1089." *Brief of Appellee* at 19. Counsel present the claim in this application in an attempt to ensure that it receives merits review.

(noting that a trial court's denial of a motion for a new trial will not be disturbed on appeal absent "clear abuse of discretion" and concluding there is no reason to "adopt a different standard of review where the trial court grants a new trial").

B. Pertinent Facts.

John Hanson and co-defendant Victor Cornell Miller were each charged with two counts of first degree murder for the deaths of Mary Bowles and Jerald Thurman. The defendants were tried separately. Mr. Hanson was tried first, convicted of two counts of first degree murder, and formally sentenced to death for the murder of Mary Bowles on June 8, 2001. He received a sentence of life imprisonment without the possibility of parole for the murder of Jerald Thurman.

Approximately a year later, Victor Miller was tried. Miller was likewise convicted of two counts of first degree murder. On June 17, 2002, Miller was formally sentenced to death for the murder of Jerald Thurman. He received a sentence of life imprisonment without the possibility of parole for the murder of Mary Bowles.

It seems clear that each jury made its sentencing determinations with an eye toward each defendant's level of participation in the respective murder – imposing the death penalty only when it appeared that the defendant at bar was the "triggerman" and the lesser sentence when the victim was actually killed by the co-defendant. In this regard, the testimony of Rashad Barnes was central to the prosecution of both Hanson and Miller.

At Mr. Hanson's original trial, Barnes testified that he and Hanson used to work together at Blue Bell Creameries near Coweta and that they would often ride to work together with a mutual friend, Tremaine Wright, who lived across the street from Barnes. Tr. (2001) V. VII at 1155. Hanson lived with Wright until both he and Barnes lost their jobs at Blue Bell in March or April of 1999. At that time, Barnes allowed Hanson to live in an old car parked in Barnes's backyard. Id. at 1157-58, 1177. Barnes testified that he did not know how much time Hanson actually spent in the car but that he was gone after about two weeks. Id. at 1178.

According to Barnes, in late August or early September of 1999, Barnes was sitting in his backyard when Hanson walked up from the other side of the fence. Id. at 1156-57. This occurred at about 3:00 in the afternoon and the two men had not spoken in the previous week. Id. at 1157. Hanson seemed nervous and jittery and could not stop moving. Id. at 1159. Barnes claimed that Hanson kept telling him that everything went bad and related that Hanson and Miller had been looking for someone to carjack so the car could be used in some robberies. They approached an old lady at the Promenade Mall and put her in the back seat of her car. Hanson stayed in the back seat with the woman while Miller drove the car to a back road where they were going to let the lady out, but someone saw them. It was a man in a dump truck. Miller got out of the car saying he was going to handle it. Miller shot the man in the head and chest, and then got back in the car saying, "You know what you have to do." Hanson then shot the lady and they pulled her out of the car and put bushes on her.

Miller and Hanson then went to a motel and cleaned out the car, but when they cut the car off, it would not start back up. Id. at 1160-64.

According to Barnes, Hanson was terrified – "like he was scared" – when he allegedly told this story. Hanson supposedly told Barnes that he caught a ride north and that is when he appeared in Barnes's yard. Id. at 1164. Barnes told the jury that he was shocked to hear this story and that he told Hanson he had to leave. Hanson then got a bag of his things out of the car and left. Id. at 1165, 1167.

Barnes did nothing after supposedly hearing this tale. He did not tell law enforcement about this alleged confession until someone showed up at his door out of the blue with a subpoena compelling him to testify before a federal grand jury. Id. at 1168. The next time Barnes saw Hanson was on television following Hanson's arrest. As far as dates, Barnes could only remember that the alleged conversation occurred on a Tuesday and he saw Hanson on television being arrested the next Thursday. Id. at 1173, 1178. Barnes claimed he never discussed this conversation with anyone before he testified before the grand jury and that he had no idea how federal investigators knew to subpoena him. Id. at 1178-79.

The following summer Barnes was back in action, this time providing testimony against Victor Miller – testimony this Court characterized as "the most critical evidence in the State's case." Miller v. State, 2004 OK CR 29, 98 P.3d 738, 748. This Court discerned numerous oddities and inconsistencies associated with Barnes's account of the conversation he claimed to have had with Mr. Hanson, 98 P.3d at 742, and noted "every time Barnes spoke

of his conversation with Hanson, his statements became more detailed." Id. at 746. For example:

> At trial, Barnes testified the conversation with Hanson happened between 3:00 and 4:00 in the afternoon and lasted fifteen to twenty minutes, but he admitted he previously testified the conversation lasted seven to eight minutes. At Hanson's trial, he testified it lasted thirty to forty-five minutes. Barnes could not recall what day Hanson told him these things, but he thought it was a Tuesday because a couple of days later, he saw [Miller and Hanson] on TV. Barnes did not remember where he was on August 31, 1999.

Id. at 742 (footnote omitted).

Ultimately, the Court concluded that because Barnes's testimony was not sufficiently "trustworthy" or "reliable," its admission at Miller's trial violated the Confrontation Clause of the Sixth Amendment. Id. at 744, 749. In evaluating the effect of the constitutional error under the harmless error doctrine, the Court noted:

> Without the admission of Hanson's statement to Barnes implicating [Miller], the evidence in this case connecting [Miller] to the murders of Bowles and Thurman consisted of a single fingerprint found in Bowles' car, a ballistics match from a bullet recovered from Thurman to a gun found in [Miller] *and* Hanson's possession after a robbery, and [Miller's] act of "wiping down" Bowles' car some time after the murder. We cannot say, beyond a reasonable doubt, that admission of Hanson's untested statement through the testimony of Rashad Barnes did not affect the jury's determination of guilt. Accordingly, this error requires this case to be reversed and remanded for a new trial.

Id. at 748 (emphasis in original).

Other testimony at Victor Miller's trial suggested that Barnes had a strong motive to testify, falsely, against Miller and Hanson. Victor Miller testified at his trial and Rashad Barnes was the prominent feature of that testimony. Miller denied any involvement in the

murder of Bowles or Thurman and contended that the murders were committed by Hanson and Barnes. At Mr. Hanson's 2001 trial, Barnes testified that he did not know Miller "personally" and that Miller had been to Barnes's home only once looking for Hanson. Tr. (2001) V. VII at 1368. Miller, on the other hand, testified that Hanson had introduced him to Barnes and Miller had been to Barnes's home on several occasions because Barnes kept the weapons used by Miller and Hanson to commit various robberies. Miller, 98 P.3d at 742.

Miller testified that on the morning of September 8, 1999, he received a call from Hanson. In response to the call he and his wife, Phillis, drove to Barnes's home where he saw Barnes talking to Hanson. Id. According to Miller, Hanson gave him some keys and then he and Phillis drove to the Oasis Motel where they found Bowles's car. Although he had nothing to do with the murders, Miller agreed to check the car "because I was doing something for my friends and getting paid for it." Id. Miller acknowledged that he attempted to rid the car of fingerprints before he returned to Barnes's home where he gave the keys back to Hanson. Id.

At Miller's trial, the contention that the murders were committed by Hanson and Barnes was further supported by the testimony of Alton White and Gregory Malone. White and Malone were each incarcerated with Hanson in the Tulsa County jail. White testified that Hanson told him that Hanson

> was upset the person who helped him commit these murders was not in jail. Hanson told White Barnes took "hisself (sic) out of the place of the murderer and put Mr. Miller in it." White testified Barnes committed the murders with Hanson and then said Victor Miller did what he [Barnes] did. About a week

> and a half later, Hanson told White he and Ali [Barnes] hijacked a car from an old lady, drove her to a back road to let her out, someone saw them, and Ali [Barnes] got out of the car and shot him. Then Hanson killed the old woman. Hanson told White they left the car in a parking lot and could not get it started; he said Hanson asked his friend "Vic" to work on the car.

Id. 743.

Malone similarly testified that during a February 2000 conversation, Hanson admitted that he and Barnes had committed the crimes, but Hanson was mad at Miller's wife for telling on them "so he put 'Vic' in the picture and took Barnes out if it." Id.

It should be noted that the version of events advanced at Miller's trial – with the lone exception of Barnes's testimony – is not inconsistent with the remaining evidence. According to the state's theory, after committing the murders, Miller and Hanson drove Bowles's car to the Oasis Motel in north Tulsa. The clerk at the motel, Sundeep Patel, identified John Hanson as the person who filled out the registration card and rented a room. Tr. (2006) V. VII at 1380.[4] Patel testified that there was another black male with Hanson but he could not identify Miller as being that person. Miller, 98 P.3d at 740. Patel described the second man as larger than Hanson, 6'2" to 6'4" and in excess of 200 pounds. Tr. (2006) V. VII at 1391. At Miller's trial, Patel allowed that the second man may have been as heavy as 240 pounds. Miller, 98 P.3d at 740. Patel's description of the second man is not at all inconsistent with Barnes's description of himself – 6'4" and 210 pounds. Tr. (2001) V. VII at 1367. In fact, Patel's description is far closer to Barnes than the description of Victor

[4] At the time of the resentencing trial, Patel was out of the country. By agreement of the parties he was declared unavailable and his previous testimony was read to the resentencing jury.

Miller appearing in the Department of Corrections' "Offender Lookup" which lists Miller as being 6'0" and 167 pounds. See App. Ex. 3. Thus, while Miller's testimony is not exculpatory as to Mr. Hanson, it certainly serves to place the credibility of Barnes – the *only* person who furnished evidence indicating that Hanson actually shot Bowles – in a much different light.

Significant developments affecting Mr. Hanson's ability to effectively challenge the veracity of the claims made by Rashad Barnes continued to unfold as the date of the resentencing trial approached. On January 5, 2005, just five days before the resentencing trial was to begin, the prosecution faxed defense counsel a transcript of a conversation had between Tulsa homicide detective Mike Nance, and a man named Ahmod Henry. The date of the conversation was August 26, 2003, more than two months after this Court decided Mr. Hanson's direct appeal. In this conversation, Henry told Nance that Henry and Victor Miller were housed together in the Tulsa County jail in 2001. During the interview, Henry described a conversation he had with Miller:

> A: [Henry] Shit, we was just talking about things that happen in the lifetime, and he started telling me something about some robberies, how he was making money out there, saying he did a lot of robberies, and he ... him and his friend was at a motel, and they got busted, and he said he was running around killing people doing [sic] the robbery. He said he killed a bitch. That's all he said, "I killed ... I killed a bitch."
>
> Q: [Nance] O.K. Did he ... was he any more specific about who he killed or ... or ... or ... how he killed her or ... or anything like that?
>
> A: He (inaudible) shot her.

Q: You say he shot her?

A: He killed a bitch.

Q: O.K. Did he tell you who he was with? You said he was with a friend.

A: Yeah, he was with a friend. He never said his friend [sic] name. Whoever the friend was is the one that got caught at the motel with him.

Q: O.K. And is there anymore information that you know about this that ... that I haven't asked you?

A: No, sir.

Q: O.K. So ... so you were in segregation at David L. Moss with him in 2001, and during that time he told you that he was caught in a motel with a friend of his, that they'd been pulling robberies and killing people, and that he'd ... he'd shot and killed a bitch.

A: Yes.

Q: O.K. Well then, it's 1310 hours, and I'll conclude the tape at this time.

O.R. (2006) V. VII at 1258-59.

Thus, had Barnes been available to testify at Mr. Hanson's 2006 resentencing trial, defense counsel would have had two crucial pieces of information to challenge his credibility – neither of which existed at the time of the original trial: 1) testimony indicating that Barnes himself was involved in the murders, and: 2) Henry's account of Miller's confession indicating that Miller, not Hanson, killed Bowles. In what can only be described as a windfall for the prosecution, however, Barnes was not available to present live testimony at the resentencing trial. Barnes had been shot during an altercation outside a north Tulsa bar

and died of his injuries on January 14, 2004. O.R. (2006) V. VIII at 1480; Tr. (2006) V. VI at 1203, 1207.[5]

In lieu of Barnes's live testimony, the state sought to introduce the prior recorded testimony of Barnes from Mr. Hanson's original trial. M.Tr. (January 4, 2006) at 19, 22. Defense counsel objected arguing that in light of newly discovered evidence – Miller's confession to shooting Bowles – the defense did not have a prior opportunity for "meaningful" cross examination of Barnes as envisioned by the Sixth Amendment's Confrontation Clause. Ultimately, defense counsel's objections in this regard were overruled and portions of Barnes's prior testimony were presented to the resentencing jury, see Tr. (2006) V. VII at 1338-76, a decision Mr. Hanson has contended is reversible error on direct appeal. See *Brief of Appellant*, Proposition I at 20-35.

Defense counsel also contended that the newly discovered evidence entitled Mr. Hanson to a new trial, a trial that encompassed the ultimate issue of guilt and innocence. To this end, defense counsel filed an *Application for Post-Conviction Relief* and *Brief in Support of New Trial* in the District Court on January 14, 2005. O.R. (2006) V. VII at 1252-60, 1261-64. Defense counsel asserted that under this Court's Rule 2.1, and Okla. Stat. tit. 22, § 1080(d) and (f)(2001), Ahmod Henry's statement constituted "evidence of material facts, not previously presented and heard, that require vacation of the conviction or sentence

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[5] Assistant District Attorney Bill Musseman stated in a Tulsa World article that an investigation revealed Barnes's shooting was "not related in any way to his testimony in the double murder case." See *Death Won't Affect Resentencing*, Tulsa World, January 20, 2004 at A-9.

in the interests of justice." O.R. (2006) V. VII at 1252; M.Tr. (March 2, 2005) at 2-6. Counsel alleged that the newly discovered evidence was material to the issue of whether Mr. Hanson was guilty of malice aforethought murder, it could not have been discovered with due diligence, it was not cumulative, and it created a reasonable probability that, had it been introduced at trial, it would have changed the outcome. O.R. (2006) V. VII at 1253-54; M.Tr. (March 2, 2005) at 4-5.

The state argued that under the terms of this Court's Order of June 17, 2003, dismissing Mr. Hanson's original post-conviction application, the post-conviction application should be dismissed without prejudice. O.R. (2006) V. VII at 1265-72. The state pointed to the following language in the June 17, 2003 Order:

> On June 9, 2003, Hanson filed an Application for Post-Conviction Relief and a Motion for Evidentiary Hearing. Hanson's Application is mooted by our disposition of his direct appeal and is DISMISSED. Hanson may re-file his Application for Post-Conviction Relief, along with any appropriate accompanying motions, after the resentencing hearing is concluded. At that time Hanson may raise all post-conviction issues allowed under the Post-Conviction Procedure Act, including issues resulting from the guilt-innocence, or conviction, phase of trial as well as those raised in the resentencing hearing.

O.R. (2006) V. VII at 1271.

The state alleged Mr. Hanson could only proceed with any post-conviction challenges to the convictions in Counts I and II after his resentencing hearing was concluded. At that point, the post-conviction claim dealing with Ahmod Henry's statement could be combined

with those from the original dismissed application to form one pleading.[6] According to the state, this would avoid piecemeal post-conviction litigation which was the clear purpose behind this Court's Order. O.R. (2006) V. VII at 1267-68; M.Tr. (March 14, 2005) at 2-3. The state also argued that even though Mr. Hanson's death sentence had been vacated, the case remained a capital case and should be governed by Rule 9.7(A)(2) of this Court's rules, requiring all capital post-conviction applications to be filed in the Court of Criminal Appeals. M.Tr. (March 14, 2005) at 5-6.

The defense responded by arguing that since Mr. Hanson's death penalty conviction was reversed, neither Rule 9.7 of this Court's rules nor Okla.Stat. tit. 22, § 1089 (Supp. 2006) were applicable. Instead, counsel argued, since this evidence was discovered after the decision and mandate of this Court, Okla.Stat. tit. 22, § 1080 (2001) and Rule 2.1 were the applicable provisions governing this post-conviction application. O.R. (2006) V. VII at 1322-25; M.Tr. (March 14, 2005) at 3-6.

At a hearing on March 3, 2005, Judge Caroline Wall commented that from a perspective of judicial economy and efficiency it seemed "ludicrous" to do one trial on sentencing, which was essentially going to be the same trial as would be presented for guilt or innocence, and then have to turn around and do it again from scratch. M.Tr. (March 3, 2005) at 9.

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[6]Curiously, this argument presupposes that Mr. Hanson would be sentenced to death at his resentencing. Had his sentence been something else, the forum for any post-conviction proceeding would be the district court, not this Court.

On March 14, 2005, Judge Wall granted Mr. Hanson's Application for Post-Conviction Relief, ordering a new trial covering both first and second stages. Judge Wall made the following findings of fact and conclusions of law:

1. Pursuant to Rule 2.1.A(4), Rules of the Oklahoma Court of Criminal Appeals and Title 22 O.S. § 1080 et seq., this Court has jurisdiction to hear this matter and to make appropriate orders.

2. Five (5) days before the re-sentencing trial in this case was to have begun, the State found a transcription of a conversation between Detective Mike Nance of the Tulsa Police Department and Ahmod Henry, an inmate at the David Moss Correctional Center. That conversation indicated that Victor Miller, a Co-Defendant of your Petitioner, was the person who actually killed Mary Agnes Bowles. That evidence was exculpatory to the Petitioner.

3. That conversation between Detective Nance and Ahmod Henry occurred on August 26, 2003, after the decision of the Court of Criminal Appeals in Petitioner's case had been rendered and the mandate issued.

4. The evidence was a material fact that had not previously been presented and heard. It could not have been discovered with reasonable diligence by the Petitioner or his lawyer before trial. The evidence is not cumulative. The evidence creates a reasonable probability that, had it been introduced at trial, it would have changed the outcome. The newly discovered evidence entitles the Petitioner to a new trial.

O.R. (2006) V. VII at 1353; M.Tr. (March 14, 2005) at 6-7.

The state asked for a stay of execution of the judgment pending an appeal to this Court which the trial court granted. O.R. (2006) V. VII at 1354-55. The state initiated an appeal, asking this Court to grant extraordinary relief on the basis that Judge Wall had "exercised her judicial officer authority without legal authority to the detriment of the State of Oklahoma." O.R. (2006) V. VII at 1357-58; O.R. (2006) V. VIII at 1375-92.

On April 26, 2005, this Court issued an *Order Consolidating Appeals and Granting Petition for Writ of Prohibition.*[7] The Court found that Judge Wall had no jurisdiction over Mr. Hanson's post-conviction application and vacated Judge Wall's order granting Mr. Hanson a new trial as void. O.R. (2006) V. VIII at 1418-1421.

Defense counsel continued to object at trial, arguing Mr. Hanson was entitled to a new trial on first stage issues. Defense counsel filed a pleading entitled, *Objection to Resentencing Trial for Failure to Afford Defendant Substantial Due Process Guaranteed by the United States and Oklahoma Constitutions.* O.R. (2006) V. VIII at 1440-43. Following jury selection, defense counsel argued:

> I object to this trial going forward as and for the reason that John Hanson is being deprived of due process of laws under the Fifth and Fourteenth Amendments to the Constitution of the United States because of newly discovered evidence that would tend – might tend to exculpate him from the crime of malice murder and give him the right to have a new trial in order to introduction [sic] evidence of and argue for felony murder and appropriate instructions on that issue.

Tr. (2006) V. V at 1112.

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[7]The appeals were consolidated because the state appealed Judge Wall's decision in two separate forms. On April 12, 2005, the state filed the Emergency Application to Assume Original Jurisdiction and Petition for Writ of Prohibition or in the Alternative a Petition for Writ of Mandamus, with a supporting brief, under Case No. PR-2005-350. On the same date, the state filed an appeal from Judge Wall's order sustaining Appellant's Application for Post-Conviction relief, which was filed under the number PCD-2005-351. The Court treated this pleading as a motion for extraordinary writ and consolidated the pleadings in Case No. PCD-2005-351 with the pleadings filed under PR-2005-350. O.R. (2006) V. VIII at 1419.

The trial court, having no real choice in the matter, overruled the objection. Id. at 1115, 1118. Finally, at formal sentencing, defense counsel again objected that Mr. Hanson should have been given a new trial rather than a resentencing hearing. S.Tr. 2.

C. The District Court Had Proper Jurisdiction to Rule on Mr. Hanson's Post-Conviction Application.

Mr. Hanson respectfully asserts that this Court abused its discretion in improvidently granting the state's request for a Writ of Prohibition. Under the plain language of the post-conviction statutes, the district court had jurisdiction to grant Mr. Hanson relief on the basis of this newly discovered evidence. Accordingly, Mr. Hanson's case should be reversed and remanded for a new trial.

The Court of Criminal Appeals is a court of special and limited jurisdiction. It has exclusive appellate jurisdiction in criminal matters and can issue writs only in the exercise or aid of its appellate jurisdiction. See Okla. Stat. tit. 20, § 40 (2001); OKLA. CONST. art. 7, § 4. "The Criminal Court of Appeals was provided for in the State Constitution but was brought into being, ... and perpetuated, ... by the State Legislature." Lawhorn v. Robertson, 1954 OK CR 19, 266 P.2d 1008, 1012. Thus, jurisdiction of the Court of Criminal Appeals exists and can be exercised solely by virtue of statutory authority. State ex. rel. Attorney General v. Davenport, 1927 OK 137, 256 P. 340, 343.

Several statutes govern this Court's appellate jurisdiction. Once an appeal has been perfected in the Court of Criminal Appeals, the trial court is divested of all jurisdiction and has no authority in the case until the Court of Criminal Appeals' mandate has issued,

restoring jurisdiction in the trial court. Dowdy v. Caswell, 2002 OK CR 11, 43 P.3d 412, 413; Crider v. State ex. rel. District Court of Oklahoma County, 2001 OK CR 10, 29 P.3d 577, 578; see also Okla. Stat. tit. 20, § 44 (2001).[8] Okla. Stat. tit. 22, § 1066 (2001), establishes this Court's powers to adjudicate appeals and the procedure for disposition of cases when the Court has issued a ruling. Under Section 1066, this Court may "reverse, affirm or modify the judgment or sentence appealed from, and may, if necessary or proper, order a new trial or resentencing." Id. After affirmance, reversal, or modification, the Court's appellate jurisdiction over the case is at an end, and jurisdiction over the case is transferred back to the trial court to execute the mandate ordered by this Court. In this case, the mandate issued on August 6, 2003, restoring jurisdiction in the trial court. O.R. (2006) V. VI at 1023. Shortly before issuing the mandate, this Court dismissed Mr. Hanson's original post-conviction application, undoubtedly in recognition that this Court had lost jurisdiction when the case was no longer a capital one. O.R. (2006) V. VI at 1020-22.[9]

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[8]Okla. Stat. tit. 20, § 44 (2001) provides that the return of the mandate reimposes jurisdiction in the lower court:

> When the court from which an appeal is taken shall be deprived of jurisdiction of the cause pending such appeal, and when such case shall have been determined by the Criminal Court of Appeals, the mandate of the Criminal Court of Appeals shall be returnable to the court of which jurisdiction has been given over said cause.

[9]In dismissing Mr. Hanson's original post-conviction application this Court stated that the application was "mooted by our disposition of his direct appeal[.]" O.R. (2006) V. VII at 1271. In a technical sense, this is untrue. "Mootness is a state or condition which prevents the appellate court from rendering effective relief." Fent v. Contingency Review Bd., 2007 OK 27, 163 P.3d 512, 526 n.62. That state or condition did not exist at the time the original post-conviction application was dismissed because the application raised first-stage claims that remained viable

When the Ahmod Henry statement was discovered, defense counsel made the logical assumption that the district court had jurisdiction to address Mr. Hanson's claim that he was entitled to a new trial. Counsel filed a post-conviction application under Okla. Stat. tit. 22, § 1080 (d)(2001).[10] This statute was directly on point, providing that it applies to cases in which the person has been "*convicted of, or sentenced for*, a crime" and who claims that "there exists evidence of material facts, not previously presented and heard, that requires vacation of the *conviction or sentence* in the interests of justice." Id. (emphasis added). Section 1080 provides the defendant may file an application "in the court in which the judgment and sentence on conviction was imposed to secure the appropriate relief." Id. Under Section 1080(d), the trial court determined it had jurisdiction to rule on Mr. Hanson's post-conviction application and granted a new trial, finding that Mr. Hanson had met all the above criteria. O.R. (2006) V. VII at 1353.

In issuing a Writ of Prohibition against the trial court, this Court directly contradicted its earlier ruling dismissing Appellant's original post-conviction application for lack of jurisdiction because the death sentence had been vacated. O.R. (2006) V. VI at 1020-22.

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after the direct appeal was decided. See Original *Application for Post-Conviction Relief*, Proposition II at 22 (improper admission of evidence concerning handwriting) & Proposition III at 28 (absence of second degree murder charge).

[10]Under the Post-Conviction Procedure Act, Okla. Stat. tit. 22, § 1080 *et. seq.*, this Court does not have original jurisdiction. An application for post-conviction relief must be filed in the court wherein the conviction was sustained, and a final judgment entered by that court may be appealed to this Court by petition in error filed within thirty (30) days of the entry of that judgment. Quick v. City of Tulsa, 1975 OK CR 220, 542 P.2d 961, 965.

This Court disregarded the fact Mr. Hanson was no longer under a sentence of death, instead determining that as long a death sentence was a possibility, this Court was the only entity with jurisdiction to hear a post-conviction application. This Court stated:

> Hanson has been convicted of first degree murder, and through a Bill of Particulars filed in his case the State is requesting the death penalty. This Court has ordered a resentencing hearing, which may result in imposition of the death penalty. This is a textbook definition of a capital case. As long as Hanson may still receive a death sentence in the course of proceedings ordered by this Court, this case remains a capital case even though Hanson's original death sentence was vacated.

O.R. (2006) V. VIII at 1419.

Citing to Okla. Stat. tit. 22, § 1089 (Supp. 2006), as authority for this ruling, the Court concluded, "As only this Court has jurisdiction over post-conviction applications in capital cases, the District Court of Tulsa County had no jurisdiction to hear or decide a post-conviction application in this case." Id. at 1419-20. Without jurisdiction, the Court found Judge Wall had no authority to enter the order granting a new trial, and the state had no adequate remedy for this unauthorized exercise of power other than a writ of prohibition. Judge Wall's order granting Mr. Hanson a new trial was vacated as void. Id.

This ruling was in direct contravention to the plain language of the statutes providing this Court with its jurisdiction. This Court's appellate jurisdiction to adjudicate capital post-conviction claims is derived solely from Okla. Stat. tit. 22, § 1089 (Supp. 2006). The purpose and scope of capital post-conviction proceedings are strictly limited by this statute. The Court has noted that "[w]ithout the statute, this Court would have no jurisdiction at all in capital post-conviction cases." Le v. State, 1998 OK CR 1, 953 P.2d 52, 54.

Okla. Stat. tit. 22, § 1089(A) sets forth those cases in which this Court may conduct post-conviction review:

> The application for post-conviction relief *of a defendant who is under a sentence of death and whose death sentence has been reviewed by the Court of Criminal Appeals in accordance with the provisions of Section 701.13 of Title 21 of the Oklahoma Statutes, and affirmed,* shall be expedited as provided in this section.

(emphasis added).

Section 1089(D) provides that, "All matters not specifically governed by the provisions of this section shall be subject to the provisions of the Uniform Post-Conviction Procedure Act." This Court has held that provisions of the non-capital portion of the post-conviction procedure act govern in the absence of a specific provision in § 1089. Rojem v. State, 1995 OK CR 1, 888 P.2d 528, 529; Duvall v. State, 1994 OK CR 19, 871 P.2d 1386, 1389.

Further, Section IX of this Court's rules governs appeals in capital cases. Rule 9.1 indicates that this section applies to cases "*in which the death penalty has been imposed.*" (emphasis added). Rule 9.7 specifically governs post-conviction procedures in capital cases. Since Section 1089 of Title 22 and Rule 9.7 of this Court's rules clearly did not apply according to the plain language of both, defense counsel correctly proceeded with filing a post-conviction application in the district court under Okla. Stat. tit. 22, § 1080 (d), which governs in the absence of a specific provision of Section 1089. This Court's decision to grant a Writ of Prohibition was inconsistent with the plain language of these statutes.

This Court has stated that where the language of the statute is plain, it should be followed without further inquiry. If the language is "unambiguous and the meaning clear and unmistakable, there is no room for construction, and no justification exists for interpretive devices to fabricate a different meaning." Barnard v. State, 2005 OK CR 13, 119 P.3d 203, 205-06 (quoting McBrain v. State, 1998 OK CR 261, 764 P.2d 905, 908). Courts must "if possible, construe a statute to give every word some operative effect" and vigorously "resist reading words or elements into the statute that do not appear on its face." Oklahoma City Zoological Trust v. State ex. Rel. Public Employees Relations Bd., 2007 OK 21, 158 P.3d 461, 464 (quoting Bates v. United States, 522 U.S. 23, 29, 118 S.Ct. 285, 139 L.Ed.2d 215 (1997)).

Under Article 7, § 4 of the Oklahoma Constitution, the Court of Criminal Appeals has the power to issue writs of prohibition to prevent an inferior court from usurping or exercising unauthorized jurisdiction. State ex. rel. Henry v. Mahler, 1990 OK 3, 786 P.2d 82, 85; Carder v. Court of Criminal Appeals, 1978 OK 130, 595 P.2d 416, 419. However, as this Court has recognized, a writ of prohibition "should be issued with forbearance and caution and only in cases of necessity, and not in a doubtful case." Woolen v. Coffman, 1984 OK CR 53, 676 P.2d 1375, 1376. "Appellate courts should not interfere by writ of prohibition with the trial of causes where the trial court has jurisdiction of the subject-matter and the person of the defendant." Estes v. Crawford, 1936 OK CR 99, 60 P.2d 798, 800.

The Tulsa County District Court had jurisdiction to rule on Mr. Hanson's post-conviction application and this Court improperly interfered with the proper exercise of that jurisdiction by issuing a Writ of Prohibition ordering Judge Wall to vacate her earlier grant of a new trial. This Court has previously granted relief on a direct appeal claim asserting that the Court's prior ruling on a writ was incorrect. See Davis v. State, 1993 OK CR 3, 845 P.2d 194, 196 (Court denied petition for writ of habeas corpus finding that the trial court did possess jurisdiction to set aside the judgment and sentence. On further review on direct appeal the Court determined the previous order was incorrect.) Likewise, here, this Court should find it improvidently granted the Writ of Prohibition and order a new trial.

D. A Reasonable Probability Existed that the Newly Discovered Evidence Would Have Changed the Outcome at the First Stage of Trial.

The state argued that even if Victor Miller's confession to Ahmod Henry was material evidence that had not been previously heard and could not have been discovered with due diligence prior to trial, there was no reasonable probability that, had the evidence been introduced at trial, it would have changed the outcome.[11] O.R. (2006) V. VIII at 1383- 85) In granting a new trial, the district court disagreed, finding a reasonable probability that the newly discovered evidence would have changed the outcome of the trial had it been presented at Mr. Hanson's first stage. O.R. (2006) V. VII at 1352-53; M.Tr. (March 3,

[11]To constitute grounds for a new trial, newly discovered evidence must be material, could not with due diligence have been discovered prior to trial and create a reasonable probability that the outcome of the trial would have been different had it been introduced. Sellers v. State, 1999 OK CR 6, 973 P.2d 894, 895; Hale v. State, 1991 OK CR 7, 807 P.2d 264, 268.

2005) at 15-16; M.Tr. (March 14, 2005) at 6-7. This Court did not address that factual determination in the order issuing a Writ of Prohibition.

Defense counsel was ultimately permitted to elicit Ahmod Henry's statement concerning Victor Miller's confession on cross-examination of Detective Nance, (to impeach *Nance's* credibility) and was allowed to argue this newly discovered evidence as mitigation. O.R. (2006) V. IX at 1586; Tr. (2006) V. VII at 1490-95. However, this was a resentencing trial and a jury that was required to accept the previous jury's determination of guilt. The presentation, as mitigation evidence, of the fact Victor Miller had confessed to being the actual killer was not an adequate substitute for the opportunity to present this evidence to a jury determining Mr. Hanson's guilt in the first instance.

This Court has reiterated that resentencing proceedings "should not be viewed as a second chance at revisiting the issue of guilt." Rojem v. State, 2006 OK CR 7, 130 P.3d 287, 299. This Court recognized the problems inherent in a resentencing proceeding:

> [R]esentencing proceedings are unique, as the original jurors who personally listened to the first stage testimony and directly reviewed the evidence of guilt/innocence have been replaced with new jurors who are wholly unfamiliar with that evidence. Thus, any lingering doubts that existed are gone, for all intents and purposes.

Id. at 298. On the other hand, "[t]he Supreme Court has recognized that residual doubts may benefit a capital defendant and are therefore appropriately considered as mitigating evidence during the sentencing phase of trial." Gillard v. Mitchell, 445 F.3d 883, 895 (6th Cir. 2006) (citing Lockhart v. McCree, 476 U.S. 162, 181, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986)).

This Court too has "agree[d] that matters of actual innocence are always relevant." Rojem, 130 P.3d at 293.[12] The tension between these ideals radically diminished the utility, and all but eviscerated the force, of the newly discovered evidence at issue here.

Mr. Hanson was deprived of the ability to marshal the new evidence in any meaningful way. Prior to closing arguments, the trial court "admonish[ed] Counsel that regarding intent, that it is not appropriate to argue since the Defendant was convicted by a previous jury." Tr. (2006) V. XI at 1830. Moreover, Mr. Hanson's jury was instructed in accordance with a modified version of OUJI 4-68:

> The defendant in this case has been found guilty by a previous jury, of the offense of murder in the first degree, malice aforethought. It is now your duty to determine the penalty to be imposed for this offense.

O.R. (2006) V. IX at 1576.

The prosecutor repeatedly reminded the jury that Mr. Hanson had already been convicted of malice aforethought murder. Tr. (2006) V. VI at 1169, 1176, 1195; Tr. (2006) V. XI at 1834, 1846. Mr. Hanson's jury was only allowed to consider the newly discovered evidence that Victor Miller had confessed to killing Mary Bowles as it related to Mr. Hanson's culpability for the crime. Id. at 1830.

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[12]In Oregon v. Guzek, 546 U.S. 517, 527, 126 S.Ct. 1226, 1233, 163 L.Ed.2d 1112 (2006), the Court held that a capital defendant has no constitutional right to present new residual doubt evidence at a resentencing trial. Guzek is distinguishable from the instant case, however, because there the defendant did not "claim that the evidence at issue was unavailable at the time of his original trial." Id.

As defense counsel declared, this case essentially boiled down to competing informants, Rashad Barnes and Ahmod Henry. Tr. (2006) V. VI at 1207. This Court has previously expressed grave doubts concerning the reliability and veracity of Rahsad Barnes's testimony. See Miller v. State, 2004 OK CR 29, 98 P.3d 738, 746-48. The trial court found Ahmod Henry's statement reliable and admissible.[13] Particularly since Henry's statement had been obtained by the District Attorney, the trial court found no reason to question whether Henry was simply making up the statement to help the defense.[14] Tr. (2006) V. VI at 1143. The trial court concluded it was important to let the jury hear Henry's statement because:

> it appears that the statement that either one of these individuals could have pulled the trigger and there is no eyewitness, it's – the case is circumstantial and it is quite possible that Victor Miller made that statement and pulled the trigger. I don't know. Certainly if he – based on the behavior regarding the Jerald Thurman murder, it's – that could clearly indicate his ability to pull the

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[13]Over the State's objection, the trial court ruled that Victor Miller's confession to Ahmod Henry met the requirements of Okla. Stat. tit. 21, § 2804(B)(3)(2001) as a "statement against interest." Section 2804(B)(3) also requires if the statement against penal interest is offered by a criminal defendant to exculpate himself, the additional foundational requirement of corroborating circumstances "to clearly indicate the trustworthiness of the statement" must be present. In this regard, the trial court examined the circumstances surrounding the statement and determined it was sufficiently corroborated.

[14]The trial court relied on several factors to establish the trustworthiness of the statement. First, there was nothing to suggest Henry would make up a story to help Hanson since he did not know him. The statement was not elicited by the defense, but rather came through the District Attorney Tim Harris and Detective Nance. In a followup report, the District Attorney's investigator referenced several facts indicating the reliability of Henry's statement, including that Henry picked Miller out of a lineup but was not able to identify Hanson. Tr. (2006) V. VI at 1142-43. Henry also provided factual information regarding the circumstances of the robbery and the murder and the motel. His statement was made prior to Miller's first trial at a time when it was clearly against Miller's interests. Id.

> trigger on the next victim. So I will give it to the jury for whatever weight they determine, if any, that it deserves.

Id. at 1148-49.

Mr. Hanson should have been presenting this evidence to a first stage jury. At the guilt stage the jury must determine whether the defendant possessed the mental state required to commit the murder. Culpability for the acts of another as an aider and abettor requires more than mere presence at the scene of the crime. Sanders/Miller v. Logan, 710 F.2d 645, 651-52 (10th Cir. 1983). Under Oklahoma law, a defendant in a malice murder case must be shown beyond a reasonable doubt, and predicated upon sound evidence, to have "personally intended the death of the victim and aided and abetted with full knowledge of the intent of the perpetrator." Torres v. State, 1998 OK CR 40, 962 P.2d 3, 15-16; Johnson v. State, 1996 OK CR 36, 928 P.2d 309, 315. See also Frazier v. State, 1981 OK CR 13, 624 P.2d 84, 85-86; Anglin v. State, 1950 OK CR 140, 224 P.2d 272, 275.

The second jury was bound by the first jury's determination of Mr. Hanson's level of responsibility. Mr. Hanson had a right to have this determination revisited in light of the new evidence. Evidence Mr. Hanson was not Mary Bowles's actual killer and did not share Mr. Miller's intent to kill her would have been crucial to defend against the element of malice aforethought.

Prior to the resentencing, the trial court recognized Victor Miller's confession to Ahmod Henry changed the entire circumstance of the crime, and for that reason she believed Mr. Hanson was entitled to a new trial. O.R. (2006) V. VII at 1353; M.Tr. (March 14, 2005)

at 6-7) The trial judge again expressed these concerns after the resentencing in the *Capital Felony Report of the Trial Judge*. O.R. (2006) V. IX at 1710-16. There, Judge Wall pointed out the inherent unfairness that Mr. Hanson was not allowed to present the Ahmod Henry evidence to a jury making a determination of his guilt or innocence on the Mary Bowles homicide. In particular, she noted Mr. Hanson's resentencing jury had not been able to give full effect to the evidence because it was not instructed as to the law of aiding and abetting:

> The second jury was not given the responsibility of determining Hanson's guilt in count one. The second jury did not have all of the facts and law incorporated into the second stage. The second jury was not instructed on the law pertaining to the complexities and evaluation of principal/aider and abettor, nor on the confession instructions 9-12, 9-13.

Id. at 1716.

If Mr. Hanson had been granted an entirely new trial, there is a reasonable probability his jury, having had the benefit of instructions on aiding and abetting and the elements of malice murder, would have acquitted him of malice murder. In any event, that same jury would have been able to carry any doubts it may have harbored from the first stage into its sentencing deliberations. As it was, the State effectively undercut any benefit of the Ahmod Henry evidence by arguing the jury had already convicted Mr. Hanson of malice murder so it was not an issue. As Judge Wall noted in her report, both Mr. Hanson's and Mr. Miller's original juries rejected the death penalty on those counts in which the two men were not alleged to be the triggerman:

> It was significant to me that the first juries did in fact appear to weigh each Defendant's individual level of participation when each first jury determined

> punishment. Although both Miller and Hanson were convicted of Malice Murder in count one, only Hanson was sentenced to death on count one, while Miller was sentenced to Life Without Parole.

O.R. (2006) V. IX at 1716.

Judge Wall concluded her report, "to sentence Hanson to death where there was newly discovered evidence (Miller's alleged confession to Ahmad Henry) that was not presented to the trier of fact on the guilt and innocence (first stage) was troubling to me." Id.

Evidence Mr. Hanson was not the shooter of Mary Bowles would have reshaped and significantly weakened the State's case from beginning to end. Mr. Hanson is entitled to be able to present this evidence to a jury, not just for purposes of determining his culpability, but also for purposes of determining his guilt or innocence of malice murder. This Court should find it erroneously granted the Writ of Prohibition and restore the district court's grant of a new trial. The absence of such an order deprives Mr. Hanson of his right to a fundamentally fair trial and to the due process of law guaranteed by the Fifth, Sixth and Fourteenth Amendments to the federal constitution. See Hicks v. Oklahoma, 447 U.S. 343, 346, 100 S.Ct. 2227, 65 L.Ed.2d 1175 (1980).

PROPOSITION TWO

THE ABSENCE OF ANY ASSURANCE THAT THE JURY UNANIMOUSLY AGREED ON THE SAME "PREDICATE CRIME" TO SUPPORT THE "AVOID ARREST" AGGRAVATING CIRCUMSTANCE RENDERS THE FINDING OF THE CIRCUMSTANCE INVALID.

A. Standard of Review.

Ultimately, this proposition of error challenges the sufficiency of the evidence offered in support of the "avoid arrest" aggravating circumstance. As such, the applicable standard of review is found in Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), and "the relevant question is whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt." See Washington v. State, 1999 OK CR 22, 989 P.2d 960, 974 (applying Jackson standard to sufficiency claims involving aggravating circumstances).

B. Argument.

One of the aggravating circumstances alleged by the state and found to exist by the resentencing jury was that the murder of Ms. Bowles was "committed for the purpose of avoiding or preventing a lawful arrest or prosecution." O.R. (2006) V. I at 108; O.R. (2006) V. IX at 1563; Tr. V. X at 1921. This Court has determined that the "avoid arrest" aggravating circumstance has two components: 1) the state must establish that the defendant committed some "predicate crime" separate from the murder, and; 2) the state must establish

that the defendant killed the victim with the intent to avoid arrest or prosecution for the separate predicate crime. Alverson v. State, 1999 OK CR 21, 983 P.2d 498, 520; LaFevers v. State, 1995 OK CR 26, 897 P.2d 292, 311. The state has the burden of establishing the existence of each component beyond a reasonable doubt. See Ring v. Arizona, 536 U.S. 584, 602, 122 S.Ct. 2428, 153 L.Ed.2d (2002) (holding that a capital jury must make any factual determination bearing on capital punishment beyond a reasonable doubt); O.R. (2006) V. IX at 1582. Finally, the jury must be unanimous in its findings. OUJI CR 2d 4-76; O.R. (2006) V. IX at 1583.

Prior to trial, the state filed a *Notice of Evidence in Support of Aggravating Circumstances* in which it asserted the presence of no less than three predicate crimes supported the avoid arrest aggravating circumstance. O.R. (2006) V. II at 340. The state alleged that Bowles was killed to prevent arrest or prosecution for the robbery and theft of her car. Id. at 343. Additionally the state claimed that Bowles was killed to prevent arrest or prosecution for Thurman's murder. Id. Finally, the state contended that Bowles was killed to prevent arrest or prosecution for the crime of possessing a firearm after former felony convictions. Id. at 344.

The prosecution, by relying on more than one predicate crime, created a situation where the jury was not required to unanimously agree on the existence of the *same* predicate crime. While it is true that the Supreme Court has not imposed a jury unanimity requirement on the state courts, see Johnson v. Louisiana, 406 U.S. 356, 362, 92 S.Ct. 1620, 32 L.Ed.2d

152 (1972), it is equally true that the Supreme Court has held that when the state guarantees a structural protection, as Oklahoma has done with respect to jury unanimity and aggravating circumstances, it violates the Due Process Clause of the federal constitution if it fails meaningfully to vindicate that guarantee. Evitts v. Lucey, 469 U.S. 387, 400-01, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

This Court has held, in an arguably analogous context, that the absence of guaranteed jury unanimity is not objectionable where multiple theories of guilt have been advanced, so long as the state's evidence is sufficient to support the finding of each theory beyond a reasonable doubt. See e.g. Primeaux v. State, 2004 OK CR 16, 88 P.3d 893, 909; Phillips v. State, 1982 OK CR 29, 641 P.2d 556, 559. Here, however, a predicate crime identified by the state lacks evidentiary support.

Mr. Hanson contends that there is insufficient evidence to allow the jury to find that Bowles was killed to prevent the arrest or prosecution for the independent crime(s) of robbery and/or car theft. In fact the only evidence presented to the jury in this regard is contrary to the state's theory. Barnes's testimony, recounting the alleged confession of Mr. Hanson, indicates that it was Mr. Hanson's intent to "let her out" on the back road. Tr. V. VII at 1347. There is simply no evidence allowing the jury to conclude – beyond a reasonable doubt – that Bowles was killed to prevent arrest or prosecution for the carjacking. Because one or more members of the jury may have found the presence of the avoid arrest

aggravating circumstance on the basis of a theory that lacks evidentiary support, the Court should find the circumstance invalid.

C. This is a Cognizable Post-Conviction Claim.

Mr. Hanson recognizes that pursuant to 22 O.S. § 1089(C)(1) and (2), the only issues that may be raised in a capital post-conviction application are those that "were not and could not have been raised in a direct appeal" and "support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent." Under 22 O.S. § 1089(D)(4)(b), a ground could not have been previously raised if:

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

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

The Supreme Court has determined that an ineffective assistance of counsel claim has two components: a defendant must show that trial counsel's performance was deficient, and that the deficiency prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). To establish deficient performance, a petitioner must demonstrate that trial counsel's representation "fell below an objective standard of

reasonableness." Id. at 688, 104 S.Ct. at 2064. The Court has declined to articulate specific guidelines for appropriate attorney conduct and instead has emphasized "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Id. For counsel's inadequate performance to constitute a Sixth Amendment violation, the defendant must show that counsel's failures prejudiced his defense. Id. at 692, 104 S.Ct. at 2067. To establish such prejudice a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. at 2068.

Concerning appellate counsel, the Tenth Circuit in Cargle v. Mullin, 317 F.3d 1196 (2003), stated:

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

> for deficient performance is more complicated, requiring an assessment of the issue relative to the rest of the appeal, and deferential consideration must be given to any professional judgment involved in its omission; of course, if the issue is meritless, its omission will not constitute deficient performance.

Id. at 1202-03 (footnote omitted).

The review of an appellate counsel ineffectiveness claim is further complicated where, as here, the direct appeal is still pending. Nevertheless, it is respectfully contended that appellate counsel for Mr. Hanson were ineffective for failing to raise the claim concerning the absence of jury unanimity. Thus, the Court is asked to reach the merits of the claim and find the avoid arrest aggravating circumstance invalid. Furthermore, in light of the strength of the mitigating circumstances presented at trial, see O.R. (2006) V. IX at 1586, the Court should find the balance of the mitigating circumstances versus the remaining aggravating factors such that death is an inappropriate penalty. See McGregor v. State, 1994 OK CR 71, 885 P.2d 1366, 1385-86 (independent reweighing of aggravating and mitigating circumstances where one of several aggravating circumstances has been invalidated is implicit to [this Court's] statutory duty to determine the factual substantiation of a verdict and validity of a death sentence'). The error in this regard has deprived Mr. Hanson of due process, a fair and reliable sentencing determination and the right to the effictive assistance of counsel as guaranteed by the Fifth, Sixth, Eight and Fourteenth Amendments of the federal constitution.

PROPOSITION THREE

MR. HANSON SHOULD BE AFFORDED POST-CONVICTION RELIEF DUE TO THE CUMULATIVE IMPACT OF ERRORS IDENTIFIED IN THIS APPLICATION AND IN HIS DIRECT APPEAL BRIEF.

In United States v. Rivera, 900 F.2d 1462, 1469 (10th Cir. 1990), the Court again recognized that the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. See Walker v. Engle, 703 F.2d 959, 963 (6th Cir. 1983). A valid death sentence must be free of any passion, prejudice or arbitrary factors that taint the reliability of the outcome. The decision to impose the death sentence must reflect a reasoned moral judgment as to the defendant's actions and character in light of the offense and the defendant's background. Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

Failure to adhere to these constitutional mandates at every stage of the capital sentencing and review process creates a risk that a death sentence will be based on considerations that are constitutionally impermissible and irrelevant to the offender and the crime. To maintain the integrity of the criminal justice system and public confidence in the reliability of its results, it is of vital importance that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice or emotion. Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

> The penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or

> two. Because of the qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1977).

According to the Tenth Circuit

> [c]umulative error analysis is an extension of harmless error, see Rivera, 900 F.2d at 1469, and [the court should] conduct the same inquiry as for individual error, id. at 1470, focusing on the underlying fairness of the trial, id. at 1469 (quoting Van Arsdall, 475 U.S. at 681; see also United States v. Wood, 207 F.3d 1222, 1237 (10th Cir. 2000). [T]he cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. Hooper, 314 F.3d at 1178; (quoting Duckett v. Mullin, 306 F.3d 982, 992 (10th Cir. 2002); see also Rivera, 900 F.2d at 1469. As in assessing harmlessness of individual errors, therefore, this court evaluate[s] whether cumulative errors were harmless by determining whether a criminal defendant's substantial rights were affected. Moore v. Reynolds, 153 F.3d 1086, 1113 (10th Cir. 1998). A cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless. Unless an aggregate harmless determination can be made, collective error will mandate reversal, just as surely as will individual error that cannot be considered harmless. Rivera, 900 F.2d at 1470; see Duckett, 306 F.3d at 992; Willingham, 296 F.3d at 935.

Darks v. Mullin, 323 F.3d 1001, 1018 (10th Cir. 2003) (internal quotations omitted); see also United States v. Toles, 297 F.3d 959, 972 (10th Cir. 2002). The Tenth Circuit further stated in Cargle v. Mullin, 317 F.3d 1196, 1200 (2003)

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

> constitutional assessment. Finally, we conclude that prejudice from guilt-phase error may be cumulated with prejudice from penalty-phase error.

This holding was reiterated in Darks, 323 F.3d at 1018: "In assessing cumulative error, only first stage errors are relevant to the conviction, but all errors are relevant to the sentence." Therefore, even though each instance of error alone would not require reversal, some or all errors combined may warrant reversal, or modification of the sentence.

The errors identified on direct appeal and in this application denied Mr. Hanson substantial statutory and constitutional rights. His death sentence was obtained in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the Federal Constitution and Article 2, Sections 7, 9 and 20 of the Oklahoma Constitution. Mr. Hanson should, therefore, be granted a new trial, or in the alternative, his sentences of death should be modified to life imprisonment or life imprisonment without parole.

PRAYER FOR RELIEF

For the foregoing reasons, Mr. Hanson respectfully requests that the Court enter an order vacating the convictions and sentence of death, remand for a new trial, or impose a sentence of life imprisonment or life imprisonment without the possibility of parole.

Respectfully submitted,

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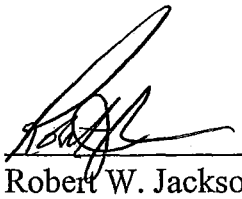
VERIFICATION OF COUNSEL

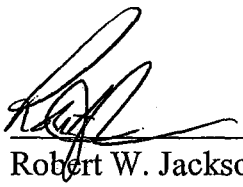
I, Robert W. Jackson, OBA # 14754, state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.



Robert W. Jackson

CERTIFICATE OF SERVICE

I certify that a copy of this Application for Post-Conviction Relief – Death Penalty was served Attorney General of the State of Oklahoma by depositing a copy of the same with the Clerk of this Court in the date it was filed.



Robert W. Jackson

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

JOHN FITZGERALD HANSON, *Petitioner,* *-vs-* **THE STATE OF OKLAHOMA,** *Respondent.*	**Tulsa County District Court** **Case No. CF-1999-4583** PCD 2011-58 **Court of Criminal Appeals** **Direct Appeal Case No.** **D-2006-126** **Post Conviction Case No.** **PCD-2011-**

SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF - DEATH PENALTY -

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January 26, 2011

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

JOHN FITZGERALD HANSON,	**Tulsa County District Court Case No. CF-1999-4583**
Petitioner,	
-vs-	**Court of Criminal Appeals Direct Appeal Case No. D-2006-126**
THE STATE OF OKLAHOMA,	
Respondent.	**Post Conviction Case No. PCD-2011-**

SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF
- DEATH PENALTY -

PART A: PROCEDURAL HISTORY

Petitioner, John Fitzgerald Hanson, through counsel, submits his second application for post-conviction relief pursuant Section 1089 of Title 22.

Mr. Hanson's "original" application followed a resentencing hearing and was filed on June 30, 2008. See Case No. PCD-2006-614. A prior application for post-conviction was filed on Mr. Hanson's behalf in Case No. PCD-2002-628 on June 9, 2003. The 2003 application was dismissed following this Court's direct appeal opinion in Case No. D-2001-717 which, *inter alia,* vacated Mr. Hanson's penalty of death and authorized a new sentencing hearing. See Hanson v. State, 2003 OK CR 12, 72 P.3d 40.

The sentence from which relief is sought is: Death.

1. (a) Court in which sentence was rendered: District Court of Tulsa County, Oklahoma

(b) Case Number: CF-1999-4583

(c) Court of Criminal Appeals: Direct Appeal Case Numbers: D-2006-126 (following resentencing); D-2001-717 (following original trial).

2. Formal sentencing, following the resentencing hearing, occurred on February 7, 2006. Mr. Hanson was originally sentenced on June 8, 2001.

3. Upon resentencing, Mr. Hanson received a sentence of death for one count of first degree murder. (Count One of the Information). Additionally, he received a sentence of life imprisonment without the possibility of parole for a separate count of first degree felony murder. (Count Two of the Information). The judgment and sentence imposed on Count Two was previously affirmed by this Court.

4. The Honorable Caroline E. Wall, Associate District Judge, presided over the resentencing proceedings. The Honorable Linda G. Morrissey, District Judge, presided over the original trial.

5. Mr. Hanson is currently incarcerated at the United States Penitentiary, Pollock, Louisiana where he is serving a federal sentence of life + 84 years. In January 2000, following a jury trial in the United States District Court for the Northern District of Oklahoma, Mr. Hanson was convicted of multiple crimes along with co-defendant Victor Miller ranging from conspiracy to bank robbery. On July 26, 2001, in an unpublished Order issued in Case No. 00-5149, the United States Court of Appeals for the Tenth Circuit affirmed the convictions and sentences. Mr. Hanson has no other criminal matters pending in any other courts.

I. Capital Offense Information

6. Mr. Hanson was convicted of the following crime for which a sentence of death was imposed: One Count of First Degree Malice Aforethought (and/or Felony) Murder in violation of Oklahoma Statute, Title 21, Section 701.7.

With regard to each of the two counts of first degree murder, the state alleged the following statutory aggravating circumstances:

A. The defendant was previously convicted of a felony involving the use or threat of violence to the person;

B. The defendant knowingly created a great risk of death to more than one person;

C. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and

D. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

O.R. 108; See 21 O.S. § 701.12 (1), (2), (5) and (7), respectively.

As to Count One, the count for which the death penalty was imposed, the resentencing jury found the presence of the "prior violent felony," "risk of death to more than one person" and the "avoid arrest" aggravating factors. O.R. 1563. As to Count Two, the original jury found the presence of the "prior violent felony" and "continuing threat" aggravating factors but declined to impose the death penalty. O.R. 543, 548.

The following mitigating factors were provided to the resentencing jury:

1. The defendant's emotional history;

2. The defendant's family history;

3. The defendant's life history while incarcerated;

4. The defendant has an eleven year old son;

5. The defendant has never taken another person's life;

6. No direct evidence other than Rashad Barnes has been presented that the defendant ever pulled the trigger on any gun the day that Mrs. Bowles was killed;

7. Direct evidence has been presented that Victor Miller was the person who shot Mrs. Bowles and not the defendant;

8. The defendant is presently serving a life sentence in federal prison;

9. A sentence of life without parole is a significant punishment;

10. The defendant was dominated by Victor Miller; and

11. The defendant was a follower.

Instruction No. 23, O.R. 1586.

Victim impact testimony was not presented at the resentencing trial.

7. The finding of guilt was made after a plea of not guilty.

8. The finding of guilt was made by a jury.

9. The sentences imposed were recommended by the jury.

II. Non-Capital Offense Information

10. The original jury convicted Mr. Hanson of first degree felony murder (Count Two of the Information) for which he was sentenced to a term of life imprisonment without the possibility of parole. O.R. 548 This conviction and sentence was affirmed by this Court. Hanson v. State, 2003 OK CR 12, 72 P.3d 40.

11. The finding of guilt was made after a plea of not guilty.

12. The sentence imposed was recommended by the jury.

III. Case Information

13. Trial Counsel:

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Claremore, Oklahoma 74017

Co-Counsel:

Mr. Steven M. Hightower
2 West Sixth Street

Tulsa, Oklahoma 74119

14. Counsel were appointed by the court.[1]

15. Following the resentencing hearing and the imposition of the death sentence, Mr. Hanson appealed. The Brief in Chief was filed on August 28, 2007. The Response Brief was filed on December 26, 2007. A Reply Brief was filed on January 15, 2008. Oral argument was held on October 21, 2008. The death sentence was affirmed on April 13, 2009. Hanson v. State, 2009 OK CR 13, 206 P.3d 1020. Mr. Hanson petitioned for rehearing on May 1, 2009, which was denied by this Court on May 22, 2009.

16. Appellate Counsel:

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17. Mr. Hanson's sentence of Death was affirmed by this Court despite its striking of the "great risk of death" aggravating circumstance. Hanson v. State, 2009 OK CR 13, 206 P.3d 1020.

18. Mr. Hanson sought further review by filing a Petition for Writ of Certiorari in the United States Supreme Court, which was denied on December 7, 2009. Hanson v. Oklahoma, 130 S.Ct. 808, 175 L.Ed.2d 568.

Mr. Hanson submitted to this Court an Original Application for Post Conviction Relief on June 30, 2008, which was denied via an unpublished opinion on June 2, 2009.[2] See Case No. PCD-2006-614. Mr. Hanson raised the following legal propositions in that application:

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[1] Mr. Hanson remains indigent and there have been no changes in his financial condition since the District Court's determination of indigency which is attached hereto pursuant Rule 9.7(A)(3)(h), *Rules of the Oklahoma Court of Criminal Appeals*. Att. 13.

[2] Pursuant Rule 9.7(A)(3)(d), *Rules of the Oklahoma Court of Criminal Appeals*, Mr. Hanson's Original Post Conviction Application is provided in the Appendix to this application as Attachment 1.

PROPOSITION ONE: EVIDENCE DISCOVERED AFTER MR. HANSON'S ORIGINAL TRIAL AND PRIOR TO THE RESENTENCING HEARING ENTITLES HIM TO A NEW PROCEEDING ENCOMPASSING BOTH THE ISSUES OF GUILT/INNOCENCE AND PUNISHMENT.

PROPOSITION TWO: THE ABSENCE OF ANY ASSURANCE THAT THE JURY UNANIMOUSLY AGREED ON THE SAME "PREDICATE CRIME" TO SUPPORT THE "AVOID ARREST" AGGRAVATING CIRCUMSTANCE RENDERS THE FINDING OF THE CIRCUMSTANCE INVALID.

PROPOSITION THREE: MR. HANSON SHOULD BE AFFORDED RELIEF DUE TO THE CUMULATIVE IMPACT OF ERRORS IDENTIFIED IN THIS APPLICATION AND IN HIS DIRECT APPEAL BRIEF.

On December 6, 2010 Mr. Hanson filed a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Oklahoma. Hanson v. Sherrod, et. al., Case No. 10-CV-113. The Federal District Court has not ruled in the matter. The following grounds for relief were raised in Mr. Hanson's habeas petition:

GROUND ONE

MR. HANSON WAS DENIED AN ADEQUATE OPPORTUNITY TO CONFRONT THE WITNESSES AGAINST HIM BY THE TRIAL COURT'S ADMISSION OF THE TESTIMONIAL HEARSAY OF RASHAD BARNES

GROUND TWO

MR. HANSON'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED BY THE OKLAHOMA COURT OF CRIMINAL APPEALS' REVERSAL OF THE DISTRICT COURT'S GRANT OF A NEW TRIAL ON THE BASIS OF NEWLY DISCOVERED EVIDENCE

GROUND THREE

MR. HANSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND ON APPEAL THEREBY VIOLATING HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

GROUND FOUR

MR. HANSON'S TRIAL WAS RIFE WITH PROSECUTORIAL MISCONDUCT SUCH THAT HE WAS DENIED A FAIR TRIAL AND A RELIABLE SENTENCE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

GROUND FIVE

INVALIDATION OF THE GREAT RISK OF DEATH AGGRAVATING CIRCUMSTANCE REQUIRED INVALIDATION OF THE DEATH SENTENCE

GROUND SIX

ERRORS INVOLVING THE "MURDER TO AVOID LAWFUL ARREST OR PROSECUTION" AGGRAVATING CIRCUMSTANCE VIOLATED MR. HANSON'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

GROUND SEVEN

THE STATE'S FAILURE TO ALLEGE WITH SPECIFICITY THE PREDICATE CRIME FOR WHICH MARY BOWLES' MURDER WAS COMMITTED IN ORDER TO AVOID ARREST OR PROSECUTION VIOLATED MR. HANSON'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

GROUND EIGHT

THE DEFINITION OF MITIGATING CIRCUMSTANCES CONTAINED IN OKLAHOMA'S UNIFORM JURY INSTRUCTIONS IMPERMISSIBLY LIMITS CONSIDERATION OF MITIGATION EVIDENCE, AND MOREOVER THE PROSECUTORS IN THIS CASE EXPLOITED THE INSTRUCTION IMPROPERLY TO DEADEN OR ELIMINATE THE JURY'S CONSIDERATION OF IMPORTANT MITIGATION EVIDENCE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

GROUND NINE

THE CUMULATIVE EFFECT OF ERRORS AT BOTH PHASES OF TRIAL DEPRIVED MR. HANSON OF HIS CONSTITUTIONAL

RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

PART B: GROUNDS FOR RELIEF

19. A motion for discovery has not been filed with this application.

20. A Motion for Evidentiary Hearing has been filed with this application.

21. Other motions have preceded the filing of this application:

An entry of appearance was filed by Mr. Robert S. Jackson, Assistant Federal Public Defender, on January 26, 2011.[3]

22. Propositions raised:

PROPOSITION ONE: MR. HANSON RECEIVED THE INEFFECTIVE ASSISTANCE OF TRIAL, APPELLATE, AND POST-CONVICTION COUNSEL FOR THEIR FAILURES TO INVESTIGATE AND/OR PRESENT LEGAL PROPOSITIONS REGARDING HIS MENTAL ILLNESS AND COGNITIVE DYSFUNCTION

PART C: FACTS

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

CITATIONS TO THE RECORD

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[3] Pursuant the United States Supreme Court's ruling in Harbison v. Bell, 556 U.S. __, 129 S.Ct. 1481, 1487 n. 7, 173 L.Ed.2d 347 (2009) and 18 U.S.C. § 3599(e), undersigned counsel sought and received authorization from the Honorable Claire Egan, Chief United States District Judge for the Northern District of Oklahoma, to file Mr. Hanson's instant Application for Post Conviction Relief. See Order, Case No. 10-CV-113 (N.D. Okla. Dec. 13, 2010) (authorizing federal court-appointed counsel to represent Mr. Hanson in these proceedings).

Consistent with Rule 9.7(D)(1)(a), the record and transcripts in this case will be cited using the following abbreviations:

"O.R. ___":	the consecutively paginated 9 volume original record in Tulsa County District Court Case No. CF-1999-4583 encompasses both the original 2001 trial and 2006 resentencing proceedings;
"TR. ___":	the consecutively paginated transcripts of the resentencing proceedings held from January 9, 2006 through January 24, 2006 and consisting of eleven volumes;
"M.Tr. (date) at ___":	the date and page number of various motion hearings and status conferences held in conjunction with the proceedings; and
"S.Tr. at ___":	the transcript of the sentencing hearing held on February 7, 2006.

Any additional record in this post-conviction proceeding, not otherwise referenced above, consists of the "record on appeal" as defined by Rule 1.13(f), and is considered to be incorporated herein by operation of that Rule. References to the *Appendix of Attachments* in support of this application for post-conviction relief will indicate their attachment number, e.g., "Att. 1."

STATEMENT OF THE CASE

Mr. Hanson was charged by information in the District Court of Tulsa County with the murders of Mary Bowles and Jerald Thurman. Mr. Hanson was charged jointly with co-defendant Victor Miller. The two counts were charged alternatively as malice aforethought or felony murder. O.R. 53-58; 95-101. Mr. Hanson and co-defendant Miller's cases were

severed for trial. The Honorable Linda G. Morrissey, District Judge, presided over Mr. Hanson's original trial, which was held from May 7 through 23, 2001. Mr. Hanson was convicted of both counts. O.R. 523, 524, 525. In Count I, Mr. Hanson was sentenced to death for the malice aforethought murder of Mary Bowles.[4] O.R. 544. Also, with respect to Count I, the jury found the following aggravating factors: (1) Mr. Hanson was previously convicted of a felony involving use or threat of force; (2) that there existed a probability that Mr. Hanson would pose a continuing threat to society; and (3) that Mr. Hanson knowingly created a great risk of death to more than one person. O.R. 542. In Count II, Mr. Hanson was sentenced to life without the possibility of parole for the felony murder of Jerald Thurman. O.R. 548. Despite finding Mr. Thurman's death was aggravated by two factors, prior violent felony convictions and continuing threat, the jury still imposed a non-death sentence. O.R. 544.

This Court affirmed Mr. Hanson's conviction and sentence for Count II; however, while affirming his conviction on Count I, this Court reversed the death sentence and remanded for a new sentencing trial. See Hanson v. State, 2003 OK CR 12, 72 P.3d 40. Mr. Hanson's death sentence was reversed for a host of reasons, including, *inter alia,* trial court error in excluding expert witness testimony; trial court error in not allowing the defense to

[4] Mr. Hanson's jury was given specific verdict forms with respect to each count and each theory of murder. As for Count I, the jury found Mr. Hanson guilty of both malice murder and felony murder. O.R. 523, 525. In this circumstance, the conviction is construed as being for malice murder. Alverson v. State, 1999 OK CR 21, 983 P.2d 498, 521.

voir dire jurors on whether death penalty would be automatically imposed; trial court error in not removing a juror for cause; failure to instruct the jury on the continuing threat aggravating circumstance; trial court refusal to instruct the jury on Mr. Hanson's proffered list of mitigating circumstances; and admission of improper victim impact evidence. Id.

At the time of reversal of his death sentence, Mr. Hanson was engaged in state collateral proceedings and had a pending Application for Post-Conviction relief on file with this Court. This application was dismissed as being *mooted* by the Court's disposition of the direct appeal case. O.R. 1270-71, Order, No. PCD-02-628 (June 17, 2003).

Just before the re-sentencing was set to begin, the State disclosed new evidence that co-defendant Miller had confessed to shooting victim Mary Bowles. In response to the new evidence, trial counsel filed an *Application for Post Conviction Relief* and *Brief in Support of New Trial*, which resulted in Mr. Hanson being granted a new trial. O.R. 1252-64, 1352-53. The State appealed and moved for a Writ of Prohibition against the trial court's grant of a new trial, which this Court granted by vacating the trial court's order as void for lack of jurisdiction. O.R. 1418-20. The trial court then commenced the re-sentencing hearing, and Mr. Hanson was sentenced to death on Count I. O.R. 1560. The re-sentencing jury found the existence of the following aggravating factors: (1) Mr. Hanson was previously convicted of a violent felony; (2) Mr. Hanson created a great risk of death to more than one person; and (3) the murder was committed for purpose of avoiding arrest or prosecution. O.R. 1563.

Mr. Hanson appealed his death sentence. This Court struck the jury's finding of the great risk of death aggravating circumstance but, however, affirmed his sentence. See Hanson v. State, 2009 OK CR 13, 206 P.3d 1020. Mr. Hanson then sought certiorari in the United States Supreme Court, which was denied. Hanson v. Oklahoma, 130 S.Ct. 808, 175 L.Ed.2d 568 (Dec. 7, 2009) (cert. denied).

Mr. Hanson additionally sought collateral relief by filing an Application for Post Conviction Relief, which this court denied in an unpublished opinion. Hanson v. State, No. PCD-2006-614 (June 2, 2009).

Mr. Hanson is currently pursuing relief via the filing of his Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Oklahoma on December 6, 2010. Case No. 10-CV-113 (pending).

STATEMENT OF THE FACTS

On Tuesday, August 31, 1999 at 3:51 p.m., Mary Bowles left her job as a volunteer at St. Francis Hospital in Tulsa, Oklahoma. TR. 1244. Ms. Bowles was last observed by another hospital worker, Lucille Neville, at approximately 4:10 or 4:15 p.m. on a freeway service road as Ms. Bowles was presumably driving home. TR. 1233. Ms. Bowles kept a regular routine and would often get exercise by walking inside the Promenade Mall in the evenings after going home from work. TR. 1238-39.

On August 31, 1999, Jerald Thurman placed a cell phone call at 5:50 p.m. to his nephew and employee James Moseby.[5] TR. 1261. Mr. Thurman owned and operated a trucking business that would deliver dirt from his dirt pit in Owasso, Oklahoma. TR. 1260. Mr. Thurman called his nephew to report that a vehicle was inside the dirt pit. TR. 1261. Mr. Moseby arrived at the dirt pit about 10 minutes after the phone conversation and observed Mr. Thurman to be unconscious having sustained multiple gunshot wounds. TR. 1262, 1268. Mr. Thurman never regained consciousness and died 14 days later. O.R. 1272. James Lavendusky lived across the road from the entrance to Mr. Thurman's dirt pit. TR. 1249. At about 5:45 p.m. while working outside on his boat, Mr. Lavendusky heard gunshots coming from the dirt pit and then observed a dark grey or silver car exiting the dirt pit. TR. 1250, 1253.

On September 7, 1999, Tim Hayhurst was driving down "Peanut Road," which is not far from Mr. Thurman's dirt pit, and observed what he thought to be a person along the side of the road. TR. 1279-81. Mr. Hayhurst reported the body to the Owasso Police Department. TR. 1281. The body was identified as Mary Bowles. TR. 1298. Ms. Bowles' body was in an advanced state of decomposition and the cause of death was determined to be multiple gunshot wounds. TR. 1565-66, 1585.

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[5] Mr. Moseby's name is improperly spelled as "Moseley" in the trial transcripts. See TR. 1259.

The State's theory of the case was predicated upon the testimony of Rashad Barnes. Barnes testified at Mr. Hanson's first trial; however, by the time of Mr. Hanson's re-sentencing, Barnes had been killed in an unrelated incident. See 2001 TR. Vol VII, 1153-87. Barnes' 2001 trial testimony was read into the record at the re-sentencing trial via a question and answer format. TR. 1338-76. According to Barnes, sometime in late August or early September 1999, Mr. Hanson showed up in Barnes' yard acting nervous and talking about how something went "bad." TR. 1342, 1346. Mr. Hanson allegedly told Barnes how he and co-defendant Victor Miller had carjacked a lady at Promenade Mall; drove her out to North Tulsa to let her out, but were confronted by Jerald Thurman, whom co-defendant Miller shot; after which Miller instructed Mr. Hanson that "You know what you have to do;" and Miller drove a short distance from the dirt pit where Mr. Hanson shot Mary Bowles. TR. 1347-50. Barnes further testified he was told that Mr. Hanson and co-defendant Miller then drove Bowles' car to the Oasis Motel where it broke down. TR. 1350. Bowles' vehicle was later recovered from that motel by police. TR. 1381, 1388. The parties stipulated that Mr. Hanson had checked into the Oasis Motel between 6:05 and 6:30 p.m. on August 31, 1999. TR. 1483, 1485. Mr. Hanson's fingerprint was found on the driver's seatbelt latch of Ms. Bowles' vehicle. TR. 1486-87, 1595-96.

Mr. Hanson and co-defendant Miller were apprehended at the Econolodge Hotel in Muskogee, Oklahoma on September 9, 1999. TR. 1443. Phyllis Miller, the wife of co-defendant Miller, had called authorities and reported that Mr. Hanson and co-defendant

Miller had robbed a credit union on September 8 and were at the Econolodge. TR 1426. Co-defendant Miller was no stranger to criminal activity having been previously convicted of murder in 1982. TR. 1832. The Federal Bureau of Investigation, the Tulsa Police Department, and the Muskogee Police Department all converged on the hotel and eventually arrested co-defendant Miller and Mr. Hanson. TR. 1430-33, 1434, 1443. Guns consistent with those used in the murders of Jerald Thurman and Mary Bowles, a five-shot .38 caliber revolver and a 9 millimeter semiautomatic pistol, were found inside of the Muskogee hotel room. TR. 1451-54, 1462, 1594-95.

Specific facts pertaining to the ground for relief raised in this Application will be discussed as necessary.

PART D: PROPOSITIONS, ARGUMENTS, AND AUTHORITIES

PROPOSITION ONE

MR. HANSON RECEIVED THE INEFFECTIVE ASSISTANCE OF TRIAL, APPELLATE, AND POST-CONVICTION COUNSEL FOR THEIR FAILURES TO INVESTIGATE AND/OR PRESENT LEGAL PROPOSITIONS REGARDING HIS MENTAL ILLNESS AND COGNITIVE DYSFUNCTION.

Mr. Hanson suffers from multiple mental illnesses and brain dysfunction; however, his jury was never able to weigh any of these factors in mitigation because of the ineffective assistance of trial counsel, direct appeal counsel, and post-conviction counsel. Under the bi-pronged Strickland v. Washington analysis, prior counsels' performance was both professionally unreasonable and prejudicial. 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsels' failures to raise these issues were not reasonable or strategic. Mr. Hanson's Constitutional rights under the Sixth and Eighth Amendments as incorporated against the states through the Fourteenth Amendment have been violated.

This pleading's posture as a successive application does not constrain the Court's ability to grant relief. This Court maintains the power to grant post-conviction relief any time "an error complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." Valdez v. State, 2002 OK CR 20, 46 P.3d 703, 710-11; see also 20 O.S., § 3001.1. The rule announced in Valdez is not an anomaly. This court has consistently followed similar rationale when addressing successive post conviction applications. Malicoat v. State, 2006 OK CR 25, 137 P.3d 1234; Torres v

State, 2005 OK CR 17, 120 P.3d 1184; Slaughter v. State, 2005 OK CR 6, 108 P.3d 1052; McCarty v. State, 2005 OK CR 10, 114 P.3d 1089; Brown v. State, Case No. PCD-2002-781 (unpub., attached hereto at Att. 3).

Mr. Hanson has been diagnosed with four types of major mental illness and a personality disorder: Dysthymia, Major Depressive Disorder, Post Traumatic Stress Disorder, Cognitive (brain) Disorder, and Paranoid Personality Disorder, respectively. Att. 4, pp. 1, 10-11, Psychiatric Evaluation Conduced by Dr. Donna Schwartz-Watts; Att. 5, Curriculum Vitae of Dr. Schwartz-Watts. Dr. Schwartz-Watts diagnoses are compelling mitigation evidence that could have been presented at the time of re-sentencing if appropriate experts had been consulted. Id. at pp. 7, 14. A psychiatrist such as Dr. Watts could have explained to Mr. Hanson's jury how he is genetically predisposed to developing mental illness, and how:

> Mr. Hanson was suffering from depression at the time of his offenses. He was homeless and had no social supports. Persons with depression can be irritable, impulsive, and use poor judgment. His cognitive [brain] disorder was also present at the time of his offense and would have contributed to his impulsivity and poor judgment.

Id. at pp. 1, 11, 14. Mr. Hanson has also recently received a neuropsychological evaluation. See Atts. 11, 12, Affidavit and Curriculum Vitae of Dr. Tora Brawley, Ph.D., respectively.

Dr. Brawley, a licensed neuropsychologist, confirms Dr. Schwartz-Watts diagnosis of cognitive disorder, opines that at the time of resentencing there were red flags indicative of brain damage, and that "Mr. Hanson should have undergone more thorough

neuropsychological and neurological evaluations at that time." Att. 11, ¶¶ 9, 10, 12. Through her battery of neuropsychological tests, Dr. Brawley was also able to ascertain that "Mr. Hanson suffers from multiple areas of focal neuropsychological deficits." Id. at ¶ 5. Importantly, Mr. Hanson exhibits deficits correlating with the frontal lobe region of his brain. Id. at ¶ 7. These deficits are significant and inherently mitigating, because "individuals with frontal lobe dysfunction can often exhibit symptoms/behaviors of poor judgment, impulsivity, poor planning ability, inability to fully consider consequences of behavior, disinhibition and deficits in reasoning ability." Id. This is just the sort of information that could have persuaded Mr. Hanson's jury to spare his life.

In addition to Dr. Schwartz-Watts and Dr. Brawley, long-time friend and roommate Tremaine Wright confirms Mr. Hanson's conditions including depression:

> John got really depressed. He would talk about suicide and how he felt no one cared about him. John slept a lot, sometimes for two days straight. I can remember him getting up, going to the bathroom, taking a shower, then going right back to sleep.

Att. 6, ¶ 9, Affidavit of Tremaine Wright. Mr. Wright also observed Mr. Hanson's chronic headaches which are signs of cognitive dysfunction. Id. at ¶ 11; Att. 4, p. 13. Despite the availability of powerful mitigating material, from both experts and lay witnesses, that could have humanized Mr. Hanson and reduced his level of culpability in the eyes of the jury, it was not presented at his re-sentencing.

The United States Supreme Court has recognized time and again the importance and necessity of adequate investigation and presentation of mitigating evidence in capital cases.

See Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 689, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); see also Romano v. Gibson, 239 F.3d 1156, 1180 (10th Cir. 2001). Likewise, the Supreme Court has held that capital trial counsel is expected to thoroughly investigate and present a mitigation case. Williams v. Taylor, 529 U.S. 362, 396-99, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (holding trial counsel's failure to present and explain all of the available mitigating evidence constituted deficient performance); Wiggins v. Smith, 539 U.S. 510, 527-34, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2005) (determining trial attorney rendered ineffective assistance where he had conducted some investigation, but not a thorough and adequate mitigation investigation); Rompilla v. Beard, 545 U.S. 374, 383-93, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (finding deficient performance where defense counsel failed to review prosecutor's file that would have led to discovery of sources of significant mitigation); Porter v. McCollum, 558 U.S. __, 130 S.Ct. 447, 452-53, 175 L.Ed.2d 398 (2009) (reversing death sentence where penalty phase counsel failed to investigate character and background of defendant); Sears v. Upton, 561 U.S. __, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010) (holding defendant prejudiced as result of facially inadequate mitigation investigation).

Trial counsel was ineffective for failing to conduct an adequate mental health investigation. While Dr. Jeanne Russell Ed.D. was retained for the limited purpose of rebutting the continuing threat aggravating circumstance alleged by the State, her services did not obviate the need for additional mental health investigation. In fact, Dr. Russell's

Social History - Risk Assessment report completed on December 31, 2004, raised multiple red flags that trial counsel should have noticed. See Att. 7, Report of Dr. Jeanne Russell. Dr. Russell's report was filled with strong indicators of mental health disorders:

> . . . [Mr. Hanson] has difficulty staying on tasks with circumstantial speech. Mr. Hanson's content of thought focuses on global problems rather than those of immediate concern such as his case. He spends a good deal of time testing this examiner to ensure she understands his concerns and point of view in relation to the world. ***He is guarded and acknowledges he trusts no one, believing most people mean him harm or fail to understand the world as it really is.***
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> . . . ***At the very least he exhibits paranoid thoughts which impair his ability to trust anyone.*** He denies homicidal or suicidal ideation and there is no evidence of hallucinations. ***Judgment and insight are poor*** as evidenced by his unwillingness or difficulty in focusing on his defense in this case.
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> * * *
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> ***He endorsed a number of extreme and bizarre thoughts, suggesting the presence of delusions and/or hallucination.*** He apparently believes that ***he has special mystical powers or a special "mission" in life*** that others do not understand or accept.
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> * * *
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> ***Mr. Hanson recalls feeling depressed and wanting to die for several years following his father's death.*** The Wards believe he was mistreated emotionally by his father and his paternal grandmother as they believe his older brother was clearly favored.
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> * * *
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> . . . These results suggest he has the ability to use his intellectual reasoning to problem solve ***unless impaired by psychological problems.*** Psychological testing suggests he is experiencing low morale and a depressed mood. It further suggests he feels estranged and alienated from people and is suspicious of the actions of others.

> It is important to note that Mr. Hanson has not been previously diagnosed with a mental illness nor does he believe he suffers from any such illness. ***This cannot be ruled out at this time*** and if present does not rise to the level of impairing his ability to appreciate the serious nature of his charge or to work with his attorney in mounting a defense.

Att. 7, pp. 5, 6, 10, 11 (emphasis added). Trial counsel failed to recognize the above red flags. Att. 8, Affidavit of Jack E. Gordon, Jr., ¶ 5.

After receiving Dr. Russell's report, Mr. Gordon did not pursue "additional testing or retain another expert to conduct a general psychological/psychiatric examination or a neuropsychological examination." Id. at ¶ 6. Further, Mr. Gordon had no strategic reason for not conducting additional mental health investigation. Id. Mr. Gordon recognizes the significance of presenting mental health evidence as part of a mitigation case and would have certainly presented such evidence to Mr. Hanson's jury had he conducted an adequate investigation. Id. at ¶¶ 7, 8.

Appellate counsel was ineffective for failing to recognize trial counsel's ineffectiveness and ultimately failing to raise an appropriate claim in Mr. Hanson's direct appeal proceedings. Attorney Jamie D. Pybas prepared both of Mr. Hanson's direct appeals. Att. 9, ¶ 1, Affidavit of Jamie D. Pybas. Ms. Pybas considered retaining a neuropsychologist to examine Mr. Hanson during the course of preparing his appeal in *Hanson I.* Id. at ¶ 2.

The process for retaining experts at the Oklahoma Indigent Defense System ("OIDS") is somewhat complex and likely contributed to counsels' failures to ever retain an appropriate professional or otherwise adequately investigate Mr. Hanson's mental health issues. See Id.

at ¶¶ 3-8. While preparing the appeal in *Hanson I*, Attorney Pybas consulted OIDS in-house Head of Psychological Services, Kathy LaFortune, Ph.D. Ms. LaFortune declined to approve the use of a neuropsychologist in Mr. Hanson's case. Id. at ¶ 6. Ms. LaFortune's negative recommendation was based upon a "screening" examination of Mr. Hanson, which she conducted prior to his 2001 trial at the request of trial attorney, Jack Gordon. Id. at ¶¶ 3, 6.

Because Ms. LaFortune was involved in Mr. Hanson's case at both the trial and direct appeal levels, Mr. Hanson did not have independent appellate counsel who was in a position to raise a trial counsel ineffectiveness claim for not investigating and presenting this strong mental health evidence. Functionally, with respect to this issue, Mr. Hanson's trial and appellate counsel were the same. The Supreme Court, the Tenth Circuit Court of Appeals, and this Court have recognized the practical and conflict problems created when trial and appeal counsel are not independent. See Kimmelman v. Morrison, 477 U.S. 365 (1986); Cannon v. Mullin, 383 F.3d 1152, 1173 (10th Cir. 2004); English v. Cody, 146 F.3d 1257 (10th Cir. 1998); Davis v. State, 2005 OK CR 21, 123 P.3d 243, 245-46. Here, Attorney Pybas did not have the ability to independently evaluate trial counsel's performance because of OIDS's procedures for retaining professional experts where she had to consult the same "screening" psychologist that had previously advised trial counsel.

An intervening event occurred prior to Attorney Pybas preparing the appeal in *Hanson II*; Dr. Russell prepared her *Social History - Risk Assessment* report, which contained the numerous red flags, discussed above, indicating significant mental illness and brain

dysfunction. Att. 7. Trial Attorney Gordon failed to catch these red flags and then Attorney Pybas was stymied from conducting an adequate mental health investigation because of her previous experiences in this case. Attorney Pybas relates, "after pursuing the issue in *Hanson I*, I did not again request to retain a neuropsychologist in *Hanson II* after already being denied on one occasion." Att. 9, ¶ 8. Numerous difficulties plague the expert retention process at OIDS:

> In my experience, a negative recommendation from Psychological Services [Kathy LaFortune] generally results in an attorney dropping their Request for Professional Services. . . . ***I am unaware of any attorney at OIDS successfully disputing a negative recommendation from Ms. LaFortune.***
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> * * *
>
> The process of retaining an expert has traditionally been one of the most frustrating parts of my job. In fact, during the tenure of the past Executive Director, ***I am aware of attorneys being terminated from employment with OIDS due in part to disputes over the retention of professional experts.***

Att. 9, at ¶¶ 4-5 (emphasis added). Given her prior experiences with the retention of experts, Attorney Pybas was implicitly prevented from conducting an adequate investigation and/or retaining an appropriate mental health professional while preparing the appeal in *Hanson II.* See Cuyler v. Sullivan, 446 U.S. 335, 342-45, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

Post-conviction counsel[6] was ineffective for failing to raise an appellate and trial ineffectiveness proposition relating to the inadequate mental health investigation in Mr.

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[6] Original Post-Conviction Counsel, Robert W. Jackson, and undersigned counsel, Robert S. Jackson are unrelated; their sharing of similar names is merely a coincidence.

Hanson's Application for Post-Conviction Relief. This Court has held that the statutory right to post-conviction counsel in capital cases carries with it a requirement that post-conviction counsel perform effectively. Hale v. State, 1997 OK CR 16, 934 P.2d 1100; See also 22 O.S. § 1356. Hale recognized the unfairness in providing a lawyer, but not requiring that lawyer to be effective. This holding provides a Due Process interests in effective post-conviction counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2237, 65 L.Ed 2d 175 (1980); Hatch v. Oklahoma, 58 F.3d 1447, 1460 (10th Cir 1995). In Hale, this Court held that a claim of ineffective assistance of post-conviction counsel was cognizable on a second post-conviction application since this was the "first available opportunity" for the petitioner to raise such a claim. Hale at 1102. Similarly, this Court should not bar Mr. Hanson's request to review the claims contained herein, because he was denied effective assistance of post-conviction counsel.

Post-conviction counsel should have been able to independently evaluate trial and appellate counsels' performance. However, he relied on the work his colleagues below instead of conducting his own investigation of Mr. Hanson's psychological impairments. See Att. 10, Affidavit of Robert W. Jackson (Nov. 17, 2010). Post-Conviction Counsel's "thought process was that previous defense teams had already investigated those issues." Id. at ¶ 4. This was a costly misperception for Mr. Hanson because an adequate investigation of his mental impairments, including retention of appropriate professionals, was never conducted by trial or appellate counsel. While a "doctor" had been involved in the case, Dr.

Russell's work was specifically limited to rebutting the continuing threat aggravating circumstance. Additional professionals were necessary to assess Mr. Hanson's mental health issues. See Att. 10 at ¶ 6. Mr. Hanson has been prejudiced as result of post-conviction counsel's failure to investigate his mental health and raise a related legal proposition with this Court. In effect, Mr. Hanson was represented by the same law firm on direct appeal and post-conviction, and because of Ms. LaFortune, the taint extended back to trial as well. See Anderson v. Sirmons, 476 F.3d 1131, 1140-41(10th Cir. 2007). Counsels' ineffectiveness and the conflict considerations have prevented Mr. Hanson from previously presenting these legal claims in a prior application for post conviction relief.

Prior counsels' investigations were Constitutionally deficient. Had Mr. Hanson's jury been given the opportunity to consider his significant mental illnesses and cognitive impairment, there is a reasonable probability he would not have been sentenced to death. Alternatively had a related claim been raised during direct appeal or original post conviction, there is a reasonable probability the outcome of those proceedings would have been different. Petitioner respectfully requests this Court grant him appropriate relief, either a new sentencing hearing at which he may present the powerful mitigating evidence discussed above or modification of his sentence to life with or without the possibility of parole.

Even if this Court does not agree that prior counsels' shortcomings necessitate the granting of relief, those errors considered in the aggregate with other errors that occurred during the course of these proceedings render Mr. Hanson's sentence Constitutionally

suspect. The purpose of cumulative error analysis is to evaluate the aggregate effect of individually harmless errors. Cargle v. Mullin, 317 F.3d 1196, 1206-07 (10th Cir. 2003); see also DeRosa v. State, 2004 OK CR 19, 89 P.3d 1124, 1157; Hanson v. State, 2003 OK CR 12, 72 P.3d 40, 55. While non-errors do not count in the cumulative analysis, error plus whatever form of prejudice or harm associated with that particular error obviously need not be established for a violation to count in cumulation. Where error plus prejudice is present in the case of an individual error, relief would be warranted for that error alone. Cargle, 317 F.3d at 1207. The Tenth Circuit has explained the "cumulative-error analysis merely aggregates all the errors [] found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." Hamilton v. Mullin, 436 F.3d 1181, 1196, (10th Cir. 2006) (quoting Workman v. Mullin, 342 F.3d 1100, 1116 (10th Cir. 2003)). The cumulative error analysis may be applied to such legally diverse claims as ineffective assistance of counsel and prosecutorial misconduct claims. Cargle, 317 F.3d at 1206-07.

Here, to name a few, are some of the errors that could have at a minimum cumulated to deprive Mr. Hanson of his Constitutional guarantees to a fair trial and reliable sentencing hearing: trial counsel's deficient performance during both the first and second stage; denial of an adequate opportunity to confront the State's key witness when the trial court admitted testimonial hearsay; the jury's consideration of an aggravating circumstance later invalidated by this Court; lack of sufficient evidence to support the jury's finding beyond a reasonable

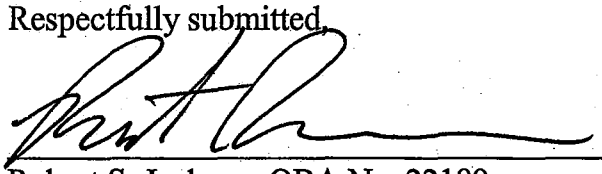
doubt that the murder was committed for the purpose of avoiding lawful arrest or prosecution; Oklahoma's jury instruction limits consideration of mitigation evidence by the jury; and prosecutorial misconduct.

If this Court finds none of the errors set forth in this Application, when considered individually, necessitates the granting of relief, then the cumulative effect of all the errors occurring below deprived Mr. Hanson of his Constitutional rights to a fair trial and reliable sentence.

PRAYER FOR RELIEF

For the foregoing reasons, Mr. Hanson respectfully requests that the Court enter an order vacating his sentence of death, remand for a new sentencing hearing, or impose a sentence of life imprisonment or life imprisonment without the possibility of parole.

Respectfully submitted,



Robert S. Jackson, OBA No. 22189
ASSISTANT FEDERAL PUBLIC DEFENDER
CAPITAL HABEAS UNIT
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Oklahoma City, OK 73102
(405) 609-5975
(405) 609-5976 (facsimile)
COUNSEL FOR JOHN HANSON

VERIFICATION

State of Oklahoma)
) ss:
County of Oklahoma)

Robert S. Jackson, being first duly sworn upon oath, states he signed the above pleading as attorney for JOHN HANSON and that the statements therein are true to the best of his knowledge, information, and belief.

Subscribed and sworn to before me this 26th day of January, 2011.

CATHY CONLEY NOTARY #01009749 EXP. 06/11/13 PUBLIC STATE OF OKLAHOMA

Cathy Conley
Notary Public

Commission Number: 01009749

My commission expires: 6/11/13

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2011, a true and correct copy of the foregoing Second Application for Post Conviction Relief along with a separately bound Appendix of Exhibits were delivered to the clerk of the court for delivery to the Office of the Attorney General pursuant Rule 1.9 (B), Rules of the Court of Criminal Appeals.

Robert S. Jackson

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

JOHN FITZGERALD HANSON,	**Tulsa County District Court**
Petitioner,	**Case No. CF-1999-4583**
-vs-	**Court of Criminal Appeals**
THE STATE OF OKLAHOMA,	**Direct Appeal Case No. D-2006-126**
Respondent.	**Court of Criminal Appeals Prior Post-Conviction Case Nos. PCD-2002-628; PCD-2006-614; PCD-2011-58**
	Successive Post-Conviction Case No.:

SUCCESSIVE APPLICATION FOR POST-CONVICTION RELIEF -- DEATH PENALTY -

PART A: PROCEDURAL HISTORY

Petitioner, John Fitzgerald Hanson, through undersigned counsel, submits this successive application for post-conviction relief pursuant section 1089 of Title 22. This is the fourth application for post-conviction relief to be filed.[1]

The sentences from which relief is sought are: Death Sentence and Life Sentence.

1. a. Court in which sentence was rendered: Tulsa County District Court

   b. Case Number: CF-1999-4583

2. Date of resentencing: February 7, 2006 (originally sentenced June 8, 2001)

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[1] Pursuant Rule 9.7(A)(3)(d), attached hereto are copies of Mr. Hanson's prior applications in Case Nos. PCD-2002-628; PCD-2006-614; and PCD-2011-58. *See* Attachment ("Att.") 12, Appendix ("App.") at 48; Att. 13, App. at 95; and Att. 14, App. at 145, respectively. Mr. Hanson remains indigent. *See* Att. 15, App. at 176 (certified determination of trial indigency) and Att. 16, App. at 184 (determination of federal court indigency). Mr. Hanson is represented in this matter by undersigned counsel, Sarah Jernigan, Meghan LeFrancois, Patti Palmer Ghezzi, and Michael Lieberman, appearing with permission of the United States District Court for the Northern District of Oklahoma in *Hanson v. Sherrod, et al.*, CIV-10-113, Dkt. 56, Order, entered Aug. 27, 2020.

3. Terms of Sentence: Mr. Hanson received a sentence of death for one count of first-degree murder (Count I) and a sentence of life without the possibility of parole for a separate count of first degree felony murder (Count II).

4. Name of Presiding Judge: Honorable Caroline E. Wall (resentencing); Honorable Linda G. Morrissey (original trial)

5. Is Petitioner currently in custody? Yes (X) No ( )

Where? United States Penitentiary, Pollock, Louisiana

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

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

Petitioner is serving a federal sentence of life plus 984 years for multiple crimes ranging from conspiracy to bank robbery, Case No. CR-99-125-C, United States District Court for the Northern District of Oklahoma. He is currently in the custody of the United States Penitentiary in Pollock, Louisiana.

I. CAPITAL OFFENSE INFORMATION

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

a. Murder in the First Degree in violation of 21 O.S. 2011, § 701.7.

Aggravating circumstances alleged:

a. The defendant was previously convicted of a felony involving the use or threat of violence to the person;

b. The defendant knowingly created a great risk of death to more than one person;

c. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and

d. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

Aggravating circumstances found:

a. The defendant was previously convicted of a felony involving the use or threat of violence to the person;

b. The defendant knowingly created a great risk of death to more than one person;

c. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution.

Mitigating factors listed in jury instructions:

a. The defendant's emotional history;

b. The defendant's family history;

c. The defendant's life history while incarcerated;

d. The defendant has an eleven-year-old son;

e. The defendant has never taken another person's life;

f. No direct evidence other than Rashad Barnes has been presented that the defendant ever pulled the trigger on any gun the day that Mrs. Bowles was killed;

g. Direct evidence has been presented that Victor Miller was the person who shot Mrs. Bowles and not the defendant;

h. The defendant is currently serving a life sentence in federal prison;

i. A sentence of life without parole is a significant punishment;

j. The defendant was dominated by Victor Miller; and

k. The defendant was a follower.

Victim impact testimony was not presented at the resentencing trial.

7. The finding of guilt was made after a plea of not guilty.

8. The finding of guilt was made by a jury.

9. The sentences imposed were recommended by the jury.

II. NON-CAPITAL OFFENSE INFORMATION

10. Mr. Hanson was also convicted of one count (Count II) of first-degree felony murder. He received a sentence of life without parole.

11. The finding of guilt was made after a plea of not guilty.

12. The sentence imposed was recommended by the jury.

III. CASE INFORMATION

13. Trial Counsel:

Jack Gordon (original trial and resentencing)
111 S. Muskogee
Claremore, Oklahoma 74017

Steven M. Hightower (co-counsel resentencing)
2 West Sixth St.
Tulsa, Oklahoma 74119

Eric Stall (co-counsel original trial)
1924 S. Utica
Tulsa, Oklahoma 74104

14. Counsel were appointed by the court.

15. Mr. Hanson's death sentence was vacated and a resentencing was authorized in *Hanson v. State*, 2003 OK CR 12, 72 P.3d 40. After being resentenced to death, Mr. Hanson appealed to the OCCA. The death sentence was affirmed on April 13, 2009. *Hanson v. State*, 2009 OK CR 13, 206 P.3d 1020.

16. Appellate Counsel:

James H. Lockard (original appeal)
Jamie D. Pybas (original and resentencing appeal)
Kathleen M. Smith (resentencing appeal)
Capital Direct Appeals Division
Oklahoma Indigent Defense System
P.O. Box 926
Norman, Oklahoma 73070-0926

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

If "yes," give citations if published:
Hanson v. State, 2003 OK CR 12, 72 P.3d 40 (original appeal)
Hanson v. State, 2009 OK CR 13, 206 P.3d 1020 (resentencing appeal)

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

Hanson v. State, Case No. PCD-2002-628, Order Dismissing Application for Post-Conviction Relief as mooted by resolution of first direct appeal (June 17, 2003) (unpub).

Hanson v. Oklahoma, 130 S. Ct. 808 (Dec. 7, 2009) (certiorari denial from resentencing direct appeal).

Hanson v. State, Case No.: PCD-2006-614, Order Denying Application for Post-Conviction Relief (June 2, 2009) (unpub).

Hanson v. State, Case No.: PCD-2011-58, Order Denying Application for Post-Conviction Relief (March 22, 2011) (unpub).

Hanson v. Sherrod, Case No. 10-CV-113-CVE-TLW (N.D. Okla. July 1, 2013) (unpub) (denying federal habeas relief).

Hanson v. Sherrod, 797 F.3d 810 (10th Cir. Aug. 13, 2015) (denying federal habeas relief).

Hanson v. Sherrod, 136 S. Ct. 2013 (May 16, 2016) (certiorari denied).

PART B: GROUNDS FOR RELIEF

19. Has a Motion for Discovery been filed with this application? Yes ( ) No (X)

20. Has a Motion for Evidentiary Hearing been filed with this application? Yes (X) No ()

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

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

PROPOSITION

McGirt v. Oklahoma Confirms Oklahoma Did Not Have Jurisdiction to Prosecute, Convict, and Sentence Mr. Hanson for Murders that Occurred Within the Boundaries of the Cherokee Nation Reservation.

A. The Legal Basis for Mr. Hanson's Subsequent Application for Post-Conviction Relief Was Unavailable Until _McGirt_ and _Murphy_ Became Final.

B. Subject-Matter Jurisdiction Can Be Raised at Any Time.

C. Crimes by Indians Within Cherokee Nation Reservation Boundaries Are Subject to Federal Jurisdiction Under the Major Crimes Act.

D. _McGirt_ Controls Reservation Status of the Cherokee Nation and Federal Criminal Jurisdiction.

E. Indian Country Includes All Fee Lands Within Cherokee Reservation Boundaries.

F. The Cherokee Reservation Was Established by Treaty, and Its Boundaries Have Been Altered Only by Express Cessions in 1866 and 1891.

1. **The Creek Reservation Was Established by Treaty.**
2. **The Cherokee Treaties Contain Same or Similar Provisions as Creek Treaties.**
3. **Special Terminology Is Not Required to Establish a Reservation, and Tribal Fee Ownership Is Not Inconsistent with Reservation Status.**
4. **The Cherokee Reservation Has Been Diminished Only by Express Cessions of Portions of the Reservation in Its 1866 Treaty and Its 1891 Agreement.**

G. Congress Has Not Disestablished the Cherokee Reservation.

1. **Only Congress Can Disestablish a Reservation by Explicit Language for the Present and Total Surrender of All Tribal Interests in the Affected Lands.**
2. **Allotment of Cherokee Land Did Not Disestablish the Cherokee Reservation.**
3. **Allotment Era Statutes Intruding on Cherokee Nation's Right to Self-Governance Did Not Disestablish the Reservation.**

4. The Events Surrounding the Enactment of Cherokee Allotment Legislation and Later Demographic Evidence Cannot, and Did Not, Result in Reservation Disestablishment.

PART C: FACTS

Petitioner's request for post-conviction relief presents the sole issue of whether Oklahoma, had jurisdiction to prosecute, convict, and sentence Mr. Hanson to death and life without parole for the murders that occurred within the boundaries of the Cherokee reservation – boundaries that have not been disestablished by Congress. Facts that relate to the offense have limited value regarding the jurisdictional issue and will only be addressed briefly.

FACTS RELATING TO THE OFFENSE

On August 31, 1999, Mr. Jerald Thurman was found unconscious and dying, having sustained gunshot wounds. Tr. VI 1262, 1268, 1272.[2] He later died at the hospital, never having gained consciousness. One week later, Ms. Mary Bowles's body was found, close to where Mr. Thurman had been shot, alongside a neighboring road. She too died from gunshot wounds. Tr. VIII 1565, 1585. Victor Miller and John Hanson were charged with the murders of both of the victims.

Though originally charged jointly, Mr. Hanson and Victor Miller's cases were eventually severed. Victor Miller was sentenced to death for the murder of Jerald Thurman. The jury imposed a non-death sentence against Mr. Hanson for Mr. Thurman's murder. However, Mr. Hanson was sentenced to death for the murder of Mary Bowles.

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[2] References to the trial transcript will be by volume ("Tr. Vol._"). Additional supporting documents are cited to as attachments ("Att."), provided in the separately bound and sequentially numbered appendix ("App.").

FACTS RELATING TO THE CHEROKEE NATION AND INDIAN COUNTRY JURISDICTION

Cherokee Nation is a federally recognized Indian tribe. It is one of five tribes that are often treated as a group for purposes of federal legislation (Cherokee, Muscogee (Creek), Choctaw, Chickasaw, and Seminole Nations, historically referred to as the "Five Civilized Tribes" or "Five Tribes"). The Cherokee Reservation boundaries encompass lands in a fourteen-county area, including all of Adair, Cherokee, Craig, Nowata, and Washington Counties and portions of Delaware, Mayes, McIntosh, Muskogee, Ottawa, Rogers, Sequoyah, Tulsa, and Wagoner Counties, within the borders of the State of Oklahoma.[3] The Nation's government, headquartered in Tahlequah, consists of executive, legislative, and judicial branches, including an active district and appellate court.[4] The Cherokee Nation provides law enforcement through its Marshal Service, and maintains cross-deputization agreements with state, county, and city law enforcement agencies to ensure protection of citizens and non-citizens.[5]

Cherokee Nation maintains a significant and continuous presence in the Cherokee Reservation. There are approximately 139,000 Cherokee citizens residing within the reservation. The Nation provides extensive services to communities throughout the reservation, including,

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[3] The following interactive link can be used to determine if a specific address is located on the Cherokee Reservation: http://geodata.cherokee.org/CherokeeNation/ (user directions are displayed on the upper-right corner of the screen; ensure Adobe Flash Player version 11.1.0 or greater is installed) (last visited August 3, 2020).

[4] *See* "*Rising Together, 2018 Annual Report to the Cherokee People*" (FY 2018 Rep.) and "*Popular Annual Financial Report for FY 2019, Cherokee Nation*" (FY 2019 Rep.). These reports are available at https://www.cherokee.org/media/lufhr5rp/fy2018-annual-report-_final-online.pdf; https://www.cherokee.org/media/gaahnswb/pafr-fy19-final-v-2.pdf (last visited August 3, 2020).

[5] *See* Attachment ("Att.") 1, Appendix ("App.") at 1 (Cherokee Nation Cross-Deputization Agreements (1992-2019).

among others: health and medical centers, veteran's center, employment, housing, bus transit, waterlines, sewers, water treatment, bridge and road construction, parks, food distribution, child support services, child welfare, youth shelter, victim services, donations to public schools and local fire departments, and charitable contributions. The Nation's activities, including its business operations, resulted in a statewide $2.17 billion favorable economic impact in 2019.[6]

The homicides occurred a short distance away from each other in the vicinity of a dirt pit outside of Owasso, Oklahoma. Tr. VII 1100, 1108, 1127. Both occurred on fee land within the Cherokee Nation Reservation. Att. 17, App. at 188-191. Mr. Hanson is an Indian with 1/32 Creek blood with the Muscogee (Creek) Nation ("MCN"), a federally-recognized tribe, and is eligible for enrollment as a citizen of the same. He is currently awaiting official, approved documentation of his enrollment as a citizen of the MCN; the documentation is expected to be produced by the MCN within the next thirty (30) days. Att. 18, App. at 193 (Affidavit of Brandi Harris). Mr. Hanson has blood-relatives who are recognized as Indians and enrolled as MCN citizens. Specifically, Mr. Hanson's paternal great-grandmother is Lilia Taylor Quapaw Hanson. Under Dawes Census Card No. 1147 (Creek by Blood), Lilia Taylor Quapaw Hanson was enrolled with Dawes Roll No. 3709. Att. 18, App. at 196. Mr. Hanson's father, Elmer Hanson, and Elmer's full biological sister, Flossie Arnita Hanson, are the grandchildren of Lilia Taylor Quapaw Hanson, as established in Okmulgee County Probate Case No. 7394. Att. 18, App. at 197. Elmer's sister, Flossie Arnita Hanson, is an enrolled citizen of the MCN, Roll No. 46137, as is her daughter, Donna Joe Hatcher, Roll No. 46213, and her daughter's children. Mr. Hanson's full biological

[6] *See* FY 2018 Rep. and FY 2019 Rep., *supra* n.1; *see also* Att. 2, App. at 4 (Cherokee Nation Service Area Maps).

sister, Charmyn Denise Clariett (Hanson), is also an enrolled citizen of the MCN with 1/32 degree Creek blood and Roll No. 76869. Att. 18, App. at 200-202.

There are also historical facts relevant in determining whether Oklahoma had jurisdiction to prosecute, convict, and sentence Mr. Hanson on the Cherokee Nation Reservation. These historical facts are discussed below in part D and documented in the attachments, which are incorporated herein by reference. *See* Atts. 1-18, App. at 1-202.

PART D: ARGUMENTS AND AUTHORITIES

PROPOSITION

McGirt v. Oklahoma Confirms Oklahoma Did Not Have Jurisdiction to Prosecute, Convict, and Sentence Mr. Hanson for Murders that Occurred Within the Boundaries of the Cherokee Nation Reservation.

The direct holding in *McGirt* is elegantly simple. The Government promised the Muscogee (Creek) Nation (MCN) a reservation in present-day Oklahoma. Only Congress can break such a promise and only by using explicit language that provides for the "'present and total surrender of tribal interests' in the affected lands." *McGirt v. Oklahoma*, 140 S. Ct 2452, 2464 (2020). Congress never, in any of the laws Oklahoma relied on, used "anything like" such language. *Id.* Therefore, the MCN reservation is intact; Oklahoma has no criminal jurisdiction over Mr. McGirt, a Seminole, whose crimes occurred within the boundaries of the MCN reservation. *McGirt* also established a methodical analysis of what standard courts must apply in determining whether any given reservation has been diminished or disestablished by Congress. *See Oneida v. Village of Hobart*, 968 F.3d 664 (7th Cir. 2020) ("We read *McGirt* as adjusting the *Solem* framework to place a greater focus on statutory text, making it even more difficult to establish the requisite congressional intent to disestablish or diminish a reservation.").

A. The Legal Basis for Mr. Hanson's Subsequent Application for Post-Conviction Relief Was Unavailable until *McGirt* and *Murphy* Became Final.

Mr. Hanson recognizes Rule 9.7(G), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (200) and Okla. Stat. tit. 22, § 1089(D) typically apply to the filing and review of subsequent applications for post-conviction relief in capital cases. Under § 1089(D)(9) the legal basis for this application – does Oklahoma have subject-matter jurisdiction to prosecute Mr. Hanson and sentence him to life without parole and death – was unavailable until mandates issued in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) *(McGirt)* and *Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam) (*Murphy*). The Supreme Court issued the mandate in *McGirt* on August 10, 2020, and the Tenth Circuit issued the judgment in *Murphy* on August 26, 2020. Both *Murphy* and *McGirt* are final decisions upon which Mr. Hanson may file a subsequent Application for Post-Conviction Relief. This Court recognizes this *McGirt/Murphy* issues fall "under the parameters of section 1089(D)" and thus the issue here is properly before this Court. *See Goode v. State*, PCD-2020-530, Order Remanding for Evidentiary Hearing, Aug. 24, 2020, at 3.

Petitioner requests this Court decide the federal claim on the merits and grant Mr. Hanson relief, dismiss the cases, and vacate the convictions and sentences. By faithfully applying *McGirt* and *Murphy*, this Court will be convinced the Cherokee Nation Reservation is intact and Oklahoma had no jurisdiction to try, convict, and sentence Mr. Hanson.

B. Subject-Matter Jurisdiction Can Be Raised at Any Time.

Even if successive post-conviction applications were not allowed in this unique situation, subject-matter jurisdiction is a fundamental issue that can be raised at any time. Oklahoma does not have subject-matter jurisdiction under the Major Crimes Act (MCA) over the crimes that arose on the Cherokee Nation Reservation.

"[L]ack of jurisdiction" is a constitutional right which is "never finally waived." *Johnson v. State*, 1980 OK CR 45, ¶ 30, 611 P.2d 1137, 1145. In three capital cases in which Indian country jurisdictional issues were raised belatedly, this Court repeatedly confirmed such a fundamental jurisdictional issue can be raised at any time. *See Cravatt v. State*, 1992 OK CR 6 at ¶ 3, 825 P.2d 277, 278 (deciding Indian country jurisdictional question though raised for first time on the day appellate oral argument was set); *Murphy v. State*, 2005 OK CR 25, ¶ 2, 124 P.3d 1198 (remanding for evidentiary hearing and deciding Indian country jurisdictional issue though raised for first time in successor post-conviction relief action); and *Magnan v. State*, 2009 OK CR 16, ¶ 9, 207 P.3d 397, 402 (remanding for evidentiary hearing and deciding Indian country jurisdictional issue even though issue was not raised in the trial court where appellant pled guilty and waived his appeal). This Court's decisions that jurisdiction can be raised at any time rest on bedrock principles which have existed for nearly a century. *See Armstrong v. State*, 1926 OK CR 259, 35 Okla. Crim. 116, 118, 248 P. 877, 878.

Such respect for jurisdictional claims is proper. The Supreme Court defines jurisdiction as "the courts' statutory and constitutional *power* to adjudicate the case." *United States v. Cotton*, 535 U.S. 625, 630 (2002). *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998). Because subject-matter jurisdiction involves a court's power to act, the Supreme Court concludes "it can never be forfeited or waived." *Cotton*, 535 U.S. at 630. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised. This concept is so grounded in law that defects in jurisdiction cannot be overlooked by the court, even if the parties fail to call attention to the defect, or consent that it may be waived. *Chicago, B. & Q. Ry. Co. v. Willard*, 220 U.S. 413, 421 (1911). Likewise, the Tenth Circuit in *Murphy v. Royal,* 875 F.3d 896, 907 n.5 (10th Cir. 2017) recognized issues of subject-matter jurisdiction in Oklahoma

are "never waived" and can "be raised on a collateral appeal." Similarly, Oklahoma's Solicitor General acknowledges "Oklahoma allows collateral challenges to subject-matter jurisdiction *at any time*." *McGirt v. Oklahoma*, Supreme Court Case No. 18-9526 (Mar 13, 2020), Brief of Respondent at 43 (emphasis added).

Consideration of the merits of Mr. Hanson's claim is appropriate.

C. Crimes by Indians Within Cherokee Nation Reservation Boundaries Are Subject to Federal Jurisdiction Under the Major Crimes Act.

In *McGirt,* the Supreme Court decided the only question before it. It determined that the Muscogee (Creek) Nation's 1866 reservation had not been disestablished, that the reservation was "Indian country" under 18 U.S.C. § 1551(a), and that Oklahoma had no jurisdiction to prosecute Mr. McGirt, an Indian, for a major crime committed within Creek reservation borders. Noting that "each tribe's treaties must be considered on their own terms," the analysis in *McGirt* extends to other Five Tribes reservations, as portended by the dissent. *McGirt*, 140 S. Ct. at 2479; *id.* at 2482 (Roberts, J., dissenting) ("[T]he Court's reasoning portends that there are four more such reservations in Oklahoma.").

The Cherokee and Creek are connected by more than their shared tragedy of the Trail of Tears. They share a common legal history and similarities in the terms of their treaty-created reservations. By applying the decision in *McGirt* to the Cherokee reservation, this Court must find that it too has not been disestablished by Congress, is "Indian country" under 18 U.S.C. §1151(a), and that Oklahoma has no jurisdiction to prosecute, convict, and sentence Mr. Hanson to life without parole and death.

The jurisdictional parameters for criminal jurisdiction in Indian country are clearly defined by federal law. *See* Att. 3 (Indian Country Criminal Jurisdictional Chart), App. at 11. *McGirt* addressed jurisdiction of crimes under the Major Crimes Act, 18 U.S.C. § 1153 (MCA) which applies to Mr. Hanson, a Creek, as it did to Mr. McGirt (Seminole) and Mr. Murphy (Creek). Mr. Hanson's crime was committed on fee land within the Cherokee Nation Reservation. Congress never disestablished this treaty-created reservation and Oklahoma has no jurisdiction.

D. McGirt Controls Reservation Status of the Cherokee Nation and Federal Criminal Jurisdiction.

As recognized by this Court more than thirty years ago, Oklahoma failed to assume criminal and civil jurisdiction under Public Law 280 before it was amended to require tribal consent; and Oklahoma "does not have jurisdiction over crimes committed by or against an Indian in Indian Country"; *see Cravatt*, 825 P.2d at 279 (citing *State v. Klindt*, 1989 OK CR 75, 782 P.2d 401, 403).[7] *Klindt* did not address whether all lands within Cherokee Nation boundaries constitute a reservation under 18 U.S.C. § 1151(c).

The United States Supreme Court likewise had not addressed reservation status as to any of the Five Tribes, until July 9, 2020, when it decided *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). In *McGirt*, the Court ruled that the Muscogee (Creek) Reservation was established by treaty; Congress never disestablished the reservation; all land, including fee land, within the reservation is Indian country under 18 U.S.C. § 1151(a); federal statutes concerning the Five Tribes near the time of statehood did not grant jurisdiction to Oklahoma over crimes committed by Indians on the

[7] In *Klindt*, this Court correctly overruled *Ex parte Nowabbi*, 1936 OK CR 123, 61 P.2d 1139, 1154, finding Oklahoma had no jurisdiction over crimes committed on restricted Choctaw allotments. *See also Cravatt,* 825 P.2d at 279 (stating there was no foundation in the statutes for the United States' position that the Five Tribes should receive different judicial treatment).

reservation; the Major Crimes Act, 18 U.S.C. § 1153 (MCA), applies to certain listed crimes committed by Indians on the reservation; and Oklahoma had no jurisdiction to prosecute a Seminole citizen for crimes committed on fee lands within the reservation under the MCA. *Id.*

On the same date, the Supreme Court not only affirmed the Tenth Circuit's 2017 ruling in *Murphy v. Royal*, 875 F. 3d 896 (10th Cir. 2017), *aff'd, Sharp v. Murphy*, 591 U.S. ___, 140 S. Ct. 2412 (2020) (*Murphy),* determining that Oklahoma had no jurisdiction under MCA over the murder of an Indian by another Indian on the Creek Reservation; it also remanded four pending cases involving other reservations in Oklahoma, in light of *McGirt.*[8]

The *McGirt* decision laid to rest Oklahoma's position that the MCA[9] and Indian Country Crimes Act (ICCA) (also known as General Crimes Act (GCA)) [10]do not apply in Oklahoma. The

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[8] *See Bentley v. Oklahoma*, OCCA No. PC-2018-743, U.S. S. Ct. No. 19-5417, Judgment Vacated and Case Remanded, July 9, 2020 (Citizen Band Potawatomi Reservation); *Johnson v. Oklahoma*, OCCA No. PC-2018-343, U.S. S. Ct. No. 18-6098, Judgment Vacated and Case Remanded, July 9, 2020 (Seminole Reservation); *Terry v. Oklahoma*, OCCA No. PC-2018-1076, U.S. S. Ct. No. 18-8801, Judgment Vacated and Case Remanded, July 9, 2020 (Quapaw/Modoc/Ottawa Reservations); and *Davis v. Oklahoma*, OCCA No. PC-2019-451, U.S. S. Ct. No. 19-6428, Judgment Vacated and Case Remanded, July 9, 2020 (Choctaw Reservation).

[9] The MCA provides in pertinent part: "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter . . . [and] robbery . . . within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a).

[10] The ICCA provides: "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." 18 U.S.C. § 1152.

Court noted that even the dissent declined "to join Oklahoma in its latest twist." *See McGirt,* 140 S. Ct. at 2476. The Court found no validity to Oklahoma's argument that the MCA was rendered inapplicable by three statutes that were passed prior to statehood: Act of June 7, 1897, ch. 3, 30 Stat. 62, 83 (granting federal courts in Indian Territory[11] "exclusive jurisdiction" to try "all criminal causes for the punishment of any offense"); Act of June 28, 1898, ch. 517, § 28, 30 Stat. 495, 504-505 (Curtis Act) (abolishing Creek Nation courts and transferring pending criminal cases to federal courts in Indian Territory); and the Oklahoma Enabling Act, Act of June 16, 1906, ch. 3335, 34 Stat. 267, as amended by the Act of Mar. 4, 1907, ch. 2911, 34 Stat. 1286) (concerning transfer of cases upon statehood).[12] *McGirt,* 140 S. Ct. at 2477.

The Supreme Court noted that Oklahoma was formed from Oklahoma Territory in the west and Indian Territory in the east,[13] and that criminal prosecutions in Indian Territory were split

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[11] Federal courts in the bordering states of Arkansas and Texas, and later in Muskogee, Indian Territory, were originally authorized to exercise federal jurisdiction in Indian Territory, subject to changes over time. *See* Act of Jan. 31, 1877, ch. 41, 19 Stat. 230 (Arkansas); Act of Jan. 6, 1883, ch. 13, § 3, 22 Stat. 400 (Texas); Act of Mar. 1, 1889, ch. 333, §§ 1, 5, 25 Stat. 783 (Muskogee, Indian Territory); §§ 29-44, 26 Stat. 81 (Indian Territory); Act of Mar. 1, 1895, ch. 145, §§ 9, 13, 28 Stat. 693 (repealing laws conferring jurisdiction on the federal courts in Arkansas, Kansas, and Texas over offenses committed in Indian Territory, and authorizing the federal court in Indian Territory to exercise such jurisdiction, including jurisdiction over "all offenses against the laws of the United States").

[12] The Enabling Act required transfer to the new federal courts of prosecutions of "all crimes and offenses" committed within Indian Territory "which, had they been committed within a State, would have been cognizable in the Federal courts." § 16, 34 Stat. 267, 276, as amended by § 1, 34 Stat. 1286. It required transfer of prosecutions of crimes not arising under federal law to the new state courts. § 20, 34 Stat. 267, 277, as amended by § 3, 34 Stat. 1286.

[13] No territorial government was ever created in the reduced Indian Territory, and it remained directly subject to tribal and federal governance until statehood. *See* Att. 5, App. at 17 (Map of Indian Territory); and Att. 6, App. at 19 (Map of Oklahoma and Indian Territories).

between tribal and federal courts, *Id.* at 2476 (citing Act of May 2, 1890, ch. 182, § 30, 26 Stat. 81, 94).[14] The Court held that Congress "abolished that [Creek tribal/federal court split] scheme" with the 1897 act, but "[w]hen Oklahoma won statehood in 1907, the MCA applied immediately according to its plain terms." *Id.* at 2477. The Enabling Act sent federal-law cases to federal court in Oklahoma, and crimes arising under the federal MCA "belonged in federal court from day one, wherever they arose within the new State." *Id.* at 2477.

E. Indian Country Includes All Fee Lands Within Cherokee Reservation Boundaries.

The Cherokee Reservation includes individual restricted and trust Cherokee allotments that constitute Indian country under 18 U.S.C. § 1151(c) for purposes of application of the MCA and GCA ("all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same"). *See United States v. Ramsey*, 271 U.S. 467, 469, 472 (1926) (GCA applies to murder of Indian by non-Indian on restricted Osage allotment); *United States v. Sands*, 968 F.2d 1058, 1061-62 (10th Cir. 1992) (MCA applies to murder of Indian by Indian on restricted Creek allotment, and allotment era statutes "did not abrogate the federal government's authority and responsibility, nor allow jurisdiction by the State of Oklahoma" over those allotments); *Klindt*, 782 P.2d at 403 (no state jurisdiction over assault with dangerous weapon by or against Indian on Cherokee trust allotment).

The Cherokee Reservation also includes tribal lands held in trust by the United States and unallotted tribal lands that constitute Indian country under 18 U.S.C. § 1151(a) for jurisdictional

[14] *See Talton v. Mayes*, 163 U.S. 376, 381 (1896) (finding that Cherokee Nation had exclusive jurisdiction over an 1892 Cherokee murder in Cherokee Nation under its treaties and the 1890 Act). The 1897 act "broadened the jurisdiction of the federal courts, thus divesting the Creek tribal courts of their exclusive jurisdiction over cases involving only Creeks." *See Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967, 978 (10th Cir. 1987).

purposes ("all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation"). *See United States v. John*, 437 U.S. 634, 649 (1978) (Mississippi Choctaw tribal trust land); *Ross v. Neff*, 905 F.2d 1349 (10th Cir. 1990) (Cherokee tribal trust land); *Indian Country, U.S.A. Inc. v. Oklahoma ex rel. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987) (unallotted Creek land).

Oklahoma has no jurisdiction over crimes covered by the MCA, even when committed on individual fee land within the Cherokee Reservation, rather than on restricted, trust or tribal fee land. Reservations include lands within reservations boundaries owned in fee by non-Indians. "[W]hen Congress has once established a reservation, *all tracts included within it* remain a part of the reservation until separated therefrom by Congress." *United States v. Celestine*, 215 U.S. 278, 285 (1909) (emphasis added). "[T]his Court long ago rejected the notion that the purchase of lands by non-Indians is inconsistent with reservation status." *McGirt*, 140 S. Ct. at 2464 n.3 (citing *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 357-58 (1962)). "'Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.'" *McGirt*, 140 S. Ct. at 2468 (citing *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)).

F. The Cherokee Reservation Was Established by Treaty, and Its Boundaries Have Been Altered Only by Express Cessions in 1866 and 1891.

1. The Creek Reservation Was Established by Treaty.

In *McGirt,* the Court discussed Creek treaties in detail, before concluding that they established the Creek Reservation. The Court noted that the 1832 and 1833 Creek removal treaties

"solemnly guarantied" the land; established boundary lines to secure "a country and permanent home;" stated the United States' desire for Creek removal west of the Mississippi River; included Creek Nation's express cession of their lands in the East; confirmed the treaty obligation of the parties upon ratification; required issuance of a patent, in fee simple, to Creek Nation for the new land, which was formally issued in 1852; and guaranteed Creek rights "so long as they shall exist as a nation, and continue to occupy the country hereby assigned to them." *McGirt*, 140 S. Ct. at 2459, 2460, 2461 (citing Treaty with the Creeks, arts. I, XII, XIV, XV, Mar. 24, 1832, 7 Stat. 366-368, and Treaty with the Creeks, preamble, arts. III, IV, IX, Feb. 14, 1833, 7 Stat. 417, 419).

The Court further noted that the 1856 Creek treaty promised that no portion of the reservation "shall ever be embraced or included within, or annexed to, any Territory or State;" and secured to the Creeks "the unrestricted right of self-government," with "full jurisdiction" over enrolled citizens and their property. *McGirt*, 140 S. Ct. at 2461 (citing Treaty with Creeks and Seminoles, arts. IV, XV, Aug. 7, 1856, 11 Stat. 699, 700, 704).

The Court recognized that although the 1866 post-civil war Creek treaty reduced the size of the Creek Reservation, it restated a commitment that the remaining land would "be forever set apart as a home for said Creek Nation," referred to as the "reduced Creek reservation." *McGirt*, 140 S. Ct. at 2461 (citing Treaty between the United States and the Creek Indians, arts. III and IX, June 14, 1866, 14 Stat. 785, 786, 788).

In sum, the Court stressed in *McGirt* that the Creek treaties promised a "permanent home" that would be "forever set apart," and the Creek were also assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any state. The Court concluded that "[u]nder any definition, this was a reservation." *McGirt*, 140 S. Ct. at 2461-62.

2. The Cherokee Treaties Contain Same or Similar Provisions as Creek Treaties.

"Each tribe's treaties must be considered on their own terms" in determining reservation status. *Id.* at 2479. The approval of Creek and Cherokee treaties during the same period of time, and the similarity of Creek treaties described in *McGirt* and Cherokee treaties, conclusively demonstrate that the Cherokee Reservation was established by treaty.

Cherokee Nation was originally located in what are now the states of Georgia, Alabama, Tennessee, South Carolina, North Carolina, and Kentucky. Wilkins, Thurman, *Cherokee Tragedy: The Ridge Family and the Decimation of a People* 22, 91, 209, 254 (rev. 2d ed. 1986) (*Cherokee Tragedy*). Like the Creeks, the Cherokees exchanged lands in the Southeast for new lands in Indian Territory in the 1830s under pressure of the national removal policy. The Indian Removal Act of 1830, Act of May 28, 1830, ch. 148, 4 Stat. 411, which implemented this policy, authorized the President to divide public domain lands into defined "districts" for tribes removing west of the Mississippi River. *Id.* at 412, § 1. It also provided that the United States would "forever secure and guaranty" such lands to the removed tribes, "and if they prefer it . . . the United States will cause a patent . . . to be made and executed to them for the same[.]" *Id.* at 412, § 3.

In 1831 and 1832, the Supreme Court issued two seminal decisions in cases involving Cherokee Nation resistance to Georgia citizens' trespasses on Cherokee lands. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), the Supreme Court held that Cherokee Nation was a "domestic dependent nation[]." The following year, the Supreme Court held that Indian tribes were '"distinct political communities, having territorial boundaries, within which their authority is exclusive . . . which is not only acknowledged, but guarantied by the United States,' a power dependent on and subject to no state authority." *McGirt*, 140 S. Ct. at 2477 (citing *Worcester v.*

Georgia, 31 U.S. (6 Pet.) 515, 557 (1832)). Despite these decisions, President Jackson persisted in efforts to remove Cherokee citizens from Georgia.

The Cherokee Reservation in Indian Territory was finally established by 1833 and 1835 treaties. The 1833 Cherokee treaty "solemnly pledged" a "guarantee" of seven million acres to the Cherokees on new lands in the West "forever." Treaty with the Western Cherokee, Preamble, Feb. 14, 1833, 7 Stat. 414. The 1833 Cherokee treaty used precise geographic terms to describe the boundaries of those lands, and provided that "a patent" would issue as soon as reasonably practical. *Id.* at 415, art. I. It confirmed the treaty obligation of the parties upon ratification. *Id.* at 416, art. VII.

However, there were internal disputes within Cherokee Nation, and the 1833 treaty failed to achieve removal of the majority of Cherokee citizens. Two Cherokee groups represented divisive viewpoints of what was best for the Cherokee people. The group led by John Ross, who represented a majority of Cherokee citizens, opposed removal. The other group, led by John Ridge, supported removal, fearing that tribal citizens would quickly lose their lands if conveyed to them individually in the southeastern states. *Cherokee Tragedy* at 266-68.

Almost three years after the 1833 treaty, members of the Ridge group signed the treaty at New Echota. Treaty with the Cherokees, Dec. 29, 1835, 7 Stat. 478. Containing language similar to wording in the 1832 and 1833 Creek treaties, the 1835 Cherokee treaty was ratified "with a view to re-unite their people in one body and to secure to them a *permanent home* for themselves and their posterity," in what became known as Indian Territory, "*without the territorial limits of the State sovereignties*," and "*where they could establish and enjoy a government of their* choice, and

perpetuate such a state of society as might be consonant with their views, habits and condition." *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 237-38 (1872) (emphasis added).

Like Creek treaty promises, the United States' treaty promises to Cherokee Nation "weren't made gratuitously." *McGirt*, 140 S. Ct. at 2460. Under the 1835 treaty, Cherokee Nation "cede[d], relinquish[ed], and convey[ed]" all its aboriginal lands east of the Mississippi River to the United States. Arts. 1, 7 Stat. 478, 479. In return, the United States agreed to convey to Cherokee Nation, by fee patent, seven million acres in Indian Territory within the same boundaries as described in the 1833 treaty, plus "a perpetual outlet west." *Id.* at 480, art. 2. Like Creek treaties, the 1835 Cherokee treaty described the United States' conveyance to the Cherokee Nation as a cession; required Cherokee removal to the new lands; covenanted that none of the new lands would be "included within the territorial limits or jurisdiction of any State or Territory" without tribal consent; and secured "to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government . . . within their own country," so long as consistent with the Constitution and laws enacted by Congress regulating trade with Indians; and provided that it would be "obligatory on the contracting parties" after ratification by the Senate and the President. *Id.* at 479, 481, 482, 486, arts. 1, 5, 8, 19.

As of January 1838, approximately 2,200 Cherokees had removed to Indian Territory, and around 14,757 remained in the east. *See The Western Cherokee Indians v. United States*, 27 Ct. Cl. 1, 3, 1800 WL 1779 (1891). That spring, the army rounded up most of the remaining Cherokees who had refused to remove within the time allotted. "They were seized as they worked in their farms and fields . . . They remained in captivity for months while hundreds died from inadequate and unaccustomed rations. The debilitation of others contributed to deaths during the removal

march." Rogin, Michael Paul, *Fathers & Children: Andrew Jackson and the Subjugation of the American Indian* 241 (1991).

After removal, on December 31, 1838, President Van Buren executed a fee patent to the Cherokee Nation for the new reservation in Indian Territory. *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 297 (1902). The patent recited the United States' treaty commitments to convey these lands to the Nation. *Id.* at 307. The title, like that of the Creek, was held by Cherokee Nation "for the common use and equal benefit of all the members." *Id.* at 307; *see also Cherokee Nation v. Journeycake*, 155 U.S. 196, 207 (1894). A few years later, an 1846 treaty between Cherokee Nation and the United States also required federal issuance of a deed to the Nation for lands it occupied, including the "purchased" 800,000-acre tract in Kansas (known as the "Neutral Lands") and the "outlet west." Treaty with the Cherokees, Aug. 6, 1846, art. I, 9 Stat. 871.

Like Creek Nation, Cherokee Nation negotiated a treaty with the United States after the Civil War. Treaty with the Cherokee Indians, July 19, 1866, art. IV, 14 Stat. 799, 800. The 1866 treaty authorized settlement of other tribes in a portion of the Nation's land west of its current western boundary (within the area known as the Cherokee Outlet), Treaty with the Cherokee, *id.* at 804, art. XVI, and required payment for those lands, stating that the Cherokee Nation would "retain the right of possession of and jurisdiction over all of said country . . . until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied." *Id.* It also expressly ceded the Nation's patented lands in Kansas, consisting of a two-and-one-half-mile-wide tract known as the Cherokee Strip and the 800,000-acre Neutral Lands, to the United States. ("The Cherokee nation hereby cedes . . . to the United States, the tract of land in the State of Kansas which was sold to the Cherokees . . . and also

that strip of the land ceded to the nation . . . which is included in the State of Kansas, and the Cherokees consent that said lands may be included in the limits and jurisdiction of the said State"). *Id.* at 804, art. XVII. None of the other provisions of the 1866 treaty affected Cherokee Nation's remaining reservation lands. Instead, the treaty required the United States, at its own expense, to cause the Cherokee boundaries to be marked "by permanent and conspicuous monuments, by two commissioners, one of whom shall be designated by the Cherokee national council." *Id.* at 805, art. XXI.

The 1866 treaty recognized the Nation's control of its reservation, by expressly providing: "*Whenever the Cherokee national council shall request it*, the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and allotted among them, at the expense of the United States." *Id.* at 805, art. XX (emphasis added). It also guaranteed "to the people of the Cherokee nation the quiet and peaceable possession of their country," and promised federal protection against "intrusion from all unauthorized citizens of the United States" and removal of persons not "lawfully residing or sojourning" in Cherokee Nation. *Id.* at 806, arts. XXVI and XXVII. It "*reaffirmed and declared to be in full force*" all previous treaty provisions "not inconsistent with the provisions of" the 1866 treaty, and provided that nothing in the 1866 treaty "shall be construed as an acknowledgment by the United States, or as a relinquishment by the Cherokee nation of any claims or demands under the guarantees of former treaties," except as expressly provided in the 1866 treaty. *Id.* at 806, art. XXXI (emphasis added).

Like Creek treaties, the Cherokee treaties involved exchange of tribal homelands in the East for a new homeland in Indian Territory, deeded to the Nation, and included the promise of a permanent home and the assurance of the right to self-government outside the jurisdiction of a state. These treaties established the Cherokee Reservation.

3. Special Terminology Is Not Required to Establish a Reservation, and Tribal Fee Ownership Is Not Inconsistent with Reservation Status.

In *McGirt*, the Court rejected Oklahoma's newly minted argument that Creek treaties did not establish a reservation and instead created a dependent Indian community, as defined by 18 U.S.C. § 1151(b) ("all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state"). *McGirt*, 140 S. Ct. at 2475-76. Oklahoma based this claim on the tribal fee ownership of the reservation, and the absence of the words "reserved from sale" in the Creek treaties. *Id.* at 2475. The "entire point" of this reclassification attempt was "to avoid *Solem's* rule that only Congress may disestablish a reservation."[15] *Id.* at 2474.

The Court was not persuaded by Oklahoma's argument that, due to tribal fee ownership of the Creek lands, a reservation could not be created in the absence of the words "reserved from sale." The Court recognized that fee title is not inherently incompatible with reservation status, and that the establishment of a reservation does not require a "particular form of words." *McGirt*, 140 S. Ct. at 2475 (citing *Maxey v. Wright,* 54 S.W. 807, 810 (Indian Terr. 1900) and *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902)). The Court also noted that the Creek land was reserved from sale in the "very real sense" and that the United States could not give the tribal lands to others or appropriate them to its own purposes, without engaging in "'an act of confiscation.'" *McGirt*, 140 S. Ct. at 2475 (citing *United States v. Creek Nation*, 295 U.S. 103, 110 (1935)).

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[15] In *Murphy*, Oklahoma did "not dispute that the [Creek] reservation was intact in 1900." *Murphy*, 875 F.3d at 954. In *McGirt*, the Court noted that the United States and the dissent did not make any arguments supporting Oklahoma's novel dependent Indian community theory. *McGirt*, 140 S. Ct. at 2474.

The "most authoritative evidence of [a tribe's] relationship to the land" does not lie in scattered references to "stray language from a statute that does not control here, a piece of congressional testimony there, and the scattered opinions of agency officials everywhere in between." *McGirt,* 140 S. Ct. at 2476, 2475. "[I]t lies in the treaties and statutes that promised the land to the Tribe in the first place." *Id.* at 2476. As previously noted, the 1830 Indian Removal Act promised issuance of fee patents upon removal of tribes affected by its implementation, which were granted to Creek Nation and Cherokee Nation. The treaties for both tribes contain extensive evidence of their relationships with their respective lands in Indian Territory. The Cherokee Reservation was established by treaty, just as Creek treaties established the Creek Reservation. *McGirt,* 140 S. Ct. at 2460-61. Later federal statutes also recognized the Cherokee Reservation as a distinct geographic area.[16]

4. The Cherokee Reservation Has Been Diminished Only by Express Cessions of Portions of the Reservation in Its 1866 Treaty and Its 1891 Agreement.

The current boundaries of Cherokee Nation are as established in Indian Territory in the 1833 and 1835 treaties, diminished only by the express cessions in the 1866 treaty and by an 1891 agreement ratified by Congress in 1893 (1891 Agreement). Act of Mar. 3, 1893, ch. 209, § 10, 27

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[16] *See* Act of June 21, 1906, ch. 3504, 34 Stat. 325, 342-43 (drawing recording districts in the Indian Territory, including district 27, with boundaries along the northern and western "boundary line[s] of the Cherokee Nation," and district 28, described as lying within the boundaries of the Cherokee Nation); Act of June 16, 1906, § 6, 34 Stat. 267, 271-72 (the third district for the House of Representatives must (with the exception of that part of recording district numbered twelve, which is in the Cherokee and Creek nations) comprise all the territory now constituting the Cherokee, Creek, and Seminole nations and the Indian reservations lying northeast of the Cherokee Nation, within said State); Act of June 30, 1913, ch. 4, § 18, 38 Stat. 77, 95 ("common schools in the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Nations"); and the Oklahoma Indian Welfare Act (OIWA), Act of June 26, 1936, ch. 831, 49 Stat. 1967, codified at 25 U.S.C. §§ 5201-5210 (authorizing Secretary of the Interior to acquire land "within or without existing Indian reservations" in Oklahoma).

Stat. 612, 640-43. The 1891 Agreement provided that Cherokee Nation "shall cede and relinquish all its title, claim, and interest of every kind and character in and to that part of the Indian Territory" encompassing a strip of land bounded by Kansas on the north and Creek Nation on the south, and located between the ninety-sixth degree west longitude and the one hundredth degree west longitude (i.e., the Cherokee Outlet). *See United States v. Cherokee Nation*, 202 U.S. 101, 105-06 (1906).[17] The 1893 ratification statute required payment of a sum certain to the Nation and provided that, upon payment, the ceded lands would "become, and be taken to be, and treated as, a part of the public domain," except for such lands allotted under the Agreement to certain described Cherokees farming the lands. *Id.* at 112. Cherokee Nation did not cede or restore any other portion of the Cherokee Reservation to the public domain in the 1891 Agreement, and no other cession has occurred since that time.

The original 1839 Cherokee Constitution identified the boundaries as described in its 1833 treaty, and the Constitution as amended in 1866 recognized those same boundaries, "subject to such modification as may be made necessary" by the 1866 treaty.[18] Cherokee Nation's most recent Constitution, a 1999 revision of its 1975 Constitution, was ratified by Cherokee citizens in 2003, and provides: "The boundaries of the Cherokee Nation territory shall be those described by the patents of 1838 and 1846 diminished only by the Treaty of July 19, 1866, and the Act of March 3, 1893." 1999 Cherokee Constitution, art. 2.

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[17] *See* Att. 4, App. at 14 (Goins, Charles Robert, and Goble, Danney, "Historical Atlas of Oklahoma" at 61 (4th Ed. 2006), showing the Cherokee Outlet ceded by the 1891 Agreement, as well as the Kansas lands, known as the Neutral Lands, and the Cherokee Strip ceded by the 1866 Treaty.

[18] 1839 Cherokee Constitution, art. I, § 1, and Nov. 26, 1866 amendment to art. I, § 1, *reprinted in* Volume I of West's Cherokee Nation Code Annotated (1993 ed.).

G. Congress Has Not Disestablished the Cherokee Reservation.

1. Only Congress Can Disestablish a Reservation by Explicit Language for the Present and Total Surrender of All Tribal Interests in the Affected Lands.

Congress has not disestablished the Cherokee Reservation as it existed following the last express Cherokee cession in the 1891 Agreement ratified in 1893. All land within reservation boundaries, including fee land, remains Indian country under 18 U.S.C. § 1151(a). Courts do not lightly infer that Congress has exercised its power to disestablish a reservation. *McGirt*, 140 S. Ct. at 2462 (citing *Solem,* 465 U.S. at 470). Once a reservation is established, it retains that status "until Congress explicitly indicates otherwise." *McGirt*, 140 S. Ct. at 2469. Congressional intent to disestablish a reservation "must be clear and plain." *Id.* (citing *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998)). Congress must clearly express its intent to disestablish, commonly by "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests." *McGirt*, 140 S. Ct. at 2463 (citing *Nebraska v. Parker*, 577 U.S. 481, __, 136 S. Ct. 1072, 1079 (2016)).

This Court's analysis must focus on the statutory text that allegedly resulted in reservation disestablishment. The only "step" proper for a court of law is "to ascertain and follow the original meaning of the law" before it. *McGirt*, 140 S. Ct. at 2468. Disestablishment has never required any particular form of words. *Id.* at 2463 (citing *Hagen v. Utah*, 510 U.S. 399, 411 (1994)). A statute disestablishing a reservation may provide an "[e]xplicit reference to cession" or an "unconditional commitment . . . to compensate the Indian tribe for its opened land." *McGirt,* 140 S. Ct. at 2462 (citing *Solem*, 465 U.S. at 470). It may direct that tribal lands be "restored to the public domain," *McGirt*, 140 S. Ct. at 2462 (citing *Hagen,* 510 U.S. at 412), or state that a

reservation is "'discontinued,' 'abolished,' or 'vacated.'" *McGirt*, 140 S. Ct. at 2463 (citing *Mattz v. Arnett*, 412 U.S. 481, 504 n.22 (1973)); *see also DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 439–40 n.22 (1975).

2. Allotment of Cherokee Land Did Not Disestablish the Cherokee Reservation.

In 1893, in the same statute ratifying the Cherokee 1891 Agreement, Congress established the Dawes Commission to negotiate agreements with the Five Tribes for "the extinguishment of the national or tribal title to any lands" in Indian Territory "either by cession," by allotment, or by such other method as agreed upon. § 16, 27 Stat. 612, 645–646.[19] The Commission reported in 1894 that the Creek Nation "would not, under any circumstances, agree to cede any portion of their lands." *McGirt*, 140 S. Ct. at 2463 (citing S. Misc. Doc. No. 24, 53d Cong., 3d Sess., 7 (1894)).[20] The Cherokee Nation resisted allotment for almost a decade longer, but finally ratified an agreement in 1902. Act of July 1, 1902, ch. 1375, 32 Stat. 716 (Cherokee Agreement). Like the Creek Allotment Agreement, Act of Mar. 1, 1901, ch. 676, 31 Stat. 861 (Creek Agreement), the Cherokee Agreement contained no cessions of land to the United States, and did not disestablish

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[19] Congress clearly knew how to use explicit language to diminish reservations. In the 1893 Act, which also ratified the 1891 Agreement, Cherokee Nation agreed to "cede" Cherokee Outlet lands to the United States in exchange for payment.

[20] Although *McGirt* referenced only Creek Nation in this statement, the 1894 report reflects that each of the Five Tribes refused to cede tribal lands to the United States. Att. 7, App. at 21 (Ann. Rept. of the Comm. Five Civ. Tribes of 1894, 1895, and 1896 at 14 (1897)). This refusal is also reflected in the Commission's 1900 annual report: "Had it been possible to secure from the Five Tribes a *cession to the United States of the entire territory at a given price*, . . . the duties of the commission would have been immeasurably simplified . . . . When an understanding is had, however, of the great difficulties which have been experienced in inducing the tribes to accept allotment in severalty . . . *it will be seen how impossible it would have been to have adopted a more radical scheme of tribal extinguishment*, no matter how simple its evolutions." Att. 9, App. at 32 (Seventh Ann. Rept. of the Comm. Five Civ. Tribes at 9 (1900) (emphasis added).

the Cherokee Reservation, which also "survived allotment." *See McGirt*, 140 S. Ct. at 2464.[21] Where Congress contemplates, but fails to enact legislation containing express disestablishment language, the statute represents "a clear retreat from previous congressional attempts to vacate the . . . Reservation in express terms[.]" *DeCoteau*, 420 U.S. at 448.

The central purpose of the 1902 Cherokee Agreement, like that of the Creek Agreement, was to facilitate transfer of title from the Nation of "allottable lands" (defined in § 5, 32 Stat. 716, as "all the lands of the Cherokee tribe" not reserved from allotment)[22] to tribal citizens individually. With exceptions for certain pre-existing town sites and other special matters, the Cherokee Agreement established procedures for conveying allotments to individual citizens who could not sell, transfer, or otherwise encumber their allotments for a number of years (5 years for any portion, 21 years for the designated "homestead" portion). §§ 9-17, 32 Stat. 716, 717; *see also McGirt*, 140 S. Ct. at 2463 (citing Creek Agreement, §§ 3, 7, 31 Stat. 861, 862-64).

The restricted status of the allotments reflects the Nation's understanding that allotments would not be acquired by non-Indians, would remain in the ownership of tribal citizens, and would be subject to federal protection. Tribal citizens were given deeds that conveyed to them "all the right, title, and interest" of the Cherokee Nation. § 58, 32 Stat. 716, 725; *see also McGirt*, 140 S. Ct. at 2463 (citing Creek Agreement, § 23, 31 Stat. 861, 867-68). As of 1910, 98.3% of the lands of Cherokee Nation (4,348,766 acres out of 4,420,068 acres) had been allotted to tribal citizens,

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[21] Even the dissent did not "purport to find any of the hallmarks of diminishment in the Creek Allotment Agreement." *McGirt*, 140 S. Ct. at 2465 n.5.

[22] Lands reserved from allotment "in the Cherokee Nation" included schools, colleges, and town sites "in Cherokee Nation," cemeteries, church grounds, an orphan home, the Nation's capital grounds, its national jail site, and the newspaper office site. §§ 24, 49, 32 Stat. 716, 719-20, 724; *see also* Creek Agreement, § 24, 31 Stat. 861, 868-69.

and an additional 21,000 acres were reserved for town sites, schools, churches, and other uses.[23] Only 50,301 acres scattered throughout the nation remained unallotted in 1910 – approximately one percent of the nation's reservation area. *Id.* Later, federal statutes relaxed restrictions on conveyances and encumbrance of allotments in various ways and contributed to the loss of individual Indian ownership of allotments over time.[24]

"Missing in all this, however, is a statute evincing anything like the 'present and total surrender of all tribal interests' in the affected lands" required for disestablishment. *McGirt*, 140 S. Ct. at 2464. Allotment alone does not disestablish a reservation. *Id.* (citing *Mattz*, 412 U.S. at 496-97) (explaining that Congress's expressed policy during the allotment era "was to continue the reservation system," and that allotment can be "completely consistent with continued reservation status"); and *Seymour*, 368 U.S. at 356-58 (allotment act "did no more than open the way for non-Indian settlers to own land on the reservation")).

3. Allotment Era Statutes Intruding on Cherokee Nation's Right to Self-Governance Did Not Disestablish the Reservation.

Statutory intrusions during the allotment era were "serious blows" to the promised right to Creek self-governance, but did not prove disestablishment. *McGirt*, 140 S. Ct. at 2466. This conclusion is mandated with respect to the Cherokee Reservation as well, in light of the

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[23] Att. 11, App. at 43 (Ann. Rept. of the Comm. Five Civ. Tribes at 169, 176 (1910)).

[24] *See McGirt*, 140 S. Ct. at 2463 (citing Act of May 27, 1908, ch. 199, § 1, 35 Stat. 312), *see also* Act of Apr. 26, 1906, ch. 1876, §§ 19, 20, 34 Stat. 137 (Five Tribes Act); Act of Aug. 4, 1947, ch. 458, 61 Stat. 731; Act of Aug. 11, 1955, ch. 786, 69 Stat. 666; Act of Dec. 31, 2018, Pub. L. No. 115-399, 132 Stat. 5331; S*ee* "Fatally Flawed: State Court Approval of Conveyances by Indians of the Five Civilized Tribes—Time for Legislative Reform," Vollmann, Tim, and Blackwell, M. Sharon, 25 Tulsa Law Journal 1 (1989). Congress has also recognized Cherokee Nation's reversionary interest in restricted lands. *See* Act of May 7, 1970, Pub. L. No. 91-240, 84 Stat. 203 (requiring escheat to Cherokee Nation, as the tribe from which title to the restricted interest derived, to be held in trust for the Nation).

applicability of relevant statutes to both the Creek and Cherokee Nations, and similarities in the Cherokee and Creek Agreements.

The Act of June 28, 1898, ch. 517, 30 Stat. 495 (Curtis Act), provided "for forced allotment and termination of tribal land ownership without tribal consent unless the tribe agreed to allotment," *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441 (D.C. Cir. 1988). "[P]erhaps in an effort to pressure the Tribe to the negotiating table," the Curtis Act included provisions for termination of tribal courts. *McGirt*, 140 S. Ct. at 2465 (citing § 28, 30 Stat. 495, 504–505. A few years later, the 1901 Creek Allotment Act expressly provided that it did not "revive" Creek courts.[25] Nevertheless, the Curtis Act's abolishment of Creek courts did not result in reservation disestablishment. *McGirt*, 140 S. Ct. at 2466. This Court need not determine whether Cherokee courts were abolished.[26] But, there are ample grounds to conclude the Cherokee Agreement superseded the Curtis Act's abolishment of Cherokee courts. While earlier unratified versions of the Cherokee Agreement contained provisions expressly validating the Curtis Act's abolishment of tribal courts, the final version, ratified in 1902, did not.[27] Instead, section 73 of the Cherokee

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[25] The Creek Agreement provided that nothing in that agreement "shall be construed to revive or reestablish the Creek courts which have been abolished" by former laws. 31 Stat. 861, 873, § 47. The 1936 OIWA, 25 U.S.C. § 5209, impliedly repealed this limitation on Creek courts. *Muscogee (Creek) Nation,* 851 F.2d at 1446-47.

[26] The Cherokee and Creek Nations operated their court systems years before the Department of the Interior's 1992 establishment of Courts of Indian Offenses in eastern Oklahoma for those tribes that had not yet developed tribal courts, "Law and Order on Indian Reservations," 57 Fed. Reg. 3270-01 (Jan. 28, 1992), and continue to do so. The Courts of Indian Offenses serving the Choctaw, Chickasaw, and Seminole Nations have also been replaced with tribal courts.

[27] Unratified agreements that predate the Cherokee Agreement demonstrate that Cherokees ensured that tribal court abolishment was not included in the final Agreement. The unratified January 14, 1899 version stated that the Cherokee "consents" to "extinguishment of Cherokee courts, as provided in section 28 of the [1898 Curtis Act]." Att. 8, App. at 26 (Sixth Ann. Rept. of the Comm. Five Civ. Tribes (1899), Appendix No. 2, § 71 at 49, 57). The unratified April 9, 1900

Agreement recognized that treaty provisions not inconsistent with the Agreement remained in force.[28] § 73, 32 Stat. 716, 727. These treaty protections included the 1866 Treaty provision that Cherokee courts would "retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee Nation, except as otherwise provided in this treaty." Art. 13, 14 Stat. 799, 803. It is also noteworthy that the Curtis Act recognized the continuation of the Cherokee Reservation boundaries by expressly referencing a "permanent settlement in the Cherokee Nation" and "lands in the Cherokee Nation." §§ 21, 25, 30 Stat. 495, 502, 504.

Another "serious blow" to Creek governmental authority was a provision in the Creek Agreement that conditioned the validity of Creek ordinances "affecting the lands of the Tribe, or of individuals after allotment, or the moneys or other property of the Tribe, or of the citizens" thereof, on approval by the President. *McGirt*, 140 S. Ct. at 2466 (citing § 42, 31 Stat. 861, 872).

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version provided that nothing in the agreement "shall be construed to revive or reestablish the Cherokee courts abolished by said last mentioned act of Congress [the 1898 Curtis Act]." Att. 9, App. at 32 (Seventh Ann. Rept. of the Comm. Five Civ. Tribes at 13 (1900), Appendix No. 1, § 80 at 37,45); *see also* Act of Mar. 1, 1901, ch. 675, pmbl. and § 72, 31 Stat. 848, 859 (version of Cherokee allotment agreement approved by Congress but rejected by Cherokee voters). The Five Tribes Commission's early efforts to conclude an agreement with Cherokee Nation were futile, "owing to the disinclination of the Cherokee commissioners to accede to such propositions as the Government had to offer." Att. 8, App. at 26 (Sixth Ann. Rept. of the Comm. Five Civ. Tribes (1899) at 9-10). The tribal court provisions in the unratified agreements were eliminated from the Cherokee Agreement as finally ratified. The Commission's discussion of the final agreement, before tribal citizen ratification, reflects that allotment was the "paramount aim" of the agreement, Att. 10, App. at 40 (Ninth Ann. Rept. of the Comm. Five Civ. Tribes at 11 (1902)), not erosion of Cherokee government.

[28] Treaty protections also included the Nation's 1835 treaty entitlement "to a delegate in the House of Representatives whenever Congress shall make provision for the same." Treaty with the Cherokees, Art. 7, 7 Stat. 478, 482.

There is no similar limitation on Cherokee legislative authority in the Cherokee Agreement. Even if there had been, such provision did not result in reservation disestablishment, in light of the absence of any of the hallmarks for disestablishment in the Cherokee Agreement, such as cession and compensation. *See McGirt*, 140 S. Ct. at 2465 n.5.

Like the Creek Agreement, § 46, 31 Stat. 861, 872, the Cherokee Agreement provided that tribal government would not continue beyond March 4, 1906. § 63, 32 Stat. 716, 725. Before that date, Congress approved a Joint Resolution continuing Five Tribes governments "in full force and effect" until distribution of tribal property or proceeds thereof to tribal citizens. Act of Mar. 2, 1906, 34 Stat. 822. The following month, Congress enacted the Five Tribes Act, which expressly continued the governments of all of the Five Tribes "in full force and effect for all purposes authorized by law, until otherwise provided by law." *McGirt,* 140 S. Ct. at 2466 (citing § 28, 34 Stat. 137, 148). The Five Tribes Act included a few incursions on Five Tribes' autonomy. *McGirt*, 140 S. Ct. at 2466. It authorized the President to remove and replace their principal chiefs, instructed the Secretary of the Interior to assume control of tribal schools, and limited the number of tribal council meetings to no more than 30 days annually. *Id.* (citing §§ 6, 10, 28, 34 Stat. 137, 139–140, 148). The Five Tribes Act also addressed the handling of the Five Tribes' funds, land, and legal liabilities in the event of dissolution. *Id.* (citing §§ 11, 27, 34 Stat. 137, 141, 148).

"Grave though they were, these congressional intrusions on pre-existing treaty rights fell short of eliminating all tribal interests in the land." *McGirt*, 140 S. Ct. at 2466. Instead, Congress left the Five Tribes "with significant sovereign functions over the lands in question." *Id.* For example, Creek Nation retained the power to collect taxes; to operate schools; and to legislate through tribal ordinances (subject to Presidential approval of certain ordinances as required by the Creek Agreement, § 42, 31 Stat. 861, 872). *Id.* (citing §§ 39, 40, 42, 31 Stat. 861, 871–872). The

Cherokee Agreement also recognized continuing tribal government authority. As previously noted, it did not require Presidential approval of any ordinance, did not abolish tribal courts, and confirmed treaty rights. § 73, 32 Stat. 716, 727. It also required that the Secretary operate schools under rules "according to Cherokee laws"; required that funds for operating tribal schools be appropriated by the Cherokee National Council; and required the Secretary's collection of a grazing tax for the benefit of Cherokee Nation. §§ 32, 34, 72, 32 Stat.716, 721, 716-27. "Congress never withdrew its recognition of the tribal government, and none of its [later] adjustments would have made any sense if Congress thought it had already completed that job." *McGirt*, 140 S. Ct. at 2466.

Instead, Congress changed course in a shift in policy from assimilation to tribal self-governance. *See McGirt*, 140 S. Ct. at 2467. The 1934 Indian Reorganization Act (IRA) officially ended the allotment era for all tribes. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101, *et seq.*).[29] In 1936, Congress enacted the OIWA, which included a section concerning tribal constitutions and corporate charters, and repealed all acts or parts of acts inconsistent with the OIWA. 25 U.S.C. §§ 5203, 5209. Cherokee Nation's government, like those of other tribes, was strengthened later by the Indian Self-Determination and Education Assistance Act (ISDEAA) of 1975. Act of January 4, 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. §§ 5301, *et seq.*). The ISDEAA enables Cherokee Nation to utilize federal funds in accordance with multi-year funding agreements after government-to-government negotiations

[29] The IRA excluded Oklahoma tribes from applicability of five IRA sections, 25 U.S.C. § 5118, but all other IRA sections applied to Oklahoma tribes, including provisions ending allotment and authorizing the Secretary to acquire lands for tribes.

with the Department of the Interior. 25 U.S.C. § 5363. Congress, for the most part, has treated the Five Tribes in a manner consistent with its treatment of tribes across the country.

Notwithstanding the shift in federal policy, the Five Tribes spent the better part of the twentieth century battling the consequences of the "bureaucratic imperialism" of the Bureau of Indian Affairs (BIA), which promoted the erroneous belief that the Five Tribes possessed only limited governmental authority. *Harjo v. Kleppe,* 420 F. Supp. 1110, 1130 (D.D.C.1976), *aff'd sub nom. Harjo v. Andrus,* 581 F.2d 949 (D.C. Cir. 1978) (finding that the evidence "clearly reveals a pattern of action on the part of" the BIA "designed to prevent any tribal resistance to the Department's methods of administering those Indian affairs delegated to it by Congress," as manifested in "deliberate attempts to frustrate, debilitate, and generally prevent from functioning the tribal governments expressly preserved by § 28 of the [Five Tribes] Act."). This treatment, which impeded the Tribes' ability to fully function as governments for decades, cannot overcome lack of statutory text demonstrating disestablishment. *See Parker*, 136 S. Ct. at 1082.

4. The Events Surrounding the Enactment of Cherokee Allotment Legislation and Later Demographic Evidence Cannot, and Did Not, Result in Reservation Disestablishment.

There is no ambiguous language in any of the relevant allotment-era statutes applicable to Creek and Cherokee Nations, including their separate allotment agreements, "that could plausibly be read as an Act of disestablishment." *McGirt*, 140 S. Ct. at 2468. Events contemporaneous with the enactment of relevant statutes, and even later events and demographics, are not alone enough to prove disestablishment. *Id.* A court may not favor contemporaneous or later practices *instead of* the laws Congress passed. *Id.* There is "no need to consult extratextual sources when the meaning of a statute's terms is clear," and "extratextual sources [may not] overcome those terms." *Id.* at

2469. The only role that extratextual sources can properly play is to help "clear up . . . not create" ambiguity about a statute's original meaning. *Id.*

The "perils of substituting stories for statutes" were demonstrated by the "stories" that Oklahoma claimed resulted in disestablishment in *McGirt*. *Id.* at 2470. Oklahoma's long-historical practice of asserting jurisdiction over Indians in state court, even for serious crimes on reservations, is "a meaningless guide for determining what counted as Indian country." *Id.* at 2471. Historical statements by tribal officials and others supporting an idea that "everyone" in the late nineteenth and twentieth centuries believed the reservation system and Creek Nation would be disbanded, without reference to any ambiguous statutory direction, were merely prophesies that were not self-fulfilling. *Id.* at 2472. Finally, the "speedy and persistent movement of white settlers" onto Five Tribes land throughout the late nineteenth and early twentieth centuries is not helpful in discerning statutory meaning. *Id.* at 2473. It is possible that some settlers had a good faith belief that Five Tribes lands no longer constituted a reservation, but others may not have cared whether the reservations still existed or even paused to think about the question. *Id.* Others may have been motivated by the discovery of oil in the region during the allotment period, as reflected by Oklahoma court "sham competency and guardianship proceedings that divested" tribal citizens of oil rich allotments. *Id.* Reliance on the "'practical advantages' of ignoring the written law" would be "the rule of the strong, not the rule of law." *Id.* at 2474.

CONCLUSION

Congress had no difficulties using clear language to diminish reservation boundaries in the 1866 treaty and 1891 Agreement provisions for Cherokee Nation's cessions of land in Indian Territory in exchange for money and promises. There are no other statutes containing any of the hallmark language altering the Cherokee Reservation boundaries as they existed after the 1891 Agreement's cession of the Cherokee Outlet. Clear language of disestablishment was available to Congress when it enacted laws specifically applicable to the Five Tribes as a group and to Cherokee Nation individually, but it did not use it. The Cherokee Reservation boundaries as established by treaty and as defined in the Cherokee Constitution have not been disestablished. Oklahoma has no jurisdiction over crimes, like that of Mr. Hanson's, that are covered by the MCA when committed on the Reservation.

Respectfully Submitted,

SARAH M. JERNIGAN, OBA #21243
MEGHAN LeFRANCOIS, OBA #32643
PATTI PALMER GHEZZI, OBA #6875
Assistant Federal Public Defenders
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Patti_P_Ghezzi@fd.org

COUNSEL FOR PETITIONER,
JOHN FITZGERALD HANSON

Dated: September 8, 2020

VERIFICATION

State of Oklahoma)
) ss:
County of Oklahoma)

Sarah M. Jernigan, being first duly sworn upon oath, states he signed the above pleading as attorney for JOHN FITZGERALD HANSON, and that the statements therein are true to the best of his knowledge, information, and belief.

SARAH M. JERNIGAN

Subscribed and sworn to before me this 8th day of September, 2020.

Notary Public

Commission Number: 10006999

My commission expires: 08/25/22

BRANDI N. HARRIS NOTARY # 10006999 EXP. 08/25/22 PUBLIC STATE OF OKLAHOMA

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2020, a true and correct copy of the foregoing Subsequent Application for Post-Conviction Relief, along with a separately bound Appendix of Attachments were delivered to the clerk of the court for delivery to the Office of the Attorney General pursuant Rule 1.9(B), Rules of the Court of Criminal Appeals.

SARAH M. JERNIGAN

INDEX OF ATTACHMENTS
(FILED IN SEPERATELY BOUND APPENDIX)

AFFIDAVIT OF RODNEY WORLEY

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

I, Rodney Worley, being of legal age and sound mind, do solemnly swear and state as follows:

1. My name is Rodney Worley. Rashad Ali Barnes was my son. In 1999 he was staying at my house with me and my wife at 5409 N. Hartford Avenue, Tulsa, Oklahoma. He was 21 years old.

2. In 1999, my son's best friend was Michael Cole. In July of 1999, Mike caught a drug case for possession of CDS. In his court papers, Mike said he lived at my house, but he was really staying with his mother who lived right down the street from us.

3. In August of 1999, law enforcement showed up at my house to check out Mike's living arrangements. I was cleaning my guns when they came by. I let them in and told them Mike wasn't there and that he was staying at his mom's. They told me to call him and have him come to my house. When Mike showed up, they arrested him for being a felon in possession of a weapon. None of the guns in my house were Mike's guns.

4. Also, during this time, my son Rashad was letting an older friend of his, John Hanson, sleep in a car parked outside in our backyard.

5. My son Rashad got wrapped up in the case involving the murder of Ms. Bowles and Mr. Thurman because John told him what happened.

6. My son had not talked to anyone in law enforcement when he got the subpoena to go to the post office building to testify. I went with him and waited out in the hall.

7. A couple of weeks to a month after he testified, a plain clothes officer knocked on my door and told me if I didn't let him in, I would be charged with harboring a fugitive. The officer told me he had a warrant for Rashad. Even though I repeatedly asked to see this warrant, the officer would not show it to me. He just raised his shirt and showed me a piece of paper in his pants. He asked where Rashad was and I

pointed to his bedroom. The officer went in and woke him up. He started to take Rashad out of the house barefoot and in just the shorts he was sleeping in. I asked him to let him put his shoes on because it was cold outside. He did, but he did not let him put on a shirt or let him change into pants or wear a coat. Rashad was cuffed and placed in the back of a police car and taken downtown. I thought he was being arrested by the way the officers were acting.

8. Rashad was not arrested. After he gave a statement, he was cut loose.

9. District Attorney Tim Harris told Rashad that he would drop the gun charge on Mike Cole if Rashad testified against John Hanson and Victor Miller. Because Mike was Rashad's best friend, he agreed to testify.

10. Rashad testified every time he was asked until he was murdered in December 2003.

11. As the district attorney promised, he dropped the gun charge on Mike because of my son's cooperation.

12. I am not friends with John Hanson and I have not had any contact with him since this all happened in August 1999.

FURTHER AFFIANT SAYETH NOT.

Rodney Worley

Subscribed and sworn to before me this 5th day of June, 2025.

Brandi N. Harris
NOTARY PUBLIC

Commission No.: 22012618

Expires: 09/16/26

BRANDI N. HARRIS NOTARY PUBLIC # 22012618 EXP. 09/16/26 STATE OF OKLAHOMA

DECLARATION OF JACK GORDON

STATE OF OKLAHOMA)
)
COUNTY OF TULSA)

ss.

I, Jack Gordon, being of legal age and sound mind, do solemnly swear and state as follows:

1. My name is Jack Gordon. I am an attorney licensed in the State of Oklahoma and have been practicing criminal defense for over forty years, including trying multiple capital cases. I now work as a public defender at the Tulsa County Public Defender's Office.

2. I represented John Hanson at his 2001 capital trial in CF-99-4583, and in the resentencing proceeding in 2006.

3. I recall Rashad Barnes testifying as the State's star witness against Mr. Hanson and that his testimony was very damaging. I also recall trying my hardest to impeach his credibility. I didn't have any evidence with which to do so.

4. Up until the trial, my co-counsel and I were unaware of how the State had even become aware of Barnes. We sent a letter to the prosecution right before trial requesting more information about this, but it remained unclear.

5. Mr. Hanson's current counsel has shared with me new evidence of a promise made to Rashad Barnes by the Tulsa County District Attorney's Office, offering favorable treatment to Barnes' best friend Michael Cole in his criminal case in exchange for Barnes' cooperation against Mr. Hanson.

6. I was unaware of this evidence or of any deal or promise offered to Barnes. If I had been, I would have used it to impeach Barnes on cross-examination.

Jack Gordon 6.6.25

Jack Gordon DATE

OKLAHOMA STATE COURTS NETWORK

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY, OKLAHOMA

State Of Oklahoma, Plaintiff, v. MICHAEL ANTWAUN COLE, Defendant.	**No. CF-1999-4210** **(Criminal Felony)** Filed: 08/31/1999 Closed: 03/29/2000 Judge: Gillert, Tom C.

PARTIES

COLE, MICHAEL ANTWAUN, Defendant
STATE OF OKLAHOMA, Plaintiff
Tulsa Police Department, ARRESTING AGENCY

ATTORNEYS

Attorney	Represented Parties
Bourland, John Albert (Bar #14090) 1515 S. DENVER TULSA	COLE, MICHAEL ANTWAUN

EVENTS

Event	Party	Docket	Reporter
Wednesday, September 22, 1999 at 9:00 AM PRELIMINARY HEARING ISSUE-PRIVATE ATTORNEY	COLE, MICHAEL ANTWAUN	Preliminary Hearing Docket	
Wednesday, October 20, 1999 at 9:00 AM PRELIMINARY HEARING ISSUE-PRIVATE ATTORNEY	COLE, MICHAEL ANTWAUN	Preliminary Hearing Docket	
Monday, October 25, 1999 at 9:30 AM DISTRICT COURT ARRAIGNMENT	COLE, MICHAEL ANTWAUN	Tom C. Gillert	
Wednesday, December 1, 1999 at 9:30 AM DISTRICT COURT ARRAIGNMENT		Tom C. Gillert	

Event	Party	Docket	Reporter
Monday, January 3, 2000 at 1:30 PM DISTRICT COURT ARRAIGNMENT		Tom C. Gillert	
Monday, January 10, 2000 at 1:30 PM DISTRICT COURT ARRAIGNMENT		Tom C. Gillert	
Wednesday, March 1, 2000 at 9:30 AM SENTENCING (AFTER PLEA)		Tom C. Gillert	
Wednesday, March 29, 2000 at 9:30 AM SENTENCING (AFTER PLEA)		Tom C. Gillert	

COUNTS

Parties appear only under the counts with which they were charged. For complete sentence information, see the court minute on the docket.

Count # 1. Count as Filed: POSS OF FIREARM WHILE UNDER SUPERVISION OF DOC/FELONY AFCF, in violation of 21 O.S. 1283/0C
Date of Offense: 08/25/1999

Party Name	Disposition Information
COLE, MICHAEL ANTWAUN	**Disposed: DISMISSED, 03/29/2000. Dismissed by Court** Count as Disposed: POSS OF FIREARM WHILE UNDER SUPERVISION OF DOC/FELONY AFCF Violation of 21 O.S. 1283/0C

DOCKET

Date	Code	Description	
08-31-1999	**[INFOD]**		COLE, MICHAEL ANTWAUN
		INFORMATION POSS OF FIREARM WHILE UNDER SUPERVISION OF DOC/FELONY AFCF	
09-02-1999	**[DAINS]**		COLE, MICHAEL ANTWAUN
		DISTRICT ATTORNEY INSPECTION NOTIFICATION	
09-02-1999	**[TEXT]**		COLE, MICHAEL ANTWAUN
		SMITH CLANCY:ARRAIGNMENT-NOT GUILTY, PRELIM HRG 9-22-99 @9AM. DEFT PRESENT, IN CUSTODY, RPE BY JOHN BORLAND. DEFT WAIVES READING OF INFORMATION AND STANDS MUTE, COURT ENTERS PLEA OF NOT GUILTY. BOND $10,000 REMAINS. ROOM 347.	
09-03-1999	**[TEXT]**		COLE, MICHAEL ANTWAUN
		SMITH CLANCY:HEARING FOR BOND REDUCTION SET 9-3-99 @3PM.	
09-03-1999	**[MOABO]**		COLE, MICHAEL ANTWAUN
		MOTION/APPLICATION FOR BOND REDUCTION	
09-03-1999	**[OHEA]**		COLE, MICHAEL ANTWAUN
		ORDER SETTING HEARING	
09-03-1999	**[TEXT]**		COLE, MICHAEL ANTWAUN
		SMITH CLANCY:HEARING FOR BOND REDUCTION STRICKEN FOR FAILURE TO PRESENT. STATE REP BY KIM HALL.	

09-08-1999 [BO] COLE, MICHAEL ANTWAUN

APPEARANCE BOND BY: L#2261 APRIL SCOTT 10000.00 [10.00]

09-15-1999 [RETRL] COLE, MICHAEL ANTWAUN

RETURN RELEASE

09-16-1999 [AFPCA] COLE, MICHAEL ANTWAUN

AFFIDAVIT & FINDING OF PROBABLE CAUSE(ARRESTED)

09-22-1999 [TEXT] COLE, MICHAEL ANTWAUN

SMITH CLANCY: PRELIMINARY HEARING PASSED TO 10/20/99 @ 9 AM. DEF PRESENTREP'D BY JOUHN BOURLAND. STATE BY DAVE ISKI. DEFT R/B. BOND SAME.

10-20-1999 [AC01] COLE, MICHAEL ANTWAUN $ 10.00

ACCOUNT BALANCE- AC10. AS OF CONVERSION FROM THE MAINFRAME (10/20/1999), THE TOTAL AMOUNT FOR THIS ACCOUNT (THIS DEFENDANT) IS: $10.00. THE TOTAL PAID ON THIS ACCOUNT IS $ 0.00. THE BALANCE ON THIS ACCOUNT IS $ 10.00.

10-20-1999 [CTPRLDCA] COLE, MICHAEL ANTWAUN

SMITH SARAH: DEFENDANT PRESENT, NOT IN CUSTODY AND REPRESENTED BY JOHN BOURLAND. STATE REPRESENTED BY DAVE ISKI. COURT REPORTER: SHANNON HARWOOD. CASE CALLED FOR PRELIMINARY HEARING. 3 WITNESSES SWORN.2ND PAGE STRICKEN FROM INFORMATION. DEFT'S DEMURRER OVERRULED DEFENDANT IS BOUND OVER TO DISTRICT COURT ON THE CHARGE(S) OF POSS OF F.A. WHILE UNDER SUPERVISION OF DEPT OF CORRECTIONS BEFORE JUDGE GILLERT ON 10-25-99 9:30 A.M.. BOND TO REMAIN; DEFT RECOGNIZED BACK.

10-28-1999 [CCERT]

COURT REPORTER'S CERTIFICATE

11-15-1999 [T] COLE, MICHAEL ANTWAUN

ORIGINAL TRANSCRIPT OF PRELIMINARY HEARING OCTOBER 20, 1999

11-22-1999 [CTPASS] COLE, MICHAEL ANTWAUN

GILLERT; THOMAS: DEFENDANT PRESENT, AND REPRESENTED BY JOHN BOURLAND. STATE REPRESENTED BY ERIC JORDAN. DISTRICT COURT ARRAIGNMENT PASSED TO 12/1/99 @9:30 AM. BOND TO REMAIN; DEFENDANT RECOGNIZED BACK .

12-01-1999 [MOQ&S] COLE, MICHAEL ANTWAUN

MOTION TO QUASH AND SUPPRESS & BRIEF IN SUPPORT

12-01-1999 [CTPASS] COLE, MICHAEL ANTWAUN

GILLERT THOMAS: DEFENDANT PRESENT, NOT IN CUSTODY AND REPRESENTED BY JOHN BOURLAND. STATE REPRESENTED BY CHAD GREER. DISTRICT COURT ARRAIGNMENT PASSED TO 1-3-2000 1:30 P.M.. BOND TO REMAIN; DEFENDANT RECOGNIZED BACK.

01-03-2000 [CTPASS] COLE, MICHAEL ANTWAUN

GILLERT: THOMAS: DEFENDANT PRESENT, AND REPRESENTED BY JOHN BORLAND. STATE REPRESENTED BY CHAD MOODY. DISTRICT COURT ARRAIGNMENT PASSED TO 1/10/00 @1:30 PM. BOND TO REMAIN; DEFENDANT RECOGNIZED BACK. .

01-10-2000 [CTPLESEN] COLE, MICHAEL ANTWAUN

GILLERT: THOMAS: DEFENDANT PRESENT, AND REPRESENTED BY JOHN BOURLAND. STATE REPRESENTED BY STEVE HIGHTOWER. COURT REPORTER JOANNA SMITH. SENTENCING IS SET FOR 3/1/00 @9:30 AM. BOND TO REMAIN; DEFENDANT RECOGNIZED BACK. .

03-01-2000 [CTPASS] COLE, MICHAEL ANTWAUN

GILLERT: THOMAS: DEFENDANT PRESENT, AND REPRESENTED BY JOHN BOURLAND. STATE REPRESENTED BY CHAD MOODY. SENTENCING PASSED TO 3/29/00 @9:30 AM. BOND TO REMAIN; DEFENDANT RECOGNIZED BACK. .

03-29-2000 [DISPDNC] COLE, MICHAEL ANTWAUN **#**1

GILLERT THOMAS: CASE CALLED FOR SENTENCING - DISMISSED, COST TO THE STATE. DEFT PRESENT AND REP BY JOHN BOURLAND, STATE BY CHAD MOODY. COURT REPORTER JOANNA SMITH. BOND EXONERATED.

09-21-2000 [RULE8]

ORDER OF THE COURT - RULE 8 HEARING

11-16-2000 [O] COLE, MICHAEL ANTWAUN

ORDER FOR REASSIGNMENT OF CRIMINAL DISTRICT JUDGE

AFFIDAVIT OF MICHAEL COLE

STATE OF OKLAHOMA)
)
COUNTY OF TULSA)

ss.

I, Michael Cole, being of legal age and sound mind, do solemnly swear and state as follows:

1. My name is Michael Cole. Rashad Ali Barnes was a close friend of mine, like a brother to me. In 1999, I primarily stayed at his parents' house on 5409 N. Hartford Avenue in Tulsa.

2. In July of 1999, I entered a guilty plea in CF-1998-2257 to one felony count of unlawful possession of marijuana with intent to distribute and a misdemeanor count of driving with a suspended license with my sentencing deferred to two years and I was placed under supervision.

3. In my paperwork with the probation office, I put down Rashad's address as the place I was staying.

4. On August 25, 1999, probation officers stopped by Rashad's address and found several guns in his home. Although I was not there, I was told to come to Rashad's house. When I did, I was arrested and charged with violating the rules of my probation for being a felon in possession of a weapon in CF-99-4210. I was released after I made bond.

5. The police were putting a lot of pressure on me, Rashad and others to talk about what happened to Ms. Bowles and Mr. Thurman. They picked me up from my momma's house and took me to the detective station. Several officers surrounded me and questioned me. I repeatedly told them I did not have anything to tell them. I would think this was recorded because of the gravity of this case.

6. Rashad, Tremaine Wright, and I were subpoenaed to appear at the grand jury. I called my attorney and told him they were trying to make me testify. He

told me to take the 5th, which I did and so did Tremaine. Rashad testified before the grand jury.

7. Because of everything that was going on, we were constantly being followed by the police everywhere we went. One morning I came out of my mother's house and got in my truck with a friend. I was still in the driveway when a cop pulled in behind me and searched my vehicle. They found an 8 ball in my truck. I was arrested for possession of CDS again and taken to the police station.

8. When Rashad heard what was happening, he called the district attorney, Tim Harris and told him that if he would testify in John Hanson and Victor Miller's cases if they did not charge me with possession of CDS. Mr. Harris agreed. I was never charged, and I was let out that same night – no bond, no nothing. Like it didn't even happen.

9. I was never asked to testify and I was never interviewed by anyone from John or Victor's defense teams about the information in this affidavit.

FURTHER AFFIANT SAYETH NOT.

Michael Cole

Subscribed and sworn to before me this 5th day of 30, 2025.

JULIE GARDNER NOTARY PUBLIC STATE OF OKLAHOMA # 05008474 EXP: 09/12/25

NOTARY PUBLIC

Commission No.: 05008474

Expires: 9/12/05

OKLAHOMA STATE BUREAU OF INVESTIGATION

Criminal History Information Request Portal Response

6600 North Harvey Place • Oklahoma City, OK 73116
(405) 879-2986
CHIRP@osbi.ok.gov
http://www.ok.gov/osbi/Criminal_History/CHIRP

Type of Search(es) Requested	Request Date
[x] OSBI Name Based [ ] DOC Sex Offender [ ] DOC Violent Offender	04/09/2025

The Oklahoma State Bureau of Investigation (OSBI)'s Criminal History Information Request Portal (CHIRP) allows for online search requests of OSBI's Criminal History Database and the Oklahoma Department of Corrections' Sex Offender and Violent Offender Registries. Matches identified in OSBI's database are returned with a state identification number and associated RAP sheet.

REQUESTOR INFORMATION:

ORGANIZATION _____

AUTHORIZED USER _____

STREET ADDRESS _____

_____

PHONE NUMBER _____ E-MAIL ADDRESS _____

SUBJECT INFORMATION:

NAME COLE, MICHAEL ANTWUAN

ALIAS/MAIDEN NAME(S) _____

DATE OF BIRTH _____ RACE B SEX M SOCIAL SECURITY NUMBER _____

PURPOSE OF REQUEST _____

SEARCH RESULTS:

OSBI Computerized Criminal History	Department of Corrections Sex Offender Registry	Department of Corrections Violent Offender Registry
BASED UPON THE INFORMATION PROVIDED, THE SUBJECT MAY BE THE SAME AS OSBI #1152020. A COPY OF THE RECORDS ARE ATTACHED. **04/09/2025**		

Record information is furnished solely on the basis of name or description similarity with the subject of the inquiry

OKLAHOMA STATE BUREAU OF INVESTIGATION
IDENTIFICATION DIVISION
6600 NORTH HARVEY SUITE 300
OKLAHOMA CITY, OKLAHOMA 73116

THE FOLLOWING OSBI RECORD IS SUBJECT TO THE OKLAHOMA OPEN RECORDS ACT. INFORMATION SHOWN ON THIS CRIMINAL HISTORY REPRESENTS DATA FURNISHED TO OSBI BY FINGERPRINT CONTRIBUTORS, DISTRICT ATTORNEYS, AND COURT RECORDS. WHERE DISPOSITION DATA IS NOT SHOWN OR FURTHER EXPLANATION OF THE CHARGE OR DISPOSITION IS DESIRED, COMMUNICATE WITH THE AGENCY CONTRIBUTING THE RECORD TO OSBI. ONLY THE COURT WHERE A FINAL DISPOSITION OCCURRED CAN PROVIDE A CERTIFIED COPY OF THAT DISPOSITION. UNLESS FINGERPRINTS ACCOMPANIED YOUR REQUEST FOR A CRIMINAL HISTORY RECORD, OSBI CANNOT AFFIRM THAT THIS RECORD RELATES TO THE PERSON OF YOUR INQUIRY. THIS INFORMATION IS COMPLETE AND ACCURATE TO THE EXTENT FEASIBLE AS OF THE DATE OF DISSEMINATION, BASED ON THE RECORDS RECEIVED AT OSBI.

OSBI #: 1152020 RELEASE DATE: 2025-04-09 RELEASE BY:0

NAME: COLE, MICHAEL ANTWAUN

BIRTHDATE: RACE: BLACK SEX: MALE

HEIGHT: 511 WEIGHT: 260 EYES: Brown HAIR: Black

BIRTHPLACE: Oklahoma CITIZENSHIP: United States

SCARS/MARKS/TATTOOS: TAT LF ARM | TAT RF ARM |

NAMES USED: COLE, MICHAEL WADE | COLE, MICHAEL ANTWUAN |
COLE, MICHAEL ANTWUAN | COLE, MICHAEL |

DOB USED:

SOCIAL SECURITY NUMBER(S): **** | **** |

PALM PRINTS AVAILABLE | PHOTO AVAILABLE

----------ARREST CYCLE(S)----------

ENTRY-1-ARRESTED/RECEIVED DATE: 2018-02-18
CONTRIBUTOR AGENCY: OK0721400-OKLAHOMA STATE UNIVERSITY TULSA CAMPUS POLICE
NAME USED: COLE, MICHAEL WADE

CHARGE:(1) DUI - LIQUOR OR DRUGS/APCV
SEVERITY: FELONY
ARREST DISPOSITION: REFERRED TO D.A.

COURT: TULSA CO/TULSA, OK CASE #: CF-2018-00875
DISPOSITION: PLED NOT GUILTY,CASE DISMISSED
DATE: 2020-05-18
OFFENSE: DUI: DRIVE UNDER THE INFLUENCE OF ALCOHOL

CHARGE:(2) TRANSPORTING OPEN CONTAINER-BEER
SEVERITY: MISDEMEANOR
ARREST DISPOSITION: REFERRED TO D.A.

COURT: TULSA CO/TULSA, OK CASE #: CF-2018-00875
DISPOSITION: PLED NOT GUILTY,CASE DISMISSED
DATE: 2020-05-18
OFFENSE: TRANSPORTING OPEN CONTAINER OF LIQUOR

COURT: TULSA CO/TULSA, OK CASE #: CF-2018-00875
DISPOSITION: PLED NOT GUILTY,CASE DISMISSED
DATE: 2020-05-18
OFFENSE: FAILURE TO STOP AT STOP SIGN

****

ENTRY-2-ARRESTED/RECEIVED DATE: 2012-09-30
CONTRIBUTOR AGENCY: OK0720000-SO TULSA CO, TULSA, OK
NAME USED: COLE, MICHAEL

CHARGE:(1) 4700110902-DUI - LIQUOR OR DRUGS/APCV
SEVERITY: MISDEMEANOR
ARREST DISPOSITION: REFERRED TO D.A.

COURT: TULSA CO/TULSA, OK CASE #: CM-2012-04945
DISPOSITION: GUILTY PLEA
DATE: 2012-11-07
OFFENSE: AGGRAVATED DUI - LIQUOR
CONVICTION: MISDEMEANOR
FINE: $375
SENTENCE: 1 YRS 0 DAYS
SUSPENDED: 1 YRS 0 DAYS
SUPERVISION: UNKNOWN

****

ENTRY-3-ARRESTED/RECEIVED DATE: 2002-03-26
CONTRIBUTOR AGENCY: OK0720500-PD TULSA, OK
NAME USED: COLE, MICHAEL ANTWUAN AGENCY CASE #: 168012

CHARGE:(1) 6300020402-POSS OF CONTROLLED SUBSTANCE
SEVERITY: FELONY
ARREST DISPOSITION: REFERRED TO D.A.

CHARGE:(2) 4700120418-FAILURE TO WEAR SEAT BELT
SEVERITY: MISDEMEANOR
ARREST DISPOSITION: REFERRED TO D.A.

****

ENTRY-4-ARRESTED/RECEIVED DATE: 1999-10-05
CONTRIBUTOR AGENCY: OK0720500-PD TULSA, OK
NAME USED: COLE, MICHAEL ANTWAUN AGENCY CASE #: 168012

CHARGE:(1) 5018-APPLICATION TO ACCELERATE DEFERRED SENTENCE
ARREST DISPOSITION: BENCH WARRANT SERVED

ENTRY-5-ARRESTED/RECEIVED DATE: 1998-04-28
CONTRIBUTOR AGENCY: OK0720500-PD TULSA, OK
NAME USED: COLE, MICHAEL ANTWAUN AGENCY CASE #: 168012

CHARGE:(1) 3560-MARIJUANA - SELL
SEVERITY: FELONY

COURT: TULSA CO/TULSA, OK CASE #: CF-1998-02257
DISPOSITION: GUILTY PLEA
DATE: 1999-07-06
OFFENSE: DIST OF CONTROLLED SUBSTANCE -INCL POSS W/ INTENT
DEFERRED: 2 YRS 0 DAYS

CHARGE:(2) 5499-TRAFFIC OFFENSE
SEVERITY: MISDEMEANOR

COURT: TULSA CO/TULSA, OK CASE #: CF-1998-02257
DISPOSITION: GUILTY PLEA
DATE: 1999-07-06
OFFENSE: DRIVING W/ LICENSE CANC/SUSP/REVOKED
CONVICTION: MISDEMEANOR
SENTENCE: FINE AND COURT COSTS
FINE AND COURT COSTS

****

----------NON ARREST CYCLE(S)----------

ENTRY-1 - RECEIVED DATE: 2021-04-30
CONTRIBUTOR AGENCY: OK920070Z-OSBI SDA LICENSING DIVISION
NAME USED: COLE, MICHAEL ANTWUAN
PURPOSE: HANDGUN LICENSE APPLICANT - TITLE 21 OS 1290-12

UNKNOWN AS TO NATIONAL ARREST STATUS

END OF RECORD