No. 25-

IN THE

Supreme Court of the United States

TREMANE WOOD,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

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

APPENDIX VOLUME 1 OF 3

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1062687027

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
SEP - 2 2025

TREMANE WOOD,	)	
	)	
Petitioner,	)	NOT FOR PUBLICATION
	)	
v.	)	No. PCD-2024-879
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

OPINION DENYING FIFTH APPLICATION FOR CAPITAL POST-CONVICTION RELIEF

LUMPKIN, PRESIDING JUDGE:

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

[1] Petitioner's jury convicted him of Count 1-First Degree Felony Murder in violation of 21 O.S.2001, § 701.7(B), Count 2-Robbery with Firearms, After Former Conviction of a Felony in violation of 21 O.S.2001, § 801, and Count 3-Conspiracy to Commit a Felony, After Former Conviction of a Felony in violation of 21 O.S.2001, § 421. The jury recommended the death penalty on Count 1 after

Sentence on direct appeal[2] and in collateral proceedings in this Court.[3] All of Petitioner's previous challenges before this Court have proved unsuccessful. Petitioner's challenges in federal court have likewise been unsuccessful and he is awaiting an execution date.[4]

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finding that Petitioner knowingly created a great risk of death to more than one person, that the murder was especially heinous, atrocious, or cruel, and that Petitioner posed a continuing threat to society. *See* 21 O.S.2001, §§ 701.12(2), (4) and (7). The jury fixed his punishment on Counts 2 and 3 at life imprisonment and he was sentenced accordingly.

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

[3] This Court denied Petitioner's original, second, third, and fourth applications for post-conviction relief in unpublished decisions. *See Wood v. State,* Case No. PCD-2005-143 (Okl.Cr. June 30, 2010) (unpublished); *Wood v. State,* Case No. PCD-2011-590 (Okl.Cr. Sept. 30, 2011) (unpublished), *Wood v. State,* Case No. PCD-2017-653 (Okl.Cr. Aug. 28, 2017) (unpublished), *cert. denied,* 139 S.Ct. 938 (2019); *Wood v. State,* Case No. PCD-2022-550 (Okl.Cr. Aug. 18, 2022) (unpublished), *cert. denied,* 143 S.Ct. 1098 (2023).

[4] The United States District Court denied a petition for writ of habeas corpus in *Wood v. Trammell,* No. CIV-10-0829-HE, 2015 WL 6621397 (W.D.Okla. 2015). The Tenth Circuit affirmed the denial of habeas corpus in *Wood v. Carpenter,* 899 F.3d 867 (10th Cir.), *opinion modified and superseded on denial of rehearing,* 907 F.3d 1279 (10th Cir. 2018). The Supreme Court denied certiorari review of the Tenth Circuit's opinion in *Wood v. Carpenter,* 139 S.Ct. 2748 (2019). Petitioner's Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b)(6) was denied in *Wood v. Quick,* No. CIV-10-0829-HE, 2015 WL 6621397 (W.D. Okla. Sept. 13, 2023). His Motion for Remand was denied in *In re: Tremane Wood,* No. 23-6129 (10th Cir. Jan. 8, 2024), *cert. denied,* 145 S.Ct. 194 (2024). His Jurisdictional Memorandum Brief was denied in *Wood v. Quick,* No. 23-6134 (10th Cir. Nov. 6, 2023), *cert. denied,* 144 S.Ct. 2597 (2024).

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 either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent.

22 O.S.Supp.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).

Petitioner raises two due process claims in this fifth application for relief relating to the deferred sentence and testimony of co-defendant Brandy Warden. First, he argues that newly discovered evidence supports a finding that prosecutors in his case withheld material evidence favorable to the defense 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. *See Brady v. Maryland,* 373 U.S. 83 (1963). He claims that prosecutors in Oklahoma County hid evidence of an agreement made with Brandy Warden and prosecutors in Payne County that in exchange for her testimony against Petitioner at his capital murder trial, her felony deferred judgment and sentence in Payne County would not be accelerated to a conviction.

Second, Petitioner asserts that not only did the Oklahoma County prosecutors suppress their agreement with Ms. Warden, those prosecutors went on to elicit false testimony from Ms. Warden and then failed to correct that false testimony about the extent of the benefits she received in exchange for her cooperation with the State's death penalty prosecution 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. *See Napue v. Illinois,* 360 U.S. 264 (1959). Petitioner asserts the prosecutors hid from the trial judge and the jury critical information indispensable to Warden's credibility, incentives, and motivations for testifying and they induced the district court's acceptance of Warden's guilty plea to accessory to murder after the fact and conspiracy to commit robbery through lies and falsehoods.

And finally, Petitioner argues the cumulative effect of these constitutional errors renders his conviction and sentence fundamentally unfair, unreliable, and infirm.[5]

Petitioner's claim of newly discovered evidence is based upon a handwritten note attached to a duplicate copy of a document filed in Petitioner's case in the District Court of Oklahoma County obtained during a review of the Oklahoma County District Attorney's case file. Petitioner asserts that he only discovered the note in September 2024 when he obtained access to the Oklahoma County prosecutor's files after the Oklahoma County District Attorney's Office implemented a policy making prosecutor's files, including their work product, available to defense counsel in capital cases. Petitioner asserts he has thereby complied with the sixty (60) day rule and 22 O.S.Supp.2022, § 1089(D)(8). The State responds that, assuming for the sake of argument, Petitioner could not have earlier discovered the factual basis for the claim, the claim is nonetheless waived because Petitioner cannot make his required showing under 22

[5] In response to an order from this Court, the State timely filed an Amended State's Response to Petitioner's (Fifth) Application for Post-Conviction Relief. Petitioner's Motion for Leave to Reply is granted and his Reply Brief is timely filed.

O.S.Supp.2022, §1089(D)(8)(b)(2). We find Petitioner has sufficiently shown that the instant application was filed within sixty days from the date the newly discovered evidence/handwritten note was discovered by the defense. *See* Rule 9.7(G)(3).

As much of Petitioner's argument for relief is based upon the interpretation of handwritten notes found throughout the prosecutor's files, we granted Petitioner's request (over the State's objection) to remand the case for an evidentiary hearing where documentary evidence and testimony from relevant participants could be presented. We directed the District Court to answer eight (8) questions to assist this Court in determining whether an undisclosed agreement existed between the prosecutors in Oklahoma County and Payne County not to accelerate Ms. Warden's Payne County deferred sentence prior to her testimony against Petitioner in his capital murder trial; and even if such an agreement existed, was it material or merely cumulative and did it have an effect on the outcome of the trial? We found the evidence from, and findings of, the District Court could aid in this Court's determination of whether prosecutors violated Petitioner's right to due process by withholding evidence in violation of *Brady*; and whether prosecutors failed to comply with the

requirements of *Napue* by eliciting and failing to correct false testimony from Ms. Warden.

At the remanded evidentiary hearing, the District Court accepted stipulations and multiple exhibits from the parties. The court also heard testimony from twelve (12) witnesses presented by Petitioner, including Ms. Warden; her defense counsel in Payne County, Ms. Cox; the two prosecutors involved in Petitioner's capital murder trial in Oklahoma County, Ms. Smith and Mr. Burnett; the two prosecutors involved in Ms. Warden's Payne County case, Mr. Lee and Mr. Antonioli; and counsel for co-defendant Zjaiton Wood, Ms. Tyner.[6] The District Court subsequently issued findings of fact and conclusions of law which were filed with this Court. The District Court ultimately found: 1) Petitioner "failed to demonstrate the existence of any *Brady* or *Napue* violation in relation to Ms. Warden's agreement with the Oklahoma County District Attorney's Office"; and 2) "*even if* such an agreement existed, it was not material in the sense that it would . . . have affected the outcome of Petitioner's trial." In reviewing the District Court's findings, we give them "strong

[6] Petitioner's trial counsel was deceased by the time of the evidentiary hearing.

deference." However, it is this Court that ultimately decides the merits of Petitioner's claims for relief. *See Wood v. State*, 2007 OK CR 17, ¶ 39, 158 P.3d 467, 479 (quoting Rule 3.11(B)(3)(b)(iv), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2006)).

The Due Process Clause of the Fourteenth Amendment requires the State to disclose exculpatory and impeachment evidence favorable to an accused. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). *See also Fuston v. State*, 2020 OK CR 4, ¶ 58, 470 P.3d 306, 322. To establish a *Brady* violation, a defendant must show that the prosecution suppressed evidence that was favorable to him or exculpatory, and that the evidence was material. *Fuston*, 2020 OK CR 4, ¶ 58, 470 P.3d at 322. The evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)). Such evidence may be material irrespective of the good or bad faith of the prosecution. *Strickler v. Greene*, 527 U.S. 262, 280-281 (citing *Brady*, 373 U.S. at 87).

Petitioner 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." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). In the context of impeachment, evidence of impeachment of a witness adverse to a defendant may be favorable and material "so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." *Bagley*, 473 U.S. at 676. *See also United States v. Bracy*, 67 F.3d 1421, 1428 (9th Cir. 1995).

The record in this case shows that Brandy Warden was on a three (3) year deferred sentence in Payne County for the crime of Larceny From a House when she was charged in the District Court of Oklahoma County, along with Petitioner, Zjaiton Wood, and Lanita Bateman with First Degree Murder, Robbery with a Firearm, and Conspiracy to Commit a Felony (Robbery with a Firearm) for the murder of Ronnie Wipf and robbery of Arnold Kleinsasser. In exchange for truthful testimony at Petitioner's trial, Ms. Warden pled guilty to lesser charges of Accessory After the Fact to First Degree Murder and Conspiracy to Commit a Felony (Robbery with a Dangerous Weapon) with a total sentence of forty-five (45) years.

Approximately one year after her sentencing, she testified in Petitioner's capital trial. In doing so, she acknowledged that she received a "good deal" in exchange for providing truthful testimony against Petitioner on behalf of the State; a more lenient sentence, and that her agreement with the State provided for a total sentence of forty-five (45) years. Ms. Warden's deferred sentence in Payne County expired and the case was dismissed approximately six (6) months before she testified against Petitioner.

Through testimony elicited at the evidentiary hearing, a consistent narrative emerged. Witnesses testified that no agreement was made between the District Attorneys' Offices of Oklahoma and Payne counties to refrain from accelerating Ms. Warden's deferred sentence prior to her testimony against Petitioner. Testimony showed that Ms. Warden's deferred sentence in Payne County played no part in her negotiations with prosecutors from Oklahoma County to testify as a prosecution witness in Petitioner's capital murder trial. Testimony also showed that no other benefits were extended to Ms. Warden for her testimony against Petitioner, outside of those she testified to at trial. The findings of the District Court that the evidence failed to substantiate Petitioner's claim of an undisclosed agreement

between the prosecutors in Oklahoma County and Payne County not to accelerate Ms. Warden's deferred sentence are fully supported by the record.

In arriving at this conclusion, we find the testimony and documentary evidence produced at the evidentiary hearing supports the District Court's conclusions regarding certain handwritten notes Petitioner claims are evidence of an agreement between the two prosecutors' offices to ensure that Ms. Warden would testify against Petitioner without being impeached with the full extent of the deal she received in exchange for her testimony.

The District Court found that a note identified as written by Mr. Lee to "hold off for a while" on the application to accelerate Ms. Warden's deferred sentence attached to a "Case Report/Violation Report" reporting violations of her probation filed in the District Court of Payne County was not indicative of a "covert, cross-county agreement". Rather, as testified by Mr. Lee, the more plausible intention behind this note was to wait to see what would ultimately happen with Ms. Warden's Oklahoma County case, (the note was written mere days after Ms. Warden had been charged in Oklahoma County) given the cost and effort of attempting to accelerate a

deferred sentence on a relatively trivial property crime when considered in light of the serious felony charges she was facing in Oklahoma County. Mr. Lee testified his decision was made independently of and in the absence of any request from Oklahoma County regarding the Payne County case.

We also find credible the District Court's conclusion regarding another note attached to the same "Case Report/Violation Report" including information such as Ms. Warden's name and "State's witness" "PG on Acc. After the fact". While the author of this note could not be determined with certainty, it was not written by Mr. Lee or Mr. Antonioli and was likely the result of Ms. Tyner's phone calls with Payne County District Attorney's Office during her representation of Zjaiton Wood.

Finally, the note which Petitioner claims is his newly discovered evidence does not establish a constitutional violation. Handwritten on the left bottom corner of a copy of the *State's Response to Defendant's Motion Requesting Production of All Statements of Co-defendants Tremane Wood, Lanita Bateman, and Brandy Warden*, filed in the District Court of Oklahoma County in Petitioner's case, Case No. CF-2002-46, is the notation "Brandy Warden D/S in Payne

County". Based upon Mr. Burnett's testimony, the District Court found Mr. Burnett likely wrote the note during a hearing where the court heard various motions by Ms. Tyner. The District Court found the note was not written in relation to any agreement with Payne County to not accelerate Ms. Warden's Payne County deferred sentence. Again, we find the District Court's conclusions of the testimony credible and supported by the record.

Petitioner's attempt to take three (3) unrelated notes found in the prosecutor's files and conjure up a conspiracy between two separate District Attorneys' Offices to hide evidence of an agreement in order to make Ms. Warden a more credible witness is nothing but speculation and suspicion. The record shows the notes in question stemmed from individual actions taken in two (2) different counties during the usual course of prosecution. The majority of the witnesses in this remanded evidentiary hearing who provided pertinent factual information regarding Petitioner's claims were attorneys. Petitioner's speculative claims of misconduct and error are not sufficient to overcome the presumption that during their participation in the two (2) cases in question the attorneys adhered to their oaths as officers of the court. *See Musconda v. State*, 2019 OK CR 1, ¶ 12, 435 P.3d

694, 697 (appellant presented nothing beyond rank speculation to support his argument). Based on the record before us, including evidence presented at the remanded evidentiary hearing, we find Petitioner has failed to demonstrate that the prosecutors in Oklahoma and Payne Counties entered into an agreement to not accelerate Ms. Warden's deferred sentence in exchange for her testimony against Petitioner in his capital murder trial.[7]

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[7] In a supplemental brief following the remanded evidentiary hearing, Petitioner raises two (2) instances he claims affect the credibility of the Oklahoma County prosecutors. Specifically, he argues that evidence of a "cooperation memorandum" concerning Ms. Warden's plea agreement with Oklahoma County and the State's conduct in relation to another prosecution witness, Coleman Givens, is relevant and probative of the prosecutors' intent to hide and deceive the court in Petitioner's case. Neither of these claims was raised in Petitioner's original fifth application for post-conviction. However, as testimony and documentary evidence were presented at the evidentiary hearing regarding these claims, we address them here.

It was established at the evidentiary hearing that plea negotiations between Ms. Warden and Oklahoma County prosecutors culminated in the preparation of a "cooperation memorandum", described as a "type of contract" between the State and its witnesses, for managing the witnesses. The memorandum was signed by all parties and filed in the prosecutor's files. It outlined Ms. Warden's anticipated plea agreement and the State's expectations of her as a cooperating witness. The full extent of the actual plea agreement with the State was set forth in the plea agreement form. Any information contained in the "cooperation memorandum", additional to that of the plea agreement, consisted of items such as advising Ms. Warden to stay out of trouble, stay in touch with your lawyer, etc. Neither Ms. Warden's plea agreement with Oklahoma County nor the "cooperation memorandum" contain any reference to any agreement regarding the Payne County deferred sentence.

For unexplained reasons, the "cooperation memorandum" lists the sentence promised Ms. Warden as thirty-five (35) years while the guilty plea form lists

forty-five (45) years. Contrary to Petitioner's claim, this discrepancy is not indicative of any secret promise by the State for a thirty-five (35) year sentence as no other document or testimony references a thirty-five (35) year sentence. Further, while Ms. Warden's sentence was ultimately modified to thirty-five (35) years, the modification occurred over the State's strenuous objections. We agree with the District Court's conclusion that the "cooperation memorandum" does not reflect the actual agreement between Ms. Warden and the State, and that the full extent of the plea agreement is set forth in the plea agreement form. We find the existence of the "cooperation memorandum" does not support any inference that the prosecutors in Oklahoma County and Payne County had any secret agreements regarding Ms. Warden's testimony against Petitioner. Nothing about the proceedings surrounding the "cooperation memorandum" calls into question the prosecutors' credibility in these proceedings.

Also raised for the first time in the supplemental brief is a claim that prosecutors "sanitized" the felony record of prosecution witness Coleman Givens and concealed the extent of their full agreement with Mr. Givens and the benefits he received for testifying against Petitioner.

The consistent narrative at the evidentiary hearing was that Mr. Givens was not a crucial part of Petitioner's prosecution. (Mr. Givens testified at Petitioner's trial that he recognized Petitioner's voice as the same voice he heard at the motel the night of the murder). While not all details of Givens' case were remembered, evidence showed that he was detained on charges unrelated to Petitioner's case. He was later in the presence of Petitioner and Zjaiton Wood when they made threatening statements while asking Givens what he knew about their case. Mr. Givens was later released from custody, prior to Petitioner's trial, on his own recognizance.

Mr. Givens was subsequently charged in two (2) felony bogus check cases which were dismissed approximately one year later based upon payment of restitution. At Petitioner's trial, the jury was informed that Mr. Givens was not given assistance from the State in his bogus check cases in exchange for his testimony. Having reviewed the record, we find the District Court's conclusion that Mr. Givens was released from custody due to concerns for his safety and not in exchange for his testimony against Petitioner is well supported. We agree with the District Court's conclusion that no evidence presented by Petitioner casts doubt on the credibility of the Oklahoma County prosecutors. The record contains no evidence supporting a conclusion that prosecutors "sanitized" Mr. Givens' record and suppressed and concealed the extent of his agreement to testify for the State.

Even if the State had suppressed evidence of an agreement with Ms. Warden not to accelerate her deferred sentence (which we emphasize there was no evidence of such an agreement) Petitioner has failed to show evidence of that agreement was material such had that evidence been disclosed to the defense and the jury, the result of the proceeding would have been different. We find testimony from the attorneys involved sufficiently showed that any impeachment value that might have been derived from any alleged agreement would not have impacted the verdict or sentence in Petitioner's case. The record shows that at Petitioner's trial, Ms. Warden was subject to direct and cross-examination regarding the terms and extent of her plea agreement with the State in exchange for her testimony. Petitioner has not shown the trial court or jury were misled in any way by her testimony.

The failure by the prosecution to disclose express or implicit agreements with a key witness will typically be seen as a violation of the principle of *Brady* in circumstances where the witness provides the essential link between the principal and the crime. *See Haber v. Wainwright*, 756 F.2d 1520, 1523-24 (11th Cir. 1985) (case remanded to allow petitioner to elicit evidence regarding government's

agreement as to future prosecution of a witness found to be the "essential link" between the petitioner and the murder).

Here, the record shows Ms. Warden was not the "essential link" necessary to convict Petitioner or support a death sentence. As evidenced from the entire record, including testimony from the remanded evidentiary hearing, substantial evidence, separate and apart from Ms. Warden's testimony connected Petitioner to the murder. While Ms. Warden was a helpful witness for the prosecution in that she corroborated much of the other evidence presented by the State, the record shows the State's case against Petitioner was not dependent on her testimony. Any (alleged) agreement not to accelerate Ms. Warden's deferred sentence for a larceny conviction would have added little to no impeachment value beyond her plea agreement with respect to her Oklahoma County charges. *See Fuston,* 2020 OK CR 4, ¶ 61, 470 P.3d at 322 (explaining that allegedly withheld impeachment evidence of prosecutorial leniency would have done little to affect the credibility of the witness in question because the jury already was aware he "had pending criminal charges and had made a deal with the State in exchange for testimony."). Petitioner has failed to show that any evidence of an

(alleged) agreement not to accelerate Ms. Warden's deferred sentence was withheld from the defense and that this evidence amounted to material impeachment evidence that was reasonably likely to have altered the outcome of the jury trial in this case. We find nothing in the record supporting Petitioner's claim of a *Brady* violation.

Turning to Petitioner's second claim, *Napue v. Illinois*, 360 U.S. 264, 269 (1959) held that a conviction knowingly obtained through the use of false evidence violates the Fourteenth Amendment's Due Process Clause. To establish a *Napue* violation, "a defendant must show that the prosecution knowingly solicited false testimony or knowingly allowed it 'to go uncorrected when it appear[ed].'" *Glossip v. Oklahoma*, 145 S.Ct. 612, 626 (2025) (quoting *Napue,* 360 U.S. at 269). "If the defendant makes that showing, a new trial is warranted so long as the false testimony 'may have had an effect on the outcome of the trial, . . . that is, if it in any reasonable likelihood [could] have affected the judgment of the jury.'" *Id.*, 145 S.Ct. at 626-627 (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)). Evidence can be material under *Napue*, "even if it 'goes only to the credibility of the witness, . . . [as] the jury's estimate of the truthfulness and reliability

of a given witness may well be determinative of guilt or innocence.'" *Id.*, 145 S.Ct. at 628 (quoting *Napue,* 360 U.S. at 269).

A review of the record shows Petitioner has completely failed to demonstrate the existence of any sort of agreement between the Oklahoma and Payne County District Attorneys' Offices not to accelerate Ms. Warden's deferred sentence. As the District Court found, the evidence established that the disposition of Ms. Warden's deferred sentence was totally unrelated to Petitioner's case. Her testimony at Petitioner's trial concerning the benefits she received in exchange for her testimony has not been shown to be false or incomplete. Therefore, Petitioner has failed to establish there was any false testimony for the State to correct. Given that an essential element of a *Napue* violation is false testimony, that element has not been satisfied.

Even if the State had failed to correct any (alleged) false testimony by Ms. Warden, the record shows this omission was not material. As addressed previously, there was substantial evidence of Petitioner's guilt, separate and apart from Ms. Warden's testimony, to support a guilty verdict and death sentence. Her testimony corroborated much of that evidence so that Petitioner would have

been convicted even if she had been impeached in this regard or not testified at all. *See Hovey v. Ayers,* 458 F.3d 892, 920 (9th Cir. 2006) (finding prosecution's failure to disclose evidence regarding the leniency a witness received in exchange for his testimony, when the witness testified, he received "no promise", was not material given other corroborating evidence heard at trial).

Further, the lack of any materiality in the State's alleged failure to correct testimony is evident from the cross-examination of Ms. Warden by Petitioner's trial counsel. The record shows that defense counsel raised questions concerning the accuracy and credibility of her testimony given her lenient treatment by the State when compared with her co-defendants. Counsel questioned Ms. Warden's motives for accepting the plea agreement and testifying against Petitioner. Any additional impeachment evidence Petitioner's counsel might have presented to the jury regarding Ms. Warden's deferred sentence for a property crime would not have affected its assessment of her credibility. We find the record and the law support the District Court's finding there was no *Napue* violation.

Finally, Petitioner argues the cumulative effect of the constitutional errors in his case warrants relief. Petitioner asserts

claims of error which he acknowledges have been raised previously and rejected by this Court in prior applications, but 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 in this application and previous post-conviction applications.

We have previously held that this Court does not consider on post-conviction any errors in previous proceedings which were not raised in the current post-conviction application itself. *Coddington v. State*, 2011 OK CR 21, ¶ 22, 259 P.3d 833, 840. As we have found no merit in the claims raised in the post-conviction application currently before us, we find there is no error to accumulate.

Based on the foregoing, Petitioner's Fifth Application for Post-Conviction Relief is denied.[8]

DECISION

Petitioner's Fifth Application for Capital Post-Conviction Relief is **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.

[8] Petitioner's Objection to Scheduling Execution Date, and Alternatively, Request for Stay of Execution Pending Resolution of *Brady/Napue* Claims is also DENIED.

ATTORNEYS ON APPEAL

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OPINION BY: LUMPKIN, P.J.
MUSSEMAN, V.P.J.: Concur
LEWIS, J.: Concur
WINCHESTER, J.:[9] Concur
DARBY, J.:[10] Concur

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[9] The Honorable James Winchester, Justice of the Oklahoma Supreme Court, sitting by assignment.

[10] The Honorable Richard Darby, Justice of the Oklahoma Supreme Court, sitting by assignment.

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FILED IN DISTRICT COURT
OKLAHOMA COUNTY

MAY - 2 2025

RICK WARREN
COURT CLERK
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IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

ORIGINAL

TREMANE WOOD,)
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Petitioner,)
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FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

MAY - 5 2025

JOHN D. HADDEN
CLERK

Oklahoma County Case No. CF-2002-46

Court of Criminal Appeals Case No. PCD-2024-879

CAPITAL CASE

ORDER OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER came on for an evidentiary hearing[1] before this Court on April 7-9, 2025, pursuant to the OCCA's Remand Order issued on March 11, 2025. Per this order, the OCCA directed this Court to resolve the following issues of fact to facilitate the OCCA's review on post-conviction:

1) Whether an agreement existed between prosecutors in Oklahoma County and Payne County not to accelerate to a conviction [Brandy] Warden's deferred sentence in Payne County Case No. CF-2000-202, in exchange for her testimony in Petitioner's case in Oklahoma County, Case No. CF-2002-46;

2) Whether the prosecution withheld any evidence concerning the existence of an agreement with Warden or additional benefits she received, in addition to those she testified to at Petitioner's trial, in exchange for her testimony;

[1] Citations to the transcript of the three-day evidentiary hearing in this matter, occurring on April 7-9, 2025, filed as separate transcripts reflecting morning and afternoon proceedings for each respective day, will be referred to as (4/7/25 AM Tr.__), (4/7/25 PM Tr.__), etc. Citations to the six-volume transcript of the jury trial occurring between March 29, 2004 and April 5, 2004 will be referred to as (JT I,__), etc. Citations to the State's evidentiary hearing exhibits will be referred to as (St. Ex.__). Citations to Petitioner's evidentiary hearing exhibits will be referred to as (Pet. Ex.__). Citations to the Court's evidentiary hearing exhibits will be referred to as (Ct. Ex. __).

3) Whether Warden's deferred sentence in Payne County played any part in the plea agreement between Warden and Oklahoma County prosecutors for Warden's testimony in Petitioner's case;

4) Even if there was an agreement not to accelerate Warden's deferred sentence prior to her testifying in Petitioner's case, is evidence of such an agreement material or merely cumulative and did it have an effect on the outcome of the trial;

5) Any evidence as to the origin and meaning of the handwritten note on a "Case Report" filed January 18, 2002, in the District Court of Payne County, Case No. CF-2002-202, reporting violations of Warden's deferred sentence. A note stuck on the report, handwritten, dated 1-18-02, and signed "Tom" states "Let's Hold off for a while on the application[]" . . .;

6) Any evidence as to the origin and meaning of another handwritten note on the same document, undated, stating the following: "Wayna Tyner – Sapulpa OIDS," "State's witness PG on Acc. After the Fact", "Brandy Warden ("45 years)" with an arrow pointing to "She's testifying for the State," and "F-00-202 . . . Zjaiton Wood[]" . . .;

7) Any evidence as to the origin and meaning of the handwritten notation, "Brandy Warden D/S in Payne County" located in the bottom corner copy of the *State's Response to Defendant's Motion Requesting Production of All Statements of Co-defendants Tremane Wood, Lanita Bateman, and Brandy Warden*, filed in the District Court of Oklahoma County in Petitioner's case, Case No. CF-2002-46;

8) What was known by Petitioner's trial counsel regarding Warden's agreement to testify for the State prior to trial and what, if any, effect would the purported additional knowledge, have had on the strategy at trial.

(Remand Order at 6-8).

Before the hearing, in addition to the entirety of the State's evidentiary hearing exhibits delineated in its Witness and Exhibit List filed in this case, the parties stipulated to the following exhibits requested by Petitioner, which are incorporated by reference as part of the record in this matter: 6 through 16 (including exhibit 16's six subparts, labelled 16-1 through 16-6), 17, 18, 23

through 27, 30 through 32, 38, 46, 47, 57 through 59, 66 through 73. (*See* State's Witness and Exhibit List at 3-7, filed March 27, 2025; Joint Stipulation Regarding the Parties' Evidentiary Hearing Exhibits at 2-11, filed April 3, 2025; 4/7/25 AM Tr. at 6-7; 4/7/25 Afternoon Tr. 4). Additionally, during the hearing, the parties stipulated that the handwritten notes contained within Petitioner's Exhibits 5-1 and 82-1, as well as in State's Exhibit 3-B, were written by former Oklahoma County Assistant District Attorney, George Burnett. (4/8/25 AM Tr. at 63-64). Finally, the Court took judicial notice of the entire Oklahoma County District Court record in this matter. (4/7/25 AM Tr. at 7).

At the evidentiary hearing, Petitioner appeared by and through Amanda Bass Castro Alves, Cary Sandman, and Alison Rose, of the Federal Public Defender's Office, District of Arizona. (4/7/25 AM Tr. 5). The State appeared by and through Assistant Attorneys General Joshua Lockett and Christina Burns. (4/7/25 AM Tr. at 5). Petitioner presented twelve (12) witnesses: Robin Konrad, his former attorney in his federal habeas case; Rebecca Postyeni and Lamont Williams, investigators for the Arizona Federal Public Defender's Office; Sherry Boyce, Ms. Warden's former attorney in Payne County Case No. CF-2000-202; Tom Lee and Vincent Antonioli, former Payne County Assistant District Attorneys; Bill Ricketts and Michael Veasey, former Oklahoma City Police officers assigned to investigate the crimes for which Petitioner was convicted; Brandy Warden, Petitioner's co-defendant who testified against him in this case; Wayna

Tyner, co-defendant Zjaiton Wood's[2] attorney; and Fern Smith and George Burnett, former Oklahoma County Assistant District Attorneys who prosecuted this case for the State of Oklahoma. Both parties also presented exhibits. Based upon the stipulations, testimony, exhibits, and trial record, as well as a review of the pleadings, briefs and arguments of counsel, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Rebecca Postyeni

Rebecca Postyeni is an investigator with the Arizona Federal Public Defender's Office and a member of the team representing Petitioner, Tremane Wood in this case. (4/7/25 AM Tr. 23). On September 4, 2024, she and other members of Petitioner's legal team reviewed twelve boxes of the Oklahoma District Attorney's Office's case file in Petitioner's case. (4/7/25 AM Tr. 23-24). During that visit the legal team discovered a copy of the "State's Response to Defendant's Motion to Reveal All Deals" within the case file. (4/7/25 AM Tr. 24; Pet. Ex. 5-1). That document contained handwritten language on the lower left-hand side that read: "Brandy Warden D/S in Payne County." (Pet. Ex. 5-1).

2. Lamont Williams

Like Ms. Postyeni, Lamont Williams is an investigator with the Arizona Federal Public Defender's Office and a member of the team representing Petitioner in this case. (4/7/25 AM Tr. 36). On December 18, 2024, Mr. Williams

[2] For ease of reference, the Court will refer to Zjaiton Wood by his first name only, and to Tremane Wood as "Petitioner."

accompanied counsel for Petitioner in reviewing two additional boxes of the Oklahoma District Attorney's Office's case file in Petitioner's case. (4/7/25 AM Tr. 36-37). During that visit the legal team discovered certain documents in the case file pertaining to Brandy Warden's Payne County Case and the deferred sentence she received there. (4/7/25 AM Tr. 37-39; Pet. Ex. 28-1-28-6).

3. Sherry Boyce

Ms. Boyce was appointed to represent Brandy Warden in Payne County Case No. CF-2000-202, where Ms. Warden and a co-defendant, Sheneda Davis, were charged with Larceny From a House. (4/7/25 AM Tr. 44-45; Pet Exs. 28-1, 66; St. Exs. 5-B, 6-B). Because she was under twenty-one (21) at the time, Ms. Warden was considered a youthful offender and the State made a plea offer for a "three year deferred youthful offender program," with the *proviso* that she testify against Ms. Davis. (4/7/25 AM Tr. 45-46; Pet. Ex. 10; St. Ex. 5-C). After completing a "youthful offender report," the Department of Corrections ("DOC") joined the State's recommendation for a three-year deferred sentence, along with the completion of an out-of-custody "[i]n . . . [c]ommunity" program. (4/7/25 AM Tr. 45-46; Pet. Ex. 10; St. Ex. 5-C). Per her plea agreement, Ms. Warden was also required to complete fifty (50) hours of community service, pay restitution and court costs, and be supervised by DOC for two (2) years. (4/7/25 AM Tr. 47; Pet. Exs. 10-11; St. Ex. 5-C, 5-D, 5-E, 5-F). Ms. Warden's deferred sentencing period commenced on October 27, 2000 (the date of completion of the community DOC program), not June 23, 2000 (the specific date of her plea), and upon successful completion of her probation conditions, the case would be dismissed and

expunged on October 23, 2003, when the three-year term expired. (4/7/25 AM Tr. 47-48; Pet. Ex. 10-11; St. Ex. 5-E).

In Ms. Boyce's experience, the procedure in cases where a defendant successfully completed a deferred sentence entailed the defendant appearing in front of a judge, who would generally ask questions to ensure successful completion and that the defendant had no other pending cases. (4/7/25 AM Tr. 49-50). On the flip side, if the terms or conditions of a deferred sentence were deemed violated, DOC would normally file a violation report, which would be transmitted to the affiliated district attorney's office and generally result in the filing of a motion to accelerate. (4/7/25 AM Tr. 59-60). Once a motion to accelerate was filed, an arrest warrant would be issued for the defendant, and the case would be placed on a court docket for a hearing. (4/7/25 AM Tr. 50). At this hearing, the State would be required to present evidence in support of any alleged probation violation, which had to be proven by a preponderance of the evidence. (4/7/25 AM Tr. at 53-54). Practically speaking, this generally took the form of either live witness testimony or introduction of documents in certain scenarios, such as a preliminary hearing transcript or judgment and sentence. (4/7/25 AM Tr. at 53-54).

Regarding Ms. Warden's Payne County deferred sentence, Ms. Boyce became aware that a DOC violation report was filed on January 18, 2002,[3] listing violations of multiple probation rules, outlined as follows:

[3] Court filings indicate a previous application to accelerate Ms. Warden's deferred sentence was filed on June 6, 2001, due to failure to pay restitution; this application

- Rules #1, #13, for being charged in the instant case and for associating with Petitioner and Zjaiton "during the commission of" these crimes;

- Rules #5, #6, #12, for failing to submit "a written report and employment verification on the first working Monday" of December, 2001; and

- Rule #8, for failing to apprise her probation officer that she was no longer employed at McDonald's.

(4/7/25 AM Tr. 51; Pet. Ex. 14; St. Ex. 5-K). Ms. Boyce indicated that generally, DOC violation reports are provided to defense attorneys *via* a mailbox at the courthouse; however, to her recollection, she never received a copy of a motion to accelerate in relation to the January 18, 2002 violation report, which the Payne County District Attorney's Office would typically file. (4/7/25 AM Tr. 51-52, 55-57; Pet. Ex. 14; St. Ex. 5-K). Ms. Boyce further affirmed: 1) Ms. Warden's violation report contained serious criminal allegations regarding major felony offenses; and 2) in her thirty (30) years of practice, she had never seen the State go forward with a probation violation hearing to prove a capital murder violation, which she admitted required much more effort than—for example—seeking to prove a violation of failure to pay restitution. (4/7/25 AM Tr. 55, 58). Additionally, Ms. Boyce testified that at the time of the filing of the January 18, 2002 violation report, she had no reason to believe Ms. Warden was not in custody in Oklahoma County and due to this, the Payne County District Attorney's Office would have been required to physically transport her to Payne County in order to accelerate her deferred sentence. (4/7/25 AM Tr. 60-61).

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was subsequently withdrawn by the State on October 12, 2001, due to Ms. Warden becoming current on restitution payments. (*See* 4/7/25 AM Tr. 56-57, 60; St. Exs. 5-A, 5-G, 5-H, 5-J). Ms. Boyce represented Ms. Warden during these proceedings (4/7/25 AM Tr. 56-57; St. Ex. 5-A).

Regarding transporting a defendant from another jurisdiction to answer for probation violations, Ms. Boyce indicated that a similar procedure occurred with Ms. Warden's co-defendant, Ms. Davis, who had been arrested on felony charges in Oklahoma County while on Payne County probation; however, the Court notes that the circumstances of Ms. Davis's situation were distinguishable from that of Ms. Warden, because Ms. Davis's probation was revoked in Payne County *after* she had already pleaded to and been sentenced in Oklahoma County, a detail of which Ms. Boyce was unaware. (*See* 4/7/25 AM Tr. at 61-63; St. Exs. 6-A, 6-D, 6-E, 6-J, 6-K, 7-A, 8-E, 8-H).[4] In addition, the Court notes that, unlike Ms. Warden, Ms. Davis was not charged with first degree murder

[4] As additional clarification, the procedural history culminating in Ms. Davis's eventual revocation is as follows: Ms. Davis was placed on a suspended sentence for two (2) years on December 20, 2000, in Payne County Case CF-2000-201, which eventually expired on December 20, 2003. The Payne County District Attorney's Office filed multiple applications to revoke her suspended sentence, one of which was based on failure to complete community service (dated September 20, 2001), and an another based on her arrest for misdemeanor drug possession and obstruction in Payne County Case No. CM-2001-1181 (dated September 24, 2001). (St. Exs. 6-A, 6-D, 6-E, 6-F, 6-G, 7-B). After being served with a second amended application to revoke on September 24, 2001, Ms. Davis failed to appear for a Payne County court date regarding her application and a bench warrant was issued for her arrest. (St. Ex. 6-A). While this warrant was outstanding, Ms. Davis was charged with multiple felonies in Oklahoma County on April 4, 2003, as alleged in Oklahoma County Case No. CF-2003-1840. (St. Exs. 8-A, 8-B). On May 14, 2004, Ms. Davis entered a blind plea in her Oklahoma County case and on July 14, 2004, the Payne County District Court received information from DOC advising them of Ms. Davis's pending Oklahoma County charges. (St. Ex. 7-C). On September 10, 2004, Ms. Davis was formally sentenced in Oklahoma County to ten (10) years in DOC with all by the first three (3) years suspended. (St. Exs. 8-E, 8-H). *After* being sentenced to DOC, Ms. Davis was transported from DOC to resolve her outstanding Payne County matters and on January 21, 2005, she was revoked in full for two (2) years in CF-2000-201, and this sentence was ordered to run concurrently with her Oklahoma County sentences. (*See* St. Exs. 6-A, 6-J, 6-K, 7-A). Per this plea agreement, her misdemeanor charges, as alleged in Payne County Case No. CM-2001-1181, were dismissed. (St. Ex. 7-D).

and there is no evidence she was expected to be a witness in a prosecution in Oklahoma County.

Ms. Boyce also testified that she had never seen an assistant district attorney file a motion to dismiss and expunge a deferred sentence at the expiration of the probationary period, which was done in Ms. Warden's Payne County case on October 24, 2003. (4/7/25 AM Tr. 52-53; *see Pet.* Ex. 27; St. Exs. 5-A, 5-L). However, the Court notes that the Oklahoma Supreme Court Network ("OSCN") docket sheet for Payne County Case No. CF-2000-202 indicates that Ms. Boyce was present on Ms. Warden's behalf when this motion was made by the Payne County District Attorney's Office and granted by the Payne County District Court. (*See* Pet. Ex. 27; St. Ex. 5-A, 5-L).[5]

4. Tom Lee

Tom Lee served as a prosecutor for District Nine (9), comprised of Payne and Logan Counties, from 1994 to 2025. Specifically, he served as an Assistant District Attorney from 1994 to 2009, First Assistant District Attorney from 2009 to 2011, and District Attorney from 2011 to 2015. (4/7/25 AM Tr. 64-65; Pet Ex. 47). At some point during his tenure as a Payne County prosecutor, he and another District Nine (9) prosecutor, Vincent Antonioli, switched dockets for ten

[5] Specifically, the OSCN docket sheet court minute states that the State of Oklahoma appeared by and through Vince Antonioli and that Ms. Warden did not personally appear because she was in DOC custody "out of Oklahoma County." (St. Ex. 5-A). Mr. Antonioli advised the Payne County District Court that Ms. Warden "received a 45 year sentence out of Oklahoma County and is currently incarcerated in" DOC. (St. Ex. 5-A). The Payne County District Court found "that court costs are paid," and ordered the case dismissed (St. Ex. 5-A).

(10) months, resulting in Mr. Lee prosecuting cases in Logan County and Mr. Antonioli doing the same in Payne County. (4/7/25 AM Tr. 74).

Based on Mr. Lee's testimony, the Court makes the following findings:

- In March, 2000, the Payne County District Attorney's Office prosecuted Brandy Warden for committing larceny from a house; Ms. Warden subsequently entered a plea of guilty to this charge in June, 2000 and was formally sentenced to a three (3) year deferred sentence in October of that same year. (Pet. Ex. 47).

- In July of 2001, the Payne County District Attorney's Office filed an application to accelerate Ms. Warden's deferred sentence for failure to pay restitution; this application was later withdrawn due to her becoming compliant. (4/7/25 AM Tr. 68-69; Pet. Ex. 47). Based on the Payne County District Attorney's Office file minutes, she paid $450 in restitution on October 5, 2001. (4/7/25 AM Tr. 81-82; Pet. Ex. 33).[6]

- On January 17, 2002, the Payne County District Attorney's Office received a DOC violation report indicating that Ms. Warden had violated the terms and conditions of her deferred sentence by committing three new crimes: First Degree Murder, Robbery with a Firearm, and Conspiracy to Commit Robbery, in Oklahoma County.[7] (Pet. Exs. 14, 47). Upon review of this violation report, which occurred a year prior to Ms. Warden's eventual plea in the instant case, Mr. Lee penned and signed a brief sticky note indicating that the District Attorney's Office should "hold off for a while" on filing an application to accelerate. (4/7/25 AM Tr. 68-70, 83; Pet. Ex. 15; St. Exs. 2-C, 2-D)

- The Court finds credible Mr. Lee's testimony that his decision to "hold off" on filing an application to accelerate was not premised upon on any expectation of speaking to anyone in Oklahoma County about Ms.

[6] Mr. Lee noted that in his experience, if a probation violation was due to failure to satisfy monetary obligations or complete a rehabilitation program, it was common practice for the defense to request additional time to rectify the violation and the Payne County District Attorney's Office would usually accommodate this request. (4/7/25 AM Tr. 88-89).

[7] The Court notes there is a discrepancy between the new crimes alleged in the violation report and Mr. Lee's affidavit (conspiracy to commit armed robbery) and the question posed to Mr. Lee regarding the nature of these offenses during the hearing (conspiracy to commit murder); the Court assumes Petitioner's counsel was simply mistaken as to the nature of the conspiracy charge, given that Mr. Lee's affidavit and the DOC violation report indicate it was in relation to commission of armed robbery, as opposed to first-degree murder. (*Compare* 4/7/25 AM Tr. 68-69 *with* Pet. Exs. 14, 47).

Warden's new criminal charges. (*See* 4/7/25 AM Tr. 68-70, 83; Pet. Ex. 15; St. Exs. 2-C, 2-D).

- The Court finds credible Mr. Lee's testimony that he likewise did not pen this handwritten note based on any sort of request from the Oklahoma County District Attorney's Office to not accelerate Ms. Warden's deferred sentence; he also did not recall tracking the status of the instant case in any way, including whether Ms. Warden ever entered a plea. (4/7/25 AM Tr. 83, 91-92, 93).

- Had Oklahoma County reached out and requested that the Payne County District Attorney's Office go forward with Ms. Warden's acceleration, the Office would have assisted them in that request; however, ordinarily, doing so would be very time consuming, so it was not typical to initiate this type of action on a regular basis in situations like Ms. Warden's, *i.e.,* where a probationer is charged with serious offenses in another county, absent a request for cooperation. (4/7/25 AM Tr. 70-71, 73, 80).

- The Court finds credible Mr. Lee's belief that he penned the handwritten note affixed to Ms. Warden's January 18, 2002 violation report because of: 1) the monetary costs of calling witnesses in association with the Oklahoma County charges; 2) transferring a first-degree murder defendant (Ms. Warden), from Oklahoma County; and 3) the difficulty of having to prove this type of probation violation in Payne County District Court, especially given that if Ms. Warden had yet to be convicted, the State would have been required to present live testimony from Oklahoma County witnesses at an acceleration hearing. (4/7/25 AM Tr. 60-61, 84-85, 91).

- The Court finds credible Mr. Lee's testimony that if he had spoken to the Oklahoma County District Attorney's Office about the instant matter in any way, he would have remembered the conversation because not only did he know George Burnett, he also knew Petitioner from being involved in his past juvenile deprived and delinquent cases, recalling that Petitioner had seemed like a "good kid." (4/7/25 AM Tr. 72, 74, 83-84, 86-88).

- The Court finds that Mr. Lee did not communicate with anyone from Oklahoma County regarding Ms. Warden's Oklahoma County plea agreement and his decision to not file an application to accelerate her Payne County deferred sentence.

- While it was possible that someone else in the Payne County District Attorney's Office could have fielded a call from the Oklahoma County District Attorney's Office regarding not accelerating Ms. Warden's deferred sentence outside of Mr. Lee's knowledge, this possibility is irrelevant given

that Mr. Lee was responsible for the decision not to accelerate. (4/7/25 AM Tr. 74).

- Contrary to Ms. Boyce's recollection, Mr. Lee testified that there were times when the State—as opposed to the defense—would move to dismiss a defendant's deferred sentence, depending on whether the State wanted to "do away with the acceleration," which generally happened in situations where a defendant had completed all the terms and conditions of probation. (4/7/25 AM Tr. 90).

- Hypothetically speaking, Mr. Lee did not think he would have filed a motion requesting dismissal and expungement of a deferred sentence based on successful completion of probation in a scenario involving a defendant who had pleaded guilty to Accessory to Murder After the Fact. However, if Ms. Warden "had received 45 years" for this offense, he did not know how eager the Payne County District Attorney's Office "would have been to further pursue the" acceleration case and he would have emphasized to the court that "an acceleration to a conviction would not be worthwhile." In his experience, "the court would have more than likely agreed" with this and dismissed the matter. (4/7/25 AM Tr. 78-79).[8]

- Mr. Lee had no knowledge of whether anyone from the Oklahoma County District Attorney's Office spoke to Mr. Antonioli, the prosecutor who signed the motion on behalf of the State to dismiss and expunge Ms. Warden's deferred sentence. (4/7/25 AM Tr. 79-80). However, the Court notes that Mr. Antonioli did not transfer to Payne County until after the decision was made by Mr. Lee to hold off on acceleration proceedings. (Partial AM & PM Tr. 42).

5. Bill Ricketts

Bill Ricketts worked as a detective with the Oklahoma City Police Department for several years. (4/7/25 PM Tr. 5-6). In 2002, Det. Ricketts worked the investigation into the death of Ronnie Wipf, the victim in this case. (4/7/25 PM Tr. 6, 15-16). That investigation caused Det. Ricketts to come into contact with Brandy Warden, a co-defendant of Petitioner, as she had used her photo ID to check in to the hotel where the murder occurred. (4/7/25 PM Tr. 7, 18). Det.

[8] The Court notes these statements reflect Mr. Lee's opinion regarding what actions the Payne County District Court would have taken in this hypothetical scenario.

Ricketts and his partner picked Ms. Warden up from the Stillwater Police Department after she had been detained there. (4/7/25 PM Tr. 8, 18). As part of the investigation, Det. Ricketts compiled information from various government agencies on the suspects in the murder; reports received from those agencies indicated Ms. Warden had a deferred sentence out of Payne County. (4/7/25 PM Tr. 6-13, 18, 28; Pet. Ex. 38). Det. Ricketts turned over this information to prosecutors in the case. (4/7/25 PM Tr. 13, 15, 19). The district attorney's office would thereafter make decisions as to how the case should be handled moving forward. (4/7/25 PM Tr. 14-15). The prosecutors in the instant case never asked Det. Ricketts to look into Ms. Warden's deferred sentence out of Payne County, and he did not believe he ever spoke with anyone from the Payne County District Attorney's Office in association with this case. (4/7/25 PM Tr. 19). The Court finds credible Det. Ricketts' testimony that he was never involved in any plea negotiations between the district attorney's office and suspects in criminal cases. (4/7/25 PM Tr. 15).

6. Michael Veasey

Michael Veasey also worked as a detective for the Oklahoma City Police Department for several years and investigated the murder of Ronnie Wipf in early 2002. (4/7/25 PM Tr. 30, 37). One of the first steps in the investigation was to identify the suspects, which was partially achieved by locating the individual who had rented the room; that person turned out to be Ms. Warden. (4/7/25 PM Tr. 30-31, 40). Background checks were performed on Ms. Warden which revealed she had previously been charged with Larceny from a House in Payne

County. (4/7/25 PM Tr. 31-34; Pet. Ex. 23, 38). Det. Veasey went to Stillwater, where Ms. Warden was in custody at the time, and brought her back to Oklahoma County. (4/7/25 PM Tr. 33, 39). Det. Veasey indicated he would "not necessarily" have looked into the prior charge any further after detaining Ms. Warden. (4/7/25 PM Tr. 33, 41). But his work as a detective would have required him to interact with attorneys out of the Oklahoma County District Attorney's Office and he would have provided documentation indicating Ms. Warden's prior Payne County charge to prosecutors in this case. (4/7/25 PM Tr. 35-38). Any information pertaining to a suspect's prior conviction(s) would have been part of the information Det. Veasey routinely forwarded to prosecutors in a case. (4/7/25 PM Tr. 38).

Det. Veasey did not recall ever being involved in the plea negotiations involving Ms. Warden in this case. (4/7/25 PM Tr. 38). Moreover, Det. Veasey did not recall either of the prosecutors in this case asking him to reach out to the Payne County District Attorney's Office about Ms. Warden's deferred sentence there. (4/7/25 PM Tr. 41). Additionally, he did not recall ever speaking with anyone from the Payne County District Attorney's Office about Ms. Warden's deferred sentence. (4/7/25 PM Tr. 41). The Court finds Det. Veasey's testimony in this regard credible.

It is undisputed, and the Court finds, that both Oklahoma County Assistant District Attorneys George Burnett and Fern Smith were aware of Ms. Warden's Payne County deferred sentence.

7. Brandy Warden

Brandy Warden was one of the defendants in this case charged with the murder of Ronnie Wipf in 2002. (4/7/25 PM Tr. 44). Prior to being charged in this case, Ms. Warden had been charged with Larceny from a House in Payne County Case No. CF-2000-202, to which she entered a plea of guilty on June 23, 2000. (4/7/25 PM Tr. 44-45; Pet. Ex. 10). Ms. Warden, through the assistance of her counsel, Sherry Boyce, received a three-year deferred sentence as a result of her plea agreement in her Payne County case. (4/7/25 PM Tr. 45; Pet. Ex. 10).

Ms. Warden admitted to being in the presence of Petitioner and her other co-defendants on the night Ronnie Wipf was murdered. (4/7/25 PM Tr. 55). She was apprehended by police in Stillwater, Oklahoma while at the home of her sister. (4/7/25 PM Tr. 55). Ms. Warden sought the appointment of counsel in the instant case on January 28, 2002, which resulted in Ms. Warden being represented by Janet Cox.[9] (4/7/25 PM Tr. 55-57; State Ex. 2-B). Ms. Cox discussed with Ms. Warden the strength of the State's case against her and her co-defendants[10] and recommended she seek a plea agreement in the case. (4/7/25 PM Tr. 58).

Ms. Warden later entered a plea of guilty to Accessory to Murder After the Fact and Conspiracy to Commit a Felony (Robbery with a Dangerous Weapon) in the instant case on February 19, 2003. (4/7/25 PM Tr. 46; Pet. Ex. 7; State Ex.

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[9] Ms. Warden recalled being represented by another attorney for "a couple days" prior to Ms. Cox becoming her counsel in the instant case. (4/7/25 PM Tr. 57).

[10] Ms. Warden recalled Ms. Cox telling her that "it didn't look good...." (4/7/25 PM Tr. 58)).

2-B). In return, Ms. Warden received a forty-five-year sentence for the Accessory charge and a ten-year sentence for the Conspiracy charge, to run concurrently with one another. (4/7/25 PM Tr. 58-59; State Ex. 2-C, 2-D). She was sentenced on April 23, 2003. (State Ex. 2-D, 2-E). At the time she entered her plea in the instant case, Ms. Warden believed she was still on probation for her deferred sentence in Payne County. (4/7/25 PM Tr. 46-47). The Court finds credible Ms. Warden's testimony that she did not recall the plea negotiations in her Oklahoma County case involving her deferred sentence out of Payne County. (4/7/25 PM Tr. 60).

Ms. Warden's plea agreement in the instant case required her to testify truthfully against her three co-defendants. (4/7/25 PM Tr. 47-48, 61). Ms. Warden later testified against each co-defendant in their respective case and was subject on cross-examination to questioning from her co-defendant's counsel in each case as to the terms and extent of her agreement with the State. (4/7/25 PM Tr. 61). The Court finds credible Ms. Warden's explanation that she had no reason to mention her Payne County deferred sentence when discussing her plea agreement during her testimony in Petitioner's trial because it was not part of the plea agreement. (4/7/25 PM Tr. 62).

8. Wayna Tyner

Wayna Tyner worked for the Oklahoma Indigent Defense System in the early 2000s and represented Zjaiton Wood, the brother of Petitioner, in relation to the charges stemming from the murder of Ronnie Wipf. (4/8/25 AM Tr. 6-7). During her representation of Zjaiton, she became aware Ms. Warden—who was

facing potential life sentences in the instant case—had a deferred sentence out of Payne County stemming from a charge of Larceny from a House. (4/8/25 AM Tr. 7-8, 30). Ms. Tyner believed she learned of this deferred sentence as a result of being provided discovery by the State in this case.[11] (4/8/25 AM Tr. 8-9). Upon learning that Ms. Warden would testify for the State at Zjaiton's trial, Ms. Tyner sought to learn more about Ms. Warden's deferred sentence in the event it could be utilized as impeachment evidence to her client's advantage. (4/8/25 AM Tr. 9-12, 32). Ms. Tyner never received any indication that Ms. Warden's plea agreement in this case was somehow conditioned upon a favorable disposition of her Payne County case. (4/8/25 AM Tr. 13).

Ms. Tyner, in exercising due diligence, reached out to the Payne County District Attorney's Office prior to her client's trial in an attempt to understand why Ms. Warden's deferred sentence had not been accelerated after she had entered her plea in the instant case. (4/8/25 AM Tr. 13, 33-34). Upon receiving no response to her inquiry, Ms. Tyner placed her concerns on the record by filing a motion for the State to reveal all deals it had made in this case and, later, by raising the issue in a motion hearing on September 3, 2003, in the instant case. (4/8/25 AM Tr. 14-15, 35-37; State Ex. 1-B at 92-94, 3-A). The district judge, the Honorable Ray Elliott, sustained the motion and ordered the State to disclose

[11] Ms. Tyner later acknowledged the State did not attempt to hide the fact Ms. Warden had a deferred sentence out of Payne County. (4/8/25 AM Tr. 32).

any deals the Oklahoma County District Attorney's Office had with any witnesses or other prosecuting authorities.[12] (State's Ex. 1-B at 93-94).

Critical to the issues on remand, Ms. Tyner admitted that, while she was suspicious, she had no documented evidence to show an agreement existed between Oklahoma County and Payne County concerning Ms. Warden. (4/8/25 AM Tr. 38). In fact, Ms. Tyner was told there was no such agreement (4/8/25 AM Tr. 58-59). Additionally, Ms. Tyner noted that Zjaiton testified at Petitioner's trial and implicated himself, as well as "[a] White guy named Alex," in the crime. (4/8/25 AM Tr. 40-41). According to Zjaiton' s testimony, it was he and "Alex" who killed Ronnie Wipf. (4/8/25 AM Tr. 41-42). Ms. Tyner believed Zjaiton's testimony was a "fatal flaw" in Petitioner's trial (4/8/25 AM Tr. 61) because juries don't like "to be lied to." (4/8/25 AM Tr. 56).

9. Fern Smith

Fern Smith began practicing law in the Oklahoma County District Attorney's Office in the early 1980s and continued there until 2007. (4/8/25 AM Tr. 66-67). Ms. Smith prosecuted Petitioner in the instant case for the murder of Ronnie Wipf. (4/8/25 AM Tr. 76-77). Ms. Smith also prosecuted Petitioner's three co-defendants in the instant case. (4/8/25 AM Tr. 77-78).

Generally speaking, Ms. Smith would have received an investigative report from police in a case such as the one here, in which suspects would be identified,

[12] Ms. Tyner recalled receiving a response to her motion from the State which indicated the motion was moot as the State had already disclosed all deals to opposing counsel and would continue to disclose any new evidence going forward. (4/8/25 AM Tr. 35; State Ex. 3-B).

their prior criminal records would be provided, and the overall evidence against the suspects would be presented. (4/8/25 PM Tr. 23-24). The Court finds credible Ms. Smith's testimony that had she learned that a suspect in a case in her county had an existing deferred sentence out of another county, she would never have attempted to influence how the other county handled the deferred case. (4/8/25 PM Tr. 24-25). At the time the instant case was filed, Ms. Smith noted the Oklahoma District Attorney's Office had an open file policy, which allowed counsel for the accused to review any evidence in the possession of the office. (4/8/25 PM Tr. 27).

Early on in the instant case, Ms. Smith first made an offer to Lanita Bateman in an attempt to secure a plea deal. (4/8/25 PM Tr. 28, 31-32; State Ex. 4-A).[13] Ms. Smith's notes on the case file indicated she made an offer to Ms. Bateman on July 1, 2002; according to her notes, Ms. Smith offered Ms. Bateman the chance to plead to a life sentence in connection with the crime in exchange for truthful testimony against her co-defendants. (4/8/25 PM Tr. 32; State Ex. 4-A). Ms. Bateman rejected this deal on July 25, 2002. (4/8/25 PM Tr. 32; State Ex. 4-A).

Ms. Smith recalled entering into a plea agreement on February 19, 2003, with Ms. Warden after the preliminary hearing in the instant case, which was achieved after negotiations between Ms. Smith, George Burnett (Ms. Smith's co-counsel in the instant case), and Ms. Cox. (4/8/25 AM Tr. 92-93; 4/8/25 PM Tr.

[13] Ms. Smith noted that if she had made a similar offer to Ms. Warden around this same time frame, her notes in the case file would have reflected as much. (4/8/25 PM Tr. 33; State Ex. 4-A).

34-35). Ms. Smith noted that Ms. Warden's plea agreement was entered after no prior felony convictions because Ms. Warden had not been convicted of a felony at the time she entered her plea. (4/8/25 AM Tr. 93). Ms. Smith averred that she would not have signed off on Ms. Warden's plea agreement stating as much if she were aware Ms. Warden *did* have a prior felony conviction. (4/8/25 AM Tr. 94). Ms. Smith testified she had reviewed Ms. Warden's files and an NCIC report[14] and spoken with Ms. Cox to arrive at her understanding that Ms. Warden had no prior felony convictions. (4/8/25 AM Tr. 94-95; 4/8/25 PM Tr. 6-7; Pet. Ex. 38). Ms. Smith was also aware Ms. Warden had a prior deferred sentence out of Payne County at the time Ms. Smith was prosecuting Ms. Warden in the instant case. (4/8/25 AM Tr. 95-96). The Court finds credible Ms. Smith's testimony that she believed, at the time of the entry of Ms. Warden's plea, according to information she received from Ms. Cox and then later at the time of this hearing according to Ms. Warden's offender lookup from DOC, that Ms. Warden had discharged her deferred sentence at the time she entered her plea in the instant case.[15] (4/8/25 AM Tr. 96; 4/8/25 PM Tr. 9-13, 37-38; State Ex. 1-B at 92-94; State Ex. 5-M (reflecting a discharge date on Ms. Warden's deferred sentence out of Payne County of October 22 & 27, 2002)). Ms. Smith testified

[14] NCIC reports are defined and discussed in more detail below with respect to the testimony of George Burnett.

[15] Ms. Smith explained her belief at the time Ms. Warden entered her plea agreement was based primarily upon Ms. Cox's representations to her at the time. (4/8/25 PM Tr. 11-13). Ms. Smith asserted that she would have never intentionally provided Judge Elliott with inaccurate information on this or any other matter. (4/8/25 PM Tr. 12).

that she relied, in part, on Ms. Cox's word because "it really didn't matter, I mean, this was a nonviolent felony crime. And the magnitude of the crime that was committed that we were prosecuting, it didn't make a hill of beans worth a [sic] difference." (4/8/25 PM Tr. 37). This testimony is supported by the pre-trial hearing transcript in which Ms. Cox says the Payne County sentence was expired and in which Ms. Smith asked Ms. Cox if this information was correct. The Court finds this testimony credible.

Ms. Smith did not know Tom Lee. (4/8/25 AM Tr. 76). The Court finds credible Ms. Smith's resolute testimony that she never entered into any agreement with Payne County concerning Ms. Warden (4/8/25 PM Tr. 13, 15, 29). She "never at any time had contact with Payne County concerning [Ms.] Warden's deferred sentence, ever." (4/8/25 PM Tr. 35).

Ms. Smith recalled Ms. Warden's testimony at Petitioner's trial corroborated other evidence the State already had in the case. (4/8/25 PM Tr. 15). She recalled that both she and opposing counsel questioned Ms. Warden about the details of her plea agreement in the instant case during Petitioner's trial. (4/8/25 PM Tr. 40). In her mind, Ms. Warden's testimony was not necessary to the convictions or sentences of Petitioner, especially in light of Zjaiton's testimony in the case which implicated himself and the "fictitious Alex," of whom there was no evidence whatsoever, in both the murder and the prior robbery of the pizza restaurant.[16] (4/8/25 PM Tr. 15-16, 41-46). Ms. Smith felt

[16] According to Ms. Smith, the jury clearly understood the "fictitious Alex" was a pseudonym for Petitioner in Zjaiton's testimony. (4/8/25 PM Tr. 43-44). Zjaiton "just

the evidence against Petitioner in the State's possession, which she characterized as overwhelming, was more than she had in any other capital case she tried. (4/8/25 PM Tr. 15-16). Based on these considerations, in Ms. Smith's mind, had the jury heard that Ms. Warden had a prior felony conviction out of Payne County for Larceny from a House, the outcome of Tremane Wood's jury trial would have been no different, nor would it have caused the jury to see Ms. Warden as any less credible. (4/8/25 PM Tr. 47). This was because Ms. Warden's testimony was largely cumulative to the other evidence the State presented that indicated Petitioner was involved in the murder of Ronnie Wipf. (4/8/25 PM Tr. 47-48).

Finally, Ms. Smith did recall responding to Ms. Tyner's motion to disclose all deals filed in the instant case; Ms. Smith's responsive filing indicated the State had already complied with that specific discovery request. (4/8/25 PM Tr. 49-50; State Ex. 3-B).

10. George Burnett

George Burnett worked for the Oklahoma County District Attorney's Office at two points in time: the first being from 1986 to 1992 and the second beginning in 1996 and ending in 2006. (4/8/25 PM Tr. 60-61). During his time at this Office, he graduated to the status of a "team leader," supervising other attorneys assigned to various criminal courtrooms and prosecuting all types of cases, including capital cases. (4/8/25 PM Tr. 61-62, 68). Over the course of his career, he came to know Tom Lee and Vincent Antonioli. (4/8/25 PM Tr. 65-66).

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substituted Alex for Tremane" Wood in his testimony. (4/8/25 PM Tr. 44). Having read the transcripts of Petitioner's trial, the Court agrees.

During his time as an Oklahoma County prosecutor, the Oklahoma County District Attorney's Office utilized an "organizational structure" called a "blue sheet," which required "police departments to synthesize information in a standardized form so that charges could be expeditiously prosecuted." (4/8/25 PM Tr. 69-70; 4/9/25 Partial AM & PM Tr. 10-11; Pet. Ex. 23). A blue sheet would ordinarily come through the District Attorney's Office first, usually after communication with law enforcement about how the Office would handle a particular set of facts. (4/8/25 PM Tr. 70-71). Additionally, criminal background documentation from the "National Crime Information Center," colloquially referred to as an "NCIC,"[17] was also generally provided by law enforcement at the beginning of the prosecution process. (4/8/25 PM Tr. 72-73). Mr. Burnett affirmed that as a prosecutor, it was important to have an understanding of the criminal records of individuals involved in cases referred for prosecution because these records could serve as a basis for sentencing enhancement, factor into plea bargaining, or be utilized as impeachment. (4/8/25 PM Tr. 68-69).

Mr. Burnett recalled prosecuting Petitioner and three of his co-defendants for the crimes alleged in the instant case, noting that he signed the Amended Information filed on October 1, 2002, in this matter. (4/8/25 PM Tr. 67; Pet. Ex.

[17] Mr. Burnett explained that NCICs are "comprehensive record[s]" compiled by "various agencies sending in fingerprints and convictions on offenders" to a national database "in order to have interstate record of criminal activity by a given person that's verified by fingerprints." (4/8/25 PM Tr. 72).

64).[18] On the blue sheet compiled for Petitioner's case, Petitioner and his three co-defendants—including Ms. Warden—were listed. Ms. Warden's portion of the blue sheet contained a notation that she had a prior felony conviction for Larceny from a House in Payne County, but did not list the sentence she received. (4/8/25 PM Tr. 71-72; Pet. Ex. 23). Regarding Ms. Warden's criminal history, Mr. Burnett affirmed that the NCIC for Ms. Warden indicated that she received a three-year deferred sentence, with a disposition date of October 21, 2000; however, he could not vouch for the accuracy of this information, given that he did not compile it and noting that in his experience, the more individuals inputting NCIC information into a national database, the more potential inaccuracies there could be. (4/8/25 PM Tr. 73-75; 4/9/25 AM Tr. 15-16; Pet. Ex. 38).[19]

At some point during the prosecution of the instant case, Mr. Burnett recalled making a strategic decision to approach Ms. Warden about cooperating with the State by providing testimony against her co-defendants in exchange for a more lenient plea agreement; negotiations for this were conducted through Janet Cox, Ms. Warden's attorney, and occurred in the time leading up to her

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[18] The evidentiary hearing transcript in this matter indicates that this Amended Information was marked and shown to Mr. Burnett as "Petitioner's Exhibit 4"; however, this is incorrect, as it is actually marked as Petitioner's Exhibit 64. (*Compare* 4/8/25 PM Tr. 67 *with* Pet. Ex. 64 *and* Joint Stipulation Regarding the Parties' Evidentiary Hearing Exhibits at 7).

[19] Specifically, Mr. Burnett noted that Ms. Warden's NCIC "may or may not be complete depending on whether Payne County turned in those finger print cards" because "NCIC won't list what happened unless the fingerprint cards are turned in to make sure that it's the same person . . . [as] the person convicted." (4/9/25 AM Tr. 17)

plea on February 19, 2003 in this matter. At the time Ms. Warden was approached as a potential cooperating witness, Mr. Burnett specified that he was aware of her prior deferred felony from Payne County for Larceny from a House; however, he doubted this would have provided a significant incentive for her to cooperate with the State, primarily because of the magnitude of the charges she was facing in Oklahoma County, which carried a sentence that significantly dwarfed any that she could have received from an acceleration in Payne County. The Court agrees with this assessment. (4/8/25 PM Tr. 79-82; *see also* 4/9/25 Partial AM & PM Tr. 10-11; Pet Ex. 28-2). Moreover, Mr. Burnett deemed Ms. Warden's criminal history a trivial issue that did not affect his own decision to approach her in the first place. (4/9/25 Partial AM & PM Tr. 11-12).

In coming to the decision to utilize Ms. Warden as a cooperating witness, Mr. Burnett gauged her prospective credibility in front of a jury. (4/8/25 PM Tr. 77-78; 4/9/25 Partial AM & PM Tr. 8-10).[20] Mr. Burnett further explained that although he did not consider her a witness that could make or break the State's case—such that the State would have tried Petitioner with or without her cooperation—she could still provide material testimony corroborating certain details of the case, which could heighten the State's certainty of conviction. (4/8/25 PM Tr. 76-77; 4/9/25 Partial AM & PM Tr. 17-18). However, Mr. Burnett also noted during the course of Petitioner's trial, Ms. Warden's testimony became

[20] Specifically, in coming to this decision, Mr. Burnett explained that although Ms. Bateman and Ms. Warden had similar culpability and could provide similar testimony, he believed Ms. Warden would present better in front of a jury, noting that "she just had a face that I thought juries would believe." (4/8/25 PM Tr. 78; *see also* 4/9/25 Partial AM & PM Tr. 8-10).

less important in the wake of Zjaiton testifying on Petitioner's behalf. (4/8/25 PM Tr. 78-79). Specifically, Mr. Burnett recalled that Zjaiton's testimony turned Petitioner's case "upside down[,]" noting it "was a totally different dynamic" afterwards, making it difficult for him to gauge whether Ms. Warden's testimony assisted the State in securing a conviction and death sentence against Petitioner. (4/9/25 AM Tr. 33-34). In Mr. Burnett's view, regardless of Ms. Warden's testimony, when Zjaiton admitted "to all of the elements of the crime with the exception of his brother's identification[,]" that was "more compelling than probably all of our other witnesses," especially given that there was no other evidence presented to corroborate that he committed the instant crimes with any individual *other* than Petitioner. (4/9/25 AM Tr. 34; *see also* 4/9/25 Partial AM & PM Tr. 17-18). A compelling example of this was DNA testing being unable to exclude Petitioner's DNA from a glove located at the crime scene. (4/9/25 Partial AM & PM Tr. 33, 36). Having read the trial transcripts, the Court finds Mr. Burnett's testimony in this regard credible; it does appear that Zjaiton's testimony was very damaging to Petitioner's case.

Turning back to the plea negotiations between Ms. Warden and the Oklahoma County District Attorney's Office, these discussions culminated in the execution of a "cooperation memorandum," which was signed by all parties and outlined Ms. Warden's anticipated plea agreement and the State's expectations of her as a cooperating witness. (4/9/25 AM Tr. 9-11, 36-40; 4/9/25 Partial AM & PM Tr. 5; Ct. Ex. 1). To Mr. Burnett's recollection, this memorandum would have been placed in the Oklahoma County District Attorney's Office prosecution

file and the specifics[21] of the agreement were disclosed to Petitioner's trial attorney. (4/9/25 AM Tr. 36-40). This memorandum contains no reference to any agreement regarding Ms. Warden's Payne County deferred sentence, a fact that coincides with testimony from Mr. Lee, Ms. Smith, and Mr. Burnett that the Payne County Case was not part of Ms. Warden's Oklahoma County plea agreement. (4/9/25 Partial AM & PM Tr. 7-8, 14-15; *see* Ct. Ex. 1).

Although the specifics of Ms. Warden's plea agreement with the Oklahoma County District Attorney's Office were partially geared towards providing her with an incentive to testify truthfully against her co-defendants, in Mr. Burnett's view, the sentence she received also needed to be significant enough for the jury to not completely discount her testimony; in other words, any agreement needed to carry enough of a stick to preserve her credibility as well as punish her for her role in extremely serious crimes. (4/8/25 PM Tr. 85-87). Mr. Burnett believed that Ms. Warden's forty-five (45) year sentence to a lesser charge of Accessory to

[21] Mr. Burnett indicated that the "gist" of Ms. Warden's agreement was to "testify truthfully" in exchange for forty-five (45) years and the murder charge would be amended to Accessory to Murder After the Fact. This would have been reflected in the Plea of Guilty Summary of Facts executed during Ms. Warden's plea. (4/9/25 AM Tr. 40; *see* Pet. Ex. 7). For unknown reasons, the actual cooperation memorandum in Ms. Warden's case lists a sentence of thirty-five (35) years. (4/9/25 Partial AM & PM Tr. 6-7; *see* Ct. Ex. 1). The Court notes that after being sentenced to forty-five (45) years, Ms. Warden requested a sentence modification over the State's strenuous objection. (4/9/25 Partial AM & PM Tr. 36-37; Ct. Ex. 2). Mr. Burnett explained that the reason for this objection was to avoid allegations of the existence of any "wink-wink" deals after the fact. (4/9/25 Partial AM & PM Tr. 38). Given: 1) that the written plea agreement with Ms. Warden delineated forty-five (45) years; 2) no other document or testimony in this case referred to a thirty-five (35) year term; and 3) Mr. Burnett's strenuous objection to the sentence modification, the Court finds the reference to thirty-five (35) years in the memorandum does not reflect the true agreement between the State and Ms. Warden.

Murder After the Fact appropriately accomplished this balance. (*See* 4/8/25 PM Tr. 86-87).

The Court makes the following additional findings based on Mr. Burnett's testimony, which this Court found credible in all material respects:

- At no point during plea negotiations with Ms. Warden were there any assurances made that her Payne County deferred sentence would not be accelerated in conjunction with her Oklahoma County plea agreement. (4/8/25 PM Tr. 90-91; *see also* 4/9/25 AM Tr. 15).

- In his experience, when an individual who is on probation in one county is arrested and agrees to testify as a State's witness in another county, generally the probationary county will refrain from accelerating or revoking the individual's probation prior to the resolution of the out-of-county case because "[n]obody wants to go through all that work . . . when there's another case that's probably going to dispose of that person." (4/9/25 Partial AM & PM Tr. 12-13).

- It did not surprise him that Payne County elected not to initiate acceleration proceedings in Ms. Warden's case given the serious murder charge she was facing in Oklahoma County, because doing so could result in things like inconsistent statements elicited during acceleration proceedings that could negatively affect Oklahoma County's case. (4/9/25 Partial AM & PM Tr. 14).

- When litigating or resolving his cases, he generally confined his actions to his own Oklahoma County cases without coordination or communication with any out-of-county district attorney's offices. (4/8/25 PM Tr. 99-100; 4/9/25 AM Tr. 11-12; *see* 4/9/25 Partial AM & PM Tr. 11).

- In his opinion, even if Ms. Warden's sentence in Payne County had been a felony conviction, this fact would have made no difference in the decision to approach her as a potential cooperating witness because he believed she would still present favorably in front of a jury in a murder case where the primary focus would be on "the testimony and articulation of what took place" at the time of the murder. (4/8/25 PM Tr. 95-96; *see also* 4/9/25 Partial AM & PM Tr. 8-9, 11-12, 15-16).

- In the time leading up to Ms. Warden's plea in this matter, he would have likely reviewed her NCIC and looked for potential notices in his file about acceleration proceedings in Payne County[22] in order to verify that she did not have any prior felony convictions. (4/8/25 PM Tr. 97-98; 4/9/25 Partial AM & PM Tr. 18-19).

- In his experience, district attorney's offices generally did not directly contact each other to obtain information regarding the criminal backgrounds of individuals being prosecuted, outside of requesting sentencing documentation. (4/8/25 PM Tr. 98-99).

- He penned a handwritten note at the bottom of a copy of Ms. Tyner's August, 2003 "Motion to Reveal All Deals," indicating: "Sustained as to Oklahoma County, not any other DA[']s Offices." (4/9/25 AM Tr. 11-12; Pet. Ex. 82-1). To the best of his recollection, this note was likely intended to memorialize the trial court's ruling in real time during the September 3, 2003 hearing on this motion. (4/9/25 AM Tr., 12-14; *see also* Pet. Ex. 32). Based on the ruling, his understanding was that if the Oklahoma County District Attorney's Office "had entered into an agreement with Payne County[,] then we'd have to reveal it." (4/9/25 AM Tr. 13-14). The Court finds this notation was not an indication that Mr. Burnett believed he did not have to disclose agreements made by Oklahoma County with respect to crimes committed in other counties. Judge Elliott's ruling was quite clear in that regard.[23]

- He penned another handwritten note at the bottom of Ms. Smith's, response to Ms. Tyner's August, 2003 motion which read: "Brandy Warden D/S in Payne County." He could not recall the exact context for why he wrote this note, remarking that it could have simply been a notation jotted down during the September 3, 2003 hearing,

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[22] Mr. Burnett clarified that had acceleration proceedings commenced in Ms. Warden's Payne County case, his prosecution file would have been necessary to prove a probation violation regarding her involvement in the crimes charged in the instant case, so he would have inevitably been notified about them. (4/8/25 PM Tr. 97-98). To his recollection he was never notified of any Payne County proceedings. (*See* 4/8/25 PM Tr. 98).

[23] Specifically, the trial court's ruling was as follows: "Any and all deals and/or agreement that the DA's Office of Oklahoma County has with any witnesses must be disclosed. I'm sustaining that. If Payne County DA on their own discretion decides not to accelerate or haven't agreed to talk to them in reference to that so be it. But any and all deals that this DA's Office has made with any other and all other DA's Offices anywhere in the world in reference to any witnesses must be disclosed. If they haven't made a deal they can't disclose anything. So . . . any and all witnesses including those mentioned in reference to any other deals will be sustained." (4/9/25 AM Tr. 13).

similar to the one memorializing the trial court's ruling on this issue, given that Ms. Warden's deferred sentence was specifically discussed on this date. (4/9/25 AM Tr. 14-15; 4/9/25 Partial AM & PM Tr. 20-21; Pet. Exs. 5-1, 32 at 92-93; St. Ex. 3-B).

- The Court finds credible Mr. Burnett's testimony that the "Brandy Warden D/S in Payne County" note in no way indicated that there was an agreement with Payne County to not accelerate her deferred sentence. (4/9/25 Partial AM & PM Tr. 21-22).

- He did not believe he ever talked with anyone from Payne County regarding Ms. Warden's deferred sentence at any time, including after the September 3, 2003 hearing in Zjaiton's prosecution. (4/9/25 AM Tr. 18-19).

a. Mr. Burnett's Testimony Regarding Coleman Givens

Although not specifically delineated within any of the issues contained in the Remand Order, the Court admitted additional testimony from Mr. Burnett regarding any potential plea offers he extended to another State's witness, Coleman Givens, based on Petitioner's proffered belief that this evidence could potentially detract from Mr. Burnett's credibility. The Court makes the following additional findings based on this testimony, which this Court found credible in all material respects:

- Mr. Burnett did not remember extending a plea agreement to Mr. Givens, who testified during the State's case-in-chief in Petitioner's trial, in exchange for his testimony. (4/9/25 AM Tr. 25-26, 30-31, 36, 40-41; 4/9/25 Partial AM & PM Tr. 23-24).

- Mr. Burnett did acknowledge written communication between himself, Ms. Smith, and another individual about Mr. Givens being released from custody on his own recognizance in July, 2002, which appeared to possibly coincide with his recollection that Mr. Givens was threatened by Petitioner and Zjaiton during the preliminary hearing stage of this case, but he could not be completely certain. (*See* 4/9/25 AM Tr. 26-27, 31-33; 4/9/25 Partial AM & PM Tr. 22; Pet. Ex. 82-3, 84-1, 84-2). Mr. Burnett also affirmed that this written

communication could have come about because of this incident. (4/9/25 Partial AM & PM Tr. 23).

- Regarding Mr. Givens, Mr. Burnett further acknowledged that: 1) in December, 2003, Mr. Givens' two Oklahoma County felony bogus check cases were continued until April 1, 2004, as indicated by a court minute noting he was testifying for the State; and 2) in July, 2004, another prosecutor signed a motion to dismiss one of Mr. Givens' Oklahoma County cases on his behalf, based upon payment of restitution. (4/9/25 AM Tr. 29-30, 41-42; Pet. Ex. 84-4).

- Upon reviewing the transcript of Mr. Givens' testimony from Petitioner's jury trial, Mr. Burnett acknowledged the jury received testimony from Mr. Givens indicating: 1) he was not given assistance from the State in his bogus check case in exchange for his testimony; and 2) he was unsure why he was granted a recognizance bond, but recalled that it was after the preliminary hearing. (4/9/25 Partial AM & PM Tr. 25-27; *see also* St. Ex. 1-G, JT V).

- The Court finds that Petitioner's exhibits do not cast doubt on Mr. Burnett's testimony at this hearing. (*See* Pet. Exs. 83, 84-1, 84-2, 84-3, 84-4, 84-6, 85-1, 85-3).

- Mr. Burnett could not offer much testimony regarding the details of Mr. Given's testimony, and any agreements he might have had, as he could not recall much about Mr. Givens.

- Based on the evidence before the Court, Mr. Givens' release on a recognizance bond was based on concerns for his safety and not a consideration provided in exchange for his testimony against Petitioner.

- The Court finds it possible that Mr. Givens' attorney arranged for the recognizance bond based on fears about Mr. Givens' safety without conveying to Mr. Givens the reason release was granted. Petitioner has failed to establish that Mr. Givens testified falsely.

11. Vincent Antonioli

Mr. Antonioli worked as an Oklahoma County Public Defender from approximately 1993 to 1996, and 1999 to 2002. (4/9/25 Partial AM & PM Tr. 42). After his second period as a public defender, he worked for the Logan County

District Attorney's Office for roughly six (6) years. (4/9/25 Partial AM & PM Tr. 42). While employed as a Logan County prosecutor, in the late summer of 2003, he and Tom Lee traded dockets, resulting in Mr. Antonioli working in the Payne County District Attorney's Office and Mr. Lee working in Logan County for a period. (4/9/25 Partial AM & PM Tr. 42).

During his time as a prosecutor, Mr. Antonioli gained experience in making plea recommendations for deferred sentences and exercising discretion regarding whether to accelerate these sentences to convictions. (4/9/25 Partial AM & PM Tr. 44). When making decisions about whether to initiate acceleration proceedings, Mr. Antonioli testified that a violation report from a probation officer would be given "[s]ignicant, but not total weight," always subject to his own discretion. (4/9/25 Partial AM & PM Tr. 45). More specifically, in a case like Ms. Warden's or any other, Mr. Antonioli would exercise prosecutorial discretion by reviewing

> what . . . [a defendant's] performance had been, what the nature of the violation was, whether it was a failure to pay restitution, failure to report to their probation officer, failure to complete community service, . . . whether they had committed a new offense . . . how much time they had left on their sentence, [and] what they could do to get – caught back up. In other words, what they could do to make things right.

(4/9/25 Partial AM & PM Tr. 45).

Although Mr. Antonioli was not working in Payne County when Ms. Warden's DOC violation report was filed on January 17, 2002, he had an opportunity to subsequently review her file for the first time in the week leading up to her deferred expiration date, which fell on October 24, 2003; Mr. Antonioli

recalled her case was placed on a Friday felony disposition docket in Payne County for this reason.[24] (4/9/25 Partial AM & PM Tr. 46-47, 63; Pet. Ex. 14).

When asked about why he chose not to file an application to accelerate Ms. Warden's deferred sentence, Mr. Antonioli affirmed that any of the violations listed on Ms. Warden's violation report reflected that she had not satisfactorily met the conditions of her deferred sentence and the criminal law violations in relation to the instant matter were serious. (4/9/25 Partial AM & PM Tr. 48-49, 55; Pet. Ex. 14). However, he explained that he would have also reviewed Tom Lee's handwritten note directing to "hold off" on filing an application to accelerate "for a while," averring there was also nothing in the file indicting that this directive ever changed. (4/9/25 Partial AM & PM Tr. 56-57; Pet. Ex. 15). As such, Mr. Antonioli indicated this note would have influenced his decision not to file an application to accelerate Mr. Warden's case prior to her deferred expiration date. (4/9/25 Partial AM & PM Tr. 57). Other factors influencing this decision consisted of the handwritten note regarding Ms. Tyner's communication with the Payne County District Attorney's Office indicating that Ms. Warden was a cooperating State witness in Zjaiton's case and that she had pleaded guilty to accessory after the fact to a forty-five (45) year sentence. (*See* 4/9/25 Partial AM & PM Tr. 59, 61-62; Pet. Ex. 15).

Mr. Antonioli testified that during the October 24, 2003 felony disposition

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[24] Mr. Antonioli explained that in preparation for a felony disposition docket, the "Court Clerk's office would prepare a list of all the cases that would be set on the docket . . . ." (4/9/25 Partial AM & PM Tr. 63). He further explained that in preparation for the docket, he would have received a hard copy of the docket itself, with Ms. Warden's name and case number on it. (4/9/25 Partial AM & PM Tr. 63).

docket in Payne County, he made handwritten notes in relation to the proceedings regarding Ms. Warden's deferred sentence. They indicated that he was aware she was serving a forty-five (45) year DOC sentence and that her Payne County matter was dismissed and expunged by the district court upon his oral request. (4/9/25 Partial AM & PM Tr. 60-62; Pet. Ex. 33). He further affirmed that he subsequently filed a "Motion to Dismiss," in Ms. Warden's case, which indicated that she had satisfactorily completed her probationary period. Regarding this motion, Mr. Antonioli specified: 1) this particular filing was not necessarily required in preparation for the October 24, 2003 disposition docket; and 2) although Ms. Warden had not achieved satisfactory completion of her probation, the filing was intended to "memorialize[] what occurred in open court" on this date. (4/9/25 Partial AM & PM Tr. 63-65, 68; *see* Pet. Ex. 27). On this point, Mr. Antonioli elaborated:

> There was no hearing to have . . . [the motion] signed. She had an appearance date on the 24th where I made the announcement for the reasons that I told you, that I told everyone, to just let it go. There was nothing more that we could do in Payne County on our dinky little property crime three-year deferred sentence that would've made any economic sense to have her writted from 75 miles away, have the Court Clerk's Office process paperwork, have the judge have to deal with it. . . . [W]e weren't going to get the restitution paid. She was in jail. So to answer your question, we didn't always file an application to accelerate, nor did we always let sentences lapse. It depended.
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> My belief now, and the way I . . . practiced as a prosecutor, was Brandy Warden had done all that she was ever going to do because of her incarceration. She was not going to be able to complete her probation. When applications to accel[erate] . . . get filed, the plan is to have the defendant get caught up. In other words, get even with the house. Brandy was never going to get even with the house. She

> had paid approximately two-thirds of the restitution[,] as indicated by the restitution adjustment form.[25] I would've said – the way I practiced, I would've said ['l]et's just call it good.['] Let's not invest anymore time in this.

(4/9/25 Partial AM & PM Tr. 64-66; *see also* 4/9/25 Partial AM & PM Tr. 67-68, 70). Mr. Antonioli further clarified that Ms. Warden could not have satisfactorily completed her probationary period simply by agreeing to testify in this matter, noting that at the time her Payne County case was expunged, he had no confirmed knowledge of whether she had even actually done so. (4/9/25 Partial AM & PM Tr. 68). He further did not recall any communication from the Oklahoma County District Attorney's Office in the week prior to the filing of the dismissal motion but if such communication had occurred, it would have been noted in the State's file. (4/9/25 Partial AM & PM Tr. 69-70; *see* Pet. Ex. 27). The Court finds credible Mr. Antonioli's adamant testimony that: 1) the ultimate decision not to file an application to accelerate in Ms. Warden's case in the week leading up to her deferred expiration date and; 2) the request for dismissal and expungement of her case, were completely unilateral actions made by himself, free of any request, communication, or coordination with Tom Lee or anyone affiliated with the Oklahoma County District Attorney's Office. (4/9/25 Partial AM & PM Tr. 70-71).

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[25] After Ms. Warden's case was dismissed and expunged, Mr. Antonioli further explained that based on records indicating that the restitution amount in her case was adjusted in July, 2004, this reflected the fact that the Payne County District Attorney's Office reviewed their accounting records and observed there was still outstanding restitution owed; however, because the case had been dismissed and expunged, there would be no further restitution payments, such that the adjustment was effectively the equivalent of "writing off a bad debt." (4/9/25 Partial AM & PM Tr. 52-53; *see* Pet. Ex. 33)

12. Specific Findings as to the OCCA's Remanded Questions One (1) Through Three (3), and Five (5) Through Eight (8)[26]

- The answer to Question One (1) is that no agreement existed between Oklahoma County and Payne County prosecutors to refrain from accelerating Ms. Warden's deferred sentence in Payne County Case No. CF-2000-202.

- The answer to Question Two (2) is that prosecutors did not withhold any evidence concerning the existence of an agreement with Ms. Warden not to accelerate her deferred sentence in Payne County Case No. CF-2000-202. The Court further finds that no other benefits were extended to her, outside of those she testified to at Petitioner's trial.

- The answer to Question Three (3) is that Ms. Warden's Payne County deferred sentence played no part in her plea agreement executed in Oklahoma County.

- The answer to Question Five (5) is that Mr. Lee penned this handwritten note because he believed it would be too costly, inefficient, and time-consuming to initiate acceleration proceedings against Ms. Warden in response to the January 18, 2002, DOC violation report.

- The answer to Question Six (6) is that the author of this handwritten note remains unknown; however, it was not drafted by either Mr. Lee or Mr. Antonioli and was likely the result of Ms. Tyner's phone calls with the Payne County District Attorney's Office during her representation of Zjaiton.

- The answer to Question Seven (7) is that Mr. Burnett likely penned this note during a September 3, 2003, hearing during which the trial court was ruling on various motions filed by Ms. Tyner; it was not penned in relation to any agreement with Payne County to not accelerate Ms. Warden's Payne County deferred sentence.

- The answer to Question Eight (8) is that although Johnny Albert, Petitioner's trial counsel is now deceased, the district court record

[26] The OCCA's Remanded Question Four (4), namely, 1) whether evidence of any agreement (had one existed) to not accelerate Ms. Warden's deferred sentence prior to her testifying in Petitioner's case was "material or merely cumulative;" and 2) whether it could have affected the outcome of Petitioner's trial, is discussed at length below within the section outlining this Court's legal conclusions, given that it presents a mixed question law and fact.

in this case reflects that he was present at pre-trial hearings in Petitioner's case and thus, fully aware of the agreement. Although there were no additional agreements, the Court presumes he would have cross-examined Ms. Warden about any additional benefits she might have obtained *had* such an agreement existed. Mr. Albert's trial co-counsel, Lance Phillips, was not called to testify.

CONCLUSIONS OF LAW

The Remand Order in this case directs this Court to evaluate the previously enumerated eight (8) questions in order assist the OCCA in determining two issues on post-conviction: 1) did an undisclosed agreement not to accelerate Ms. Warden's Payne County deferred sentence exist between Oklahoma County and Payne County Prosecutors; and 2) even if such an agreement existed, was it "material or merely cumulative and did it have an effect on the outcome of the trial." (*See* Remand Order at 6-8). These issues, as noted in the Remand Order, are necessary to resolving two claims made by Petitioner in his Fifth Application, namely that: 1) prosecutors violated Petitioner's right to due process by withholding this evidence, in defiance of *Brady v. Maryland*, 373 U.S. 83 (1963); and 2) prosecutors failed to comply with the requirements of *Napue v. Illinois*, 360 U.S. 264 (1959), by "elicit[ing] and fail[ing] to correct Ms. Warden's false testimony about the extent of the benefits she received in exchange for her cooperation with the State's death penalty prosecution." (*See* Remand Order at 2-3); *see also Slaughter v. State*, 2005 OK CR 2, ¶ 11, 105 P.3d 832, 835 (noting if the OCCA "determines that the requirements of Section 1089(D) of Title 22 have been met and issues of fact must be resolved by the District Court, it shall issue an order remanding to the District Court for a

hearing on the merits of the claim raised in the application." (quoting Rule 9.7(D)(1)(a), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. 2004; 22 O.S.2001, § 1089(D)). Based on the previously outlined evidence presented during the evidentiary hearing in this matter, the Court finds: 1) the evidence is sufficient to answer the questions posed by the OCCA's Remand Order; and 2) Petitioner has failed to demonstrate the existence of any *Brady* or *Napue* violation in relation to Brandy Warden's plea agreement with the Oklahoma County District Attorney's Office. Moreover, the Court further finds that *even if* such an agreement existed, it was not material in the sense that it would not have affected the outcome of Petitioner's trial. In other words, this Court finds that based on the facts adduced here (or lack thereof), Petitioner fails to demonstrate that any agreement existed between the Oklahoma and Payne County District Attorneys' Offices, as there has been no evidence adduced linking the several notes written on various documents and pleadings at different times and in different proceedings as part of a scheme by these two Offices to keep Ms. Warden's criminal record free of felony convictions in order to preserve her credibility as a State's witness in this matter. On the contrary, the former assistant district attorneys who testified at this hearing all credibly denied the existence of any such agreement.

A. Petitioner Fails to Demonstrate the Existence of a *Brady* Violation by the Concealment of Favorable Impeachment Evidence.

"Due process requires the State to disclose exculpatory and impeachment evidence favorable to an accused." *Jones v. State*, 2006 OK CR 5, ¶ 51, 128 P.3d

521, 540 (citing *Brady v. Maryland*, 373 U.S. 83 (1963)). As such, due process violations premised upon *Brady* have three essential components: 1) the evidence at issue must be favorable to the accused, either because of its exculpatory or impeachment value; 2) the evidence must have been suppressed by the government, either willfully or inadvertently; and 3) the evidence must have been material. *Strickler v. Greene*, 527 U.S. 263, 280-281 (1999); *Fuston v. State*, 2020 OK CR 4, ¶ 58, 470 P.3d 306, 322. Importantly, evidence is material "'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). Thus, to carry the burden imposed under *Brady*, Petitioner 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." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

Moreover, in the context of impeachment, evidence of impeachment of a witness adverse to a defendant may be favorable and material when "the reliability of the witness may be determinative of the defendant's guilt or innocence." *United States v. Bracy*, 67 F.3d 1421, 1428 (9th Cir. 1995); *see also Bagley*, 473 U.S. at 676 (noting the duty to disclose evidence encompasses impeachment evidence). However, when impeachment evidence is merely cumulative to other impeachment evidence, the materiality threshold appears

less clear.[27] *See Fuston*, 2020 OK CR 4, ¶ 61, 470 P.3d at 322-323 (explaining that allegedly withheld impeachment evidence of prosecutorial leniency would have done little to affect the credibility of the witness at issue because the jury already was aware he "had pending criminal charges and had made a deal with the State in exchange for testimony."). In other words, withheld impeachment evidence is only considered material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different by damaging the witness's credibility. *See Strickler*, 527 U.S. at 280. Thus, failure by the prosecution to disclose express or implicit deals with a key witness will typically only be seen as a violation of the principles of *Brady* in circumstances where the witness provides the essential link between the principal and the crime. *See Hober v. Wainwright*, 756 F.2d 1520, 1523-1524 (11th Cir. 1985). Moreover, this Court does not—and should not—entertain

[27] To be sure, the Supreme Court recently found false testimony material where the testimony "'goes to the credibility of the witness.'" *See Glossip v. Oklahoma*, 145 S. Ct. 612, 628 (2025) (quoting *Napue*, 360 U.S. at 269)). However, this Court finds the instant case to be readily distinguishable. In the *Glossip* case, the Supreme Court specifically noted that "[b]ecause [State witness, Justin] Sneed's testimony was the only direct evidence of Glossip's guilt of capital murder, the jury's assessment of Sneed's credibility was determinative . . . ." *See id.* Additionally, the Supreme Court opined that "no other witness and no physical evidence established Glossip orchestrated Van Treese's murder. Thus, the jury could convict Glossip only if it believed Sneed." *Id.* Unlike in *Glossip*, here, Ms. Warden's testimony was decidedly not the only evidence linking Petitioner to the crimes in this case. Moreover, the Supreme Court spelled out numerous other circumstances specific to the *Glossip* case that demonstrated materiality of false testimony, *see Glossip*, 145 S. Ct. at 629-631, none of which is present here. Finally, the Supreme Court specifically noted the State of Oklahoma's confession of multiple errors in *Glossip*, which this Court finds to be another circumstance not present in the instant case. *See Glossip*, 145 S. Ct. at 626-627 ("Because the attorney general's confession of error is supported by ample evidence, the Court declines to remand this case for further evidentiary proceedings.").

Brady claims which are based on pure speculation. *Musonda v. State*, 2019 OK CR 1, ¶ 12, 435 P.3d 694, 697; *Rogers v. State*, 1997 OK CR 7, ¶ 7 n.18, 934 P.2d 1093, 1098 n.18.

Turning to the instant matter, this Court finds that Petitioner has presented no evidence indicating the Oklahoma County District Attorney's Office and the Payne County District Attorney's Office entered into any form of mutual agreement to not accelerate Ms. Warden's deferred sentence and thus, no favorable impeachment evidence—material or otherwise—was withheld from Petitioner in this case. Specifically, not a single prosecutor involved in the prosecution of either Petitioner or Ms. Warden testified to any actual communication between these two Offices and no other documentation—either in the form of phone calls, e-mail, or written correspondence—demonstrating the existence of such a scheme, was offered by Petitioner. In fact, the witnesses testified there was no such communication and there was no agreement.

At best, Petitioner attempts to offer *speculation* stemming from *individual* actions taken by each Office, such as: 1) Mr. Lee's handwritten sticky note affixed to Ms. Warden's January 18, 2002 violation report; 2) Mr. Burnett's handwritten notes on copies of Ms. Tyner's request to reveal all plea agreements and Ms. Smith's response to the same; and 3) Mr. Antonioli's notations on the State's Payne County file from October 24, 2003, as well as his subsequently filed motion to dismiss her case. Based on these independent actions by three different prosecutors in two different counties, Petitioner attempts to convince this Court there was an intricate conspiracy theory. Petitioner's claim is based

solely on speculation and is contrary to the evidence.

In *Fuston v. State*, the OCCA addressed a similar issue when the defendant contended on direct appeal that the State had withheld evidence that a prosecution witness, Ivan Williamson, "had an agreement by which he was to receive leniency in federal proceedings in exchange for testimony against" the defendant. *Fuston*, 2020 OK CR 4, ¶ 55, 470 P.3d at 321. Similar to the facts adduced here, Mr. Fuston highlighted that the trial court issued a ruling sustaining a motion "requesting, in part, all agreements between the State and its witnesses reflecting any special or lenient treatment in exchange for their testimony" and that the "State failed to turn over information on pending federal charges," such that "failure to disclose impeachment evidence denied him his due process rights under *Brady* . . . ." *Id.* However, the OCCA rejected the claim because there was no evidence of an agreement that Mr. Williamson receive leniency in federal proceedings. *Id.*, 2020 OK CR 4, ¶ 59, 470 P.3d at 322

The Court finds that Petitioner similarly fails to show the State suppressed any information regarding the non-acceleration of Ms. Warden's deferred sentence. Although Mr. Burnett and Ms. Smith were aware of the Payne County deferred sentence, each viewed this detail as a trivial matter that did not affect their decision to utilize Ms. Warden as a cooperating State's witness in this case; each further affirmed the absence of communications with the Payne County District Attorney's Office. Moreover, Mr. Burnett explained that his handwritten notations on both Ms. Tyner's "Motion to Reveal All Deals" and Ms. Smith's response were likely jotted down during the September 3, 2003 hearing in order

to memorialize the trial court's ruling on this issue. Given this testimony, the Court finds that these notations in no way evidenced any sort of agreement with Payne County regarding the non-acceleration of Ms. Warden's deferred sentence as part of her Oklahoma County plea deal.

Along these same lines, despite Petitioner's allegation that Mr. Lee's notation to hold off on initiating acceleration proceedings in Ms. Warden's Payne County case is somehow indicative of a covert, cross-county agreement, the Court finds credibility in Mr. Lee's testimony that the more plausible intention behind this action was to wait to see what would ultimately happen with Ms. Warden's Oklahoma County case, given that the cost and effort of attempting to accelerate a deferred sentence on a relatively trivial property crime would have greatly outweighed any potential result that could have been achieved *via* acceleration at that time. Mr. Lee's testimony to this effect is especially well taken given that Ms. Warden had yet to be convicted of the Oklahoma County crimes and the State would have been required to prove such a violation by presenting live testimony that she had committed these crimes in order to attain an acceleration. *See Miller v. State*, 2024 OK CR 22, ¶ 10, 555 P.3d 792, 795 ("Where the State's application to accelerate is based on a claim the defendant committed a new offense, the State must present evidence of either a final judgment and sentence or sufficient evidence to show that the defendant committed *each element of the offense*." (emphasis added)). In other words, because Ms. Warden was being held in Oklahoma County on Oklahoma County charges involving Oklahoma County witnesses, the Court deems Mr. Lee's election to wait on filing

an application to accelerate in Ms. Warden's Payne County Case credible, because the cost of doing so at the time would have been extremely inefficient.

The Court further finds that Mr. Lee's decision was made independent of any alleged request from the Oklahoma County District Attorney's Office. The Court notes the date of Mr. Lee's handwritten note—January 18, 2002—reinforces this conclusion. More specifically, Mr. Lee's note was written mere days after the commission of the Oklahoma County crimes. The District Court record in this case indicates that, apart from the flurry of filings charging the four defendants with their respective crimes on January 7, 2002, the first appearance by any of the defendants in this case did not occur until January 28, 2002. Notably, Ms. Warden did not enter her plea in this case until February 19, 2003, *over a year later*. The Court finds it implausible that, a mere eleven days after Ms. Warden was charged in Oklahoma County, the Oklahoma County District Attorney's Office had already decided: 1) that it was necessary to ensure as little impeachment evidence existed against her; and 2) in furtherance of this, obtained an agreement from Payne County to help her avoid an additional felony conviction. Notably, the testimony of Ms. Warden herself further strengthens this conclusion, given that she testified to having no recollection of any alleged plan to this effect, which is likewise backed up by the Oklahoma County cooperation memorandum and plea agreement executed on her behalf.

For similar reasons, this Court further rejects Petitioner's allegation that the actions Mr. Antonioli took in moving to dismiss and expunge Ms. Warden's deferred sentence were demonstrative of an undisclosed, cross-county

prosecutorial plea agreement. Although the Court notes Mr. Antonioli's representation that Ms. Warden had successfully completed her probation was technically incorrect, his testimony explaining his reasoning for making the decision to request dismissal and expungement—primarily, that Ms. Warden was already serving a forty-five (45) year sentence of imprisonment and Payne County would very likely be getting no more restitution from her due to this—was highly credible. In short, Mr. Antonioli believed that Payne County could obtain nothing more from Ms. Warden in compensation for her Payne County crimes, nor offer any further punishment, such that acceleration would have been a waste of judicial resources. The Court finds this reasoning, along with Mr. Antonioli's testimony that this decision was wholly made on his own, without any communication from Mr. Lee or anyone from Oklahoma County, credible, such that it directly rebuts Petitioner's claim that the dismissal and expungement was done in furtherance of covertly preserving Ms. Warden's credibility in relation to her testimony in this case.

In sum, the above-outlined evidence fails to substantiate Petitioner's speculative claim that no other reason, other than the presence of an undisclosed plea agreement, could exist for Payne County electing not to accelerate Ms. Warden's deferred sentence. Consequently, based on the evidence presented, this Court concludes that Petitioner has failed to demonstrate that the State withheld favorable impeachment evidence in this case. *See Collier v. Davis*, 301 F.3d 843, 848-849 (7th Cir. 2002) (finding the evidence failed to show an agreement or informal understanding existed between the prosecution and a

key witness); *Johnston v. Love*, 940 F. Supp. 738, 763-765 (E.D. Pa. 1996) (*judgment aff'd without opinion Johnston v. Love*, 118 F.3d 1576 (3rd Cir. 1997) (finding state officials had no awareness of certain aspects of an agreement between the contested witness and the federal government).

B. Even Assuming an Agreement to Not Accelerate Ms. Warden's Deferred Sentence Existed, Petitioner Fails to Demonstrate This Evidence Was Material.

Petitioner similarly fails to demonstrate that *even if* such an agreement existed in the way Petitioner claims, it amounted to material impeachment evidence that would have likely altered the outcome of his trial. The Court comes to this conclusion based primarily on the evidence adduced during Petitioner's trial and finds that any impeachment value that might have been derived from any alleged agreement between Oklahoma and Payne Counties would not have impacted Petitioner's verdict or sentence. The principal reasoning for this conclusion is that while Ms. Warden's testimony was valuable to the State, it did not provide the "essential link" necessary to connect Petitioner to the crimes for which he was convicted, or bear on the aggravating circumstances in this case. In support of this finding, a synopsis of the following relevant trial evidence is included below.

As an initial matter, the Court notes that evidence from the evidentiary hearing also bears on the materiality question. Ms. Warden testified to being subjected to direct and cross-examination regarding the terms and extent of her agreement with the State in each trial that occurred in this matter. Thus, the jury was aware that Ms. Warden was testifying to avoid a potential life without

parole sentence. Moreover, Ms. Smith testified that Ms. Warden's trial testimony served as corroboration in relation to other evidence adduced and, after Zjaiton's testimony implicating himself and the "fictitious Alex," Ms. Warden's testimony was even less important to the State in securing a conviction and death sentence. Similarly, Mr. Burnett's opinion of Ms. Warden's testimony was that it was not required for the State to move forward with Petitioner's prosecution and likewise became much less important in light of the testimony of Zjaiton. Finally, Ms. Tyner testified that Zjaiton's testimony was the "fatal flaw" in Petitioner's trial. The Court finds these opinions credible, as they are supported by the following evidence introduced in Petitioner's case.

1. *Trial Evidence Implicating Petitioner in the Crimes, Irrespective of Zjaiton and Ms. Warden's Testimony.*

Despite Zjaiton Wood's claims that Petitioner had no involvement in the robbery and murder[28] and *irrespective* of Ms. Warden's testimony, the State's evidence against Petitioner consisted of:

- Evidence placing Petitioner with the three (3) other defendants before and after the murder;

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[28] The Court notes that, as in every case tried to a jury, the jury in Petitioner's case was free to believe Zjaiton's testimony that he committed these crimes with another individual, while at the same time disbelieving his testimony about this individual's identity—*i.e.*, that it was someone named "Alex," as opposed to Petitioner. It is a well settled principle that "'[t]he credibility of witnesses and the weight and consideration to be given to their testimony are within the exclusive province of the trier of facts.'" *Mason v. State*, 2018 OK CR 37, ¶ 13, 433 P.3d 1264, 1269 (quoting *Rutan v. State*, 2009 OK CR 3, ¶ 49, 202 P.3d 839, 849). *Cf. Davis v. State*, 2011 OK CR 29, ¶ 83, 268 P.3d at 112-113 ("[T]he trier of facts may believe the evidence of a single witness on a question and disbelieve several others testifying to the contrary."); *see also, United States v. Cueto*, 628 F.2d 1273, 1275 (10th Cir. 1980). As Ms. Smith and Mr. Burnett testified, Zjaiton ultimately offered some of the most powerful testimony for the State. In any event, this Court finds that the State had a strong case against Petitioner's irrespective of either Zjainton or Ms. Warden's testimonies.

- Evidence that a car similar to that owned by Petitioner's girlfriend was used in the murder while Petitioner was using his girlfriend's car all night;

- Evidence that Petitioner purchased gloves and ski masks similar to those used by the murderers;

- Evidence, including from surviving victim Arnold Kleinsasser, that the murder was perpetrated by two individuals who possessed physical traits and characteristics consistent with those of Petitioner and his brother, with the smaller man (Petitioner) carrying a knife and the larger man (Zjaiton) carrying a gun—just as in the pizza restaurant robbery earlier in the evening;

- Testimony from Coleman Givens identifying Petitioner's voice as one that matched one of the killers;

- Evidence that Petitioner arrived back at his and Casey Odell's home after the murder and ordered Ms. Odell to take his brother, Ms. Bateman, and Ms. Warden home;

- Evidence of Petitioner's flight to Houston, combined with his need to accumulate money in the days after the murder;

- Petitioner's letter to his brother attempting to harmonize their stories to explain away evidence implicating Petitioner, as well as his threat made to Mr. Givens prior to the preliminary hearing in this case;

- The glove left at the crime scene that contained DNA from which Petitioner could not be excluded as a contributor.

(*See* St. Ex. 1-E, JT III, 129-143, 176, 218-218, 225-229, 233-234; St. Ex. 1-F, JT IV, 24-31, 34-36, 50, 76-109, 220-224, 256-257, 273-294; St. Ex. 1-G, JT V, 7-13, 24, 33-41). Based on these facts, the Court agrees with Ms. Smith that the State had a strong case against Petitioner.

2. Zjaiton's Trial Testimony in Petitioner's Case

Zjaiton testified to many of the same details other witnesses offered regarding the events that took place at the Bricktown Brewery, the hotel, and

immediately following the murder, with one key difference: the identity of the other masked man involved in the crimes. Zjaiton indicated that he, Petitioner, Lanita Bateman, and Ms. Warden had all gone to the Bricktown Brewery on New Year's Eve; however, in his version, he also claimed another individual named "Alex" was present in their group as well. Zjaiton claimed that Petitioner declined to be involved in the plot to rob Mr. Wipf and Mr. Kleinsasser. After Ms. Bateman and Ms. Warden left with the victims for the hotel, Zjaiton testified that he paged "Alex" and the two of them drove to the hotel and carried out the robbery and murder. Zjaiton also testified that he and "Alex" had also robbed a pizza restaurant earlier in the evening on the night of the murder. (*See* St. Ex. 1-G, JT V, 88-115).

3. Guilt-State Evidence Provided by Ms. Warden

Comparing the preceding evidence implicating Petitioner to Ms. Warden's actual trial testimony, the court finds that almost all of her testimony was cumulative to the other evidence received in this case from other sources. Specifically, Ms. Warden testified that Zjaiton was larger in stature[29] than Petitioner and that she, Petitioner, Zjaiton, and Ms. Bateman went to Walmart on the night of the crimes at Petitioner's behest and purchased two pairs of gloves, two ski masks and feminine products. After robbing the pizza

[29] Evidence of the physical size of Petitioner and Zjaiton would have been apparent to the jury during Petitioner's jury trial as well, given that Zajiton elected to testify. Additionally, Linda Wood, Petitioner's mother, also testified to this fact. (St. Ex. 1-F, JT IV, 34).

restaurant,[30] they traveled to the Bricktown Brewery, where she and Ms. Bateman arranged to go to a hotel with the victims. (St. Ex. 1-G, JT IV, 134-135, 138-142, 146-151).

After arriving at the hotel, Ms. Warden accompanied the surviving victim, Mr. Kleinsasser to an ATM, where he withdrew money to pay both her and Ms. Bateman for sex that night; he gave this money directly to Ms. Warden. (St. ex. 1-G, JT IV, 156, 160-162). Prior to leaving the hotel room hotel room, Ms. Bateman used the phone to act as if she was calling her mother and not long after this, there was a knock at the door and a voice outside indicating that someone was there to pick up the girls. (St. Ex. 1-G, JT IV, 162-163-166). In response, Ms. Bateman again got on the phone to act as if she were calling the police; however, the murder victim, Mr. Wipf, eventually opened the door. Ms. Warden and Ms. Bateman then ran outside while Petitioner and Zjaiton ran in wearing the ski masks and the gloves they purchased at Walmart earlier. (St. Ex. 1-G, JT IV, 166-170). Petitioner was brandishing a knife while Zjaiton had a gun. (St. Ex. 1-G, JT IV, 178-179, *see also*, 181). Ms. Warden and Ms. Bateman ran to Ms. Odell's vehicle in the parking lot, where Petitioner and Zjaiton joined them minutes later; Petitioner then directed Ms. Bateman to drive them to Ms. Odell's residence.[31] (St. Ex. 1-G, JT IV, 166-171). After arriving at Ms. Odell's, Petitioner

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[30] The Court notes that the entirety of this evidence regarding the events that occurred prior to and during the pizza robbery was also established by other evidence at trial.

[31] The Court notes that the entirety of this evidence was also established by other evidence at trial.

went inside and Ms. Odell drove Ms. Bateman, Ms. Warden and Zjaiton to the home of Linda Wood, Petitioner's mother; Ms. Warden testified that during the ride, Zjaiton was holding his hand outside the car's window because he had shot himself in the hand during the struggle with Mr. Wipf and Mr. Kleinsasser.[32] (St. Ex. 1-G, JT IV, 172-176).

After arriving at Linda Wood's, Zjaiton told them to say nothing about what happened and later that day; after seeing a news story about the crimes, Zjaiton called Petitioner to talk about it and the pair determined they needed to leave town. (St. Ex. 1-G, JT IV, 174-175, 189, 198-199). That same day, Petitioner also contacted Ms. Warden via phone and asked her about what she was going to say in relation the events at the hotel, to which she responded that she would tell the truth. (St. Ex. 1-G, JT IV, 197-198). The next day, Linda Wood took Ms. Warden back to Stillwater, where Ms. Warden was later arrested.[33] (St. Ex. 1-G, JT IV, 181).

In line with her evidentiary hearing testimony, during Petitioner's trial, Ms. Warden further acknowledged that she entered a plea of guilty to reduced charges for her role in the robbery and murder, which resulted in a forty-five (45) year sentence. (St. Ex. 1-G, JT IV, 189, 194-195, 198-201). She also admitted that she had made previous statements that Zjaiton was the one who murdered Mr. Wipf; however, she clarified that she was under the impression when she

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[32] Zjaiton also testified that he had shot himself in the hand during the robbery and murder, which Ms. O'Dell also confirmed. (St. Ex. 1-G, JT V, 85-109).

[33] The Court notes that the entirety of the evidence in this paragraph was provided *via* Ms. Warden's testimony, alone.

made the statements, that Mr. Wipf had been shot. (St. Ex. 1-G, JT IV, 201). After finding out that Mr. Wipf had actually been stabbed, she then altered these statements to reflect that Petitioner had stabbed him, given that he had been the one with the knife in the hotel room that night. (St. Ex. 1-F, JT IV, 134-204).

4. Sentencing-Stage Evidence Provided by Witnesses & Sources Other than Ms. Warden

The State's sentencing-stage evidence against Petitioner consisted of two witnesses: Keramat Taghizadeh and Ms. Warden. The record further reflects that the jury in this case found the existence of three aggravating circumstances: 1) that Petitioner created a great risk of death to more than one person; 2) that the murder was especially heinous, atrocious, or cruel; and 3) that there existed a probability that Petitioner would commit criminal acts of violence that would constitute a continuing threat to society. The Court notes that the first two aggravating circumstances were proved in the first stage of trial, independent of Ms. Warden's testimony, such that the evidence discussed within this section outlines only new evidence introduced during the sentencing stage regarding the third aggravator.

Regarding this particular aggravator, Mr. Taghizadeh testified that at the time of the crimes at issue, he owned La Franca's Pizza, a restaurant in Oklahoma City. On the same night as Mr. Wipf's murder, two men stormed into his restaurant wearing masks. The smaller man—Petitioner[34]—had a knife and

[34] Mr. Taghizadeh could not identify the robbers. As will be discussed, Ms. Warden testified that she was in a car outside of La Franca's during the robbery, which was committed by Petitioner and Zjaiton. Nonetheless, other evidence (not to include Ms.

the larger man—Zjaiton—wielded a gun. Petitioner jumped over the counter and told him that he was being robbed. While holding the knife close to Mr. Taghizadeh's stomach, Petitioner demanded Mr. Taghizadeh open the cash register, a demand with which Mr. Taghizadeh complied. Mr. Taghizadeh also testified that Zjaiton hit him in the head several times during the robbery. (St. Ex. 1-H, JT VI, 23-29).

5. Sentencing-Stage Evidence Provided by Ms. Warden

Ms. Warden directly testified that it was Petitioner and Zjaiton who effected the La Franca pizza restaurant robbery, which occurred while she and Ms. Bateman waited outside the car. She indicated that Petitioner carried a knife and Zjaiton carried a gun and that afterwards, the pair told Ms. Bateman to drive away while they tried to conceal themselves in the backseat. From there, the group drove to the Bricktown Brewery. (St. Ex. 1-H, JT VI, 15-19).

6. Conclusions As to the Potential Materiality and/or Cumulativeness of Any Alleged Agreement to Not Accelerate Ms. Warden's Deferred Sentence

Based on a survey of the above-outlined trial evidence, in conjunction with that adduced during the evidentiary hearing in this case, this Court does not find that evidence of such an agreement (had one existed) would have proved material to Petitioner's trial.

In coming to this conclusion, the Court again finds the OCCA's holding in

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Warden's testimony) fully supports the jury's likely finding that Petitioner participated in this robbery. This evidence includes Petitioner's presence with Zjaiton before and after this robbery, the similarities between this robbery and the later murder (two masked men, the larger one armed with a gun and the smaller one armed with a knife), and Zajiton's testimony that "Alex" committed both this robbery and the murder.

Fuston instructive. In determining that there was no reasonable probability that the defendant would have been acquitted had his jury known that the witness at issue was expecting leniency in additional federal cases, the OCCA reasoned

> it is not clear how that would have impacted Williamson's credibility with the jury. They knew he had pending criminal charges and had made a deal with the State in exchange for his testimony. His testimony connecting . . . [Mr. Fuston] to the murder weapon was corroborated by numerous witnesses and a photograph of . . . [Mr. Fuston] with the gun. Williamson's testimony that he ultimately sold the gun was corroborated by the purchaser . . . who turned the gun over to law enforcement. This trial testimony was consistent with Williamson's preliminary hearing testimony. There was no reasonable probability that . . . [Mr. Fuston] would have been acquitted if the jury knew Williamson had additional pending federal charges.

Fuston, 2020 OK CR 4, ¶ 61, 470 P.3d at 322-323.

The Court finds a similar result is warranted here. During guilt stage proceedings, Ms. Warden's testimony provided direct evidence of the following: that Petitioner was one of the two masked men who participated in the pizza restaurant robbery and the robbery and murder inside the hotel room; however, as outlined above, the State *also* presented considerable circumstantial evidence in this case independently implicating his involvement, most notably the DNA evidence and accounts that Petitioner was with the three other accomplices after the events that transpired inside the hotel room. *See Dodd v. State*, 2004 OK CR 31, ¶ 80, 100 P.3d 1017, 1041 ("The law makes no distinction between direct and circumstantial evidence; either, or any combination of the two, may be sufficient to support a conviction."). Additionally, as Ms. Smith and Mr. Burnett alluded to during their evidentiary hearing testimony, Zjaiton's own testimony asserting that a man only known as "Alex" and not referenced by anyone else

present throughout the course of the night in question played more into the theory of the State's case than it worked in opposition to it, especially given evidence of the note written by Petitioner essentially encouraging Zjaiton to lie in order to cover for him.

Furthermore, the Court finds that, as in *Fuston*, any agreement to not accelerate Ms. Warden's deferred sentence would have added little to no impeachment value beyond her plea agreement with respect to the Oklahoma County charges. Alternatively, had her deferred sentence been accelerated by Payne County, the jury would have merely heard that she had one prior felony conviction for Larceny from a House, in addition to the very serious crimes she committed in the instant case. Thus, any alleged agreement was not material. *Cf. United States v. Buchanan*, 891 F.2d 1426, 1443-1445 (10th Cir. 1989) (denying petitioner's *Brady* claim due to a lack of materiality despite finding the government failed to disclose considerable impeachment evidence); *Brown v. State*, 2018 OK CR 3, ¶¶ 101-110, 422 P.3d 155, 174-175 (rejecting appellant's argument concerning the withholding of impeachment evidence on the basis that the contested testimony lacked materiality when assessed in light of other evidence).

Furthermore, although the Court finds that Ms. Warden's testimony directly tied Petitioner to the pizza restaurant robbery, any agreement was not material to second stage given: 1) the robbery directly preceded the group's trip to the Bricktown Brewery; 2) the similarities between the pizza robbery and the robbery and murder occurring later in the night (*i.e.*, being perpetrated by two

men, one larger and one smaller, with the larger wielding a gun and the smaller wielding a knife); and 3) Zjaiton's confession that he and "Alex" committed this crime, when the jury plainly found that "Alex" was a substitution for Petitioner. As such, there is no reasonable probability that any incremental decrease in the jury's assessment of Ms. Warden's credibility due to the alleged agreement would have left the jury in doubt about whether Petitioner committed the robbery with his brother or resulted in a lesser sentence.

In sum, for the foregoing reasons, the Court finds: 1) that the State's case against Petitioner was not contingent upon Ms. Warden's testimony, and; 2) even if an alleged agreement not to accelerate Ms. Warden's deferred sentence had been withheld from the Petitioner in this case, he has failed to show that this evidence amounted to material impeachment evidence that was reasonably likely to have altered the outcome of the jury trial in this matter.

C. Petitioner Fails to Demonstrate the Existence of a *Napue* Violation.

Similar to Petitioner's inability to demonstrate the existence of a *Brady* violation, this Court further finds that he has also failed to demonstrate that the State in this case did not correct knowingly false testimony from Ms. Warden about the alleged benefits Petitioner claims she received in exchange for her testimony against him in this case.

Like a *Brady* claim, a *Napue* claim requires Petitioner "that the prosecution knowingly solicited false testimony or knowingly allowed it 'to go uncorrected when it appear[ed];'" upon making this showing, "a new trial is warranted so long as the false testimony 'may have had an effect on the outcome of the trial'"—*i.e.*,

"if it 'in any reasonable likelihood [could] have affected the judgment of the jury.'"; *Glossip*, 145 S. Ct. at 626-627 (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)); *see also Giglio*, 405 U.S. at 154 (providing that the government has a duty to disclose any understandings or agreements as to the future prosecution of key witnesses which might affect the credibility of the witness and explaining this duty is even more important where the witness provides key testimony against the accused)).

To the extent Petitioner argues that the evidence adduced during the evidentiary hearing in this case indicates that the Oklahoma County District Attorney's Office: 1) permitted Ms. Warden to falsely testify that she only received the benefit of a plea agreement to the lesser charges of Accessory to Murder After the Fact and Conspiracy to Commit a Felony; and 2) failed to correct her testimony to reflect an alleged benefit of her deferred sentence not being accelerated in her Payne County case, the Court finds evidentiary support for this allegation wholly lacking. As exhaustively outlined above, the testimony adduced during the evidentiary hearing in this case completely failed to demonstrate the existence of any sort of agreement between Oklahoma and Payne Counties. In fact, the evidence establishes that the disposition of Ms. Warden's deferred sentence was entirely unrelated to this case. Thus, there was no false testimony for Oklahoma County prosecutors to correct. Consequently, given that an essential element of a *Napue* violation is false testimony, the Court finds this this element unsatisfied.

Moreover, Petitioner likewise fails to show materiality in this context as

well. As previously noted, Ms. Warden's testimony was very well corroborated, such that Petitioner would have been convicted even if she had been impeached in this regard or had not testified at all. *See Hovey v. Ayers*, 458 F.3d 892, 920 (9th Cir. 2006) (finding prosecution's failure to disclose evidence regarding the leniency a witness received in exchange for his testimony, when the witness testified he received "no promises," was not material given other corroborating evidence heard at trial). The lack of materiality in this context is further demonstrated by the trial record, which indicates that Petitioner's counsel was able to raise questions regarding the accuracy of Ms. Warden's testimony by impeaching her credibility, given her lenient treatment by the prosecution in relation to her two felonies stemming from her involvement in this crime. (St. Ex. 1-F, 189, 195). Specifically, Petitioner's trial counsel noted that the crime for which Ms. Warden was sentenced, unlike that which Petitioner faced, was a non-violent crime that had been reduced from its original charge. (St. Ex. 1-F, 189). Moreover, Petitioner's trial counsel got Ms. Warden to admit that: 1) her desire to be released in time to be able to spend time with her children was a driving force in her decision to cooperate with the State; and 2) she was "going to do whatever [she] ha[d] to [do] to keep [her plea] agreement . . . ." (St. Ex. 1-F, 195); see *Belmontes v. Woodford*, 350 F.3d 861, 881-882 (9th Cir. 2003) (*cert. granted, judgment vacated, and remanded on other grounds in Brown v. Belmontes*, 544 U.S. 945 (2005)) (evidence of prosecution's favorable treatment of witness was not material given that defense counsel was able to impeach the witness with his plea agreement stemming from the same case and that other evidence

corroborated the witness' testimony); *cf. Castleberry v. State*, 1979 OK CR 16, ¶¶ 2, 20, 590 P.3d 697, 698-700, 703 (rejecting appellant's claim that authorities improperly suppressed evidence due to lack of materiality). Thus, this Court finds that any additional impeachment evidence Petitioner's counsel might have presented to the jury stemming from Ms. Warden's Payne County crime would not have affected its assessment of her credibility. *See Hovey*, 458 F.3d at 921 (noting that even if the jury had been aware of the prosecution's promises to a witness, the jury's awareness of the witness' criminal record would not have affected the jury's assessment of his credibility).

The answer to this Court's fourth question—whether evidence of an agreement is material—is no.

D. Conclusion.

In sum, based on the testimony, exhibits, and district court record introduced in connection with the evidentiary hearing held in this matter, Petitioner has not demonstrated the existence of either a *Brady* or *Napue* violation. More specifically, the Court determines that Petitioner has wholly failed to demonstrate: 1) the existence of any such agreement; and 2) a reasonable probability that, even if such an alleged agreement existed, this evidence amounted to material, impeachment evidence that could have damaged Ms. Warden's credibility to the point that it would have altered the outcome of Petitioner's trial.

Respectfully submitted,



Susan C. Stallings
District Court Judge

CERTIFIED COPY
AS FILED OF RECORD
IN DISTRICT COURT

MAY - 2 2025

RICK WARREN COURT CLERK
Oklahoma County

CERTIFICATE OF SERVICE

On this 2nd day of May, 2025, a true and correct copy of the foregoing was mailed to:

Keith J. Hilzendeger
Amanda Bass Castro Alves
Alison Rose
250 North 7th Avenue, Suite 600
Phoenix, Arizona, 85007
Attorneys for Tremane Wood

and

Joshua Lockett
Christina Burns
313 N.E. 21st Street
Oklahoma City, Oklahoma 73105
Attorneys for Respondent

Deputy Court Clerk

ORIGINAL

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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
NOV - 5 2024
JOHN D. HADDEN
CLERK

TREMANE WOOD, Petitioner,

vs.

STATE OF OKLAHOMA, Respondent.

PCD Case No. PCD 2024 879

Capital Postconviction Proceeding

Postconviction No. PCD-2022-550
Postconviction No. PCD-2017-653
Postconviction No. PCD-2011-590
Postconviction No. PCD-2005-143
Direct Appeal Nos. D-2004-550; D-2005-171
Oklahoma County No. CF-2002-46
Tenth Circuit Court of Appeals No. 16-6001
U.S. District Court, Western District of Oklahoma No. 5:10-cv-829-HE

SUBSEQUENT APPLICATION FOR POSTCONVICTION RELIEF

DEATH PENALTY CASE

JON M. SANDS
Federal Public Defender
District of Arizona

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Attorneys for Petitioner Tremane Wood
**Motion for Admission Pro Hac Vice Pending*

"The prosecutor's role transcends that of an adversary: he is the representative not of an ordinary party to a controversy, but of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done."

–*United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985) (cleaned up).

PART A: PROCEDURAL HISTORY

Petitioner Tremane Wood, through undersigned counsel, submits this application for postconviction relief under Section 1089 of Title 22 of the Oklahoma Statutes (hereafter "Application") based on newly discovered evidence that the Oklahoma County Assistant District Attorneys who prosecuted him suppressed favorable and material evidence to secure his convictions and death sentence in violation of the Due Process guarantees of the Federal and Oklahoma Constitutions. *See* U.S. Const. amend. XIV; Okla. Const. art. II, § 7. This new evidence consists of a handwritten note located in recently obtained[1] prosecutors' files that documents a deal reached with Mr. Wood's co-defendant, Brandy Warden, over her pending deferred felony and sentence out of Payne County that was never accelerated to a conviction so that she could testify for the State and against Mr. Wood at his capital trial without being impeached as a twice-convicted felon with strong incentives to exculpate herself and incriminate Mr. Wood.

[1] As discussed *infra*, Mr. Wood obtained access to prosecutors' work product in his case for the very first time on September 4, 2024 when the Oklahoma County District Attorney's Office made that available to his lawyers. Because several boxes contained in the prosecutors' files were not available to counsel for Mr. Wood to review on September 4, 2024, counsel for Mr. Wood have been working with the Oklahoma County District Attorney's Office to schedule a time to expeditiously review those remaining boxes as soon as they are available. Mr. Wood files this Application based on the new evidence discovered on September 4, 2024 to comply with this Court's Rules requiring any postconviction claims based on new evidence to be filed within 60 days of their discovery. Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2024). Mr. Wood nevertheless respectfully reserves the right to supplement this Application with any new evidence and claims that may arise once the remaining boxes in the prosecutors' files become available to him.

This is the fifth time an application for postconviction relief has been filed in this case. Pursuant to the Rules of this Court, a copy of the amended (first) application for postconviction relief is appended hereto as Attachment 1; the second application for postconviction relief is appended as Attachment 2; the third application for postconviction relief is appended as Attachment 3; and the fourth application for postconviction relief is appended as Attachment 4.[2] Rule 9.7(A)(3)(d), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2024) (hereafter cited as "Rule" followed by the rule number).

The sentences from which relief is sought are: Count I—Death; Count II—Life; Count III—Life.

1. (a) Court in which sentences were rendered: Oklahoma County District Court

   (b) Case Number: CF-2002-46

2. Date of original sentence: May 7, 2004

3. Terms of sentences:

   a. Count I, First-Degree Murder—Death

   b. Count II, Robbery with Firearms—Life

   c. Count III, Conspiracy—Life

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

5. Petitioner Wood is presently in custody at the Oklahoma State Penitentiary, A-Unit.

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

[2] Mr. Wood 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.

I. CAPITAL OFFENSE INFORMATION

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

First-Degree Felony Murder

Aggravating factors alleged and found:

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

b. The murder was especially heinous, atrocious, or cruel; and

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

Mitigating factors listed in jury instructions:

a. The defendant is only 24 years old.

b. The defendant's parents were divorced at a young age.

c. The defendant has a family that loves him and will continue to support him in a prison environment and desperately wants to do so.

d. The defendant has a son, Brendon, who is five (5) years old. He would like to see what his son becomes and hopefully be a positive influence on him in the future.

e. The defendant has another son, Tremane, who is two (2) years old. He would like to see what his son becomes and hopefully be a positive influence on him in the future.

f. The defendant had no father figure during his childhood, and little support from his natural father.

g. The defendant's mother was absent during most of his childhood and was faced with substitute parenting.

h. The defendant has a moderately severe mental health disorder.

i. The defendant can live in a structured prison environment without hurting anyone.

j. The defendant's previous felony conviction was non-violent. This is his first violent conviction.

k. With increased age, the defendant could become a positive influence on others, even in prison.

l. The defendant has been employed in the past.

m. The defendant has had prior drug dependencies.

n. The defendant spent time in foster care.

o. The defendant took directions from older brother, Zjaiton Wood.

p. The defendant is of educational potential.

q. The defendant is of average intelligence.

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

7. Check whether the finding of guilty was made:

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

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

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

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

II. NON-CAPITAL OFFENSE INFORMATION

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

11. Check whether the finding of guilty was made:

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

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

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

III. CASE INFORMATION

13. Names of lawyers in trial court[3]:

John Albert
3001 NW Classen Boulevard
Oklahoma City, Oklahoma 73106

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

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

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

To what court or courts? Oklahoma Court of Criminal Appeals

No. D-2004-550 (dismissed Apr. 4, 2005, as untimely)

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

Date Brief in Chief filed: June 28, 2005

Date Response filed: July 22, 2005

Date Reply Brief filed: August 11, 2005

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

Date of Petition for Rehearing: May 21, 2007

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

If so, what were the grounds for the remand?

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

[3] Mr. Wood is indigent. (*See* O.R.1 855.)

16. Names and addresses of lawyers for appeal:

Perry Hudson
1315 North Shartel Avenue
Oklahoma City, Oklahoma 73103

Jason Spanich
805 Northwest 8
Oklahoma City, Oklahoma 73106

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

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

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

Petition for Writ of Certiorari, filed Sept. 12, 2007
Denied: *Wood v. Oklahoma*, 552 U.S. 999 (2007) (Mem.)

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

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

Petition for a Writ of Habeas Corpus, *Tremane Wood v. Anita Trammell*, No. 5:10-cv-00829-HE, United States District Court for the Western District of Oklahoma, filed June 30, 2011
Denied: *Wood v. Trammell*, No. CIV-10-0829-HE, 2015 WL 6621397 (W.D. Okla. Oct. 30, 2015)

Appeal to the United States Court of Appeals for the Tenth Circuit, filed May 3, 2017
Denied: *Wood v. Carpenter*, 899 F.3d 867 (10th Cir. 2018), *opinion modified and superseded on denial of rehearing*, 907 F.3d 1279 (2018)

Petition for Writ of Certiorari, filed Mar. 29, 2019
Denied: *Wood v. Carpenter*, 139 S. Ct. 2748 (2019) (Mem.)

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

Petition for Writ of Certiorari, filed Nov. 27, 2017
Denied: *Wood v. Oklahoma*, 139 S. Ct. 938 (2019) (Mem.)

Fourth Application for Post Conviction Relief, filed June 16, 2022
Denied: *Wood v. State*, No. PCD-2022-550 (Okla. Crim. App. Aug. 18, 2022)

Petition for Writ of Certiorari, filed Jan. 12, 2023
Denied: *Wood v. Oklahoma*, No. 22-6538 (U.S. Apr. 3, 2023)

Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b)(6), No. 5:10-cv-00829-HE, United States District Court for the Western District of Oklahoma, filed Apr. 19, 2023
Denied: *Wood v. Quick*, No. CIV-10-0829-HE, 2015 WL 6621397 (W.D. Okla. Sept. 13, 2023)

Motion for Remand, *In re: Tremane Wood*, No. 23-6129 (10th Cir.), filed Oct. 13, 2023
Denied: *In re: Tremane Wood*, No. 23-6129 (10th Cir. Jan. 8, 2024)

Petition for Writ of Certiorari, filed May 9, 2024
Denied: *Wood v. Oklahoma*, No. 23-7465 (U.S. Oct. 7, 2024)

Jurisdictional Memorandum Brief, No. 23-6134 (10th Cir.), filed Oct. 3, 2023
Denied: *Wood v. Quick*, No. 23-6134 (10th Cir. Nov. 6, 2023)

Petition for Writ of Certiorari, No. 23-7066, filed Mar. 21, 2024
Denied: *Wood v. Quick*, No. 23-7066 (U.S. May 28, 2024)

Issues raised in first postconviction application:

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

Issues raised in second postconviction application:

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

Proposition Two: Prosecutorial Misconduct During the State Court Proceedings Deprived Tremane of his Due Process Rights and Rendered his State Court Proceedings Unfair

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

Proposition Four: Tremane Was Denied His Sixth, Eighth, and Fourteenth Amendment Right to Counsel During his Post-Conviction Proceedings

Proposition Five: The State Court 3.11 Proceedings Violated Tremane's Due Process Rights

Proposition Six: Tremane's Due Process Rights Were Violated by the State Withholding Exculpatory Evidence

Proposition Seven: The Cumulative Impact of the Errors in this Case Requires Relief

Issues raised in third postconviction application:

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

Issues raised in fourth postconviction application:

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

Issues raised in federal habeas petition:

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

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

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

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

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

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

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

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

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

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

PART B: GROUNDS FOR RELIEF

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

20. Has a motion for Evidentiary Hearing been filed with this application?

Yes (X) No ( )

21. Have other motions been filed with this application or prior to the filing of this application?

Yes (X) No ()

a. A Motion to Associate Counsel Pro Hac Vice has been contemporaneously filed with this Application.

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

Proposition One: The State withheld material evidence favorable to the defense of its deal with Brandy Warden not to have her Payne County deferred felony conviction and sentence accelerated in exchange for her testimony against her co-defendants and Mr. Wood at his capital

murder trial, violating Mr. Wood'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 Brandy Warden about the benefits she received in exchange for her testimony against her co-defendants and Mr. Wood at his capital murder trial—concealing from the jury the deal not to have her Payne County deferred felony conviction and sentence accelerated in exchange for her cooperation—thus violating Mr. Wood'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. Wood'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

References to the record will be made as follows:

1. The original trial record is referred to as: O.R.1 ___ using the page number.
2. The direct appeal record is referred to as: DA1 ___ followed by the docket and page number.
3. The initial postconviction record is referred to as: PCR1 ___ followed by the docket and page number.
4. Trial exhibits are referred to as: State Tr. Ex. ___ or Def. Tr. Ex. ___ followed by the exhibit number.
5. Transcripts of the jury trial and Rule 3.11 evidentiary hearing will be referred to as: Tr. ___ at ___ using the date of the transcript and the page number.

The Record in This Proceeding

The record in this proceeding consists of the trial, direct appeal, and prior postconviction records to the extent relevant to the Court's adjudication of the issues presented herein; the record also consists of the attachments submitted in support of this Application. An appendix is being filed contemporaneously with this Application containing:

1. Amended (First) Application for Post Conviction Relief, *Wood v. State*, No. PCD-2005-143 (Okla. Crim. App. Apr. 25, 2007) [Attachment 1]
2. Second Application for Postconviction Relief, *Wood v. State*, No. PCD-2011-590 (Okla. Crim. App. July 6, 2011) [Attachment 2]
3. Third Application for Postconviction Relief, *Wood v. State*, No. PCD-2017-653 (Okla. Crim. App. July 23, 2017) [Attachment 3]
4. Fourth Application for Postconviction Relief, *Wood v. State*, No. PCD-2022-550 (Okla. Crim. App. June 17, 2022) [Attachment 4]
5. Affidavit of Amanda Bass Castro Alves, dated Oct. 30, 2024 [Attachment 5]
6. Transcript of Plea of Guilty, *State v. Warden*, No. CF-02-46 (Okla. Cnty. Dist. Ct. Feb. 19, 2003) [Attachment 6]
7. Transcript of Sentencing, *State v. Warden*, No. CF-02-46 (Okla. Cnty. Dist. Ct. Apr. 18, 2003) [Attachment 7]
8. Judgment and Sentence – Deferred, *State v. Warden*, No. CF-2000-202, (Payne Cnty. Dist. Ct. Oct. 27, 2000) [Attachment 8]
9. Plea of Guilty, Summary of Facts, *State v. Warden*, No. CF-2000-202, (Payne Cnty. Dist. Ct. June 23, 2000) [Attachment 9]

10. Plea of Guilty, Summary of Fact, *State v. Warden*, No. CF-2002-46 (Okla. Cnty. Dist. Ct. Feb. 19, 2003) [Attachment 10]

11. Order Granting Sentence Modification After Hearing, *State v. Warden*, CF-02-46 (Okla. Cnty Dist. Ct. Apr. 15, 2004) [Attachment 11]

12. Information, *State v. Warden*, No. CF-2000-202 (Payne Cnty. Dist. Ct. Mar. 15, 2000) [Attachment 12]

13. Affidavit, *State v. Warden*, No. CF-2000-202 (Payne Cnty. Dist. Ct. Mar. 20, 2000) [Attachment 13]

14. Okla. Dept. of Corrections Probation & Parole Violation Report, *State v. Warden*, CF-2000-202 (Payne Cnty. Dist. Ct. Jan. 17, 2002) [Attachment 14]

15. Handwritten Note from Tom Lee on Okla. Dept. of Corrections Probation & Parole Violation Report, *State v. Warden*, CF-2000-202 (Payne Cnty. Dist. Ct. Jan. 17, 2002), Jan. 18, 2002 [Attachment 15]

16. Application to Accelerate Deferred Sentence, *State v. Warden*, CF-2000-202 (Payne Cnty. Dist. Ct. May 31, 2001) [Attachment 16]

17. Order to Issue Bench Warrant, *State v. Warden*, CF-2000-202 (Payne Cnty. Dist. Ct. May 31, 2001) [Attachment 17]

18. Order Granting Sentence Modification, After Hearing, *State v. Warden*, CF-02-46 (Okla. Cnty Dist. Ct. Apr. 19, 2004) [Attachment 18]

19. Memorandum re Brandy Warden Sentence Reduction, dated Mar. 9, 2005 [Attachment 19]

20. Certified Court File, *State v. Sheneda Davis*, No. CF-2000-201 (Payne Cnty. Dist. Ct.) [Attachment 20]

21. Affidavit of William J. Crye Jr., dated Oct. 23, 2024 [Attachment 21]

22. Motion to Disclose All Deals, State v. Wood, No. CF-02-46 (Okla. Cnty Dist. Ct. Aug. 6, 2003) [Attachment 22]

23. State's Response to Motion to Disclose All Deals, *State v. Wood*, No. CF-02-46 (Okla. Cnty Dist. Ct. Aug. 18, 2003) [Attachment 23]

24. Handwritten Note on State's Response to Motion to Disclose All Deals, *State v. Wood*, No. CF-02-46 (Okla. Cnty Dist. Ct. Aug. 18, 2003) [Attachment 24]

25. Bill of Particulars in re Punishment, *State v. Wood*, No. CF-02-46 (Okla. Cnty. Dist. Ct. Aug. 14, 2002), ROA 35–36 [Attachment 25]

26. Reed Smith LLP, *Independent Investigation of State v. Richard E. Glossip Supplemental Report* (Aug. 9, 2022) [Attachment 26]

27. Reed Smith LLP, *Independent Investigation of State v. Richard E. Glossip Second Supplemental Report* (Aug. 20, 2022) [Attachment 27]

28. Copy of Case Record from Oklahoma DA's file [Attachment 28]

29. Copy of Criminal History Checks from Oklahoma DA's files [Attachment 29]

30. Motion to Withdraw Application to Accelerate Deferred Sentence, *State v. Warden*, No. CF-2000-202 (Payne Cnty. Dist. Ct. Oct. 23, 2001) [Attachment 30]

31. Second Amended Application to Revoke Suspended Sentence, *State v. Davis*, No. CF-2000-201 (Payne Cnty. Dist. Ct. Sept. 24, 2001) [Attachment 31]

32. Judgment and Sentence, *State v. Davis*, No. CF-2000-201 (Payne Cnty. Dist. Ct. Jan. 17, 2001) [Attachment 32]

33. Amended Judgment and Sentence After Revocation, *State v. Davis*, No. CF-2000-201 (Payne Cnty. Dist. Ct. Apr. 7, 2005) [Attachment 33]

34. Restitution Adjustment Form, *State v. Warden*, CF-2000-202 (Payne Cnty. Dist. Ct. July 27, 2004) [Attachment 34]

35. Motion & Order of Dismissal, *State v. Warden*, CF-2000-202 (Payne Cnty. Dist. Ct. Oct. 31, 2003) [Attachment 35]

A. INTRODUCTION

Newly discovered evidence reveals that the Oklahoma County Assistant District Attorneys who obtained Mr. Wood's convictions and death sentence did so by withholding from his defense lawyers, the trial judge, and the jury its deal with co-defendant and key prosecution witness Brandy Warden to ensure her pending deferred felony arising out of her criminal acts in another county was never accelerated to a conviction. As a result of that deal and its suppression by the State, Warden provided damning testimony against Mr. Wood at his capital murder trial without being impeached with the full extent of the deal she received in exchange for her testimony, or as a twice-convicted felon with strong incentives to exculpate herself and incriminate Mr. Wood. Moreover, the jurors who convicted and sentenced Mr. Wood to death did so without "be[ing] apprised of the true facts" indispensable to their assessment of Warden's credibility, incentives, and motivations for testifying against Mr. Wood. *Binsz v. State*, 1984 OK CR 28, ¶ 12, 675 P.2d 448.

In the face of this new evidence of official misconduct, which infects the integrity of Mr. Wood's convictions and death sentence, there is simply no way to conclude that Mr. Wood "received a fair trial resulting in a verdict worthy of any confidence." *Harris v. State*, 2019 OK CR 22, ¶ 38, 450 P.3d 933, 950.

B. THE 2001/2002 NEW YEAR'S CRIME IN OKLAHOMA COUNTY

On December 31, 2001, Ronald Wipf and Arnold Kleinsasser celebrated New Year's Eve at the Bricktown Brewery in Oklahoma City, Oklahoma. (Tr. 03/31/04 at 14–15, 102, 120–21.)

While at the Bricktown Brewery, the men met and socialized with Brandy Warden (Mr. Wood's ex-girlfriend and the mother of his eldest son (Tr. 04/01/04 at 25)), and Lanita Bateman (the girlfriend of Mr. Wood's older brother Zjaiton Wood (hereafter "Jake") (Tr. 04/01/04 at 24–26)). After the Bricktown Brewery closed, the women agreed to accompany these men back to a motel. (Tr. 03/31/04 at 122–24.) Warden testified that she only agreed to accompany Wipf and Kleinsasser back to the motel after talking with Mr. Wood and Jake who she claimed both came up with the idea to rob the men and pressured her to go along.[4] (Tr. 04/01/04. at 146–51.) According to Warden, "I had tears in my eyes . . . [b]ecause I was scared" and "Termane [sic] . . . told me to quit crying like a big ass baby and suck it up." (Tr. 04/01/04 at 150, 152.) Warden testified that Mr. Wood "grabbed my face" and "[s]queezed [her] cheeks together" while "calling [her] that name" not giving her a choice other than to go along.[5] (Tr. 04/01/04 at 154.)

Once inside the motel room, Wipf and Kleinsasser agreed to pay Bateman and Warden $210.00 in exchange for sex.[6] (Tr. 03/31/04 at 125–27.) Bateman pretended to call her mother but

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

[5] As discussed *infra*, Warden's testimony minimized her participation and culpability while maximizing those of her co-defendants in numerous other ways as well. For example, Warden testified that although she drove the victim's car to the motel it was "Lanita" who "was giving me directions there[,]" and it was "Lanita" who "selected the motel[.]" (Tr. 04/01/04 at 155–56.) Warden also testified that while she is the one who "gave their ID" to rent the motel room—in fact, she volunteered two forms of ID to secure the room (Tr. 04/01/04 at 159)—it was only because the motel manager said that "one of us girls had to give our ID, too[]" because Wipf and Kleinsasser were underage. (Tr. 04/01/04 at 156–57; *cf.* Tr. 03/31/04 at 124–25 (Kleinsasser testifying that "Brandy volunteered to give her ID, because she was 21").)

[6] Warden further minimized her participation and culpability on this point as well, testifying that it was "Lanita" who "started talking about money and said that every minute counts" (Tr. 04/01/04 at 160), even though Kleinsasser testified that "Brandy made a statement that one of her friends ran a big ring . . . [a]nd she was kind of telling us how much it would cost if you had to go through something like that, like a ring, to get a girl for the night." (Tr. 03/31/04 at 125–26.) Kleinsasser also testified that it was Warden who drove him to the ATM machine to retrieve $210 in exchange for sex and "when I got back to the car, she asked for the money so she could count it. She took the money and never gave it back to me . . . When we got into the motel room, she asked for the extra $10.00. I had given her 200. I gave her that $10.00." (Tr. 03/31/04 at 127.)

instead called Jake. (Tr. 03/31/04 at 129.) Warden testified that shortly thereafter, Jake and Mr. Wood arrived at the room with Jake banging on the door until Wipf opened it. (Tr. 04/01/04 at 164–68.) According to Warden, she and Bateman ran out of the room while Jake and Mr. Wood ran in with Jake holding a gun and Mr. Wood holding a knife. (Tr. 04/01/04 at 168, 178.) Wipf put up a fight. (Tr. 03/31/04 at 133–36.) Kleinsasser testified that the larger of the two men took money from Kleinsasser at gunpoint, after which the smaller of the two men also demanded money, hit him on the head with what he believed to be the handle of the knife, and then returned to the struggle with Wipf. (Tr. 03/31/04 at 135–39.) At that point, Kleinsasser fled the room. (Tr. 03/31/04 at 139.) Wipf died from a single stab wound to the chest. (Tr. 04/02/04 at 11–12, 18.) Kleinsasser was unable to identify who had stabbed Wipf. (Tr. 03/31/04 at 172–73.)

Mr. Wood, Jake, Bateman, and Warden were all charged with first-degree felony murder, in violation of 21 O.S. § 701.7(B); robbery with firearms, in violation of 21 O.S. § 801; and conspiracy to commit a felony (robbery), in violation of 21 O.S. § 421(A). (O.R.1 79.) Oklahoma County Assistant District Attorneys Fern Smith and George Burnett sought the death penalty against both Mr. Wood and his brother Jake. (O.R.1 72–73; Attachment 25.)

C. FERN SMITH'S PATTERN OF MISCONDUCT IN CAPITAL CASES

Before capitally prosecuting Mr. Wood, Fern Smith spent years prosecuting death penalty cases under former Oklahoma County District Attorney Bob Macy who "sought more death sentences than any individual district attorney in the U.S." Okla. Death Penalty Review Comm'n, *The Report of the Oklahoma Death Penalty Review Commission* ("The Report"), 78 (Apr. 25, 2017), https://www.courthousenews.com/wp-content/uploads/2017/04/OklaDeathPenalty.pdf; Pat McQuigan et al., *Bob Macy: The Man Behind the String Tie, As Told by Bob Macy*, 135 (2011); (Attachment 26 (describing Smith as an Assistant District Attorney under Bob Macy).) "A 2016

study found that prosecutorial misconduct occurred in a third of death penalty cases during [Macy's] 21-year tenure (1980-2001)" and "courts reversed almost half of the death sentences imposed in Oklahoma County under Macy's tenure." The Report at 80–81. Not unlike Macy himself, Smith developed her own record of misconduct in several capital cases she prosecuted.

Marcus Cargle. Before capitally prosecuting Mr. Wood, Fern Smith and Bob Macy together capitally prosecuted Marcus Cargle and successfully obtained a death sentence against him. The United States Court of Appeals for the Tenth Circuit specifically identified Smith's and Macy's misconduct during Cargle's capital trial as a basis for reversing his conviction and death sentence:

> During closing argument, the prosecutor assured the jury that his office prosecutes only those who are guilty:
>
> > 'Ladies and Gentleman, all we want is justice . . . [W]hat in the world have I or [assistant district attorney] Mrs. Smith or the D.A.'s Office or the police department got to gain by even trying to convict an innocent person? It would destroy our credibility. It would—it would fly in the face of everything we believe in and everything we do. We don't do those things.'
>
> It is always improper for a prosecutor to suggest that a defendant is guilty merely because he is being prosecuted.

Cargle v. Mullin, 317 F.3d 1196, 1218 (10th Cir. 2003) (internal quotation marks and citations omitted). The Tenth Circuit went on to explain its "universal denunciation of this type of argument." *Id.* But beyond that, the Tenth Circuit also condemned Macy's and Smith's "constitutionally improper" vouching for the truthfulness of one of their witnesses, *id.* at 1219–20, finding that "we do consider the misconduct and resultant prejudice substantial enough to play a role in our assessment of cumulative error[,]" *id.* at 1220, which it concluded warranted reversal of Cargle's conviction and death sentence, *id.* at 1209.

Richard Glossip. Just a few years before she capitally prosecuted Mr. Wood, Fern Smith prosecuted Richard Glossip for capital murder in 1997. *Glossip v. State*, 2001 OK CR 21, 29 P.3d 597. Only in August 2003—after this Court reversed Glossip's conviction and death sentence, remanding his case for a new trial—did "Connie Pope [Smothermon] replace[] Fern Smith as lead ADA on the Glossip case." (Attachment 27). According to the Final Report on the Independent Investigation commissioned by the Oklahoma Legislature in *State v. Richard E. Glossip*:

> In 1999, before Glossip was re-tried in his capital murder case, the State destroyed an entire box of key evidence it had in its possession, custody, and control. . . . [M]ultiple prosecutors from the District Attorney's Office, including Fern Smith and Connie Smothermon, were aware of this destruction of evidence and neither appear to have investigated or determined how this destruction happened. This represents a complete breakdown in our criminal justice system.

Reed Smith, LLP, *Independent Investigation of State v. Richard E. Glossip Final Report*, 44–45 (June 7, 2022), https://www.courthousenews.com/wp-content/uploads/2023/04/glossip-independent-investigation.pdf.

Brenda Andrew. Around the same time that Fern Smith capitally prosecuted Mr. Wood, she also capitally prosecuted Brenda Andrew. Although this Court ultimately upheld Andrew's conviction and death sentence, it nevertheless "struggle[ed] to find any relevance" to Smith's and her co-counsel's introduction of evidence at Andrew's capital trial that Andrew "had come on to" a witness's "adult sons"; "dressed provocatively"; was called "a hoochie"; and "changed her hair color" according to men's preference. *Andrew v. State*, 2007 OK CR 23, ¶¶ 55–56, 164 P.3d 176, 191 (internal quotation marks omitted), *as corrected by* 2007 OK CR 36, 168 P.3d 1150.

In his concurrence and dissent in part, former OCCA Judge Johnson observed that, "The first stage of this capital murder trial is rife with error. That error, its most egregious, includes a pattern of introducing evidence that has no purpose other than to hammer home that Brenda Andrew is a bad wife, a bad mother, and a bad woman." *Andrew*, 2007 OK CR 23, ¶¶ 1, 9–10 n.3

(Johnson, A., concurring in result in part and dissenting in part) (noting that "[d]uring closing argument at the penalty stage of trial, the prosecutor made numerous improper statements" including that Andrew's daughter "did not beg for her mother's life" which amounted to an appeal "designed to inflame the passions of the jury . . . long been condemned by this Court."). Judge Johnson also pointed out that "[n]ot only has this Court repeatedly condemned" the types of arguments advanced by Smith and her co-counsel at Andrew's trial, "*we have done so in many cases prosecuted by this district attorney's office.*" *Id.* at ¶ 10 n.5 (citing cases) (emphasis added). Nevertheless, he lamented that "[o]ur reprimands to seasoned prosecutors, including the lead prosecutor here, have been ignored *and capital case after capital case has been jeopardized.* It cannot and should not be tolerated." *Id.* (emphasis added).

Smith's and her co-counsel's misconduct in obtaining Andrew's death sentence is presently under consideration for review on certiorari by the United States Supreme Court. *See* Docket, *Andrew v. White*, No. 23-6537 (U.S.), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-6573.html; Pet. for Writ of Certiorari at i, *Andrew v. White*, No. 23-6537 (U.S. Jan. 22, 2024) (presenting the question "[w]hether clearly established federal law . . . forbids the prosecution's use of a woman's plainly irrelevant sexual history, gender presentation, and role as a mother and wife to assess guilt and punishment").

David Lee Flippo. Several years before capitally prosecuting Mr. Wood, Fern Smith also capitally prosecuted David Lee Flippo and his co-defendants Alfredo Omalza, Patricia Jones, and Ronnie Lee Floyd. *See Omalza v. State*, 1995 OK CR 80, 911 P.2d 286. This Court reversed Flippo's conviction and death sentence based on misconduct committed by Smith and her co-

counsel as part of "an apparent prosecution strategy to put as much before the jury as possible, admissible or not." *Omalza*, 1995 OK CR 80, ¶ 91. This Court found that:

> The prosecutor stated that Pat Jones' attorney would testify regarding the advice he gave her in regard to her defense, and that Flippo's wife would testify that he admitted to participating in the murders. This evidence was not introduced at trial. The opening statement was therefore improper . . . the prosecutor had to know this evidence would not be introduced at trial. The Court is hard pressed to imagine how these statements could be made in good faith. They underscore an apparent prosecution strategy to put as much before the jury as possible, admissible or not. . . . The statement that his wife would testify he admitted to the killings is highly prejudicial, and warrants reversal.

Omalza, 1995 OK CR 80, ¶¶ 90–91; *id.* at ¶ 101 (holding that "[t]he Judgment and Sentence imposed against David Lee Flippo is REVERSED and REMANDED for retrial on the grounds of . . . prosecutorial misconduct" and other enumerated grounds).

These cases paint the troubling picture of a prosecutor and a District Attorney's Office under Bob Macy whose "responsibility to do justice [was] overshadowed by the desire to win"—not just guilty verdicts, but death sentences. Coleen McCarty, Esq., et al., *The Truth Will Always Come Out: Prosecutorial Misconduct, Brady, & Lack of Justice in Okla.*, Okla. Appleseed Center for Law & Justice 1 (Oct. 15, 2024), https://drive.google.com/file/d/1DH6KX2kf3Ku4KqunvRxbhr8a9rppaeOL/view?usp=sharing.

Newly discovered evidence reveals that Mr. Wood's capital prosecution by Fern Smith during this troubling period in the Oklahoma County District Attorney's Office fared no differently. *See* Section G, *infra*; McCarty, Peebles, & Stroud, Okla. Appleseed, *The Truth Will Always Come Out*, 30 (listing "Oklahoma County" among "the locations where the most prolific and documented offenders of prosecutorial misconduct were working during the time periods of 1990 to 2004[]").

D. BRANDY WARDEN'S 2003 PLEA DEAL IN THE OKLAHOMA COUNTY MURDER CASE

Oklahoma County Assistant District Attorneys Fern Smith and George Burnett prosecuted Mr. Wood and his co-defendants in a series of separate trials between 2003 and 2005. Bateman went to trial first in March 2003. *See generally* Tr. 03/10/2003, *State v. Bateman*, No. CF-02-46 (Okla. Cnty. Dist. Ct.). A month before Bateman's trial began, Warden struck a deal with Smith and Burnett to testify against her co-defendants in exchange for pleading guilty to accessory to first-degree murder after the fact and conspiracy to commit robbery with a dangerous weapon; Smith and Burnett also agreed to dismiss Count 2 of the indictment, robbery with a dangerous weapon, "as to deft. Warden only" and to recommend that her 10-year sentence on the conspiracy to commit robbery count run concurrent to the recommended 45-year sentence on the accessory to murder count. (Attachment 10 at 2–3.) Warden's plea agreement—signed on February 19, 2003 by Fern Smith and Warden's attorney Janet Cox—represented that Warden was pleading guilty "after[] no prior felony convictions." (Attachment 10 at 4, 6.)

Warden's formal sentencing in connection with her cooperation agreement with Smith and Burnett was delayed until after she testified against Bateman on March 12, 2003 and jurors returned verdicts of guilt on all three counts. (*See* Tr. 03/12/2003 at 68–123, Tr. 03/14/2003 at 3, *State v. Bateman*, CF-02-46 (Okla. Cnty. Dist. Ct.); Attachment 10 at 6.) Warden was formally sentenced in accordance with her plea agreement on April 18, 2003. (Attachment 7.)

The following year, after Warden again testified on behalf of the prosecution at Mr. Wood's capital trial and penalty phase proceeding, her 45-year sentence was reduced by an

additional 10 years just two weeks after her testimony helped prosecutors successfully secure a death sentence against Mr. Wood.[7] (Attachment 18); Tr. 04/05/2004 at 164.

E. BRANDY WARDEN'S FELONY GUILTY PLEA AND DEFERRED JUDGMENT AND SENTENCE IN 2000—A YEAR AND A HALF BEFORE THE MURDER

Unbeknownst to the jurors who convicted and sentenced Mr. Wood to death based largely on Warden's critical testimony for the prosecution, a year and a half before Warden was prosecuted for Wipf's murder, Payne County prosecutors charged her with felony larceny from a house. (Attachment 12 at 1.) According to the information filed by prosecutors against her in that felony case, on March 10, 2000, Warden and her co-defendant Sheneda Davis broke into someone's home and stole a "Gateway computer system, . . . with monitor, keyboard, mouse and camera, an Aiwa stereo system with sound and five (5) speakers, Sony Playstation with controllers, Sony Playstation video game Die Hard II and a .45 caliber Llama pistol[.]" (Attachment 12 at 1; *see also* Attachment 13 at 1–2.)

Warden pleaded guilty to that felony and related crimes on June 23, 2000—a year and a half before she was prosecuted for Wipf's murder on January 7, 2002. (Attachment 9.) In exchange for pleading guilty to that felony and testifying against Davis, Warden was sentenced to a 3-year deferred sentence, 50 hours of community service, 2 years in custody of the Oklahoma Department of Corrections ("ODOC"), payment of court costs, and payment of restitution in the amount of $1,845. (Attachment 9 at 3.) According to Senior Probation and Parole Officer William J. Crye Jr., who the Payne County District Court tasked with authoring Warden's October 10, 2000

[7] To undersigned counsel's knowledge, Warden's sentence-modification hearing was never transcribed, however the available orders reflect that the court "receiv[ed] testimony and other evidence" at that hearing. (Attachment 11.) While the court granted the sentence modification "over the strenuous objections of the State," (Attachment 18), Warden's attorney later informed an investigator for Mr. Wood that "the State did not, in fact, object to the reduction." (Attachment 19.)

Offender Accountability Plan and Presentence Investigation Report in connection with the felony larceny to which she pled guilty, Warden "was placed in ODOC custody as part of the Delayed Sentencing Program for Young Adults." (Attachment 21 ¶ 6.) Upon Warden's completion of that ODOC program, Crye "recommended that Ms. Warden be sentenced in accordance with her June 23, 2000 guilty plea agreement" including the deferred 3-year sentence "typically given to first-time offenders." (Attachment 21 ¶¶ 6–7, 12.) *See also* Okla. Stat. Ann. tit. 22, § 991c.F (2000) ("The deferred judgment procedure described in this section shall only apply to defendants not having been previously convicted of a felony offense.").

On October 27, 2000, the Payne County District Court entered a deferred judgment and sentence against Warden in connection with her guilty plea to felony larceny, and ordered that "she be placed on probation with the Department of Corrections of the State of Oklahoma for a period of THREE (3) YEARS until the 24th day of October, 2003, unless sooner called up, and that the defendant be under the supervision of the Department of Corrections[.]" (Attachment 8 at 1.) The court also ordered Warden "to pay restitution in the sum of $1,845.00" and "that the deferment of judgment and sentence be in accordance with the rules of this Court and the rules of the Department of Corrections of the State of Oklahoma and the State of Oklahoma[.]" (Attachment 8 at 1–2.) Importantly, the court further ordered that "**in the event that the terms of the probation herein provided, or any of the conditions hereinbefore enumerated be breached or broken by said defendant, a warrant shall issue for her arrest, and she shall be brought before this court for revocation of probation for imposition of judgment and sentence.**" (Attachment 8 at 2 (emphasis added).)

Among the Rules and Conditions of Probation that Warden's plea agreement and the court's order required her to follow as a necessary condition to remaining on the deferred felony

sentence were that she: "will not violate any city, state, or federal law"; "will not . . . visit or frequent places where alcoholic beverages are exclusively sold or used"; "will not . . . travel in a vehicle in which a deadly weapon, firearm, or destructive device is present. Nor [] be in the company of any person possessing the same"; "will not leave the county of supervision for more than 24 hours without prior approval of probation officer"; and "will avoid associating with persons on parole or probation, or persons with criminal records." (Attachment 8 at 8–10.) "The consequences Ms. Warden could face for violating the Rules of Probation were severe and included: advancement of the deferred proceedings resulting in a judgment of guilt and sentence to a term of imprisonment; revocation of the suspended sentence; and/or jail time or other sanctions." (Attachment 21 ¶ 8; Attachment 9 at 10.)

Only a year and a half into Warden's 3-year deferred felony judgment and sentence, on January 7, 2002, Oklahoma County Assistant District Attorneys Fern Smith and George Burnett charged Warden with the first-degree felony murder of Wipf, robbery with a dangerous weapon, and conspiracy to commit a felony. (O.R.1 79.) Documents in Smith's and Burnett's file demonstrate their awareness that Warden already had a pending deferred felony and sentence out of Payne County at the time they prosecuted her for first-degree murder, conspiracy, and robbery in Oklahoma County. First, a Case Record located in their files lists Warden's "Former Convictions" as "Larceny from a House" with the "date of conviction" on "10/21/00" in "Payne" County case number CF-00-202. (Attachment 28.) Second, a criminal history check located in their files shows that Warden pled guilty to "Larceny from a House" on October 21, 2000, at which time she was sentenced to "DEFERRED: 3 YRS 0 DAYS" and ordered to pay "RESTITUTION: $1845 LOCAL." (Attachment 29.) Smith and Burnett were thus well-aware that Warden was still serving a deferred felony sentence at the time they charged her with serious additional felony

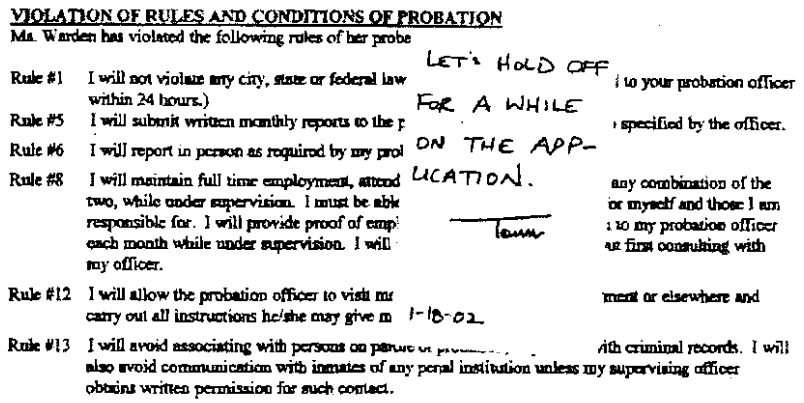
offenses in Oklahoma County. And as seasoned prosecutors, they would also have been well-aware that the additional felony offenses with which they charged Warden triggered an automatic violation of the terms and conditions of her deferred sentence, warranting its immediate acceleration to a felony conviction. *See* Okla. Stat. Ann. tit. 22, § 991c.E (2000) ("Upon violation of *any condition* of the deferred judgment, the court may enter a judgment of guilt and proceed as provided in Section 991a of this title or may modify any condition imposed." (emphasis added)).

Even Senior Probation and Parole Officer James Rich recognized as much. Within two weeks of Warden's indictment for first-degree murder and related offenses in Oklahoma County, Rich filed a Violation Report notifying Payne County prosecutors and the court that Warden's Oklahoma County felony charges amounted to violations of the Rules of Probation and conditions of her deferred felony judgment and sentence. (Attachment 14 at 1–2.) Rich "recommend[ed] Brandy Warden's deferred sentence be accelerated due to the above mentioned violations." (Attachment 14 at 2.)

The very next day, Payne County Assistant District Attorney Tom Lee[8] wrote the following post-it note on Rich's Violation Report[9]:

[8] Tom Lee appeared as a Payne County Assistant District Attorney assigned to Warden's felony larceny case on the deferred judgment and sentence entered by the court on October 27, 2000. (Attachment 8.)

[9] Mr. Wood obtained a copy of this handwritten note in 2011 through a public records request to the Payne County District Attorney's Office.



VIOLATION OF RULES AND CONDITIONS OF PROBATION

Ms. Warden has violated the following rules of her probe

LET'S HOLD OFF FOR A WHILE ON THE APPLICATION.

Rule #1 I will not violate any city, state or federal law ... to your probation officer within 24 hours.)

Rule #5 I will submit written monthly reports to the p ... specified by the officer.

Rule #6 I will report in person as required by my prol

Rule #8 I will maintain full time employment, attend ... any combination of the two, while under supervision. I must be able ... or myself and those I am responsible for. I will provide proof of emp ... to my probation officer each month while under supervision. I will ... at first consulting with my officer.

Team

Rule #12 I will allow the probation officer to visit mi ... ment or elsewhere and carry out all instructions he/she may give m 1-18-02

Rule #13 I will avoid associating with persons on parole or ... with criminal records. I will also avoid communication with inmates of any penal institution unless my supervising officer obtains written permission for such contact.

(Attachment 15.)

According to Crye, the prosecutor's directive to "hold off for a while" on accelerating Warden's deferred felony judgment and sentence was "very unusual" because:

> In my experience, if an offender who is on a deferred felony sentence picks up a violent criminal charge or pleads guilty to another felony during the deferred sentencing period, prosecutors typically file an application to accelerate the deferred sentence after receiving a Rules Violation Report, a bench warrant issues for the offender's arrest, and the deferred judgment and sentence would be accelerated to a judgment of conviction with a suspended sentence, or a judgment of conviction with the offender being immediately incarcerated to serve out the remainder of the sentence term.

(Attachment 21 ¶¶ 10, 13.) Adding to the peculiarity of Lee's directive against the acceleration of Warden's deferred felony judgment and sentence is the way in which it stands in sharp contrast to the application to accelerate Warden's deferred sentence that he filed just 7 months earlier merely because she "failed to pay restitution as ordered by this Court" which triggered a Bench Warrant for Warden's immediate arrest.[10] (Attachment 16; Attachment 17.) It also stands in sharp contrast to the actions Payne County prosecutors took against Warden's co-defendant in the felony larceny case, Sheneda Davis, when she also failed to pay restitution and "was charged with" additional

[10] Only after Warden made the required restitution payments did Lee move to withdraw the application to accelerate her deferred judgment and sentence, which the court ultimately granted. (Attachment 30.)

"crimes" while serving her suspended sentence in the felony larceny case. (Attachment 31; Attachment 32.) Those additional crimes with which Davis was charged—obstructing an officer and possessing a controlled substance—were far less serious than the first-degree murder, conspiracy, and robbery charges Warden faced in Oklahoma County. (Attachment 31.) Nevertheless, only in Davis's case did Payne County prosecutors immediately file an application for her "suspended sentence" to "be revoked." (Attachment 31.) The court granted that request finding Davis "has, during the period of probation, violated the terms and conditions thereof" and ordered her immediately incarcerated "for the balance of the sentence." (Attachment 33.)

Newly discovered evidence sheds light on the reason for Davis's and Warden's vastly dissimilar treatment: it reveals that Oklahoma County prosecutors in fact had a deal with Warden and her attorneys that ensured her Payne County deferred felony judgment and sentence would never be accelerated to a felony conviction in order to guarantee that Warden would testify for the prosecution and against her co-defendants and Mr. Wood at his capital murder trial without being impeached as a twice-convicted felon with strong incentives to exculpate herself and incriminate Mr. Wood. *See* Section G, *infra*.

F. JUDGE ELLIOTT ORDERS PROSECUTORS TO DISCLOSE ANY DEALS MADE WITH WITNESSES FOR THE PROSECUTION

On February 19, 2003, Warden appeared before Oklahoma County District Court Judge Ray Elliott with her attorney Janet Cox and Oklahoma County Assistant District Attorney Fern Smith to enter her guilty plea to accessory to murder after the fact and conspiracy to commit robbery with a dangerous weapon in exchange for cooperating with the State's prosecution of Warden's co-defendants and its capital prosecution of Mr. Wood and Jake. (*See* Attachment 6.) At the time of Warden's guilty-plea hearing in Oklahoma County District Court, Warden was still serving a deferred felony sentence out of Payne County, the terms of which she had clearly violated

and for which her probation officer had recommended immediate acceleration, and which was only set to expire 8 months later, on October 24, 2003. (*See* Attachment 8 at 1.) Despite Smith's awareness of these facts as demonstrated by information contained in her own files, *see* Section C *supra*, she induced Judge Elliott to accept Warden's guilty plea by falsely representing to the Court that Warden's pending Payne County deferred felony had already expired so it played no part in Warden's Oklahoma County deal:

> MS. SMITH: And the defendant, it is my understanding, the defendant has a prior deferred sentence out of Payne County and that has now expired; is that correct?
> MS. COX: That is correct, Judge.
> MS. SMITH: That is not part of our plea agreement to do anything with that. Because at this point in time, it is my understanding it has expired. And we cannot revoke or do anything with that as a result of her plea of guilty in this case.
> COURT: Okay.
> MS. COX: It is my understanding, Judge, that the deferred sentence has expired. There was – I think that was close in time to when this case was filed. And Payne County never filed an application to revoke the case. I assume it is too late to do it.
> COURT: I am getting the jest is, the point being, there was no agreement made in reference to that case at all for any purpose.
> MS. SMITH: Right.
> MS. COX: Right.
> MS. SMITH: That is correct. . . . I want to be clear on the record, I can't do anything with it because it has expired.
> COURT: Okay
> MS. SMITH: And it is in another county as well.
> COURT: Okay.

(*See* Attachment 6 at 13–14.)

At a pre-trial hearing in Mr. Wood's and Jake's cases that took place later that same year on September 3, 2003—approximately two months before Warden's Payne County deferred sentence was set to expire and approximately six months before Mr. Wood's capital trial began—Judge Elliott took up a defense motion for Smith and Burnett to "reveal all deals" reached with any of their witness in exchange for testimony. (Tr. 09/03/2003 at 92.) The discovery motion was

filed by Jake's lawyers and asked for "an Order directing the State of Oklahoma to reveal all deals, offers of leniency or favorable treatment of whatever form or nature[.]" (Attachment 22 at 1.) Although the discovery motion was filed by Jake's lawyers, prosecutors' affirmative obligation to disclose favorable information to the defense also applied to Mr. Wood. *See* Okla. Stat. Ann. tit. 22, § 2002(A)(2) (2002) ("The state shall provide the defendant any evidence favorable to the defendant if such evidence is material to either guilt or punishment."); *Harris v. State*, 2019 OK CR 22, ¶ 38, 450 P.3d 933, 950 ("Due process requires the State to disclose evidence favorable to an accused, including evidence that would impeach the credibility of the State's witnesses or the probative force of its physical evidence."); *Douglas v. Workman*, 560 F.3d 1156, 1172 (10th Cir. 2009) (per curiam) ("The government's obligation to disclose exculpatory evidence does not turn on an accused's request." (citing *Strickler v. Greene*, 527 U.S. 263, 280 (1999)); *see also* O.R.1 74 (the magistrate judge in Mr. Wood's case ordering that "all parties will provide discovery to opposing counsel within 30 days of this Order pursuant to *Allen v. District Court of Washington County*, 803 P.2d 1164, 1167 (Okla. Cr. 1990)"); *Powell v. State*, 2000 OK CR 5, ¶ 52, 995 P.2d 510, 524 (noting that "*Allen* has been superseded by the Oklahoma Criminal Discovery Code, 22 O.S.Supp.1994, § 2001 et seq." (footnote omitted)).

The discovery motion argued that "such information is exculpatory" in that "it would tend to impeach the testimony of witnesses," and the disclosure to the defense "of any such promises of leniency, favorable treatment, monetary reward, whether express or implied" were required under the United States and Oklahoma Constitutions. (Attachment 22 at 1 (citing *Napue v. Illinois*, 360 U.S. 264 (1959), *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), *United States v. Bagley*, 473 U.S. 667 (1985), and *Binsz v. State*, 675 P.2d 448 (Okla. Crim. App. 1984)). Fern Smith responded to the defense discovery motion representing that "the

State has fully complied with 22 O.S. 2201 [sic], et. seq., and will continue to disclose any new evidence." (Attachment 23.) Judge Elliott "sustained" the defense motion to disclose any and all deals. (Tr. 09/03/03 at 92.) He told prosecutors that "[i]f you've already previously complied, sobeit. If not, do it." (*Id.*)

Counsel for Jake, Wayna Tyner, put on the record her concern about an undisclosed deal between the Oklahoma County Assistant District Attorneys and Payne County prosecutors not to accelerate Warden's deferred felony sentence in exchange for her cooperation in the murder cases against her co-defendants:

> MS. TYNER: Your Honor, if I could put on the record, I am concerned about Miss Brandy Warden does have an accelerated - - she is still on a deferred judgment and sentence out of Payne County. That does not expire until sometime in October of this year. I have been in the process of trying to contact one of the prosecutors that is on that case to determine whether or not she is going to be accelerated. I also know right after this offense allegedly occurred her probation officer, and I have a report from January the 17th, indicating this offense as an alleged violation and others in addition to that. And the probation and parole requested that to be accelerated. However, nothing has been done on behalf of the prosecution. I am trying to find out what it is and if there was any deal.

(Tr. 09/03/03 at 92–93.)

In response to these concerns, Judge Elliott ordered that "Any and all deals and/or agreements with the DA's office of Oklahoma County has with any witness must be disclosed. I am sustaining that." (Tr. 09/03/03 at 93–94.) He ordered further that:

> If the Payne County DA on their own discretion decides not to accelerate her and they haven't agreed or talked to them in reference to that, then sobeit. But any and all deals that this DA's office has made with any other and all other DA's offices anywhere in the world in reference to any witness must be disclosed. If they haven't made a deal, they obviously can't disclose anything. So witnesses, any and all deals, including those you mentioned in reference to any other deals, it will be sustained.

(Tr. 09/03/03 at 94.)

G. NEWLY DISCOVERED EVIDENCE OF A DEAL

On September 4, 2024, counsel for Mr. Wood obtained access to Oklahoma County Assistant District Attorneys Fern Smith's and George Burnett's work product in Mr. Wood's case for the very first time, and only after the Oklahoma County District Attorney's Office implemented a new policy making trial prosecutors' files, including their work product, available to defense counsel in capital cases. (Attachment 5, ¶¶ 3–5.) In those files, and on a document in which prosecutors claimed to have disclosed all deals made with witnesses for the prosecution, counsel located a handwritten note that reads: "Brandy Warden D/S in Payne County." (Attachment 5, Ex. A; Attachment 24.)

This handwritten note supports that—contrary to what Smith told Judge Elliott on the record at Warden's guilty plea hearing on February 19, 2003—Oklahoma County prosecutors in fact had a deal with Warden, her attorneys, and Payne County prosecutors that ensured Warden's Payne County deferred felony judgment and sentence would not be accelerated to a conviction so that she could testify against her co-defendants and on behalf of the State at Mr. Wood's capital trial without being impeached as a twice-convicted felon with strong incentives to exculpate herself and inculpate Mr. Wood.

As detailed more fully in the propositions below, without Warden's cooperation, testimony, and protection against impeachment, Oklahoma County prosecutors' case against Mr. Wood and their pursuit of the death penalty were far from foregone conclusions.[11]

[11] Judge Elliott acknowledged the importance of Warden's testimony to the State's case against her co-defendants. At Warden's Oklahoma County plea hearing following her testimony against Lanita Bateman in March 2003, Judge Elliott stated, "[A]s all the parties are aware, including Ms. Warden, I presided over the trial in which she gave testimony. I am of the opinion it was very powerful testimony. It certainly appeared to the Court it was very truthful testimony. I think one might surmise based upon the verdict in that case they felt like it was very truthful testimony as

PART D: PROPOSITIONS—ARGUMENTS AND AUTHORITIES[12]

Proposition One: **The State withheld material evidence favorable to the defense of its deal with Brandy Warden, her lawyers, and Payne County prosecutors not to have her Payne County deferred felony conviction and sentence accelerated in exchange for her testimony against Mr. Wood at his capital murder trial, violating Mr. Wood'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.**

1. 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, ¶ 38, 450 P.3d 933, 950; *Giglio v. United States*, 405 U.S. 150, 154 (1972) ("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." (internal quotation marks omitted)); *United States v. Bagley*, 473 U.S. 667, 676–77 (1985) ("This Court has rejected any such distinction between impeachment evidence and exculpatory evidence.").

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well." (Tr. 04/18/03 at 19–20.) The jury in Bateman's case not only found her guilty based on Warden's "very powerful" testimony, but sentenced Bateman to life plus 101 years imprisonment.

[12] In compliance with Rule 9.7(A)(4), this Section of the Application does not exceed fifty (50) pages in length.

"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, ¶ 38. 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, ¶ 38; *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 prosecutors' deal with Brandy Warden to ensure her pending Payne County deferred felony would never be accelerated to a conviction in exchange for her cooperation with the State's capital prosecution of Mr. Wood—and so that she could testify against him without being impeached with the full extent of the deal she received in exchange for her testimony, or as a twice-convicted felon with strong incentives to exculpate herself and

inculpate Mr. Wood—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.").

2. The State suppressed its deal with Brandy Warden, her lawyers, and Payne County prosecutors to ensure her pending Payne County deferred felony would never be accelerated to a conviction in exchange for her testimony against her co-defendants and Mr. Wood at his capital murder trial.

A new study on prosecutorial misconduct committed between 1990 and 2004 in Oklahoma, Tulsa, and Pontotoc Counties published by the Oklahoma Appleseed Center for Law & Justice found that "many murder cases involving multiple defendants and young individuals are particularly susceptible to prosecutorial misconduct, often involving hidden plea deals or unexamined exculpatory evidence." McCarty, Esq. et al., *The Truth Will Always Come Out*, at Executive Summary. According to researchers:

> Cases with suspected *Brady* violations emerged with similar characteristics. The cases often have multiple defendants. Usually defendants are young (ages 14 to 25) and living in poverty. . . . Often in the early stages of the cases, certain defendants' cases are dismissed or they take a plea bargain for a lesser sentence in exchange for their testimony. Ultimately, if there was a plea deal or bargain in exchange for testimony, that must be turned over to all the defense attorneys in the case. It is a *Brady* violation to withhold favorable deals in exchange for testimony. These types of cases abound in Oklahoma's criminal justice history.

McCarty, Esq., et al., *The Truth Will Always Come Out*, at 33.

Mr. Wood's capital prosecution and the newly discovered evidence of Oklahoma County prosecutors' deal with Brandy Warden to ensure that she would testify against Mr. Wood without being impeached with the full extent of the deal she received in exchange for her testimony, and

as a twice-convicted felon with strong motives to exculpate herself and inculpate Mr. Wood, fits this troubling pattern.

As detailed *supra*, Sections D–F, at no time prior to or during Mr. Wood's capital trial did Oklahoma County Assistant District Attorneys Fern Smith and George Burnett disclose to the defense, to Judge Elliott, or to the jury that their deal with Warden included ensuring that her pending deferred felony judgment and sentence would not be accelerated to a felony conviction. The nondisclosure of that information amounts to a textbook case of suppression. *Brady*, 373 U.S. at 87; *Brown*, 2018 OK CR 3, ¶¶ 102–04.

But beyond suppressing this information, Smith and Burnett went a step further. They affirmatively *misled* defense counsel and Judge Elliott into believing that Warden's Payne County deferred felony and sentence was expired and so could not possibly be part of her deal in the Oklahoma County murder case. *See Brady*, 373 U.S. at 86 ("It is a requirement that cannot be deemed to be satisfied by mere notice and a hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury . . . Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation." (internal quotation marks omitted)).

3. The State's deal to ensure Brandy Warden's pending Payne County deferred felony would never be accelerated to a conviction in exchange for her testimony against her co-defendants and Mr. Wood at his capital murder trial is evidence favorable to Mr. Wood's defense.

As Judge Elliott recognized when, 6 months before Mr. Wood's capital trial began, he ordered the Oklahoma County Assistant District Attorneys prosecuting him to disclose any deals made with witnesses for the State—including any deals related to Warden's Payne County deferred felony judgment and sentence—such evidence constituted powerful impeachment favorable to Mr.

Wood's defense. (*See* Tr. 09/03/03 at 93–94 (Judge Elliott ordering that "[a]ny and all deals and/or agreements with the DA's office of Oklahoma County has with any witness must be disclosed. . . [and] any and all deals that this DA's office has made with any other and all other DA's offices anywhere in the world in reference to any witness must be disclosed[]").)

Had the evidence that Oklahoma County prosecutors' deal with Warden included ensuring that her pending deferred felony judgment and sentence would never be accelerated to a conviction not been suppressed, Mr. Wood's "defense might have used [that] information to impeach" Warden "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.").

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.* ¶ 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.*, ¶ 12. It further reaffirmed that "[a]s we stated in *Mays v. State*, 594 P.2d 777 (Okla. Cr. 1979), public policy demands full disclosure to the jury of the terms of any plea bargain between the prosecutor and an accomplice who testifies for the State." *Id.*

Here, Warden was far more than just an accomplice to the crimes with which Mr. Wood was capitally charged. She was a co-defendant, co-conspirator, and principal perpetrator in the

very same crimes with which Mr. Wood was on trial for his life. (O.R.1 79–80 (amended information charging Warden, Mr. Wood, Jake, and Bateman with first-degree felony murder, robbery with firearms, and conspiracy to commit robbery with a dangerous weapon); O.R.1 663, 679 (final first-stage jury instructions stating that "Brandy Lynn Warden is what is termed in law as a coconspirator to the crime of which the defendant stands charged[]" and that "[a]ll persons concerned in the commission of a crime are regarded by law as principals and are equally guilty thereof").) And as the only co-defendant to testify for the prosecution against Mr. Wood, Warden's testimony was vital to the State's pursuit of convictions and a death sentence against Mr. Wood for several reasons.

First, Wipf's assailants were masked and there were no eyewitnesses to his killing. Warden's testimony identifying Mr. Wood and Jake as Wipf's assailants therefore was vital to the State's proof that Mr. Wood committed first-degree felony-murder. (Tr. 03/31/04 at 131–42 (Kleinsasser testifying that the two men who entered the motel room were masked and that he ran out before one of the two masked men stabbed Wipf); Tr. 04/01/04 at 168 (Warden testifying that "those two ski-masked men that ran in" the motel room were "Zjaiton and Tremane").) Second, apart from Warden's testimony that she and her co-defendants devised a plan to rob Wipf and Kleinsasser before they left the Bricktown Brewery on New Year's Eve 2001, the only evidence that Mr. Wood was part of the conspiracy to rob Wipf and Kleinsasser came from Warden's mouth. (Tr. 04/01/04 at 150–54 (Warden testifying that Mr. Wood forced her to go along with the robbery, "grabb[ing] [her] face" and telling her "to quit crying like a big ass baby and suck it up[,]" and also testifying that she "agree[d] to go that night" because she "knew they wanted money"—"they" being "Zjaiton and Tremane.").) Third, prosecutors again put Warden on the stand at the penalty phase to help establish the continuing threat aggravating circumstance that made Mr. Wood

eligible for the death penalty. Warden's penalty phase testimony supplied the only evidence that Mr. Wood and Jake robbed a pizza restaurant earlier in the evening on New Year's Eve 2001. (Tr. 04/05/04 at 15–20.) And Smith specifically invoked Warden's testimony when she urged jurors to sentence Mr. Wood to death, telling them "[t]he state will present evidence to you in the form of testimony from Brandy Warden that Zjaiton Wood and Termane Wood robbed La Franca's Pizza on December 31st of 2001, just hours before the murder of Ronnie Wipf . . . Brandy Warden will tell you it was Termane Wood that participated in that robbery." (Tr. 04/05/04 at 9–11.)

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 Oklahoma County prosecutors' deal with Warden to ensure she would testify against Mr. Wood without being impeached as a twice-convicted felon or with the sordid details of that felony (i.e., that Warden broke into someone's home and stole nearly $2,000 in property including a gun), would have been favorable to Mr. Wood's defense at the guilt/innocence and penalty phases of his capital trial. *See Mays v. State*, 1979 OK CR 27, ¶ 10, 594 P.2d 777 (reversing conviction and remanding for new trial, finding that "[i]f the alleged accomplice had in fact made a bargain with the District Attorney, the knowledge of that bargain 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[]").

4. The State's deal to ensure Brandy Warden's pending Payne County deferred felony would never be accelerated to a conviction in exchange for her testimony against her co-defendants and Mr. Wood at his capital murder trial is material.

i. Materiality at the Guilt/Innocence Stage

As discussed *supra*, the State's first-stage case against Mr. Wood for first-degree felony murder, robbery with a firearm, and conspiracy to commit robbery with a dangerous weapon

turned on the testimony and credibility of Brandy Warden. Not only was she Mr. Wood's co-defendant and co-conspirator in the very same crimes for which he was on trial for his life, she was also his ex-girlfriend and the mother of his eldest child, which lent her damning testimony against him an added boost of credibility. (*See* Tr. 04/01/04 at 130 (Warden testifying on direct examination that Mr. Wood is the father of her eldest son, then five years old).)

In opening arguments at the first stage, Smith previewed key portions of Warden's testimony for the jury, telling them:

> [O]ur evidence will show that Jake, Termane, Brandy and Lanita planned the robbery. A robbery that led to the death of Ronnie Wipf. The actual planning of the robbery by Termane, Jake, Brandy and Lanita began earlier in the day. . . . At the Bricktown Brewery, Lanita Bateman and Brandy Warden met and made a deal with Arnold Kleinsasser and Ronnie Wipf. . . . Little did Ronnie and Arnold Kleinsasser know, that they were the robbery marks for the evening for these four. . . . Jake and Tremane completed the robbery. . . . You will hear from Brandy Warden. Brandy Warden is one of the co-defendants in this case. She is the mother of three small children. One of them belonging to Termane Wood. Brandy Warden will tell you that she pled guilty to the crime, a reduced charged, and that she is serving 40 years in prison for her part in this crime. She will tell you that Termane Wood participated in the murder of Ronnie Wipf.

(Tr. 03/31/04 at 102–09.)

Warden then took the stand on behalf of the prosecution at the first stage and provided the critical testimony directly incriminating Mr. Wood in all three crimes with which prosecutors charged him: the first-degree felony murder of Wipf, the robbery of Wipf and Kleinsasser using a dangerous weapon, and the conspiracy to rob them both. (Tr. 04/01/04 at 150–54, 168.)

To drive home Warden's credibility for the jury, Smith elicited the following testimony from Warden about her deal with Oklahoma County prosecutors:

Q. [SMITH]	At some time, did you or did Ms. Cox come to the District Attorney's Office and offer to have you testify in order to get a good deal for you?
A. [WARDEN]	Yes, she did.

Q. [SMITH]	And did the District Attorney's Office, Mr. Burnett and myself, offer you some kind of deal in order for you to testify truthfully to the jury?
A. [WARDEN]	Yes.
Q. [SMITH]	And will you tell the jury what that was, please?
A. [WARDEN]	Accessory to Murder After the Fact and Conspiracy to Commit a Felony. Forty-five and ten years running concurrent.
Q. [SMITH]	So you basically got 45 years to do in the state penitentiary for your part in the murder; is that right?
A. [WARDEN]	Yes.
Q. [SMITH]	Are you here to tell the jury what your part and what Mr. Termane Wood's part in the murder was?
A. [WARDEN]	Yes.

(Tr. 04/01/04 at 131–32.)

Throughout her direct testimony, Warden minimized her participation in and culpability for the crimes while maximizing those of her co-defendants including Mr. Wood. For example, Warden testified that:

- Although she is the one who purchased the gloves and ski masks from Wal-Mart earlier in the evening on December 31, 2001, she didn't know in advance that they were going to be used in a robbery. Rather, she purchased them only because "[Tremane] . . . asked me for money. . . . And he asked me if I would buy him something. He didn't tell me what at the time." (Tr. 04/01/04 at 137–38; *id.* at 139 (Warden testifying that "the first time [she] saw those gloves and ski masks" was "[w]henever [Mr. Wood] put them on the counter" at Wal-Mart).)
- She only agreed to go along with the robbery of Wipf and Kleinsasser under pressure from Mr. Wood. (Tr. 04/01/04. at 146–52 (Warden testifying that "I had tears in my eyes . . . [b]ecause I was scared" and "Termane [sic] . . . told me to quit crying like a big ass baby and suck it up."); *id.* at 154 (Warden testifying that Mr. Wood "grabbed my face" and "squeezed [my] cheeks together" while "calling [me] that name").)

- Although she drove the victim's car to the motel it was "Lanita" who "was giving me directions there[,]" and it was "Lanita" who "selected the motel[.]" (Tr. 04/01/04 at 155–56.)
- Although she is the one who "gave their ID" to rent the motel room, it was only because the motel manager said that "one of us girls had to give our ID, too[]" because Wipf and Kleinsasser were underage. (Tr. 04/01/04 at 156–57.)
- It was "Lanita" who "started talking about money and said that every minute counts[.]" (Tr. 04/01/04 at 160.)

On cross-examination, Albert tried to impeach Warden's credibility, truthfulness, and motivations for testifying by pointing out for the jury her minimization of her role in the crimes, the 45-year deal she obtained in exchange for her cooperation, and her incentives to lie:

Q. [ALBERT]	Ms. Warden, I am listening to you today and it is Lanita did this and Lanita did that. You are still downplaying your role in this, aren't you?
A. [WARDEN]	No, I'm not.
. . .	
Q. [ALBERT]	You talk about this 45-year sentence you got. That is actually a non-violent sentence, isn't it?
A. [WARDEN]	Yes.
. . .	
Q. [ALBERT]	Your charge was reduced, right?
A. [WARDEN]	Yes.
. . .	
Q. [ALBERT]	. . . Were you jealous of [Mr. Wood's new girlfriend]?
A. [WARDEN]	No.
Q. [ALBERT]	Were you mad because he stayed at the bar with her?
A. [WARDEN]	No.

(Tr. 04/01/04 at 186–91.) The State's suppression of evidence that its deal with Warden also included ensuring that her pending Payne County deferred felony would not be accelerated so that she could not be impeached with that prior felony conviction by the time she testified against Mr. Wood seriously undermined Albert's efforts to dismantle her credibility before the jury. *See Mays*,

1979 OK CR 27, ¶ 10 (reversing and remanding for new trial where prosecutors suppressed deal with witness that inhibited full cross-examination); *Nuckols v. Gibson*, 233 F.3d 1261, 1263 (10th Cir. 2000) (same).

Had Oklahoma County prosecutors not suppressed evidence of this deal over Warden's prior pending felony, Albert could have vigorously impeached Warden on cross-examination—particularly her minimization of her own participation in and culpability for the crimes, including by claiming Mr. Wood forced her to go along with the crimes against her will—as "fabricated. . . in order to curry favor with the district attorney's office." *Binsz*, 1984 OK CR 28, ¶ 12; *see also Nuckols*, 233 F.3d at 1263 (holding that habeas petitioner's right to fair trial under *Brady* was violated where the prosecution's suppression of evidence "ultimately inhibited full cross-examination of the veracity of the key prosecution witness[]").

For example, Albert could have impeached Warden with the fact that in the Payne County felony to which Warden pled guilty in October 2000 for breaking into someone's home and stealing nearly $2,000 worth of property including a gun, she similarly tried to shift responsibility to her co-defendant in that case, Sheneda Davis, while minimizing her own responsibility. According to the Pre-Sentence Report authored by William J. Crye Jr., Warden claimed that it was Davis who wanted to steal; it was Davis who knew where the house keys were hidden to later break into the home; and it was Davis who needed the money. (Attachment 21, Attach. A at 2.) Warden claimed that "I was not raised like this. I am a sweet person and won't lie I have a problem with letting my supose [sic] to be friends down telling them no I don't like to because I don't like people being mad at me." (*Id.*) Albert could have also impeached Warden with the fact that in the Payne County felony case—as in the Oklahoma County murder case—Warden pled guilty and agreed to cooperate with the State's prosecution of her co-defendant in exchange for a more lenient

sentence for herself. (Attachment 9 at 3 (Warden's guilty plea to felony larceny requiring that she "testify against Sheneda Davis").)

Mr. Wood's jury would have also learned that Warden's deal with Oklahoma County prosecutors to avoid the acceleration of her deferred felony to a conviction ensured that: 1) Warden avoided the stigma of a prior felony conviction for a serious offense that she committed with Sheneda Davis all by herself a year and a half before the Oklahoma County crimes and without Mr. Wood's supposed coercive influence; 2) Warden did not have to spend an additional two-and-a-half years imprisoned in the Oklahoma Department of Corrections; 3) when Warden pled guilty to and was sentenced for crimes in Oklahoma County, she was not subject to a sentencing enhancement under Oklahoma's habitual offender law, *see* Okla. Stat. Ann. tit. 21, § 51.1 (2002); and 4) Warden's sentence in connection with her Oklahoma County guilty plea—the most lenient of all her co-defendants' sentences—came with the added benefit of having "no prior felony convictions" (Attachment 10 at 4, 6; Attachment 6 at 9). Instead, Mr. Wood's jury knew none of this.

Oklahoma County prosecutors' suppression of their deal with Warden to avoid accelerating her Payne County deferred felony to a conviction hampered Mr. Wood's defense, misled the Court, and misled the jury including by depriving them of information critical to jurors' assessment of Warden's truthfulness, credibility, and motivations for testifying. On the other side of the scale, the State's suppression of its deal unfairly advantaged its case against Mr. Wood by bolstering the credibility, believability, and truthfulness of Warden's testimony. It allowed Fern Smith and George Burnett to convincingly argue in closing at the first stage that Warden wasn't some "big conspirator"; rather she was a girl who "know[s] one rule, you do what Termane told you to do." (Tr. 04/02/04 at 152.) They asked jurors to question whether Warden "is she the big conspirator

or is she the fall guy?" (Tr. 04/02/04 at 153), and urged jurors to believe Warden by hiding the full extent of the deal she obtained in exchange for testifying against Mr. Wood:

> Brandy Warden, 30. She has been convicted of a criminal offense. Basically the case you are here on today. I want you to look at Brandy Warden. I want you to look at her. And I want you to look at her testimony and the things she testified to. She sacrificed half her life with those kids, 45 years. . . . She gave up 45 years of her life because of the terrible thing that she did in this case. She at least tried to come and do one right thing, that is come and tell the truth in this courtroom about the things that transpired. . . . Brandy Warden's testimony shows that this (indicating) defendant was involved in this case. . . . the story that Brandy Warden testified in this courtroom is the right one.

(Tr. 04/02/04 at 161–64.)

Oklahoma County prosecutors' suppression of their deal with Warden over her Payne County deferred felony also allowed them to unfairly attack the credibility of Mr. Wood's sole witness—his brother Zjaiton "Jake" Wood—by invoking Jake's prior convictions and urging jurors to discredit his testimony, in part, on that basis. (Tr. 04/02/04 at 186 (Smith telling jurors that "Zjaiton Tyrone Wood has heretofore been convicted of criminal offenses . . . . He had three prior felony convictions"); *id.* at 160–61 (Burnett telling jurors that Jake "has been convicted of criminal offenses . . . you get to weigh the credibility of this dope slinging, gang banging convict who comes into this courtroom and gives you this story[]").) As for Warden, however, their suppression allowed them to tell jurors:

> Instruction number 30 tells you that evidence has been presented that Brandy Lynn Warden has heretofore been convicted of a criminal offense. And that criminal offense, **the only one she has ever been convicted of**, is this murder she told you, Accessory After the Fact for the commission of this murder. She has no other felony convictions. . . . Do you want to believe Zjaiton Wood or do you want to believe Brandy Warden who cried her eyes out on the stand and does every day I submit to you. It is your choice.

(Tr. 04/02/04 at 187, 198–99 (emphasis added).) What jurors didn't know is how Smith and Burnett engineered this result through a deal with Warden that guaranteed she wouldn't have any other prior felony convictions by the time she testified against Mr. Wood.

The suppressed evidence of Oklahoma County prosecutors' deal with Warden to ensure her Payne County deferred felony would not be accelerated to a felony conviction would have dismantled Warden's credibility before Mr. Wood's jury and, by that same token, the State's entire case against him. *Kyles*, 514 U.S. at 435 (to show the materiality of suppressed evidence a defendant need only "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."); *Nuckols*, 233 F.3d at 1267 ("Because impeachment of the witness who held the key to successful prosecution was denied to the defense, we have no doubt Petitioner suffered prejudice as a consequence. Moreover, we are not confident of the outcome of the trial."). Because prosecutors hid that evidence from Mr. Wood's defense, Judge Elliott, and the jury, there is simply no way to conclude that Mr. Wood "received a fair trial resulting in a verdict worthy of confidence." *Harris*, 2019 OK CR 22, ¶ 38; *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)); *Nuckols*, 233 F.3d at 1267 ("As in many death penalty, habeas corpus cases, the problem presented here is not whether the prisoner is innocent . . . but rather whether he received the full benefit of fair rules of constitutional procedure and a fair opportunity. . . to a jury trial." (internal quotation marks omitted)).

ii. Materiality at the Penalty Stage

As with the State's first-stage case, Warden's testimony featured prominently in the State's case for the death penalty against Mr. Wood at the second stage.[13] In her opening argument at the penalty stage, Fern Smith told jurors that "[t]he state will present evidence to you in the form of testimony from Brandy Warden that Zjaiton Wood and Termane Wood robbed La Franca's Pizza on December 31st of 2001, just hours before the murder of Ronnie Wipf. . . . Brandy Warden will tell you it was Termane Wood that participated in that robbery." (Tr. 04/05/2004 at 9–11.) Her testimony provided support for the continuing threat aggravating circumstance that prosecutors alleged made Mr. Wood death eligible. (*Id.*)

Warden testified that earlier in the evening on December 31, 2001, she and Bateman were with Mr. Wood when he and his brother Jake robbed a pizza restaurant while they waited in the car. (Tr. 04/05/04 at 17.) She testified the men had weapons—specifically, Zjaiton had a gun while Mr. Wood had a knife—and that Bateman selected the place for the robbery. (Tr. 04/05/04 at 18.) Smith invoked Warden's testimony several times in her penalty phase closing argument to urge jurors to sentence Mr. Wood to death, arguing that his "robbery of Kermat, the pizza man" supplied proof that he is "a threat to society." (Tr. 04/05/04 at 115; *id.* at 134 (Smith arguing that Mr. Wood deserved the death penalty because he is the "kind of man who can go out and rob the little pizza man that you saw on the witness stand. . . . This man, Termane Wood, is clearly the aggressor in that pizza robbery. Clearly the aggressor[]").) Smith also argued that Mr. Wood deserved the death

[13] The State expressly incorporated all of the first-stage evidence into the penalty phase. (Tr. 04/05/04 at 5 (Smith telling jurors that the State is "incorporating all of the evidence in the first stage of the trial into the second stage of the trial for your consideration . . . and you will have to remember what you heard in the first stage of the trial"); *id.* at 130 (Smith telling jurors that "we incorporated all of the evidence in the first stage of the trial, so you get to consider that part as well[]").) For the same reasons that Oklahoma County prosecutors' suppression of their deal with Warden over the non-acceleration of her Payne County deferred felony was material at the guilt-phase, it was also material at the penalty phase of Mr. Wood's capital trial.

penalty because "[h]e manipulates women." (Tr. 04/05/04 at 134.) Relying on Warden's first-stage testimony, Smith told jurors, "He manipulated, I submit to you, Brandy into doing the things that she did and now she is serving 45 years in prison." (*Id.*) Burnett reiterated that same refrain in his final penalty phase closing argument, telling jurors "Brandy messed up her life. She gave up 45 years of her life and gave up the opportunity to raise these kids because of what she did and participated in this event." (Tr. 04/05/04 at 156.)

The suppressed evidence of Warden's deal with Oklahoma County prosecutors to avoid having her Payne County deferred felony accelerated to a conviction would have put the State's penalty phase case for death "in such a different light as to undermine confidence in the verdict." *Cone v. Bell*, 556 U.S. 449, 470 (2009) (quoting *Kyles*, 514 U.S. at 435). Rather than hearing that Mr. Wood was the type of man who manipulated Warden into participating in this crime, jurors would have learned that a year and a half earlier Warden pled guilty to a serious felony offense in Payne County that she committed without Mr. Wood's involvement or supposed coercive influence which involved her breaking into someone's home and stealing close to $2,000 worth of property including a gun. And rather than crediting Warden's testimony that she naively went along with the pizza robbery which she claimed was orchestrated by Bateman, Mr. Wood, and Jake, jurors would have instead learned that Warden's deal with prosecutors helped her avoid becoming a twice-convicted felon; and they "might well have concluded that [Warden] had fabricated testimony in order to curry favor with the district attorney's office." *Binsz*, 1984 OK CR 28, ¶ 12.

The reasonable probability of a different penalty phase result had prosecutors not suppressed evidence of their deal with Warden entitles Mr. Wood to sentencing relief. *See Bagley*, 473 U.S. at 678.

5. 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)(1) of the Rules of the Oklahoma Court of Criminal Appeals, meanwhile, allows this Court to entertain a subsequent application for postconviction relief where it asserts claims "which have not been and could not have been previously presented in the original application because the factual or legal basis was unavailable." Mr. Wood's present application for postconviction relief satisfies these requirements.

First, the factual basis for this claim became available only on September 4, 2024 when the Oklahoma County District Attorney's Office gave counsel for Mr. Wood access to the trial prosecutors' work product for the very first time. (Attachment 5, ¶¶ 3–5.) It was on that date that the new evidence which forms the factual basis of this *Brady* claim was first discovered. 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)(1) 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."). And especially where the prosecutors here falsely represented to the defense and to Judge Elliott pre-trial that they had complied with their disclosure obligations, turned over everything exculpatory, and disclaimed having any deal with Warden related to her pending deferred felony conviction and sentence, *see* Section F *supra*, Mr. Wood was entitled to rely on that representation. *See Amado v. Gonzalez*, 758 F.3d 1119, 1136 (9th Cir. 2014) ("[D]efense counsel may rely on the prosecutor's obligation to produce that which *Brady* and *Giglio* require him to produce.").

Second, as the discussion *supra* demonstrates, the facts underlying this claim are sufficient to establish by clear and convincing evidence that Mr. Wood'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 Warden's deal in her deferred felony case, no reasonable fact finder would have either found Mr. Wood guilty of first-degree felony murder, conspiracy, or robbery with a dangerous weapon, 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. Wood has satisfied the necessary requirements for this Court to consider this claim, order discovery and a hearing on his colorable allegations, and grant relief.

Proposition Two: **The State knowingly presented false testimony from Brandy Warden about the benefits she received in exchange for her testimony against her co-defendants and Mr. Wood at his capital murder trial—concealing from the jury the deal not to have her Payne County deferred felony conviction and sentence accelerated in exchange for her cooperation—thus violating Mr. Wood'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.**

1. 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 1194, 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).

2. The trial prosecutors knowingly solicited and failed to correct Brandy Warden's false testimony that the only benefit she received in exchange for her testimony was a deal allowing her to plead guilty to reduced charges in the Oklahoma County murder case, which carried a 45-year sentence.

Brandy Warden was the State's star witness in its case against Mr. Wood at both the guilt/innocence and penalty phases. On direct examination at the first stage, she was asked whether Oklahoma County Assistant District Attorneys Fern Smith and George Burnett had offered her "some kind of a deal in order for [her] to testify truthfully to the jury." (Tr. 04/01/04 at 131–32.) Warden responded that she agreed to plead guilty to the less serious charges of "Accessory to Murder After the Fact and Conspiracy to Commit a Felony" for which she received 45-years in

the state penitentiary. (Tr. 04/01/04 at 132.) However, as detailed above, newly discovered evidence shows that Warden received additional benefits in exchange for her testimony against Mr. Wood and their co-defendants: her deferred felony and sentence out of Payne County was never accelerated, against her probation officer's recommendation and based on her numerous probation violations, including being charged with first-degree murder, conspiracy, and robbery in Oklahoma County. *See* Sections E–G, *supra*.

In the absence of an agreement between Warden and Oklahoma and Payne County district attorneys not to accelerate her deferred felony and sentence, Warden would have been a twice-convicted felon by the time she testified for the State against her co-defendants and Mr. Wood. And with a felony larceny conviction already on her record, Warden would have not only faced an additional two-and-a-half years imprisoned in the Oklahoma Department of Corrections, but as an already-convicted felon she would have been exposed to a sentencing enhancement under Oklahoma's habitual offender law, *see* Okla. Stat. Ann. tit. 21, § 51.1 (2002), rendering it unlikely that Judge Elliott would have accepted Warden's plea agreement with Oklahoma County prosecutors which depended on Warden having "no prior felony convictions." (Attachment 10 at 4, 6; Attachment 6 at 9.) It is also unlikely that—with a prior serious felony conviction already on her record—Judge Elliott would have accepted the State's recommendation that her 10-year sentence on the conspiracy to commit robbery count run concurrent to the 45-year sentence on the accessory to murder count.

Beyond the substantial benefit to Warden (and to the Oklahoma County Assistant District Attorneys capitally prosecuting Mr. Wood whose case depended on Warden's testimony and credibility) of having a prior serious felony conviction effectively disappear from her record, Warden also received a financial benefit: on July 27, 2004—after she helped secure the conviction

of Lanita Bateman and a conviction and death sentence against Mr. Wood—the amount of restitution she owed in Payne County was adjusted from $1,845.00 to $695.00 (*Compare* Attachment 8 *with* Attachment 34.)

The newly discovered handwritten note from Oklahoma County prosecutors about Warden's Payne County deferred sentence on a document in which they claimed to have disclosed "all deals, offers of leniency or favorable treatment of whatever form or nature . . . which pertain to all State's witnesses" supports both 1) the existence of an agreement between Warden and Oklahoma and Payne County prosecutors not to accelerate Warden's deferred felony conviction; and 2) that Smith and Burnett knew that Warden's testimony at Mr. Wood's capital murder trial that the *only* benefit she received in exchange for her cooperation was reduced charges in the Oklahoma County murder case was false. (Attachment 24.) Despite that awareness, Smith and Burnett not only failed to fulfill their duty to correct Warden's false testimony, but they went even further by *explicitly soliciting it*. (Tr. 04/01/04 at 131–32 (Fern Smith asking Warden on direct-examination to confirm that her "good deal" with the Oklahoma County District Attorney's office was that "you basically got 45 years to do in the state penitentiary for your part in the murder; is that right?" to which Warden responded "Yes.") They then turned around and repeatedly referenced that false testimony during closing argument at the guilt/innocence and penalty phases in urging the jury to credit Warden's testimony and to convict and condemn Mr. Wood. (*See, e.g.*, Tr. 04/02/04 at 161 ("She sacrificed half of her life with those kids, 45 years."); *id.* at 162 ("She gave up 45 years of her life because of the terrible thing that she did in this case."); Tr. 04/05/04 at 134 ("[Mr. Wood] manipulated, I submit to you, Brandy into doing the things that she did and now she is serving 45 years in prison."); *id.* at 156 ("She gave up 45 years of her life and gave up the opportunity to raise those kids because of what she did and participated in this event.").)

What is more, Smith and Burnett capitalized on the false impression created by Warden's false testimony about the extent of the benefits she was receiving in exchange for her cooperation to bolster her credibility. For example, Smith told the jury:

> Instruction number 30 tells you that evidence has been presented that Brandy Lynn Warden has heretofore been convicted of a criminal offense. And that criminal offense, the only one she has ever been convicted of, is this murder that she told you, Accessory After the Fact for the commission of this murder. She has no other felony convictions.

(Tr. 04/02/04 at 187.) As previously discussed, Smith and Burnett made sure Warden "ha[d] no other felony convictions" by the time she testified against Mr. Wood by reaching a deal with Warden and Payne County prosecutors to ensure her Payne County felony was never accelerated against her probation officer's recommendation. Sections E–G, *supra*. They also ensured that Warden's Payne County felony conviction was dismissed and expunged 6 months before she took the stand at Mr. Wood's capital murder trial and testified that the only benefit she received in exchange for her testimony was reduced charges and a 45-year sentence in the Oklahoma County murder case. (Attachment 35.) Equally as troubling, the motion to dismiss and expunge Warden's Payne County felony record falsely represented that "The Defendant has satisfactorily completed the probationary period." (Attachment 35.) That was far from true: Warden had violated the terms of her probation in the most serious way possible by being charged with first-degree murder, conspiracy, and robbery in Oklahoma County, and then pleading guilty to felonies in Oklahoma County (accessory to murder after the fact and conspiracy to commit robbery) *during* the probationary period. *Compare* Attachment 8 at 1 (Warden's Payne County deferred felony judgment and sentence ordering the probationary period to extend "until the 24th day of October, 2003"), *with* Attachment 10 (Warden pleading guilty to accessory to murder and conspiracy on February 19, 2003).)

In these ways, both Warden and the Oklahoma County Assistant District Attorneys who capitally prosecuted Mr. Wood received benefits that were concealed from the jury. Warden was spared a second felony conviction that could have tacked on an extra two-and-a-half-year prison sentence and significantly increased the sentence she received for the subsequent Oklahoma County felonies to which she pled guilty under Oklahoma's enhanced punishment law for habitual felony offenders. Meanwhile, Burnett and Smith did not have to hang their death penalty prosecution of Mr. Wood on the testimony of a highly incentivized and twice-convicted felon. In voting to convict and sentence Mr. Wood to death, his jury was deprived of this material impeachment evidence without which it could not accurately assess the credibility of Warden's damaging testimony against Mr. Wood. That's because Oklahoma County prosecutors solicited and then failed to correct Warden's false testimony about the extent of the benefits she received in exchange for her cooperation.

3. There is a reasonable likelihood that Brandy Warden's false testimony about the benefits she received affected the jury's decision to convict Mr. Wood 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) (emphasis added). 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).

i. Materiality at the Guilt/Innocence Stage

As detailed above, the State's first stage case turned on Warden's credibility because she provided critical testimony 1) that identified Mr. Wood and Jake as Wipf's assailants and 2) that was necessary to establish that Mr. Wood and his co-defendants engaged in a conspiracy. In so doing, Warden minimized her participation in and culpability for the offense while maximizing that of her co-defendants, and especially Mr. Wood—her ex-boyfriend and the father of one of her children. While it was Albert's strategy to impeach Warden by cross-examining her about her minimization of her role in the offense, the deal she struck with the State, and her incentives to lie, his efforts were significantly undermined by Warden's false testimony concealing the true nature of the significant benefits she actually received in exchange for her cooperation. (*See* Tr. 04/01/04 at 186–91.)

Had Burnett and Smith corrected Warden's testimony that the only benefit she received was reduced charges in Oklahoma County carrying a 45-year-sentence—testimony they knew to be false—Albert could have dismantled Warden's credibility, as detailed *supra* in Proposition One. What is more, the State's invocation of Jake's prior convictions to discredit his testimony that he—

and not Mr. Wood—stabbed Wipf would have been far less impactful if the jury had also been aware that Warden had previously been convicted of felony larceny. And Mr. Wood's jurors could have been correctly instructed that they could consider that Warden was a twice-convicted-felon when assessing the believability and truthfulness of her testimony. (*Compare* O.R.1 673 *with* O.R.1 675.) For all these reasons, Mr. Wood has demonstrated a reasonable likelihood that Warden's false testimony *could* have affected the judgment of the jury. *See Giglio*, 405 U.S. at 154.

ii. Materiality at the Penalty Phase

At the second stage, the State repeatedly invoked Warden's false testimony that the only benefit she received in exchange for her testimony was reduced charges carrying a 45-year sentence—and concealing the true extent of the benefits she received—to secure Mr. Wood's death sentence. As discussed above in Proposition One, the State capitalized on the false impression created by Warden's testimony to argue that Mr. Wood deserved the death penalty because "[h]e manipulated" Warden into participating in the offense, for which she "gave up 45 years of her life and gave up the opportunity to raise these kids[,]" including the son she shared with Mr. Wood. (*See* Tr. 04/05/04 at 134, 156.) The State further argued, "Those kids need to stay away from this guy. They might have a chance if their mamas take care of them, or their relatives." (Tr. 04/05/04 at 156.)

Had the State not let Warden's false testimony go uncorrected, such that she could have been impeached with her Payne County felony larceny conviction, the force of these arguments for death would have been greatly diminished. As explained *supra* in Proposition One, the jury would be far less likely to believe that Warden was a vulnerable young woman coerced by Mr. Wood, as well as a less corrosive influence on their child, if jurors knew that she previously—and

independent of Mr. Wood—broke into a home to steal property and attempted to shift the blame onto her female co-defendant. There exists a reasonable likelihood that truthful testimony and argument about the extent of the benefits Warden received in exchange for her cooperation *could* have turned the tides for the jury at sentencing, resulting in at least one juror voting for life. *See Giglio*, 405 U.S. at 154.

4. 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. Wood 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. Wood'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. Wood has previously raised the following constitutional errors in his convictions and death sentence, which this Court has denied based on lack of prejudice:

- Mr. Wood received ineffective assistance of counsel at his capital trial in violation of the Sixth Amendment to the United States Constitution, and Article II, Sections

7 and 20 of the Oklahoma Constitution (DA2 15 at 62–64; PCR1 26 at 2–39; *Wood v. State*, 2007 OK CR 17, ¶¶ 37, 44, 158 P.3d 467, 479, 481 (finding that Mr. Wood's "ineffective assistance of counsel claim must likewise fail because he cannot show that the alleged errors affected the outcome of his case[]"); PCR1 42 at 8–18 (rejecting ineffective assistance of counsel claims, noting that "[w]e need not determine whether counsel's performance was deficient if the claim can be disposed of on the ground of lack of prejudice[]").

Although this Court did not grant relief on any of these ineffective assistance claims individually, Mr. Wood 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. Wood could not have presented this claim any sooner than he has, and it satisfies the requirements of Okla. Stat. Ann. tit. 22, § 1089(D)(8) and Rule 9.7(G), for the same reasons set forth in Propositions One and Two, which are expressly incorporated for this proposition as well.

CONCLUSION

Mr. Wood has set forth herein colorable allegations that his convictions and death sentence violate his state and federal rights. He respectfully asks that the Court enter an order granting his requested discovery, remand this matter for an evidentiary hearing in the district court, enter an order reversing his conviction and sentences, and any other relief as may be just and proper.

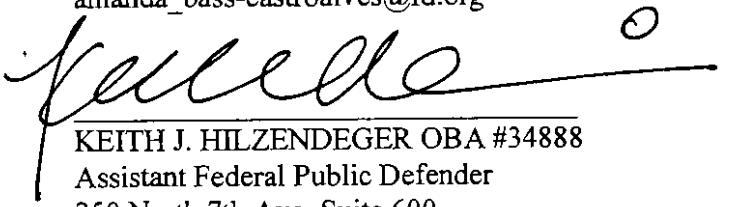
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Respectfully submitted:

November 1, 2024

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**Motion for Admission Pro Hac Vice Pending*

VERIFICATION OF COUNSEL

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

November 1, 2024
Date

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Attorney for Petitioner Tremane Wood

CERTIFICATE OF SERVICE

I certify that on November 1, 2024, I caused an original and 10 copies of the foregoing Subsequent Application for Postconviction Relief and a separately bound Appendix of Attachments to be filed in this Court by delivering them to the Clerk of this Court via FedEx overnight delivery on this same date, with one of the copies deposited with the Clerk of this Court being for service on the Oklahoma Attorney General.

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAR 11 2025
JOHN D. HADDEN
CLERK

TREMANE WOOD,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. PCD-2024-879
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER REMANDING FOR EVIDENTIARY HEARING ON PETITIONER'S FIFTH APPLICATION ON POST-CONVICTION RELIEF

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

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

Petitioner has challenged his Judgment and Sentence on direct appeal. This Court affirmed Petitioner's Judgment and Sentence in *Wood v. State,* 2007 OK CR 17, 158 P.3d 467 and the United States Supreme Court denied *certiorari* in *Wood v. Oklahoma,* 552 U.S. 999 (2007). Previous collateral proceedings before this Court and challenges in federal court have likewise been unsuccessful and he is awaiting an execution date.

Petitioner claims in this fifth application that newly discovered evidence supports a finding that the prosecutors in his case withheld material evidence favorable to the defense 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. *See Brady v. Maryland,* 373 U.S. 83 (1963). He claims that prosecutors in Oklahoma County hid evidence of a deal made with Brandy Warden and prosecutors in Payne County that in exchange for her testimony against Petitioner at his capital murder trial, her felony deferred judgment and sentence in Payne County would not be accelerated so she could testify as a twice convicted, as opposed to a three-time convicted, felon.

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punishment on Counts 2 and 3 at life imprisonment and he was sentenced accordingly.

Petitioner further maintains that not only did the Oklahoma County prosecutors suppress this deal, those prosecutors went on both to elicit and to fail to correct Warden's false testimony about the extent of the benefits she had received in exchange for her cooperation with the State's death penalty prosecution in violation 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). He asserts the prosecutors hid from the trial judge and the jury critical information indispensable to Warden's credibility, incentives, and motivations for testifying and induced the district court's acceptance of Warden's guilty plea to accessory to murder after the fact and conspiracy to commit robbery through lies and falsehoods.

In an accompanying *Motion for Evidentiary Hearing,* Petitioner requests his case be remanded to the District Court of Oklahoma County for an evidentiary hearing on these claims.

In its response, filed upon order of this Court, the State asserts that Petitioner has not met the requirements of 22 O.S.Supp.2022, § 1089(D), the Post-Conviction Procedure Act, and therefore the claims in his fifth application are procedurally barred from this Court's consideration. The State also objects to the request for an evidentiary hearing arguing that

Petitioner has not met his burden under Rule 9.7(D)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2025) to warrant an evidentiary hearing.

Brandy Warden was on a three (3) year deferred sentence in Payne County when she was charged in the District Court of Oklahoma County, along with Petitioner, Zjaiton Wood, and Lanita Bateman with First Degree Murder, Robbery with a Firearm, and Conspiracy to Commit a Felony (Robbery with a Firearm) for the murder of Ronnie Wipf and robbery of Arnold Kleinsasser.

In exchange for truthful testimony at Petitioner's trial, Warden pled guilty to lesser charges of Accessory After the Fact to First Degree Murder and Conspiracy to Commit a Felony (Robbery with a Dangerous Weapon) with a total of sentence of 45 years. Approximately one year after her sentencing, she testified in Petitioner's capital trial. In the meantime, Warden's deferred sentence in Payne County had expired and the case was dismissed. (Pet.Appx. Attachment 35).

Approximately eight (8) months before Petitioner's trial, counsel for co-defendant Zjaiton Wood filed a *Motion to Reveal all Deals*. The State responded to the motion indicating the State had fully complied. On a copy of the State's response is a handwritten notation in the bottom left

corner "Brandy Warden D/S in Payne County." (Pet. Appx. Attachments 22-23).

Petitioner's claim of newly discovered evidence is based upon this handwritten note, "Brandy Warden D/S in Payne County", on a duplicate copy of the State's Response. Petitioner asserts he discovered this note during a review of the Oklahoma County District Attorney's case file. Petitioner asserts that he only discovered the note in September 2024 when he obtained access to the Oklahoma County prosecutor's files after the Oklahoma County District Attorney's Office implemented a new policy making prosecutor's files, including their work product, available to defense counsel in capital cases. (Pet. Appx. Attachment 5).

Pursuant to Rule 9.7(D)(5), a request for an evidentiary hearing must present information which shows "by clear and convincing evidence the materials sought to be introduced have or are likely to have support in law and fact to be relevant to an allegation raised in the application for post-conviction relief." *Id.* The affidavits and evidentiary materials filed in support of the post-conviction application and request for evidentiary hearing are not reviewed on their merits, but are reviewed to determine if a threshold showing is met to require a review on the merits. *Slaughter v. State,* 2005 OK CR 2, ¶ 11, 105 P.3d 832, 835. If this Court determines

from the application and affidavits that the requirements of Section 1089(D) of Title 22 have been met and issues of fact must be resolved by the District Court, it shall issue an order remanding to the District Court for an evidentiary hearing. *Id.*, 2005 OK CR 2, ¶ 12, 105 P.3d at 835. The order shall set out the issues to be resolved and define the scope of the hearing. Rule 9.7(D)(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2025).

Having thoroughly reviewed the post-conviction application and attachments; accompanying motions; and the State's response and included exhibits, we find it appropriate to remand for an evidentiary hearing to resolve issues of fact and facilitate this Court's review on post-conviction. On remand, the District Court is to determine the following:

1) Whether an agreement existed between prosecutors in Oklahoma County and Payne County not to accelerate to a conviction Warden's deferred sentence in Payne County Case No. CF-2000-202, in exchange for her testimony in Petitioner's case in Oklahoma County, Case No. CF-2002-46;

2) Whether the prosecution withheld any evidence concerning the existence of an agreement with Warden or additional benefits she

received, in addition to those she testified to at Petitioner's trial, in exchange for her testimony;

3) Whether Warden's deferred sentence in Payne County played any part in the plea agreement between Warden and Oklahoma County prosecutors for Warden's testimony in Petitioner's case;

4) Even if there was an agreement not to accelerate Warden's deferred sentence prior to her testifying in Petitioner's case, is evidence of such an agreement material or merely cumulative and did it have an effect on the outcome of the trial;

5) Any evidence as to the origin and meaning of the handwritten note on a "Case Report" filed January 18, 2002, in the District Court of Payne County, Case No. CF-2000-202, reporting violations of Warden's deferred sentence. A note stuck on the report, handwritten, dated 1-18-02, and signed "Tom" states "Let's Hold off for a while on the application". (Pet. Appx. Attachment 15) (Exhibit F, State's Amended Response, sworn affidavit of Tom Lee, Assistant District Attorney for Payne County);

6) Any evidence as to the origin and meaning of another handwritten note on the same document, undated, stating the following: "Wayna Tyner – Sapulpa OIDS", "State's witness PG on Acc. After the Fact",

"Brandy Warden ("45 years)" with an arrow pointing to "She's testifying for State," and "F-00-202 . . . Zjaiton Wood". (Pet. Appx. Attachment 15).

7) Any evidence as to the origin and meaning of the handwritten notation, "Brandy Warden D/S in Payne County" located in the bottom corner of a copy of the *State's Response to Defendant's Motion Requesting Production of All Statements of Co-defendants Tremane Wood, Lanita Bateman, and Brandy Warden*, filed in the District Court of Oklahoma County in Petitioner's case, Case No. CF-2002-46.

8) What was known by Petitioner's trial counsel regarding Warden's agreement to testify for the State prior to trial and what, if any, effect would the purported additional knowledge, have had on the strategy at trial.

The District Court shall conduct the evidentiary hearing within thirty (30) days from the date of this remand. The trial court is authorized to order the parties to conduct any necessary discovery and exchange any relevant exhibits. The trial court shall make written findings of fact and conclusions of law to be submitted to this court within thirty (30) days of the evidentiary hearing, together with the transcripts of the proceeding. A supplemental brief not exceeding ten (10) pages and addressing only issues relevant to the evidentiary hearing may be filed by

either party within fifteen (15) days after the trial court has filed its written findings and conclusions in this Court.

IT IS THEREFORE THE ORDER OF THIS COURT that Petitioner's ***Motion for Evidentiary Hearing*** is **GRANTED.**

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 11 day of March, 2025.

GARY L. LUMPKIN, Presiding Judge

WILLIAM J. MUSSEMAN, Vice Presiding Judge

DAVID B. LEWIS, Judge

RECUSED

ROBERT L. HUDSON, Judge

RECUSED

SCOTT ROWLAND, Judge

ATTEST: John D. Hadden

Clerk

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

APR 28 2025

RICK WARREN
COURT CLERK

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IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF OKLAHOMA IN AND FOR THE COUNTY OF OKLAHOMA

TREMANE WOOD,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

No. CF-2002-46
No. PCD-2024-879

PETITIONER'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Death Penalty Case)

Petitioner Tremane[1] Wood was convicted and sentenced to death in Oklahoma County for the first-degree felony murder of Ronnie Wipf on January 1, 2002. (Tr. 04/02/2004 at 214–15; Tr. 04/05/2004 at 164; O.R.1 734–36.)[2]

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[1] The Court notes that Petitioner's first name is spelled inconsistently throughout the record as either "Termane" or "Tremane." As noted by the OCCA, Petitioner's birth certificate and social security card use "Tremane." *See Wood v. State*, 2007 OK CR 17, 158 P.3d 467, 470 n.1. The pleadings filed in this matter by Petitioner's counsel also use the spelling "Tremane." Accordingly, this Court adopts the spelling "Tremane."

[2] The original trial record in this case, *State v. Wood*, Case No. CF-2002-46 (Okla. Cnty. Dist. Ct.), is referred to as O.R.1 __ using the page number. The transcripts from the trial proceedings are referred to as Tr. __ at __ using the date of the transcript and the page number. Exhibits admitted into evidence at Petitioner's trial are referred to as Trial Ex. __ followed by the exhibit number. The transcripts from the evidentiary hearing held in this Court on April 7–9, 2025, are referred to as Evid. Hr'g Tr. __ __ at __ using the date and time period of the transcript and the page number. Petitioner's exhibits admitted into evidence at the hearing are referred to as Pet. Ex. __ followed by the exhibit number. The State's exhibits admitted into evidence at the hearing are referred to as State's Ex. __ followed by the exhibit number. The Court's exhibits admitted into evidence at the hearing are referred to as Court's Ex. __ followed by the exhibit number. As indicated at the evidentiary hearing, the Court takes judicial notice of the entire record in this case, including the docket, original trial record, and transcripts. (Evid. Hr'g Tr. 04/07/2025 A.M. at 7.) *See State v. Torres*, 2004 OK 12, 87 P.3d 572, 580 n.28; ("A trial court may take judicial notice of any proceedings conducted in the same forum[.]"); *Lambert v. State*, 2005 OK CR 26, 126 P.3d 646, 651 n.15 ("This Court may take judicial notice of material filed with the Court.").

He was also convicted of robbery with firearms and conspiracy to commit a felony (robbery) for which he was sentenced to consecutive terms of life imprisonment. (O.R.1 at 614–22, 737–40.)

Following Wipf's murder, Oklahoma County Assistant District Attorneys George Burnett and Fern Smith pursued first-degree felony murder, conspiracy, and robbery charges against Petitioner; Zjaiton Wood, Petitioner's older brother; Lanita Bateman, Zjaiton's[3] then-girlfriend; and Brandy Warden, Petitioner's ex-girlfriend and the mother of his eldest son. (*See* Pet. Ex. 64; Tr. 04/01/2004 at 24–26.) Burnett and Smith sought the death penalty only against Petitioner and Zjaiton. (Tr. 10/02/2002 at 3–4; O.R.1 72–73.)

On February 19, 2003, Warden pled guilty to reduced charges in exchange for a recommended 45-year sentence and her testimony against her co-defendants. (Pet. Ex. 7.) At the time of her guilty plea, Warden was serving a deferred felony sentence in Payne County, which was set to expire 8 months later, in October 2003. (Pet. Ex. 11.) Although Warden had violated the terms of her deferred sentence and her probation officer had recommended immediate acceleration, the recommendation was not followed. (Pet. Exs. 11, 14.)

At Petitioner's capital trial in 2004, Warden testified for the prosecution at both the first and second stages. (Tr. 04/01/2004 at 128–83, 186–204.) Petitioner's jury was repeatedly told that Warden had received a 45-year sentence in exchange for her testimony against Petitioner. (*See, e.g.*, Tr. 04/01/2004 at 132, 134; Tr. 04/02/2004 at 161; Tr. 04/05/2004 at 134, 156.) Shortly after

[3] Zjaiton's first name is used throughout to distinguish him from Petitioner.

Warden's testimony helped the State secure Petitioner's convictions and death sentence, Warden obtained a judicial modification of her 45-year sentence to a 35-year sentence. (Court's Ex. 2; State's Ex. 2-F.)

On November 5, 2024, Petitioner filed a Fifth Application for Postconviction Relief in the Oklahoma Court of Criminal Appeals ("OCCA") where he alleged that new evidence shows that Burnett and Smith obtained his convictions and death sentence by suppressing evidence of their full agreement with Warden in exchange for her testimony against him, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Napue v. Illinois*, 360 U.S. 264 (1959). Subsequent Application for Postconviction Relief, *Wood v. State*, No. PCD-2024-879 (Okla. Crim. App. Nov. 5, 2024). Petitioner alleged that the full agreement ensured that Warden's pending deferred sentence arising out of her prior, unrelated criminal acts in Payne County would never be accelerated to a felony conviction. *Id.* at 14.

On March 11, 2025, the OCCA remanded Petitioner's Fifth Application for Postconviction Relief to this Court for an evidentiary hearing and any necessary discovery on his *Brady* and *Napue* claims. Order Remanding for Evidentiary Hearing on Petitioner's Fifth Application on Post-Conviction Relief ("Remand Order") at 5, *Wood v. State*, No. PCD-2024-879 (Okla. Crim. App. Mar. 11, 2025) (quoting OCCA Rule 9.7(D)(5)). The OCCA ordered this Court to answer the following eight questions:

1. Whether an agreement existed between prosecutors in Oklahoma County and Payne County not to accelerate to a conviction Warden's deferred sentence in Payne County Case No. CF-2000-202, in exchange for her testimony in Petitioner's case in Oklahoma County, Case No. CF-2002-46;

2. Whether the prosecution withheld any evidence concerning the existence of an agreement with Warden or additional benefits she received, in addition to those she testified to at Petitioner's trial, in exchange for her testimony;

3. Whether Warden's deferred sentence in Payne County played any part in the plea agreement between Warden and Oklahoma County prosecutors for Warden's testimony in Petitioner's case;

4. Even if there was an agreement not to accelerate Warden's deferred sentence prior to her testifying in Petitioner's case, is evidence of such an agreement material or merely cumulative and did it have an effect on the outcome of the trial;

5. Any evidence as to the origin and meaning of the handwritten note on a "Case Report" filed January 18, 2002, in the District Court of Payne County, Case No. CF-2000-202, reporting violations of Warden's deferred sentence. A note stuck on the report, handwritten, dated 1-18-02, and signed "Tom" states "Let's Hold off for a while on the application" (Pet. Appx Attachment 15) (Exhibit F, State's Amended Response, sworn affidavit of Tom Lee, Assistant District Attorney for Payne County);

6. Any evidence as to the origin and meaning of another handwritten note on the same document, undated, stating the following: "Wayna Tyner – Sapulpa OIDS", "State's witness PG on Acc. After the Fact", "Brandy Warden (45 years)" with an arrow pointing to "She's testifying for State," and "F-00-202" "Zjaiton Wood." (Pet. Appx. Attachment 15).

7. Any evidence as to the origin and meaning of the handwritten notation, "Brandy Warden D/S in Payne County" located in the bottom corner of a copy of the State's Response to Defendant's Motion Requesting Production of All Statements of Co-Defendants Tremane Wood, Lanita Bateman, and Brandy Warden, filed in the District Court of Oklahoma County in Petitioner's case, Case No. CF-2002-46;

8. What was known by Petitioner's trial counsel regarding Warden's agreement to testify for the State prior to trial and what, if any

effect, would the purported additional knowledge have had on the strategy at trial.

Remand Order at 6–8.

The evidentiary hearing on these eight issues occurred on April 7–9, 2025, at which this Court took judicial notice of the entire record in this case, including the transcripts, docket, and original trial record; admitted into the record extensive documentary evidence offered by both parties and the Court; and heard testimony from twelve witnesses.

Midway through the testimony of Burnett on April 9, 2025, additional evidence of the full scope of Warden's agreement with Oklahoma County prosecutors came to light through a previously undisclosed cooperation memorandum. On direct examination, Burnett testified that the prosecution's plea agreement with Warden in the Oklahoma County murder case memorialized the full extent of the prosecution's agreement with Warden. (Evid. Hr'g Tr. 04/09/2025 A.M. at 20–21; Pet. Ex. 7.) The plea agreement states that Warden pled guilty to Accessory to Murder After the Fact and Conspiracy to Commit Robbery in exchange for a recommended 45-year sentence concurrent to a 10-year sentence and truthful testimony against her co-defendants in the Oklahoma County murder case. (Pet. Ex. 7.) Burnett testified further that he always puts the full extent of his agreement with cooperating witnesses in the four corners of the plea agreement. (Evid. Hr'g Tr. 04/09/2025 A.M. at 21.)

Petitioner's counsel then presented Burnett with evidence that his plea agreement with another prosecution witness, Coleman Givens, did not reflect the full extent of the prosecution's agreement with Givens to dismiss and downgrade

Givens' pending felonies after Petitioner was sentenced to death and in exchange for Givens' testimony against Petitioner. (Pet. Exs. 82-3, 84-1–84-6, 85-1–85-3.) Burnett then testified that the prosecution's full agreement with Warden was actually documented in a "cooperation memorandum" which Burnett testified is different and distinct from the "plea agreement" in evidence as Petitioner's Exhibit 7. (Evid. Hr'g Tr. 04/09/2025 A.M. at 36–37.) The following exchange occurred between Petitioner's counsel and Burnett:

Q. [Bass]	Now, you previously testified that you always put the full extent of your agreement with cooperating witnesses in the four corners of the written plea agreement, correct?
A. [Burnett]	**No.**
Q. [Bass]	You did not previously testify to that?
A. [Burnett]	**No, not in the plea agreement. It's in a memorandum.**
. . .	
Q. [Bass]	So is it your testimony today that Ms. Warden's cooperation agreement as distinct from her written plea agreement may have information about her agreement that is not in the written plea agreement?
. . .	
A. [Burnett]	**Her cooperation memorandum has conditions of her testimony. And there's a summary of that in her plea agreement that she'll agree to testify**. . . . **The plea agreement just has a statement about cooperating I think. You know, there were other things that she had to do in the memorandum**.

(Tr. 04/09/2025 A.M. at 36–37 (emphasis added).)

After the Court inquired of counsel for Petitioner and the State and learned that neither had seen Warden's "cooperation memorandum," the Court recessed and obtained a copy from Warden's casefile at the Oklahoma County Public Defender's Office, which had represented Warden in the Oklahoma County

murder case. The cooperation memorandum was then admitted into evidence as the Court's Exhibit 1. (*See* Tr. 04/09/2025 A.M. at 38; Court's Ex. 1; Tr. 04/09/2025 P.M. at 4–5 (Burnett confirming on cross-examination that the Court's Exhibit 1 is the prosecution's cooperation memorandum with Warden and her attorney).) The cooperation memorandum shows that on February 4, 2003, Oklahoma County prosecutors, Warden, and Warden's attorney Janet Cox all agreed that Warden would receive "a term of 35 years in the Oklahoma Department of Corrections" in exchange for Warden's interview with Oklahoma County District Attorney Investigator Glenn Ring and Warden's truthful testimony against "one or all co-defendants" in the Oklahoma County murder case. (Court's Ex. 1.)

The State's counsel cross-examined Burnett about Warden's cooperation memorandum, as follows:

Q. [Burns]	Now, Mr. Burnett, I believe that you testified on direct that **Ms. Warden's plea agreement would have been memorialized in what you termed as a cooperation memorandum.** Do you recall testifying to that?
A. [Burnett]	**Yes.**
Q. [Burns]	And what I showed you is what's been admitted as Court's Exhibit 1. Do you know what that is?
A. [Burnett]	Yes.
Q. [Burns]	And what is it?
A. [Burnett]	**It's a cooperation memorandum.**
Q. [Burns]	And is that **the cooperation memorandum that you were previously testifying about that would have been in reference to Ms. Warden's case**?
A. [Burnett]	**Yes.**
. . .	
Q. [Burns]	Would you agree with me that **these are done in particularly serious cases**?
A. [Burnett]	**Correct**.

(Tr. 04/09/2025 P.M. at 4–6 (emphasis added).)

On redirect examination, Petitioner's counsel inquired about the discrepancy between the 45 years Burnett told Petitioner's jury that Warden would serve in prison pursuant to her plea agreement, and the 35 years' imprisonment promised in the cooperation memorandum:

Q. [Bass]	Mr. Burnett going back to Exhibit 36-1 which is the transcript of your closing argument in the first stage of Mr. Wood's case, page 161—
A. [Burnett]	Okay.
Q. [Bass]	—lines 21 through 22.
A. [Burnett]	Yes.
Q. [Bass]	**You state that Ms. Warden—you tell the jury that Ms. Warden sacrificed half her life with those kids, 45 years**.
A. [Burnett]	Yes.
Q. [Bass]	And that that was her agreement in the Oklahoma County murder case; correct?
A. [Burnett]	Correct.
. . .	
Q. [Bass]	Mr. Burnett, I'm handing you Court's Exhibit 1, the cooperation agreement—
A. [Burnett]	Yes.
Q. [Bass]	—executed with Brandy Warden.
A. [Burnett]	Yes.
Q. [Bass]	**Isn't it true that this cooperation agreement states that Brandy Warden is offered a term of 35 years**?
A. [Burnett]	Yes.
Q. [Bass]	**And that's ultimately what she got after her sentence was modified down; correct?**
A. [Burnett]	**Yeah.**
Q. [Bass]	**And the 35 years that she was promised according to this cooperation agreement is not in the written plea agreement; correct**?
A. [Burnett]	**Correct. Never underestimate my—my ability to say something stupid to a jury. I mean, I—I've made a mistake probably, best I can tell.**

(Tr. 04/09/2025 P.M. at 34–35 (emphasis added).)

The Court then asked why Burnett later "strenuously objected" to Warden's request that her 45-year sentence be modified down to 35 years when the cooperation memorandum shows that a 35-year sentence is what prosecutors had promised Warden all along:

[The Court]	Court has another question. All right. Evidence has been submitted that Ms. Warden did enter a plea to 45 years.
[Burnett]	Okay.
[The Court]	And then afterwards, about a year later, she filed a motion to—for a sentence modification. Do you recall that?
[Burnett]	I don't remember—no, I don't remember that.
[The Court]	Okay. I am going to hand you what I've marked as Court's Exhibit Number 2. I know you guys have it. It is the order granting the modification. So I don't know what your numbers are, this is my number. Court's Exhibit 2. Would you take a look at that?
[Burnett]	Okay. (Witness complies.) Wow. Looks like I threw a fit.
[The Court]	Well, hang on. Hang on. Do you recognize that?
[Burnett]	Yes.
[The Court]	What is that?
[Burnett]	That's an order granting modification of her sentence after hearing.
[The Court]	Okay. Do you recall that hearing?
[Burnett]	Yeah. Yes, I think I'm—this is starting to ring some bells.
[The Court]	Okay. Well, I notice that there is an underline and some initials in that document. Do you recognize those?
[Burnett]	Yes.
[The Court]	What is that?
[Burnett]	That's my handwriting. That's my—I regularly initialed stuff down here at the time with that funny looking GB.
[The Court]	And what exactly did you underline?
[Burnett]	Strenuous objection from the State.
[The Court]	All right. So is it a fair statement then that you objected to her sentence being modified from 45 years?
[Burnett]	Yes.

> [The Court] Okay. Why did you object?
> [Burnett] Because that—because—because of what we're doing here today. I mean, we wanted to—you know, you present your case and you try to set this thing out and then all of a sudden, you know, you're—you know, somebody thinks there's some wink-wink deal, and then all of a sudden you're in a mess, just like we're in here today. And I'm sure that's why I threw a fit at that deal.

(Tr. 04/09/2025 P.M. at 36–38.)[4]

Under Oklahoma law at the time, Warden would have been statutorily ineligible to pursue a modification of the 45-year sentence to conform to the 35-year sentence she was secretly promised by Oklahoma County prosecutors had her Payne County deferred sentence been accelerated to a felony conviction. 22 O.S. § 982a(A) (2003) ("Any time within twelve (12) months after a sentence is imposed or within twelve (12) months after probation has been revoked, the court imposing sentence or revocation of probation may modify such sentence or revocation by directing that another penalty be imposed, if the court is satisfied that the best interests of the public will not be jeopardized. *This section shall not apply to convicted felons who have been in confinement in any state prison system for any previous felony conviction during the ten-year period preceding the date that the sentence this section applies to was imposed.*" (emphasis added)).

[4] On April 15, 2004, the same day Warden's modification hearing occurred, an Order was filed in this case modifying Warden's sentence from 45 years down to 35 years. (State's Ex. 2-F.) Nowhere in that Order does it reflect that Oklahoma County prosecutors objected to Warden's request for modification. *Id.* Then, four days later, on April 19, 2004, a second Order modifying Warden's sentence from 45 years down to 35 years was filed and included for the first time language indicating that the modification was granted "over strenuous objection of the State," which was underlined and initialed by Burnett. (Court's Ex. 2.)

The Court now turns to answering the eight questions posed by the OCCA and is guided by the OCCA's instruction that factual findings must be consistent with "the logic and effect of the facts presented." *Barkus v. State*, 2024 OK CR 25, ¶ 4, 556 P.3d 633, 637 (Lumpkin, J., concurring) (quoting *Marshall v. State*, 2010 OK CR 8, ¶ 24, 232 P.3d 467, 474). The Court first, summarizes its findings of facts and conclusions of law (Section I); second, details its factual findings based on the totality of the evidence in the record (Section II); and third, details its conclusions of law (Section III).

I. Summary of Findings of Fact & Conclusions of Law

1. The Court finds that there was an agreement between prosecutors in Oklahoma County and Payne County not to accelerate Warden's deferred sentence in Case No. CF-2000-202, in exchange for her testimony in Petitioner's case in Oklahoma County, Case No. CF-2002-46.

The cooperation memorandum which Burnett testified was the prosecution's full agreement with Warden promised her 35 years' imprisonment in exchange for her testimony against Petitioner and his co-defendants. Oklahoma County prosecutors could not have promised Warden in February 2003 the 35 years' imprisonment she ultimately received through a judicial modification of her sentence without having first ensured Warden's Payne County deferred sentence would not be accelerated to a felony conviction. (Court's Ex. 1); 22 O.S. § 982a(A) (2003) (stating that the judicial modification procedure "shall not apply to convicted felons who have been in confinement in any state prison system for any previous felony conviction during the ten-year

period preceding the date that the sentence this section applies to was imposed.").

Former Payne County Assistant District Attorney Tom Lee testified that during the time Warden was being prosecuted for first-degree murder and related crimes in Oklahoma County, the Payne County District Attorney's Office had a standing agreement with the Oklahoma County District Attorney's Office to pursue or forego accelerating a defendant's deferred sentence if that was requested by prosecutors in Oklahoma County. (Evid. Hr'g Tr. 04/07/2025 A.M. at 70–73, 79–80.) The totality of the evidence shows that standing agreement was fulfilled in Warden's case.

Probative evidence before the Court also shows that the prosecutors in this case had the motive and plan to sanitize the felony records of prosecution witnesses against Petitioner; to file plea agreements that did not document their full agreement with prosecution witnesses in exchange for testimony against Petitioner; and to conceal those benefits from Petitioner's trial counsel and jury. Evidence presented at the hearing shows that this is what the prosecutors did with Coleman Givens, who testified against Petitioner at the first-stage of his capital trial. The prosecutors intervened into Givens' pending felony cases, had the preliminary hearing conferences in both of those cases continued until after Givens testified against Petitioner, and then dismissed one of Givens' pending felonies entirely and downgraded the second felony to a misdemeanor 3 months *after* Petitioner was sentenced to death. The plea agreement that the prosecutors filed in Givens' consolidated felony cases conferring these significant benefits

after Petitioner was sentenced to death did not document the prosecutors' full agreement with Givens, nor were these benefits disclosed to Petitioner's trial counsel.

2. The Court finds that the prosecution withheld from Petitioner its full agreement with Warden which promised her the 35 years' imprisonment she ultimately received; allowed her to avoid a felony conviction for her criminal acts in Payne County; allowed her to avoid serving additional or concurrent terms of incarceration for her Payne County offense; allowed her to avoid a sentencing enhancement as a habitual offender when she pled guilty to lesser felonies in Oklahoma County; and allowed her to avoid paying $695 in outstanding restitution to her Payne County victims.

3. The Court finds that Warden's deferred sentence in Payne County was part of her agreement with Oklahoma County prosecutors for her testimony in Petitioner's case. As already discussed, without an agreement and cooperation between Oklahoma and Payne County prosecutors not to accelerate Warden's deferred sentence to a felony conviction, the 35-year deal that the cooperation memorandum promised Warden in February 2003, and which Burnett testified was the prosecution's full agreement with Warden, could not have been fulfilled. (Court's Ex. 1); Okla. Stat. Ann. tit. 22, § 982a(A) (2003).

4. The Court finds that the evidence of the prosecution's full agreement with Warden which included ensuring her Payne County deferred sentence was not accelerated to a felony conviction is material under *Napue* and *Brady*, not

merely cumulative, and affected the outcome of Petitioner's trial and penalty phase.

Materiality under *Napue*

Once a defendant has proved that prosecutors knowingly solicited false testimony or knowingly allowed it to go uncorrected, the materiality standard under *Napue* requires "a new trial . . . so long as the false testimony may have had an effect on the outcome of the trial." *Glossip v. Oklahoma*, 145 S. Ct. 612, 626–27 (2025). The Supreme Court recently explained that "this materiality standard requires the *beneficiary* of the constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 627 (cleaned up) (emphasis added) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). In other words, since Petitioner has shown that the prosecutors knowingly solicited or failed to correct Warden's false testimony about her full agreement in violation of *Napue*, the State must prove beyond a reasonable doubt that this constitutional error was harmless at both the first stage and the penalty phase of Petitioner's trial. In *Glossip* and *Chapman*, the Supreme Court instructed that a constitutional error is not "harmless" if "it 'in any reasonable likelihood [could] have affected the outcome of the trial,'" *Glossip*, 145 S. Ct. at 626–27, or "contribute[d] to petitioners' convictions" and death sentence, *Chapman*, 386 U.S. at 829.

Based on the totality of the evidence before the Court, the State has not proved beyond a reasonable doubt that the *Napue* errors in Petitioner's case were harmless at the first stage and the penalty phase of his trial. Even with Warden's

testimony for the prosecution directly incriminating Petitioner in the crimes with which he was charged and in the pizza restaurant robbery supporting the continuing threat aggravator at the penalty phase, the jury still deliberated for approximately 5 hours over Petitioner's guilt at the first stage, and for approximately another 5 hours at the penalty phase over whether to sentence Petitioner to death. (Tr. 04/02/2004 at 213-14; Tr. 04/05/2004 at 163.) If Petitioner's guilt and his death sentence were decisions over which the jury struggled for 5 hours with Warden's sanitized testimony on behalf of the prosecution, then there is a reasonable likelihood that at least one juror would have voted to acquit Petitioner and would have voted against sentencing him to death if Warden had been impeached with: her criminal acts in Payne County; her incentives for testifying to the story she told the jury; and with the full extent of the benefits she was promised in exchange for her cooperation—benefits that included a 35-year sentence, the non-acceleration of her Payne County deferred sentence; her avoidance of another felony conviction; and having $695 in restitution owed to her Payne County victims forgiven.

Materiality under *Brady*

Once a defendant has proved that the prosecution suppressed favorable evidence, the materiality standard under *Brady* requires him to show that there is "a reasonable probability that its omission affected the outcome of the proceeding." *Harris v. State*, 2019 OK CR 22, ¶ 38, 450 P.3d 933, 950. The Supreme Court has instructed that *Brady*'s materiality standard "is not a sufficiency of the evidence test." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). This

means that a *Brady* violation can be material even if, without the suppressed evidence, the prosecution would still have had enough evidence to convict the defendant or sentence him to death. *Id.* at 434–35 (footnote omitted).

To show that a *Brady* violation is material, "[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.* Instead, a defendant shows that a *Brady* violation is material if the evidence the prosecution suppressed "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* The totality of the evidence before the Court shows that the suppressed evidence of Oklahoma County prosecutors' full agreement with Warden would have put the prosecution's entire theory of the case against Petitioner at both phases of his trial "in such a different light" as to undermine this Court's confidence in those verdicts. *Id.*

Warden was the prosecution's key witness against Petitioner at both the first stage and the penalty phase of Petitioner's capital trial. As Burnett testified at the evidentiary hearing, Warden's testimony gave the prosecution the "certainty of a conviction" against Petitioner. (Evid. Hr'g 04/08/2025 P.M. at 77; Tr. 04/01/2004 at 128–83, 186–204.) Warden's testimony provided the prosecution with its only direct evidence incriminating Petitioner in Wipf's murder and in the pizza restaurant robbery that supported the continuing threat aggravator, one of the aggravating circumstances that the prosecution alleged made Petitioner eligible for the death penalty. (Tr. 04/01/2004 at 128–83, 186–

204.) Her testimony provided the prosecution with its only evidence of Petitioner's motive for the crimes—she testified that she knew he "wanted money." (Tr. 04/01/2004 at 151.) And her testimony allowed prosecutors to present the jury with a theory of the case in which Warden was a "go-along girl[]" with no prior felony convictions who committed the crimes under Petitioner's control. (Evid. Hr'g 04/08/2025 P.M. at 95; Tr. 04/01/2004 at 137–39; 146–52; Tr. 04/02/2004 at 152–53, 161–64, 187, 198–99; Tr. 04/05/2004 at 5, 130, 134.) *Cf. Glossip*, 145 S. Ct. at 620–21 (finding *Napue* error material where prosecution witness provided the only direct evidence incriminating Glossip in the murder, even though other circumstantial evidence incriminated Glossip; provided the only evidence of Glossip's motive for the crime; and where prosecution crafted its theory of the case around portraying witness as someone under Glossip's control).

At both stages of Petitioner's trial, "that theory was an important part of the prosecution's case and featured prominently in its opening and closing statements." *Glossip*, 145 S. Ct. at 628. The prosecutors told Petitioner's jury that Warden was not some "big conspirator" but rather was a girl who "know[s] one rule, you do what Tremane told you to do." (Tr. 04/02/2004 at 152–53.) They told the jury that Warden had no felony convictions before Petitioner pressured her into participating in these crimes that cost her "45 years of her life." (Tr. 04/02/2004 at 161–64, 187, 198–99.) They told the jury that "the story that Brandy Warden testified in this courtroom is the right one." (Tr. 04/02/2004 at 161–65.) And they told the jury that Petitioner deserved the death penalty

because he "is different from people like you and me. He manipulates women. He manipulated, I submit to you, Brandy into doing the things that she did and now she is serving 45 years in prison." (Tr. 04/05/2004 at 134.) *See Binsz v. State*, 1984 OK CR 28, ¶ 11, 675 P.2d 448, 450 (reversing conviction and death sentence where prosecutors suppressed evidence of deal with witness and told jury that witness "had no reason to lie").

By suppressing the full agreement with Warden and the array of benefits she had received and was promised in exchange for her cooperation, the prosecution was able to hide from Petitioner's jury the fact of Warden's prior guilty plea and deferred sentence resulting from her criminal acts in Payne County a year and a half before the Oklahoma County crimes. *See Binsz*, 1984 OK CR 28 ¶ 11, 675 P.2d at 450 (reversing conviction and death sentence where prosecutors suppressed deal with witness that included recommendation for lenient sentence and "provided [the witness] a strong temptation to swear falsely"); *id.* at 450 n.3 ("A tentative promise for leniency might be interpreted by a witness as contingent upon the nature of his testimony. Thus, there would be a greater incentive for the witness to try and make his testimony pleasing to the prosecutor."). It bolstered Warden's credibility and prevented the jury from accurately assessing the credibility of her story. It undermined Petitioner's efforts to show the jury that Warden was minimizing her role in the crimes and embellishing that Petitioner forced her into participating. And it gave persuasive force to the prosecution's theory that Warden's story "is the right one" and that she was just "a go-along girl[.]"

As already noted, the decisions whether to convict Petitioner and sentence him to death were ones over which the jury wrestled for 5 hours at each stage of the trial even with Warden's directly incriminating testimony against Petitioner, and despite the fact that Petitioner's brother Zjaiton's testimony indirectly incriminated Petitioner in the crime. (Tr. 04/02/2004 at 213–14; Tr. 04/05/2004 at 163.) Had Warden's testimony and credibility been impeached with her prior criminal acts in Payne County and with the full extent of the benefits she was receiving in exchange for story she told the jury, there is a reasonable probability that at least one juror would have voted to acquit Petitioner, or would have voted against sentencing him to death.

After considering the totality of the evidence, the Court is unable to conclude that Petitioner "received a fair trial resulting in a verdict worthy of confidence." *Harris*, 2019 OK CR 22, ¶ 38, 450 P.3d at 950; *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)); *Nuckols v. Gibson*, 233 F.3d 1261, 1267 (10th Cir. 2000) ("As in many death penalty, habeas corpus cases, the problem presented here is not whether the petitioner is innocent . . . but rather whether he received the full benefit of fair rules and constitutional procedure and a fair opportunity . . . to a jury trial." (internal quotation marks omitted)).

5. The Court finds that the handwritten note "Let's Hold off for a while on the application" on a "Case Report" filed January 18, 2002, in the District

Court of Payne County, Case No. CF-2000-202, reporting violations of Warden's deferred sentence was authored by former Assistant Payne County District Attorney Tom Lee.

The Court finds, based on the totality of the evidence, that the note means that on January 18, 2002, Lee had not yet decided whether to file an application to accelerate Warden's deferred sentence. The Court also finds that Lee's initial decision to hold off on accelerating Warden's deferred sentence is consistent with Lee's testimony that in such cases, in accordance with the standing agreement between the Oklahoma and Payne County District Attorney's Offices, a decision to accelerate would depend on whether or not it would jeopardize the first-degree murder prosecution of Warden in Oklahoma County.

6. The Court finds that the other handwritten note on the same "Case Report" which is undated and states "Wayna Tyner – Sapulpa OIDS", "State's witness PG on Acc. After the Fact", Brandy Warden (45 years)" with an arrow pointing to "She's testifying for State," and "F-00-202" "Zjaiton Wood" was authored by an employee of the Payne County District Attorney's Office who took the message Tyner left sometime prior to August 6, 2003.

7. The Court finds that the handwritten note "Brandy Warden D/S in Payne County" located on the bottom corner of the State's Response to Defendant's Motion to Reveal All Deals,[5] filed in the District Court of Oklahoma

[5] Question 7 of the OCCA's remand order describes the motion on which this note appears as the "State's Response to Defendant's Motion Requesting Production of All Statements of Co-Defendants Tremane Wood, Lanita Bateman, and Brandy Warden." Remand Order at 8. The evidence presented at the hearing shows that the handwritten note "Brandy Warden D/S in Payne County" was

County in Petitioner's case, Case No. CF-2002-46 was authored by George Burnett at a September 3, 2003 status conference on Tyner's Motion to Reveal All Deals. The Court also finds that when this handwritten note is considered on the totality of the evidence and in the context of this Court's other findings regarding the true nature of the prosecution's agreement with Warden, it reflects Burnett's awareness that Warden's deferred sentence in Payne County was part of her deal, which had not been disclosed.

8. The Court finds that the prosecution did not disclose to Petitioner's defense the cooperation memorandum that came to light for the first time during the evidentiary hearing and which Burnett testified was the prosecution's full agreement with Warden. The Court also finds that the prosecution did not disclose to Petitioner's defense that its full agreement with Warden promised her 35 years' imprisonment, ensured her Payne County deferred sentence was not accelerated to a felony conviction, allowed her to avoid serving additional or concurrent terms of incarceration for her Payne County offense, allowed her to avoid a sentencing enhancement as a habitual offender when she pled guilty in Oklahoma County, and allowed her to avoid paying $695 in outstanding restitution to her Payne County victims. *See Smith v. Sec'y of New Mexico Dept. of Corr.*, 50 F.3d 801, 829 (10th Cir. 1995) (finding that "perhaps the most highly probative evidence relating to the disclosure *vel non* of this report is the conspicuous absence of any cross-examination of [the prosecution's witness] on

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written on the "State's Response to Defendant's Motion to Reveal All Deals." (Pet. Ex. 19.)

matters contained in [the] report, matters that were extremely relevant to [petitioner's] defense").

The Court further finds that had the prosecution disclosed its full agreement with Warden to Petitioner's defense, Petitioner's trial lawyer Johnny Albert[6] acting as competent defense counsel would have used that evidence in defense of Petitioner. *See Kyles*, 514 U.S. at 441 (under *Brady*, the question is what "competent counsel" would have done with the suppressed evidence); *Wilson v. Beard*, 589 F.3d 651, 664–65 (3d Cir. 2009) ("The question under *Brady* is whether 'disclosure of the suppressed evidence to *competent* counsel would have made a different result reasonably probable.'") (citing *Kyles*, 514 U.S. at 441) (emphasis in original); *United States v. Overton*, 24 F.4th 870, 878 (2d Cir. 2022) (under *Brady*, "[m]ateriality is analyzed through an 'objective inquiry'").

The record shows that Albert's strategy at Petitioner's trial was to try to impeach Warden's credibility, truthfulness, and motivations for testifying. (Tr. 04/01/2004 at 186–200.) On cross-examination, Albert attempted to expose for the jury Warden's minimization of her role in the crimes, the deal she obtained in exchange for her cooperation, and her incentives to embellish her story and to lie about what Petitioner and her co-defendants forced her to do. (Tr. 04/01/2004 at 186–91.) He questioned Warden for "downplaying [her] role in

[6] Albert is deceased. *See* Response to Petitioner's Fourth Application for Post-Conviction Relief at 13 n.2 (the State stating that "Albert has since passed away"), *Wood v. State*, No. PCD-2022-550 (Okla. Crim. App. June 29, 2022); *see also* Reply in Support of Petitioner's Fourth Application for Post-Conviction Relief at 8, No. PCD-2022-550 (Okla. Crim. App. July 13, 2022) (Petitioner stating that "Albert did not pass away until 2018").

this," asked about "this 45-year sentence [she] got," and questioned whether her motive for testifying against Petitioner was jealousy that he had a new girlfriend. (*Id.*)

Had prosecutors not suppressed their full agreement with Warden, Albert would have been able impeach Warden with the fact that her deal allowed her to avoid a felony conviction for her prior criminal acts in Payne County. The jury would have learned that Warden pled guilty in October 2000 for breaking into someone's home and stealing $1,845 worth of property, including a gun. The jury would have learned that she committed those criminal acts on her own, and without being under Petitioner's control. The jury would have also learned that in that case too, Warden similarly tried to shift responsibility to her co-defendant, Sheneda Davis, while minimizing her own role in that crime. According to the Pre-Sentence Report authored by Oklahoma Department of Corrections ("ODOC") Senior Probation and Parole Officer William Crye Jr., Warden claimed it was Davis who wanted to steal; it was Davis who knew where the house keys were hidden to later break into the home; and it was Davis who needed the money. (Pet. Ex. 16-1 at 2.) Albert would also have been able to impeach Warden with the fact that in the Payne County felony case—as in the Oklahoma County murder case—Warden pled guilty and agreed to cooperate with the prosecution of her co-defendant in exchange for a more lenient sentence for herself. (Pet. Ex. 28-2 at 2.)

II. Findings of Fact

A. Warden is charged with felony larceny of a house in Payne County, pleads guilty, and receives a 3-year deferred sentence that expires on October 24, 2003.

A year and a half before Warden was prosecuted for first-degree murder in Oklahoma County, she was prosecuted for felony larceny of a house in Payne County. (Pet. Ex. 8.) On March 15, 2000, Payne County prosecutors charged that Warden, while acting together and conjointly with her co-defendant Sheneda Davis, "did unlawfully, willfully, intentionally and feloniously, enter into a certain house . . . and did then and there take, steal and carry away certain personal property of value, to wit: Gateway computer system, . . . Serial No. 0011856047, with monitor, keyboard, mouse and camera, an Aiwa stereo system with sound and five (5) speakers, Sony Playstation with Controllers, Sony Playstation video game Die Hard II and a .45 caliber Llama pistol, Serial No. B95129[.]" (Pet. Ex. 8 at 1.) Warden faced "[u]p to 5 years" imprisonment for this felony offense. (Pet. Ex. 8 at 1.)

Attorney Sherry Boyce represented Warden on the felony larceny charge. (Evid. Hr'g Tr. 04/07/2025 A.M. at 44.) Warden and Davis were both 19 years old at the time of the crime, had a key to someone's home made, and broke in when no one was home. (Evid. Hr'g Tr. 04/07/2025 A.M. at 44.) According to Boyce, "the co-defendant [Davis] drove the car and my client [Warden] was the one who went in." (*Id.*; *see also* State's Ex. 6-D. at 3 (factual basis for Davis's plea agreement stating that she "drove the car while the crime was committed").)

On June 23, 2000, Warden pled guilty to felony larceny in exchange for being sentenced as a youthful offender in the community; testifying against Davis; receiving a 3 year deferred sentence with 50 hours of community service and 2 years under ODOC custody; and paying court costs and restitution to the victims in the amount of $1,845.[7] (Pet. Ex. 10; Pet. Ex. 16 ¶¶ 5–7; Evid. Hr'g Tr. 04/07/2025 A.M. at 45.) The Payne County District Court ordered an Offender Accountability Plan to be authored in advance of Warden's sentencing on her guilty plea to felony larceny. (Pet. Ex. 16 ¶¶ 5–6.) That Offender Accountability Plan was authored by Crye Jr. (Pet. Ex. 16 ¶¶ 5–6; Pet. Ex. 16-1 at 1.)

On October 27, 2000, the Payne County District Court entered Warden's Judgment and Sentence Deferred, which required her to remain on a 3-year deferred sentence until October 24, 2003 and adhere to the Rules and Conditions of Probation throughout that period. (Pet. Ex. 11; Evid. Hr'g Tr. 04/07/2025 A.M. at 48.)

Among the many Rules and Conditions of Probation Warden was required to follow to remain on the deferred sentence were paying restitution, maintaining a job, not associating with individuals with criminal records, and not violating any city, state, or federal law. (Pet. Ex. 10 at 8; Pet. Ex. 16 ¶ 8; Evid. Hr'g Tr. 04/07/2025 A.M. at 47.) The consequences Warden could face for violating the Rules of Probation included revocation of probation and acceleration of the deferred sentence resulting in a felony conviction and imprisonment. (Pet. Ex.

[7] Warden and Davis were jointly and severally liable for the $1,845 restitution payment to their victims in the felony larceny case. (Evid. Hr'g Tr. 04/07/2025 A.M. at 56–57.)

16 ¶ 8; Pet. Ex. 11 at 2 (the Payne County District Court ordering that "in the event the terms of probation herein provided, or any of the conditions hereinbefore enumerated be breached or broken by the defendant, a warrant shall issue for her arrest, and she shall be brought before this Court for revocation of probation for imposition of judgment and sentence.").)

On June 6, 2001, eight months into Warden's 3-year deferred sentence, she violated the Rules of Probation by failing to pay restitution, and Payne County Assistant District Attorney Tom Lee filed an Application to Accelerate Warden's deferred sentence on that basis. (Pet. Ex. 12; Evid. Hr'g Tr. 04/07/2025 A.M. at 56.) A bench warrant was issued for Warden's arrest. (Pet. Ex. 13.) After Warden caught up on her restitution payments, Lee moved to withdraw the Application to Accelerate. (Pet. Ex. 25.)

In Boyce's experience representing criminal defendants on deferred sentences in Payne County, it was commonplace for Payne County prosecutors to file an application to accelerate a defendant's deferred sentence for minor violations of the Rules of Probation such as a public intoxication violation. (Evid. Hr'g Tr. 04/07/2025 A.M. at 55.) And in situations where a defendant on a deferred or suspended sentence in Payne County became incarcerated for convictions in another county, Payne County prosecutors still typically filed an application to accelerate and would writ the defendant back to Payne County for the imposition of judgment and sentence.[8] (Evid. Hr'g Tr. 04/07/2025 A.M. at

[8] That this was common practice is further supported by Burnett's testimony that in his experience, if a defendant on a deferred sentence in one county picks up new charges in a different county and becomes a cooperating witness for the

61–63.) Boyce and Lee testified that in that circumstance, the only evidence Payne County prosecutors would need to present at the hearing on the acceleration application would be a certified copy of the judgment and sentence adjudicating the defendant guilty of offenses during the deferred period. (Evid. Hr'g Tr. 04/07/2025 A.M. at 59, 89.)

This is the practice Payne County prosecutors followed with Warden's co-defendant, Davis, after she violated the Rules of Probation while serving a suspended sentence in the felony larceny case. As previously discussed, Payne County prosecutors had charged Davis conjointly with Warden for the felony larceny of a house. (Pet. Exs. 66, 67.) Davis pled guilty to that crime and on December 20, 2000 received a 2-year suspended sentence that required her to follow the Rules and Conditions of Probation, remain under the supervision of the Oklahoma Department of Corrections, complete 40 hours of community service, maintain full time employment, pay restitution in the amount of $1,845, and obtain her GED. (State's Ex. 6-D; Pet. Ex. 68 at 1–3; Pet. Ex. 69 at 1–3.) Less than a year into Davis's 2-year suspended sentence, Payne County prosecutors filed an amended application to revoke Davis's suspended sentence because she

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State, the county out of which the defendant's deferred sentence originates "might wait and see what happens in the new case and use it to accelerate, or they may work out their case and do something, or may bring them back and accelerate them . . . oftentimes somebody reoffends, they've got other conditions and they can go ahead and accelerate them on those . . . They can kind of do whatever they want. . . . [a]nd then they can either dismiss theirs or run it CC or – you know, that's the typical deal when there's a pending application is they'll let the new case work itself out and then just come back and bring them back and CC their case. You know, that's pretty standard stuff." (Evid. Hr'g Tr. 04/09/2025 P.M. at 12–13.)

"failed to pay restitution as ordered by this Court." (Pet. Ex. 71.) Four days later, Payne County prosecutors filed a second amended application to revoke Davis's suspended sentence because, in addition to not paying restitution, she had "failed to complete community service as set forth in the violation report dated August 29, 2001" and "was charged with the crimes of Obstruct an Officer-Count 1 and Possession of Controlled Substance-Count 2." (Pet. Ex. 70.)

Davis failed to appear at the hearing on the application to accelerate her suspended sentence, a bench warrant issued for her arrest, and the acceleration hearing was continued. (State's Ex. 6-A at 8.) Davis was thereafter charged in Oklahoma County with nine felony counts of false impersonation and identity theft to which she ultimately pled guilty. (State's Ex. 08-A at 3–5; State's Ex. 8-B; *id.* at 7 (probable cause affidavit stating that Oklahoma City police officers arrested Davis in Oklahoma County "for an outstanding Payne County arrest warrant"); State's Ex. 8-D.) Davis was sentenced in Oklahoma County to concurrent terms of 10 years' imprisonment on all nine felony counts with all suspended except as to the first 3 years to be served in prison. (State's Ex. 8-A at 7; State's Ex. 8-E at 3; State's Ex. 8-H.)

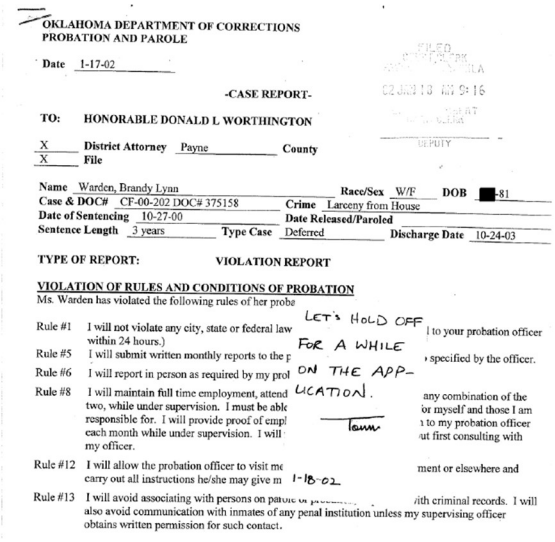
In 2004,[9] while Davis was incarcerated over 100 miles away at the Eddie Warrior Correctional Center for her Oklahoma County felony convictions, Payne County prosecutors applied for and obtained a writ of habeas corpus ad

[9] Vincent Antonioli was First Assistant Payne County District Attorney at this time. (Evid. Hr'g Tr. 04/09/2025 P.M. at 42–43 (Antonioli testifying that he worked as First Assistant Payne County District Attorney starting in late-summer 2003 until approximately 2006).)

prosequendum to have Davis transported from ODOC custody to Payne County for the acceleration hearing on her felony larceny suspended sentence. (Evid. Hr'g Tr. 04/07/2025 A.M. at 61–62; State's Ex. 6-A at 9.) Davis appeared in custody at the Payne County acceleration hearing where the court revoked her 2-year suspended sentence, ordered it to be served concurrent to her sentence for her Oklahoma County felony convictions, and gave her credit for time served. (State's Ex. 06-A at 10.)

B. Warden is charged with first-degree murder and related crimes in Oklahoma County and Payne County Assistant District Attorney Tom Lee holds off on accelerating her deferred sentence pursuant to the standing agreement between the Oklahoma and Payne County District Attorney's Offices.

On January 7, 2002, Warden was charged with first-degree murder, robbery with firearms, and conspiracy to commit robbery in Oklahoma County. (Pet. Ex. 14 at 1.) On January 18, 2002, ODOC Senior Probation and Parole Officer James Rich and Team Supervisor David Hamilton filed a violation report in Warden's Payne County felony larceny case recommending acceleration of Warden's deferred sentence based on her violations of 6 different Rules of Probation including the charges she faced in Oklahoma County for which she was in jail. (Pet. Ex. 14 at 1.) The same day, Payne County Assistant District Attorney Tom Lee wrote the following note on the violation report:



OKLAHOMA DEPARTMENT OF CORRECTIONS
PROBATION AND PAROLE

Date 1-17-02

-CASE REPORT-

TO: HONORABLE DONALD L WORTHINGTON

X District Attorney Payne County
X File

Name Warden, Brandy Lynn Race/Sex W/F DOB [redacted]-81
Case & DOC# CF-00-202 DOC# 375158 Crime Larceny from House
Date of Sentencing 10-27-00 Date Released/Paroled
Sentence Length 3 years Type Case Deferred Discharge Date 10-24-03

TYPE OF REPORT: VIOLATION REPORT

VIOLATION OF RULES AND CONDITIONS OF PROBATION
Ms. Warden has violated the following rules of her probe

LET'S HOLD OFF FOR A WHILE ON THE APPLICATION. Tamm 1-18-02

Rule #1 I will not violate any city, state or federal law ... to your probation officer within 24 hours.)
Rule #5 I will submit written monthly reports to the p ... specified by the officer.
Rule #6 I will report in person as required by my prol
Rule #8 I will maintain full time employment, attend ... any combination of the two, while under supervision. I must be able ... or myself and those I am responsible for. I will provide proof of empl ... to my probation officer each month while under supervision. I will ... ut first consulting with my officer.
Rule #12 I will allow the probation officer to visit me ... ment or elsewhere and carry out all instructions he/she may give m
Rule #13 I will avoid associating with persons on pa ... ith criminal records. I will also avoid communication with inmates of any penal institution unless my supervising officer obtains written permission for such contact.

(Pet. Ex. 15; Pet. Ex. 47, ¶ 4; Evid. Hr'g Tr. 04/07/2025 A.M. at 69.)

Lee testified that at the time he wrote the note, "Let's hold off for a while on the application," he was not making a final decision with respect to accelerating or not accelerating Warden's deferred sentence. (Evid. Hr'g Tr. 04/07/2025 A.M. at 69.) While Lee testified that he did not expect to speak with someone at the Oklahoma County District Attorney's Office before deciding whether or not to accelerate Warden's deferred sentence, he also testified that "if someone from Oklahoma County would have called and requested an action on our part as to going forward with acceleration our office would have assisted them and complied with that request." (Evid. Hr'g Tr. 04/07/2025 A.M. at 70.)

Lee testified that if someone from the Oklahoma County District Attorney's Office asked him to accelerate a Payne County defendant's deferred sentence he would do that regardless of the cost because he would do whatever the Oklahoma County District Attorney's Office wanted him to do to either help or not jeopardize their case. (Evid. Hr'g Tr. 04/07/2025 A.M. at 70–71.) Lee testified that the Payne County District Attorney's Office's practice of doing (or refraining from doing)

whatever the Oklahoma County District Attorney's Office wanted was a standing agreement between the two offices. (Evid. Hr'g Tr. 04/07/2025 A.M. at 73.) The following exchange occurred between Petitioner's counsel and Lee:

Q. [Sandman]	So when we talk about all these costs and expenses none of that – do you agree with me that none of that really matters if you're spending money to try to help Oklahoma County District Attorney's Office in a serious case that they have pending in their county?
A. [Lee]	Correct.
Q. [Sandman]	And that could mean for example that if Oklahoma County District Attorney had a star witness testifying for them in a first degree murder case and they might not want that defendant to have their deferred sentence accelerated you'd go along with that if that's what they wanted you to do?
A. [Lee]	Yes, I would have. . . . If I was contacted.

(Evid. Hr'g Tr. 04/07/2025 A.M. at 71.)

Lee testified that this standing agreement existed between the Payne County District Attorney's Office and other county district attorney's offices as well. (*Id.* (Lee testifying that the Payne County District Attorney's Office helped other county district attorney's offices by accelerating or not accelerating the deferred sentence of a Payne County defendant if that was requested by another county's district attorney's office); *id.* at 79–80.)

Lee testified that when he spoke to the investigators at the Oklahoma Attorney General's Office in January 2025 about Warden's Payne County felony larceny case, he did not remember Warden's case. (Evid. Hr'g Tr. 04/07/2025 A.M. at 71–72.) He testified further that at the time he spoke to the investigators he had "zero memory of anything about that case" "other than [Warden's] name."

(Evid. Hr'g Tr. 04/07/2025 A.M. at 72.) The following exchange occurred between Mr. Lee and Petitioner's counsel:

Q. [Sandman]	If you had zero memory about her case you had zero memory about who you might have talked to for a minute or two on the telephone regarding her case? You don't remember one way or the other who you talked to or who you didn't talk to back in 2002 or 2003?
A. [Lee]	Correct. I do not remember that.
Q. [Sandman]	Okay. So as you sit here the best that you can say is that if you had a conversation with an Oklahoma County District Attorney about Brandy's case you just don't remember whether you had it or if you did have it what was said?
A. [Lee]	No, I would have remembered if I would have had a conversation with Oklahoma County.
Q. [Sandman]	Oh you would have?
A. [Lee]	Yes.
Q. [Sandman]	Do you remember every conversation that you had about Ms. Warden's case?
A. [Lee]	No.

(Evid. Hr'g Tr. 04/07/2025 A.M. at 72–73.)

Lee clarified that "in this case if Oklahoma County would have called me *about Mr. Wood's case* I would have remembered it." (Evid. Hr'g Tr. 04/07/2025 A.M. at 74 (emphasis added).) Lee testified that he remembered Petitioner from back when he was a kid. (Evid. Hr'g Tr. 04/07/2025 A.M. at 87.) Lee recalled "hav[ing] conversations" with the Payne County juvenile judge about Petitioner "[a]nd the judge talked about him being a real good athlete and we thought perhaps he could excel at sports and do well in school and get out of the juvenile delinquent court. We were hoping for that." (Evid. Hr'g Tr. 04/07/2025 A.M. at 87.) Lee testified that he and the juvenile judge "tried to help" Petitioner. (Evid.

Hr'g Tr. 04/07/2025 A.M. at 87.) Lee "thought Tremane was a good kid" and testified that Petitioner was a young man who sticks out in his memory. (Evid. Hr'g Tr. 04/07/2025 A.M. at 87–88.)

The Court finds, based on Lee's admitted lack of memory about Warden and her felony larceny case compared to his specific memories about Petitioner, that Lee would not remember whether he had a conversation 20 years ago with someone in the Oklahoma County District Attorney's Office about Warden and her Payne County deferred sentence.

Lee testified that he did not remember writing the note, "Let's hold off for a while on the application," but confirmed he wrote it. (Evid. Hr'g Tr. 04/07/2025 A.M. at 83.) He testified further that the expenditure of resources required to prove Warden's Oklahoma County crimes in order to accelerate her deferred sentence would have factored into his decision over whether to act on the violation report when he authored the note. (Evid. Hr'g Tr. 04/07/2025 A.M. at 85.)

Apart from Warden's arrest for serious crimes in Oklahoma County, Rich and Hamilton had recommended accelerating her deferred sentence based on her commission of 4 other probation violations: she had failed to submit monthly written reports to her probation officer; failed to report in person to her probation officer; failed to maintain full time employment; and failed to inform her probation officer of her employment change. (Pet. Ex. 14 at 1–2.) Any of those 4 probation violations could have been proved at an acceleration hearing with just the violation report, Warden's signed verification of orientation form, and the

testimony of Warden's probation officer. (Pet. Ex. 14 at 1–2; Evid. Hr'g Tr. 04/07/2025 A.M. at 54.)

The question before the Court thus becomes whether the fact that Warden was being held in custody in the Oklahoma County jail when the violation report was filed explains why Lee decided to "hold off for a while" on filing an application to accelerate Warden's deferred sentence. Boyce testified that in her experience representing criminal defendants on deferred sentences in Payne County, even after receiving the violation report showing that Warden was being held in the Oklahoma County jail on first-degree murder charges, Payne County prosecutors still "would have filed the motion [to accelerate] and then waited." (Evid. Hr'g Tr. 04/07/2025 A.M. at 60–61.) The record shows that this file-and-wait practice is what Payne County prosecutors did with Warden's co-defendant in the felony larceny case Sheneda Davis: In 2001, Payne County prosecutors filed applications to accelerate Davis's suspended sentence after she failed to pay restitution, failed to complete community service, and was charged with additional crimes. (Pet. Exs. 70, 71.) Payne County prosecutors then waited until 2004 when Davis was incarcerated on Oklahoma County convictions to have Davis brought back on a writ to Payne County where they accelerated her suspended sentence on the felony larceny charge, ordered it to be served concurrent to the sentence on her Oklahoma County convictions, and gave her credit for time served. (State's Ex. 6-A at 9–10.) Based on the foregoing, the Court finds that Warden's detention in the Oklahoma County jail at the time the violation report was filed recommending acceleration of her deferred sentence

does not explain why Payne County prosecutors did not follow the file-and-wait practice in Warden's case that they followed in Davis's case.

To recap:

- Payne County prosecutors had a practice of filing applications to accelerate deferred sentences when defendants committed even minor violations of the Rules of Probation (Evid. Hr'g Tr. 04/07/2025 A.M. at 55); this is demonstrated by the fact that Lee filed an application to accelerate Warden's deferred sentence on June 6, 2001 based on her failure to pay restitution (Pet. Ex. 12; Evid. Hr'g Tr. 04/07/2025 A.M. at 56);

- The January 17, 2002 violation report in which Warden's probation officer recommended accelerating her deferred sentence identified 4 different probation violations that could have been proved with just the violation report, the probation officer's testimony, and Warden's signed Verification of Orientation form (Ex. 14 at 1–2; Evid. Hr'g Tr. 04/07/2025 A.M. at 54);

- Payne County prosecutors had a file-and-wait approach to accelerating the deferred or suspended sentences of defendants in custody elsewhere who violated the rules of probation (Evid. Hr'g Tr. 04/07/2025 A.M. at 60–61); Payne County prosecutors followed this file-and-wait approach with Warden's co-defendant in the felony larceny case, Sheneda Davis, but not with Warden (Pet. Exs. 70, 71; State's Ex. 6-A at 1, 6–7, 10; State's Exs. 6-E & 6-G; Evid. Hr'g Tr. 04/07/2025 A.M. at 61–63);

- Lee testified that at the time he authored the note on the violation report, "Let's hold off for a while on the application," he had not yet decided whether to accelerate or not accelerate Warden's deferred sentence (Evid. Hr'g Tr. 04/07/2025 A.M. at 69);

- Lee also testified that the Payne County District Attorney's Office had a standing agreement with the Oklahoma County District Attorney's Office to accelerate or not accelerate defendants on deferred or suspended sentences to either help or not jeopardize the prosecution of those defendants in Oklahoma County (Evid. Hr'g Tr. 04/07/2025 A.M. at 70–73, 79–80).

Based on the foregoing, the Court finds that Lee's note on the violation report "Let's hold off for a while on the application," means that on January 18, 2002, Lee had not yet decided whether to file an application to accelerate Warden's deferred sentence. The Court also finds that Lee's initial decision to

hold off on accelerating Warden's deferred sentence is consistent with Lee's testimony that in such cases, in accordance with the standing agreement between the Oklahoma and Payne County District Attorney's Offices, a decision to accelerate would depend on whether or not it would jeopardize the first-degree murder prosecution of Warden in Oklahoma County.

C. Oklahoma County Assistant District Attorneys George Burnett and Fern Smith are aware that Warden is on a 3-year deferred sentence in Payne County that expires in late-October 2003.

Following the January 1, 2002 murder of Ronnie Wipf, Oklahoma City Police Detectives Bill Ricketts and Michael Veasey identified Warden as a suspect. (Evid. Hr'g Tr. 04/07/2025 P.M. at 7, 15–16.) Warden had used her photo ID to rent the motel room where Wipf's murder occurred, and she was also captured renting the room on the motel surveillance video. (*Id.* at 7–8, 24, 30–31, 40.) Detectives Ricketts and Veasey arrested Warden on January 3, 2002, at the Stillwater Police Department where law enforcement had prior contact and "were quite familiar with her," and they booked her into the Oklahoma County jail that same day. (Evid. Hr'g Tr. 04/07/2025 P.M. at 18, 31; Pet. Ex. 38 at 2.)

In order to develop a picture of Warden's criminal history, Detectives Ricketts and Veasey ran a background check on Warden through the Oklahoma City Police Department's Varuna system for contacts with law enforcement locally. They obtained an NCIC ("National Crime Information Center") report on Warden's contacts with law enforcement nationwide. They also obtained Warden's investigation record from the Oklahoma State Bureau of Investigation ("OSBI"). (Evid. Hr'g Tr. 04/07/2025 P.M. at 8–10, 31–32; Pet. Ex. 38 at 4–5.)

The NCIC report that Detective Ricketts received on Warden with an inquiry date of January 11, 2002, shows that at the time Warden was arrested for murder in Oklahoma County, she had previously been charged with "Larceny from the House Felony" in "Payne Co, Stillwater, OK" dated "10/21/2000" to which she pled guilty and was "Deferred: 3 YRS 0 DAYS." (Evid. Hr'g Tr. 04/07/2025 P.M. at 10–11; Pet. Ex. 38 at 5.) According to Detective Veasey, the NCIC report "says that she had pled guilty to a felony charge of larceny from a house out of Payne County for three years, suspended." (Evid. Hr'g Tr. 04/07/2025 P.M. at 40–41.)

Detectives Ricketts and Veasey compiled the criminal history information on Warden and her co-defendants in "a black book" and on a Blue Sheet (also called the Charge Sheet) which they provided to the assigned Oklahoma County Assistant District Attorneys George Burnett and Fern Smith at the time Detectives Ricketts and Veasey recommended first-degree murder and robbery charges against all suspects.[10] (Evid. Hr'g Tr. 04/07/2025 P.M. at 10–11, 15, 24, 26–27, 35–36, 41; Evid. Hr'g Tr. 04/08/2025 P.M. at 69, 72–73; Pet. Exs. 23, 38 at 5.) According to Burnett, "[t]he blue sheet's usually the first thing that comes through" to the District Attorney's Office. (Evid. Hr'g Tr. 04/08/2025 P.M.

[10] Ricketts, Veasey, and Burnett all identified the case record and NCIC report from the Oklahoma County District Attorney's files in this case which are in evidence as Petitioner's Exhibits 23 and 38. They testified that these documents were routinely used by detectives and Oklahoma County prosecutors at the time to obtain and document suspects' criminal history information. Smith testified that she did not recognize the case record from her files in Petitioner's case or know the kind of information it would document. (Evid. Hr'g Tr. 04/08/2025 A.M. at 82, 83, 85.) Smith also testified that she did not know whether she was familiar with NCIC reports at the time she prosecuted Petitioner. (Evid. Hr'g Tr. 04/08/2025 A.M. at 85.)

at 70–71.) The Blue Sheet that Detectives Ricketts and Veasey provided to Burnett and Smith lists Warden's "former conviction" for "Larceny from House" in "Payne" County with a date of "10/21/00." (Pet. Ex. 23.) According to Detective Ricketts, the "AFCF" notation on the Blue Sheet after the recommended first-degree murder and robbery charges against Warden would have further informed Burnett and Smith about Warden's Payne County deferred sentence. (Evid. Hr'g Tr. 04/07/2025 P.M. at 19, 25–28; Evid. Hr'g 04/08/2025 P.M. at 71.)

Burnett and Smith charged Petitioner, Zjaiton, Warden, and Bateman with first-degree felony murder, conspiracy to commit robbery, and robbery with a dangerous weapon, and sought the death penalty against the Wood brothers. (Pet. Ex. 64; O.R. 72, 79–84.) Burnett and Smith were both seasoned prosecutors at the time. (Evid. Hr'g Tr. 04/08/2025 P.M. at 68; Evid. Hr'g Tr. 04/08/2025 A.M. at 66.) Burnett worked in the Oklahoma County District Attorney's Office from 1986–1992 and again from 1996–2006. (Evid. Hr'g Tr. 04/08/2025 P.M. at 61.) Smith began working in the Oklahoma County District Attorney's Office in the early 1980s. (Evid. Hr'g Tr. 04/08/2025 A.M. at 66–67.) Burnett and Smith prosecuted every type of case while at the Oklahoma County District Attorney's Office, including capital cases. (Evid. Hr'g Tr. 04/08/2025 P.M. at 61–62; Evid. Hr'g Tr. 04/08/2025 A.M. at 67.)

As experienced prosecutors, it would have been a matter of "routine" for Burnett and Smith to examine and understand the prior convictions and charges of the individuals they prosecuted, including Petitioner, Warden, and their co-

defendants. (Evid. Hr'g Tr. 04/08/2025 P.M. at 68.) Burnett testified that this is because:

> [O]bviously you can enhance punishment for any offender if they have records. And then at the same time you can use that for the determination of whatever kind of plea agreement or plea bargaining you may want to do in a case. . . . [and] if [a defendant] – if he takes the stand you could obviously use it for impeachment evidence.

(Evid. Hr'g Tr. 04/08/2025 P.M. at 69.) Smith testified that in prosecuting a death penalty case it would be important for her to know and understand the prior convictions and charges against the individuals she prosecuted in cases going to a jury trial because prior convictions could be used to enhance a defendant's punishment. (Evid. Hr'g Tr. 04/08/2025 A.M. at 79–80.)

Burnett and Smith testified they were both aware while prosecuting Warden for first-degree murder and related crimes that she was still on a deferred sentence in Payne County. (Evid. Hr'g Tr. 04/08/2025 A.M. at 95–96; Evid. Hr'g Tr. 04/08/2025 P.M. at 29, 79.) In addition, a basic review of the Blue Sheet and Warden's NCIC Report which Burnett and Smith received and were in their files would have informed them that at the time they prosecuted Warden she was on a 3-year deferred sentence in Payne County that expired sometime in late-October 2003. (Pet. Exs. 23, 38 at 5); *see also In re LeBlanc*, 884 So. 2d 552, 555, 557 (La. 2004) (attorney competence requires reviewing the case file); *In re Mekler*, 669 A.2d 655, 663–64 (Del. 1995) (attorney diligence requires prompt review of case file).

Wayna Tyner, who represented Petitioner's older brother and co-defendant Zjaiton at his capital trial, testified that she learned about Warden's deferred

sentence in Payne County by reviewing the pre-trial discovery Burnett and Smith provided including the NCIC reports. (Evid. Hr'g Tr. 04/08/2025 A.M. at 7–8.) Tyner testified that she wanted "to know all about that charge" and "the outcome" including by getting the court documents from Warden's Payne County felony case. (Evid. Hr'g Tr. 04/08/2025 A.M. at 8.) That information was relevant to Tyner because:

> [I]f she had a conviction and she testified we would be able to use that as impeachment. If it was a felony conviction we could use that to impeach her testimony and ask for the judge to provide the jury with an instruction showing that she had a felony conviction and that they could use that to determine her believability. And any time a witness takes the stand . . . their credibility is immediately at issue.

(Evid. Hr'g Tr. 04/08/2025 A.M. at 9, 19.) A pre-trial hearing in Petitioner's and Zjaiton's case that occurred on September 3, 2003 reflects that Tyner learned from her review of the discovery and basic research into Warden's Payne County court file that Warden was still on the deferred sentence in Payne County that expired in late-October 2003. (Pet. Ex. 32 at 92–93.)

Based on the foregoing, the Court finds that as seasoned prosecutors Burnett and Smith were aware from the information in their files and "routine examination" of Warden's criminal record early on in the case that she was on a deferred sentence in Payne County that expired in late-October 2003. (Pet. Exs. 23, 38; Evid. Hr'g Tr. 04/08/2025 P.M. at 68–69.) *See Glossip*, 145 S. Ct. at 627 (finding that "the evidence [ ] establishes that the prosecution knew Sneed's statements were false" based on the fact that "[t]he prosecution almost certainly had access to Sneed's medical file").

D. Burnett and Smith need Warden to cooperate, and after she agreed to do so they memorialize their full agreement with Warden in an undisclosed cooperation memorandum reflecting her 35-year deal.

Burnett and Smith ultimately determined that given the evidence in the case it would be better for their capital prosecution of Petitioner to have a cooperating co-defendant who could help them "reach certainty of conviction." (Evid. Hr'g Tr. 04/08/2025 P.M. at 75, 78; Evid. Hr'g Tr. 04/09/2025 P.M. at 8.) Burnett testified that Warden would:

> [M]ake the best witness, just looking at her, that she had that kid – kid – I don't know what's a – kind of – little bit of a child-like appearance. . . . she had the look of someone that if she'd got – that's got overwhelmed in a deal that was more than what she ever intended. She could – she could present to a jury. That was my main focus on her. . . . you always want to look at the believability of a witness.
>
> . . .
>
> I looked at Brandy and – you know, personally I thought she looked – she'd look sympathetic to a jury. That was my – kinda my – didn't matter – her and Lanita both were [the] same with culpability, but she just had a face that I thought juries would believe her. That's why I wanted to use her. . . . Just looking at her I thought she looked more like a kid. She probably – jury might feel sorry for her a little bit listening to her testimony, and that's – I thought she – her physical characteristics were what's critical, not so much – you know, she's going to tell the same story that we thought we had at the time that Bateman could tell, you know?

(Evid. Hr'g Tr. 04/09/2025 P.M. at 8–9; Evid. Hr'g 04/08/2025 P.M. at 78.)

Burnett and Smith approached Warden and her attorney Janet Cox at the Oklahoma County Public Defender's Office about cooperating. (Evid. Hr'g Tr. 04/08/2025 P.M. at 82.) According to Burnett, involved negotiations ensued because Cox and Warden were pushing for the best deal they could get, while Burnett and Smith wanted Warden to have a sentence that was significant

enough for the jury not to discount her testimony. (Evid. Hr'g 04/08/2025 P.M. at 83–86.)

On January 28, 2003, Burnett and Smith worked with Cox to arrange for Warden to provide a videotaped statement to Oklahoma County District Attorney Investigator Glenn Ring. (Pet. Ex. 31.) The very next day, Burnett and Smith filed in Petitioner's case a "Summary of Testimony of Witnesses for the First Stage of the Trial" and a "Summary of Testimony of Witnesses for the Second Stage of the Trial" in which they noticed Warden as a witness for the prosecution and her expected testimony against Petitioner directly incriminating him at both stages. (O.R.1 at 193–95, 201–03.)

The cooperation memorandum which this Court obtained from Warden's casefile at the Oklahoma County Public Defender's Office during a recess at the evidentiary hearing on April 9, 2025, shows that on February 4, 2003, Burnett, Smith, Cox, and Warden agreed that Warden would receive a sentence of 35 years in prison in exchange for "WARDEN's interview this date, to be conducted by the Office of the District Attorney, with Investigator Glenn Ring," "the truthfulness of the statements made and BRANDY WARDEN'S agreement to testify truthfully at the time of jury trial against one or all co-defendants." (Court's Ex. 1; Evid. Hr'g Tr. 04/09/2025 A.M. at 36–37.) The cooperation memorandum shows that Burnett, Smith, Cox, and Warden also agreed that "BRANDY WARDEN, will not be held in custody, pending further proceedings, in the Oklahoma County Detention Center, but will be placed in protective custody at a similar institution." (Court's Ex. 1.)

Warden provided the videotaped statement to Ring on February 4, 2003 in which she directly incriminated Petitioner in Wipf's murder and in the robbery of a pizza restaurant in Cleveland County that occurred the evening before the crime. (Pet. Ex. 31 at 2–4.) Thereafter, in accordance with the cooperation memorandum, Warden was transferred out of the Oklahoma County Detention Center and placed in protective custody at the Cleveland County Jail. (Pet. Ex. 57 at 23.)

Burnett testified that it was important to Warden's credibility for the jury to be informed that she was being punished with a 45-year sentence which is what ODOC construes as a life sentence. (Evid. Hr'g 04/08/2025 P.M. at 85–86 (Burnett testifying "that – you want them – you want the sentence to be significant enough to be, you know, what DOC construes as life" and that "for the State – it's always – we had to give them a significant sentence for the jury not to think that their testimony is discounted").) The plea agreement that was filed in Warden's case on February 20, 2003 represented that Warden was pleading guilty in exchange for a 45-year sentence and Warden's testimony against Petitioner and her co-defendants, including the statements she provided to Ring. (Pet. Ex. 7.) Burnett identified this plea agreement and testified that it was not the prosecution's full agreement with Warden but only a "summary." (Evid. Hr'g Tr. 04/09/2025 A.M. at 36–37.) Burnett also testified that the prosecution's full agreement with Warden was the cooperation memorandum which was never filed in Warden's case. (Evid. Hr'g Tr. 04/09/2025 A.M. at 36–37.)

Burnett testified that whatever he disclosed to Petitioner's trial counsel Johnny Albert about the prosecution's agreement with Warden "would be in the cooperation memorandum" and "[t]he gist of it was that she would testify truthfully and she'd receive a 45 year sentence on accessory I think it was . . . there's several other conditions and just don't recall all of them." (Evid. Hr'g Tr. 04/0/2025 A.M. at 9.) Burnett also testified that he could not recall if he provided Albert with a copy of the cooperation agreement itself. (Evid. Hr'g Tr. 04/09/2025 P.M. at 28–29.) The record shows that only the plea agreement representing Warden's promised sentence as 45 years' imprisonment was disclosed to Petitioner's counsel.

At Petitioner's trial, Albert cross-examined Warden "about this 45-year sentence you got," whether it was "a non-violent sentence," and whether she "will get out faster than had you been convicted of a violent crime[.]" (Tr. 04/01/2004 at 189.) This reflects that Albert cross-examined Warden about the information in her plea agreement. Tyner also identified Warden's plea agreement to a 45-year sentence as the extent of what she obtained about Warden's deal prior to Zjaiton's trial. (Pet. Ex. 7; Evid. Hr'g Tr. 04/08/2024 A.M. at 12.) When questioned by this Court at the evidentiary hearing on April 9, 2025, neither counsel for Petitioner nor the State had ever seen the cooperation memorandum or had it in their files, even after having reviewed the Oklahoma County District Attorney's files in this case. (Evid. Hr'g Tr. 04/09/2025 A.M. at 37; Evid. Hr'g Tr. 04/07/2025 A.M. at 22–42.)

Smith testified that at the time she prosecuted Petitioner the Oklahoma County District Attorney's Office had an open file policy. (Evid. Hr'g Tr. 04/08/2025 P.M. at 27.) When asked whether Albert or trial counsel for the other defendants reviewed the prosecution's file pursuant to that open file policy, Smith testified "I don't have an – a recollection of it, but of course they did." (Evid. Hr'g Tr. 04/08/2025 P.M. at 56 (Smith also testifying "I don't recall specifically, but I know they did.").) Albert's invoice for his work on Petitioner's case does not reflect that he reviewed the prosecution's file pursuant to an open file policy. (O.R.1 at 822–23.) But even assuming both that this open file policy existed and that Albert had reviewed the prosecution's file, there is no evidence that the cooperation memorandum was in the prosecution's file. Neither counsel for Petitioner nor the State had a copy of or seen it before, and the only copy that was located was in Warden's casefile at the Oklahoma County Public Defender's Office, which had represented Warden. (Evid. Hr'g Tr. 04/09/2025 A.M. at 36–37.) And in any event, an open file policy is neither a necessary nor a sufficient means for a prosecutor to discharge their affirmative obligation under *Brady* to disclose favorable evidence to the defense. *Smith*, 50 F.3d at 828.

Based on the foregoing, the Court finds that the cooperation memorandum memorializing the prosecution's full agreement with Warden was not disclosed to the defense prior to Petitioner's trial. *See Smith*, 50 F.3d at 829 (finding that "perhaps the most highly probative evidence relating to the disclosure *vel non* of this report is the conspicuous absence of any cross-

examination of [the prosecution's witness] on matters contained in [the] report, matters that were extremely relevant to [petitioner's] defense").

Warden's plea agreement, filed on February 20, 2003, described her deal as 45 years' imprisonment in exchange for her testimony against her co-defendants, including Petitioner. (Pet. Ex. 7.) However, the prosecution's full agreement with Warden contained in the undisclosed cooperation memorandum actually promised Warden 35 years' imprisonment in exchange for her testimony. (Evid. Hr'g Tr. 04/09/2025 A.M. at 36–37; Court's Ex. 1.) Fulfillment of that undisclosed 35-year promise would require Warden to pursue a judicial modification of her 45-year sentence. Under Oklahoma law at the time, judicial modifications did not apply to defendants who were "convicted felons . . . for any previous felony conviction during the ten-year period preceding the date that the sentence" seeking to be judicially modified "was imposed." Okla. Stat. Ann. tit. 22, § 982a(A) (2003). In light of this, Oklahoma County prosecutors could not have secretly promised Warden in February 2003 the 35 years' imprisonment Warden ultimately received through the judicial modification procedure without having first ensured through an agreement with Payne County prosecutors that Warden's deferred sentence would not be accelerated to a felony conviction.

Ten days after Petitioner was sentenced to death, Warden obtained a hearing on her request for judicial modification of her 45-year sentence. (*Compare* Tr. 04/05/2004 at 164 (jury sentencing Petitioner to death on April 5, 2004), *with* State's Ex. 2-F (showing that Warden's judicial modification

hearing occurred on April 15, 2004).) Although Oklahoma law at the time required judicial modification hearings to occur "in open court," Okla. Stat. Ann. tit. 22, § 982a(C) (2003), Warden's modification hearing occurred off-the-record on April 15, 2004. (State's Ex. 1-A at 52 (docket entry showing "Court reporter waived"); *Black's Law Dictionary* (7th ed. 1999) (noting that "[o]pen court" usually "refers to a proceeding in which formal entries are made on the record" and "[t]he term is distinguished from a court that is hearing evidence in camera or from a judge that is exercising merely magisterial powers"). That same day, an order modifying Warden's sentence from 45 years down to 35 years was filed in this case. (State's Ex. 2-F.) Nowhere in that Order does it reflect that Oklahoma County prosecutors objected to Warden's modification of her sentence to 35 years' imprisonment. (*Id.*) However four days later, on April 19, 2004, a *second* order modifying Warden's sentence from 45 years down to 35 years was filed in this case. (Court's Ex. 2.) In that second order, the language "over strenuous objection of the State" appears for the first time and is underlined and initialed by Burnett. (Court's Ex. 2.)

When this Court asked Burnett why he objected to Warden's modification of her sentence to 35 years' imprisonment, Burnett testified "[b]ecause of what we're doing here today. . . . somebody thinks there's some wink-wink deal, and then all of a sudden you're in a mess, just like we're in here today. And I'm sure that's why I threw a fit at that deal." (Evid. Hr'g Tr. 04/09/2025 P.M. at 36–38.) Burnett had just testified that the cooperation memorandum promising Warden 35 years' imprisonment was the prosecution's full agreement with Warden all

along. (Evid. Hr'g Tr. 04/09/2025 A.M. at 36–37; Evid. Hr'g Tr. 04/09/2025 P.M. at 4–6.) He had also just testified that when he told Petitioner's jury that Warden's deal was for 45 years, when in fact it was for 35 years, that was because of his "ability to say something stupid to a jury" and he "made a mistake probably, best I can tell." (Evid. Hr'g Tr. 04/09/2025 P.M. at 34–35.) The Court thus finds that to the extent prosecutors objected to the modification of Warden's sentence to the 35 years they promised her in the cooperation memorandum, it was to conceal that this was the prosecution's deal with Warden all along. The Court also finds that even assuming Burnett and Smith genuinely objected later to the modification of Warden's sentence to 35 years' imprisonment, the undisclosed cooperation memorandum proving that 35 years' imprisonment is what Burnett and Smith promised Warden all along would have rendered hollow any objection to Warden receiving exactly what they had promised her.

E. At Warden's February 19, 2003 plea hearing, Smith and Cox falsely inform the Court that Warden's Payne County deferred sentence was expired and therefore was not part of Warden's deal in the Oklahoma County murder case.

Warden's guilty plea hearing occurred on February 19, 2003. (Pet. Ex. 6-1.) At that hearing, Smith told the Court that Warden's Payne County deferred sentence was expired and, for that reason, played no part in Warden's Oklahoma County deal:

> [Smith] And the defendant, it is my understanding, the defendant has a prior deferred sentence out of Payne County and that has now expired; is that correct?

[Cox]	That is correct, Judge.
[Smith]	That is not part of our plea agreement to do anything with that. Because at this point in time, it is my understanding it has expired. And we cannot revoke or do anything with that as a result of her plea of guilty in this case.
[The Court]	Okay.
[Cox]	It is my understanding, Judge, that the deferred sentence has expired. There was – I think that was close in time to when this case was filed. And Payne County never filed an application to revoke the case. I assume it is too late to do it.
[The Court]	I am getting the jest is, the point being, there was no agreement made in reference to that case at all for any purpose.
[Smith]	Right.
[Cox]	Right.
[Smith]	That is correct. . . . I want to be clear on the record, I can't do anything with it because it has expired.
[The Court]	Okay.
[Smith]	And it is in another county as well.
[The Court]	Okay.

(Pet. Ex. 6-1 at 13–14.)

During the evidentiary hearing, Smith testified that before Warden's February 19, 2003 plea hearing, she had been prosecuting Warden for over a year and "didn't see anything in her background that showed she was a convicted felon." (Evid. Hr'g Tr. 04/08/2025 A.M. at 94.) Smith also testified that she "reviewed [Warden's] files" and "talked with [Warden's] lawyer" before she signed Warden's plea agreement representing that Warden had "no prior felony convictions." (*Id.*; Pet. Ex. 7 at 6.) While Smith testified that she told the Court at Warden's February 19, 2003 plea hearing that Warden's Payne County deferred sentence was expired because that was her understanding and she "trusted Ms. Cox," Smith also testified that she only "partly" relied on Cox who

"had some reason to believe that the sentence had been expired." (Evid. Hr'g Tr. 04/08/2025 P.M. at 52.)

The Court has concerns about the representations made by Smith and Cox at Warden's change of plea hearing on February 19, 2003. During that plea hearing, Smith and Cox each represented that Warden's guilty plea would result in a sentence of 45-years, when the evidence shows the parties had privately agreed in the cooperation memorandum to a reduction of that sentence to 35 years. The falsity of that representation taints the additional representation made by Smith and Cox during the plea hearing that Warden's deferred sentence had expired, which was also untrue.

As a seasoned prosecutor, Smith would not have relied exclusively on the understanding of a defendant's lawyer for information about that defendant's criminal record. Smith testified that she only "partly" relied on Cox about whether Warden's deferred sentence had expired, and had also independently looked at Warden's file. (Evid. Hr'g Tr. 04/08/2025 A.M. at 94; Evid. Hr'g Tr. 04/08/2025 P.M. at 52.) And as this Court has already found, Smith's review of Warden's files, of the information contained in her own files, and "routine" examination and understanding of Warden's prior criminal history would have informed her prior to February 19, 2003, that Warden's 3-year deferred sentence in Payne County did not expire until sometime in late-October 2003. *See* Section II(C), *supra*.

As for Cox, she had a Sixth Amendment duty to provide Warden with effective representation and could not have ethically advised Warden to plead

guilty to felonies in Oklahoma County while on probation for her Payne County crime without first knowing the consequences that would have on Warden's criminal liability in Payne County. *Strickland v. Washington*, 466 U.S. 668 (1984) (the Sixth Amendment entitles criminal defendants to the effective assistance of counsel); *Padilla v. Kentucky*, 559 U.S. 356 (2010) (holding defense counsel is constitutionally deficient under *Strickland* by failing to advise client on the immigration consequences of guilty plea). In order to conclude that Cox made an innocent mistake when she told the Court in February 2003 that Warden's deferred sentence had expired, this Court would have to find that Cox provided Warden what amounts to constitutionally ineffective assistance by: 1) failing to know basic facts about Warden's criminal history, including when her Payne County deferred sentence expired; and 2) failing to know and therefore ethically advise Warden on the consequences of her Oklahoma County guilty plea, including the criminal liability she could face in Payne County by pleading guilty to serious felonies in Oklahoma County during the deferred sentencing period while on probation.

The evidence before the Court thus shows that both Smith and Cox knew that Warden's deferred sentence in Payne County did not expire until sometime in late-October 2003 when they told the Court otherwise at Warden's February 19, 2003 plea hearing. And as the secret cooperation memorandum shows, the prosecutors and Warden's lawyer also knew by February 19, 2003 that Warden would face no adverse consequences or additional criminal liability in Payne County as a result of her Oklahoma County guilty plea. *See* Section II(D), *supra*.

At the evidentiary hearing, when the State presented Warden with her plea agreement, Warden testified that she "honestly don't recall any of this." (Evid. Hr'g Tr. 04/07/2025 P.M. at 60.) However, Warden recalled and testified that she was still on probation for her Payne County deferred sentence when she pled guilty to lesser felonies in the Oklahoma County murder case in February 2003. (Pet. Ex. 7; Evid. Hr'g Tr. 04/07/2025 P.M. at 46–47.) Warden also testified that it would have been inaccurate for Cox and the prosecutors to tell the Court that Warden had finished her probation at the time she pled guilty. (Evid. Hr'g Tr. 04/07/2025 P.M. at 46–47.) If Warden, who was a 22-year old defendant in a murder case without legal training, was aware that she was still on probation for her Payne County crime when she pled guilty in Oklahoma County in February 2003, there is no credible argument or evidence showing that Smith and Cox were not also aware of that too.

Smith and Burnett testified that Warden's Payne County deferred sentence "really didn't matter" and was "a nonviolent felony crime . . . it didn't make a hill of beans worth of difference." (Evid. Hr'g Tr. 04/08/2025 P.M. at 37, 95.) However, the totality of the evidence shows that it did matter to Burnett's and Smith's capital prosecution of Petitioner whether Warden was a previously convicted felon as a result of her Payne County crimes by the time she testified for the prosecution at Petitioner's trial, including because it was a necessary component of the true agreement Burnett and Smith had entered into with Warden.

Burnett testified that had Warden's deferred sentence been accelerated to a felony conviction, Warden could have been impeached with that felony which also qualified as "a crime of moral turpitude" and "a crime – act involving dishonesty." (Evid. Hr'g Tr. 04/08/2025 P.M. at 94.) The record also shows that in Petitioner's case, Burnett and Smith crafted their theory of Petitioner's guilt and moral culpability warranting the death penalty around Warden's comparatively lesser responsibility for and participation in the crimes and her lack of a prior criminal record. (Tr. 04/01/2004 at 137–39; 146–52; Tr. 04/02/2004 at 152–53, 161–65, 187, 198–99; Tr. 04/05/2004 at 5, 130, 134.) *See also* Section II(J), *infra*. They argued to the jury that the story Warden told them "is the right one," that Warden had "no prior felony convictions" before Petitioner forced her to participate in these crimes, and told the jury that Warden was someone who Petitioner "manipulated . . . into doing the things she did and now she is serving 45 years in prison." (Tr. 04/01/2004 at 137–39; 146–52; Tr. 04/02/2004 at 152–53, 161–64, 187, 198–99; Tr. 04/05/2004 at 5, 130, 134.) At the same time, Smith used Zjaiton's prior felony convictions to impeach his testimony and urged the jury to consider those prior felony convictions in evaluating his credibility. (Tr. 04/02/2004 at 186.) Moreover, as this Court has already found, ensuring that Warden's deferred sentence was not accelerated to a felony conviction was critical to Burnett's and Smith's ability to promise Warden in the undisclosed February 2003 cooperation memorandum the 35-year sentence she ultimately received. *See* Section II(D), *supra*.

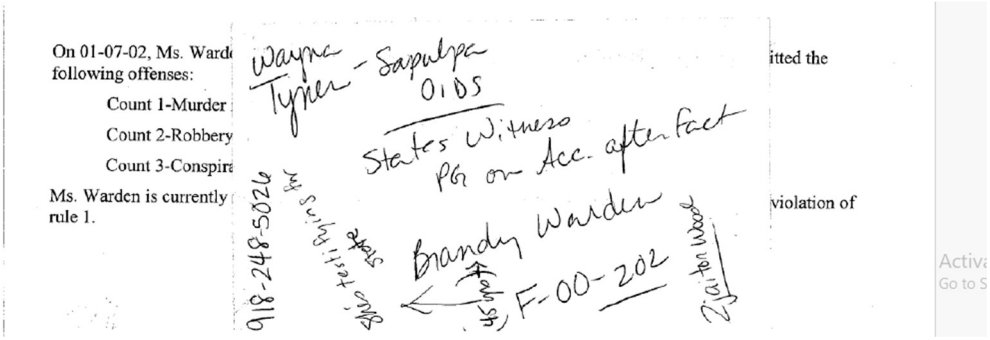
F. Oklahoma and Payne County prosecutors give Wayna Tyner no information about whether Warden's Payne County deferred sentence is part of her Oklahoma County deal.

Wayna Tyner testified that after obtaining Warden's Oklahoma County plea agreement in February 2003 and learning from her review of the discovery and basic research into Warden's Payne County court file that Warden was still on a deferred sentence in Payne County, Tyner could not get any information from Burnett or Smith about whether Warden's deferred sentence was part of her Oklahoma County deal. (Evid. Hr'g Tr. 04/08/2025 A.M. at 7–13 (Tyner testifying that "I don't recall anybody telling me anything"); *id.* at 18 (Tyner testifying that "I was asking everybody" about any deals involving Warden's Payne County deferred sentence and "nobody told me anything.").)

After receiving no answers from Burnett or Smith, Tyner reached out to prosecutors in Payne County some time prior to August 6, 2003. (Evid. Hr'g Tr. 04/08/2025 A.M. at 13, 15–16 (Tyner testifying that she filed the August 6, 2003 Motion to Reveal all Deals only after getting no response from Oklahoma or Payne County prosecutors to her inquiries about whether Warden's deferred sentence was part of Warden's Oklahoma County deal).) Tyner testified that:

> I called the Payne County DA's office. I wanted to know what was going on. I also knew that, and it was I'm sure in my discovery, that the probation – that her probation and parole officer had written a violation report that was sent to the Payne County DA's office advising the Payne County District Attorney's Office of her arrest on murder charges. And nothing had happened. So I contacted the Payne County DA's office to find out what was going on. I knew that her probation had not – you know, her probation had not expired.

(Evid. Hr'g Tr. 04/08/2025 A.M. at 13–14.) Tyner testified that she did not speak with anyone at the Payne County District Attorney's Office but would have left a message. (Evid. Hr'g Tr. 04/08/2025 A.M. at 14, 17.) Tyner was shown the following note and identified her name and telephone number at the Oklahoma Indigent Defense System's Sapulpa office where she was working at the time:



(Pet. Ex. 15; Evid. Hr'g Tr. 04/08/2025 A.M. at 16–17.) Tyner testified that the handwriting in the note was not hers, but she "would have left a detailed message" with the Payne County District Attorney's Office about what her "call was in reference to." (Evid. Hr'g Tr. 04/08/2025 A.M. at 17.) The Court finds that this handwritten note was authored by an employee of the Payne County District Attorney's Office who took the message Tyner left sometime prior to August 6, 2003.

No one from the Payne County District Attorney's Office ever called Tyner back. (Evid. Hr'g Tr. 04/08/2025 A.M. at 14, 16; Evid. Hr'g Tr. 04/09/2025 P.M. at 72 (Antonioli testifying that he never called Tyner back or spoke to her after seeing the note with her name and telephone number).) Tyner testified that she "got no information from anybody. Not the Payne County DA's office, not the Oklahoma County DA's office." (Evid. Hr'g Tr. 04/08/2025 A.M. at 14.)

Tyner testified that at no time did Burnett or Smith ever inform her that Warden's Oklahoma County deal involved her Payne County deferred sentence. (Evid. Hr'g Tr. 04/08/2025 A.M. at 13.) Tyner also testified that Burnett and Smith never told her that the Oklahoma County District Attorney's Office and the Payne County District Attorney's Office had a standing agreement that if a defendant like Warden on a deferred sentence in Payne County was charged with serious crimes in Oklahoma County, Payne County prosecutors would wait and see what Oklahoma County prosecutors wanted them to do before deciding how to act on that deferred sentence. (Evid. Hr'g Tr. 04/08/2025 A.M. at 13.)

Tyner testified that the information about the full extent of Warden's deal was "[n]ot just for me to know but for a jury ultimately to determine what kind of weight to give her testimony" and her "motivation to testify falsely." (Evid. Hr'g Tr. 04/08/2025 A.M. at 11–12, 19.) Because the prosecutors in Oklahoma or Payne Counties were giving Tyner no information about whether Warden's Oklahoma County deal included her Payne County deferred sentence, Tyner filed a Motion to Reveal all Deals on August 6, 2003. (Pet. Ex. 17; Evid. Hr'g Tr. 04/08/2025 A.M. at 15.) According to Tyner, "I put on the record when this was heard the steps that I had taken because it smelled to me." (Evid. Hr'g Tr. 04/08/2025 A.M. at 16.)

G. <u>At the September 3, 2003, hearing on Tyner's Motion to Reveal all Deals, the Court orders Burnett and Smith to disclose to the defense any deals involving Warden's Payne County deferred sentence.</u>

Tyner's Motion to Reveal All Deals was filed on August 6, 2003. (Pet. Ex. 17 at 1.) That motion requested "an Order directing the State of Oklahoma to

reveal all deals, offers of leniency or favorable treatment of whatever form or nature[.]" (Pet. Ex. 17 at 1.) Smith responded to Tyner's motion on August 18, 2003 stating that "the State has fully complied with 22 O.S. 2201 [*sic*], et. seq., and will continue to disclose any new evidence." (Pet. Ex. 18.)

The hearing on Tyner's Motion to Reveal All Deals occurred on September 3, 2003. (Pet. Ex. 17; Pet. Ex. 32 at 92.) Tyner put on the record her concern about an undisclosed deal between Oklahoma County and Payne County prosecutors not to accelerate Warden's deferred sentence:

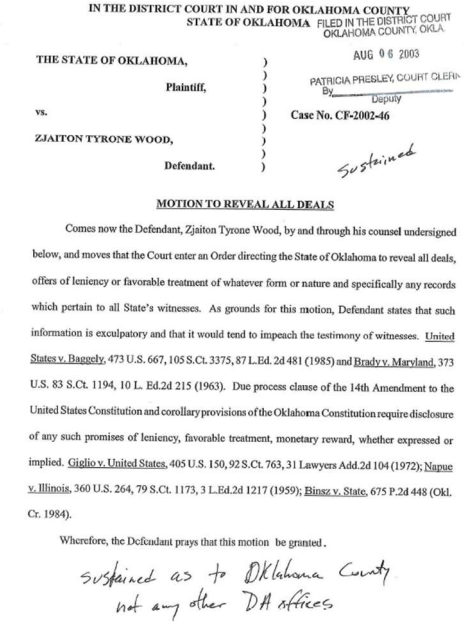
> Your Honor, if I could put on the record, I am concerned about Miss Brandy Warden does have an accelerated – she is still on a deferred judgment and sentence out of Payne County. That does not expire until sometime in October of this year. I have been in the process of trying to contact one of the prosecutors that is on that case to determine whether or not she is going to be accelerated. I also know right after this offense allegedly occurred her probation officer, and I have a report from January 17th, indicating this offense as an alleged violation and others in addition to that. And the probation and parole requested that to be accelerated. However, nothing has been done on behalf of the prosecution. I am trying to find out what it is and if there was any deal.

(Pet. Ex. 32 at 93–94.) The Court sustained Tyner's motion, ordering that:

> Any and all deals and/or agreements that the DA's office of Oklahoma County has with any witness must be disclosed. I am sustaining that. If the Payne County DA on their own discretion decides not to accelerate her and they haven't agreed or talked to them in reference to that, then sobeit. But any and all deals that this DA's office has made with any other and all other DA's offices anywhere in the world in reference to any witness must be disclosed. If they haven't made a deal, they obviously can't disclose anything. So witnesses, any and all deals, including those you mentioned in reference to any other deals, it will be sustained.

(Pet. Ex. 32 at 92–93.)

Burnett, who appeared at this hearing, authored the following handwritten note on his copy of Tyner's motion:



IN THE DISTRICT COURT IN AND FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
AUG 06 2003
PATRICIA PRESLEY, COURT CLERK
By _____ Deputy

THE STATE OF OKLAHOMA, Plaintiff,
vs.
ZJAITON TYRONE WOOD, Defendant.
Case No. CF-2002-46

Sustained

MOTION TO REVEAL ALL DEALS

Comes now the Defendant, Zjaiton Tyrone Wood, by and through his counsel undersigned below, and moves that the Court enter an Order directing the State of Oklahoma to reveal all deals, offers of leniency or favorable treatment of whatever form or nature and specifically any records which pertain to all State's witnesses. As grounds for this motion, Defendant states that such information is exculpatory and that it would tend to impeach the testimony of witnesses. United States v. Baggely, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed. 2d 481 (1985) and Brady v. Maryland, 373 U.S. 83 S.Ct. 1194, 10 L. Ed.2d 215 (1963). Due process clause of the 14th Amendment to the United States Constitution and corollary provisions of the Oklahoma Constitution require disclosure of any such promises of leniency, favorable treatment, monetary reward, whether expressed or implied. Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 Lawyers Add.2d 104 (1972); Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); Binsz v. State, 675 P.2d 448 (Okl. Cr. 1984).

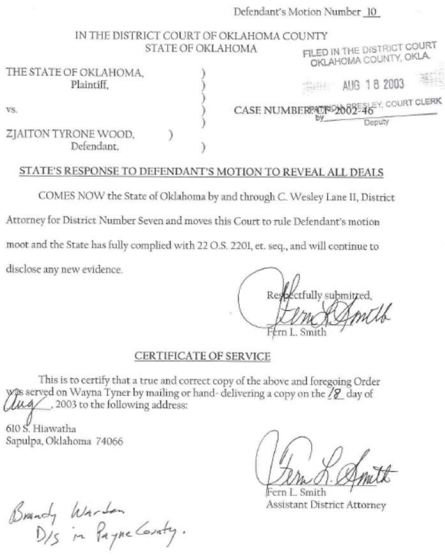
Wherefore, the Defendant prays that this motion be granted.

sustained as to Oklahoma County not any other DA offices

(Pet. Ex. 82-1; Evid. Hr'g Tr. 04/08/2025 A.M. at 63–64; Evid. Hr'g 04/09/2025 A.M. at 11.) Burnett testified that he did not recall what he meant when he wrote these notes and would "just write down what the judge was saying." (Evid. Hr'g Tr. 04/09/2025 A.M. at 12.) When asked whether his understanding in writing this note was "that you, as Oklahoma County, had to disclose deals with Brandy Warden, not deals involving other DA offices?" Burnett testified that "I can't – I don't remember." (Evid. Hr'g Tr. 04/09/2025 A.M. at 14.) Read literally, Burnett's note reflects that the Court "sustained" Tyner's Motion to Reveal All Deals "as to Oklahoma County" but did "not" sustain Tyner's Motion to Reveal All Deals as to "any other DA offices." And considered in context based on the Court's ruling at this hearing, Burnett's note reflects his understanding that the Court was ordering the Oklahoma County District Attorney's Office to reveal their

deals with Warden, but was not ordering other District Attorney's Offices to do so.

Burnett also authored the following handwritten note on the State's Response to Tyner's Motion to Reveal All Deals:



Defendant's Motion Number 10

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
AUG 18 2003
TIM RHODDY, COURT CLERK
By _____ Deputy

THE STATE OF OKLAHOMA, Plaintiff,
vs.
ZJAITON TYRONE WOOD, Defendant.

CASE NUMBER CF-2002-46

STATE'S RESPONSE TO DEFENDANT'S MOTION TO REVEAL ALL DEALS

COMES NOW the State of Oklahoma by and through C. Wesley Lane II, District Attorney for District Number Seven and moves this Court to rule Defendant's motion moot and the State has fully complied with 22 O.S. 2201, et. seq., and will continue to disclose any new evidence.

Respectfully submitted,
Fern L. Smith

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Order was served on Wayna Tyner by mailing or hand- delivering a copy on the 18 day of Aug, 2003 to the following address:

610 S. Hiawatha
Sapulpa, Oklahoma 74066

Fern L. Smith
Assistant District Attorney

Brandy Warden D/S in Payne County.

(Pet. Exs. 19, 59; Evid. Hr'g Tr. 04/09/2025 A.M. at 15.) When asked whether he wrote this note because Warden's deferred sentence in Payne County was relevant, Burnett testified:

> A. [Burnett] I don't know. I mean, I wrote it at the bottom here. I don't know. I don't know if something was said at the motion hearing or what. But I just wrote that on there.
>
> Q. [Bass] And you don't remember why you wrote that?
>
> A. [Burnett] No.

(Evid. Hr'g Tr. 04/09/2025 A.M. at 15.) In light of Burnett's lack of memory as to why he authored the note "Brandy Warden D/S in Payne County," the Court is left with a few possible explanations based on the totality of the evidence.

As this Court has already found, Burnett's and Smith's full agreement with Warden contained in the February 2003 cooperation memorandum was never disclosed to the defense, and fulfillment of the cooperation memorandum's 35-year promise required Burnett and Smith to ensure Warden's deferred sentence was not accelerated to a felony conviction. *See* Section II(D), *supra*. Moreover, at the time of this September 3, 2003 hearing, neither Burnett nor Smith had given Tyner any information about whether their deal with Warden included her Payne County deferred sentence. *See* Section II(F), *supra*. Thus, by the September 3, 2003 hearing on Tyner's motion to reveal all deals, Burnett was aware that Warden's deferred sentence in Payne County was part of her deal which had not been disclosed to Tyner. Burnett was also aware from the information he had in his files, from his "routine" examination of Warden's criminal history, and from Tyner's on-the-record statements at the September 3, 2003 hearing that Warden's deferred sentence was set to expire in late-October 2003. *See* Section II(C), *supra*. (Pet. Ex. 32 at 92–93.) And through Tyner making a record of her concerns that Warden's deal included her Payne County deferred sentence, Burnett would have also been aware that Tyner was pushing for an answer not just from him and Smith, but also from prosecutors in Payne County, as to whether Warden's deferred sentence was part of her Oklahoma County deal. (Pet. Ex. 32 at 92–93.) Thus, when Burnett wrote the note "Brandy Warden D/S in Payne County" on his copy of the State's response to Tyner's Motion to Reveal all Deals, he may have merely jotted down something that was said at the September 3, 2003 hearing. (*See* Evid. Hr'g Tr. 04/09/2025 A.M. at 15.) But

when considered on the totality of the evidence and in the context of this Court's other findings regarding the true nature of the prosecution's agreement with Warden, the Court finds that, at a minimum, the note reflects Burnett's awareness that Warden's deferred sentence in Payne County was part of her deal, which had not been disclosed.

H. Burnett and Smith sanitize the felony record of another prosecution witness against Petitioner, Coleman Givens, fail to document their full agreement with Givens in exchange for his testimony against Petitioner in the plea agreement, and fail to disclose those benefits to Petitioner's trial counsel.

Probative evidence before the Court shows that in Petitioner's case, Burnett and Smith had the motive and plan to sanitize the felony records of prosecution witnesses against Petitioner, file plea agreements that did not document their full agreement with prosecution witnesses in exchange for testimony against Petitioner, and conceal those benefits from Petitioner's trial counsel and jury. *See* Okla. Stat. Ann. tit. 12, § 2404(B). The evidence shows that this is what Burnett and Smith did with prosecution witness Coleman Givens, which is relevant to and probative of their motive and plan to do that with Warden as well. (Pet. Exs. 82-3, 84-1, 84-2, 84-4, 84-6, 85-1, 85-3.) Okla. Stat. Ann. tit. 12, §§ 2401–03, 2404(B).

Givens testified for the prosecution at the first stage of Petitioner's trial. (Tr. 03/31/2004 at 224.) He testified that in the early morning hours of January 1, 2002, he was staying at a motel connected to the Ramada Inn where Wipf's murder occurred. (*Id.* at 224–25.) He "heard a commotion across at the Ramada" and "sat there and watched that for a while." (*Id.* at 227.) Givens testified that he

heard pounding and someone saying to open the door. (*Id.*) He testified that the door opened and he saw two girls who he later identified as Warden and Bateman come out of the motel room and two men go inside. (*Id.* at 227–28, 230.) When Smith asked whether the men he saw "were black men or white men?" Givens testified that "[t]heir voice made me think they were black men." (*Id.* at 229.) Givens described one of the men as bigger than the other. (*Id.* at 230.) Givens testified further that he saw four people leave the motel in a little white car. (*Id.* at 233–34.)

Givens also testified that after becoming a witness for the prosecution, he encountered Petitioner and Zjaiton in the Oklahoma County jail where he was incarcerated because of "some outstanding checks" written by his girlfriend without his knowledge. (*Id.* at 231, 234, 260.) He identified Petitioner and testified that Zjaiton was the larger of the two men. (*Id.* at 234–35.) Givens testified that he was "handcuffed" between Petitioner, Zjaiton, Warden, and Bateman and overheard a conversation between Petitioner and his brother and "got a feeling about the voices" of Petitioner and his brother, recognizing them and Petitioner's in particular. (*Id.* at 255–56.) Givens testified that Petitioner and his brother tried to intimidate him. (*Id.* at 258–59.) Smith solicited from Givens testimony that he had received no help from the prosecution in his pending bogus check case in exchange for testifying against Petitioner. (*Id.* at 236–37.)

A handwritten communication obtained from the prosecution's file reflects that Burnett and Smith discussed getting Givens released on his own recognizance from the Oklahoma County jail "after he testifies" against Petitioner

at the July 26, 2002 preliminary hearing. (Pet. Ex. 82-3; Evid. Hr'g Tr. 04/08/2025 A.M. at 87–90 (Smith identifying her handwriting in the communication about Givens); Evid. Hr'g Tr. 04/09/2025 A.M. at 19–20 (Burnett identifying his and Smith's handwriting in the communication about Givens); Tr. 07/26/2002 at 347.) At the time, Givens was incarcerated in the Oklahoma County jail on a felony bogus checks charge. (Pet. Ex. 84-1.)

On July 26, 2002, Burnett had Givens released from custody on his own recognizance in his pending bogus checks felony case. (Pet. Ex. 84-2; Evid Hr'g Tr. 04/09/2025 A.M. at 27–28.) While released on his own recognizance for that felony, Givens was indicted on October 25, 2002 for a second felony of false declaration of ownership to a pawn broker. (Pet. Ex. 85-1.) A minute entry from Givens' consolidated felony cases shows that on December 8, 2003, Burnett had the preliminary hearing conferences in both of Givens' pending felony cases continued until April 1, 2004 because Givens was "to testify in murder trial 1 set in March; 1 set in April." (Pet. Ex. 84-4; Evid. Hr'g Tr. 04/09/2025 A.M. at 29–30.) The record shows that Givens testified against Petitioner on March 31, 2004. (Tr. 03/31/2004 at 224.)

The evidence also shows that on July 8, 2004, 3 months after Petitioner was sentenced to death, Burnett filed a plea agreement in Givens' felony cases in which Burnett dismissed Givens' bogus checks felony entirely and reduced Givens' felony of false declaration to a pawnbroker down to a misdemeanor with a 1 year deferred sentence, costs, and restitution. (Pet. Ex. 85-3; Evid. Hr'g Tr. 04/09/2025 A.M. at 22–23.) The filed plea agreement does not require Givens to

provide any consideration in exchange for these benefits in both of Givens' felony cases. (Pet. Ex. 85-3 at 2; Evid. Hr'g Tr. 04/09/2025 A.M. at 24 (Burnett identifying his filed plea agreement with Givens and testifying that "I don't see – I don't see anything in here about any – I don't see anything in here about what he's required to do").) The evidence shows that the consideration Givens provided in exchange for the benefits he received from Burnett in his pending felony cases, and which Burnett did not document in his filed plea agreement with Givens, was testifying against Petitioner in March 2004.

On July 23, 2004, Burnett filed a motion to dismiss Givens' bogus checks felony "without Costs, Restitution Paid." (Pet. Ex. 84-6; Evid. Hr'g Tr. 04/09/2025 A.M. at 41–42 (Burnett testifying that he thinks his motion dismissing Givens' bogus check felony was filed three months after Petitioner was sentenced to death in April 2004).)

When Burnett was asked whether he ever disclosed to Petitioner's trial lawyer Johnny Albert that Givens was going to get these significant benefits in both of his pending felony cases in exchange for testifying against Petitioner, Burnett testified that he did not "recall whatever conversations I had about all this." (Evid. Hr'g Tr. 04/09/2025 A.M. at 32.) The record before the Court shows that Burnett and Smith did not disclose to Albert that Givens was going to get these benefits in both of his pending felony cases in exchange for testifying against Petitioner. Albert vigorously cross-examined Givens at Petitioner's trial about the benefits Givens had or expected to receive from the prosecution in exchange for his testimony. (Tr. 03/31/2004 at 241–43.) Albert asked Givens

"[i]s your court date after you get through testifying in these cases?" which Givens denied, testifying that his court date "is tomorrow" and was put off previously only because "I asked for it to be put off because I was coming up with the rest of the money I had to pay for." (Tr. 03/31/2004 at 243.) Albert also questioned whether Givens being handcuffed to Petitioner and his brother twice while in the county jail was mere coincidence. (Tr. 03/31/2004 at 260 (Albert asking Givens "[s]o you are going to be a witness for the state and they have you handcuffed with two men charged with murder . . . And they do it the second day too?" to which Givens responded "Yes.").) But with the benefits the prosecution had provided to and promised Givens concealed, Albert was cross-examining Givens in defense of Petitioner with one hand tied behind his back. *See Dodd v. State*, 2000 OK CR 2, ¶¶ 24–25, 993 P.2d 778, 784 ("Today we adopt a procedure to ensure complete disclosure so that counsel will be prepared to cross-examine an informant-witness . . . the state is required to disclose in discovery: . . . any deal, promise, inducement, or benefit that the offering party has made or may make *in the future* to the informant . . ." (emphasis in original)); Tr. 09/03/2003 at 91 (the Court instructing Burnett that "[a]ny and all jailhouse informants you have got to disclose pursuant to the Dodd opinion")).

In light of Albert's strategy on cross-examination to draw out Givens' incentives for testifying and the benefits he had received in exchange for testifying against Petitioner, had Burnett and Smith disclosed that they postponed the preliminary hearing conferences in both of Givens' felony cases until after he testified against Petitioner, and that they were going to give Givens

significant benefits in his pending felony cases in exchange for his testimony against Petitioner, Albert would surely have cross-examined Givens about those benefits. *See Smith*, 50 F.3d at 829. The prosecution's nondisclosure of the benefits they gave Givens in exchange for his testimony against Petitioner is further shown by: Smith's solicitation from Givens testimony that he received no help from the prosecution in his pending bogus check case in exchange for testifying against Petitioner (Tr. 03/31/2004 at 236–37); and Burnett's first-stage closing argument telling jurors that Givens had "paid off his bogus checks" (Tr. 04/02/2004 at 151).

The evidence before the Court shows that Burnett and Smith sanitized Givens' felony record at the time he testified against Petitioner by having the preliminary hearing conferences in both of his pending felony cases postponed until after he testified against Petitioner; they gave Givens significant benefits in his two pending felony cases in exchange for his testimony against Petitioner, which they did not disclose to Petitioner's trial lawyer and fulfilled three months after Petitioner was sentenced to death; and they failed to document their full agreement with Givens in his filed plea agreement.[11] The fact that Burnett and

[11] While Burnett's name and signature appear on the court documents releasing Givens' on a recognizance bond, postponing his pending felony cases until after he testified against Petitioner, and dismissing and downgrading Givens' pending felonies after he testified against Petitioner, Smith testified that she and Burnett "worked very closely" together on Petitioner's case over several years. (Evid. Hr'g Tr. 04/08/2025 P.M. at 31.) Burnett testified that to the "best of my recollection [Givens] must have been Fern Smith's witness because I don't remember . . . dealing with him." (Evid. Hr'g Tr. 04/09/2025 P.M. at 24.) Smith's notes in evidence as State's Ex. 4-A do not document the benefits Givens was promised and received in exchange for his testimony against Petitioner. Nor do Smith's notes document the undisclosed cooperation memorandum which Burnett

Smith would sanitize Givens' felony record and conceal his true incentives for testifying against Petitioner is relevant to and probative of their motive and plan to do the same with Warden, a witness whose testimony and credibility was far more important to their death penalty case against Petitioner.

I. Six months before Warden testifies against Petitioner, Antonioli dismisses and expunges her Payne County deferred sentence based on her "satisfactorily completing the probationary period" even though that representation was false.

Burnett testified that he and Vincent Antonioli knew one another from their work together in Oklahoma County in the early-1990s. (Evid. Hr'g Tr. 04/08/2025 P.M. at 66.) At that time, Antonioli worked as a public defender in the Oklahoma County Public Defender's Office and Burnett worked as an Assistant District Attorney in the Oklahoma County District Attorney's Office. (Evid. Hr'g Tr. 04/08/2025 P.M. at 66; Evid. Hr'g Tr. 04/09/2025 P.M. at 42.) Burnett testified that he and Antonioli also knew one another during the time Antonioli worked as First Assistant for the Payne County District Attorney's Office starting in the late summer of 2003 until approximately 2006. (Evid. Hr'g Tr. 04/08/2025 P.M. at 66; Evid. Hr'g Tr. 04/09/2025 P.M. at 42–43.) Smith testified that she too knew Antonioli professionally. (Evid. Hr'g Tr. 04/08/2025 A.M. at 76.)

When Burnett was asked whether, at any time after the September 3, 2003 hearing on Tyner's Motion to Reveal All Deals, he communicated with Antonioli over in the Payne County District Attorney's Office about Warden's deferred

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testified was the prosecution's full agreement with Warden promising her 35 years' imprisonment.

sentence, Burnett testified that "I don't remember doing that." (Evid. Hr'g Tr. 04/09/2025 A.M. at 18.) When asked whether he communicated with anyone in the Payne County District Attorney's Office about Warden's deferred sentence after the September 2003 hearing, Burnett testified, "No, I don't think I ever talked to anybody from Payne County about all this. It's just not ringing any bells." (Evid. Hr'g Tr. 04/09/2025 A.M. at 18.) Smith denied that she spoke to anyone in the Payne County District Attorney's Office about Warden's deferred sentence. (Evid. Hr'g Tr. 04/08/2025 P.M. at 29–30.) She also testified that she did not know whether Burnett had spoken to anyone in the Payne County District Attorney's Office about Warden's deferred sentence. (Evid. Hr'g Tr. 04/08/2025 P.M. at 55.)

As this Court has already found, *see* Section II(B), *supra*, former Payne County Assistant District Attorney Tom Lee testified that at the time Warden was prosecuted for first-degree murder and related crimes in Oklahoma County while still serving a deferred sentence in Payne County, there was a standing agreement between the Oklahoma and Payne County District Attorney's Offices according to which Payne County prosecutors would take or forego action to accelerate a Payne County defendant's deferred sentence to aid or not jeopardize Oklahoma County's prosecution of that defendant if requested. (Evid. Hr'g Tr. 04/07/2025 A.M. at 70–73, 79–80.) Lee also testified that other prosecutors in the Payne County District Attorney's Office understood this practice as well. (Evid. Hr'g Tr. 04/07/2024 A.M. at 79–80.)

On October 24, 2003, the same day Warden's deferred sentence was scheduled to expire (Pet. Ex. 11), Antonioli orally moved the Payne County District Court to dismiss and expunge Warden's deferred sentence (Pet. Ex. 27; Evid. Hr'g Tr. 04/09/2025 P.M. at 64 (Antonioli testifying that at Warden's Payne County felony disposition hearing on Oct. 24, 2003 "I told everyone, to just let it go").) The motion to dismiss and expunge Warden's deferred sentence which Antonioli filed in Warden's case on October 31, 2003, and which he testified "memorializes what occurred in open court on October 24th" at the felony disposition docket (Evid. Hr'g Tr. 04/09/2025 P.M. at 64), asked the court to dismiss Warden's Payne County felony case "for the following reason: The Defendant has satisfactorily completed the probationary period" (Pet. Ex. 27; Evid. Hr'g Tr. 04/09/2025 P.M. at 62).

Boyce, who represented Warden on her Payne County felony larceny charge, testified that in her experience practicing law in Payne County and representing criminal defendants on deferred sentences, she had never seen a Payne County prosecutor move to dismiss and expunge a criminal defendant's deferred sentence. (Evid. Hr'g Tr. 04/07/2025 A.M. at 52–53.) Boyce testified that "it's the defense attorneys who do the dismissal and expungements" and, in Warden's case, she never moved to dismiss and expunge Warden's deferred sentence. (Evid. Hr'g Tr. 04/07/2025 A.M. at 52.)

Antonioli testified that before taking the affirmative steps to dismiss and expunge Warden's deferred sentence, he would have reviewed the violation report in Warden's file in which her probation officer recommended accelerating her

deferred sentence based on her history of probation violations, including her failure to report to her probation officer, failure to submit employment verification, failure to maintain full-time employment, failure to report changes in employment to her probation officer, and association with individuals who have criminal records. (Ex. 14 at 1–2; Evid. Hr'g Tr. 04/09/2025 P.M. at 46–47, 63.)

Antonioli testified that in deciding whether to accelerate a defendant's deferred sentence, he would typically "look at what their performance had been, what the nature of the violation was, whether it was failure to pay restitution, failure to report to their probation officer, failure to complete community service, and also whether they had committed a new offense" and "how much time they had left on their sentence." (Evid. Hr'g Tr. 04/09/2025 P.M. at 45.) Antonioli also testified that an ODOC probation officer's recommendation to accelerate a criminal defendant's deferred sentence would usually be given significant but not total weight. (Evid. Hr'g Tr. 04/09/2025 P.M. at 45.)

Antonioli testified that the violation report in Warden's file that he would have reviewed before moving to dismiss and expunge her deferred sentence showed that Warden had not satisfactorily completed her probationary period. (Evid. Hr'g Tr. 04/09/2025 P.M. at 49.) Antonioli also testified that Warden's guilty plea to accessory to murder while still on a deferred sentence would also have shown that Warden had not successfully completed her probationary period. (*Id.*) Antonioli admitted that his representation that Warden had "satisfactorily completed the probationary period" was not accurate. (Evid. Hr'g

Tr. 04/09/2025 P.M. at 65.) He also admitted that it was unnecessary for him to represent that Warden had satisfactorily completed her probation when she had not. (*Id.*) According to Antonioli, he made this inaccurate representation in moving to dismiss and expunge Warden's deferred sentence because her felony larceny was "a dinky little property crime" and for the Payne County District Attorney's Office it would not have "made any economic sense to have her writted from 75 miles away, have the Court Clerk's Office have to process paperwork, have the judge have to deal with it." (Evid. Hr'g Tr. 04/09/2025 P.M. at 64.)

The evidence before the Court does not support Antonioli's characterization of Warden's Payne County felony larceny as a "dinky little property crime." Warden was indicted by Payne County prosecutors for breaking into someone's home and stealing $1,845 worth of property including a gun. (Pet. Ex. 8 at 1.) Warden faced "[u]p to 5 years" imprisonment for that felony offense which even Burnett recognized was "a crime of moral turpitude . . . involving dishonesty." (Pet. Ex. 8 at 1; Evid. Hr'g Tr. 04/08/2025 P.M. at 94.) Neither does the evidence before the Court support Antonioli's conservation-of-resources explanation for his dismissal and expungement of Warden's deferred sentence.

First, as discussed *supra*, Section II(A), in 2004 while Antonioli was serving as First Assistant Payne County District Attorney, the Payne County District Attorney's Office had Warden's co-defendant in the felony larceny case Sheneda Davis transported over 100 miles from the Eddie Warrior Correctional Center where she was incarcerated on Oklahoma County felony convictions to Payne County for the acceleration hearing on Davis's suspended sentence in the felony

larceny case. (Evid. Hr'g Tr. 04/07/2025 A.M. at 61–62; State's Ex. 6-A at 9.) Davis appeared in custody at the Payne County acceleration hearing where the court revoked her 2-year suspended sentence, ordered it to be served concurrent to her Oklahoma County felony convictions, and gave her credit for time served. (State's Ex. 6-A at 10.) Payne County prosecutors could easily have pursued this same course of action with Warden. As Boyce and Lee both testified, after Warden pled guilty to felonies in Oklahoma County in February 2003, the only evidence Payne County prosecutors needed to present at the hearing on an application to accelerate Warden's deferred sentence was a certified copy of the judgment and sentence adjudicating her guilty of offenses during the deferred period. (*See* Evid. Hr'g Tr. 04/07/2025 A.M. at 59, 89.) And apart from that, any of Warden's other 4 probation violations could have been proved at an acceleration hearing by a preponderance of the evidence with just the violation report, Warden's signed verification of orientation form, and the testimony of Warden's probation officer. (Pet. Ex. 14 at 1–2; Evid. Hr'g Tr. 04/07/2025 A.M. at 54.)

The evidence before the Court also shows that the Payne County District Attorney's Office aggressively pursued Davis on the felony larceny charge despite her incarceration on charges elsewhere, without regard for the economic costs of transporting her to Payne County from custody in another jurisdiction, and despite the fact that Davis drove the car the stolen goods were transported in while Warden actually broke into the victims' home to steal the items. (Evid. Hr'g Tr. 04/07/2025 A.M. at 44 (Boyce testifying that "the co-defendant [Davis] drove

the car and my client [Warden] was the one who went in"); *see also* State's Ex. 6-D. at 3 (factual basis for Davis's plea agreement stating that she "drove the car while the crime was committed").) Payne County prosecutors' vastly dissimilar treatment of Warden and Davis cannot be explained in terms of economic sense.

Second, if saving time and money were the factors motivating Antonioli's decision over Warden's deferred sentence, the most straightforward thing for him to do would have been nothing. As even Antonioli recognized, he could have simply let Warden's deferred sentence lapse without doing anything. (Evid. Hr'g Tr. 04/09/2025 P.M. at 66; *see also* Evid. Hr'g Tr. 04/07/2025 A.M. at 78 (Lee testifying that allowing a deferred sentence to expire would require no action, and it could just die on its own terms).) Instead, Antonioli took the affirmative and unusual steps to dismiss and expunge Warden's deferred sentence, including through a representation he admittedly knew was inaccurate. (Pet. Ex. 27; Evid. Hr'g Tr. 04/07/2025 A.M. at 52–53; Evid. Hr'g Tr. 04/09/2025 P.M. at 49, 65; *see also* Pet. Ex. 16, ¶¶ 10–13 (Senior ODOC Probation and Parole Officer William Crye Jr. attesting that Payne County prosecutors' non-acceleration of Warden's deferred sentence was "very unusual" in light of Warden's numerous probation violations, her probation officer's acceleration recommendation, breach of the express terms and conditions of her deferred judgment and sentence, and guilty plea to serious felonies in Oklahoma County).)

Antonioli testified that he would have seen and been influenced by Lee's handwritten note in Warden's file stating "Let's hold off for a while on the application" in deciding not to file an application to accelerate Warden's deferred

sentence before it expired on October 24, 2003. (Evid. Hr'g Tr. 04/09/2025 P.M. at 56–57, 68.) According to Antonioli, had Lee withdrawn the hold he had originally placed on the acceleration of Warden's deferred sentence, "he would have had an application filed." (Evid. Hr'g Tr. 04/09/2025 P.M. at 57.)

Antonioli testified that prior to dismissing and expunging Warden's deferred sentence, it is possible he received a call from someone in the Oklahoma County District Attorney's Office asking him to take that action. (Evid. Hr'g Tr. 04/09/2025 P.M. at 69.) If that occurred, Antonioli testified that he did not recall having spoken to anyone. (*Id.* at 69, 71.) According to Antonioli, if he had received such a call, there would be a note somewhere in the now-destroyed file, most likely on a post-it note or somewhere other than the file jacket minutes Antonioli identified and which was admitted into evidence as Page 3 of Petitioner's Exhibit 33. (Evid. Hr'g Tr. 04/09/2025 P.M. at 69–70; Pet. Ex. 33 at 3.)

Antonioli denied that he would have called the Oklahoma County District Attorney's Office before dismissing and expunging Warden's deferred sentence. (Evid. Hr'g Tr. 04/09/2025 P.M. at 72–73.) He testified that although he did not know who Wayna Tyner was at the time and never called her back, he would have taken the affirmative action to dismiss and expunge Warden's deferred sentence based solely on the post-it note in the file containing Tyner's name, contact information, and the content of her message, and he would have done so without taking any steps to verify the information in the post-it note. (Evid. Hr'g Tr. 04/09/2025 P.M. at 58–61, 72.) According to Antonioli, "I would've taken

the information on this Post-It note from the Sapulpa OIDS attorney. I would've believed it." (Evid. Hr'g Tr. 04/09/2025 P.M. at 72–73.)

However, the post-it note containing Tyner's name and contact information does not state that Tyner is an "attorney." (Pet. Ex. 15.) At most, it conveys that Tyner was employed in some capacity at the Oklahoma Indigent Defense System in Sapulpa. (Pet. Ex. 15.) Antonioli had earlier testified that he thought the note was from "Wayne" Tyner, and it was Burnett who informed him on April 9, 2025 shortly before Antonioli's testimony at the evidentiary hearing that the note pertained to "Wayna" Tyner who was an attorney at OIDS who represented Zjaiton. (Evid. Hr'g Tr. 04/09/2025 P.M. at 58.) Considering the totality of the evidence, the Court finds it difficult to credit that Antonioli would have taken the affirmative and unusual steps of dismissing and expunging Warden's deferred sentence based on unverified information contained in a post-it note from someone he did not bother to call back and who he thought was named "Wayne."

Warden, in addition to having her Payne County deferred sentence dismissed and expunged 6 months before she testified on behalf of Oklahoma County prosecutors at Petitioner's capital trial, also had $695 that she owed in restitution to her Payne County victims dismissed. (Pet. Ex. 26.) Antonioli testified that the dismissal of Warden's restitution by the Payne County District Attorney's Office "is like writing off a bad debt" and "we weren't going to get restitution paid. She was in jail." (Evid. Hr'g Tr. 04/09/2025 P.M. at 53, 64.) However, the record demonstrates that Payne County prosecutors only wrote off this debt for Warden: they continued to aggressively pursue Davis over a period

of many years for the restitution it had forgiven from Warden even after Davis became incarcerated on serious felonies in Oklahoma County. *See* Section II(A), *supra*. (State's Ex. 6-A at 12–15.)

The totality of the evidence leads the Court to find that only fulfillment of the agreement—standing or otherwise—between the Oklahoma County District Attorney's Office and the Payne County District Attorney's Office to dismiss and expunge Warden's deferred sentence in aid of Oklahoma County's prosecution of her co-defendants explains why Antonioli took the affirmative and unusual steps to dismiss and expunge Warden's deferred sentence based on a representation he admitted was inaccurate; and it explains why Payne County prosecutors' treatment of Warden and Davis was so drastically different.

J. Burnett and Smith craft their theory of the case against Petitioner at the guilt/innocence and penalty phases of his capital trial around Warden's directly incriminating testimony, and by portraying her to the jury as the "go-along girl[]" who had no prior felony convictions, committed the crimes under Petitioner's control, and was only testifying to "do the right thing."

The record shows that Burnett and Smith crafted the theory of their capital case against Petitioner around their assessment that Warden "looked like, you know, kind of a timid, go-along girlish kind of impression of her." (Evid. Hr'g Tr. 04/08/2025 P.M. at 95.) In opening argument at the first stage of Petitioner's trial, Smith highlighted Warden's cooperation, that she was a "mother to three small children," including one of Petitioner's children, and that she would directly incriminate Petitioner:

> You will hear from Brandy Warden. Brandy Warden is one of the co-defendants in this case. She is the mother of three small children.

> One of them belonging to Termane [*sic*] Wood. Brandy Warden will tell you that she pled guilty to the crime, a reduced charge, and that she is serving 40 years in prison for her part in this crime. She will tell you that Termane Wood participated in the murder of Ronnie Wipf.

(Tr. 03/31/2004 at 109.)

Once Warden took the stand on behalf of the prosecution, Smith solicited testimony that Warden had been in love with Petitioner at the time of the crime, was the mother of one of his children, and participated in the crime under his control and influence. (Tr. 04/01/2004 at 128–83, 186–204.) Warden testified that although she paid for the gloves and ski masks from Wal-Mart the evening before the crime, she did not know what she was purchasing. She testified, "[Petitioner] asked me for money. And I told him all I had was my checks. And he asked me if I would buy him something. He didn't tell me what at that time." (Tr. 04/01/2004 at 137.) Warden also testified that "the first time [she] saw those gloves and ski masks" was when Petitioner "put them on the counter" at the Wal-Mart checkout stand. (Tr. 04/01/2004 at 139.)

Warden testified further that after she and Bateman agreed to go to a motel with Wipf and Arnold Kleinsasser, Bateman pretended to go the bathroom but really went to talk to Petitioner and Zjaiton. (Tr. 04/01/2004 at 148–49.) According to Warden, when Bateman returned from speaking with them, "She asked me if I needed to go to the restroom. And by the way she looked at me, I went, knowing that they wanted to talk to me." (Tr. 04/01/2004 at 149.) Warden testified that when she approached Petitioner, he asked "what was wrong" because she had tears in her eyes. (Tr. 04/01/2004 at 149.) Warden testified

that she was "scared" because she "had never went to a motel room with guys before." (Tr. 04/01/2004 at 150.) When Smith asked Warden why she agreed to go with Wipf and Kleinsasser that night, she testified that it was because she "knew [Petitioner and Zjaiton] wanted money." (Tr. 04/01/2004 at 151.)

The following exchange occurred between Smith and Warden:

Q. [Smith]	Now, what did Termane [*sic*] say to you after he saw you tear up and you tried to tell us a while ago. We couldn't understand because you were crying. Tell us what he said.
A. [Warden]	He told me to quit crying like a big a-s-s baby and suck it up.
Q. [Smith]	You said "A big a-s-s baby."
A. [Warden]	Yes.
Q. [Smith]	Did he say "big a-s-s baby" or did he say "Big ass baby"?
A. [Warden]	He said "big ass baby."

(Tr. 04/01/2004 at 151–52.) After Warden described leaving the Bricktown Brewery and getting into the driver's seat of Wipf's car, Smith followed up:

Q. [Smith]	Let me get back to one thing I forgot to ask. You go back to the bar area when Termane [*sic*] was telling you that you were a big ass baby. Did he do something to you?
A. [Warden]	He grabbed my face.
Q. [Smith]	Show the jury what he did to you.
A. [Warden]	Like that (indicating.)
Q. [Smith]	Squeezed your cheeks together?
A. [Warden]	Yeah.
Q. [Smith]	Was that at the time that he was calling you that name?
A. [Ms. Warden]	Yes.

(Tr. 04/01/2004 at 153–54.) Smith also solicited the following testimony from Warden about her deal:

Q. [Smith]	At some time, did you or did Ms. Cox come to the District Attorney's Office and offer to have you testify in order to get a good deal for you?

A. [Warden] Yes, she did.
Q. [Smith] And did the District Attorney's Office, Mr. Burnett and myself, offer you some kind of a deal in order for you to testify truthfully to the jury?
A. [Warden] Yes.
Q. [Smith] And will you tell the jury what that was, please?
A. [Warden] Accessory to Murder After the Fact and Conspiracy to Commit a Felony. Forty-five and ten years running concurrent.
Q. [Smith] So you basically got 45 years to do in the state penitentiary for your part in the murder; is that right?
A. [Warden] Yes.
Q. [Smith] Are you here to tell the jury what your part and what Mr. Termane [*sic*] Wood's part in the murder was?
A. [Warden] Yes.

(Pet. Ex. 34, Tr. 04/01/2004 at 131–32.)

In closing argument at the first stage, Burnett told Petitioner's jury that Warden "kn[ew] one rule, you do what Termane [*sic*] told you to do." (Tr. 04/02/2004 at 152.) He urged the jury to see Warden more as Petitioner's victim than a co-conspirator, arguing, "Now is she the big conspirator or is she the fall guy?" (Tr. 04/02/2004 at 153.)

Burnett also told the jury that Petitioner's only witness, his older brother Zjaiton, "has been convicted of criminal offenses" so "you get to weigh the credibility of this dope slinging, gang banging convict who comes into this courtroom and gives you this story." (Tr. 04/02/2004 at 160–61.) Burnett continued, "When you weigh his testimony and his credibility about turning people's lives loose, you look carefully at someone like him." (Tr. 04/02/2004 at 161.) Regarding Warden, however, Burnett told the jury:

> She has been convicted of a criminal offense. Basically the case you are here on today. I want you to look at Brandy Warden. I want you

> to look at her. And I want you to look at her testimony and the things she testified to. She sacrificed half of her life with those kids, 45 years. . . . She gave up 45 years of her life because of the terrible thing that she did in this case. She at least tried to come and do one right thing, that is come and tell the truth in this courtroom about the things that transpired.

(Tr. 04/02/2004 at 161–62.) Smith similarly urged the jury to discredit Zjaiton's testimony during her rebuttal closing argument at the first stage by pointing out his "three prior felony convictions." (Tr. 04/02/2004 at 186.) At the same time, Smith urged the jury to credit Warden's testimony because she had "no other felony convictions" before the crimes Warden testified Petitioner forced her into committing:

> Instruction number 30 tells you that evidence has been presented that Brandy Lynn Warden has heretofore been convicted of a criminal offense. And that criminal offense, the only one she has ever been convicted of, is this murder she told you, Accessory After the Fact for the commission of this murder. She has no other felony convictions.

(Tr. 04/02/2004 at 187). Smith also told the jury, "Do you want to believe Zjaiton Wood or do you want to believe Brandy Warden who cried her eyes out on the stand and does every day I submit to you." (Tr. 04/02/2004 at 198–99.)

At the outset of the penalty phase, Smith told the jury that the prosecution was "incorporating all of the evidence in the first stage of the trial into the second stage of the trial for your consideration . . . and you will have to remember what you heard in the first stage of the trial" which included Warden's testimony. (Tr. 04/05/2004 at 5.) Smith also told the jury that "[t]he state will present evidence to you in the form of testimony from Brandy Warden that Zjaiton Wood and Termane [*sic*] Wood robbed La Franca's Pizza on December 31st of 2001, just

hours before the murder of Ronnie Wipf." (Tr. 04/05/2004 at 9–10.) Smith reiterated that "Brandy Warden will tell you it was Termane [*sic*] Wood that participated in that robbery." (Tr. 04/05/2004 at 11.)

Warden testified that earlier in the evening on December 31, 2001, she and Bateman waited in the car while Petitioner and Zjaiton robbed a pizza restaurant. (Tr. 04/05/2004 at 17.) Warden also testified that it was Bateman who had suggested the location for the robbery and that Zjaiton had a gun while Petitioner had a knife. (Tr. 04/05/2004 at 18.) Smith emphasized for the jury Warden's testimony several times in her penalty phase closing argument as support for the continuing threat aggravator, one of the aggravating circumstances that the prosecution alleged made Petitioner eligible for the death penalty. For example, Smith argued that Petitioner's "robbery of Kermat, the pizza man" supplied proof that he is "a threat to society." (Tr. 04/05/2004 at 115.) Smith also argued that Petitioner deserved the death penalty because he is the "kind of man who can go out and rob the little pizza man that you saw on the witness stand." (Tr. 04/05/2004 at 134.)

During her closing argument at the penalty phase, Smith again reminded the jury that the prosecution had "incorporated all of the evidence in the first stage of the trial, so you get to consider that part as well." (Tr. 04/05/2004 at 130.) Relying on that evidence, which is summarized above and included Warden's first-stage testimony, Smith argued that Petitioner deserved the death penalty because he is "different from people like you and me. He manipulates women. He manipulated, I submit to you, Brandy into doing the things that she

did and now is serving 45 years in prison." (Tr. 04/05/2004 at 134.) Burnett similarly urged the jury to sentence Petitioner to death to save his children from his influence: "Keep him alive so maybe some day he can be an influence? Those kids need to stay away from this guy. They might have a chance if their mamas take care of them, or their relatives. Brandy messed up her life. She gave up 45 years of her life and gave up the opportunity to raise these kids because of what she did and participated in this event." (Tr. 04/05/2004 at 156.)

Burnett and Smith both denied that Warden was an essential witness for their capital prosecution of Petitioner, testifying respectively that they "could've tried that case and won it without her" and that Warden's testimony merely corroborated other evidence implicating Petitioner in Wipf's murder. (Evid. Hr'g 04/08/2025 P.M. at 48, 77.) However, Burnett acknowledged that in his interview with the Oklahoma Attorney General's Office about his work on Petitioner's case, he had described Warden's testimony against Petitioner as "essential" to the prosecution's case. (Evid. Hr'g 04/08/2025 P.M. at 76–77.) Burnett also testified that Warden's testimony gave the prosecution "the certainty of a conviction." (Evid. Hr'g 04/08/2025 P.M. at 77.)

The record shows that Burnett told the jury that in order to convict Petitioner, there has "[g]ot to be an independent fact. That is what Brandy Warden is. We have independent facts. Brandy Warden's testimony shows that this (indicating) defendant was involved in this case." (Tr. 04/02/2004 at 163.) Burnett also told Petitioner's jury that Warden's story was central to the prosecution's case against him: "All of these little things you see on this

(indicating) outer circle tells you that the story that Brandy Warden testified in this courtroom is the right one." (Tr. 04/02/2004 at 165.)

Warden's testimony directly incriminated Petitioner in all of the crimes with which he was charged. She supplied the key corroboration for the prosecution's otherwise circumstantial case against him, which consisted of:

- Arnold Kleinsasser's testimony that he and Ronnie Wipf were robbed by two masked men who he believed were White men, one of whom was smaller than the other (Tr. 07/26/2002 at 155, 165–66; Tr. 03/31/2004 at 131–33);
- Coleman Givens' testimony that on the night of the crime he saw two men banging on the door of the motel room where the crime occurred and they had "Black voices" (Tr. 04/02/2004 at 151);
- Kyla Marshall's testimony that a brown glove obtained from the crime scene contained a partial DNA profile from which Petitioner could not be excluded (Tr. 04/02/2004 at 24–26, 33–34);
- Linda Wood's testimony that the evening prior to the crime, Petitioner went to Wal-Mart with Warden, Zjaiton, and Bateman before going to the Bricktown Brewery (Tr. 07/25/2002 at 99; Tr. 04/01/2004 at 28);
- A Wal-Mart receipt showing that the items Warden purchased at Wal-Mart with a bad check included masks and gloves (State's Trial Ex. 67, 68);
- Wal-Mart surveillance footage showing Petitioner, Zjaiton, Warden, and Bateman in the store the evening prior to the crime (State's Trial Exs. 71–72);
- Andre Wood's testimony that Petitioner was at the Bricktown Brewery with Warden, Zjaiton, and Bateman the night before the crime (Tr. 7/25/2002 at 119; Tr. 04/01/2004 at 54–56);
- Casey Odell's testimony that Petitioner was at the Bricktown Brewery with Warden, Zjaiton, and Bateman the night before the crime and that after they picked up their infant son and returned home, Petitioner left before returning again a short while later (Tr. 04/01/2004 at 80–81, 84–85);
- Kevin Collins' testimony that Petitioner was at the Bricktown Brewery the night before the crimes (Tr. 04/01/2004 at 121);

- A letter from T-Loc to Seven located in Zjaiton's cell in the Oklahoma County Jail identified by handwriting analysis to have been written by Petitioner that states "you say you are pleading guilty, so what are you going to tell them bout the glove? It was mine and you got it from my house that's why my D.N.A. is on it? Are you going to tell them that you called me and asked me to come picc you up at the store after the fact? Cuz its just some shit I need to know cuz I know my attorneys won't come talk to you shit they won't even come talk to me." (State's Tr. Ex. 112.)

Without Warden's testimony directly incriminating Petitioner in the murder of Wipf and the earlier robbery of a pizza restaurant, minimizing her participation in and moral culpability for the crimes while maximizing Petitioner's, and portraying Petitioner as someone who forced her into participating in those crimes, the prosecution's aggravating evidence against Petitioner in support of the death penalty consisted of:

- Arnold Kleinsasser's testimony that the two masked men robbed him and Wipf using a knife and a gun that fired during Wipf's fight with his assailants (Tr. 03/31/2004 at 131–42; Tr. 04/05/2004 at 8);
- Fred Jordan's testimony that the stab wound which Wipf suffered was not instantly fatal (Tr. 04/02/2004 at 11, 17–18; Tr. 04/05/2004 at 7);
- Keramat Taghizigdeh's testimony that his pizza restaurant was robbed the night before the crimes by two masked men the smaller of whom had a knife that was held to his stomach during the robbery, and the larger of whom had a gun that was used to assault Taghizigadeh over the head during the robbery (Tr. 04/05/2004 at 24);
- Casey Odell's testimony that after returning home in the early morning hours on the day of the crime, Petitioner fell asleep on the couch watching television before Odell drove him to Houston, Texas (Tr. 04/01/2004 at 89–90).

Even with Warden's sanitized criminal record, undisclosed benefits, and testimony directly incriminating Petitioner in the charged offenses and in the pizza restaurant robbery that supported the continuing threat aggravator, the jury at both the first stage and the penalty phase still deliberated for

approximately 5 hours at each stage before ultimately returning its verdicts. (Tr. 04/02/2004 at 213–14; Tr. 04/05/2004 at 163.) *Cf. Liles v. State*, 1985 OK CR 73, ¶¶ 27–28, 702 P.2d 1025, 1033 (rejecting the argument that trial court in a death penalty case allowed the jury to deliberate for an unreasonably long period of time after approximately 3 hours of deliberations where the case involved "detailed instructions as well as four days of evidence" and holding that "three hours, or even five hours" is not an unreasonably long period of time for jury to deliberate in complex case). If Petitioner's guilt and his death sentence were decisions over which the jury struggled for nearly 5 hours at both the first stage and penalty phase with Warden's testimony on behalf of the prosecution, then without her testimony the prosecution's case against Petitioner was by no means certain. The Court thus finds Burnett's and Smith's *post hoc* assertions that they did not need Warden's testimony, and would have obtained Petitioner's convictions and death sentence without it, to be unsupported by the record. (Evid. Hr'g 04/08/2025 P.M. at 48, 77.)

III. Conclusions of Law

A. *Napue v. Illinois*, 360 U.S. 264 (1959)

The Supreme Court held in *Napue v. Illinois* that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." 360 U.S. 264, 269 (1959). False evidence includes "false testimony [that] goes only to the credibility of [a] witness." *Id.* That 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.*

Less than two months ago, the Supreme Court reversed under *Napue* the conviction and death sentence of Richard Glossip whose case was prosecuted by the Oklahoma County District Attorney's Office during the same period of time as Petitioner's case. *Glossip v. Oklahoma*, 145 S. Ct. 612 (2025). The Supreme Court held that the prosecutors in Glossip's case violated *Napue* when they knowingly solicited false testimony from a prosecution witness who provided the only direct evidence incriminating Glossip in the murder for which Glossip was sentenced to death. *Id.* at 626–27. The Supreme Court reaffirmed *Napue*'s standard:

> To establish a *Napue* violation, a defendant must show that the prosecution knowingly solicited false testimony or knowingly allowed it to go uncorrected when it appeared. If the defendant makes that showing, a new trial is warranted so long as the false testimony may have had an effect on the outcome of the trial—that is, if it in any reasonable likelihood could have affected the judgment of the jury.

Id. (cleaned up).

The OCCA implements *Napue* using a three-part test: "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 at ¶ 10, 675 P.2d at 450 (citing *Runnels v. State*, 1977 OK CR 146, ¶ 30, 562 P.2d

932, 936). 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.

Once a defendant proves that prosecutors knowingly solicited false testimony or knowingly allowed it to go uncorrected, *Napue*'s materiality standard "requires the *beneficiary* of the constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Glossip*, 145 S. Ct. at 627 (cleaned up) (emphasis added). That requires the State (as the beneficiary of the constitutional error when it obtained the defendant's convictions and sentence through false testimony) to prove beyond a reasonable doubt that the *Napue* error is harmless. Proof "beyond a reasonable doubt" is an "exacting standard." *Addington v. Texas*, 441 U.S. 418, 422 (1979). The State fails to meet its burden in the *Napue* context "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); *Glossip*, 145 S. Ct. at 626–27.

1. <u>The prosecution knowingly solicited false testimony from Warden about her deal in violation of *Napue*.</u>

Warden was the prosecution's key witness at both the first stage and the penalty phase of Petitioner's capital trial. *See* Section II(J), *supra*. As Burnett testified at the evidentiary hearing, Warden's testimony gave the prosecution the "certainty of a conviction" against Petitioner. (Evid. Hr'g 04/08/2025 P.M. at 77; Tr. 04/01/2004 at 128–83, 186–204.) Warden's testimony provided the prosecution with its only direct evidence incriminating Petitioner in Wipf's

murder and in the pizza restaurant robbery that supported the continuing threat aggravator at the penalty phase. (Tr. 04/01/2004 at 128–83, 186–204. Her testimony provided the prosecution with its only evidence of Petitioner's motive for the crimes—she testified that she knew he "wanted money." (Tr. 04/01/2004 at 151.) And her testimony allowed prosecutors to present the jury with a theory of the case in which Warden was a "go-along girl[]" with no prior felony convictions who committed the crimes under Petitioner's control. (Evid. Hr'g 04/08/2025 P.M. at 95; Tr. 04/01/2004 at 137–39; 146–52; Tr. 04/02/2004 at 152–53, 161–64, 187, 198–99; Tr. 04/05/2004 at 5, 130, 134.)

On direct-examination at the first stage, Smith asked Warden whether she was offered "some kind of deal in order for [her] to testify truthfully to the jury. (Tr. 04/01/2004 at 131–32.) Warden responded that she agreed to plead guilty to the lesser charges of "Accessory to Murder after the Fact and Conspiracy to Commit a Felony" in exchange for a 45-year sentence in the state penitentiary with 10 years to run concurrent. (Tr. 04/01/2004 at 132.) The evidence before the Court now shows that testimony was false.

The prosecutors were aware that their actual deal with Warden contained in the cooperation memorandum promised her 35 years' imprisonment and ensured her Payne County deferred sentence was not accelerated to a felony conviction. Section II, *supra*. That agreement allowed Warden to avoid a felony conviction for her criminal acts a year and a half before she was charged with murder in Oklahoma County. It allowed her to avoid serving additional or concurrent terms of incarceration. It allowed her to avoid paying $695 in

outstanding restitution to her Payne County victims. And it allowed her to testify on behalf of the prosecution without being impeached with the facts of her Payne County crimes and her various incentives for testifying.[12]

While the evidence shows that Warden, who signed the cooperation memorandum agreeing to 35 years' imprisonment, was aware that her testimony about her deal was false, whether Warden knew her testimony about her deal was false is irrelevant to the *Napue* analysis which focuses on what the prosecutors knew, and what the prosecutors knowingly solicited or failed to correct. *See, e.g.*, *Gimenez v. Ochoa*, 821 F.3d 1136, 1142–43 (9th Cir. 2016) ("We have found due process violations . . . where a *fact* witness told lies (even unknowingly so) . . ."); *Phillips v. Ornoski*, 673 F.3d 1168, 1184 (9th Cir. 2012) ("[T]hat a witness may have been unaware of the agreement entered into on his behalf may mean that his testimony denying the existence of such an agreement is not knowingly false or perjured, but it does not mean that it was not false nevertheless."); *Drake v. Portuondo*, 553 F.3d 230, 242 & n.7 (2d Cir. 2009) (rejecting relevance of state's contention that false testimony "may have been the result of confusion or mistake," and finding *Napue* violation despite witness claiming he was "quite convinced" his trial testimony was true).

The prosecutors here not only failed to correct Warden's false testimony that her deal was for 45 years' imprisonment; they went further by explicitly

[12] Tyner testified that after Warden's deferred sentence was dismissed and expunged, she nevertheless tried to cross-examine Warden about her Payne County prior bad acts but Judge Elliott, who also presided over Petitioner's trial, shut her down. (Evid. Hr'g Tr. 04/08/2025 A.M. at 22–23.)

soliciting that testimony. (Tr. 04/01/2004 at 131–32 (Smith asking Warden on direct examination to confirm that her "good deal" with the Oklahoma County District Attorney's Office was that "you basically got 45 years to do in the state penitentiary for your part in the murder; is that right?" to which Warden responded "Yes.").) They then repeatedly invoked that false testimony during closing argument at the first stage and at the penalty phase of Petitioner's trial. (*E.g.*, Tr. 04/02/2004 at 161 ("She sacrificed half her life with those kids, 45 years."); *id.* at 162 ("She gave up 45 years of her life because of the terrible thing that she did in this case."); Tr. 04/05/2004 at 134 ("[Petitioner] manipulated, I submit to you, Brandy into doing the things she did and now she is serving 45 years in prison."); *id.* at 156 ("She gave up 45 years of her life and gave up the opportunity to raise those kids because of what she did and participated in this event.").)

The prosecution also capitalized on the false impression created by Warden's false testimony about her deal to bolster her credibility. For example, Smith told the jury:

> Instruction number 30 tells you that evidence has been presented that Brandy Lynn Warden has heretofore been convicted of a criminal offense. And that criminal offense, *the only one she has ever been convicted of*, is this murder that she told you, Accessory After the Fact for the commission of this murder. *She has no other felony convictions*.

(Tr. 04/02/2004 at 187 (emphasis added).)

The suppressed evidence of Warden's actual agreement prevented the jury from learning that her deal allowed her to avoid a felony conviction for her

unrelated criminal acts in Payne County prior to the murder. Instead, the false testimony which prosecutors solicited from Warden and failed to correct undermined the efforts of Petitioner's trial lawyer Johnny Albert to impeach her, and deprived the jury of evidence critical to its assessment of her credibility, truthfulness, and motivations for testifying. *See Binz*, 1984 OK CR 28, ¶ 12, 675 P.2d at 451 ("Had 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 . . . [a]s we stated in *Mays v. State*, 594 P.2d 777 (Okla. Cr. 1979), public policy demands full disclosure to the jury of the terms of any plea bargain between the prosecutor and an accomplice who testifies for the State.").

2. The State has not proved beyond a reasonable doubt that the *Napue* errors in Petitioner's case were harmless.

In *Glossip*, the false testimony that prosecutors solicited from its key prosecution witness Justin Sneed was that he was prescribed lithium for reasons unknown to him after his arrest and after he had asked for cold medication. 145 S. Ct. at 620. The Supreme Court determined that this *Napue* error was not harmless beyond a reasonable doubt at Glossip's trial and penalty phase because Sneed's testimony: (1) provided the prosecution with its only direct evidence incriminating Glossip in the murder, even though other circumstantial evidence implicated him; (2) provided the prosecution with its only evidence of Glossip's motive for the crime; (3) and the prosecution used Sneed's testimony to craft the entire theory of its case against Glossip around portraying Sneed to the jury as someone who "had no propensity to violence except at Glossip's

direction." *Glossip*, 145 S. Ct. at 620–21. The Supreme Court pointed out that the prosecution went so far as to portray Sneed as a "puppy" and Glossip as his "trainer." *Id.* at 621; *see also id.* (recognizing that the Reed Smith Report commissioned by the Oklahoma Legislature "concluded that the State had 'falsely portrayed Sneed at trial as a meek and non-violent 'puppet'" and that prosecutors "had deliberately destroyed 'key physical evidence' before Glossip's retrial").

The similarities between *Glossip* and the evidence before the Court in Petitioner's case are striking. That evidence shows that the prosecutors in *Glossip* and the prosecutors in Petitioner's case drew from the exact same playbook: (1) Warden's testimony provided the prosecution with its only direct evidence incriminating Petitioner, even though other circumstantial evidence implicated him, *see* Section II(J), *supra*; (2) Warden's testimony provided the prosecution its only evidence of Petitioner's motive for the crime—i.e., Warden testified she knew Petitioner "wanted money" (Tr. 04/01/2004 at 151); and (3) the prosecution used Warden's testimony to craft the entire theory of its case against Petitioner around portraying Warden to the jury as someone who was just a "go-along girl[]" with "no prior felony convictions" and only committed these crimes under Petitioner's manipulation and control. (Tr. 04/01/2004 at 137–39, 146–52; Tr. 04/02/2004 at 152–53, 161–64, 187, 198–99; Tr. 04/05/2004 at 5, 130, 134). *See* Section II(J), *supra*. And as in *Glossip*, "[t]he prosecution weaved these suggestions into its closing argument[s]" to the jury at

both the first stage and penalty phase of Petitioner's trial. *Glossip*, 145 S. Ct. at 621. Section II(J), *supra*.

Had prosecutors "corrected [Warden's] testimony on the stand, [her] credibility plainly would have suffered." *Glossip*, 145 S. Ct. at 628. It would have exposed for the jury that Warden "was untrustworthy" and even "willing to lie to them under oath." *Id.* The evidence of Warden's full agreement and the array of benefits she received and was promised in exchange for testifying against Petitioner would have exposed for the jury her prior criminal acts in Payne County, including that she broke into someone's home and stole $1,845 worth of property including a gun. It would have also exposed for the jury that she committed those criminal acts on her own, and not under Petitioner's manipulation and control. And, as in *Glossip*, it "would have undermined the prosecution's theory that [Warden] was harmless on [her] own"—just a "go-along girl[]" who "kn[ew] one rule, you do what Termane [*sic*] told you to do." 145 S. Ct. at 628. (Evid. Hr'g Tr. 04/08/2025 P.M. at 95; Tr. 04/02/2004 at 152.)

At both stages, "that theory was an important part of the prosecution's case and featured prominently in its opening and closing statements." *Glossip*, 145 S. Ct. at 628. The prosecutors here told Petitioner's jury that Warden was not some "big conspirator" but rather was a girl who "know[s] one rule, you do what Tremane told you to do." (Tr. 04/02/2004 at 152–53.) They told the jury that Warden had no felony convictions before Petitioner pressured her into participating in these crimes that cost her "45 years of her life." (Tr. 04/02/2004 at 161–64, 187, 198–99.) They told the jury that "the story that Brandy Warden

testified in this courtroom is the right one." (Tr. 04/02/2004 at 161–65.) And they told the jury that Petitioner deserved the death penalty because he "is different from people like you and me. He manipulates women. He manipulated, I submit to you, Brandy into doing the things that she did and now she is serving 45 years in prison." (Tr. 04/05/2004 at 134.)

The Supreme Court has instructed that *Napue*'s materiality analysis "requires a 'cumulative evaluation' of all the evidence, whether or not that evidence is before the Court in the form of an independent claim for relief." *Glossip*, 145 S. Ct. at 630. Here, the totality of the evidence before this Court, including the evidence that the prosecutors also sanitized the felony record of prosecution witness Coleman Givens and concealed from Petitioner's trial lawyer and the jury Givens' true incentives for testifying against Petitioner, "reinforce [the] conclusion that the *Napue* error here prejudiced the defense." *Id.* at 629–30.

B. *Brady v. Maryland*, 373 U.S. 83 (1963)

"To establish a *Brady* violation" based on the State's suppression of favorable 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, ¶ 38, 450 P.3d at 950; *Brown v. State*, 2018 OK CR 3, ¶ 104, 422 P.3d 155, 175 (noting that 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.").

Under *Brady*, in order to find that the prosecution suppressed favorable evidence it is not required to find "bad faith or any other culpable state of mind on the part of the prosecutor." *Smith*, 50 F.3d at 824 (citing *Brady*, 373 U.S. at 87); *id.* n.34 (noting that "the state of mind of the prosecutor is irrelevant to the question under *Brady* of whether the prosecution failed to disclose material exculpatory evidence"). The Supreme Court has also instructed that "implicit in the requirement of materiality is a concern that the suppressed evidence *might* have affected the outcome of the trial" or penalty phase in a given case. *Bagley*, 473 U.S. at 674–75 (quoting *Agurs*, 427 U.S. at 104) (emphasis added).

Importantly, the Supreme Court has instructed that showing materiality under *Brady* "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 inculpate the defendant)." *Kyles*, 514 U.S. at 434. That is because *Brady*'s materiality standard "is not a sufficiency of the evidence test," which means a *Brady* violation can still be material even if, without the suppressed evidence, the prosecution would still have had enough evidence to convict the defendant or sentence him to death. *Id.* at 434–35 (footnote omitted). Instead, if the favorable evidence that was suppressed "could reasonably be taken to put the whole case

in such a different light as to undermine confidence in the verdict" then materiality under *Brady* is established. *Kyles*, 514 U.S. at 435.

1. The prosecution suppressed its full agreement with Warden, and evidence of that full agreement was favorable to Petitioner's defense under *Brady*.

The totality of the evidence before the Court shows that the prosecution suppressed the cooperation memorandum in which they secretly promised Warden 35 years' imprisonment and ensured her Payne County deferred sentence was not accelerated to a felony conviction. Section II, *supra*. As discussed *supra* in the context of the *Napue* errors in Petitioner's case, the full agreement between prosecutors and Warden promised her the 35 years' imprisonment she ultimately received, allowed her to avoid a felony conviction for her criminal acts in Payne County, allowed her to avoid serving additional or concurrent terms of incarceration, and allowed her to avoid paying $695 in outstanding restitution to her Payne County victims.

In *Binsz*, 1984 OK CR 28, 675 P.2d at 448, the OCCA 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.* ¶ 11, 675 P.2d at 450. The OCCA found the suppressed evidence of a deal "favorable" to the defense because "[h]ad the jury been appraised of the true facts, it might well have concluded that [the prosecution witness] fabricated testimony in order to curry favor with the district attorney's office." *Id.* ¶ 12, 675 P.2d at 451. The OCCA also held that, especially in a death penalty case, "public policy demands full disclosure to the jury of the terms of

any plea bargain between the prosecutor and an accomplice who testifies for the State." *Id.*

Here, the evidence of the prosecution's full agreement with Warden and the plethora of benefits she received and was promised in exchange for her testimony against Petitioner is clearly favorable to Petitioner's defense. *Harris*, 2019 OK CR 22, ¶ 38, 450 P.3d at 950 (evidence that would impeach witness's credibility is favorable); *Giglio*, 405 U.S. at 154 (nondisclosure of evidence affecting credibility is favorable where reliability of witness "may well be determinative of guilt or innocence"). Had that evidence not been suppressed, Petitioner "might have used [that information] to impeach" Warden "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.").

2. The evidence of the prosecution's full agreement with Warden is material under *Brady* because a reasonable probability exists that its suppression contributed to Petitioner's conviction and death sentence.

i. Materiality at the First Stage of Petitioner's Trial

The record here shows that the prosecution's first-stage case against Petitioner for first-degree felony murder, robbery with a firearm, and conspiracy

to commit robbery with a dangerous weapon turned on the testimony and credibility of Warden. *See* Section II(J), *supra*. As Burnett testified at the evidentiary hearing, Warden's testimony gave the prosecution "the certainty of a conviction." (Evid. Hr'g Tr. 04/08/2025 P.M. at 77.) Burnett testified that the prosecution's strategy at the first stage of Petitioner's trial was to present Warden to the jury as "kind of a timid, go-along girl[]" and to make the jury "feel sorry for her a little bit listening to her testimony." (Evid. Hr'g Tr. 04/08/2025 P.M. at 78, 95.)

In opening arguments at the first stage, prosecutors previewed key portions of Warden's testimony for the jury, telling them, "You will hear from Brandy Warden. Brandy Warden is one of the co-defendants in this case. She is the mother of three small children. One of them belonging to Termane [*sic*] Wood. . . . She will tell you that Termane Wood participated in the murder of Ronnie Wipf." (Tr. 03/31/2004 at 102–09.)

Warden then took the stand on behalf of the prosecution at the first stage and provided the critical testimony directly incriminating Petitioner in all three crimes with which he was charged: the first-degree felony murder of Wipf, the robbery of Wipf and Kleinsasser using a dangerous weapon, and the conspiracy to rob them both. (Tr. 04/01/2004 at 150–54, 168.)

To drive home Warden's credibility for the jury, prosecutors elicited the following testimony from Warden about her deal:

Q. [Smith]	At some time, did you or Ms. Cox come to the District Attorney's Office and offer to have you testify in order to get a good deal for you?
A. [Warden]	Yes, she did.

Q. [Smith]	And did the District Attorney's Office, Mr. Burnett and myself, offer you some kind of deal in order for you to testify truthfully to the jury?
A. [Warden]	Yes.
Q. [Smith]	And will you tell the jury what that was, please?
A. [Warden]	Accessory to Murder After the Fact and Conspiracy to Commit a Felony. Forty-five and ten years running concurrent.
Q. [Smith]	So you basically got 45 years to do in the state penitentiary for your part in the murder, is that right?
A. [Warden]	Yes.
Q. [Smith]	Are you here to tell the jury what your part and what Mr. Termane [*sic*] Wood's part in the murder was?
A. [Warden]	Yes.

(Tr. 04/01/2004 at 131–32.)

The story that Warden told the jury was one in which she minimized her participation in and culpability for the crimes while maximizing those of her co-defendants, including Petitioner. For example, Warden testified that although she is the one who wrote the bogus check[13] to purchase the gloves and ski masks from Wal-Mart earlier in the evening, she purchased them only because "[Petitioner] . . . asked me for money. . . . And he asked me if I would buy him something. He didn't tell me what at the time." (Tr. 04/01/2004 at 137–38; *id.* at 139 (Warden testifying that "the first time [she] saw those gloves and ski masks" was "[w]henever [Petitioner] put them on the counter" at Wal-Mart).) Warden also testified that she only agreed to participate in the robbery of Wipf

[13] James Potter, an employee in Wal-Mart's accounting division, testified at Petitioner's trial that Warden's check was later returned for insufficient funds. (Tr. 04/01/2004 at 4, 11–12.) The record does not reflect that Warden was ever prosecuted for the crime of obtaining merchandise by means of a false or bogus check. 21 O.S. § 1541.1 (2002).

and Kleinsasser under pressure from Petitioner. She testified that "I had tears in my eyes . . . [b]ecause I was scared" and "Termane [*sic*] . . . told me to quit crying like a big ass baby and suck it up." (Tr. 04/01/2004 at 146–52.) Warden testified further that Petitioner "grabbed my face" and "squeezed [my] cheeks together" while "calling [me] that name." (Tr. 04/01/2004 at 154.)

According to the story Warden told the jury, although she drove the victim's car to the motel, it was her co-defendant "Lanita" who "was giving me directions there[,]" and it was "Lanita" who "selected the motel[.]" (Tr. 04/01/2004 at 155–56.) Warden testified that she gave her ID to rent the motel room only because the motel manager said that "one of us girls had to give our ID, too[]" because Wipf and Kleinsasser were underage. (Tr. 04/01/2004 at 156–57.) Warden also testified that it was "Lanita" who "started talking about money and said that every minute counts[.]" (Tr. 04/01/2004 at 160.)

On cross-examination, Johnny Albert's strategy in defense of Petitioner was to impeach Warden's credibility, truthfulness, and motivations for testifying. (Tr. 04/01/2004 at 186–200.) Albert attempted to expose for the jury Warden's minimization of her role in the crimes, the deal she obtained in exchange for her cooperation, and her incentives to embellish her story and to lie about what Petitioner and her co-defendants did:

Q. [Albert]	Ms. Warden, I am listening to you today and it is Lanita did this and Lanita did that. You are still downplaying your role in this, aren't you?
A. [Warden]	No, I'm not.
. . .	
Q. [Albert]	You talk about this 45-year sentence you got. That is actually a non-violent sentence, isn't it?
A. [Warden]	Yes.

. . .
Q. [Albert] Your charge was reduced, right?
A. [Warden] Yes.
. . .
Q. [Albert] . . . Were you jealous of [Mr. Wood's new girlfriend]?
A. [Warden] No.
Q. [Albert] Were you mad because he stayed at the bar with her?
A. [Warden] No.

(Tr. 04/01/2004 at 186–91.) The prosecution's suppression of its full agreement with Warden and the array of benefits she was promised and had received damaged Albert's effort to dismantle her credibility before the jury. *See Mays*, 1979 OK CR at ¶ 10, 594 P.2d at 779 (reversing and remanding for new trial where prosecutors suppressed deal with witness that inhibited full cross-examination, and holding that "knowledge of that bargain was vital to the jury for a proper evaluation of the weight and credibility to be given to his testimony"); *Nuckols*, 233 F.3d at 1267 ("Because impeachment of the witness who held the key to successful prosecution was denied to the defense, we have no doubt Petitioner suffered prejudice as a consequence. Moreover, we are not confident [in] the outcome of the trial.").

Had the prosecution not suppressed its full agreement with Warden which promised her 35 years' imprisonment, allowed her to avoid a felony conviction for her prior criminal acts in Payne County, allowed her to avoid a sentencing enhancement when she pled guilty in Oklahoma County, allowed her to avoid serving additional or concurrent terms of incarceration, and allowed her to avoid paying $695 in outstanding restitution to her Payne County victims, that information would have "put the whole case in such a different light as to

undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. The prosecutors could not have crafted their entire theory of the case against Petitioner around portraying Warden to the jury as someone who was just a "go-along girl[]" with "no prior felony convictions" and committed these crimes under Petitioner's manipulation and control. (Tr. 04/01/2004 at 137–39, 146–52; Tr. 04/02/2004 at 152–53, 161–64, 187, 198–99; Tr. 04/05/2004 at 5, 130, 134). *See* Section II(J), *supra*.

Instead, Albert could have impeached Warden with the fact that her deal allowed her to avoid a felony conviction for her prior criminal acts in Payne County. The jury would have learned that Warden pled guilty in October 2000 for breaking into someone's home and stealing $1,845 worth of property, including a gun. The jury would have learned that she committed those criminal acts on her own, and being under Petitioner's "control." The jury would have also learned that in that case too, Warden similarly tried to shift responsibility to her co-defendant in that case, Sheneda Davis, while minimizing her own role in that crime. According to the Pre-Sentence Report authored by ODOC Senior Probation and Parole Officer William Crye Jr., Warden claimed it was Davis who wanted to steal; it was Davis who knew where the house keys were hidden to later break into the home; and it was Davis who needed the money. (Pet. Ex. 16-1 at 2.) Meanwhile, Sherry Boyce, Warden's attorney in the felony larceny case testified that it was actually Warden who had broken into the victims' home and stolen their property while Davis waited outside in the car. (Evid. Hr'g Tr. 04/07/2025 A.M. at 44.) Albert could have also impeached Warden with the fact

that in the Payne County felony case—as in the Oklahoma County murder case—Warden pled guilty and agreed to cooperate with the prosecution of her co-defendant in exchange for a more lenient sentence for herself. (Pet. Ex. 28-2 at 2.)

The jury would have learned that when Warden pled guilty and was sentenced for lesser crimes in Oklahoma County, she was not subject to a sentencing enhancement as a habitual felony offender. *See* 21 O.S. § 51.1(2002). The jury would have also learned that Warden's deal helped her avoid serving a consecutive or concurrent term of imprisonment for her Payne County criminal acts and having to pay $695 in restitution to her Payne County victims. Instead, Petitioner's jury knew none of this.

The prosecutors' suppression of their full agreement with Warden undermined Petitioner's defense and misled the jury by depriving it of information critical to jurors' assessment of Warden's truthfulness, credibility, and motivations for testifying to the story she told the jury. On the other side of the equation, the prosecution's suppression of its full agreement with Warden unfairly advantaged its case against Petitioner by bolstering the credibility, believability, and truthfulness of Warden's testimony. It allowed prosecutors to convincingly argue in closing at the first stage that Warden was not some "big conspirator" but rather was a girl who "know[s] one rule, you do what Termane told you to do." (Tr. 04/02/2004 at 152.) It allowed prosecutors to tell the jury that Warden's story "is the right one." (Tr. 04/02/2004 at 161–65.) It allowed them to use the prior felony convictions of Petitioner's sole witness, his brother

Zjaiton, to attack Zjaiton's credibility while protecting Warden's credibility from attack on the same basis. (*Compare* Tr. 04/02/2004 at 186 (Smith telling the jury that "Zjaiton Tyrone Wood has heretofore been convicted of criminal offenses . . . He had three prior felony convictions"); *and id.* at 160–61 (Burnett telling jurors that Zjaiton "has been convicted of criminal offenses . . . you get to weigh the credibility of this dope slinging, gang banging convict who comes into this courtroom and gives you this story[]"), *with* Tr. 04/02/2004 at 187, 198–99 (prosecutors telling the jury that "Brandy Lynn Warden has heretofore been convicted of a criminal offense. And that criminal offense, the only one she has ever been convicted of, is this murder she told you, Accessory After the Fact for the commission of this murder. . . . She has no other felony convictions. Do you want to believe Zjaiton Wood or do you want to believe Brandy Warden who cried her eyes out on the stand and does every day I submit to you. It's your choice.").)

ii. Materiality at the Penalty Phase of Petitioner's Trial

Warden's testimony featured prominently in the State's death penalty case against Petitioner at the second stage. The State incorporated all its first-stage evidence into the penalty phase, which included Warden's testimony. (Tr. 04/05/2004 at 5, 130.) The prosecution highlighted Warden's testimony for the jury in opening argument, telling jurors that "[t]he state will present evidence to you in the form of testimony from Brandy Warden that Zjaiton Wood and Termane [*sic*] Wood robbed La Franca's Pizza on December 31st of 2001, just hours before the murder of Ronnie Wipf. . . . Brandy Warden will tell you it was Termane [*sic*] Wood that participated in that robbery." (Tr. 04/05/2004 at 9–11.)

Warden's testimony provided support for the continuing threat aggravating circumstance, one of the aggravating circumstances that prosecutors alleged made Petitioner eligible for the death penalty.

Warden testified that earlier in the evening on December 31, 2001, she and Bateman were with Petitioner when he and his brother Zjaiton robbed a pizza restaurant while they waited in the car. (Tr. 04/05/2004 at 17.) She testified that Bateman had selected the place for the robbery and Zjaiton had a gun and Petitioner had a knife. (Tr. 04/05/2004 at 18.)

The prosecution highlighted Warden's testimony in its penalty phase closing argument, telling the jury that Petitioner deserved the death penalty because his "robbery of Kermat, the pizza man" proved he is "a threat to society." (Tr. 04/05/2004 at 115; *id.* at 134 (prosecutor arguing that Petitioner deserved the death penalty because he is the "kind of man who can go out and rob the little pizza man that you saw on the witness stand. . . . This man, Termane [*sic*] Wood, is clearly the aggressor in that pizza robbery. Clearly the aggressor[]").) The prosecution also told the jury that Petitioner deserved the death penalty because "[h]e manipulates women." (Tr. 04/05/2004 at 134.) Reminding the jury of Warden's first-stage testimony against Petitioner, the prosecution told jurors that "He manipulated, I submit to you, Brandy into doing the things that she did and now she is serving 45 years in prison." (*Id.*) They also told jurors that because of Petitioner, "Brandy messed up her life. She gave up 45 years of her life and gave up the opportunity to raise these kids because of what she did and participated in this event." (Tr. 04/05/2004 at 156.)

The suppressed evidence of the prosecution's full agreement with Warden would have put the prosecution's case for the death penalty against Petitioner "in such a different light as to undermine confidence in the verdict." *Cone v. Bell*, 556 U.S. 449, 470 (1009) (quoting *Kyles*, 514 U.S. at 435). Rather than hearing that Petitioner was the type of man who manipulated Warden into participating in the crimes, jurors would have learned that a year and a half earlier Warden pled guilty to a felony offense in Payne County that she committed without Petitioner's involvement or being under his control. Jurors would also have learned that Warden and a female co-defendant broke into someone's home and stole $1,845 worth of property, including a gun. And had the jury also known about the full array of benefits Warden received and was promised in exchange for her testimony against Petitioner, that information might have led at least one juror to question the credibility of Warden's testimony that she naively went along with the pizza restaurant robbery that she claimed was orchestrated by Bateman, Petitioner, and Zjaiton. It might also have led at least one juror to question Warden's overall story that Petitioner forced her to go along with the crimes for which the prosecution was seeking the death penalty against him. Instead, at least one juror "might well have concluded that [Warden] had fabricated testimony in order to curry favor with the district attorney's office." *Binsz*, 1984 OK CR 28, ¶ 12, 675 P.2d at 451.

Having considered the totality of the evidence, this Court is unable to conclude that Petitioner "received a fair trial resulting in a verdict worthy of confidence." *Harris*, 2019 OK CR 22, ¶ 38, 450 P.3d at 950; *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)); *Nuckols*, 233 F.3d at 1267 ("As in many death penalty, habeas corpus cases, the problem presented here is not whether the petitioner is innocent . . . but rather whether he received the full benefit of fair rules and constitutional procedure and a fair opportunity . . . to a jury trial." (internal quotation marks omitted)).

Dated this ____ day of May, 2025.

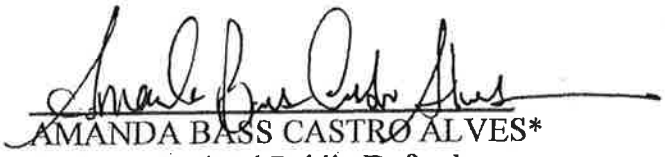
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Susan C. Stallings
DISTRICT COURT JUDGE

Respectfully submitted: April 28, 2025

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CERTIFICATE OF SERVICE

I certify that on April 28, 2025, I caused an original of the foregoing Petitioner's Proposed Findings of Fact and Conclusions of Law to be filed with the Clerk of Court, 320 Robert S. Kerr Avenue, Suite 409, Oklahoma City, Oklahoma, 73102. I further certify that I caused the foregoing document to be served on counsel for the State, Assistant Oklahoma Attorneys General Joshua Lockett and Christina Burns, Office of the Oklahoma Attorney General, at the following email addresses: Joshua.Lockett@oag.ok.gov and Christina.Burns@oag.ok.gov.

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