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Appendix A: Tenth Circuit Order Denying Rehearing and Rehearing En Banc (Aug. 14, 2026)

FILED
United States Court of Appeals
Tenth Circuit

August 14, 2026

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BRENDA EVERS ANDREW,

Petitioner - Appellant,

v.

SCOTT TINSLEY, Warden, Mabel Bassett Correctional Center,

Respondent - Appellee.

FAIR TRIAL ANALYSIS, LLC, et al.,

Amicus Curiae.

No. 15-6190
(D.C. No. 5:08-CV-00832-R)
(W.D. Okla.)

ORDER

Before **HOLMES**, Chief Judge, **HARTZ**, **TYMKOVICH**, **MATHESON**, **BACHARACH**, **PHILLIPS**, **McHUGH**, **MORITZ**, **EID**, **CARSON**, and **FEDERICO**, Circuit Judges.*

This matter is before the court Appellant's *Petition for Panel Rehearing and Rehearing En Banc*, and Appellee's *Response to Petitioner's Petition for Rehearing.*

Upon careful consideration of the petition and the response, we direct as follows.

* The Honorable Veronica S. Rossman is recused in this matter.

The pending motions for leave to file amicus briefs are GRANTED. All amicus briefs submitted in connection with the court's consideration of whether to grant en banc rehearing will be filed as of the date they were submitted.

Appellant's request for panel rehearing is DENIED.

The petition and response were transmitted to all non-recused judges of the court who are in regular active service, and a poll was called. The poll did not carry. Consequently, Appellant's request for en banc rehearing is DENIED.

Judge Federico voted to grant en banc rehearing and has filed a separate dissent from the denial of en banc rehearing.

Entered for the Court,

Per Curiam

No. 15-6190, *Andrew v. Tinsley*
FEDERICO, Circuit Judge, dissenting from the denial of rehearing en banc.

"[W]hen evidence 'is so extremely unfair that its admission violates fundamental conceptions of justice,'" the Constitution "impose[s] a constraint tied to the Due Process Clause." *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012) (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990)). The Supreme Court reaffirmed this principle last year when it granted certiorari in this very case: the "mistaken admission of irrelevant evidence" can be so "'unduly prejudicial' as to render [a] trial 'fundamentally unfair.'" *Andrew v. White*, 604 U.S. 86, 96 (2025) (per curiam) (*Andrew III*). On remand, the Supreme Court tasked this court to apply this principle against the extreme record in this case. Because I disagree with how the panel resolved this appeal following the remand, I vote to grant the petition and rehear this case before the en banc court.

After Oklahoma introduced a swell of evidence (ranging from testimony about her appearance to the physical underwear she wore on vacation) to advance a sex-based stereotype of Andrew's character, the jury convicted her of murder and sentenced her to death. This court then rejected Andrew's claim and held that clearly established federal law precluded her challenge to the admission of irrelevant and prejudicial evidence. Now, this court holds that

Andrew's appeal must fail because she has not demonstrated that the challenged evidence "concern[ed] the central jury issues" at trial. *Andrew v. Tinsley*, 164 F.4th 789, 801 (10th Cir. 2026) (*Andrew IV*). But this test turns the constitutional principle on its head.

I will first very briefly address the factual and procedural background of this case; then discuss the merits of Andrew's petition for rehearing; and then conclude by explaining why the issues in this case rank, in my view, as exceptionally important within the meaning of our local rules for rehearing en banc.

I

To recite the facts is to state the fundamental unfairness of the trial that sent Andrew to death row. They are well-trodden by judges up and down the state and federal court systems who have considered this case, so I will be very brief in summarizing the factual and procedural history. These are snippets from the state's evidence:

- "She came into the store and just had been shopping there regularly for a while and then just, she started kinda flirting with me, coming in dressed sexy." State R. II at 84 (testimony of James Higgins).

- "[Prosecutor's Question:] When you say she was dressing sexy can you describe the attire that she would wear when she came into the store? [Higgins' Answer:] Like short skirt, low-cut tops, just sexy outfits, provocative." State R. II at 84–85.

- "Does a good mother invite her boyfriends over to the house with the children in the home when they're still married to their father?" State R. II at 258 (prosecutor's question on redirect examination of Higgins).

- "She wasn't wearing attire that I would consider appropriate for running errands." State R. II at 181 (testimony of Jennifer Jones).

- "[Prosecutor's Question:] How did she appear to you? [David Ostrowe's Answer:] Well, as we were sitting at the bar waiting for them to come the comment that was made was who is the hoochie." State R. II at 161.

- "[Prosecutor's Question:] Anything in particular that you can tell me about her appearance that was surprising to you? [Ostrowe's Answer] Uhm, her dress was very tight, very short with a lot of cleavage she exposed." State R. II at 161.

There was so much more. And these were not stray comments elicited in the heat of trial; they were part of a trial strategy to draw the jury's attention to Andrew's concededly irrelevant but, the state argued, unwomanly and unmotherly behavior. In its opening statement, Oklahoma promised evidence of Andrew's "extracurricular activities." State R. I at 13. And in closing, Oklahoma held aloft the underwear of the accused and stated: "The grieving widow packs this to run off with her boyfriend. The grieving widow packs this to go sleep in a hotel room with her children and her boyfriend. The grieving widow packs this in her appropriate act of grief." State R. XVII at 249. According to the trial judge, evidence of this kind was allowed into evidence "only as it relate[d] to her ability to manipulate men." State R. XII at 227.

Altogether, Oklahoma put forward a scene at trial that would make Nathaniel Hawthorne blush. Or as one of my colleagues put it:

> The State focused from start to finish on Ms. Andrew's sex life. This focus portrayed Ms. Andrew as a scarlet woman, a modern Jezebel, sparking distrust based on her loose morals. The drumbeat on Ms. Andrew's sex life continued in closing argument, plucking away any realistic chance that the jury would seriously consider her version of events.

Andrew v. White, 62 F.4th 1299, 1336 (10th Cir. 2023) (*Andrew II*) (Bacharach, J., dissenting).

The Oklahoma Court of Criminal Appeals acknowledged the same. On direct appeal, the three-judge majority wrote: "This Court is struggling to find any relevance to this evidence, other than to show Appellant's character. The State agrees that most of this evidence was irrelevant to any issue in this case; however, even so, the introduction of this evidence was harmless due to the overwhelming evidence in this case." *Andrew v. State*, 164 P.3d 176, 192 (Okla. Crim. App. 2007) (*Andrew I*). Judge Johnson dissented in part, as she could not agree that the "jury was unaffected by that evidence in deciding whether this defendant should live or die," *id.* at 207, and Judge Chapel would have reversed both Andrew's conviction and her sentence, *id.* at 208.

After she sought federal habeas review, the district court denied Andrew relief. *Andrew v. Moham*, 2015 WL 5254525 (W.D. Okla. Sept. 9, 2015). This court affirmed. Andrew argued that the Supreme Court's decision in *Payne v.*

Tennessee, 501 U.S. 808 (1991), established a rule of due process precluding the admission of irrelevant and prejudicial evidence in at least some cases. *Andrew II*, 62 F.4th at 1314. Unpersuaded, this court initially held "*Payne* is not 'clearly established law' that establishes a due-process violation arising from ordinary evidentiary rulings at trial." *Id.* at 1315.

The Supreme Court reversed. "By the time of Andrew's trial, this Court had made clear that when 'evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.'" *Andrew III*, 604 U.S. at 87 (quoting *Payne*, 501 U.S. at 825). The Supreme Court left to us on remand the task of deciding whether, in light of this clearly established federal law, the Oklahoma Court of Criminal Appeals unreasonably applied that law in Andrew's case, sufficient to warrant relief under 28 U.S.C. 2254(d)(1). "Specifically, the question now is whether a fairminded jurist *reviewing this record* could disagree with Andrew that the trial court's mistaken admission of irrelevant evidence was so 'unduly prejudicial' as to render her trial 'fundamentally unfair.'" *Id.* at 95–96 (quoting *Payne*, 501 U.S. at 825) (emphasis added).

II

This court again affirmed following the remand. There were essentially three steps the panel took to reach its bottom line. First, taking measure of the

record, it concluded that only "ten testimonial passages" had been properly preserved for federal review, *Andrew IV*, 164 F.4th at 797–98. Second, parrying Andrew's other bases for reversal, the court also concluded that she had abandoned her cumulative error claim, *id.* at 793. Third, and in the coup de grâce, the court held that neither the guilt nor penalty phase of Andrew's trial were fundamentally unfair because of the overall strength of the evidence and the irrelevant, sex-based evidence did not pertain to a central jury question, *id.* at 801–02, 803–04.

A

As to the scope of review following the Supreme Court's remand, the court held that it would not consider any of Andrew's challenged evidence beyond the "ten testimonial passages" Andrew specifically cited to the Oklahoma Court of Criminal Appeals in her briefs before that court. *Andrew IV*, 164 F.4th at 797–98. Neither the law nor the facts support that result.

Starting with the law, the Antiterrorism and Effective Death Penalty Act of 1996 constrains federal habeas relief for those in state custody to cases where a state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). As the text of the second clause would suggest, the touchstone for AEDPA is reasonableness. Applying that principle, the Supreme Court has said that the reasonability inquiry "focuses on what the state court knew and did" and so

the inquiry is confined to the record before the state court. *Cullen v. Pinholster*, 563 U.S. 170, 181–85 (2011); *see also Wellmon v. Colo. Dep't of Corr.*, 952 F.3d 1242, 1249 (10th Cir. 2020) (same). But so long as the state court was reasonably or actually on notice of the record evidence, we are free to consider the same record evidence. "[N]othing in *Pinholster* inherently limits this court's review to evidence that the state appellate court – as opposed to the state trial court – considered." *Jamerson v. Runnels*, 713 F.3d 1218, 1227 (9th Cir. 2013); *see also Higgins v. Cain*, 720 F.3d 255, 263 (5th Cir. 2013) (quoting *Jamerson*). As best I can tell, no federal court has so narrowly confined federal habeas review to the specific record citations found in the briefs before the state court.

On the facts, the panel held "the Oklahoma Court of Criminal Appeals didn't act unreasonably by disregarding evidence that Ms. Andrew hadn't addressed." *Andrew IV*, 164 F.4th at 798. But at least with respect to the penalty phase, the Oklahoma court did not disregard any evidence. To the contrary, it was required under its own rules to review, and in fact *did* review, "the entire record" to "find that the sentence of death was not imposed because of any arbitrary factor, passion, or prejudice." *Andrew I*, 164 P.3d at 205. Under these circumstances, it was entirely within our power to consider the entire record as well. Instead, we may have now split with both the Fifth and Ninth Circuits and did so without the benefit of a district court decision on this point.

B

On remand, the panel also declined to consider Andrew's closely related claim of cumulative error. *Andrew IV*, 164 F.4th at 793. To be sure, "the parties' arguments on remand constrain our review." *Id.* But although the court exercised its discretion to invite briefing from parties after *Andrew III*, it did not place the parties on notice that the failure to re-brief or to address a previously briefed and argued issue would constitute abandonment. Rather, it ordered the parties to address in simultaneous briefs "the impact, on the course of further proceedings in this appeal, of the Supreme Court's" *Andrew III* decision. Doc. 193. Andrew did precisely that, addressing the issue upon which the Supreme Court granted certiorari, vacated, and remanded to this court. Doc. 197. She cannot now be faulted for failing to address an issue that the Supreme Court did not consider, for it was not part of its "impact." Doc. 193.

Nor does the mandate rule, a more apt justification for the panel's winnowing paradigm, appear to lead to the same result. "A lower court is 'bound to carry the mandate of the upper court into execution and [cannot] consider the questions which the mandate laid at rest.'" *Estate of Cummings ex rel. Montoya v. Cmty. Health Sys. Inc.*, 881 F.3d 793, 801 (10th Cir. 2018) (alteration in original) (quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939)). But for a previously raised issue to be precluded from consideration by the mandate rule, a party must have failed to have raised or

pursued it on appeal. *Id.* Here, Andrew did raise her cumulative error argument before the Supreme Court, but that court simply did not grant certiorari on that issue. Petition for Writ of Certiorari at 29–34, *Andrew III*, No. 23-6573, 2024 WL 5378840 (U.S. Jan. 22, 2024). Whether the cumulative error argument was therefore left available for this court's consideration on remand is a tougher question in light of the unique posture in which the case returned to us – by a reasoned opinion granting certiorari, vacating the judgment, and remanding, rather than summary reversal. *Andrew III*, 604 U.S. at 96. Regardless, given the seriousness of this case and the fact that the panel did not rest its holding on the mandate rule, this court should grant rehearing en banc to also consider whether cumulative error was preserved for our review.

C

Finally, my main concern is the panel's formulation of the constitutional standard for determining when irrelevant, prejudicial evidence so impedes the fundamental fairness of a criminal trial that a due process violation occurs. The premise upon which the panel decided this question was relatively undisputed; it agreed with the Oklahoma Court of Criminal Appeals "that much of the challenged evidence had been irrelevant to guilt or innocence." *Andrew IV*, 164 F.4th at 798. The panel concluded that Andrew's trial and sentencing were fundamentally fair because the challenged, irrelevant

evidence did not "concern the central jury issues," *id.* at 801, and the strength of the evidence of guilt and aggravation was overwhelming, *id.* at 799–800, 804. In my view, Andrews rightfully questions the correctness of that legal standard.

"There is a principle – not so much a rule of evidence as a presupposition involved in the very conception of a rational system of evidence . . . which forbids receiving anything irrelevant, not logically probative." James Bradley Thayer, A Preliminary Treatise on Evidence at the Common Law 264–65 (1898). Irrelevant evidence is inadmissible for a reason – it necessarily invites the jury to render a decision based on factors other than what is provided for by law. Fed. R. Evid. 402; *cf.* 1 McCormick On Evid. § 184 (9th ed.). And when that irrelevant evidence touches upon an issue of passion or prejudice, it can do much worse than procure a decision on merely other-than-permissible grounds; rather, it can induce decision-making on affirmatively prohibited grounds.

The Constitution does not permit imposing the death penalty on the defendant "by reason of [her] race, religion, wealth, social position, or class, [or sex,] or if it is imposed under a procedure that gives room for the play of such prejudices." *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring). Thus, the law has long recognized that irrelevant evidence can be prejudicial precisely because it does *not* concern a central issue of fact and

therefore distracts the jury and invites it to render a decision based on inflamed passions, or a prohibited, rather than a permissible, basis. *See, e.g., Hanson v. Sherrod*, 797 F.3d 810, 840 (10th Cir. 2015); *Duvall v. Reynolds*, 139 F.3d 768, 794 (10th Cir. 1998); *Payne*, 501 U.S. at 832 (O'Connor, J., concurring) (suggesting that due process may be offended if a prosecutor's statement "inflame[d] the [jurors'] passions more than the facts of the crime"); Fed. R. Evid. 403 notes of advisory committee ("Unfair prejudice within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.").

To my mind, the panel's holding flips this around. Irrelevant evidence carries the risk of prejudice precisely because it *never* tracks the central jury issues at trial, and instead lures the jury away from its appropriate task: "the determination of truth." *Tehan v. United States ex rel. Schott*, 382 U.S. 406, 416 (1966). That risk of prejudice becomes constitutionally intolerable when, by its nature, the irrelevant evidence tempts the jury into judgment on a prohibited ground, such as race or sex. *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 265 (1989) (O'Connor, J., concurring).

Also, the panel's reliance and interpretation of *Buck v. Davis* was misplaced. 580 U.S. 100 (2017). There, the Court held that a single race-based statement by an expert witness was sufficient to infect the trial with fundamental unfairness because, among other things, it "coincided precisely

with a particularly noxious strain of racial prejudice, which itself coincided precisely with the central question at sentencing." *Id.* at 121. But fairly read, *Buck* did not interpret the Due Process Clause to permit the introduction of irrelevant, prejudicial evidence so long as it is not targeted at a central jury question. That would make no sense. To the contrary, the Supreme Court sensibly held that even a quantitatively small amount of irrelevant, prejudicial evidence put before the jury can be unconstitutional when its quality – its source, its place within the broader trial, and the "unusual confluence" of other factors – supports such a conclusion. *Id.* "Some toxins can be deadly in small doses." *Id.* at 122. Here, by contrast to *Buck*, the trial record is suffuse with sex-stereotyping evidence, so this part of the holding in *Buck* was inapposite.[1]

What is more, this novel test invites substantial confusion about the scope of its holding. The panel appeared to hold that some of the challenged evidence could bear on central jury questions like demeanor or motive, so

[1] Nor can Andrew be fairly blamed for this misapprehension of *Buck*. Andrew never cited *Buck* in her principal briefs. Indeed, she could not have, because as Oklahoma helpfully points out, *Buck* was decided after Andrew's opening brief was first filed in this case. Resp. to Pet. for Rehearing at 18. Nor did Andrew make *Buck* the centerpiece of her supplemental brief after remand from *Andrew III*, where she cited it only twice. Aplt. Supp. Br. at 3. She relied instead on *Payne*, as she had before the Supreme Court and this court, and cited *Buck* only for the proposition that even a small quantum of irrelevant evidence can be prejudicial when it aligns with a prohibited ground for decision.

Andrew's challenge to that evidence failed. *Andrew IV*, 164 F.4th at 799. But if this is correct, why hasn't Andrew demonstrated that the sex-stereotyping evidence coincided precisely with a central jury question? How can Andrew's claim fail simultaneously because some of the evidence is too relevant to a central jury question, and the remaining evidence is not relevant enough? And it is questionable that the jury would have isolated some of the sex-stereotyping evidence, appropriately considered it only for its relevance as to motive, and disregarded the remainder.

Also, two points about the strength of the evidence against Andrew. First, in determining whether the irrelevant evidence is prejudicial for constitutional purposes, the Supreme Court did not intend for this court to ask simply whether, in a counterfactual world where the irrelevant evidence had not been admitted, the result would have been the same. Instead, the analysis asks whether the irrelevant evidence distracted the jury from its appropriate task and tempted it into an inappropriate one, such that no fair-minded jurist could have confidence that the jury *actually* rendered its decisions based only on admissible, relevant evidence.

Second, with respect to the penalty phase of Andrew's trial, the panel held that there was "strong evidentiary support for [two] aggravating factors," *Andrew IV*, 164 F.4th at 804. Maybe so. But an Oklahoma capital jury does not merely consider whether the state has proven an aggravating factor, it must

weigh that against mitigating factors as well, *Eddings v. Oklahoma*, 455 U.S. 104, 110–12 (1982); *see also* Okla. Stat. tit. 21 § 701.11 ("[I]f it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed."). Oklahoma's strategy of flooding the decision-making zone with irrelevant, prejudicial sex-stereotyping evidence may have undermined the jury's ability to properly weigh any mitigating factors in Andrew's favor. The panel opinion does not discuss this required balancing and may have over-emphasized the aggravating evidence alone.

III

In a classic evidence law case, the New Hampshire Chief Justice explained: "It is quite inconsistent with that fairness of trial to which every man [and woman] is entitled, that the jury should be prejudiced against him [or her] by any evidence except what relates to the issue; above all should it not be permitted to blacken his [or her] character, to show that he [or she] is worthless, to lighten the sense of responsibility which rests upon the jury, by showing that he [or she] is not worthy of painstaking and care, and, in short, that the trial is what the chemists and anatomists call *experimentum in corpore vili*." *State v. Lapage*, 57 N.H. 245, 289–90 (1876); *see also* 1 John Henry Wigmore, Treatise on the Anglo-American System of Evidence in Trials at Common Law Including the Statutes and Judicial Decisions of All

Jurisdictions of the United States and Canada § 12 (2d ed. 1923). The trial record here demonstrates not only that this likely occurred in this trial, but that it was Oklahoma's trial objective for it to occur. It thus strikes me as among those "extreme malfunctions in the state criminal justice system" we are charged to guard against. *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in the judgment)).

In failing to correct this error, I fear we have compounded it. As binding precedent, the due process holding of this case will govern a wide range of claims that recur in federal and state courts. In Andrew's case, there is a real risk that the death penalty will be carried out based on a replete record of inadmissible sex-stereotyping evidence and argument. I respectfully dissent.

Appendix B: Tenth Circuit Decision (Jan. 13, 2026)

FILED
United States Court of Appeals
Tenth Circuit

January 13, 2026

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BRENDA EVERS ANDREW,

Petitioner - Appellant,

v.

SCOTT TINSLEY, Warden, Mabel Bassett Correctional Center,

Respondent - Appellee.

FAIR TRIAL ANALYSIS, LLC; OKLAHOMA APPLESEED CENTER FOR LAW AND JUSTICE; JAMIE ABRAMS; MARY ATWELL; VALENA BEETY; SALLY GOLDFARB; LEIGH GOODMARK; AYA GRUBER; MALLIKA KAUR; LEGAL MOMENTUM; NANCY LEMON; CORTNEY LOLLAR; MINDY MECHANIC; PRISCILLA OCEN; AMANDA POTTS; SUSAN SHARP; WOMEN'S LAW PROJECT,

Amicus Curiae.

No. 15-6190

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. 5:08-CV-00832-R)

Nathalie Marie Greenfield, Phillips Black, Inc. Oakland, California (John R. Mills and Meredith Huang, Phillips Black, Inc., Oakland, California, and John T. Carlson, Ridley McGreevy & Winocur, Denver, Colorado, with her on the briefs), for Petitioner-Appellant.

Jennifer L. Crabb, Assistant Attorney General (Gentner F. Drummond, Attorney General, with her on the briefs), Attorney General's Office, State of Oklahoma, Oklahoma City, Oklahoma, for Respondent-Appellee.

Andrew LeGrand, Counsel of Record, Russ Falconer, and Erin Marie Choi, Gibson, Dunn & Crutcher, LLP, Dallas, Texas; Mark J. Cherry, Gibson, Dunn & Crutcher LLP, New York, New York; Monica Limeng Woolley, Hayley N. Lawrence, Maya Jeyendran, and Tate Rosenblatt, Gibson, Dunn & Crutcher LLP, Washington, D.C., filed an amicus curiae brief for Jamie Abrams, Mary Atwell, Valena Beety, Sally Goldfarb, Leigh Goodmark, Aya Gruber, Mallika Kaur, Legal Momentum, Nancy Lemon, Cortney Lollar, Mindy Mechanic, Priscilla Ocen, Amanda Potts, Susan Sharp, Women's Law Project, on behalf of Appellant. Barry C. Edwards, Orlando Florida, filed an amicus curiae brief for Fair Trial Analysis, LLC, in partial support of Appellant and partial support of Appellee.

Before **HARTZ**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

BACHARACH, Circuit Judge.

This appeal grew out of the murder of Mr. Rob Andrew. Suspicion descended on his wife, Ms. Brenda Andrew, who was having an affair with James Pavatt. Mr. Pavatt eventually admitted that he had shot Rob. But the police suspected collusion with Ms. Andrew, and she was eventually convicted and sentenced to (1) death for first-degree murder and (2) 10 years and a $5,000.00 fine for conspiracy to commit first-degree murder. After exhausting her appeals in state court, Ms. Andrew unsuccessfully

sought habeas relief in federal district court. She appeals the denial of habeas relief.

We are addressing this appeal for the second time. The first time, Ms. Andrew presented multiple claims. This time, the claims have been winnowed to one: the denial of a fair trial based on evidence of a gender stereotype and promiscuity. The Oklahoma Court of Criminal Appeals rejected this claim, triggering limited review under federal law. With the limited scope of review, we conclude that the Oklahoma Court of Criminal Appeals reasonably applied Supreme Court precedent in deeming the trial fundamentally fair.

1. The issues have narrowed.

When we addressed the appeal the first time, we considered ten claims, including

- improper introduction of sexual evidence,
- exclusion of defense witnesses,
- violation of *Miranda*, and
- cumulative error.

Andrew v. White, 62 F.4th 1299, 1309–10 (10th Cir. 2023) (listing the ten issues that Ms. Andrew had raised and we considered), *judgment vacated*, 604 U.S. 86 (2025). A majority of the panel rejected all of the claims. Ms. Andrew obtained certiorari, and the Supreme Court addressed only the claim involving sexual evidence.

With this focus on the claim involving sexual evidence, the Supreme Court vacated our judgment and remanded the case. But the Court didn't vacate the majority opinion. So we directed the parties to address the impact of the remand.

Ms. Andrew responded by reurging her claim of an unfair trial based on the introduction of sexual evidence. But she didn't assert constitutional violations based on the exclusion of testimony, a violation of *Miranda*, or the existence of cumulative error. Instead, Ms. Andrew argued only that the court could consider these alleged violations when assessing prejudice from the sexual evidence. The parties' arguments on remand constrain our review. *See Greenlaw v. United States*, 554 U.S. 237, 243 (2008) (stating that "we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present").

For this review, the parties agree that federal law bars the availability of habeas relief unless the Oklahoma Court of Criminal Appeals

- unreasonably applied Supreme Court precedent involving the denial of a fundamentally fair trial or
- based the decision on an unreasonable determination of fact.

28 U.S.C. § 2254(d)(1)–(2). We apply this standard based solely on the introduction of sexual evidence.

2. Ms. Andrew challenges a wide range of evidence.

In supplemental briefing after remand, Ms. Andrew challenges the introduction of "sex-stereotyping evidence." Appellant's Supp. Opening Br. at 19–20 (Apr. 7, 2025). This evidence concerns Ms. Andrew's sex life, appearance, and demeanor.

Ms. Andrew's sex life. The sexual evidence includes Ms. Andrew's affairs with James Higgins and Rick Nunley. Both men testified about these affairs. For example, Mr. Higgins testified about how Ms. Andrew had flirted and discussed their sexual interludes.[1]

Ms. Andrew also points to testimony about her affair with James Pavatt. This testimony came from three ministers and a neighbor who had seen Mr. Pavatt holding his face within inches of Ms. Andrew's.

Finally, the government presented an excerpt from Rob's journal, which discusses Ms. Andrew's alleged infidelity during their engagement.

Ms. Andrew's appearance and demeanor. The evidence also includes testimony by five persons about Ms. Andrew's provocative clothing and hair style. Mr. Higgins testified that Ms. Andrew had "dressed sexy" with "short skirt[s], low-cut tops, just sexy outfits, provocative." Trial Trans. vol. 2, at 247. Mr. Higgins added that Ms. Andrew had made

[1] Mr. Higgins also testified that Ms. Andrew had told him that she hated Rob and wished he were dead so that she could go on with her life. Trial Trans. vol. 2, at 250, 256.

advances on his sons. Besides Mr. Higgins, a babysitter recalled that Ms. Andrew had once left her house with rolled hair and revealing clothes. Another witness testified that Ms. Andrew had entered a restaurant wearing a "very tight" dress exposing a lot of cleavage, with "[v]ery Gothic, long black hair," leading someone to call her a "hoochie." *Id.* at 320–24. Still another witness recalled that

- Ms. Andrew had asked a woman what hair color her husband preferred,
- the woman answered that her husband liked red hair, and
- Ms. Andrew then dyed her hair red.

Ms. Andrew identifies other evidence about her demeanor. For example, ministers testified that Ms. Andrew had

- used "foul" language and name calling when speaking with Rob and
- engaged in "inappropriate behavior" with Mr. Pavatt.

Id. at 211. Similarly, a neighbor testified that the Andrew family had a hot tub and that Ms. Andrew might have used the hot tub for skinny-dipping. *Id.* vol. 12, at 2848.

3. Ms. Andrew also challenges the prosecution's statements about her sex life and parental shortcomings.

Ms. Andrew also contests the fairness of the trial based on the prosecution's statements to the jury.

Some of these statements came in the guilt phase. In its opening statement, for example, the prosecution told that jury that "this case is about a controlling wife." *Id.* vol. 1, at 12. In closing argument, the prosecution discussed Ms. Andrew's sex life and demeanor, calling her "an attractive woman" who had cheated with Mr. Pavatt for months and who had "failed to express sorrow when questioned by the police after the shooting." *Id.* vol. 17, at 3903. The prosecution then displayed a pair of underwear from a suitcase that Ms. Andrew had taken to Mexico, asking if a "grieving widow" would wear "this." *Id.* at 4101. The prosecutor added that Ms. Andrew must have been a "slut puppy" because she was sleeping with a married man. *Id.* at 4125.

During closing argument in the sentencing phase, the prosecution discussed Ms. Andrew's character and demeanor. There a prosecutor said that Ms. Andrew was "different," had people "under [her] spell," and was a poor mother. *Id.*, vol. 19, at 4312–14, 4410–11, 4493.

4. We assume for the sake of argument that Ms. Andrew has exhausted her claim.

To obtain federal habeas relief, Ms. Andrew must show that she exhausted the remedies that were available in state court. 28 U.S.C. § 2254(b)(1)(A). But a federal district court can deny habeas relief on the merits without deciding the issue of exhaustion. *See* 28 U.S.C. § 2254(b)(2); *see also Williams v. Trammell*, 782 F.3d 1184, 1194 (10th

Cir. 2015) (assuming that a claim was unexhausted and denying relief on the merits). We take this approach, assuming for the sake of argument that Ms. Andrew exhausted her claim.

5. The federal district court could grant habeas relief only if the Oklahoma Court of Criminal Appeals had failed to reasonably apply Supreme Court precedent.

Ms. Andrew claimed the denial of a fair trial, and the federal district court rejected the claim. *Andrew v. Moham*, No. CIV–08–832–R, 2015 WL 5254525, at **14–19 (W.D. Okla. Sept. 9, 2015), *aff'd sub nom.*, *Andrew v. White*, 62 F.4th 1299, 1312–16 (10th Cir. 2023), *judgment vacated*, 604 U.S. 86 (2025). We engage in de novo review over the federal district court's legal analysis. *See Littlejohn v. Trammell*, 704 F.3d 817, 825 (10th Cir. 2013) (applying the same deferential standard as the district court when the state appellate court had adjudicated the claim on the merits).

After the claim was rejected in state court, the federal district court could reach the merits only if the state appellate court's decision had been

- contrary to, or involving an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or

- based on an unreasonable determination of the facts given the evidence presented in state court.

28 U.S.C. § 2254(d); *Andrew v. White*, 604 U.S. 86, 92 (2025) (per curiam).[2]

For legal issues, we conduct a two-step process. *Budder v. Addison*, 851 F.3d 1047, 1051–52 (10th Cir. 2017). We first determine what the Supreme Court has clearly established as federal law. *Williams v. Taylor*, 529 U.S. 362, 379–82 (2000). "[C]learly established Federal law . . . is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003) (internal quotation marks omitted). We then ask whether the state court's decision was contrary to, or involved an unreasonable application of, the clearly established federal law. *Frost v. Pryor*, 749 F.3d 1212, 1223 (10th Cir. 2014). It's not enough for the state court to be wrong; it must be so wrong that no fair-minded jurist would agree with the state court. *Id.*

For the state court's factual findings, we consider whether "the state court[] plainly misapprehend[ed] or misstate[d] the record in making [its] findings, and the misapprehension goes to a material factual issue that is central to [the] petitioner's claim." *Ryder ex rel. Ryder v. Warrior*, 810 F.3d 724, 739 (10th Cir. 2016) (quoting *Byrd v. Workman,* 645 F.3d 1159,

[2] Ms. Andrew acknowledges the applicability of these restrictions on habeas relief. *See* Appellant's Supp. Resp. Br. at 20 (stating that 28 U.S.C. § 2254(d) applies).

1171–72 (10th Cir. 2011)). To overcome the state appellate court's factual findings, the petitioner must show that they are objectively unreasonable. *Smith v. Aldridge*, 904 F.3d 874, 880 (10th Cir. 2018).

If the state's highest court acted unreasonably in applying Supreme Court precedent or in finding facts, we would need to decide whether the conviction or sentence had violated the Constitution. *See Fry v. Pliler*, 551 U.S. 112, 119 (2007) (stating that 28 U.S.C. § 2254(d) provides "precondition[s] to the grant of habeas relief . . . , not an entitlement to it"); *Hancock v. Trammell*, 798 F.3d 1002, 1010 (10th Cir. 2015) ("[E]ven when petitioners satisfy the threshold in § 2254(d), they must establish a violation of federal law or the federal constitution.").

6. Ms. Andrew didn't preserve her challenge to the state appellate court's fact-finding.

In her supplemental briefs, Ms. Andrew argues that the Oklahoma Court of Criminal Appeals acted unreasonably twice in its factual findings:

1. In referring to Ms. Andrew's affair with Mr. Rick Nunley, the court stated that "[e]vidence of their affair [had been] limited to one question during [Mr. Nunley's] testimony."

2. The court also stated that Ms. Andrew had told Mr. Nunley that she hated Rob and wished he was dead.

Andrew v. State, 164 P.3d 176, 192 (Okla. Crim. App. 2007).

But Ms. Andrew admittedly failed to present these arguments in district court. *See* Appellant's Supp. Resp. Br. at 4 n.3 (acknowledging that

"§ 2254(d)(2) was not raised in the District Court as a basis for granting relief on the relevant claims"). As a result, Ms. Andrew forfeited or waived this argument. *See Harris v. Sharp*, 941 F.3d 962, 975 (10th Cir. 2019) ("Even in habeas cases involving the death penalty, we consider arguments forfeited or waived when they are raised for the first time on appeal.").

Ms. Andrew suggests that the preservation issue was waived when she presented this argument in her opening appellate brief and the respondent failed to object. Appellant's Supp. Resp. Br. at 4 n.3. This suggestion is misguided. Ms. Andrew doesn't say where in her opening brief she had mentioned § 2254(d)(2). In fact, this section isn't cited anywhere in her opening appellate brief.

She did say in a footnote: "Incidentally, the [Oklahoma Court of Criminal Appeals] misstated the record with respect to [Mr.] Nunley. It said evidence of his 'sexual affair' with Andrew 'was limited to one question during his testimony.' In fact, there were 10 such questions . . . ." Appellant's Opening Br. at 26 n.2. This "incidental" observation in a footnote didn't fairly alert either the respondent or the panel to an argument involving § 2254(d)(2). So neither the respondent nor the panel ever addressed an argument under § 2254(d)(2).

As a fall-back position, Ms. Andrew says in a footnote that we "should address" the argument under § 2254(d)(2) as "an issue of plain error." Appellant's Supp. Resp. Br. at 4 n.3. But this footnote doesn't say

how the alleged factual mistake would satisfy the plain-error standard. This failure triggers a waiver because the single sentence in Ms. Andrew's footnote does not adequately develop an argument for plain error. *See Verlo v. Martinez*, 820 F.3d 1113, 1127 (10th Cir. 2016) ("A party's offhand reference to an issue in a footnote, without citation to legal authority or reasoned argument, is insufficient to present the issue for our consideration."). Given the waiver, we decline to consider the possibility of plain error. *See Hancock v. Trammell*, 798 F.3d 1002, 1011 (10th Cir. 2015) (declining to consider a forfeited argument when the appellant in a capital habeas case failed to urge plain error).

7. A fair-minded jurist could reject Ms. Andrew's claim as to the guilt phase.

In considering Ms. Andrew's claim, we apply the clearly established prohibition of "evidence so unduly prejudicial as to render a criminal trial fundamentally unfair." *Andrew v. White* 604 U.S. 86, 96 (2025) (per curiam). We first apply this prohibition to the guilt phase, addressing the relevance of the challenged evidence, the degree of prejudice from the improper evidence, and any mitigating instructions. *See id.*

A. The Oklahoma Court of Criminal Appeals had leeway on the issue.

We must determine "whether a fair-minded jurist reviewing this record could disagree with [Ms.] Andrew that the trial court's mistaken admission of irrelevant evidence was so 'unduly prejudicial' as to render

her trial 'fundamentally unfair.'" *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)); *see also Martinez v. Quick*, 134 F.4th 1046, 1065 (10th Cir. 2025) (applying this standard and concluding that "a fairminded jurist could (and perhaps would) disagree with [the petitioner's] view that the inadvertent introduction of [a] racial slur rendered his sentencing fundamentally unfair"), *petition for cert. filed* (U.S. Sept. 15, 2025). To predict what a fair-minded jurist might decide, we consider the specificity of the Supreme Court's rule. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004); *Graham v. White*, 101 F.4th 1199, 1208 (10th Cir. 2024). "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough*, 541 U.S. at 664.

Given the generality of the rule on fundamental fairness, we afford considerable leeway to the state appellate courts. *See Keahey v. Marquis*, 978 F.3d 474, 479 (6th Cir. 2020) (concluding that a state court had considerable leeway because the right of a criminal defendant to fundamental fairness lacks specificity); *see also Graham*, 101 F.4th at 1208 (stating that we give leeway to the state appeals court when applying a general Supreme Court rule on the arbitrariness of a state court's decision). So the Oklahoma Court of Criminal Appeals had "broad discretion" when deciding the issue. *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003).

B. We consider only the arguments that Ms. Andrew presented in the Oklahoma Court of Criminal Appeals.

We review the reasonableness of a state court's ruling "in light of the arguments the petitioner raised in the state court." *Wellmon v. Colo. Dep't of Corr.*, 952 F.3d 1242, 1249 (10th Cir. 2020); *see also Menzies v. Powell*, 52 F.4th 1178, 1201 (10th Cir. 2022) ("We review the reasonableness of the [state supreme court's] decision based on the arguments presented."). For example, we "do not expect state courts to address arguments the parties do not raise." *Wellmon*, 952 F.3d at 1249.

In her arguments to the Oklahoma Court of Criminal Appeals, Ms. Andrew relied on ten testimonial passages:

1. testimony from Tracy Higgins and Rick Nunley about sexual affairs with Ms. Andrew,

2. testimony that Rob had suspected an affair between Ms. Andrew and Mr. Nunley,

3. testimony that Rob had noticed Mr. Nunley and Ms. Andrew spending a lot of time together,

4. testimony about Ms. Andrew's advances to Mr. Higgins's sons,

5. testimony about a dinner where Ms. Andrew had worn revealing clothing,

6. testimony that someone had referred to Ms. Andrew as a "hoochie,"

7. testimony that a woman had said her husband liked red hair on women and that Ms. Andrew then dyed her hair red,

8. testimony that Ms. Andrew had lied to Mr. Pavatt when stating that she had not slept with any men other than Mr. Pavatt and Rob,

9. testimony that Mr. Pavatt had stated that Ms. Andrew's children were "well-trained" to hide the couple's affair, and

10. testimony by a minister about Ms. Andrew's demeanor when she was planning Rob's funeral.

Appellant's Opening Br. at 29, 38–42, 66–67, Case No. D-2004-1010 (Okla. Crim. App. Feb. 21, 2006). In addition to this testimony, Ms. Andrew points to the prosecution's argument about the underwear found in her luggage. *See* Trial Trans. vol. 17, at 4103 (stating that a "grieving widow . . . doesn't pack her thong underwear and run off with her boyfriend").

In our appeal, Ms. Andrew challenges the introduction of evidence that she didn't challenge in the state-court appeal. In the state-court appeal, for example, she didn't mention evidence about

- her use of "foul" language,
- her skinny-dipping in a hot tub,
- Mr. Pavatt's holding his face within inches of Ms. Andrew's,
- Ms. Andrew's relationship with another man in college,
- Ms. Andrew's attractiveness,
- her blank demeanor when questioned at the police station, or
- characterization of her as a "slut puppy."

The Oklahoma Court of Criminal Appeals relies on the evidence identified by the parties rather than search the record to find support for a defendant's claim. *Cuesta-Rodriguez v. State*, 247 P.3d 1192, 1197 (Okla. Crim. App. 2011). We can't fault the Oklahoma court for this approach because we do the same thing. *United States v. Rodriguez-Aguirre*, 108 F.3d 1228, 1237 n.8 (10th Cir. 1997). So the Oklahoma Court of Criminal Appeals didn't act unreasonably by disregarding evidence that Ms. Andrew hadn't addressed. *See Wellmon v. Colo. Dep't of Corr.*, 952 F.3d 1242, 1249–50 (10th Cir. 2020) (concluding that the state appeals court reached a reasonable decision based on the arguments presented there).

C. Some of the sexual evidence was irrelevant.

Given the Supreme Court's directions on remand, we revisit the relevance of the State's evidence involving Ms. Andrew's sexual conduct. *See Andrew v. White*, 604 U.S. 86, 96 (2025) (per curiam) (instructing our court to consider the relevance of the disputed evidence to the charges and sentencing factors). Ordinarily, we're bound by a state court's determinations of relevance under a state evidence code. *See DeLozier v. Sirmons*, 531 F.3d 1306, 1323 (10th Cir. 2008) (stating that we're bound in habeas review based on the Oklahoma Court of Criminal Appeals' evaluation of admissibility under state law); *see also* Okla. Stat. tit. 12, §§ 2401–02 (stating the standard for relevant evidence); Okla. Stat. tit. 12

§ 2103 (stating that the Oklahoma Rules of Evidence apply in criminal cases as well as in civil cases).

But Ms. Andrew argues that the introduction of irrelevant evidence deprived her of a fundamentally fair trial. We thus reconsider the relevance of the evidence despite the Oklahoma Court of Criminal Appeals' assessment under state law. *See Spears v. Mullin*, 343 F.3d 1215, 1227–28 (10th Cir. 2003) (disagreeing with the Oklahoma Court of Criminal Appeals on the relevance of evidence when assessing the fundamental fairness of a sentencing); *see also Lesko v. Owens*, 881 F.2d 44, 51 (3d Cir. 1989) (concluding that "the erroneous admission of evidence that is relevant [under state law], but excessively inflammatory, might rise to the level of a constitutional violation").[3]

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[3] A potential issue exists as to our level of scrutiny over the state appellate court's conclusions on relevance. On the one hand, relevance is a condition of admissibility. Okla. Stat. tit. 12, § 2402. So we follow the state appellate court's determinations regarding relevance as a condition of admissibility. *See Boyd v. Ward*, 179 F.3d 904, 912 (10th Cir.1999) ("[W]e defer to state court determinations of state law."). On the other hand, relevance bears on our due process inquiry, which addresses fundamental fairness as a matter of federal law. *See Martinez v. Quick*, 134 F.4th 1046, 1064–65 (10th Cir. 2025) (applying the "due-process principle that the admission of irrelevant evidence can render a trial fundamentally unfair"); *Hooks v. Workman*, 689 F.3d 1148, 1182 (10th Cir. 2012) (discussing "fundamental fairness safeguarded by federal law").

In this case, we need not decide the required level of scrutiny over the state appellate court's determinations of relevance. We instead assume for the sake of argument that we should independently assess relevance when considering the federal claim involving the denial of a fair trial.

The Oklahoma Court of Criminal Appeals acknowledged that much of the challenged evidence had been irrelevant to guilt or innocence. *Andrew v. State*, 164 P.3d 176, 192 (Okla. Crim. App. 2007). That irrelevant evidence included testimony that Ms. Andrew "had 'come on to' [Mr. Higgins's] two adult sons," that Ms. Andrew had dressed provocatively when dining, that someone at a restaurant had called her a "hoochie," and that Ms. Andrew had changed her hair color to match a man's preference. *Id.* We agree with the state court's assessment of this evidence as irrelevant. For example, Ms. Andrew's provocative appearance and flirtatious behavior couldn't rationally bear on whether she had plotted to kill her husband. *See United States v. McFadyen-Snider*, 552 F.2d 1178, 1181–82 (6th Cir. 1977) (concluding that "[e]vidence of illicit sexual activities is totally immaterial to the credibility or character traits involved in most criminal cases" (quoting *United States v. Cox*, 536 F.2d 65, 71 (5th Cir. 1976))).

But the Oklahoma Court of Criminal Appeals also regarded other evidence of sexual conduct as relevant. That evidence had addressed

- Ms. Andrew's affairs with Mr. Higgins and Mr. Nunley,
- thong underwear found in Ms. Andrew's luggage in Mexico, and
- her "flat, cold, and unemotional" demeanor after the murder.

Andrew v. State, 164 P.3d 176, 192–94 (Okla. Crim. App. 2007). In the Oklahoma court's view, evidence about the affairs was pertinent to motive and intent, the thong underwear showed "the extent and the nature of the relationship between Mr. Pavatt and [Ms. Andrew] . . . and their intentions in fleeing to Mexico, and the demeanor showed "a consciousness of guilt." *Id.* at 192–94.

We agree that evidence of demeanor could bear on guilt. But we may assume for the sake of argument that the court had misgauged the relevance of (1) Ms. Andrew's affairs with Mr. Nunley and Mr. Higgins and (2) the thong underwear found in her luggage. *See Spears v. Mullin*, 343 F.3d 1215, 1228 (10th Cir. 2003) (concluding that photographs had not been relevant because they did not "support, clarify, or illustrate" other testimony related to the prosecution's theory).

D. The properly admitted evidence was overwhelming.

In assessing Ms. Andrew's claim, we consider not only the relevance of the sexual evidence but also the prejudice. *See Andrew v. White*, 604 U.S. 86, 96 (2025) (per curiam) (instructing us to consider "the degree of prejudice [Ms. Andrew] suffered" from the introduction of the disputed evidence). In considering the prejudice, we examine the strength of the evidence of guilt. *See Le v. Mullin*, 311 F.3d 1002, 1013 (10th Cir. 2002) ("Inquiry into fundamental fairness requires examination of the entire proceedings, including the strength of the evidence against the petitioner,

both as to guilt at that stage of the trial and as to moral culpability at the sentencing phase."); *Thornburg v. Mullin,* 422 F.3d 1113, 1125 (10th Cir. 2005) (rejecting an argument that the admission of evidence had violated the right to a fair trial when "the evidence of guilt could reasonably be viewed as overwhelming"). "Where evidence against a defendant is strong, the likelihood that erroneously admitted evidence will have an unduly prejudicial impact is lessened." *Johnson v. Martin*, 3 F.4th 1210, 1231 (10th Cir. 2021).

In the prior panel opinion, the majority concluded that a reasonable jurist could find "overwhelming evidence of Ms. Andrew's guilt." *Andrew v. White*, 62 F.4th 1299, 1319–20 (10th Cir. 2023), *judgment vacated*, 604 U.S. 86 (2025).[4] For this conclusion, the majority referred to the state appellate court's extensive summary of the underlying facts, together with 24 other pieces of evidence:

1. Ms. Andrew had stated that she

   - wished Rob were dead so that she could proceed with her life and get his life-insurance money,

   - "would see him dead," Trial Trans. vol. 3, at 607, and

[4] In her supplemental response brief, Ms. Andrew tries to counter the State's evidence based on her claims involving a violation of *Miranda*, the exclusion of defense witnesses, and the existence of cumulative error. Appellant's Supp. Resp. Br. at 14, 19. But the Supreme Court's opinion did not address these claims and Ms. Andrew hasn't argued that they remain viable on remand. *See* Part 1, above.

- would kill Rob or have him killed,

2. Ms. Andrew had told Mr. Higgins that she had hated Rob "and wished that she didn't have to stay with him," *id.* vol. 2, at 250,

3. Ms. Andrew had asked Mr. Pavatt whether he would kill Rob or if he knew someone who would commit the killing,

4. Rob had repeatedly expressed fear that he would be killed by Ms. Andrew and Mr. Pavatt for life insurance benefits,

5. Ms. Andrew and Mr. Pavatt had tried to murder Rob by cutting his car's brake lines and luring him to a hospital,

6. Ms. Andrew and Mr. Pavatt had forged Rob's signature to get ownership of his life-insurance policy,

7. Ms. Andrew had directed Mr. Pavatt to track Rob in the month leading to his murder,

8. Ms. Andrew had said the night before the murder that she hated Rob,

9. Ms. Andrew had been unusually calm at the crime scene and in the hours following the murder,

10. Ms. Andrew and Mr. Pavatt had giggled together at the hospital the morning after the murder,

11. the Andrews children had been watching television at a loud volume when the shooting took place even though they were supposed to be preparing to leave with Rob,

12. expert witnesses for both sides testified that the shot to Ms. Andrew's arm had been staged to make it look like she was the victim,

13. an expert witness contradicted Ms. Andrew's account by testifying that she had been shot in the arm from two to four inches away,

14. Ms. Andrew had refused to return a 16-gauge shotgun to Rob,

15. Ms. Andrew had used a target range 8 days before the shooting and left behind 16-gauge shotgun shells,

16. Rob had been killed by two 16-gauge shotgun blasts,

17. a spent 16-gauge shotgun shell was found on top of the Andrews' van in the garage and the other spent shell had been found in a neighbor's bedroom,

18. the same 16-gauge shotgun had fired the spent shells found on the van in the garage and in the neighbor's bedroom,

19. Mr. Pavatt had bought a .22 handgun, and .22 caliber rounds were found in a nearby house accessible to Ms. Andrew,

20. Ms. Andrew had been shot with a .22 caliber handgun, and the shell from that gun had been recovered at the crime scene,

21. the police had found three .22 caliber rounds in the attic and a spare bedroom in a nearby home that Ms. Andrew had been asked to watch while the owners were out of town,

22. the neighbors' home and a car belonging to Mr. Pavatt's daughter had contained the same brand of .22 ammunition and that ammunition was consistent with what had been used to shoot Ms. Andrew,

23. Ms. Andrew had shown disinterest in planning her husband's funeral and said there was nothing about Rob that she loved, *id.* vol. 11, at 2582, and

24. Ms. Andrew had fled to Mexico with Mr. Pavatt and her children before Rob's funeral.

Andrew v. White, 62 F.4th 1299, 1306–09, 1319–21 (10th Cir. 2023), *judgment vacated*, 604 U.S. 86 (2025). On remand, Ms. Andrew hasn't challenged the existence or strength of this evidence of guilt.[5]

E. The alleged stereotyping didn't concern the central jury issues.

Ms. Andrew argues that the trial was fundamentally unfair, relying on federal courts' recognition of the prejudicial effects of stereotyping. For support, she points to a Supreme Court opinion concerning racial stereotypes injected into capital proceedings: *Buck v. Davis*, 580 U.S. 100, 119–122, 128 (2017).

In *Buck*, a psychologist testified during the sentencing phase of a trial for a Black defendant that

- race was a "factor[] . . . known to predict future dangerousness" and

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[5] Ms. Andrew states that the parties "agree that her conviction must be set aside even if there was overwhelming evidence of guilt, if the evidence offered was unduly prejudicial." Appellant's Supp. Resp. Br. at 12 n.10. For this alleged agreement, Ms. Andrew points to a statement of the respondent's counsel in the first oral argument. There we posed a hypothetical question to counsel: In a case involving "a really strong case for guilt," would there be a limit to the amount of "inadmissible . . . harmful, [and] irrelevant" evidence that could be introduced without depriving a defendant of a fundamentally fair trial?" Oral Arg. 39:36–40:03 (July 27, 2017). The respondent's counsel acknowledged that this possibility could exist in a hypothetical case, but clarified that the sexual evidence against Ms. Andrew did not rise to that level. *Id.* at 40:04–24.

Ms. Andrew apparently misunderstands the respondent's position: The respondent's counsel did not agree that the evidence of guilt should be disregarded in assessing the fundamental fairness of the trial.

- "the race factor, black, increases the future dangerousness for various complicated reasons."

580 U.S. at 107–08 (internal quotation marks & citations omitted). In closing argument, the prosecutor referred to the psychologist's testimony, telling the jury that it had "heard from [the psychologist] . . . who told you that . . . the probability did exist that [the defendant] would be a continuing threat to society." *Id.* at 108.

The Supreme Court concluded that the defendant had shown prejudice from the psychologist's testimony. *Id.* at 119–20. The testimony appealed to a powerful racial stereotype—that Black men were prone to violence. *Id.* at 121. That stereotype "coincided precisely with the central question at sentencing": Whether the defendant posed a continuing threat. *Id.* The prejudice was not cured by the infrequency of the racial references: "[W]hen a jury hears expert testimony that expressly makes a defendant's race directly pertinent on the question of life or death, the impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record." *Id.* at 121–122.

In contrast, the alleged effort to stereotype Ms. Andrew did not "coincide[] precisely with the central question" before the jury. *Id.* at 121. Here, for example, the prosecution argued that Ms. Andrew had conspired with Mr. Pavatt to murder Rob. In response, Ms. Andrew argued that

Mr. Pavatt had unilaterally committed the murder to prevent a reconciliation. Trial Trans. vol. 17, at 3943–63, 4011–4013.

To resolve this dispute, the jury needed to weigh the evidence, including Ms. Andrew's statements about her feelings toward Rob, her interactions with Mr. Pavatt in the runup to the murder, the efforts to obtain the insurance proceeds, the cutting of Rob's brake lines, the forensic materials gathered from the crime scene, Ms. Andrew's demeanor after the murder, and her flight to Mexico.

In the closing argument in the guilt phase, the prosecution asked the jury to consider that evidence. *Id.* at 3860–61, 3891–92 (evidence of the flight to Mexico); *id.* at 3862–68, 3875–76, 4108–11 (evidence that Ms. Andrew hated Rob and didn't want to reconcile with him); *id.* at 3873 (evidence of Ms. Andrew's demeanor after the murder); *id.* at 3880–81, 3895–96 (forensic evidence); *id.* at 3893–94, 4047–58 (evidence of efforts to obtain insurance proceeds); *id.* at 4043–45 (evidence of phone calls between Ms. Andrew and Mr. Pavatt on the day that the brake lines were cut and the following day); *id.* at 4114–17 (evidence about the discovery of a shotgun shell from the murder weapon in a nearby house accessible to Ms. Andrew).

The prosecutor did mention the evidence of Ms. Andrew's affairs with Mr. Higgins and Mr. Nunley, *id.* at 4122–23, and told the jury that the underwear in Ms. Andrew's luggage hadn't suggested that she was a

grieving widow, *id.* at 4101, 4103. But that evidence did not "coincide precisely" with "the central question" for the jury—whether Ms. Andrew had conspired with Mr. Pavatt to commit the murder.

Ms. Andrew also relies on *Bennett v. Stirling*, 842 F.3d 319 (4th Cir. 2016). There the prosecutor

- told an all-white jury that "[m]eeting the [Black offender] again will be like meeting King Kong on a bad day" and
- called the offender a "caveman," a "mountain man," a "monster," a "big old tiger," and "[t]he beast of burden."

Id. at 321. In addition, a witness described a dream from his hospital stay involving a chase "by murderous, black Indians." *Id.* at 321, 326. The Fourth Circuit concluded that the prosecutor's use of racial prejudice had rendered the trial unfair. *Id.* at 327–28..

Bennett doesn't suggest a constitutional violation here. In *Bennett*, the Fourth Circuit concluded that the prosecutor's racist comments had "risked reducing [the defendant] to his race" and impaired the jurors' ability to "'focus their collective judgment on the unique characteristics of a particular criminal defendant.'" *Id.* at 325 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987)). Ms. Andrew has not shown that the challenged evidence and argument would have created a similar stereotype involving a propensity to murder.

We thus conclude that the alleged stereotyping did not substantially undermine the fundamental fairness of the trial.

F. The lack of a mitigating instruction does not show that the trial was fundamentally unfair.

Finally, we consider "whether the trial court provided any mitigating instructions." *Andrew v. White*, 604 U.S. 86, 96 (2025) (per curiam).

At trial, Ms. Andrew requested an instruction that would have prohibited the jury from considering evidence of other misconduct. Trial Trans. vol. 16, at 3835–36. The trial court declined to give this instruction. Ms. Andrew appealed this ruling, and the state appellate court concluded that the failure to give a limiting instruction had constituted harmless error. *Andrew v. State*, 164 P.3d 176, 201 (Okla. Crim App. 2007).

In our view, the failure to give this instruction did not prevent a reasonable jurist from concluding that the trial been fundamentally fair. Though the instruction might have tempered the risk of reliance on irrelevant sexual evidence, the jury had overwhelming evidence of guilt unrelated to Ms. Andrew's sexual conduct. *See United States v. Esparsen*, 930 F.2d 1461, 1476 (10th Cir. 1991) (concluding that a refusal to give an instruction limiting consideration of other crimes, wrongs, or acts had been harmless given the substantial evidence of guilt).

Following the Supreme Court's instructions, we have considered the relevance of the evidence challenged by Ms. Andrew, the degree of prejudice to her, and the trial court's failure to provide mitigating instructions about the evidence. We conclude that a fair-minded jurist

could doubt infection of the trial "with unfairness." *See Andrew v. White*, 604 U.S. 86, 96 (2025) (per curiam) (internal quotation marks & citation omitted). As a result, we uphold the denial of habeas relief at the guilt stage.

8. A fair-minded jurist could also reject Ms. Andrew's challenge as to the sentencing phase.

Ms. Andrew also challenges the fairness of her sentencing proceeding. For this challenge, we assess the reasonableness of the state appellate court's decision based on the arguments presented there. *See Wellmon v. Colo. Dep't of Corr.*, 952 F.3d 1242, 1249 (10th Cir. 2020).

In the state-court appeal, Ms. Andrew pointed to the prosecution's closing argument at the sentencing phase, insisting that Ms. Andrew had been a poor mother because she brought men into the home while the children were there. Trial Trans. vol. 19, at 4394. Ms. Andrew characterized this argument as "an inflammatory, derogatory, and prejudicial attack" based on "an antiquated belief about the appropriate behavior of women." Appellant's Opening Br. at 97, Case No. D-2004-1010 (Okla. Crim. App. Feb. 21, 2006) (internal quotation marks & citation omitted).

But Ms. Andrew didn't question some of the prosecution's arguments that she challenges now. For example, in state court, Ms. Andrew didn't question the prosecutor's statements that Ms. Andrew

- had people "under her spell,"
- was "not like you and me,"
- had not shown any emotion, or remorse, or grief, and
- had "deserve[d] that different kind of punishment that's reserved for people exactly like her."

Trial Trans. vol 19, at 4410–11, 4493–94. So we will not consider those statements when determining whether the Oklahoma Court of Criminal Appeals acted reasonably in assessing the fairness of the sentencing stage.

We assume for the sake of argument that the evidence of Ms. Andrew's affairs with Mr. Higgins and Mr. Nunley hadn't been relevant. *See* p. 19, above. But the other evidence supported two aggravating factors:

1. Ms. Andrew committed the murder for remuneration or the promise of remuneration or employed someone else to commit the murder for remuneration or the promise of remuneration.
2. The murder was especially heinous, atrocious, or cruel.

See Okla. Stat tit. 21 § 701.12(3)–(4).

In the state-court appeal, Ms. Andrew challenged the sufficiency of the evidence on the second aggravating factor (a killing that had been heinous, atrocious and cruel). But the state appellate court rejected this challenge, concluding that the evidence had "tend[ed] to show that Rob . . . [had] suffered serious physical abuse, and [had been] conscious of the fatal

attack for several minutes." *Andrew v. State*, 164 P.3d 176, 201 (Okla. Crim. App. 2007). Ms. Andrew doesn't challenge that conclusion.

For the murder-for-renumeration aggravator, Ms. Andrew challenged the trial court's refusal to give her proposed instruction. The Oklahoma Court of Criminal Appeals rejected this challenge, concluding that (1) the proposed instruction hadn't accurately stated the law and (2) the actual instruction had been correct. *Id.* at 201–02. Ms. Andrew doesn't challenge these rulings or question the strength of the evidentiary support for the aggravator.

Despite the strong evidentiary support for these aggravating factors, Ms. Andrew argues that the irrelevant evidence and arguments had infected the sentencing phase. But Ms. Andrew hasn't shown that the challenged evidence and arguments "coincided precisely with the central question[s] at sentencing" or the use of prohibited grounds to decide between life or death. *See Buck v. Davis*, 580 U.S. 100, 121 (2017). For example, evidence of Ms. Andrew's affairs, appearance, and failure to conform to conventional gender roles wouldn't appear to affect the jury's consideration of Rob's consciousness after the shooting or the existence of a financial motive.

The prosecution did characterize Ms. Andrew as a poor mother, and this characterization concerned a sentencing issue. But Ms. Andrew had injected this issue by arguing that she was a good mother. Trial Trans.

vol. 19, at 4179 (defense argument to the jury that Ms. Andrew was "a good mother who love[d] her children very much, and the death penalty would deprive [her children] of their only remaining living parent"). Given Ms. Andrew's argument, a fair-minded jurist could reject her allegation of unfair prejudice.

As with the guilt phase of the trial, we have considered the relevance of the evidence challenged by Ms. Andrew, the degree of prejudice that she suffered from its introduction, and the trial court's failure to provide mitigating instructions about the evidence. We conclude that a fair-minded jurist could reasonably conclude that the challenged evidence hadn't infected the sentencing proceedings.[6]

* * *

[6] Ms. Andrew submitted a decision of the Inter-American Commission on Human Rights, which concluded that the introduction of sexualized evidence had violated Ms. Andrew's human rights. But the Commission's decision is not binding here. *See Tamayo v Stephens*, 740 F.3d 991, 997 (5th Cir. 2014) (concluding that decisions by the Inter-American Commission on Human Rights are not binding on domestic courts); *Flores-Nova v. Attorney General of U.S.*, 652 F.3d 488, 494 (7th Cir. 2011) (concluding that "[the Inter-American Commission on Human Rights'] advisory opinions are not binding on the United States and, therefore, they are not enforceable domestically"). In addition, the Commission wasn't subject to the statutory restrictions on habeas relief. *See* Part 5, above; *see also Tamayo*, 740 F.3d at 997 (stating that the court could not "address the merits of the [Inter-American Commission on Human Rights] decision by way of a federal habeas").

So we affirm the district court's denial of habeas relief on Ms. Andrew's claim involving fundamental fairness of her trial.

15-6190, *Andrew v. Tinsley*
PHILLIPS, J., concurring in the opinion.

I concur in the majority opinion. To assist the reader in understanding the weight of the evidence, I quote the OCCA's findings in its decision, which we incorporated into our earlier majority opinion:

> [Ms. Andrew]'s husband Robert ("Rob") Andrew was shot to death at their Oklahoma City home sometime around 7:00 p.m. on November 20, 2001. [Ms. Andrew] was also shot in the arm during this incident.
>
> The Andrews were separated at the time and Rob Andrew was at the home to pickup [sic] the two minor children for visitation over the Thanksgiving holiday. The custom was that [Ms. Andrew] would bring the children out to the car and Rob would take them from there. However, on this night, [Ms. Andrew] asked Rob Andrew to come into the garage to light the pilot light on the furnace because it had gone out.
>
> [Ms. Andrew]'s version of the events from that point on was that as Rob was trying to light the furnace, two masked men entered the garage. Rob turned to face the men and was shot in the abdomen. He grabbed a bag of aluminum cans to defend himself and was shot again. [Ms. Andrew] was hit during this second shot.
>
> Undisputed facts showed that after that, [Ms. Andrew] called 911 and reported that her husband had been shot. Emergency personnel arrived and found Rob Andrew's body on the floor of the garage; he had suffered extensive blood loss and they were unable to revive him. [Ms. Andrew] had also suffered a superficial gunshot wound to her arm. The Andrew children were found in a bedroom, watching television with the volume turned up very high, oblivious to what had happened in the garage.
>
> [Ms. Andrew] was taken to a local hospital for treatment. Her behavior was described by several witnesses, experienced in dealing with people in traumatic situations, as uncharacteristically calm for a woman whose husband had just been gunned down.
>
> Rob Andrew was shot twice with a shotgun. A spent 16–gauge shotgun shell was found in the garage on top of the family van. Rob Andrew owned a 16–gauge shotgun, but had told several friends that [Ms. Andrew] refused to let him take it when they separated. Rob Andrew's shotgun was missing from

the home. One witness testified to seeing [Ms. Andrew] at an area used for firearm target practice near her family's rural Garfield County home eight days before the murder and he later found several 16–gauge shotgun shells at the site.

[Ms. Andrew]'s superficial wound was caused by a .22 caliber bullet, apparently fired at close range, which was inconsistent with her claim that she was shot at some distance. About a week before the murder, [James] Pavatt purchased a .22 caliber handgun from a local gun shop. Janna Larson, Pavatt's daughter testified that, on the day of the murder, Pavatt borrowed her car and claimed he was going to have it serviced for her. When he returned it the morning after the murder, the car had not been serviced, but Larson found one round of .22 caliber rimfire ammunition on the floorboard. In a conversation later that day, Pavatt told Larson never to repeat that [Ms. Andrew] had asked him to kill Rob Andrew, and he threatened to kill Larson if she did. He also told her to throw away the .22 round she found in her car.

Police searched the home of Dean Gigstad, the Andrews' next-door neighbor, after the Gigstads reported finding suspicious things in their home. Police found evidence that someone had entered the Gigstads' attic through an opening in a bedroom closet. A spent 16 gauge shotgun shell was found on the bedroom floor, and several .22 caliber rounds were found in the attic itself. There were no signs of forced entry into the Gigstad home. Gigstad and his wife were out of town when the murder took place, but [Ms. Andrew] had a key to their home. The .22 caliber round found in Janna Larson's car was of the same brand as the three .22 caliber rounds found in the Gigstads' attic; the .22 caliber bullet fired at [Ms. Andrew] and retrieved from the Andrews' garage appeared consistent with bullets in these unfired rounds. These rounds were capable of being fired from the firearm that Pavatt purchased a few weeks before the murder; further testing was not possible because that gun was never found. The 16 gauge shotgun shell found in the Gigstads' home was of the same brand as the 16 gauge shell found in the Andrews' garage. Ballistics comparison showed similar markings, indicating that they could have been fired from the same weapon. Whether these shells were fired from the 16–gauge shotgun Rob Andrew had left at the home was impossible to confirm because, as noted, that gun remains missing.

Within days after the shooting, before Rob Andrew's funeral, [Ms. Andrew], James Pavatt and the two minor children left the State and crossed the border into Mexico. They were apprehended while attempting to re-enter the United States in late February 2002.

[Ms. Andrew] and Pavatt met while attending the same church. At some

point they began teaching a Sunday school class together. [Ms. Andrew] and Pavatt began having a sexual relationship. Around the same time, Pavatt, a life insurance agent, assisted Rob Andrew in setting up a life insurance policy through Prudential worth approximately $800,000. In late September 2001, Rob Andrew moved out of the family home, and [Ms. Andrew] initiated divorce proceedings a short time later.

Janna Larson, Pavatt's adult daughter, testified that in late October, Pavatt told her that [Ms. Andrew] had asked him to murder Rob Andrew. On the night of October 25–26, 2001, someone cut the brake lines on Rob Andrew's automobile. The next morning, Pavatt persuaded his daughter to call Rob Andrew from an untraceable phone and claim that [Ms. Andrew] was at a hospital in Norman, Oklahoma, and needed him immediately. An unknown male also called Rob that morning and made the same plea. Rob Andrew's cell phone records showed that one call came from a pay phone in Norman (near Larson's workplace), and the other from a pay phone in south Oklahoma City. Rob Andrew discovered the tampering to his car before placing himself in any danger. He then notified the police. The next day, [Ms. Andrew] told Rob that she read in the newspaper that someone cut his brakes, but no media coverage of this event had occurred.

One contentious issue in the Andrews' relationship was control over the insurance policy on Rob Andrew's life. After his brake lines were cut, Rob Andrew inquired about removing [Ms. Andrew] as beneficiary of his life insurance policy. Rob Andrew spoke with Pavatt's supervisor about changing the beneficiary. He also related his suspicions that Pavatt and [Ms. Andrew] were trying to kill him. At trial, the State presented evidence that in the months preceding the murder, [Ms. Andrew] and Pavatt actually attempted to transfer ownership of the insurance policy to [Ms. Andrew] without Rob Andrew's knowledge, by forging his signature to a change-of-ownership form and backdating it to March 2001.

In the days following the murder, Pavatt obtained information over the Internet about Argentina, because he had heard that country had no extradition agreement with the United States. Larson also testified that after the murder, [Ms. Andrew] and Pavatt asked her to help them create a document, with the forged signature of Rob Andrew, granting permission for his children to travel with [Ms. Andrew] out of the country. [Ms. Andrew] also asked Larson to transfer funds from her bank account to Larson's own account, so that Larson might wire them money after they left town.

[Ms. Andrew] did not attend her husband's funeral, choosing instead, to go to Mexico with Pavatt and the children. Pavatt called his daughter several

> times from Mexico and asked her to send them money. Larson cooperated with the FBI and local authorities in trying to track down the pair.
>
> After her apprehension, [Ms. Andrew] came into contact with Teresa Sullivan, who was a federal inmate at the Oklahoma County jail. Sullivan testified that [Ms. Andrew] told her that she and Pavatt killed her husband for the money, the kids, and each other. [Ms. Andrew] also told her that Pavatt shot her in the arm to make it look as if she was a victim.
>
> Expert testimony opined that the wound to [Ms. Andrew]'s arm was not self-inflicted, but was part of a scheme to stage the scene to make it look like she was a victim, just like her husband.

Andrew v. State (*Andrew I*), 164 P.3d 176, 184–85 (Okla. Crim. App. 2007) (paragraph numbers and footnotes omitted), *as corrected* (July 9, 2007), *opinion corrected on denial of reh'g*, 168 P.3d 1150.[1]

[1] Ms. Andrew does not challenge these factual findings, and without clear and convincing evidence to the contrary, we presume them to be correct. *Lockett v. Trammel*, 711 F.3d 1218, 1222 (10th Cir. 2013); *see also* 28 U.S.C. § 2254(e)(1).

Appendix C: Supreme Court Decision (Jan. 21, 2025)

Per Curiam

SUPREME COURT OF THE UNITED STATES

BRENDA EVERS ANDREW *v.* TAMIKA WHITE, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 23–6573. Decided January 21, 2025

PER CURIAM.

An Oklahoma jury convicted Brenda Andrew of murdering her husband, Rob Andrew, and sentenced her to death. The State spent significant time at trial introducing evidence about Andrew's sex life and about her failings as a mother and wife, much of which it later conceded was irrelevant. In a federal habeas petition, Andrew argued that this evidence had been so prejudicial as to violate the Due Process Clause. The Court of Appeals rejected that claim because, it thought, no holding of this Court established a general rule that the erroneous admission of prejudicial evidence could violate due process. That was wrong. By the time of Andrew's trial, this Court had made clear that when "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Payne* v. *Tennessee*, 501 U. S. 808, 825 (1991).

I

A

On November 20, 2001, Rob Andrew was fatally shot in his garage. Brenda Andrew, who herself had been shot in the arm during the incident, told the police that two armed assailants had committed the shooting. Andrew further explained that she had separated from her husband and was now dating James Pavatt, but that she and Rob continued to see each other as they had two children together.

Per Curiam

Pavatt and Andrew traveled to Mexico together after Rob Andrew's death and soon became suspects in his murder. Eventually, Pavatt confessed to committing the shooting with a friend. Pavatt denied that Andrew had been involved. The State thereafter charged both Pavatt and Andrew with capital murder, and a jury convicted Pavatt and sentenced him to death.

At Andrew's trial, the prosecution sought to prove that Andrew had conspired with Pavatt, an insurance agent, to murder her husband for the proceeds of his life insurance policy. Among other things, the prosecution elicited testimony about Andrew's sexual partners reaching back two decades; about the outfits she wore to dinner or during grocery runs; about the underwear she packed for vacation; and about how often she had sex in her car. At least two of the prosecution's guilt-phase witnesses took the stand exclusively to testify about Andrew's provocative clothing, and others were asked to comment on whether a good mother would dress or behave the way Andrew had. In its closing statement, the prosecution again invoked these themes, including by displaying Andrew's "thong underwear" to the jury, by reminding the jury of Andrew's alleged affairs during college, and by emphasizing that Andrew "had sex on [her husband] over and over and over" while "keeping a boyfriend on the side." Tr. 4103, 4124–4125 (July 12, 2004). At both the guilt and sentencing phases, prosecutors contrasted Andrew with the victim, whom they asserted had been "committed to God." *Id.*, at 4124; see also, *e.g.*, Tr. 4402 (July 14, 2004) (suggesting nothing could mitigate murder of Rob Andrew because he just "wanted to love God").[1]

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[1]The dissent recites what it insists was substantial evidence of Andrew's guilt, contending in the process that this Court "inaccurately portrays" that evidence. *Post*, at 2 (opinion of THOMAS, J.). In doing so, it prejudges the prejudice analysis by characterizing as fact the State's narrative at trial. That narrative, of course, was hotly contested then and

B

The jury convicted Andrew and sentenced her to death.

On appeal, Andrew argued that the introduction of irrelevant evidence, including evidence "that she had extramarital sexual affairs with two other men," that she had "'come on to'" another witness's sons, and that she had dressed provocatively at a restaurant, *Andrew* v. *State*, 2007 OK CR 23, ¶¶42–59, 164 P. 3d 176, 190–193, violated Oklahoma law as well as the Federal Due Process Clause. The Oklahoma Court of Criminal Appeals (OCCA) held that admission of evidence about Andrew's extramarital affairs had been proper because it showed that "[h]er co-defendant was just the last in a long line of men that she seduced." *Id.,* at 192.[2] The OCCA "struggl[ed]," however, "to find any relevance . . . other than to show [Andrew's] character" for the

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remains so now. For example, the defense elicited testimony from multiple witnesses that Andrew knew on the day of the murder that she was not the beneficiary on the life insurance policy. The OCCA held that the court also wrongly excluded evidence Andrew argued would cast doubt on the theory that she had staged the shooting, though the OCCA held that exclusion was harmless. *Andrew* v. *State*, 2007 OK CR 23, ¶¶89–92, 164 P. 3d 176, 197. The Court today says nothing about the strength of the evidence against Andrew because the issue of prejudice in both the guilt and sentencing phases of the trial is one for the Tenth Circuit to consider on remand. See *infra*, at 9. Similarly, the dissent asserts that Andrew falsely accuses the prosecution of calling her a "slut puppy" in closing argument. *Post*, at 7, n. 3 (opinion of THOMAS, J.). Whether the prosecution quoted something it believed Andrew once said to suggest to the jury that Andrew herself was a "slut puppy," or simply to recite an alleged abusive phone call, is a question of fact for the Tenth Circuit to resolve.

[2]The dissent asserts that the OCCA held evidence of Andrew's "'close personal relationship'" with two of her affair partners to be relevant because it gave credence to testimony that Andrew had "'shared with both of these men her hatred for Rob Andrew and her wish that he was dead.'" *Post*, at 6 (opinion of THOMAS, J.) (quoting 164 P. 3d, at 192). Andrew never objected to evidence that she had a "close personal relationship" with these men. In fact, defense counsel stipulated that she had affairs with them. See, *e.g.*, Tr. 338 (June 18, 2004) ("We're not contesting the

remaining challenged evidence. *Ibid.* By now, the State "agree[d] that most of this evidence was irrelevant to any issue in this case." *Ibid.* The OCCA nonetheless denied relief on the ground that the trial court's errors had been harmless.

Judge Johnson dissented in part. In his view, the "egregious . . . pattern of introducing evidence that ha[d] no purpose other than to hammer home that Brenda Andrew is a bad wife, a bad mother, and a bad woman . . . trivialize[d] the value of her life in the minds of the jurors." *Id.*, at 206–207. He would therefore have vacated her sentence. Judge Chapel dissented separately, indicating that he would have reversed the conviction and remanded for a new trial. *Id.*, at 208.

In federal court, Andrew reiterated her claim that the admission of this evidence rendered the guilt and penalty phases of her trial fundamentally unfair, in violation of due process. 62 F. 4th 1299, 1312–1313 (CA10 2023). The District Court denied relief. A divided Tenth Circuit affirmed because, it held, Andrew had failed to cite "clearly established federal law governing her claim." *Id.*, at 1314. The majority acknowledged that Andrew had cited *Payne*, in which this Court said that the Due Process Clause "provides a mechanism for relief" when the introduction of unduly prejudicial evidence "renders [a] trial fundamentally unfair." 501 U. S., at 825. According to the majority, however, that had been a "pronouncement," not a "holding," of this Court. 62 F. 4th, at 1314. It therefore concluded Andrew had failed to identify "clearly established federal law governing her claim," as required under the Antiterrorism

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affair. We have never contested the affair with Nunley or Higgins"). Andrew's claim instead concerned the extensive testimony about how she flirted with these men, how she dressed around them, and how many times (and where) she had sex with them. That testimony appears to have no bearing on Andrew's alleged expressions of hatred for her husband.

and Effective Death Penalty Act of 1996 (AEDPA). *Id.*, at 1316; 28 U. S. C. §2254(d)(1). As a result, the majority declined to consider whether the OCCA unreasonably applied *Payne*, *i.e.*, whether a fairminded jurist could hold that the admission of irrelevant evidence about Andrew's demeanor as a woman was not so prejudicial as to deprive her of a fundamentally fair trial. 62 F. 4th, at 1316 ("'The absence of clearly established federal law is dispositive under §2254(d)(1)'" (quoting *House* v. *Hatch*, 527 F. 3d 1010, 1018 (CA10 2008))).

In dissent, Judge Bacharach condemned the State's focus "from start to finish on Ms. Andrew's sex life," a move he argued "portrayed Ms. Andrew as a scarlet woman, a modern Jezebel, sparking distrust based on her loose morals . . . plucking away any realistic chance that the jury would seriously consider her version of events." 62 F. 4th, at 1366. Judge Bacharach therefore would have held that the combination of evidentiary errors "deprived Ms. Andrew of a fundamentally fair trial." *Id.*, at 1377.

II

A federal court may grant habeas relief as to a claim adjudicated on the merits in state court only if the state court relied on an unreasonable determination of the facts or unreasonably applied "clearly established Federal law, as determined by" this Court. 28 U. S. C. §§2254(d)(1)–(2). To show that a state court unreasonably applied clearly established federal law, a petitioner must show that the court unreasonably applied "'the holdings, as opposed to the dicta, of this Court's decisions.'" *White* v. *Woodall*, 572 U. S. 415, 419 (2014) (quoting *Howes* v. *Fields*, 565 U. S. 499, 505 (2012)). An unreasonable application, in turn, is one with which no fairminded jurist would agree. *Harrington* v. *Richter*, 562 U. S. 86, 101 (2011).

Per Curiam

A

When this Court relies on a legal rule or principle to decide a case, that principle is a "holding" of the Court for purposes of AEDPA. *Lockyer* v. *Andrade*, 538 U. S. 63, 71–72 (2003) ("[C]learly established Federal law . . . is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision" (internal quotation marks omitted)). Following these principles, it is clear that Andrew properly identified clearly established federal law.

In *Payne*, this Court considered whether to overrule a set of prior cases that had categorically barred the introduction of victim impact evidence during the sentencing phases of a capital trial. The Court noted that, in many circumstances, "victim impact evidence serves entirely legitimate purposes," 501 U. S., at 825, even though in others it could be prejudicial. It then concluded that a categorical bar was not necessary to protect against the risk of prejudicial testimony because "the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief" against the introduction of evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair." *Ibid.* (citing *Darden* v. *Wainwright*, 477 U. S. 168, 179–183 (1986)). In light of that protection, the Court held, it could permit victim impact evidence where appropriate without risking undue prejudice to defendants. 501 U. S., at 825. In other words, the Court removed one protection for capital defendants (the *per se* bar on victim impact statements) in part *because* another protection (the Due Process Clause) remained available against evidence that is so unduly prejudicial that it renders the trial fundamentally unfair. The legal principle on which Andrew relies, that the Due Process Clause can in certain cases protect against the introduction of unduly prejudicial evidence at a criminal trial, was therefore indispensable to the decision in *Payne*. That means it was a holding of this Court for purposes of

AEDPA.

Importantly, *Payne* did not invent due process protections against unduly prejudicial evidence. The Court had several times before held that prosecutors' prejudicial or misleading statements violate due process if they render a trial or capital sentencing fundamentally unfair. *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974); *Caldwell* v. *Mississippi*, 472 U. S. 320, 338–340 (1985); *Darden*, 477 U. S., at 178–183. *Payne* thus broke little new ground in this respect. By the time of the OCCA's decision in this case, it was clear that the introduction of unduly prejudicial evidence could, in certain cases, violate the Due Process Clause.[3]

B

The Court of Appeals nonetheless held that *Payne* "merely established that the Eighth Amendment did not erect a '*per se* bar' to the introduction of victim-impact statements in capital cases." 62 F. 4th, at 1314 (quoting *Payne*, 501 U. S., at 827). As just explained, however, *Payne* expressly relied on the availability of relief under the Due Process Clause to reach that conclusion. This Court

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[3] The dissent argues that *Estelle* v. *McGuire*, 502 U. S. 62 (1991), shows otherwise because it left open whether "'it is a violation of the due process guaranteed by the Fourteenth Amendment for evidence that is not relevant to be received in a criminal trial.'" *Post*, at 16 (opinion of THOMAS, J.) (quoting *Estelle*, 502 U. S., at 70). To be sure, this Court did not hold in *Payne* that the introduction of all irrelevant evidence violates the Due Process Clause. *Payne* established, rather, that due process protects defendants from the introduction of evidence so prejudicial as to affect the fundamental fairness of their trials. This Court squarely acknowledged that rule in *Estelle*, explaining that "the challenged evidence" at issue there did not warrant relief because it did not "'so infus[e] the trial with unfairness as to deny due process of law.'" 502 U. S., at 75 (quoting *Lisenba* v. *California*, 314 U. S. 219, 228 (1941), and citing *Donnelly*, 416 U. S., at 643). In any event, and as recounted below, this Court has continued to rely on *Payne*'s fundamental fairness principle since *Estelle*.

has accordingly applied *Payne*'s framework to a claim much like Andrew's: "that the introduction of [prejudicial] evidence" at the sentencing phases "violated the Due Process Clause of the Fourteenth Amendment." *Romano* v. *Oklahoma*, 512 U. S. 1, 12 (1994). More recently, the Court relied on *Payne* in the same way that Andrew sought to rely on it here: for the proposition that "the Due Process Clause . . . wards off the introduction of unduly prejudicial evidence that would render the trial fundamentally unfair." *Kansas* v. *Carr*, 577 U. S. 108, 123 (2016) (quoting *Payne*, 501 U. S., at 825; internal quotation marks and alteration omitted). This Court has also relied on the underlying fundamental fairness principle in the jury-impartiality context. See *Rideau* v. *Louisiana*, 373 U. S. 723, 726 (1963); *Skilling* v. *United States*, 561 U. S. 358, 379 (2010).

To the extent that the Court of Appeals thought itself constrained by AEDPA to limit *Payne* to its facts, it was mistaken. General legal principles can constitute clearly established law for purposes of AEDPA so long as they are holdings of this Court. For example, the Eighth Amendment principle that a sentence may not be grossly disproportionate to the offense is "'clearly established' under §2554(d)(1)," even though it arises out of a "thicket of Eighth Amendment jurisprudence" and lacks "'precise contours.'" *Lockyer*, 538 U. S., at 72. Although this Court has not previously relied on *Payne* to invalidate a conviction for improperly admitted prejudicial evidence, moreover, "certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *White*, 572 U. S., at 427 (quoting *Yarborough* v. *Alvarado*, 541 U. S. 652, 666 (2004)); see also *Taylor* v. *Riojas*, 592 U. S. 7, 9 (2020) (*per curiam*) ("'[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question'" (quoting *Hope* v. *Pelzer*, 536 U. S. 730, 741 (2002))). The Court of Appeals thus erred by refusing

even to consider whether the OCCA unreasonably applied established due process principles to Andrew's case.

The dissent maintains that a reasonable jurist could agree with the Tenth Circuit's understanding of our precedent. That assertion conflates the deference federal habeas courts must extend to a state court's "application of" this Court's precedent with the federal courts' independent obligation to first identify the relevant "clearly established Federal law." 28 U. S. C. §2254(d)(1); *Lockyer*, 538 U. S., at 71 (identifying clearly established law "[a]s a threshold matter"). A legal principle is clearly established for purposes of AEDPA if it is a holding of this Court. *White*, 572 U. S., at 419. This Court has no occasion to defer to other federal courts' erroneous interpretations of its own precedent. Nor is such double deference necessary to prevent expansion of federal habeas relief to those who rely on "debatable" interpretations or extensions of our holdings. *Post* at 17–18 (opinion of THOMAS, J.). Andrew does not rely on an interpretation or extension of this Court's cases but on a principle this Court itself has relied on over the course of decades.

Because the Tenth Circuit nonetheless held that no relevant clearly established law existed (a ruling this Court reviews *de novo*) it never considered whether the state court's application of that law was reasonable. On remand, the Court of Appeals should conduct that inquiry in the first instance. Specifically, the question now is whether a fair-minded jurist reviewing this record could disagree with Andrew that the trial court's mistaken admission of irrelevant evidence was so "unduly prejudicial" as to render her trial "fundamentally unfair." *Payne*, 501 U. S., at 825.

The Court of Appeals must ask that question separately for the guilt and sentencing phases. As to each phase, it might consider the relevance of the disputed evidence to the charges or sentencing factors, the degree of prejudice Andrew suffered from its introduction, and whether the trial

court provided any mitigating instructions. Cf. *Romano*, 512 U. S., at 13. The ultimate question is whether a fair-minded jurist could disagree that the evidence "so infected the trial with unfairness" as to render the resulting conviction or sentence "a denial of due process." *Ibid.*

* * *

At the time of the OCCA's decision, clearly established law provided that the Due Process Clause forbids the introduction of evidence so unduly prejudicial as to render a criminal trial fundamentally unfair. This Court accordingly grants the petition for certiorari and the motion for leave to proceed *in forma pauperis*, vacates the judgment below, and remands the case for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

BRENDA EVERS ANDREW *v.* TAMIKA WHITE, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 23–6573. Decided January 21, 2025

JUSTICE ALITO, concurring in the judgment.

I concur in the judgment because our case law establishes that a defendant's due-process rights can be violated when the properly admitted evidence at trial is overwhelmed by a flood of irrelevant and highly prejudicial evidence that renders the trial fundamentally unfair. See *Payne* v. *Tennessee*, 501 U. S. 808, 825 (1991); *Romano* v. *Oklahoma*, 512 U. S. 1, 12 (1994); cf. *Rideau* v. *Louisiana*, 373 U. S. 723, 726 (1963). I express no view on whether that very high standard is met here.

SUPREME COURT OF THE UNITED STATES

BRENDA EVERS ANDREW *v.* TAMIKA WHITE, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 23–6573. Decided January 21, 2025

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, dissenting.

Our precedent under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) establishes several rules for identifying clearly established federal law. 28 U. S. C. §2254(d)(1). We have instructed lower courts to avoid framing our precedents at too high a level of generality; to carefully distinguish holdings from dicta; and to refrain from treating reserved questions as though they have already been answered. The Tenth Circuit followed these rules. The Court today does not. Instead, it summarily vacates the opinion below for failing to elevate to "clearly established" law the broadest possible interpretation of a one-sentence aside in *Payne* v. *Tennessee*, 501 U. S. 808 (1991). In doing so, the Court blows past *Estelle* v. *McGuire*, 502 U. S. 62 (1991), which, months after *Payne*, reserved the very question that the Court says *Payne* resolved. And, worst of all, it redefines "clearly established" law to include debatable interpretations of our precedent. It is this Court, and not the Tenth Circuit, that has deviated from settled law. I respectfully dissent.

I

The Court's errors begin with its recitation of the facts. Contrary to the majority's insinuations, the State presented "overwhelming evidence" that Andrew participated in the murder of her husband. See *Andrew* v. *State*, 2007 OK CR 23, ¶56, 164 P. 3d 176, 192; accord, *id.*, at 207 (A. Johnson,

J., concurring in result in part and dissenting in part). In fact, the State presented an "unusually strong evidentiary case, which leaves little or no doubt that [Andrew] is guilty of the crimes charged, crimes committed after methodical planning." *Id.*, at 206 (Lumpkin, P. J., concurring in result). The Court inaccurately portrays the State's evidence, the prosecution's closing arguments, and the reasoning of the Oklahoma Court of Criminal Appeals (OCCA).

A

Brenda Andrew (Andrew) married Robert Andrew (Rob) in 1984. In February 2000, Rob purchased an $800,000 life insurance policy through agent Jim Pavatt, with Andrew as the beneficiary. The Andrews and Pavatt attended the same church. Pavatt and Andrew both served as Sunday school teachers. But, by August 2001, they had begun an affair. The affair caused the Andrews' already strained marriage to reach a breaking point. Around late September Andrew initiated divorce proceedings and told Rob to move out of the house.

One morning in October, Rob discovered that someone had cut the brake lines in his car. Several hours later, he received phone calls from two unknown callers—one of whom turned out to be Pavatt's adult daughter, Janna Larson—falsely claiming that Andrew was in the hospital and urgently needed him. Phone records reveal that Pavatt and Andrew exchanged 82 phone calls that day and more than 50 calls the next day. The next day, Andrew told Rob she had read in the newspaper about his brake lines being cut, but no such news story existed. And, around this time, Pavatt told Larson that Andrew had asked him to kill Rob. Pavatt later threatened to kill her if she ever revealed this information.

After the brake-line incident, Rob sought to remove Andrew as the beneficiary of his life insurance policy, explaining to another insurance agent that he thought Pavatt and

Andrew were trying to kill him. But, Andrew and Pavatt resorted to fraud to try to prevent this from happening, forging Rob's signature on a form transferring ownership of the policy to Andrew. The policy then became a serious point of contention in the divorce proceedings, even though Rob was only 38 years old and healthy.

The Andrews had two young children who, after their separation, continued to live with Andrew in the former family home. Rob would sometimes meet them outside the house and take them for visitation.

When Rob came to pick up the children for the Thanksgiving holiday, however, Andrew asked him to come into the garage to help her light the pilot light of her furnace. As he started to do so, someone pointed a 16-gauge shotgun at him from across the garage. Seeing this, Rob turned and grabbed a trash bag filled with aluminum cans, apparently in a desperate attempt to protect himself. The perpetrator shot him through the bag. Reloading the shotgun, the perpetrator (or an accomplice) then moved within three feet of Rob, and shot him a second time as he lay on the floor. Andrew was also shot with a .22-caliber weapon, but suffered only a superficial wound on her arm.

Andrew called 911 after the shootings, claiming that two masked men had come into the garage and attacked her and Rob. She related on the call that Rob was still conscious and trying to speak. By the time emergency responders arrived, however, he was dead. During the shootings, the children were in the master bedroom watching television with the volume turned up high, unaware of what was happening in the garage. An ambulance then took Andrew to the hospital, where witnesses described her demeanor as unusually calm.

Police discovered substantial evidence linking Andrew and Pavatt to the murder. Rob owned a 16-gauge shotgun, but had told friends that Andrew refused to let him take it with him when he moved out. One witness testified that,

eight days before the murder, he had seen Andrew in a rural area commonly used for target practice. The witness also said that later he found 16-gauge shotgun shells at the site. Pavatt owned a .22-caliber handgun, which he had purchased about a week before the murder. The day of the murder, he borrowed Larson's car, claiming he would get it serviced for her. When he returned it the following day, she noticed the car had not been serviced. And, she found a .22-caliber shell on the floorboard of her car.

Forensic evidence also undermined Andrew's account that she had been shot at a distance. Powder burns on her clothes and body revealed the shot had been fired within two inches of her arm. An expert witness later testified that Andrew's injury—a superficial, close-range gunshot wound—was staged to make it look as if she had been a victim of the attack and thereby avoid suspicion.

The Andrews' neighbors were out of town on the day of the murder. When they returned, they found suspicious items in their home and contacted the police. Police discovered that someone had left a 16-gauge shotgun shell and several .22-caliber bullets in the home, both the same brand as those used in Rob's murder. There was no evidence of a break-in, but Andrew had a key to their home. Prosecutors suggested that, after the shooting, Pavatt hid in the home until police had left the crime scene.

Rather than attend her husband's funeral, Andrew traveled with Pavatt and her children to Mexico. She apparently had no plans to return. Before the trip, Andrew tried to transfer funds from her account to Larson's, so that Larson could wire money to her and Pavatt. The pair also asked Larson to help them forge Rob's signature on a document granting Andrew permission to take the children abroad. Andrew abandoned her car in an apartment complex before leaving. She also stopped making payments on her home. Pavatt researched traveling to Argentina after hearing that Argentina did not extradite.

Larson, however, cooperated with the FBI and refused to wire Pavatt or Andrew any money, despite their repeated requests. When they ran out of money three months later, they returned to the United States and were immediately arrested.

While in Mexico, Pavatt wrote a letter addressed to Andrew's daughter claiming that he and an unnamed "friend" had killed Rob, and that Andrew had nothing to do with it. *Ante,* at 2. He stated he did so because Andrew had told him four days before the murder that she planned to beg Rob to take her back after Thanksgiving. This was a peculiar claim, given that hours before the murder Pavatt had moved his washer and dryer into her home. And, far from adopting a conciliatory attitude toward Rob, the night before the murder Andrew had called a friend just to say, "I hate him. I hate him. I hate him." Tr. 2662–2663 (July 1, 2004). The friend recalled that the comment "made the hairs on the back of my neck stand up. She hated that man." *Id.*, at 2664.

B

A jury convicted Andrew of capital murder, and she was sentenced to death. So too was Pavatt in a separate trial. Sex and marriage were unavoidable issues at Andrew's trial, and the State introduced a variety of evidence about her sexual behavior. On direct appeal, Andrew challenged some of the sex-based evidence introduced during the guilt phase of her trial, arguing that it was irrelevant and unduly prejudicial.[1] Given that "this trial was primarily about the

[1]As the Court notes, in federal habeas proceedings, Andrew has "reiterated her claim that the admission of this evidence" rendered both her guilt and penalty phases fundamentally unfair. *Ante,* at 4. But, Andrew also objects now to the admission of certain evidence from the penalty phase, as well as items of guilt-phase evidence she did not challenge on direct appeal. These challenges fail for lack of exhaustion. See 28 U. S. C. §2254(b)(1)(A). To preserve an evidentiary claim, an Oklahoma defendant must raise a specific objection when the evidence in question

motive and intent of [Andrew] to kill her husband with the aid of Pavatt," the OCCA held that much of this evidence, particularly concerning her relationship with Pavatt, was not just admissible, but "highly relevant" and "probative." *Andrew*, 164 P. 3d, at 194. But, not all of it was so. The OCCA recognized that some evidence, like the sort of outfits Andrew wore to dinner outings, was not relevant. *Id.*, at 192. Given "the overwhelming evidence in this case," however, it determined that the introduction of the irrelevant evidence "was harmless." *Ibid.*

The Court suggests that the OCCA permitted evidence of Andrew's two prior affairs simply because it showed she had a penchant for adultery. See *ante,* at 3. In reality, the OCCA concluded that this evidence helped to prove "motive and intent." *Andrew*, 164 P. 3d, at 192. Andrew had "shared with both of these men her hatred for Rob Andrew and her wish that he was dead." *Ibid.* Evidence that Andrew had "a close personal relationship" with these men gave credence to their testimony that she had revealed to them these "intimate details of [her] marriage." *Ibid.*[2]

The Court also insinuates that there was something improper about the State's introduction of evidence on An-

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is admitted. *Stemple* v. *State*, 2000 OK CR 4, ¶32, 994 P. 2d 61, 68–69. The OCCA will review on direct appeal only those objections brought to its attention. *Stouffer* v. *State*, 2006 OK CR 46, ¶126, 147 P. 3d 245, 270. Because Andrew did not raise these new objections in her direct appeal, she has not presented them in state court "in accordance with state procedures," and so has not exhausted them. *Shinn* v. *Martinez Ramirez*, 596 U. S. 366, 378 (2022). Because the Court today does not address exhaustion, the Tenth Circuit is free to do so on remand.

[2] Faced with this reasonable holding by the OCCA, the majority insists that Andrew's claim concerned certain gratuitous details about these affairs rather than the affairs' existence. *Ante,* at 3–4, n. 2. The truth is just the opposite. Andrew's sole argument to the OCCA was that the fact "[t]hat [she] had once had affairs with these men provided no evidence of her motive" or "intent" or any other relevant fact. App. to Reply Brief 62a–64a.

drew's "failings as a mother." *Ante,* at 1. But, it conveniently omits the context. Andrew asserted that she was a "good mother" as part of her defense in both the guilt and penalty phases of her trial. Tr. 62–63 (June 17, 2004); Tr. 4179 (July 14, 2004); *Andrew*, 164 P. 3d, at 205. In presenting evidence to the contrary, the State was simply *rebutting* a point that *Andrew* had placed in issue, as it clearly is entitled to do. See 1 R. Mosteller et al., McCormick on Evidence §191, p. 1188 (8th ed. 2020) ("[O]nce the defendant gives evidence of pertinent character traits to show that he is not guilty, his claim of possession of these traits . . . is open to rebuttal").

During its closing argument, the prosecution did not rely on any of the sexual evidence that the OCCA would later find irrelevant.[3] The prosecution's reference to the underwear Andrew brought to Mexico, see *ante,* at 2, is no exception. The OCCA recognized that this evidence bore on Pavatt's and Andrew's "intentions in fleeing to Mexico," a key issue in the case. *Andrew*, 164 P. 3d, at 194.

Finally, the Court is wrong to imply that the prosecution drew any kind of "contras[t]" between Rob and Andrew in terms of religious commitment. *Ante,* at 2. The prosecution mentioned Rob's religious faith to emphasize that the world lost "a fine human being" when Rob was brutally murdered.

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[3] Andrew's briefing before this Court alleges that the prosecution called her a "'slut puppy'" who is not a "'woman of God'" during its guilt-stage closing argument. Pet. for Cert. i, 8, 11, 14 (quoting Tr. 4125 (July 12, 2004)); Pet. for Cert. Reply 5, 13 (same). This accusation—which Andrew did not make until almost 20 years after her trial—is entirely false. The prosecutor was not referring to Andrew. Instead, he was recounting an abusive phone call *from Andrew* to Rob, during which Andrew baselessly "accused [Rob] . . . of having" an affair with a "slut puppy," before telling him that he "can't be a man of God and [Rob's supposed affair partner] can't be a woman of God because she's sleeping with a married man and even if you're single that's adultery, what a slut puppy she must be." *Ibid.* For all its efforts to portray Andrew sympathetically, even the majority stops short of endorsing her accusation. See *ante*, at 2–3, n. 1.

Tr. 4401–4402 (July 14, 2004). But, the prosecution never cast any sort of religious judgment against Andrew. Tellingly, the Court is unable to cite even one example of the prosecution condemning Andrew in religious terms.

The record makes clear that it was *the defense*, not the prosecution, that repeatedly appealed to the jury's religious sentiments at sentencing. For example, the defense called a pastor as a witness, who testified to the importance of "mercy" as a "biblical" value. *Id.*, at 4333. And, in its closing, the defense repeatedly quoted the Bible; said that, if Rob could speak to the jury, he would ask them to "forgive" Andrew as "Jesus Christ on the cross" forgave His killers; and concluded with a prayer. *Id.*, at 4429–4430, 4471–4473. The prosecution simply asked the jury during rebuttal to ignore the defense's attempts to "guilt trip" them. *Id.*, at 4480.

II

The Court's legal analysis fares no better. Under AEDPA, Andrew may obtain federal habeas relief only if the OCCA's resolution of her due process claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" the holdings of this Court. 28 U. S. C. §2254(d)(1); see *Lockyer* v. *Andrade*, 538 U. S. 63, 71 (2003). This "standard is," and "was meant to be," "difficult to meet." *Harrington* v. *Richter*, 562 U. S. 86, 102 (2011). It forecloses relief unless all "fairminded jurists" would agree that the OCCA's "decision conflicts with this Court's precedents." *Ibid.*

The Court today asserts that the Due Process Clause forbids the admission of evidence so unduly prejudicial as to render a defendant's trial fundamentally unfair, and holds that the Tenth Circuit erred in failing to recognize this rule as clearly established under our precedents. In so holding, the Court commits the error of "'framing our precedents at'" too "'high [a] level of generality.'" *Lopez* v. *Smith*, 574 U. S.

1, 6 (2014) (*per curiam*) (quoting *Nevada* v. *Jackson*, 569 U. S. 505, 512 (2013) (*per curiam*)). And, even setting that aside, this reading of our precedents is one with which fair-minded jurists could easily (and justifiably) disagree.

A

"[H]oldings that speak only at a high level of generality" "cannot supply a ground for relief" under AEDPA. *Brown* v. *Davenport*, 596 U. S. 118, 136 (2022). We have repeatedly cautioned lower courts against "framing our precedents" too generally. *Lopez*, 574 U. S., at 6 (internal quotation marks omitted); see, *e.g.*, *Woods* v. *Donald*, 575 U. S. 312, 318–319 (2015) (*per curiam*); *White* v. *Woodall*, 572 U. S. 415, 426 (2014); *Nevada*, 569 U. S., at 512; *Harrington*, 562 U. S., at 101; *Knowles* v. *Mirzayance*, 556 U. S. 111, 122 (2009). We have instead required courts to ask whether our precedents "establish clearly *the specific rule* [the prisoner] needs." *Lopez*, 574 U. S., at 6 (emphasis added). The Tenth Circuit heeded our repeated warnings. The majority disregards them.

Payne "h[e]ld" that "the Eighth Amendment erects no *per se* bar" to "the admission of victim impact evidence" in capital sentencing proceedings. 501 U. S., at 827. But, the Court included a caveat: "In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.*, at 825. Significantly, that caveat did not apply in *Payne* itself. There, as in "the majority of cases," the "victim impact evidence serve[d] entirely legitimate purposes." *Ibid.*

The Tenth Circuit correctly rejected Andrew's claim that *Payne*'s caveat clearly established that the admission of *any* evidence so prejudicial as to render a trial fundamentally unfair would violate due process. It held that *Payne*'s brief discussion of due process only "appl[ied] to scenarios in

which . . . victim impact statements" are "unfairly prejudicial." 62 F. 4th 1299, 1314 (2023) (internal quotation marks omitted).

Nevertheless, the Court today vacates the Tenth Circuit's decision, marking the first time it has ever summarily set aside a lower court decision for *failing* to find that a legal rule is clearly established under AEDPA. Yet, the Court does not identify a specific on-point holding from *Payne*—or any other decision—that the Tenth Circuit overlooked. Instead, it faults the Tenth Circuit for failing to distill a "[g]eneral legal principl[e]" about fairness from *Payne*'s one-sentence due process caveat. *Ante,* at 8. In the process, the Court does not once mention, much less distinguish, our many precedents admonishing lower courts not to define clearly established law too abstractly.

This specificity requirement serves an important function. Defining clearly established law at an overly high level of generality makes it virtually impossible to find an unreasonable application warranting relief. See *Brown*, 596 U. S., at 136. It "is not 'an unreasonable application of'" a more general rule "for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." *Knowles*, 556 U. S., at 122. "[I]f a habeas court must extend a rationale before it can apply to the facts at hand, then by definition the rationale was not clearly established at the time of the state-court decision." *White*, 572 U. S., at 426 (internal quotation marks omitted). When a legal rule is defined at too high a level of generality, it becomes impossible to apply it to the facts without articulating subsidiary legal principles that are not themselves clearly established, leaving no principled basis for granting relief under §2254(d).

To the extent some courts nonetheless grant relief based on an overly general principle, they defy AEDPA. As we have explained, when courts use "a high level of generality" to "transform even the most imaginative extension of case

law into 'clearly established Federal law,'" they wrongly perform ordinary error correction under the guise of applying §2254(d). *Nevada*, 569 U. S., at 512. Thus, at best, today's decision will simply create an extra, unnecessary step judges must perform before they can deny a habeas claim that is doomed to fail. At worst, it will confuse lower courts into misapplying AEDPA's standard of review.

Consider Andrew's case. On remand, if the Tenth Circuit properly applies AEDPA, it still will find that the state court reasonably applied the principle the Court has identified, no matter what it thinks of the specific facts of Andrew's trial. *Payne* addressed the use of victim-impact evidence at the penalty phase of a capital trial. 501 U. S., at 824–825. Andrew challenges the admission of evidence from her guilt phase, as well as non-victim-impact evidence from her penalty phase. "[I]t is not uncommon for a constitutional rule to apply somewhat differently at the penalty phase than it does at the guilt phase." *White*, 572 U. S., at 421. And, a fairminded jurist could believe that victim-impact evidence raises unique due process concerns; otherwise, the specific question whether victim-impact evidence categorically violates the Eighth Amendment would never have arisen. So, it would be impossible for the Tenth Circuit to grant Andrew relief without impermissibly "extend[ing]" *Payne*'s "rationale." *Id.*, at 426 (internal quotation marks omitted).

Andrew's claim also cannot survive on remand because *Payne*'s lone sentence on due process does not establish a test for determining when a trial is so infected by prejudicial evidence as to be fundamentally unfair. It does not identify what factors a court should consider, how to weigh them, or what the gap is between, say, a garden-variety Federal Rule of Evidence 403 error and a fundamentally unfair trial. To consider the specific facts of Andrew's trial, the Tenth Circuit would need to decide these matters for itself. But it would then by definition be doing more than

applying clearly established law. See *Knowles*, 556 U. S., at 122.

The Court defends its reliance on a broadly defined rule of law by citing *Lockyer*, 538 U. S., at 73, which recognized as clearly established the general principle that grossly disproportionate sentences violate the Eighth Amendment. *Ante,* at 8. But, in *Lockyer* the Court denied relief, so it did not carefully consider the appropriate level of generality at which to define clearly established law. Indeed, it denied relief precisely *because* it had identified a "broad" legal principle whose "precise contours" were "unclear." 538 U. S., at 76–77 (internal quotation marks omitted). *Lockyer* also was an early AEDPA decision. In our many subsequent decisions, we have come to appreciate the need to ask whether our precedents "establish clearly *the specific rule* [the prisoner] needs." *Lopez*, 574 U. S., at 6 (emphasis added). "[H]oldings that speak only at a high level of generality" cannot "supply a ground for relief" under AEDPA. *Brown*, 596 U. S., at 136.

In an effort to show that remand will not be futile, the Court observes that clearly established law can apply to "'new factual permutations.'" *Ante,* at 8 (quoting *White*, 572 U. S., at 427). That is true, so long as one also keeps in mind *White*'s admonition that AEDPA "does not require state courts to *extend* [our] precedent" to any arguably distinct context, as would be necessary to grant Andrew relief. *Id*., at 426. The Court attempts to escape *White*'s strict limitation by invoking *Taylor* v. *Riojas*, 592 U. S. 7 (2020) (*per curiam*), to suggest that a "'general constitutional rule'" can be a basis for relief in an "'obvious'" case. *Ante,* at 8–9. But, the majority omits that *Taylor* is a qualified immunity decision, rendering it utterly inapposite. Although both qualified immunity and AEDPA impose demanding standards based on "clearly established law," the two are meaningfully different. A plaintiff overcomes qual-

ified immunity by identifying case law "finding a [constitutional] violation under similar circumstances," *except* that in "an obvious case . . . a body of relevant case law is not needed." *District of Columbia* v. *Wesby*, 583 U. S. 48, 65 (2018) (internal quotation marks omitted). In *Taylor*, this Court found that the obviousness exception applied. 592 U. S., at 8–9. AEDPA, by contrast, permits relief only when a state-court decision undeniably "conflicts with this Court's precedents." *Harrington*, 562 U. S., at 102.

Regardless of what we think of "the merits of the [due process] principle" that Andrew asserts, it does not warrant relief under AEDPA absent a prior Supreme Court holding that the principle "applies to the circumstances presented in this case." *Woods*, 575 U. S., at 319 (internal quotation marks omitted). There is no such holding here, and the Tenth Circuit was right to insist on one.

B

Even setting aside the level-of-generality problem, the Court is wrong to find a clearly established rule of law. For at least three reasons, a fairminded jurist could disagree with the Court's reading of *Payne*. The Court holds otherwise only by redefining "clearly established" law to include debatable interpretations of our precedents.

1

First, a fairminded jurist could conclude that *Payne*'s lone sentence on due process is not a holding at all. Although *Payne* asserted that victim-impact evidence could violate due process if it was unduly prejudicial, the Court found that "in this case" the evidence "serves entirely legitimate purposes," and so declined to disturb the capital sentence under review. 501 U. S., at 825. The Court's statement that a different case presenting different facts could violate due process was thus dicta because it was not "'*necessary* to'" its "disposition of [the] case." *Tyler* v. *Cain*, 533 U. S.

656, 663, n. 4 (2001) (quoting *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 67 (1996)); see *Stewart* v. *Winn*, 967 F. 3d 534, 539 (CA6 2020) (describing *Payne*'s due process discussion as a "snippe[t]" of "'dicta'"). As we have previously recognized, because "'clearly established [f]ederal law' . . . 'refers to the *holdings*'" of this Court, Andrew cannot premise her habeas claim on "a case in which we *rejected* a due process claim." *Metrish* v. *Lancaster*, 569 U. S. 351, 367 (2013) (alteration in original).

The Court insists *Payne*'s due process statement was "indispensable" to its disposition, because without the existence of a due process backstop, the *Payne* Court might have determined that a categorical Eighth Amendment bar on victim-impact evidence is necessary to protect defendants. *Ante,* at 7. But, this is hardly the only "reasonable interpretatio[n]" of *Payne*, which nowhere sets forth the reasoning the Court ascribes to it. *White*, 572 U. S., at 423. The Court's interpretation makes sense only if we assume that the *Payne* Court would have seriously considered holding victim-impact evidence categorically unconstitutional despite it "serv[ing] entirely legitimate purposes" in "the majority of cases." 501 U. S., at 825. That would be a highly unusual approach to constitutional litigation. Cf. *United States* v. *Salerno*, 481 U. S. 739, 745 (1987) (requiring that a law be valid in "no set of circumstances" to be facially unconstitutional). Another reasonable interpretation—and indeed, a far more plausible one—is that the Court simply wanted to make clear that its rejection of a categorical rule against victim-impact evidence did not rule out future fact-specific challenges. That kind of dicta is common in cases rejecting categorical challenges. See, *e.g.*, *United States* v. *Hansen*, 599 U. S. 762, 784–785 (2023). A fairminded jurist

need not agree that *Payne*'s single-sentence caveat constitutes a holding.

2

Even if we were to treat *Payne*'s sentence about due process as a holding, a fairminded jurist need not read it as broadly as the Court does. "[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they . . . ought not to control the judgment in a subsequent suit." *Cohens* v. *Virginia*, 6 Wheat. 264, 399 (1821). This principle applies with special force when a party claims "a single sentence" in an opinion establishes a broad legal principle. See *Arkansas Game and Fish Comm'n* v. *United States*, 568 U. S. 23, 35 (2012).

A fairminded jurist could believe that the scope of any holding established by *Payne*'s cursory discussion of due process is limited to *Payne*'s analysis. On the majority's telling, *Payne* eliminated a categorical Eighth Amendment prohibition *on victim-impact evidence* because of the availability of an alternative due process protection *against such evidence*. See *ante,* at 6–7. Because *Payne* was not considering the role of due process vis-à-vis any other kind of evidence, a fairminded jurist could conclude that any due process holding laid down by *Payne* extends only to victim-impact evidence.

3

Finally, a fairminded jurist could rely on this Court's later decision in *Estelle* to conclude that *Payne* did not establish any general due process prohibition on the admission of unduly prejudicial evidence.

The Court of Appeals in *Estelle* granted habeas relief on the ground that the admission of irrelevant and prejudicial prior-bad-act evidence had helped render the prisoner's trial "fundamentally unfair in violation of due process." 502

U. S., at 67 (internal quotation marks omitted). This Court reversed, holding the evidence in question "was relevant to an issue in the case." *Id.*, at 70. Having reached this conclusion, the Court added that "we need not explore further the apparent assumption of the Court of Appeals that it is a violation of the due process guaranteed by the Fourteenth Amendment for evidence that is not relevant to be received in a criminal trial." *Ibid.* That is, the *Estelle* Court expressly reserved the very question the majority asserts *Payne* resolved. This Court is "hardly in the habit of reserving separate questions that have already been definitively answered." *White*, 572 U. S., at 424 (citation, alteration, and internal quotation marks omitted). Thus, "fairminded jurists could conclude that [*Estelle*]'s reservation regarding" unduly prejudicial evidence "would have served no meaningful purpose if [*Payne*] had created [a] rule against" it already. *Ibid.*; accord, *Kernan* v. *Cuero*, 583 U. S. 1, 8 (2017) (*per curiam*).

The law has not changed since we decided *Estelle*. The Court cites several decisions postdating and predating *Payne* and *Estelle*, but only for vague, atmospheric support. See *ante*, at 7–8. The Court does not assert that any of them establishes a general due process rule against unduly prejudicial evidence. And, the Court does not explain what work, if any, these citations do in its analysis. Nor could it. Our decision in *Romano* v. *Oklahoma*, 512 U. S. 1, 13–14 (1994), cannot move the needle because *Romano rejected* a due process claim. The reference to due process in *Kansas* v. *Carr*, 577 U. S. 108, 123 (2016), also is not a holding. As in *Payne*, it is a one-sentence aside in a case rejecting an Eighth Amendment claim. Regardless, *Carr* has no possible bearing on this case, as it was decided after the conclusion of Andrew's direct appeal. See *Lockyer*, 538 U. S., at 71–72. So too, the Court's remaining citations are clearly inapposite, as none involves the admission of evidence. As the Tenth Circuit correctly recognized, this Court has never

answered the question it reserved in *Estelle*. 62 F. 4th, at 1315.

4

Remarkably, the Court does not deny that "a reasonable jurist could agree" that *Payne* does not establish the principle Andrew asserts. *Ante,* at 9. Instead, it maintains that the potentially differing views of reasonable, fairminded jurists do not matter. According to the majority, federal habeas courts have an "independent obligation" to identify the holdings of this Court. *Ibid*. Only afterward does "deference" kick in. *Ibid.*

That view is patently wrong. AEDPA requires state prisoners to base their claims on "'clearly established'" law. *Ibid.* (quoting §2254(d)(1)). A debatable holding does not *clearly* establish anything. AEDPA permits relief only when "the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U. S., at 103. If one could fairly disagree that the rule a prisoner invokes is part of "existing law," one could fairly disagree that the state court erred under existing law.

Our precedents confirm that debatable readings of this Court's cases cannot be clearly established law. In *White*, we held that *Estelle* v. *Smith*, 451 U. S. 454 (1981), did not clearly establish the prisoner's asserted rule, because other "perfectly reasonable interpretations of *Estelle*" existed. 572 U. S., at 423. In other words, the prisoner's claim failed because "fairminded jurists could conclude" that *Estelle* had not "created [the] across-the-board rule" he invoked. 572 U. S., at 424. To find clearly established law in the face of these reasonable alternative interpretations would "contraven[e] §2254(d)'s deferential standard of review." *Id.*, at 423–424. Likewise, in *Kernan*, we reversed after the Ninth Circuit held that our decision in *Santobello* v. *New York*,

404 U. S. 257 (1971), clearly established the rule on which the prisoner relied. See 583 U. S., at 6–9. Because "'fair-minded jurists could disagree' with the Ninth Circuit's reading of *Santobello*," we were "unable to find in Supreme Court precedent that 'clearly established federal law'" that the Ninth Circuit had claimed to see. *Id.*, at 7–8. Thus, contrary to what the majority says, we have extended "deference" both at the threshold step of identifying clearly established law and at the subsequent step of applying it. *Ante,* at 9. A contestable interpretation of precedent cannot be clearly established law.

* * *

Summary vacatur "is a rare disposition." *Schweiker* v. *Hansen*, 450 U. S. 785, 791 (1981) (Marshall, J., dissenting). This Court has traditionally reserved it for the uncommon "situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Ibid.* Today, however, the Court turns this approach on its head, steamrolling settled AEDPA principles to set aside an entirely correct Tenth Circuit decision. I respectfully dissent.

Appendix D: Tenth Circuit Decision (Mar. 21, 2023)

FILED
United States Court of Appeals
Tenth Circuit

March 21, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BRENDA EVERS ANDREW,

Petitioner - Appellant,

v.

TAMIKA WHITE, Acting Warden, Mabel Bassett Correctional Center,*

Respondent - Appellee.

No. 15-6190

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 5:08-CV-00832-R)

John T. Carlson, Assistant Federal Public Defender (Virginia Grady, Federal Public Defender, and Mark Henricksen of Henricksen & Henricksen, Oklahoma City, Oklahoma, with him on the briefs), Denver, Colorado, for Petitioner-Appellant.

Joshua Lockett, Assistant Attorney General (Mike Hunter, former Attorney General of Oklahoma, with him on the briefs), Oklahoma City, Oklahoma, for Respondent-Appellee.

Before **HARTZ**, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

PHILLIPS, Circuit Judge.

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* Pursuant to Fed. R. App. P. 43(c)(2), Aboutanaa El Habti is replaced by Tamika White as Acting Warden of the Mabel Bassett Correctional Facility.

Petitioner Brenda Evers Andrew, an Oklahoma state prisoner convicted of first-degree murder and sentenced to death, appeals the district court's denial of her habeas petition seeking a new trial or resentencing under 28 U.S.C. § 2254. We granted Ms. Andrew a Certificate of Appealability ("COA") on ten issues. Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253, we affirm.

BACKGROUND

I. Factual Background

We begin with the Oklahoma Court of Criminal Appeals' ("OCCA") recitation of some orienting facts, as contained in its order affirming on direct appeal:

> [Ms. Andrew]'s husband Robert ("Rob") Andrew was shot to death at their Oklahoma City home sometime around 7:00 p.m. on November 20, 2001. [Ms. Andrew] was also shot in the arm during this incident.
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> The Andrews were separated at the time and Rob Andrew was at the home to pickup [sic] the two minor children for visitation over the Thanksgiving holiday. The custom was that [Ms. Andrew] would bring the children out to the car and Rob would take them from there. However, on this night, [Ms. Andrew] asked Rob Andrew to come into the garage to light the pilot light on the furnace because it had gone out.
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> [Ms. Andrew]'s version of the events from that point on was that as Rob was trying to light the furnace, two masked men entered the garage. Rob turned to face the men and was shot in the abdomen. He grabbed a bag of aluminum cans to defend himself and was shot again. [Ms. Andrew] was hit during this second shot.
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> Undisputed facts showed that after that, [Ms. Andrew] called 911 and reported that her husband had been shot. Emergency personnel arrived and found Rob Andrew's body on the floor of the garage; he had suffered extensive blood loss and they were unable to revive him. [Ms. Andrew] had also suffered a superficial gunshot wound to her arm. The Andrew children were found in a bedroom, watching television with the volume turned up very high, oblivious to what had happened in the garage.

[Ms. Andrew] was taken to a local hospital for treatment. Her behavior was described by several witnesses, experienced in dealing with people in traumatic situations, as uncharacteristically calm for a woman whose husband had just been gunned down.
Rob Andrew was shot twice with a shotgun. A spent 16–gauge shotgun shell was found in the garage on top of the family van. Rob Andrew owned a 16–gauge shotgun, but had told several friends that [Ms. Andrew] refused to let him take it when they separated. Rob Andrew's shotgun was missing from the home. One witness testified to seeing [Ms. Andrew] at an area used for firearm target practice near her family's rural Garfield County home eight days before the murder and he later found several 16–gauge shotgun shells at the site.

[Ms. Andrew]'s superficial wound was caused by a .22 caliber bullet, apparently fired at close range, which was inconsistent with her claim that she was shot at some distance. About a week before the murder, [James] Pavatt purchased a .22 caliber handgun from a local gun shop. Janna Larson, Pavatt's daughter testified that, on the day of the murder, Pavatt borrowed her car and claimed he was going to have it serviced for her. When he returned it the morning after the murder, the car had not been serviced, but Larson found one round of .22 caliber rimfire ammunition on the floorboard. In a conversation later that day, Pavatt told Larson never to repeat that [Ms. Andrew] had asked him to kill Rob Andrew, and he threatened to kill Larson if she did. He also told her to throw away the .22 round she found in her car.

Police searched the home of Dean Gigstad, the Andrews' next-door neighbor, after the Gigstads reported finding suspicious things in their home. Police found evidence that someone had entered the Gigstads' attic through an opening in a bedroom closet. A spent 16 gauge shotgun shell was found on the bedroom floor, and several .22 caliber rounds were found in the attic itself. There were no signs of forced entry into the Gigstad home. Gigstad and his wife were out of town when the murder took place, but [Ms. Andrew] had a key to their home. The .22 caliber round found in Janna Larson's car was of the same brand as the three .22 caliber rounds found in the Gigstads' attic; the .22 caliber bullet fired at [Ms. Andrew] and retrieved from the Andrews' garage appeared consistent with bullets in these unfired rounds. These rounds were capable of being fired from the firearm that Pavatt purchased a few weeks before the murder; further testing was not possible because that gun was never found. The 16 gauge shotgun shell found in the Gigstads' home was of the same brand as the 16 gauge shell found in the Andrews' garage. Ballistics comparison showed similar markings, indicating that they could have been fired from the same weapon. Whether these shells were fired from the 16–gauge shotgun Rob Andrew had left at the home was

impossible to confirm because, as noted, that gun remains missing.

Within days after the shooting, before Rob Andrew's funeral, [Ms. Andrew], James Pavatt and the two minor children left the State and crossed the border into Mexico. They were apprehended while attempting to re-enter the United States in late February 2002.

[Ms. Andrew] and Pavatt met while attending the same church. At some point they began teaching a Sunday school class together. [Ms. Andrew] and Pavatt began having a sexual relationship. Around the same time, Pavatt, a life insurance agent, assisted Rob Andrew in setting up a life insurance policy through Prudential worth approximately $800,000. In late September 2001, Rob Andrew moved out of the family home, and [Ms. Andrew] initiated divorce proceedings a short time later.

Janna Larson, Pavatt's adult daughter, testified that in late October, Pavatt told her that [Ms. Andrew] had asked him to murder Rob Andrew. On the night of October 25–26, 2001, someone cut the brake lines on Rob Andrew's automobile. The next morning, Pavatt persuaded his daughter to call Rob Andrew from an untraceable phone and claim that [Ms. Andrew] was at a hospital in Norman, Oklahoma, and needed him immediately. An unknown male also called Rob that morning and made the same plea. Rob Andrew's cell phone records showed that one call came from a pay phone in Norman (near Larson's workplace), and the other from a pay phone in south Oklahoma City. Rob Andrew discovered the tampering to his car before placing himself in any danger. He then notified the police. The next day, [Ms. Andrew] told Rob that she read in the newspaper that someone cut his brakes, but no media coverage of this event had occurred.

One contentious issue in the Andrews' relationship was control over the insurance policy on Rob Andrew's life. After his brake lines were cut, Rob Andrew inquired about removing [Ms. Andrew] as beneficiary of his life insurance policy. Rob Andrew spoke with Pavatt's supervisor about changing the beneficiary. He also related his suspicions that Pavatt and [Ms. Andrew] were trying to kill him. At trial, the State presented evidence that in the months preceding the murder, [Ms. Andrew] and Pavatt actually attempted to transfer ownership of the insurance policy to [Ms. Andrew] without Rob Andrew's knowledge, by forging his signature to a change-of-ownership form and backdating it to March 2001.

In the days following the murder, Pavatt obtained information over the Internet about Argentina, because he had heard that country had no extradition agreement with the United States. Larson also testified that after

> the murder, [Ms. Andrew] and Pavatt asked her to help them create a document, with the forged signature of Rob Andrew, granting permission for his children to travel with [Ms. Andrew] out of the country. [Ms. Andrew] also asked Larson to transfer funds from her bank account to Larson's own account, so that Larson might wire them money after they left town.
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> [Ms. Andrew] did not attend her husband's funeral, choosing instead, to go to Mexico with Pavatt and the children. Pavatt called his daughter several times from Mexico and asked her to send them money. Larson cooperated with the FBI and local authorities in trying to track down the pair.
>
> After her apprehension, [Ms. Andrew] came into contact with Teresa Sullivan, who was a federal inmate at the Oklahoma County jail. Sullivan testified that [Ms. Andrew] told her that she and Pavatt killed her husband for the money, the kids, and each other. [Ms. Andrew] also told her that Pavatt shot her in the arm to make it look as if she was a victim.
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> Expert testimony opined that the wound to [Ms. Andrew]'s arm was not self-inflicted, but was part of a scheme to stage the scene to make it look like she was a victim, just like her husband.

Andrew v. State (*Andrew I*), 164 P.3d 176, 184–85 (Okla. Crim. App. 2007) (paragraph numbers and footnotes omitted), *as corrected* (July 9, 2007), *opinion corrected on denial of reh'g*, 168 P.3d 1150.[1]

II. Procedural Background

In November 2001, the State of Oklahoma charged Ms. Andrew with the first-degree murder of Rob Andrew and with conspiracy to commit that murder.[2] A jury convicted her on both counts.

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[1] Ms. Andrew does not challenge these factual findings, and without clear and convincing evidence to the contrary, we presume them to be correct. *Lockett v. Trammel*, 711 F.3d 1218, 1222 (10th Cir. 2013); *see also* 28 U.S.C. § 2254(e)(1).

[2] Ms. Andrew was charged jointly with Pavatt, but their cases were severed for trial. A jury convicted Pavatt on both counts, and he received the death penalty. The (continued)

At the close of the ensuing penalty-stage proceedings, the jury found, beyond a reasonable doubt, two aggravating factors that warranted the death penalty: (1) Ms. Andrew committed the murder for remuneration or the promise of remuneration ("remuneration aggravator"), and (2) the murder was especially heinous, atrocious, or cruel ("HAC aggravator").[3] After weighing those factors against mitigating evidence, the jury recommended a sentence of death. The court adopted that recommendation and sentenced Ms. Andrew to death.[4]

The OCCA affirmed Ms. Andrew's convictions and sentence on direct appeal and denied her petition for rehearing. *See Andrew I*, 164 P.3d at 206.[5] The OCCA also denied her application for post-conviction relief. *Andrew v. State* (*Andrew II*), No. PCD-2005-176 (Okla. Crim. App. Jun. 17, 2008) (unpublished).

OCCA affirmed his convictions and sentence, *Pavatt v. State*, 159 P.3d 272, 297 (Okla. Crim. App. 2007), and a federal district court denied his habeas petition, *Pavatt v. Trammell*, No. CIV-08-470-R, 2014 WL 1745019, at *57 (W.D. Okla. May 1, 2014). Pavatt appealed to this court. The original hearing panel affirmed Pavatt's convictions but reversed and remanded for further sentencing proceedings. *Pavatt v. Royal* (*Pavatt I*), 894 F.3d 1115, 1134 (10th Cir. 2017). After an en banc hearing, we vacated our prior panel opinion and affirmed the district court. *Pavatt v. Carpenter* (*Pavatt II*), 928 F.3d 906, 935 (2019) (en banc), *cert denied*, 140 S. Ct. 958 (2020). Pavatt now awaits execution.

[3] The jury rejected a third aggravating factor proposed by the government: that Ms. Andrew was a continuing threat to society.

[4] The court also sentenced Ms. Andrew to ten years' imprisonment and a fine for the conspiracy conviction.

[5] The OCCA corrected its earlier opinion in its order denying Ms. Andrew's petition for rehearing. *Andrew v. State*, 168 P.3d 1150, 1151–52 (Okla. Crim. App. 2007). That change is reflected in the recitation of the facts.

Having exhausted her state-court remedies, Ms. Andrew filed the 28 U.S.C. § 2254 petition underlying this appeal. The district court denied the petition and declined to issue a COA. *Andrew v. Moham* (*Andrew III*), No. CIV-08-832-R, 2015 WL 5254525, at *58 (W.D. Okla. Sept. 9, 2015).

Ms. Andrew then appealed to this court. We ultimately granted her a COA on these ten issues:

1. Whether the admission and use of evidence about Ms. Andrew's sex life rendered the guilt and penalty phases of the trial fundamentally unfair.

2. Whether the exclusion of the six defense witnesses during the trial's guilt phase violated Ms. Andrew's Sixth Amendment right to present a defense.

3. Whether the government, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), suppressed material evidence during the guilt phase by failing to disclose evidence that Teresa Sullivan, a jailhouse informant, received a benefit after testifying against Ms. Andrew and whether an evidentiary hearing is warranted.

4. Whether the admission of a video-recorded, pre-*Miranda* interview Ms. Andrew gave to law enforcement violated the Fifth Amendment, affecting the guilt phase.

5. Whether the admission of Rob Andrew's statements in a police report during the guilt phase violated Ms. Andrew's rights under the Sixth Amendment's Confrontation Clause.

6. Whether four instances of penalty-phase prosecutorial misconduct violated Ms. Andrew's due-process rights.

7. Whether Ms. Andrew received ineffective assistance of counsel on the handling of bloodstain evidence, affecting both the guilt phase and penalty phase of the trial.

8. Whether Ms. Andrew received ineffective assistance of counsel because of her trial counsel's ignorance of the extradition treaty between Mexico and the United States and her appellate counsel's failure to bring her

ineffective-assistance-of-counsel claim on direct appeal.

9. Whether there was sufficient evidence to support the HAC aggravator.

10. Whether accumulation of error in the guilt and penalty phases offends due process.

Case Mgmt. Order at 1–2 (Sept. 29, 2016); Order Granting Motion to Expand COA at 1 (Mar. 30, 2017) (expanding the COA to include Claim 8 and to include two other defense witnesses in Claim 2); Order Granting Combined Motion for Expanded COA at 1 (July 3, 2017) (expanding the COA to include Claim 10).[6]

STANDARD OF REVIEW

This appeal is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Under AEDPA, when a state court has "adjudicated" a claim "on the merits," we may grant habeas relief only if the petitioner establishes that the adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)–(2).[7]

Our application of § 2254(d)(1) requires two steps. First, as a "threshold matter," we must determine "what constitutes 'clearly established Federal law, as determined by

[6] We have altered the order of Ms. Andrew's claims in light of our orders granting her motions to expand the COA.

[7] Here, the OCCA adjudicated all claims on the merits. When a state court has not done so, we are "not constrained by the deference principles in § 2254(d)." *Cargle v. Mullin*, 317 F.3d 1196, 1212 (10th Cir. 2003).

the Supreme Court of the United States.'" *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003) (quoting § 2254(d)(1)). In this context, clearly established federal law refers to holdings of the Supreme Court, not dicta. *Terry Williams v. Taylor*, 529 U.S. 362, 412 (2000). Those holdings "must be construed narrowly" and "on-point." *Fairchild v. Trammell*, 784 F.3d 702, 710 (10th Cir. 2015) (citation omitted). It isn't necessary for the holding to "have had its genesis in [a] closely-related or similar factual context" to the case at issue, but "the Supreme Court must have expressly extended the legal rule to that context." *House v. Hatch*, 527 F.3d 1010, 1016 (10th Cir. 2008).

If—and only if—the principle of federal law was clearly established, do we then move to the second step. *See id.* at 1017–18 ("The absence of clearly established federal law is dispositive under § 2254(d)(1)."). In step two, we "consider whether the state court decision was 'contrary to' or an 'unreasonable application of' that clearly established federal law." *Bland v. Sirmons*, 459 F.3d 999, 1009 (10th Cir. 2006).

A state-court decision is "contrary to" clearly established law under § 2254(d)(1) if it "applies a rule different from the governing law set forth in Supreme Court cases, or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts." *Lockett*, 711 F.3d at 1231 (brackets and citation omitted).

And a state court decision involves an "'unreasonable application' of clearly established federal law if it 'identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of [the] petitioner's case.'" *Id.* (citation omitted). Whether an application of a rule is unreasonable depends in part on the rule's specificity. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). "The more general the

rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Id.*

Crucially, an "*unreasonable* application of federal law is different from an *incorrect* application of federal law." *Terry Williams*, 529 U.S. at 410. A state court's application of federal law is unreasonable only if "*every* fairminded jurist" would "reach a different conclusion." *Brown v. Davenport*, 142 S. Ct. 1510, 1530 (2022). In other words, the state-court determination must have been "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Davis v. Ayala*, 576 U.S. 257, 269–70 (2015) (citation omitted).

Our application of § 2254(d)(2) is similarly constrained. We cannot conclude that a state court's determination of the facts was unreasonable "merely because we would have reached a different conclusion in the first instance." *Brumfield v. Cain*, 576 U.S. 305, 313–14 (2015) (cleaned up). Instead, we must defer to the state court's factual determinations if "reasonable minds reviewing the record might disagree about the finding in question." *Id.* (cleaned up). Thus, a state court's factual findings are presumed correct, and a petitioner bears the burden of rebutting that presumption by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

"Recognizing the duty and ability of our state-court colleagues to adjudicate claims of constitutional wrong, AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Burt v. Titlow*, 571 U.S. 12, 19 (2013). The standard stops short only of a "complete bar on federal-court

relitigation of claims already rejected in state proceedings." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). So if the standard appears "difficult to meet, that is because it was meant to be." *Id.*

We also briefly review how harmless error applies for alleged constitutional violations at different stages of a criminal proceeding. On direct appeal, the *Chapman* harmless-error standard applies. *Ayala*, 576 U.S. at 267 (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). Under that standard, the government bears the burden of showing that the federal constitutional error was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24; *see also Deck v. Missouri*, 544 U.S. 622, 635 (2005) ("The State must prove 'beyond a reasonable doubt that the [constitutional] error complained of did not contribute to the verdict obtained.'" (citation omitted)).

But after a case is decided on a direct appeal and presents itself on federal habeas review, we apply the harmless-error standard from *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Under the *Brecht* standard, "relief is proper only if the federal court has grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict." *Ayala*, 576 U.S. at 267–68 (quotations and citation omitted). This requires that the petitioner show "actual prejudice." *Brecht*, 506 U.S. at 637.

But *Brecht* doesn't "abrograte[] the limitation on federal habeas relief that § 2254(d) plainly sets out." *Ayala*, 576 U.S. at 268. Instead, when we review a state

court's *Chapman* decision under AEDPA,[8] the petitioner must show that the state court "applied *Chapman* in an objectively unreasonable manner." *Id.* at 269 (citation omitted). Put differently, the state's "*harmlessness determination itself*" must have been unreasonable. *Id.* (citation omitted). "And a state-court decision is not unreasonable if fairminded jurists could disagree on its correctness." *Id.* (cleaned up).

So "a federal court must *deny* relief to a state habeas petitioner who fails to satisfy either [*Brecht*] or AEDPA. But to *grant* relief, a court must find that the petitioner has cleared both tests." *Davenport*, 142 S. Ct. at 1524; *see also Malone v. Carpenter*, 911 F.3d 1022, 1030 (10th Cir. 2018) ("[S]atisfaction of the AEDPA/*Chapman* standard is a *necessary* condition for relief (that is, failure to satisfy the standard requires denial of relief), but satisfaction of the standard is not a *sufficient* condition because *Brecht* must also be satisfied.").

Further, we review the federal district court's conclusions of law de novo and its factual determinations for clear error. *Hanson v. Sherrod*, 797 F.3d 810, 825 (10th Cir. 2015).

DISCUSSION

With the AEDPA standard firmly in mind, we address each of Ms. Andrew's claims in turn.

[8] A state court's determination that a federal error was harmless beyond a reasonable doubt under *Chapman* constitutes an adjudication "on the merits" for the purposes of § 2254(d). *See Ayala*, 576 U.S. at 269.

I. Right to a Fair Trial: Admission of Sexualization Evidence

Ms. Andrew argues that the admission of "bad acts" evidence, in her view all irrelevant to the charged crimes, rendered the guilt and penalty phases of her trial fundamentally unfair, in violation of due process.[9] The challenged evidence included:

- Testimony about Ms. Andrew's affairs with Rick Nunley and James Higgins.
- Testimony that Ms. Andrew dyed her hair red after learning that her husband's friend preferred that color.
- Testimony that while with her husband and another couple at a restaurant, someone called her a "hootchie" because she was dressed provocatively.
- Testimony that Ms. Andrew trained her children to be discreet about her affairs.
- Testimony that Ms. Andrew made sexual advances toward two college-aged males who were hired to fence her yard.
- Evidence that Ms. Andrew possessed a book entitled "203 Ways to Drive a Man Wild in Bed."
- Testimony that Pavatt's daughter doubted Ms. Andrew's claim to him that she had only had two sexual partners in her life—Rob Andrew and Pavatt.
- Testimony that Rob Andrew had expressed frustration with his and Ms. Andrew's lack of a sex life.
- Ms. Andrew's thong underwear that she took to Mexico.

See Opening Br. at 22–27.

[9] On direct appeal, Ms. Andrew challenged this evidence in two separate "Propositions." Proposition III.B and III.C challenged evidence of her affairs and other sexual and sexualizing facts unrelated to her relationship with Pavatt. Proposition VII.2 challenged evidence directly tied to her relationship with Pavatt. Because both Propositions were "anchored" in the Due Process Clause of the Fourteenth Amendment, she consolidated them for this appeal. Opening Br. at 44.

Ms. Andrew also challenged how the above evidence was used by the government in closing arguments. Specifically, she objected to the government doing these things:

- "Brandish[ing]"[10] Ms. Andrew's underwear and insinuating that no true grieving widow would pack such underwear and leave for Mexico with her boyfriend.
- Referring to her affairs with Nunley and Higgins.
- Referring to entries in Rob Andrew's journal about Ms. Andrew's two earlier affairs during their engagement.[11]

See Opening Br. at 28–31.

The OCCA concluded that the state court hadn't abused its discretion by admitting the majority of the challenged evidence because it was relevant to show Ms. Andrew's motive, intent, preparation, and "the schemes she used to enter into a conspiracy with Pavatt to kill Rob Andrew." *Andrew I*, 164 P.3d at 188–94. Though the OCCA "struggl[ed] to find any relevance" for some of the challenged evidence, the court still concluded that its admission "was harmless due to the overwhelming evidence in this case." *Id.* at 192.

[10] As Ms. Andrew concedes, nothing in the record indicates that the government ever "brandished" her underwear.

[11] The government argues that though all the challenged evidence was in the record, Ms. Andrew failed to identify it before the OCCA. So it requests that we ignore all newly presented evidence when evaluating this claim. But we need not decide this issue because Ms. Andrew cannot prevail even if we consider all the matters she raises in this claim.

Because the OCCA adjudicated this legal claim "on the merits," Ms. Andrew must overcome AEDPA's deferential standard of review set out at § 2254(d)(1).[12] Specifically, Ms. Andrew must show that the OCCA's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

We begin, as we must, with Ms. Andrew's first required showing under § 2254(d)(1): evaluating whether she has cited clearly established federal law governing her claim. *Sanders v. Miller*, 555 F. App'x 750, 752 (10th Cir. 2014) (Gorsuch, J.) ("[The petitioner] bears the burden of identifying [the] clearly established Supreme Court law."). The district court accepted Ms. Andrew's position that *Payne v. Tennessee*, 501 U.S. 808 (1991), met the clearly-established-law requirement. *See Andrew III*, 2015 WL 5254525, at *18–19. We disagree.

In *Holland v. Allbaugh*, 824 F.3d 1222, 1228 (10th Cir. 2016), we foreclosed reliance on *Payne* as an "on-point" Supreme Court holding for evidentiary claims. There, the petitioner sought habeas relief given the trial court's admission of what the petitioner

[12] On direct appeal to the OCCA, Ms. Andrew styled this claim as one arising under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and under the Oklahoma Constitution. In denying her claim, the OCCA referenced only state law. Nevertheless, we must presume that the OCCA adjudicated the merits of the federal claims as well. *See Johnson v. Williams*, 568 U.S. 289, 301 (2013) ("When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits[.]"). Though the "presumption that the federal claim was adjudicated on the merits may be rebutted," Ms. Andrew has made no effort to do so on appeal. *Id.* In fact, the parties treat this claim as requiring consideration of the OCCA's harmlessness determination subject to AEDPA's deferential standard of review.

alleged was irrelevant and prejudicial evidence. *Id.* Specifically, the petitioner challenged the admission of any testimony about his racial animus and Nazi tattoos. *Id.* The district court agreed with the petitioner and granted him relief after concluding that the OCCA had unreasonably applied *Payne* by not ruling that the challenged evidence violated the petitioner's right to a fair trial. *Id.*

We reversed. We viewed *Payne*'s central holding as more limited than the district court had viewed it, namely, that *Payne* had merely established that the Eighth Amendment did not erect a "*per se* bar" to the introduction of victim-impact statements in capital cases. *Id.* (quoting *Payne*, 501 U.S. at 827). We acknowledged *Payne*'s broad pronouncement that when "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.* (quoting *Payne*, 501 U.S. at 825). But we viewed the broad statement as applying to scenarios in which "some victim impact statements will be so unfairly prejudicial, that their introduction will violate the Constitution notwithstanding the Eighth Amendment." *Id.*

Thus, we concluded that *Payne* didn't "clearly establish the applicable legal framework for wrongfully-admitted trial evidence." *Id.* at 1229. We treated *Payne* as setting a "general legal principle" involving the "factually distinct context" of victim-impact statements in a capital case. *Id.* at 1229. And because the petitioner hadn't identified clearly established law governing his evidentiary-rulings-based claim, we reversed the district court's grant of habeas relief. *Id.*; *see also Wyatt v. Crow*, 812 F. App'x 764, 767 (10th Cir. 2020) (relying on *Holland* to hold that no "Supreme

Court decision clearly establish[es] a standard for wrongfully admitted trial evidence"); *Stewart v. Winn*, 967 F.3d 534, 539–40 (6th Cir. 2020) (rejecting the petitioner's attempt to rely on the "general rule that the Due Process Clause prohibits 'fundamentally unfair' procedures—without a specific Supreme Court holding covering the type of due-process error he asserts"); *Holley v. Yarborough*, 568 F.3d 1091, 1101 (9th Cir. 2009) ("[The Supreme Court] has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ.").

Because Ms. Andrew raises a claim challenging a state court's evidentiary rulings, she faces the same problem as the petitioner faced in *Holland*: *Payne* is not "clearly established law" that establishes a due-process violation arising from ordinary evidentiary rulings at trial.

In pursuing a constitutional claim for the evidentiary rulings, Ms. Andrew also faces a roadblock in *Estelle v. McGuire*, 502 U.S. 62 (1991). There, the petitioner, convicted of the second-degree murder of his infant daughter, challenged his conviction on grounds that the district court had violated his due-process rights by admitting irrelevant battered-child-syndrome evidence. *Id.* at 67. The Ninth Circuit granted habeas relief, concluding that the evidence rendered the petitioner's trial arbitrary and fundamentally unfair in violation of due process. *Id.* at 66–67. But the Supreme Court reversed after concluding that the evidence was probative of intent. *Id.* at 69. With that decided, the Court observed that it "need not explore further the apparent assumption of the Court of Appeals that it is a violation of the due process guaranteed by the Fourteenth

Amendment for evidence that is not relevant to be received in a criminal trial." *Id.* at 70. So *Estelle* found no clearly established federal law that would entitle a petitioner to habeas relief based on the admission of irrelevant evidence. And no post-*Estelle* case has opted to "explore further" that rule. *Id*.

Though Ms. Andrew chiefly relies on *Payne* as her strongest case, we briefly explain why her other cited cases also fall short. Those cases include *Lisenba v. California*, 314 U.S. 219 (1941), *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Brown v. Sanders*, 546 U.S. 212 (2006).[13]

First, Ms. Andrew argues that *Lisenba* constitutes clearly established law given its statement that the "aim" of due process is "to prevent fundamental unfairness in the use of evidence whether true or false." 314 U.S. at 236. But *Lisenba* provides Ms. Andrew no help. The Court rejected a due-process claim contesting the admission of prejudicial evidence, noting that it didn't "sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence." *Id.* at 228; *see also Stewart*, 967 F.3d at 539 (holding that *Lisenba* did not serve as clearly established law for a due-process claim based on the admission of irrelevant and prejudicial evidence).

[13] In her Reply Brief, Ms. Andrew also urges us to consider *Kansas v. Carr*, 577 U.S. 108 (2016). She does so because *Carr* quotes *Payne* for the proposition that due process "wards off the introduction of 'unduly prejudicial' evidence that would 'rende[r] the trial fundamentally unfair.'" *Carr*, 577 U.S. at 123 (quoting *Payne*, 501 U.S. at 825). But as Ms. Andrew concedes, *Carr* post-dates the OCCA's direct appeal opinion by nearly a decade. *See Greene v. Fisher*, 565 U.S. 34, 38 (2011) (holding that "clearly established" requires that the precedent be in place at the time of the state court decision). Further, *Carr* does not persuade us that, contrary to our precedent, *Payne* serves as clearly established law entitling her to proceed with her due-process claim.

Next, Ms. Andrew relies on *Chambers* as clearly established law based on its rejection of two common-law evidentiary rules—(1) that a party may not impeach his own witness, and (2) that the declarations-against-interest hearsay exception applies only to declarations against pecuniary, not penal, interests, which the trial court relied on to exclude "critical evidence. . . [that] denied [the petitioner] a trial in accord with traditional and fundamental standards of due process." 410 U.S. at 302. But that holding dealt with exclusion, not admission, of evidence that was critical to the petitioner's defense. *Id.* at 294–303.

As for *Brown*, Ms. Andrew provides no analysis. She merely fashions a sentence from interspersed quotes from *Brown* to argue that "'due process would mandate reversal' where 'an invalid sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it.'" Reply Br. at 2 (quoting *Brown*, 546 U.S. at 220–21). *Brown* doesn't apply here. That case involved the factually distinct context of capital sentencing and set forth a test for setting aside a death sentence if an aggravating sentencing factor is later invalidated. *Id.* at 220; *see also House*, 527 F.3d at 1016 (holding that while a Supreme Court holding need not "have had its genesis in [a] closely-related or similar factual context" to the case at issue, "the Supreme Court must have expressly extended the legal rule to that context"). It did not involve the admission of prejudicial evidence at the guilt phase.[14]

[14] Ms. Andrew also cites four Tenth Circuit cases to meet the clearly-established-law requirement: *Spears v. Mullin*, 343 F.3d 1215 (10th Cir. 2003); *Duckett v. Mullin*, 306 F.3d 982 (10th Cir. 2002); *Revilla v. Gibson*, 283 F.3d 1203 (10th Cir. 2002); and (continued)

In sum, Ms. Andrew has not identified clearly established federal law governing her claim. *See House*, 527 F.3d at 1018 ("The absence of clearly established federal law is dispositive under § 2254(d)(1)."). We thus affirm the district court's denial of Ms. Andrew's claim premised on the due-process right to a fair trial.[15]

II. Right to Present a Complete Defense: Exclusion of Witnesses and Testimony

In her second claim, Ms. Andrew argues that the trial court violated her right to present a complete defense by excluding all or part of the testimony of six defense witnesses during the guilt phase of her trial. Relying on a provision of the Oklahoma Discovery Code, the trial court excluded at least some of the testimony of five witnesses because Ms. Andrew hadn't furnished summaries of their anticipated testimony.[16] It excluded part of a sixth witness's testimony as hearsay.

Williamson v. Ward, 110 F.3d 1508 (10th Cir. 1997). But "circuit precedent does not constitute 'clearly established Federal law'" and therefore "cannot form the basis for habeas relief under AEDPA." *Parker v. Matthews*, 567 U.S. 37, 48–49 (2012) (per curiam) (quoting 28 U.S.C. § 2254(d)(1)).

[15] We share the OCCA's concerns about some of the "sexual and sexualizing" evidence admitted at trial, and the use to which it was put by the government. But Ms. Andrew must overcome AEDPA's deferential standard of review, and as explained in this opinion, she has not.

[16] The trial court excluded the witnesses under Okla. Stat. tit. 22, § 2002, which provides that "[i]f at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances."

The OCCA rejected Ms. Andrew's constitutional claim for all six witnesses, holding under *Chapman* that excluding the testimony was harmless beyond a reasonable doubt. Thus, we will assume constitutional error and move to whether Ms. Andrew can establish that the OCCA unreasonably applied *Chapman* under § 2254(d)(1). *See Ayala*, 576 U.S. at 269. Ms. Andrew cannot meet this stringent standard without showing that "*every* fairminded jurist" would "reach a different conclusion." *Davenport*, 142 S. Ct. at 1530.

After providing some brief legal background, we address Ms. Andrew's arguments and the OCCA's decision regarding each witness.

A. Legal Background

Defendants are guaranteed "a meaningful opportunity to present a complete defense" by the Due Process Clause of the Fourteenth Amendment and the Compulsory Process and Confrontation Clauses of the Sixth Amendment. *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (citation omitted). "This right is abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Id.* (cleaned up).

But the right to present testimony is not "free from the legitimate demands of the adversarial system." *United States v. Nobles*, 422 U.S. 225, 241 (1975). Defendants must "comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers*, 410 U.S. at 302; *see also Taylor v. Illinois*, 484 U.S. 400, 413–15 (holding that the trial court's

exclusion of a witness whose name was untimely disclosed to the government didn't violate the defendant's right to a complete defense).

B. Sergeant Northcutt and Officer Frost

Ms. Andrew first challenges the exclusion of one portion of testimony from two Oklahoma City police officers—Sergeant Northcutt and Officer Frost—who provided off-duty patrols in Ms. Andrew's neighborhood. Ms. Andrew contends that Sergeant Northcutt would have testified that a few weeks before the shooting, she asked him to conduct extra off-duty patrols of her house because she feared Rob Andrew. She also contends that Officer Frost would have testified that Sergeant Northcutt had told him about Ms. Andrew's request and reported fear.

Ms. Andrew sought to admit the two officers' testimony because it "would have chipped away at the theory that Andrew planned and participated in her husband's murder." Opening Br. at 48. And, she says, it could have given the jury "an alternate, innocent explanation for Andrew's retention of the family shotgun after she and her husband separated, namely, her personal-security fears." *Id.* at 50.

Because Ms. Andrew failed to provide notice as required by Oklahoma's Discovery Code, the trial court barred Sergeant Northcutt from testifying that Ms. Andrew was the person who had requested the extra patrols. It limited his testimony to information about his work conducting off-duty patrols in her neighborhood.

Further, the trial court precluded as hearsay Officer Frost's proposed testimony that Ms. Andrew had asked Sergeant Northcutt to provide increased patrols. Even so, Officer Frost testified about his and other officers' off-duty patrols in Ms. Andrew's

neighborhood. He also testified that before Rob Andrew's murder, Sergeant Northcutt received a request for extra security from someone in Ms. Andrew's neighborhood—he just couldn't name the person requesting this.

On direct appeal, the OCCA rejected Ms. Andrew's claims:

> [Ms. Andrew] claims that she was not allowed to present the testimony from Sergeant Larry Northcutt and Officer Roger Frost, both of whom worked during their off duty hours patrolling the Lansbrook neighborhood where the Andrews lived. Counsel asked Northcutt whether [Ms. Andrew] requested extra patrols around her house. Trial court ruled that the information had not been provided in discovery; therefore, Northcutt could not answer the question. Not until the day that Northcutt was to testify, did [Ms. Andrew] provide a summary of his testimony. No good reason existed for this other than to attempt to gain a tactical advantage; therefore, the trial court did not abuse its discretion in precluding this testimony.
>
> Counsel asked Frost, in many different ways, whether Northcutt told him that [Ms. Andrew] requested extra patrols at her residence. The trial court sustained each objection based on hearsay. What was evident from the testimony was that the off-duty officers were providing extra patrol near the residence. On appeal, [Ms. Andrew] argues that the testimony is not hearsay, it is provided to show why the officers provided extra patrol. On the contrary, counsel wanted to elicit this testimony to show that [Ms. Andrew] requested extra patrols in order to show that she was not a calculating murderer. This testimony was hearsay and the trial court did not abuse its discretion.
>
> Furthermore, the jury was well aware that extra patrols were requested. The only information that was kept from the jury was that [Ms. Andrew] had requested those patrols. The failure to give this information to the jury did not prejudice [Ms. Andrew]. The jury might have believed that her request for extra patrols took place during the planning stage of this murder, and the request was just another method of deflecting suspicion away from her.

Andrew I, 164 P.3d at 196–97 (paragraph numbers omitted).

So Ms. Andrew's claim depends on her showing that the OCCA unreasonably applied *Chapman* in ruling that any (assumed) constitutional error in precluding the proffered testimony (that Ms. Andrew requested the additional patrols) was harmless

beyond a reasonable doubt.[17] As did the OCCA, we must consider (1) the probative value of the precluded testimony and (2) the overall strength of the evidence against Ms. Andrew. *See United States v. Roach*, 896 F.3d 1185, 1195–96 (10th Cir. 2018).

Ms. Andrew disputes the OCCA's harmlessness determination in a single paragraph. She contends that we should grant relief because the precluded testimony "may have caused just one juror to pause, hesitant to convict Andrew of planning a murder in a location she knew would be the object of intensified surveillance." Opening Br. at 52.[18] But even if that were so, it would not address AEDPA's requirements. That same misunderstanding of her burden recurs throughout her briefing.

We reiterate that Ms. Andrew must establish that the OCCA unreasonably applied *Chapman*. To do so, she must demonstrate that "*every* fairminded jurist" would "reach a different conclusion"—not whether "*some* fairminded jurist" might. *Davenport*, 142 S. Ct. at 1530; *see also Ayala*, 562 U.S. at 101 (holding that a petitioner is not entitled to relief so long as "fairminded jurists could disagree" on the correctness of the

[17] In ruling that the excluded testimony didn't "prejudice" Ms. Andrew, the OCCA didn't refer to the "harmless beyond a reasonable doubt" standard or cite *Chapman*, as it did elsewhere in its opinion. But the parties agree that the finding of no "prejudice" substitutes for that. Further, we don't "impose mandatory opinion-writing standards on state courts." *Williams*, 568 U.S. at 300. And because Ms. Andrew presented this claim as a federal claim, we must presume that the OCCA adjudicated it as such and on its merits. *Id.* at 301. We therefore interpret the OCCA's no "prejudice" language as a *Chapman* application.

[18] Ms. Andrew doesn't dispute that she provided inadequate notice of the content of Sergeant Northcutt's testimony, or that Officer Frost's testimony about what Sergeant Northcutt told him was hearsay.

state court's decision) (quoting *Alvarado*, 541 U.S. at 664)). In advancing a "just one juror" argument, Ms. Andrew is in reality asking that we review her claim as though she were on direct appeal seeking de novo review. She neglects even to acknowledge—let alone meet—her much heavier burden under AEDPA/*Chapman*.

We have no difficulty concluding that a fairminded jurist could agree with the OCCA that any constitutional error in excluding these portions of the two witnesses' testimony was harmless beyond a reasonable doubt. As did the OCCA, a reasonable jurist would need look no further than the overwhelming evidence of Ms. Andrew's guilt. To supplement some of the earlier-provided evidence in support of her planning and carrying out the murder of Rob Andrew, we mention these additional facts:

- Ms. Andrew stated that she wished Rob Andrew was dead so she could go on with her life and get his life-insurance money; "she would see him dead" [Trial Vol. 3 at 136]; and she was going to kill Rob Andrew or have him killed.[19]

- Ms. Andrew told Higgins that she hated Rob "and wished that she didn't have to stay with him." Trial Vol. 2 at 88.

- Ms. Andrew asked Pavatt whether he would kill Rob Andrew or knew someone who would do it for her.

- Rob Andrew repeatedly expressed fear of Ms. Andrew and Pavatt and said he believed that they would murder him over his life-insurance policy.

- Ms. Andrew and Pavatt attempted to murder Rob Andrew by cutting his car's brake lines and luring him to the hospital.

- Ms. Andrew and Pavatt attempted to fraudulently change the ownership

[19] All record citations, unless otherwise noted, are to the digital version of the record, not the paper version. We cite the appropriate folder and PDF pagination.

of Rob Andrew's life-insurance policy from Rob Andrew to Ms. Andrew.

- Ms. Andrew had Pavatt tracking Rob Andrew in the month leading up to his murder.

- The night before Rob's murder, Ms. Andrew told her friend, referring to Rob: "I hate him. I hate him. I hate him." Trial Vol. 11 at 175–76.

- Ms. Andrew was unusually calm at the crime scene and in the hours after her husband's murder.

- Ms. Andrew and Pavatt were seen giggling together at the hospital the morning after the murder.

- At the time of the murder, the Andrew children were in a room far from the garage, where the murder took place, with the door closed and the television turned up loud even though they were supposed to be ready to leave with Rob Andrew to spend the Thanksgiving vacation with him and his parents.

- Testimony from each side's expert witness that Ms. Andrew's arm-shooting was staged to make it look like she was a victim.

- Expert testimony that Ms. Andrew was shot in the arm from two to four inches away, in contradiction of her testimony that she was shot from some distance.

- Pavatt purchased a .22 caliber handgun a week before the murder. On the day of the murder, Pavatt borrowed his daughter's car. The day after the murder, Pavatt's daughter found a .22 caliber round on the floorboard of her car and turned it over to the police.

- Ms. Andrew was shot with a .22 caliber handgun, the shell of which was recovered at the crime scene.

- Ms. Andrew kept and refused to return to Rob Andrew his 16-gauge shotgun, a variety of shotgun less common than a 12- or 20-gauge shotgun, after Rob moved out in September 2001. Rob told several friends that Ms. Andrew refused to let him take it when they separated. Ms. Andrew told the police she hadn't seen it since January 2001, and the shotgun was never found after the murder.

- Ms. Andrew was seen at a firearm target range near her family's Garfield County home eight days before the murder. Several 16-gauge shotgun shells were later found at the site.

- Rob was killed by two 16-gauge shotgun blasts.

- One spent 16-gauge shotgun shell was found on top of the Andrews' van in the garage and the other spent shell was found in the neighbors' spare bedroom.

- The police found three .22 caliber rounds in the attic and spare bedroom leading to the attic at the Andrews' neighbors' home. Ms. Andrew had a spare key to the home, and was watching the home for the neighbors, who were out of town on vacation at the time of the murder.

- Ballistics evidence showed that the same 16-gauge shotgun fired the spent shells found on the van in the garage and in the spare bedroom of the neighbors' home.

- The .22 caliber round found in Pavatt's daughter's car the day after the murder and the .22 caliber rounds found inside the neighbors' home were the same brand. And the .22 caliber bullet fired at Ms. Andrew and recovered from the crime scene was consistent with those unfired rounds.

- Ms. Andrew demonstrated no interest in planning her husband's funeral. When the funeral director asked her what she loved and would miss about Rob, she said "nothing." Trial Vol. 11 at 95. The funeral director said that her response was the most "bizarre" he had received in his twenty-five years of experience. Trial Vol. 11 at 95.

- Ms. Andrew fled to Mexico with Pavatt and her children in Ms. Pavatt's car before Rob Andrew's funeral.

- Though Ms. Andrew blamed two masked men for the shootings, Pavatt later claimed that he had shot Ms. Andrew and that another unidentified man had murdered Rob Andrew.

Ms. Andrew does not dispute that Officer Frost's and Sergeant Northcutt's testimony was cut short on just one point: that Ms. Andrew was the one who requested the extra neighborhood patrols. But based on the overwhelming evidence of Ms.

Andrew's guilt, as the OCCA concluded, the exclusion of this evidence was harmless.

Second and relatedly, Ms. Andrew overstates the value of the precluded testimony because, as the OCCA correctly noted, the jury "might have believed that her request for extra patrols took place during the planning stage of this murder, and the request was just another method of deflecting suspicion away from her." *Andrew I*, 164 P.3d at 197. Such a view would be bolstered by the undisputed fact that Ms. Andrew asked Rob Andrew to get out of his car and enter the garage with her, purportedly to reignite the pilot light.

Thus, we conclude that a fairminded jurist could easily conclude that the OCCA correctly determined that any constitutional error in excluding Sergeant Northcutt's and Officer Frost's testimony on this point was harmless beyond a reasonable doubt. Ms. Andrew has therefore failed to demonstrate that the OCCA unreasonably applied *Chapman* in evaluating the testimony of these two witnesses.[20]

C. Officer Warren

Next, Ms. Andrew challenges the exclusion of Officer Warren's testimony. Officer Warren was one of the first officers to arrive at the murder scene. Ms. Andrew claims that had Officer Warren been permitted to testify, he would have testified that after entering the garage (1) he found Ms. Andrew kneeling by Rob Andrew's side; (2) she asked Officer Warren to help Rob Andrew; and (3) Rob Andrew had obviously already died. Ms. Andrew argues that this testimony would have "blunted a key aspect of

[20] Because Ms. Andrew failed to show that the OCCA unreasonably applied *Chapman*'s standard of harmlessness, she "necessarily cannot satisfy" the *Brecht* standard of actual prejudice. *Ayala*, 576 U.S. at 270.

the prosecution's case: that Brenda Andrew acted indifferently, even coldly toward her husband on the night he was killed." Opening Br. at 53.

The OCCA determined that even assuming constitutional error from precluding Officer Warren's testimony, any such error was harmless beyond a reasonable doubt:

> [Ms. Andrew] claims that exclusion of Officer Ronald Warren's testimony was error. The testimony was excluded, because of a lack of pre-trial notice. This officer made a written report, which was in the custody of the State. The report spells out his expected testimony . . . . [T]he exclusion of the testimony constituted an abuse of discretion. However, defense counsel was able, through another witness, to elicit the same evidence; evidence that [Ms. Andrew] was kneeling over obviously deceased Rob Andrew attempting to aid him, while disregarding her own gunshot injury. This excluded evidence was largely cumulative; therefore, the exclusion was harmless beyond a reasonable doubt.

Andrew I, 164 P.3d at 197 (paragraph number omitted).

In disputing the OCCA's harmlessness determination, Ms. Andrew concedes that Officer Ramsey (Officer Warren's partner) testified that he saw Ms. Andrew "kneeling over the top" of Rob Andrew when he arrived on the scene. Trial Vol. 15 at 83. But she argues that his testimony was "cut short" because the trial court sustained the government's objections to any testimony about Officer Ramsey's perceptions of Ms. Andrew at the scene. Opening Br. at 55.[21]

Specifically, Ms. Andrew contends that Officer Ramsey did not testify, as Officer Warren would have, that "in kneeling over the top of her husband Andrew was deeply upset and imploring the police to help her husband." Reply Br. at 24 (quotations omitted).

[21] The trial court sustained the objections because Ms. Andrew failed to give notice that Officer Ramsey would be testifying about her demeanor.

Ms. Andrew also alleges that Officer Warren would have testified that when he arrived in the garage Rob Andrew was obviously already dead. She believes these facts "would have cleared up a concern troubling two later-arriving emergency responders, prosecution witnesses who advanced the callous-indifference narrative by noting that Andrew did not ask about her husband's condition." *Id.* So, in her estimation, "Officer Ramsey was no substitute for Officer Warren." Opening Br. at 56. [22]

We find Ms. Andrew's arguments unavailing for three reasons. First, as the district court noted, evidence was admitted about the content of Ms. Andrew's calls with police dispatch, and an ambulance report documented that she had asked about her husband's condition. Trial Vol. 15 at 127; State's Ex. 84. So, contrary to Ms. Andrew's view of the record, the jury heard evidence about her demeanor at the crime scene and her questions about her husband's condition.

Second, Officer Ramsey testified that when he arrived on the scene, it was clear that Rob Andrew "was deceased and had been shot." Trial Vol. 15 at 88. So there was no need for Officer Warren to testify that Rob Andrew was dead when he arrived.

[22] Though it does not affect our decision, we note that defense counsel asked Officer Ramsey about Ms. Andrew's demeanor and Officer Ramsey, before the government could finish objecting, said that "[s]he was very distraught." Trial Vol. 15 at 85. The state trial court sustained the government's objection, but it did not order the jury to disregard the testimony. And later, when defense counsel asked Officer Ramsey about what Ms. Andrew was "trying to do" while on the phone beside Rob Andrew, Officer Ramsey answered that "[s]he was trying to get help." Trial Vol. 15 at 87. Again, the government objected, and the trial court sustained the objection without instructing the jury to disregard the testimony. So the jury did indeed hear the very "demeanor-related testimony" that Ms. Andrew insists would have made all the difference in her case.

Third, given the testimony of other witnesses on this point, as well as the overwhelming evidence of her guilt, we find it unlikely that Officer Warren's testimony would have, as Ms. Andrew puts it, "blunted" the prosecution's theory that she acted "coldly" toward her deceased husband. *E.g.*, Trial Vol. 8 at 124 (Officer Frost testified that Ms. Andrew was strangely calm at the crime scene); Trial Vol. 9 at 64 (Officer Teresa Bunn of the Oklahoma City police department testified that Ms. Andrew was "unusually calm" and that she wasn't sure if Ms. Andrew was a victim because Officer Bunn "wasn't seeing the usual signs"); Trial Vol. 10 at 113 (Detective Roland Garrett testified that when he interviewed Ms. Andrew the night of the murder, Ms. Andrew didn't seem to be grieving); *see also supra* Section II.B.

Thus, we conclude that a fairminded jurist could reasonably find that the OCCA correctly determined that any constitutional error in disallowing Officer Warren's testimony was harmless beyond a reasonable doubt. Ms. Andrew has therefore failed to meet her burden in establishing that the OCCA unreasonably applied *Chapman*.

D. Officer Donna Tyra

Next, Ms. Andrew challenges the exclusion of testimony from Officer Donna Tyra, who worked as a detention officer at the county jail where Ms. Andrew was detained pending trial. Ms. Andrew alleges that Officer Tyra would have rebutted the testimony of Teresa Sullivan, who had testified that while she was jailed with Ms. Andrew, Ms. Andrew confessed to Sullivan to murdering Rob Andrew.

The OCCA held any error committed by the trial court in excluding Officer Tyra's testimony to be harmless beyond a reasonable doubt:

> Defense counsel listed Tyra as a second stage witness who would offer testimony about [Ms. Andrew]'s good character while incarcerated at the County jail (the State did not list Tyra as a witness or have a report from her, unlike the above witnesses) [sic] However, defense counsel wished her to testify to rebut witness Teresa Sullivan's testimony regarding [Ms. Andrew]'s confession.
>
> An offer of proof indicated that Tyra would have testified that Sullivan was a known snitch, known as the "mouth of the south;" Sullivan and [Ms. Andrew] could not have contacted each other, either verbally or through notes; and that there were newspapers available to the inmates on the pod, so that Sullivan could have learned the facts of the case through news reports. Discovery of this testimony was not presented to the State.
>
> Defense counsel was allowed to produce the testimony of [County jail inmate] Angela Burk, who testified that Sullivan was a known snitch. She testified that she communicated to Sullivan through the cell doors, and she testified that inmates were sometimes out in the pod together. Any error in the failure to allow Tyra to testify was harmless beyond a reasonable doubt.

Andrew I, 164 P.3d at 197–98 (paragraph numbers omitted).

Because this claim depends on a few nuanced distinctions between Burk's testimony and Officer Tyra's proposed testimony, a more precise recounting of Burk's relevant testimony is required.

When asked about inmate communication at the County jail, Burk informed the jury that inmates could communicate with each other through letters or "hollering underneath" cell doors. Trial Vol. 15 at 172. And when asked about whether Andrew partook in those communication methods, Burk said she "never once saw Brenda [Andrew] talk to anybody." Trial Vol. 15 at 173. Burk also explained that because Ms. Andrew was in a segregated unit, whenever she was out of her unit and in the pod, she was alone. But later, Burk said that inmates were sometimes together in the pod.

Ms. Andrew contends that Burk's testimony was inadequate to replace Officer

Tyra's testimony. Specifically, she claims that Officer Tyra would have contradicted Burk's testimony by explaining that Ms. Andrew and Sullivan couldn't have had private, extended conversations in their segregation unit. And that testimony, Ms. Andrew argues, could have caused "at least one juror" to reasonably conclude that Sullivan fabricated Ms. Andrew's confession. Opening Br. at 58.

But as already discussed, even if Ms. Andrew persuaded us that "at least one juror" might have disregarded Sullivan's testimony had Officer Tyra testified, that wouldn't meet her AEDPA burden. She would need to show that "*every* fairminded jurist" would conclude that the OCCA's harmlessness determination was unreasonable. *Davenport*, 142 S. Ct. at 1530. And in any event, Burk's testimony, on top of defense counsel's effective cross-examination of Sullivan, accomplished the ultimate goal of the defense—to question Sullivan's motive in testifying. So that, combined with the overwhelming evidence of Ms. Andrew's guilt discussed above, leads us to conclude that Ms. Andrew has failed to establish that the OCCA unreasonably applied *Chapman* in ruling that any constitutional error in excluding Officer Tyra's testimony was harmless beyond a reasonable doubt.

E. Lisa Gisler and Carol Shadid

Finally, Ms. Andrew challenges the state trial court's preclusion of testimony from two of her neighbors, Lisa Gisler and Carol Shadid ("the neighbors"). Their testimony, Ms. Andrew contends, would have strengthened the evidence in support of her timeline of events on the night of the murder—that the shots were fired in rapid succession by the two masked gunmen.

The OCCA held under *Chapman* that any constitutional error in excluding the neighbors' testimony was harmless beyond a reasonable doubt:

> Next, [Ms. Andrew] cites to her attempts to present the testimony of Lisa Gisler and Carol Shadid, who were neighbors of [Ms. Andrew], regarding what they heard on the night of the murder. These witnesses heard noises, which [Ms. Andrew] describes as a "loud noise" (Gisler) or "three shotgun blasts" and a scream (Shadid). [Ms. Andrew] claims this testimony would corroborate her story of the events and rebut the staging theory espoused by the State.
>
> Defense counsel provided the State with a list of witnesses which included these two witnesses; however, no summary of their expected testimony was provided. Nevertheless, both of these witnesses provided statements to the police. Their statements were contained in police reports that were in the custody of the State. Defense counsel made an offer of proof indicating that their testimony would be consistent with their statements to police. Preclusion of this testimony, under the circumstances was too harsh a sanction, thus there was an abuse of discretion here. The trial court had at its disposal the possibility of a short continuance, if necessary, so the State could prepare for cross-examination of these two witnesses, especially considering the limited nature of their testimony. The trial court abused its discretion in using the preclusion sanction.
>
> Even though an abuse of discretion occurred, we find that the error was harmless beyond a reasonable doubt. *See Hooks v. State*, 2001 OK CR 1, ¶ 14, 19 P.3d 294, 307. Despite [Ms. Andrew]'s claim, evidence that there were three shots is consistent with the State's theory of two shots fired from a shotgun and one fired from a .22 caliber handgun. The testimony is inconsistent with [Ms. Andrew]'s story that she heard only two shots fired. Furthermore, both reconstruction experts, prosecution and defense, testified that [Ms. Andrew]'s gunshot wound was evidence of a staged event.

Andrew I, 164 P.3d at 197 (paragraph numbers omitted).[23]

[23] The parties agree that the OCCA based its harmlessness determination in part on a misstatement of the record: it stated that Ms. Andrew said she heard only two gunshots, when she has always maintained that she heard three. Ms. Andrew argues (in a single paragraph in briefing submitted before she was granted a COA on this issue), that this misstatement "removes the deference AEDPA would otherwise

(continued)

Ms. Andrew argues that "[t]he neighbors' discrepant perceptions, one hearing a single loud noise while the other detected three separate shots," suggest that the shots were fired rapidly. Reply Br. at 20. Thus, in Ms. Andrew's view, their testimony would have "challenged the arguably more expansive time required to support the State's staging theory"—that Ms. Andrew and Pavatt orchestrated her gunshot wound.[24] *Id*. Ms. Andrew also contends that the testimony "would have strengthened the defense claim that two separate shooters entered the garage, one shooting Brenda Andrew with a handgun while the other near-simultaneously fired the shotgun at Robert Andrew." Opening Br. at 65.

We see no basis for defense counsel's view that the neighbors would have testified that the firearm shots were fired in rapid succession. One claimed that she heard "a loud

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extend to the state-court decision, forfeited because the OCCA's adjudication of the issue 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" Opening Br. at 67 (quoting 28 U.S.C. § 2254(d)(2)). Thus, she contends, we must review the claim de novo. *Id.*

Upon a review of the record, Ms. Andrew has rebutted by "clear and convincing evidence" the OCCA's determination that Ms. Andrew heard only two gunshots. *See* 28 U.S.C. § 2254(e)(1). But this isn't enough for Ms. Andrew to show an unreasonable factual determination. Rather, she must show that the OCCA's harmlessness determination about the exclusion of the neighbors' testimony was "*based on*" the unreasonable factual determination. *Byrd v. Worman*, 645 F.3d 1159, 1172 (10th Cir. 2011) (quoting 28 U.S.C. § 2254(d)(2)). Ms. Andrew has failed to meet that burden, and thus is not entitled to relief under § 2254(d)(2).

[24] Certainly, Pavatt and Ms. Andrew would have tried to complete the three shots as quickly as possible. It's not difficult to conceive Ms. Andrew firing the first two shots at Rob Andrew, and Pavatt quickly entering the garage to shoot her in the arm before retreating back through the house and across to the neighbors' house and attic. The point is simply that a shortened time interval between shots doesn't necessarily benefit Ms. Andrew.

noise." Trial Vol. 16 at 164. And the other claimed that she heard "three shots" with no description of the intervals between the shots. Trial Vol. 16 at 165. We glean little, if any, probative value from these statements.[25] And we don't believe a reasonable juror would gather from those statements that the shots were fired in rapid succession.

But even if we accept Ms. Andrew's theory that the shots were fired in rapid succession, as the OCCA noted and as Ms. Andrew fails to dispute, the reconstruction experts of both parties testified that Ms. Andrew's gunshot wound was staged. That was because (1) Ms. Andrew's wound was located where it would do the least damage, and (2) the wound, sustained from a .22 pistol shot from no more than four inches away, was unlike Rob Andrew's wounds, which were caused by two shotgun blasts from at least a few feet away. So, given the expert testimony, the "discrepant perceptions" of Ms. Andrew's neighbors would cast no doubt on the state's staging theory.

Thus, we conclude that Ms. Andrew has not met her burden to show that all reasonable jurists would agree that the OCCA's decision was unreasonable in concluding that the exclusion of the neighbors' testimony was harmless beyond a reasonable doubt. Ms. Andrew has therefore failed to show that the OCCA's harmlessness determination under *Chapman* was unreasonable. We affirm the district court's denial of Ms. Andrew's

[25] In her Supplemental Reply Brief, for the first and only time, Ms. Andrew notes that an appellate investigator re-interviewed Gisler. During that interview, Gisler signed an affidavit stating that she heard two shots, not one, as she stated before. But Ms. Andrew does not explain what we should make of this contradictory affidavit, or why she did not mention it in her habeas petition, Motion for COA, Motion for Expanded COA, Opening Brief, or Reply Brief. *See* Fed. Dist. Court at 79–82 (stating that "Ms. Gisler heard only one shot"). So we decline to consider it now. *See United States v. Viera*, 674 F.3d 1214, 1220 (10th Cir. 2012).

right-to-present-a-complete-defense claim for all six witnesses.

III. *Brady*

Ms. Andrew next alleges that the government violated its disclosure obligations under *Brady*. Specifically, she contends that the government suppressed a "tacit agreement" between the government and Sullivan to reduce her existing federal drug sentence in exchange for her testimony against Ms. Andrew. Reply Br. at 35.

A. The OCCA's Decision

Ms. Andrew presented this claim to the OCCA in a motion for new trial based on newly discovered evidence. The OCCA denied the motion within its opinion dismissing Ms. Andrew's direct appeal:

> [Ms. Andrew] filed a motion for new trial with this Court on September 21, 2005. [Ms. Andrew]'s motion is brought pursuant to 22 O.S.2001, §§ 952 and 953, alleging newly discovered evidence. The State filed a response on June 21, 2006.
>
> "The test for whether a motion for a new trial should be granted based upon newly discovered evidence is: (1) whether the evidence is material; (2) whether the evidence could not have been discovered before trial with reasonable diligence; (3) whether the evidence is cumulative; and (4) whether the evidence creates a reasonable probability that, had it been introduced at trial, it would have changed the outcome." *Ellis v. State*, 1992 OK CR 45, ¶ 50, 867 P.2d 1289, 1303.
>
> The motion contains information that Teresa Sullivan, who testified against [Ms. Andrew], received a reduction of her federal sentence due to her cooperation with the Oklahoma County District Attorney's office in this case. Sullivan testified that she had twenty-two (22) months left on her sentence; however, a new sentence was given by the federal court after she testified, which basically allowed her release just five (5) months after testifying. The documents indicate that Sullivan was granted the early release because of her cooperation in this case.
>
> Information attached to the motion also indicates that Sullivan received a

> downward departure on her federal sentence because she cooperated with the federal authorities in the investigation of her co-defendants (even though she testified that she was not a snitch). The gist of the motion is that the State knew about the potential for a benefit to Sullivan, but failed to disclose the information.
>
> Sullivan testified that [Ms. Andrew] confessed that she and James Pavatt killed Rob Andrew. Sullivan's attorney says in a letter written to the federal prosecutor that he had to explain to her that she might receive additional consideration on her federal sentence if she were called to testify against [Ms. Andrew]. It appears that Sullivan provided information to the State (before testifying) with no understanding that she might receive a benefit. When she testified at trial, there were no guarantees that she would receive any benefit.
>
> One document in particular states that Oklahoma City Police detectives contacted Sullivan at her place of federal confinement as part of their investigation (as well as others who where [sic] incarcerated with [Ms. Andrew] at the Oklahoma County Jail). Sullivan provided information to the detectives before contacting, William P. Earley, the federal public defender who represented her in her federal case. The documents indicate that Earley filed the motion for a reduction of sentence after Sullivan testified as any effective advocate might have done. He stated that he would have filed this motion regardless of any input from the Oklahoma County District Attorney's office.
>
> [Ms. Andrew] has not presented a sufficient showing to be granted a new trial. Substantial additional evidence supports the conviction. We are further convinced that, were we to grant a new trial with this "newly discovered evidence" being introduced, the outcome of the trial would be the same.
>
> Sullivan was thoroughly cross-examined regarding her motivation to testify against [Ms. Andrew], with repeated attempts to show her bias. Defense counsel also called a witness to refute the possibility that [Ms. Andrew] shared any information with Sullivan. The knowledge of the fact that Sullivan was the beneficiary of an act of grace by the federal courts would not change the outcome of this trial.

Andrew I, 164 P.3d at 204–05 (paragraph numbers and footnote omitted).

B. Clearly Established Law

The clearly established federal law governing this claim is the Supreme Court's

holding in *Brady*. In *Brady*, the Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. From that holding, and the line of cases that followed, we distilled three elements of a *Brady* claim "(1) the prosecutor suppressed the evidence; (2) the suppressed evidence was favorable to the accused, either because it is exculpatory or because it is impeaching; and (3) prejudice ensued because the suppressed evidence was material." *Simpson v. Carpenter*, 912 F.3d 542, 569 (10th Cir. 2018); *see also Giglio v. United States*, 405 U.S. 150, 154 (1972) (holding that impeachment evidence "falls within" *Brady*).

"[F]avorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles v. Whitley*, 514 U.S. 419, 433 (1995) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). And the "reasonable probability" standard is met by a "showing 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.[26]

[26] In an attempt to cast doubt on the OCCA's decision, Ms. Andrew notes that the OCCA failed to cite *Brady* or *Giglio*. We note that a state court need not cite Supreme Court precedents, nor "even be aware" of them, "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003) (citation omitted).

C. Analysis

Ms. Andrew challenges the OCCA's decision as contrary to and as an unreasonable application of *Brady* under § 2254(d)(1).

The OCCA's denial of Ms. Andrew's *Brady* claim depended almost entirely on its finding that her proffered evidence was not material—that is, that she had not shown a reasonable probability that the outcome of the trial would have changed had the jury known about the inner workings of Sullivan's hypothetical, future reduction of her federal prison sentence. For three reasons, it found that the evidence of Sullivan's hypothetical future benefit for testifying was not material: (1) substantial other evidence supported Ms. Andrew's conviction; (2) Sullivan was cross-examined about bias and motivation to testify against Ms. Andrew; and (3) fellow-detainee Burk testified that Ms. Andrew couldn't have shared any information with Sullivan. *Id.* at 205. So the only real question before us now is this: has Ms. Andrew established that the OCCA's denial of her *Brady* claim on materiality grounds was contrary to or an unreasonable application of *Brady*? We conclude that she has not.

1. "Contrary To"

A state-court decision is "contrary to" clearly established law under § 2254(d)(1) if it "applies a rule different from the governing law set forth in Supreme Court cases, or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts." *Lockett*, 711 F.3d at 1231 (citation omitted). Ms. Andrew makes no attempt to identify a Supreme Court case with materially indistinguishable facts. Instead, she argues that the OCCA twice applied a rule different from *Brady*'s materiality

standard: once when it "misstated" the standard, and again when the OCCA failed to apply a "presumption of materiality." Opening Br. at 88–89 n.6. As a reminder, under *Brady*, evidence is material if there "is reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682.

We begin with Ms. Andrew's argument that the OCCA misstated *Brady*'s materiality standard.[27] Ms. Andrew specifically objects to this statement from the OCCA: "We are further convinced that, were we to grant a new trial with this 'newly discovered evidence' being introduced, the outcome of the trial would be the same." *Andrew I*, 164 P.3d at 205. Ms. Andrew states that this "would-it-have-changed-the-outcome test" (as she calls it) is more demanding than the *Brady* materiality test, which requires only a showing of "a reasonable probability" of a different outcome. Opening Br. at 89 n.6.

But as Ms. Andrew herself notes, the OCCA stated the proper standard for evaluating materiality earlier in its analysis. *See Andrew I*, 164 P.3d at 204 (noting that whether a new trial is warranted depends on if "the [newly discovered] evidence creates a reasonable probability that, had it been introduced at trial, it would have changed the outcome"). That the OCCA later failed to recite the complete "reasonable probability"

[27] This argument is relegated to a single footnote without citation to authority. We note that while we are inclined to address its merits here because of the nature of the case, such a cursory reference to an issue is usually fatal. *See Verlo v. Martinez*, 820 F.3d 1113, 1127 (10th Cir. 2016) ("A party's offhand reference to an issue in a footnote, without citation to legal authority or reasoned argument, is insufficient to present the issue for our consideration.").

condition does little to rebut "the presumption that state courts know and follow the law." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). And to attribute error to the OCCA's statement would be "incompatible with § 2254(d)'s highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Id.* (internal quotations and citation omitted).

Next, we address Ms. Andrew's argument that the OCCA's decision was contrary to *Brady* because it didn't apply a "presumption of materiality." Opening Br. at 88. In support of that supposed presumption, Ms. Andrew cites a footnote from *Smith v. Secretary of New Mexico Department of Corrections*, 50 F.3d 801 (10th Cir. 1995). In the footnote, we stated,

> The Supreme Court enunciated a fourth standard of materiality for the exceptional case where the undisclosed evidence would demonstrate "the prosecutor's knowing failure to disclose that testimony used to convict the defendant was false." *Bagley*, 473 U.S. at 668. In those rare situations, the evidence is presumptively material "unless failure to disclose it would be harmless beyond a reasonable doubt." *Id.* at 680.

Id. at 826 n.38.

Ms. Andrew claims that her case is the "exceptional case" in which the government knowingly presented false testimony from Sullivan that Ms. Andrew confessed her crime, and then falsely argued in closing that Sullivan "got no deal" for her testimony, when she in fact later received a reduction to her federal sentence. Reply Br. at 37. Thus, as we understand it, Ms. Andrew argues that the OCCA's decision was contrary to the Supreme Court's holding in *Bagley*, as interpreted by us in a footnote in *Smith*. This argument, particularly in the habeas context, fails for two primary reasons.

First, in *Smith*, we applied *Bagley*'s flexible standard consolidating the Court's previous three standards for materiality into one. *Smith*, 50 F.3d at 834–35.[28] Thus, as the OCCA noted, the *Brady* materiality standard applicable to this case and *all* cases, whether the government knowingly presented perjured testimony or not, is that "[t]he 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." 473 U.S. at 682. The OCCA therefore did not misapply the "presumption of materiality" test because no such test exists.

Second, Ms. Andrew hasn't explained how Sullivan's testimony was inaccurate, let alone perjurious. Ms. Andrew points to this single exchange between Sullivan and the prosecutor:

> **Q:** Have you been offered anything by the State of Oklahoma to testify against Defendant Brenda Andrew?
>
> **A:** No, ma'am.

Trial Vol. 12 at 17.

Ms. Andrew relies on these later happenings to try to establish that she had indeed "been offered anything by the State of Oklahoma to testify against Brenda Andrew": a

[28] We disagree with *Smith*'s statement that *Bagley* "enunciated a fourth standard of materiality" for cases involving the government's nondisclosure of perjured testimony. 50 F.3d at 826 n.38. Rather, the Supreme Court listed the *three* previously identified standards of materiality for various nondisclosure situations, the first of which "was the prosecutor's knowing use of perjured testimony." *Bagley*, 473 U.S. at 679. The Court consolidated the three existing tests into a single materiality test "sufficiently flexible to cover" all cases of nondisclosure. *Id.* at 682.

few months before Ms. Andrew's trial, Sullivan's Assistant Federal Public Defender ("AFPD") told the Assistant District Attorney ("ADA") that *he might* ask the ADA to write a letter to the United States Attorney concerning Sullivan's testimony after the trial; before Ms. Andrew's trial, the AFPD told Sullivan she *might* receive a benefit if she testified against Ms. Andrew; before Ms. Andrew's trial, Sullivan's AFPD reached out to the Assistant United States Attorney ("AUSA") who prosecuted Sullivan's federal drug case to advise him that he would soon ask the United States to file a substantial-assistance motion in the federal court; after Ms. Andrew was convicted, the AFPD wrote to the ADA asking that she advise the AUSA about Sullivan's assistance; two weeks later, the ADA wrote to the AUSA doing so; the next month, the AUSA filed a motion asking that the federal court reduce Sullivan's sentence based on her cooperation in Ms. Andrew's trial; and the federal district court reduced Sullivan's sentence on that basis.

Sullivan never testified that she wasn't hoping for a reduction of her federal sentence from her testimony. Defense counsel never raised that question. But in closing, he emphasized that all it would take was a phone call to the federal prosecutor for Sullivan's sentence to be reduced. Now on appeal, Ms. Andrew provides nothing showing that Sullivan was in fact *offered* or *promised* anything of value by the ADA. Ms. Andrew therefore has failed to establish that the OCCA's decision was contrary to *Brady*.[29]

[29] Ms. Andrew also contends that several findings made by the OCCA "deviated from" the *Brady* standard. Opening Br. at 86. First, she challenges the OCCA's statement that "[w]hen [Sullivan] testified at trial, there were no guarantees (continued)

2. "Unreasonable Application"

Next, we determine whether Ms. Andrew has shown that the OCCA's decision was an unreasonable application of *Brady*. As a reminder, a state-court decision involves an "unreasonable application" of clearly established federal law if it "identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of [the] petitioner's case." *Lockett*, 711 F.3d at 1231 (citation omitted). Whether an application of a rule was unreasonable requires consideration of the rule's specificity. *Alvarado*, 541 U.S. at 664. "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Id.* An application is unreasonable only if "*every* fairminded jurist" would "reach a different conclusion" than the OCCA. *Davenport*, 142 S. Ct. at 1530.

The disclosure rule that the Supreme Court announced in *Brady* is a general one. So in determining whether the OCCA unreasonably applied *Brady* here, the OCCA enjoys substantial deference. *See Alvarado*, 541 U.S. at 664. With that in mind, we conclude that the OCCA's materiality determination was not unreasonable, and briefly

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that she would receive any benefit." *Andrew I*, 164 P.3d at 204. But there, the OCCA was merely stating, correctly, that the record did not reflect any promises made by the ADA to Sullivan. Second, Ms. Andrew challenges the OCCA's emphasis on the fact that Sullivan spoke with the police before contacting her FPD. *Id.* at 204. But that is a reasonable fact to emphasize, considering that it makes it more likely that Sullivan cooperated without any promise or offer from the ADA. Lastly, Ms. Andrew challenges the OCCA's characterization of her sentence reduction as "an act of grace by the federal courts." *Id.* at 205. But that is a perfectly reasonable characterization as, at the end of the day, whether Sullivan was granted a sentence reduction or not was entirely within the discretion of the federal district court. So at bottom, none of those statements "deviated" whatsoever from *Brady*.

explain why.

As discussed, the evidence of Ms. Andrew's guilt in the murder of Rob Andrew is overwhelming, even without any incremental value provided by Sullivan's testimony. *See supra* Section II.B.[30] This is doubly so because Sullivan was vigorously cross-examined with questions like these:

> **Q.** Well, Ms. Sullivan, you didn't voluntarily come forward, they found you because you're a snitch over there at the County Jail and everybody knows that you'll tell any story that they want to hear; isn't that correct, ma'am?
> . . .
> **Q.** And it's a known fact that you [sic] over at the County Jail and down at the federal prison where you are you'll do anything and say anything for law enforcement to get your sentence reduced; isn't that correct, ma'am?

Trial Vol. 12 at 17–18. Sullivan of course answered no to both questions, but the jury no doubt got the point.

Plus, fellow detainee Burk challenged Sullivan's testimony. She testified that Sullivan "was a known jailhouse snitch throughout the jail for testifying against other people"; that Sullivan had access to newspapers and the news, from which she could have learned all she needed to know about Ms. Andrew's case to testify against her; that Ms. Andrew never talked to anyone about her case; and, most importantly, that Sullivan told Burk that she was testifying so she could get some benefit. Trial Vol. 15 at 174, 176–77,

[30] Two weeks after Ms. Andrew was convicted, the ADA in this case sent a letter to the AUSA advising of Sullivan's cooperation. In that letter, the ADA described Sullivan's testimony as being "of a critical nature" and an "important link in the State's case." Direct Appeal, Mot. for New Trial at 65. But whatever the jury thought of Sullivan's testimony, it had overwhelming evidence of Ms. Andrew's guilt.

179.[31] In light of the foregoing, Ms. Andrew has failed to establish that every fairminded jurist would agree with her that the OCCA unreasonably applied *Brady*. Accordingly, we affirm the district court's denial of Ms. Andrew's *Brady* claim.[32]

IV. *Miranda*

We move next to Ms. Andrew's *Miranda* challenge. Before trial, Ms. Andrew objected to the admission at trial of her videotaped interview taken at the police station on the night of Rob Andrew's murder. She contends that she was in custody when she was interviewed, without being advised of, or waiving, her constitutional rights under *Miranda v. Arizona*, 384 U.S. 436 (1966).

A. Background

First, some background developed at a pretrial hearing. On the night of the murder, Ms. Andrew was taken to the hospital for medical treatment. While she was there, police gathered crime evidence, including her clothing. Officers Bunn and Frost encountered Ms. Andrew at the hospital. After asking her some initial questions, Officer

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[31] It is instructive to compare the facts of *Bagley* with Ms. Andrew's case in determining materiality. In *Bagley*, the government failed to disclose that it had paid its two key witnesses $300 each for their testimony. 473 U.S. at 671. On remand, the Ninth Circuit concluded that the government's nondisclosure undermined confidence in the outcome of the *Bagley* defendant's trial and required reversal of his conviction. *Bagley v. Lumpkin*, 798 F.2d 1297, 1302 (9th Cir. 1986). Ms. Andrew has no such evidence of knowing nondisclosure.

[32] Ms. Andrew initially requested an evidentiary hearing on this claim. But based on the government's response, she conceded that an evidentiary hearing may be "unnecessary." Reply Br. at 36. In any event, we note that because the OCCA's resolution of Ms. Andrew's *Brady* claim was reasonable, we must deny her request for an evidentiary hearing. *See Smith v. Aldridge*, 904 F.3d 874, 886 (10th Cir. 2018).

Frost told Ms. Andrew that a detective (Detective Garrett) wanted to interview her about the murder. So after Ms. Andrew's wound was treated and all relevant evidence had been gathered, Officer Frost drove Ms. Andrew to the police department for an interview. The police videotaped her two-plus-hour interview.

Overruling Ms. Andrew's pretrial motion to suppress, the trial court admitted the videotape, concluding that Ms. Andrew was not in police custody when she was interviewed. During closing, the government pointed to Ms. Andrew's lies during the interview—including her denying that she had affairs, denying the significance of her dispute with Rob over the life-insurance policy, and suggesting that Rob was in possession of his 16-gauge shotgun.

B. The OCCA's Decision

On direct appeal, the OCCA affirmed the trial court's ruling:

> [Ms. Andrew] argues that her statements to police were the result of custodial interrogation, thus their introduction was unconstitutional because she had not been advised of her *Miranda* rights. During the *Jackson v. Denno* hearing, [Ms. Andrew] admitted that she agreed to speak with the police because she wanted to help the police catch those responsible for shooting her husband. [Ms. Andrew] was taken to the police station to be questioned by detectives. The detective interviewing her considered her to be a witness, not a suspect. She was taken to a friend's house after the interview. She was not "arrested" at any time. She was not handcuffed, shackled or placed in any type of restraint. Eye-witnesses are routinely taken to the police station for interviews. [Ms. Andrew] was the only living eye-witness to this crime. Under the circumstances of this case, a reasonable person in the same position would not conclude that he or she was in custody. *See Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S. Ct. 3138, 3151, 82 L.Ed.2d 317 (1984) (the relevant inquiry is how a reasonable man under the circumstances would understand the situation.) Warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 714, 50 L.Ed.2d 714 (1977). The trial court did not abuse its

discretion in allowing the admission of [Ms. Andrew]'s statements.

Andrew I, 164 P.3d at 194–95 (footnotes omitted).[33]

C. Clearly Established Law

Miranda's holding furnishes the clearly established federal law required by § 2254(d)(1). In *Miranda*, the Supreme Court held that police must advise suspects in "custodial interrogation" of certain rights, including the right to remain silent and the right to the presence of an attorney. 384 U.S. at 444–45. Statements obtained in violation of *Miranda* are ordinarily suppressed. *See Berkemer v. McCarty*, 468 U.S. 420, 429 (1984).

In determining whether a person is "in custody" under *Miranda*, courts employ an objective test that requires two discrete inquiries. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). First, courts must evaluate "the circumstances surrounding the interrogation." *Id.* Second, courts ask, "given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Id.* (footnote

[33] As for Ms. Andrew's state of mind that evening, the government refers to the same pretrial-hearing transcript that the dissent uses to establish the officers' testimony. *See* Dissent at 15–18. The government cites supporting testimony that Ms. Andrew never stated that she did not want to go to the police station; that she could have left the hospital at any time; that she signed search waivers voluntarily because in her words, "I was trying to help"; that she was never placed under arrest or handcuffed; that she spoke to the officers because in her words, "I wanted to help [Rob Andrew] and I told them what had happened"; and that in her words she was "cooperating" with the police that night. Tr. of Mot. Hr'g Proceedings at 87, 97–98, 109, 128, 146–47, 149, 151, 155 (June 7, 2004). Further, the government relies on officers' testimony that Ms. Andrew was not kept from leaving the police station that night. *Id.* at 52–53, 67, 87, 92, 94, 98, 109, 128.

omitted).[34] Courts then apply "an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." *Id.* (cleaned up). Thus, the "subjective views harbored by either the interrogating officers or the person being questioned," unless "somehow manifested," are not relevant to the inquiry. *Stansbury v. California*, 511 U.S. 318, 323–25 (1994) (per curiam).

Relevant in the AEDPA context, the Supreme Court has classified the "custody test" as a general rule. *Alvarado*, 541 U.S. at 665. Thus, when applying the rule, state courts have "more leeway . . . in reaching outcomes in case-by-case determinations." *Id.* at 664.

D. Analysis

Ms. Andrew argues that the OCCA's determination that she was not in custody during her interview was an unreasonable application of *Miranda* under § 2254(d)(1).[35] She points to testimony at a pretrial hearing, during which the voluntariness of her statements to the police was determined, to support her argument that the police would have required her to go to the station for the interview had she refused to go. Specifically, she points to Officer Frost's testimony that he didn't give Ms. Andrew the option of going home (the crime-scene investigation was still ongoing) after her release from the

[34] We note that, at least in the Fourth Amendment context, the "reasonable person test presupposes an *innocent* person." *Florida v. Bostick*, 501 U.S. 429, 438 (1991) (internal quotations omitted).

[35] Ms. Andrew also argues that she is entitled to relief because the OCCA's decision was based on an unreasonable determination of the facts under § 2254(d)(2). But because she didn't make this argument before the district court, it is waived. *See Owens v. Trammell*, 792 F.3d 1234, 1246 (10th Cir. 2015).

hospital. Rather, he told her that they "were going down to the station" so that the detective could speak with her. Tr. of Mot. Hr'g Proceedings at 113. She also emphasizes her own testimony that she felt like she had no choice but to go with the police to the station because Officer Frost "told [her that she] had to go to the police station." *Id.* at 139. And she notes that Detective Garrett testified that, before he met with Ms. Andrew, Officer Frost evidently did not allow Ms. Andrew to go home to change out of her hospital gown.

But given the *objective* circumstances of Ms. Andrew's interview, we cannot say that every fairminded jurist would conclude that the OCCA unreasonably applied *Miranda*. Those circumstances include the following:

- At the crime scene, Ms. Andrew answered questions from the police.
- At the hospital, Officer Frost informed Ms. Andrew that they would be going to the police station so that a detective (Detective Garrett) could talk to her about the murder.
- Ms. Andrew knew that she could not go home from the hospital, because the police were still processing the crime scene and searching the premises.[36]
- Ms. Andrew was told that when the investigation was complete, she could return home.
- Officer Frost transported Ms. Andrew, who was dressed in two hospital gowns (each covering a side of her body) because her clothes were taken into evidence, from the hospital to the police station for the interview.
- Ms. Andrew never objected to going to the police station for the

[36] Ms. Andrew signed search waivers for her home and vehicle to aid the investigation.

interview.

- Ms. Andrew wasn't arrested, handcuffed, or told that she was a suspect in the murder.

- After Ms. Andrew's two-and-a-half-hour interview was over, Officer Frost took Ms. Andrew directly to her friend's house where her children were staying.

Whether Ms. Andrew "*felt*" she couldn't refuse to go to the police station or terminate the interview and leave, or whether she felt she needed to go to avoid suspicion, does not affect our objective inquiry. Tr. of Mot. Hr'g Proceedings at 138, 142 (emphasis added). Considering only the objective circumstances before the OCCA and the leeway that the OCCA has in applying the general *Miranda* rule, not every reasonable jurist would conclude that the OCCA's custody determination was unreasonable. Thus, Ms. Andrew has failed to demonstrate that the OCCA's application of *Miranda* was objectively unreasonable. We therefore affirm the district court's denial of Ms. Andrew's *Miranda* claim.

V. Confrontation Clause

Next, Ms. Andrew challenges the admission of statements that Rob Andrew made to the police about the severing of his brake lines. Ms. Andrew contends that the statements' admission violated the Sixth Amendment's Confrontation Clause.

A. Background

Two officers testified at trial, over Ms. Andrew's objections, that Rob Andrew had told them that he suspected that Ms. Andrew and Pavatt cut his car brake lines. One officer told the jury that Rob Andrew stated that Ms. Andrew asked him about the brake-

line incident before he had told anyone other than his mechanic and police about it, suggesting her involvement. Obviously, Ms. Andrew could not cross-examine Rob Andrew about those statements because he was deceased.

B. The OCCA's Decision

On direct appeal, the OCCA rejected Ms. Andrew's claim, concluding that any constitutional violation from the admission of the evidence was harmless beyond a reasonable doubt:

> [Ms. Andrew] also claims that Rob's statements to the police that he believed that [Ms. Andrew] and Pavatt were responsible were testimonial in nature, and thus, in violation of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004). *Crawford* held that testimonial hearsay violates the confrontation clause. *Id.* at 51–52, 124 S. Ct. at 1364. Rob's belief was supported by the evidence in this case. The jury would have reached the same conclusion absent this testimony. The introduction of this testimony was harmless beyond a reasonable doubt, considering the mountain of evidence leading to the conclusion that [Ms. Andrew] was responsible, in part, for the brake line incident. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L.Ed.2d 705, 710–711 (1967).

Andrew I, 164 P.3d at 189.

C. Analysis

Because the OCCA determined under *Chapman* that any constitutional error from the introduction of Rob Andrew's testimony was harmless beyond a reasonable doubt, we may decide only whether Ms. Andrew has met her burden in establishing that the OCCA's application of *Chapman* was unreasonable. *See Ayala*, 576 U.S. at 269.[37] In

[37] Alternatively, the OCCA found that the admission of Rob Andrew's testimony didn't require reversal because the testimony was admitted for purposes other than establishing the truth of the matter asserted. *Andrew I*, 164 P.3d at 189.
(continued)

reviewing the OCCA's harmlessness decision, we must consider factors such as "the importance" of the unconfronted testimony in the government's case; "whether the testimony was cumulative"; whether other evidence corroborated or contradicted the testimony; the extent of cross-examination permitted; and "the overall strength" of the government's case. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

With the *Van Arsdall* factors in mind, we cannot say that the OCCA unreasonably applied *Chapman*. Ms. Andrew's argument relies exclusively on the first *Van Arsdall* factor—the importance of Rob Andrew's testimony. She argues that his testimony was clearly important to the government's case because the testimony was repeatedly "accentuated" by the government during closing argument. Opening Br. at 105**.**

We don't doubt that Rob Andrew's statements were important to the government's case. But the other *Van Arsdall* factors—whether the testimony was cumulative, whether other evidence corroborated or contradicted the testimony, and the overall strength of the government's case—support a finding of harmlessness beyond a reasonable doubt.

The OCCA generally referenced a "mountain of evidence" apart from Rob Andrew's statements to the police implicating Ms. Andrew in the brake-line incident. This includes the evidence that Ms. Andrew asked Pavatt to kill Rob Andrew in late October 2001 (the brake-line incident occurred on October 26, 2001) and the eighty-two calls between her and Pavatt on the day of the brake-line incident. Ms. Andrew offers no

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But because we can resolve Ms. Andrew's claim by ascertaining whether the OCCA's harmlessness determination was reasonable, we need not consider whether its alternative holding was reasonable.

compelling reason why the jury could not have credited this corroborating evidence, or why the corroborating evidence did not render Rob Andrew's testimony cumulative. And, as we've discussed, the government submitted overwhelming evidence of Ms. Andrew's guilt in the murder. *See supra* Section II.B.

For these reasons, the OCCA's harmlessness determination was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Ayala*, 576 U.S. at 269–70 (citation omitted). Ms. Andrew has failed to establish that the OCCA unreasonably applied *Chapman*. We therefore affirm the district court's denial of Ms. Andrew's Confrontation Clause claim.

VI. Penalty-Phase Prosecutorial Misconduct

Next, Ms. Andrew claims that four alleged instances of government misconduct during the penalty phase violated the Eighth and Fourteenth Amendments, rendering her sentence unreliable.

A. Background

We begin by summarizing each instance of alleged misconduct. The first involves the prosecutor's comments about the testimony of 13-year-old Tricity Andrew, the daughter of Rob Andrew and Ms. Andrew. During the penalty phase, the defense called Tricity to testify. The defense expected Tricity to read several letters she wrote to Ms. Andrew, and the defense attorney planned to ask Tricity whether she wanted Ms. Andrew to receive the death penalty. But when Tricity took the stand, she was overcome with emotion and was unable to read her letters. She was never asked about the appropriate

punishment for Ms. Andrew. Even so, the prosecutor argued in closing that "[a]nd another thing I'm sure you noticed from the witness stand, Tricity didn't beg for her mother's life." Trial Vol. 19 at 321. Ms. Andrew did not object.

The second instance relates to the prosecutor's comment on the defense's decision to call Ms. Andrew's 15-year-old niece, Jennifer Bowlin, to testify. During the penalty phase, Jennifer tearfully read a prepared statement asking the jury to spare Ms. Andrew's life. In her closing arguments, the prosecutor asked the jury, "Would you put your 15-year-old niece on the stand to do that?" Trial Vol. 19 at 328. Answering for herself, the prosecutor said she would not. *Id.* Ms. Andrew again did not object.

The third instance involves a comment about one of the defense's proposed mitigating circumstances: that Ms. Andrew had relatives who would visit her in prison if they could. In response, the prosecutor said that "Rob Andrew's parents would like to visit him in prison. They'd like to visit him anywhere, but they can't. They have been deprived of that. The only place they get to visit is his grave." Trial Vol. 19 at 239. Ms. Andrew again did not object.

The fourth and final instance relates to the prosecutor's comment on the victim-impact evidence. In closing, the defense noted that "no one from the Andrew family asked you to impose the death penalty, if you even get there, and if no one from the Andrew family asked for that do you think that Rob Andrew, Brenda's husband would ask for that?" Trial Vol. 19 at 311. In response, the prosecutor said, "[defense counsel] said twice . . . you didn't hear the victim's family ask for the death penalty. They're prohibited by the law from asking for a specific punishment. Did they have to say it?

Wasn't it conveyed? Wasn't their message conveyed to you what punishment they want?" Trial Vol. 19 at 326–27. Ms. Andrew again did not object.

B. The OCCA's Decision

On direct appeal, given Ms. Andrew's failure to object to any of the alleged misconduct, the OCCA reviewed each instance for plain error. It concluded that none of them rose to the level of plain error:

> [Ms. Andrew] alleges several instances of what she calls prosecutorial misconduct. We first note that no trial will be reversed on the allegations of prosecutorial misconduct unless the cumulative effect was such to deprive [Ms. Andrew] of a fair trial. *Garrison v. State*, 2004 OK CR 35, ¶ 128, 103 P.3d 590, 612. Many of the allegations here were not preserved at trial with contemporaneous objections, thus we review for plain error. We will not find plain error unless the error is plain on the record and the error goes to the foundation of the case, or takes from a defendant a right essential to his defense. *Simpson*, 1994 OK CR 40, ¶ 23, 876 P.2d at 698.
>
> [Ms. Andrew] first claims that the prosecutor intentionally misled the jury by pointing out to them that Tricity Andrew did not beg for her mother's life. Defense counsel had planned and had informed the Court that he intended to ask Tricity if she wanted her mother to get the death penalty, but the question was never asked, possibly due to Tricity's emotional state on the witness stand. [Ms. Andrew] also claims that the prosecution attacked defense counsel's choice to use [Ms. Andrew]'s fifteen-year-old niece to ask to spare [Ms. Andrew]'s life by asking the jury, "would you put your 15–year–old niece on the stand to do that? I wouldn't." There was no objection to either of these comments.
>
> While these comments were "low blows" and may have constituted improper argument and casting aspersions on defense counsel, we can confidently say that they did not rise to the level of plain error.
>
> . . .
>
> [Ms. Andrew], next points us to the prosecutors comment that, "Rob Andrew's parents would like to visit him in prison.... The only place they get to visit is his grave." The prosecutor used this comment to rebut mitigating evidence that [Ms. Andrew] "has many relatives who would visit her in

> prison if given the opportunity." Again, no objection was lodged. This comment is similar to the ones condemned in *Duckett v. State*, 1995 OK CR 61, ¶ 46, 919 P.2d 7, 19. However, as in *Duckett*, we find that the comment did not rise to the level of plain error.
>
> . . .
>
> [Ms. Andrew] claims that the prosecutor misstated the evidence by inferring that the victim impact witnesses wanted the death penalty through their testimony, even though Rob's father testified that "all of our family will do everything in our power to assist for convictions and punishment for all of those who are involved in this and responsible for the murder of my son and that they will never ever walk free again." These arguments were in direct response to the defense argument that the victim impact witnesses didn't ask for the death penalty. The prosecutor informed the jury that, by law, the victim impact witnesses could not ask for a specific punishment during their victim impact testimony. There was no objection and the comments do not rise to the level of plain error.
>
> . . .
>
> [Ms. Andrew] has failed to show either that her trial was so infected by misconduct as to violate due process, or that her death sentence was improperly or unconstitutionally obtained. *DeRosa*, 2004 OK CR 19, ¶ 70, 89 P.3d at 1149. [Ms. Andrew] was convicted and sentenced to death based upon the facts and circumstances of this case, rather than any improper remarks by the prosecutor. *Id.*

Andrew I, 164 P.3d at 202–04.

C. Clearly Established Law

The standard of review for a prosecutorial-misconduct claim at the habeas stage is "the narrow one of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974).

In *Darden v. Wainwright*, 477 U.S. 168 (1986), the Supreme Court explained that "[i]t is not enough that the prosecutors' remarks were undesirable or even universally condemned." *Id.* at 181 (citation omitted). "The relevant question is whether the prosecutors' improper comments 'so infected the trial with unfairness as to make the

resulting conviction a denial of due process.'" *Id.* (quoting *Donnelly*, 416 U.S. at 643). In answering this question, we may consider factors such as whether the comments were "invited by" or "responsive" to defense arguments; whether curative instructions were given to the jury; and the weight of the evidence. *See id.* at 182. And critical to our analysis, the Supreme Court later noted that "the *Darden* standard is a very general one, leaving courts 'more leeway . . . in reaching outcomes in case-by-case determinations.'" *Parker*, 567 U.S. at 48 (quoting *Alvarado*, 541 U.S. at 664).[38]

D. Analysis

Ms. Andrew's briefing on this claim consists mostly of a long description of the prosecutor's comments as borderline "inhumane" and contrary to "prosecutorial norms." Opening Br. at 111. After noting her agreement with the dissenting member of the OCCA, Ms. Andrew spends one cursory paragraph arguing that the prosecutor's comments denied her due process.

In that paragraph, she never mentions the applicable, deferential AEDPA standard. Rather, she summarily states that "[t]he prosecution's remarks at closing argument befouled the sentencing process and its outcome, subverting the heightened standards of reliability required by the Constitution in capital cases." Opening Br. at 113. And she concludes, vaguely, that "[t]he state-court decision excusing the remarks was unreasonable, particularly in conjunction with other errors undermining the fairness of

[38] Although the OCCA reviewed Ms. Andrew's claim for plain error, Oklahoma's plain-error test and the federal due-process test are the same. *Thornburg v. Mullin*, 422 F.3d 1113, 1125 (10th Cir. 2005). So we defer to the OCCA's ruling unless it unreasonably applied that test. *Id.*

the trial." *Id.* at 114.

We disagree. Despite pointing to some troublesome comments, Ms. Andrew hasn't established that "*every* fairminded jurist" would "reach a different conclusion" than the OCCA. *Davenport*, 142 S. Ct. at 1530. First, though the trial court didn't provide the jury with curative instructions, it had no occasion to do so given that defense counsel failed to object to any of the statements they now claim warrant reversal. Second, as noted by the OCCA and the district court, at least two of the comments responded to defense arguments. And third, as discussed, the evidence of Ms. Andrew's guilt was overwhelming. *See supra* Section II.B. That evidence, both of her guilt and in support of aggravating factors, "reduced the likelihood that the jury's decision was influenced by argument." *Darden*, 477 U.S. at 182. So, particularly because we must substantially defer to the OCCA in applying the general *Darden* rule, we cannot say that the OCCA's decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Ayala*, 576 U.S. at 269–70.

The Supreme Court's own refusal to grant relief in *Darden* also supports this conclusion. There, the prosecutor's closing argument during the guilt phase contained many "undoubtedly. . . improper" comments. 477 U.S. at 180. For example, he implied that the death penalty was necessary to protect the public; he called the defendant an "animal"; and he made comments reflecting his emotional reaction to the case, including expressing his desire to see the defendant "blown away by a shotgun." *Id.* at 179, 180 n.12. The Supreme Court held that while the prosecutor's comments deserved

"condemnation," *id.* at 179, they didn't deprive the petitioner of a fair trial, *id.* at 181. We view the prosecutor's comments here, individually and collectively, to be less problematic than those made by the prosecutor in *Darden*. So we have "no warrant to set aside the [OCCA]'s conclusion." *Parker*, 567 U.S. at 48 (reversing the Sixth Circuit's grant of habeas relief based on the petitioner's prosecutorial misconduct claim and noting that the more inflammatory comments from the prosecutor in *Darden* did not warrant relief).

We conclude that Ms. Andrew has failed to demonstrate that all fairminded jurists would agree that the OCCA's resolution of Ms. Andrew's prosecutorial-misconduct claim was incorrect. Thus, we cannot say that the OCCA unreasonably applied *Darden*. We therefore affirm the district court's denial of relief on Ms. Andrew's prosecutorial-misconduct claim.

VII. Ineffective Assistance of Counsel: DNA Evidence

Ms. Andrew next argues that her trial counsel provided ineffective assistance by not submitting a bloodstain ("Pattern 5") found on Ms. Andrew's jeans for DNA testing before trial. She contends that had Pattern 5 been tested before trial, the government couldn't have argued that Pattern 5 contained Rob Andrew's blood and tied that to Ms. Andrew being the shooter.

A. Background

At trial, Ms. Andrew's expert witness, Ross Gardner, testified that he believed Pattern 5 to be blood spatter from the second gunshot wound Rob Andrew suffered—not blood from Ms. Andrew's arm wound. He could not determine whether the stain was

forward or back spatter.[39] But he acknowledged that if it was back spatter, it would be reasonable to conclude that Ms. Andrew was the shooter.

During guilt-stage closing arguments, the government argued that Pattern 5 was definitively back spatter. That evidence, the government contended, demonstrated that Ms. Andrew shot Rob Andrew. The government later repeated that assertion, stating that when Rob Andrew "turn[ed] to look at her one last time . . . . [T]he blood spatter shows you, [that] he saw her face over the barrel of a shotgun." Trial Vol. 17 at 274. The government made clear, however, that even if Pavatt had shot Rob Andrew, it wouldn't matter—under Oklahoma law, Ms. Andrew was guilty "as long as she was aiding, abetting, advising, or encouraging" Pavatt. *Id.* at 19.

During penalty-stage closing arguments, the government again highlighted the Pattern 5 evidence. It noted that Pattern 5 consisted of blood spatter on the front of Ms. Andrew's jeans and that Rob Andrew had been lying on the garage floor when shot, supporting the theory that Ms. Andrew was the shooter. And it told the jury that there was no need to test the blood: "You know whose it is. It's Rob Andrew's blood. And [the defense's] own witness is the one who said that." Trial Vol. 19 at 326.

On direct appeal, Ms. Andrew argued that her trial counsel was ineffective for failing to submit Pattern 5 for DNA testing and that she was entitled to an evidentiary hearing. In support of that claim, she submitted an affidavit from a forensic scientist who

[39] A spray of blood projected from a gunshot victim's wound can be forward spatter or back spatter. Forward spatter comes from a bullet exit wound, traveling in the same direction as the bullet. Back spatter comes from a bullet entrance wound, traveling in the opposite direction of the bullet.

performed post-trial DNA testing on Pattern 5, as well as the other stains found on the jeans. The affidavit states as follows:

> There is no evidence from which I can identify Robert Andrew as having contributed to any of these stains. While [Pattern 5] shows an additional allele of a Y at the amelogenin (sex marker) locus, the data do not allow me to attribute that Y to any person. As I received the jeans in an unsealed condition from the District Attorney's Office, I cannot exclude any male who may have had contact with those jeans as having contributed that Y.
>
> Certain other possible alleles at various loci which fell below the laboratory's call standard were indicated in the tabular results on page 3 of the Supplemental Report with asterisks. Reviewing these possible other alleles, it is my opinion that every one of them (with the exception of the Y in [Pattern 5]) is more than likely stutter from an allele contributed by Ms. Andrew.
>
> Accordingly, I have no evidence from the DNA analysis from which I could identify Robert Andrew, or any specific other person than Brenda Andrew, as having contributed to the identified blood stains.

Direct Appeal, App. for Evidentiary Hr'g at 28–29 (paragraph numbers omitted).

From this, Ms. Andrew argued that had Pattern 5 been tested pretrial, as it was posttrial, the government couldn't have argued that Pattern 5 consisted of Rob Andrew's blood. Thus, Ms. Andrew reasoned, the government could have never claimed that Ms. Andrew shot him.

B. The OCCA's Decision

After a detailed explanation of the standard for ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the OCCA rejected her claim:

> The blood pattern evidence deals with the defense expert who testified that [Ms. Andrew] had high velocity blood spatter on her jeans. In closing the prosecution turned this evidence against [Ms. Andrew] by arguing that she received this spatter by firing the second shot and getting blow back blood spatter from Rob. However, this blood spatter had never been tested to

> determine its source. Now, during the pendency of this Appeal, [Ms. Andrew] provides DNA analysis which she argues shows that the blood stains were from her alone. The State's response points out that the blood is a mixture: the major component from [Ms. Andrew] and the minor component being from an unknown male (arguably the victim because the tester cannot exclude the victim as the source of the blood). [Ms. Andrew] claims that utilizing a defense expert without first determining the source of these stains led to the theory that she fired the second shot, making her more culpable and allowing the jury to more easily give her the death penalty. The prosecutor could have made this argument by stating that the unknown (minor component) blood spatter came from the victim, forming the basis for the same argument.
>
> This evidence does not show by clear and convincing evidence that the outcome would have been different; consequently, no evidentiary hearing is necessary.

Andrew I, 164 P.3d at 198–99 (paragraph numbers and footnote omitted).

C. Analysis

In her petition to the district court, Ms. Andrew argued that the OCCA didn't adjudicate this claim on the merits, which would free her from the need to overcome AEDPA deference. In the alternative, she argued that even if AEDPA deference applied, relief would be warranted under 28 U.S.C. § 2254(d)(1) because the OCCA's decision was contrary to or involved an unreasonable application of *Strickland*. The district court rejected both arguments and denied relief.

On appeal, Ms. Andrew doesn't challenge the district court's order. Rather, her sole argument is a new one: that she is entitled to relief under 28 U.S.C. § 2254(d)(2) because the OCCA's resolution of her claim was "based upon an unreasonable determination of the facts." Opening Br. at 126. Specifically, she contends that the OCCA "incorrectly interpreted the [forensic scientist's] affidavit and the specific, actual

argument the prosecutors presented to the jury." *Id.* at 125–26.

Ms. Andrew's change in tactics—to seek relief under § 2254(d)(2) when she altogether failed to do so before the district court—presents a clear-cut waiver issue.[40] Ms. Andrew acknowledges that this issue might "trouble[]" us. Reply Br. at 59. Yet she encourages us to exercise our discretion to review her claim on grounds that her overarching argument has remained largely the same. But we have held that if an argument wasn't presented to the district court, it is waived on appeal—even in situations "where a litigant changes to a new theory on appeal that falls under the same general category as an argument presented below." *Owens*, 792 F.3d at 1246 (brackets and citation omitted).[41] Thus, we conclude that Ms. Andrew's § 2254(d)(2) argument is waived.

We briefly note, however, that the OCCA's resolution of this claim was in no way

[40] In moving for a certificate of appealability on this claim, Ms. Andrew did briefly argue that the OCCA unreasonably interpreted the affidavit. But at bottom, as shown by her concluding paragraph, her argument was that she'd satisfied her burden "by showing that the OCCA unreasonably applied the prejudice test erected by *Strickland*." Mot. for COA at 78–79.

[41] Ms. Andrew argues that in *Jackson v. Warrior*, 805 F.3d 940 (10th Cir. 2015), we confronted "the same problem" and still exercised our discretion to review a claim that the petitioner failed to raise to the district court. Reply Br. at 58. But *Jackson* is distinguishable. There, we found the petitioner's new claim to be "closely intertwined with his prior position" and to "involve[] pure matters of law." *Jackson*, 805 F.3d at 947 n.2. Ms. Andrew's new position is fundamentally different from the one she took before the district court, and it involves matters of factual interpretation.

based on an unreasonable determination of the facts.[42] The OCCA stated that the DNA analysis revealed that Pattern 5 consisted of a mixture of blood—most from Ms. Andrew, but some from an unidentified male. Ms. Andrew does not dispute that factual finding.

What she does dispute is the OCCA's interpretation of this statement from the affidavit: "[t]here is no evidence from which I can identify Robert Andrew as having contributed to any of these stains." Direct Appeal, App. for Evidentiary Hr'g at 28. Reading this statement in the context of the rest of the affidavit, the OCCA concluded that the unidentified male DNA could "arguably" have been Rob Andrew's because the test couldn't "exclude" Rob Andrew as the source. *Andrew I*, 164 P.3d at 199.

Ms. Andrew disagrees, positing that "the only reasonable interpretation" of that statement is that the forensic scientist explicitly *excluded* Rob Andrew as the contributor of the male DNA. Opening Br. at 123. So, in Ms. Andrew's estimation, Pattern 5's male DNA source must've been "*another* male, mostly likely left there by careless handling of the jeans." *Id.*

Ms. Andrew's interpretation of the affidavit is wholly unsupported. In the sentence following the statement that Ms. Andrew disputes, the forensic scientist states that "the

[42] The parties are at odds as to whether the plain-error doctrine applies in the AEDPA context. This question and the related question of whether to treat unpreserved issues as forfeited or waived have been sources of debate and inconsistency in our precedents. *See Harmon v. Sharp*, 936 F.3d 1044, 1085–91 (10th Cir. 2019) (Holmes, J., concurring) (discussing that inconsistency and why "the waiver doctrine—not the forfeiture/plain-error rubric—should be applied to arguments that habeas petitioners proceeding under AEDPA seek to advance for the first time on appeal"). But because Ms. Andrew did not urge plain error here and because her argument, as discussed, is invalid, we need not wade into the parties' arguments.

data do not allow me to attribute that [male chromosome] to *any* person." Direct Appeal, App. for Evidentiary Hr'g at 28 (emphasis added). Later, she states that she has "no evidence from the DNA analysis from which I could identify Robert Andrew, *or any specific other person* than Brenda Andrew, as having contributed to the identified blood stains." *Id.* at 29 (emphasis added). Given that context, contrary to Ms. Andrew's view, the only reasonable interpretation of the affidavit is that the forensic scientist couldn't identify *or exclude* any male individual from the data she possessed—including Rob Andrew.

Ms. Andrew also objects to the OCCA's conclusion that the government could have argued that Ms. Andrew was the shooter even if the DNA testing had been done before trial "by stating that the unknown (minor component) blood spatter came from the victim." *Andrew I*, 164 P.3d at 199. Ms. Andrew contends that had the DNA been tested pretrial, its argument that Ms. Andrew was the shooter "would have been sapped of its potency." Opening Br. at 125.

To us, this is not a true § 2254(d)(2) challenge to a "factual determination" of the OCCA. Rather, Ms. Andrew attempts to renew her argument that the OCCA unreasonably applied *Strickland*'s prejudice prong under § 2254(d)(1)—an argument she abandoned on appeal. But regardless, the OCCA never equated the strength of the government's argument that Ms. Andrew was the shooter pre-DNA testing and the hypothetical strength of the same argument post-DNA testing. It merely stated that with or without the testing, "*the basis*" of the argument remained the same. *Andrew I*, 164 P.3d at 199 (emphasis added). That was a reasonable determination.

Thus, we affirm the district court's denial of relief on Ms. Andrew's first ineffective-assistance-of-counsel claim. We also deny her request for an evidentiary hearing. *See Smith*, 904 F.3d at 886.

VIII. Ineffective Assistance of Counsel: Extradition Treaty

Ms. Andrew also contends that her trial counsel was ineffective for failing to advise her (1) about a provision within a treaty between the United States and Mexico ("Extradition Treaty") and (2) to turn herself in to Mexican authorities.

A. Background

On November 20, 2001, Rob Andrew was murdered. Five days later, before Rob Andrew's funeral, Ms. Andrew crossed the Mexico border with Pavatt and her children. On November 29, 2001, after she entered Mexico, she was charged with first-degree murder. Three months later, on February 28, 2002, Ms. Andrew and Pavatt were arrested at the border as they attempted to return to the United States. On the day of those arrests, Ms. Andrew's trial counsel entered his appearance on behalf of Ms. Andrew in the criminal case against her (he had previously represented her in the divorce proceedings). She allegedly had many phone calls with him while she was in Mexico.

In her application for post-conviction relief to the OCCA, Ms. Andrew argued that her trial counsel had failed to advise her of the following provision of the Extradition Treaty:

> When the offense for which extradition is requested is punishable by death under the laws of the requesting Party and the laws of the requested Party do not permit such punishment for that offense, extradition may be refused unless the requesting Party furnishes such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if

imposed, shall not be executed.

Extradition Treaty Between the United States of America and the United Mexican States, Mex.-U.S., May 4, 1978, 31 U.S.T. 5059.

Because Mexico doesn't approve of death or life-without-parole sentences, Ms. Andrew contends that she could have turned herself in to Mexican authorities under the Extradition Treaty and avoided extradition absent Oklahoma's agreeing to forgo those penalties. She also argues that her appellate counsel was ineffective for failing to raise the issue on direct appeal.

B. The OCCA's Decision

After reciting the *Strickland* standard, the OCCA rejected Ms. Andrew's claim for ineffective assistance of counsel. In adjudicating it on the merits, the court stated as follows:

> [Ms. Andrew] makes two assumptions which are necessary to her argument. Her first assumption is that Mexico would have invoked the provisions of the treaty had Oklahoma authorities refused to agree to not seek the death penalty. In reading this treaty we find that the language of the treaty is not mandatory. The language contains the discretionary phrase "may be refused." Mexico is under no obligation to refuse extradition, and without any specific statement from the Mexican authorities saying they would have refused to extradite [Ms. Andrew], *she cannot show a prejudicial result which is necessary to any ineffective assistance of counsel claim*.
>
> Her second assumption is that Oklahoma would have sought extradition and would have agreed to the terms of the treaty before extraditing Andrew to Oklahoma. However, Oklahoma authorities could have simply remained patient and not sought extradition, planning instead on some other means of rendition.[FN3]
>
> > [FN3] For example, Oklahoma could have simply waited on Andrew and Pavatt to run out of money and attempt to return to the United States, where their families resided. It is

> interesting to note that this is exactly what happened and the pair were apprehended by United States border agents when they tried to enter the United States.
>
> Had Andrew surrendered to Mexican authorities, there is no guarantee that Oklahoma would have sought extradition, because of the possible agreement they would have to make with Mexico. The result would be that she would both be released from Mexican custody and be faced with the possibility of life on the lamb [sic] in Mexico, or the Mexican authorities could simply deport her to the United States as an illegal alien. With deportation, there is no triggering of the extradition treaty. Again, her speculation does not provide evidence that she suffered a prejudicial result from counsel's conduct.
>
> What Andrew is asking this Court to do is to give murder defendants *carte blanch* [sic] authority to flee to Mexico, turn themselves over to the Mexican authorities, and claim immunity from the penalties of death and life without parole. Public policy aside, the discretionary language of the treaty would allow Mexico to curtail this type of behavior by extraditing those seeking to avoid justice. Andrew has neither made a compelling argument nor provided sufficient evidence that she would have escaped the death penalty had her attorney advised her to turn herself in to the Mexican authorities. Therefore, regardless of counsel's knowledge of the treaty, *Andrew cannot show that she was prejudiced by counsel's conduct*.

Andrew II, No. PCD-2005-176 at 3–5 (emphasis added).[43]

Because her ineffective-assistance-of-trial-counsel claim lacked merit, the OCCA also concluded that her appellate counsel wasn't ineffective in failing to raise it on direct appeal. *Id.* at 5 n.4.

C. Clearly Established Law

"It is past question that the rule set forth in *Strickland* qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.'"

[43] The dissent focuses on the extradition issue and does not address the other bases in the above OCCA determination—a possible deportation as well as Oklahoma's option to patiently await her cash-strapped return to the United States.

Terry Williams, 529 U.S. at 391. *Strickland* involves a two-part test. First, the petitioner must demonstrate that her counsel performed deficiently. 466 U.S. at 687–88. Second, the petitioner must show that her counsel's performance prejudiced her. *Id.* at 693. To establish prejudice, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[44] *Id.* at 694.

"The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so." *Richter*, 562 U.S. at 105 (internal quotations and citations omitted). That is because "[t]he *Strickland* standard is a general one, so the range of reasonable applications is substantial." *Id.* (citing *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)).

D. Analysis

1. The Right to Counsel

We begin by noting that the OCCA did not adjudicate the merits of whether Ms. Andrew had a Sixth Amendment right to counsel while she was on the run in Mexico. That means the State of Oklahoma doesn't get § 2254(d)(1) deference on that issue. Addressing this preliminary question of whether *Strickland* even applies here, the district court ruled de novo that Ms. Andrew had no such right while in Mexico. That, of course,

[44] Ms. Andrew's ineffective-assistance-of-counsel claim differs from those in *Strickland* and other cases by alleging deficient performance concerning advice about an extradition treaty with a foreign country, a matter outside of the trial proceedings themselves. We assume for this appeal, but do not decide, that *Strickland* could provide clearly established law in this context.

is significant because without a Sixth Amendment right to counsel, Ms. Andrew "cannot claim constitutionally ineffective assistance of counsel." *Coleman v. Thompson*, 501 U.S. 722, 752 (1991) (citing *Wainwright v. Torna*, 455 U.S. 586 (1982)).

Ms. Andrew argues that the district court erred in this analysis. She says that her Sixth Amendment right to effective counsel attached on the filing of her state charges on November 29, 2001, before she received the alleged ineffective assistance of counsel. In contrast, the government says that the district court correctly ruled that Ms. Andrew's Sixth Amendment right first attached at her appearance before a judicial officer, which followed her arrest after entering the United States on February 28, 2002.

Even assuming Ms. Andrew's right to counsel attached on the filing of charges, we would question whether she had a right to counsel when she was in Mexico. That's because even after the Sixth Amendment attaches, it guarantees criminal defendants the right to counsel only during *critical stages* of the prosecution. *See Montejo v. Louisiana,* 556 U.S. 778, 786 (2009); *Rothgery v. Gillespie County*, 554 U.S. 191, 211–12 (2008) (noting that it is "an analytical mistake" to "assume that attachment necessarily requires the occurrence or imminence of a critical stage" because "the attachment question" and the "critical stage question" are distinct (cleaned up)). The parties haven't briefed whether Ms. Andrew's time in Mexico qualifies as a critical stage.

But we need not decide whether Ms. Andrew had a Sixth Amendment right to effective counsel when she was on the run in Mexico because, even if she did, she wouldn't be entitled to any habeas relief on this claim.

2. The Merits

Ms. Andrew argues under § 2254(d)(1) that the OCCA unreasonably applied *Strickland*'s prejudice prong. Specifically, she contends that the affidavits of five attorneys—filed with her petition to the OCCA for an evidentiary hearing—establish that "(1) it is common knowledge among defense attorneys . . . that Mexico refuses to extradite capital defendants to the United States; and (2) failure to advise a client facing capital charges to surrender to the Mexican authorities would be an unacceptable failure to advise a client to take advantage of available protection from the risk of capital punishment." Suppl. Reply Br. at 2–3. In her view, those affidavits, combined with "the historical context of the treaty" and "the history of the extradition practices establish the high probability that Mexico would have initiated formal extradition proceedings and would not have handed [Ms.] Andrew over to Oklahoma without a waiver of capital sentence."[45] *Id.* at 3–4.

But these arguments fail to acknowledge the stringent standard of review imposed by § 2254(d)(1) for claims that a state court adjudicated on the merits. To show that the OCCA's adjudication of her ineffective-assistance-of-counsel claim was unreasonable, Ms. Andrew needs to show that "*every* fairminded jurist" would "reach a different conclusion" than the OCCA did. *Davenport*, 142 S. Ct. at 1530. Yet Ms. Andrew doesn't

[45] Based on its own research, the dissent treats Mexico's forced extradition of Ms. Andrew as more akin to an impossibility than just a low probability as Ms. Andrew had maintained. Dissent at 45–47. Ms. Andrew provided none of these academic sources to the OCCA, the federal district court, or us.

even contend that she can meet that standard.[46] We conclude that Ms. Andrew cannot make such a showing, so we affirm the district court's denial of Ms. Andrew's ineffective-assistance-of-counsel claim.[47]

Apart from this, Ms. Andrews makes a mere perfunctory assertion—without any legal analysis—that she is entitled to a federal evidentiary hearing on this extradition-based claim of ineffective assistance of counsel. But her inability to overcome § 2254(d)(1)'s deference on that claim also bears on her request for evidentiary hearing. In *Michael Williams v. Taylor*, the Court examined the availability of a federal evidentiary hearing over the prisoner's claim (among others) that the government had "failed to disclose an informal plea agreement with [a testifying co-defendant]." 529 U.S. 420, 427, 444 (2000). Because the federal court of appeals had rejected this claim on the merits under § 2254(d)(1), the Supreme Court ruled that "it is unnecessary to reach the question whether § 2254(e)(2) would permit a hearing on the claim." *Id.* at 444. Thus, in that circumstance, it didn't matter whether the prisoner had failed to develop the factual record in state court.

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[46] Nor does the dissent acknowledge this standard, let alone explain how Ms. Andrew has met its demanding terms.

[47] We interpret Ms. Andrew's argument broadly to challenge—under § 2254(d)(1)—the OCCA's rejection of her extradition-related claim for ineffective assistance of counsel. After making that argument, she switches gears by asserting that "[a]ny *remaining questions* on prejudice should have been resolved in a hearing." Suppl. Reply Br. at 5 (emphasis added). Though Ms. Andrew disagrees with the OCCA's decision not to grant an evidentiary hearing after reviewing her submitted affidavits, she makes no legal argument challenging the OCCA's decision under the federal habeas law.

On a related point, in *Cullen v. Pinholster*, the Court reviewed a Ninth Circuit decision using evidence collected at a federal evidentiary hearing in determining that the prisoner had overcome the deference due under § 2254(d)(1) to the state court's merits adjudication of an ineffective-assistance-of-counsel claim. 563 U.S. 170, 174 (2011). The Supreme Court agreed with the government that "review is limited to the record that was before the state court that adjudicated the claim on the merits." *Id.* at 180. The Court held "that evidence later introduced in federal court is irrelevant to § 2254(d)(1) review." *Id.* at 184. Otherwise stated, the Court held "that evidence introduced in federal court has no bearing on § 2254(d)(1) review." *Id.* at 185. Emphasizing the importance of § 2254(d)(1) in determining the availability of a federal evidentiary hearing, the Court noted that "[s]ection 2254(e)(2) continues to have force where § 2254(d)(1) does not bar federal habeas relief." *Id.*; *see also Shoop v. Twyford*, 142 S. Ct. 2037, 2043–44 (2022) (relying on *Cullen v. Pinholster* for the rule that "review of legal claims under § 2254(d)(1) is also 'limited to the record that was before the state court'" (citation omitted)).

In view of these pronouncements, we cannot see how Ms. Andrew could obtain a federal evidentiary hearing on her extradition-related claim for ineffective assistance of counsel when the OCCA had adjudicated that claim on the merits and we upheld its ruling under § 2254(d)(1) review. Ms. Andrew could not use any evidence collected in that hearing in the review under § 2254(d)(1). Though that should end Ms. Andrew's request that we order the district court to conduct an evidentiary hearing, we note that her request fails on other bases too.

Even if Ms. Andrew could ignore § 2254(d)(1)'s effect on her request, she would

still need to face § 2254(e)(2). She fails even to cite that statute, let alone argue that she has not "failed to develop the factual basis of a claim in State court proceedings," which would render § 2254(e)(2) inapposite. Instead, she merely mentions her request to the OCCA that it order an evidentiary hearing on the extradition issue.

Further, if Ms. Andrew could somehow avoid § 2254(d)(1) and (e)(2), her demand for a federal evidentiary hearing would still fail. Even "[i]n cases where an applicant for federal habeas relief is not barred from obtaining an evidentiary hearing by 28 U.S.C. § 2254(e)(2), the decision to grant such a hearing rests in the discretion of the district court." *Schriro*, 550 U.S. at 468. And here we cannot conclude that the district court abused its discretion in denying the evidentiary hearing. In the end, Ms. Andrew has not made a threshold showing that an evidentiary hearing would have revealed a "fact" that would entitle her to habeas relief. No matter what, the questions that the OCCA identified would have remained. Though Ms. Andrew now says that she would have surrendered for Mexican detention, that is nothing more than a self-serving attestation. By her own account, she learned in Mexico that Pavatt was one of the two shooters (he would never name the other) and claimed to have shot her in the arm (with the experts saying from within inches). Would she have left her young children in his custody and volunteered for Mexican detention?[48] And even if so, would the Mexican government still have declined

[48] As the dissent notes, one of Ms. Andrew's expert attorneys, who had represented the Mexican government in extradition cases, stated that on surrendering to the Mexican authorities Ms. Andrew "would have been detained in a Mexican penal institution pending extradition to Oklahoma." Dissent at 45.

to extradite or deport her? And if Mexico would have refused to extradite or deport, would the State of Oklahoma have chosen to reduce its penalties rather than bide its time?[49] As mentioned, the state had already come close to nabbing Ms. Andrew as she and Pavatt retrieved cash sent by his daughter, who unknown to them was working with the FBI. In these circumstances, the district court did not abuse its discretion by declining to order a federal evidentiary hearing. *See Tharpe v. Sellers*, 138 S. Ct. 545 (2018) (in evaluating a fact determination under § 2254(d)(1) review, the Court noted that "even if we might have made a different call, abuse-of-discretion review means we cannot 'substitute [our] judgment for that of the district court.'" (quoting *Horne v. Flores*, 557 U.S. 433, 493 (2009) (Breyer, J., dissenting))).

IX. HAC Aggravating Circumstance: Sufficiency of the Evidence

Ms. Andrew next challenges the sufficiency of the evidence supporting the HAC aggravator found by the jury at the end of the penalty phase.

A. *Pavatt I* and *Pavatt II*

Ms. Andrew requested, and was ultimately granted, a COA on this claim before we vacated the panel decision in *Pavatt I*. She argues under the Eighth and Fourteenth Amendments that the evidence presented in support of the HAC aggravator was insufficient. And she encourages us to endorse that argument and reverse and remand for resentencing, as we did with Pavatt's identical claim in *Pavatt I*. 894 F.3d at 1133 (holding that the HAC aggravator could not "constitutionally be applied" in Pavatt's

[49] We note that Pavatt and Ms. Andrew had only had a few American coins and some cans of tuna fish when they were apprehended returning to the United States.

case). She contends that "[a]ny other outcome would be arbitrary and capricious, to say nothing of cruel and unusual" and that a "HAC aggravator should apply equally to two codefendants charged, convicted, and sentenced for the same murder." Andrew Suppl. Br. on HAC at 11.

But after the briefing was completed on this claim, we vacated our decision in *Pavatt I* and set a rehearing en banc. And our ensuing en banc decision in *Pavatt II* demands denial of Ms. Andrew's claim here. To explain why, it helps to provide some background on Pavatt's sufficiency-of-the-evidence claim relating to the HAC aggravator claim and an explanation of our resolution of that claim in *Pavatt II*.

At the end of the penalty phase of Pavatt's trial, the jury, as it did in Ms. Andrew's case, concluded that the government had proved the HAC aggravator beyond a reasonable doubt. On direct appeal, Pavatt challenged the sufficiency of the evidence supporting the HAC aggravator. The OCCA rejected the claim, concluding under Oklahoma state law that a rational juror could have found the existence of the HAC aggravator beyond a reasonable doubt. *Pavatt v. State*, 159 P.3d 272, 295 (Okla. Crim. App. 2007).

In his federal habeas petition, Pavatt challenged this sufficiency-of-the-evidence determination. In reviewing the claim, we first considered whether the OCCA's decision was an unreasonable application of the Supreme Court's holding in *Jackson v. Virginia*, 443 U.S. 307 (1979). *See Pavatt II*, 928 F.3d at 920. In *Jackson*, the Supreme Court established that "the fundamental protection of due process of law" requires that the evidence presented at a criminal trial, viewed in the light most favorable to the

prosecution, be sufficient to allow "*any* rational trier of fact to have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. at 319. That same due-process requirement applies to aggravating factors argued to the jury in a capital case. *See Pavatt II*, 928 F.3d at 917.

After a detailed review of the evidence—which was substantially the same evidence as presented in Ms. Andrew's case—we concluded that Pavatt had "failed to establish that the OCCA's determination that the evidence was sufficient to support the HAC aggravator was contrary to, or involved an unreasonable application of, clearly established law" and denied relief. *Id.* at 922.

Next, we considered Pavatt's attempted as-applied challenge to the HAC aggravator. Pavatt argued that the OCCA had "unreasonably failed to follow its own precedent that had adopted a constitutionally narrow construction of the HAC aggravator, compounded its historically inconsistent approach to what Oklahoma requires to support the HAC aggravator, and, ultimately, applied an unconstitutionally overbroad definition of the HAC aggravator in affirming his death sentence." *Id.* (internal quotations omitted).

We ultimately concluded that this challenge failed at the threshold. We explained that a prerequisite to seeking habeas relief is exhaustion of state-court remedies. *Id.* at 923 (citing 28 U.S.C. § 2254(b)(1)(A)). "A claim is exhausted only after it has been fairly presented to the state court." *Id.* (quoting *Simpson*, 912 F.3d at 564). And "[f]air representation requires that the substance of the federal claim was raised in state court." *Id.* (citation omitted).

On direct appeal, Pavatt asserted only a *Jackson* due-process challenge. It wasn't

until his second application for state post-conviction relief that he challenged the HAC aggravator as "facially vague" and violative of the Eighth and Fourteenth Amendments. Citing other OCCA cases applying the HAC aggravator, he contrasted the lack of gratuitous violence in Rob Andrew's murder. The OCCA concluded that the claim was procedurally barred because he failed to raise it in prior proceedings.

After reviewing those state court pleadings, we were unpersuaded that Pavatt had fairly presented to the OCCA his as-applied challenge and found it subject to an anticipatory procedural bar:

> To begin with, we reject the notion that the *Jackson* challenge that Pavatt asserted in his direct appeal necessarily incorporated an as-applied challenge to the HAC aggravator.[FN6] Indeed, Pavatt's *Jackson* claim could not have incorporated the as-applied arguments that he now attempts to make in this federal habeas appeal because his as-applied arguments challenge only the manner in which the OCCA, in disposing of his *Jackson* challenge on direct appeal, construed the HAC aggravator. We further conclude that Pavatt's second application for post-conviction relief plainly asserted a facial vagueness challenge to the HAC aggravator, but, at best, only hinted at an as-applied challenge to the HAC aggravator. Consequently, we conclude that the as-applied arguments Pavatt now presents in his federal appellate brief were not fairly presented to the OCCA and are thus unexhausted and, in turn, subject to an anticipatory procedural bar. *See Moore v. Schoeman*, 288 F.3d 1231, 1233 n.3 (10th Cir. 2002).
>
> > [FN6] A *Jackson* challenge to a jury's finding of the HAC aggravator, which relies on the Due Process Clause of the Fourteenth Amendment, is a separate and distinct legal claim from an Eighth Amendment challenge to the HAC aggravator. That said, we do not foreclose the possibility that a petitioner may, depending on the circumstances, assert a *Jackson* claim and an Eighth Amendment claim in the same proceeding. We hold only that the Eighth Amendment as-applied claim that Pavatt now seeks to assert was not, and could not have been, asserted in his direct appeal because it focuses on the manner in which the OCCA applied the HAC aggravator in rejecting Pavatt's *Jackson* claim on direct appeal.

Id. at 924 & n.6 (other footnote omitted).

Thus, for that reason, along with others irrelevant here, we concluded that Pavatt's as-applied challenge to the HAC aggravator wasn't properly before us and could not serve as a basis for habeas relief. *Id.* at 926.

B. Anticipatory Procedural Bar

Pavatt's and Ms. Andrew's as-applied challenges rest on nearly identical substantive claims and procedural history, so it is no surprise that Ms. Andrew's claim is similarly barred. Like Pavatt, Ms. Andrew asserted only a *Jackson* challenge on direct appeal.[50] She did not and *could not have*, contrary to her assertions, incorporated an as-applied challenge within her *Jackson* challenge because an as-applied challenge "focuses on the manner in which the OCCA applied the HAC aggravator in rejecting [Ms. Andrew]'s *Jackson* claim on direct appeal." *Pavatt II*, 928 F.3d at 924 n.6. In addition, unlike Pavatt, Ms. Andrew failed even to try to assert an as-applied challenge in her application for post-conviction relief. So it is even clearer here than in Pavatt's case that Ms. Andrew failed to fairly present her as-applied challenge to the OCCA. Thus, the claim is unexhausted.[51]

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[50] On appeal before us, Ms. Andrew does not challenge the OCCA's finding of sufficient evidence under the *Jackson* due-process standard.

[51] Though *Pavatt II* considered whether the government had waived its exhaustion argument, no such questions exist here. In its response to Ms. Andrew's petition for habeas corpus, the government argued in depth that Ms. Andrew had failed to exhaust her as-applied challenge in state court. Ms. Andrew failed to respond to the government's failure-to-exhaust argument. We also note that the district court failed altogether to address the government's argument in its order denying Ms. Andrew relief.

Further, if Ms. Andrew were to return to the OCCA and present her as-applied challenge now, the OCCA would find it procedurally barred. *See Davis v. Sharp*, 943 F.3d 1290, 1296 (10th Cir. 2019). That is so because she could have brought the challenge in her application for post-conviction relief. *See id.*; *see also* Okla. Stat. Ann. tit. 22, § 1086 (requiring a petitioner to present "[a]ll grounds for relief available . . . in his original, supplemental or amended application" for post-conviction relief and stating that "[a]ny ground . . . not so raised . . . may not be the basis for a subsequent application"); *id.* § 1089(D)(2) (providing that in capital cases, any available "grounds for relief" that are "not included in a timely [post-conviction] application shall be deemed waived"). Ms. Andrew's as-applied challenge is therefore subject to an anticipatory procedural bar.

C. Exceptions

A petitioner may overcome an anticipatory procedural bar by showing (1) "cause for the default and actual prejudice as a result of the alleged violation of federal law," or (2) "that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. On appeal, Ms. Andrew argues—for the first time—that both cause and prejudice, as well as the risk of a fundamental miscarriage of justice, excuse any potential default. But she failed to make that argument before the district court. In fact, she failed to respond at all to the government's argument in response to her petition that she had failed to exhaust her as-applied challenge before the OCCA. Thus, she has waived consideration of her arguments about any excuse she may have to sidestep the procedural bar against this challenge. *See Cuesta-Rodriguez v. Carpenter*,

916 F.3d 885, 905 (10th Cir. 2019) (declining to review the petitioner's argument on the miscarriage-of-justice exception because he failed to preserve it for appellate review).

We therefore affirm the district court's denial of relief on Ms. Andrew's sufficiency-of-the-evidence claim.

X. Cumulative Error

Finally, Ms. Andrew raises a claim of cumulative error. She argues that even if each individual constitutional error identified might be viewed separately as harmless beyond a reasonable doubt, when taken together, the errors violated her right to due process during both the guilt and penalty phases.

On direct appeal, the OCCA rejected Ms. Andrew's cumulative-error claim:

> [Ms. Andrew] urges this Court to view the alleged errors in a cumulative fashion, should we hold that no individual error rises to the level of reversible error. We have reviewed the case to determine the effect, if any, of [Ms. Andrew]'s alleged accumulation of error. We find, even viewed in a cumulative fashion, the errors we identified do not require relief. *Stouffer v. State*, 2006 OK CR 46, ¶ 205–06, 147 P.3d 245, 280.
>
> We found error, although harmless, in the admission of some State's evidence and exclusion of some defense evidence. We also found error in the failure to include an instruction on "other crimes" evidence. We find that even viewed in a cumulative fashion, these errors do not require relief. Furthermore, these errors combined with alleged and unpreserved error which did not rise to the level of plain error did not cause [Ms. Andrew] to receive an unfair trial.

Andrew I, 164 P.3d at 205 (paragraph numbers omitted).

"In *Darks v. Mullin*, 327 F.3d 1001 (10th Cir. 2003), we announced that when a habeas petitioner raises a cumulative error argument under due process principles the argument is reviewable because 'Supreme Court authority clearly establishes the right to

a fair trial and due process.'" *Hanson v. Sherrod*, 797 F.3d 810, 852 n.16 (10th Cir. 2015) (quoting *Darks*, 317 F.3d at 1017).[52] Under our precedent, petitioners are entitled to "relief under cumulative error doctrine only when the constitutional errors committed in the state court trial so fatally infected the trial that they violated the trial's fundamental fairness." *Littlejohn v. Trammell*, 704 F.3d 817, 868 (10th Cir. 2013) (internal quotation marks and citation omitted).[53]

Here, the OCCA considered the merits of Ms. Andrew's cumulative-error claim, and we did not find any constitutional errors beyond those that the OCCA identified. So its decision is owed deference under AEDPA. *See Hanson*, 797 F.3d at 852. Our task then is to determine whether the OCCA's cumulative-error decision was an unreasonable application of the rule that a defendant has a right to a trial that is fundamentally fair. Because that rule is a general one, the OCCA is granted "more leeway." *Alvarado*, 541 U.S. at 664.

Having reviewed the state court record and the constitutional errors alleged by Ms.

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[52] In *Darks*, we listed three examples of Supreme Court cases that, in our view, emphasize that rule: *Van Arsdall*, 475 U.S. at 681 ("[T]he Constitution entitles [a criminal] defendant to a fair trial, not a perfect one[.]"); *Taylor v. Kentucky*, 436 U.S. 478, 487–88 & n.15 (1978) ("[T]he cumulative effect of potentially damaging circumstances violated [the] due process guarantee of fundamental fairness . . . ."); and *DeChristoforo*, 416 U.S. at 643 (concluding that when viewed in the context of the entire trial, a prosecutor's improper remark did not "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process").

[53] The government argues, "for preservation purposes," that no clearly established federal law entitles habeas petitioners to relief on cumulative-error claims. Response Br. at 112. We, like the panel in *Bush v. Carpenter*, 926 F.3d 644, 686 n.16 (10th Cir. 2019), acknowledge that "we are bound by Tenth Circuit precedent on this issue."

Andrew in her habeas petition, it is evident that Ms. Andrew's trial was not perfect. But it is just as evident that her trial was fundamentally fair, and that is all she was entitled to. *Van Arsdall*, 475 U.S. at 681. We are confident that the alleged federal constitutional violations did not have the requisite "synergistic effect" we've observed in the rare cumulative-error claim we have granted relief on. *Black v. Workman*, 682 F.3d 880, 914 (10th Cir. 2012) (quoting *Cargle*, 317 F.3d at 1221).[54] Particularly because, as the district court noted, each of the constitutional errors identified had minor significance when viewed against the backdrop of the entire proceeding and the overwhelming evidence supporting Ms. Andrew's guilt and conviction. *See supra* Section II.B.

We briefly address the dissent's cumulative-error analysis. The dissent goes beyond Ms. Andrew's argument by including its self-found *Miranda* violation in its cumulative-error analysis.[55] It does so despite acknowledging that the OCCA adjudicated the merits of the *Miranda* issue and that the district court's affirmance under § 2254(d)(1) was correct. Dissent at 5–7.

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[54] Ms. Andrew argues that this "synergistic effect" can be found when combining two of the harmless errors recognized by the OCCA: the admission of some of the "bad acts" evidence and the exclusion of four of the defense witnesses. Opening Br. at 127–28. But the admission of the "bad acts" evidence, as discussed, did not constitute federal constitutional error. Thus, we may not consider that error in our cumulative-error analysis. *See Young v. Sirmons*, 551 F.3d 942, 972 (10th Cir. 2008) ("[I]n the federal habeas context, cumulative error analysis applies only to cumulative constitutional errors.").

[55] Notably, Ms. Andrew acknowledges that the *Miranda* issue isn't part of the cumulative-error analysis unless this court finds a *Miranda* violation, Reply Br. at 65. We could do so only under the limits of § 2254(d)(1) review.

The dissent begins correctly by stating that "[f]or cumulative error, two or more individually *harmless* errors can cumulate to create prejudice, justifying habeas relief." *Id.* at 5 (emphasis added) (citing *Bush*, 926 F.3d at 686). Consistently, it later states that "[b]ecause the right involves a fair trial, we aggregate 'all errors found to be *harmless*.'" *Id.* at 21 (emphasis added) (quoting *Cargle*, 317 F.3d at 1206). But it then drifts from those pronouncements by unilaterally finding *Miranda* error, deeming it harmless, and adding the incremental prejudice to its own cumulative-error mix. In other words, the dissent claims for itself a right to redetermine the *Miranda* issue while ignoring the OCCA's determination or our affirmance under the deferential § 2254(d) review. The dissent points to no clearly established law from the Supreme Court approving its approach.[56] Instead, the dissent relies on two of our cases. But neither *Bush* nor *Cargle* authorizes the dissent's move. Those cases confine themselves to aggregating the harm from (1) constitutional violations found by the state court and deemed harmless and (2) constitutional violations we have found after § 2254(d) review and then deemed harmless. Neither case authorizes the dissent's approach of disregarding the state court's adjudication on the merits and our affirmance under § 2254(d).

The OCCA rejected Ms. Andrew's *Miranda* claim after concluding that she had not been in custody during her videotaped interview. As noted, it did not find a *Miranda*

[56] It says that "[w]e've never said that when considering a distinct constitutional claim of the denial of a fair trial, we can consider errors only if they would individually overcome the AEDPA." Dissent at 23. Even if the dissent's unprecedented approach were justified by a Supreme Court holding, we would still rule that the overwhelming evidence of Ms. Andrew's guilt would outweigh any harm from the dissent's combined constitutional violations.

violation and then deem it harmless. And as seen above, we have determined under § 2254(d)(1) review that the OCCA's determination was neither contrary to, nor an unreasonable application of, a Supreme Court holding. So the *Miranda* issue has no place in the cumulative-error analysis.

The dissent cannot determine for itself the *Miranda* issue despite the OCCA's having already adjudicated that issue on the merits.[57] That approach would enable this court to treat any constitutional issue already rejected by a state court and affirmed by us under § 2254(d)(1) as fair game for inclusion in a cumulative-error analysis.[58] And that would cut § 2254(d)(1) deference to a stump. The dissent's cited cases, *see* Dissent at 22, do not provide support for such a result.[59]

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[57] The dissent contends that "[b]ecause the [OCCA] did not consider the effect of the *Miranda* violation, we must engage in de novo review." Dissent at 22 (citing *Bush*, 926 F.3d at 686). But this assumes that the OCCA had to agree with the dissent about a *Miranda* violation and then "consider the effect." It ignores that the OCCA *did* adjudicate the merits of the *Miranda* issue and found no violation. That the dissent would resolve that issue differently if it were the OCCA doesn't justify de novo review.

[58] Indeed, if the dissent's approach is permissible, we are unsure why it has not decided for itself all the other constitutional issues cursorily mentioned in Ms. Andrew's cumulative-error argument and assessed for itself any additional harm from them. Those alleged errors include "the *Crawford* error, . . . the illegitimate comments at closing argument, the constitutionally significant mistakes of defense counsel, and a breach of the *Brady* rule." Opening Br. at 129.

[59] *See Bush*, 926 F.3d at 666–67 (reviewing de novo the OCCA's cumulative-error decision, because the OCCA's approval of victim-impact statements was contrary to Supreme Court precedent, thus requiring consideration of the harmlessness issue); *Cargle*, 317 F.3d at 1224 (same but rejecting the OCCA's standard used to measure ineffective assistance of counsel); *Lockett*, 711 F.3d at 1245 (same but rejecting the OCCA's approval of victim-impact testimony and exclusion

(continued)

Next, the dissent says that "[a]s with the other claims, the State argues that any error was harmless." Dissent at 20. But that misses the point. In fact, the government has always argued that no *Miranda* violation occurred, reasoning that Ms. Andrew was not in custody during the police interrogation. Resp. Br. at 82–87. And applying § 2254(d) (which the dissent fails to do), the government has further argued that "[t]his court should deny relief because the OCCA's decision on this issue was neither contrary to, nor an unreasonable application of, clearly established federal law." *Id.* at 78. The government raised the possibility of harmless-error review solely as a backup argument if this court upended the OCCA's *Miranda* ruling on review under § 2254(d)(1). *Id.* at 87–88. Because that didn't happen, the hypothetical question of any harmlessness of a *Miranda* violation never came into play.

Thus, we are confident that, especially given the leeway the OCCA was afforded in ruling on the cumulative-error claim, Ms. Andrew has failed to establish that the OCCA's application of clearly established federal law in denying her cumulative-error claim was objectively unreasonable under § 2254(d)(1). We thus affirm the district court's denial of relief on Ms. Andrew's cumulative-error claim.

CONCLUSION

For these reasons, we affirm the district court's denial of Ms. Andrew's petition for relief under 28 U.S.C. § 2254.

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of mitigating testimony). Unlike in these three cases, the OCCA's *Miranda* ruling in Ms. Andrew's case withstood § 2254(d)(1) review, so harmlessness never became an issue.

Brenda Evers Andrew v. Tamika White, Acting Warden, Mabel Bassett Correctional Center, No. 15-6190
BACHARACH, J., dissenting.

An Oklahoma jury found Ms. Brenda Andrew guilty of murdering and conspiring to murder her estranged husband, Mr. Rob Andrew. After finding guilt, the jury decided on the death penalty for the murder count[1] and 10 years' imprisonment for the conspiracy count. The trial court entered judgment accordingly.

After unsuccessful challenges in state court, Ms. Andrew petitioned for federal habeas relief. The district court denied relief. *Andrew v. Moham*, No. CIV-08-832-R, 2015 WL 5254525, at *58 (W.D. Okla. Sept. 9, 2015). In my view, we should vacate the judgment and remand for issuance of habeas relief on both convictions and the death sentence.

The jury found guilt only after the trial court had committed a slew of errors—many of which were recognized by the state's appellate court—that combined to deprive Ms. Andrew of her constitutional right to fundamental fairness.

But even if Ms. Andrew had obtained a fair trial at the guilt stage, we should at least reverse the denial of habeas relief on the death sentence.

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[1] Before deciding on the death penalty for the murder count, the jury also found two aggravating circumstances:

1. The murder had been committed for remuneration.

2. The murder had been especially heinous, atrocious, or cruel.

Ms. Andrew challenges the death sentence based on the legal advice given to her when she learned of the criminal charges. At the time, Ms. Andrew was vacationing in Mexico, which could have conditioned her extradition on the State's willingness to drop its request for the death penalty. But Ms. Andrew's attorney allegedly failed to tell her of the chance to avoid the death penalty by requiring extradition from Mexico. That failure could constitute ineffective assistance of counsel.

Granted, the merits of this claim turns on multiple factual disputes; so Ms. Andrew asked the federal district court for an evidentiary hearing. But the district court denied Ms. Andrew's request. In my view, the district court should have provided Ms. Andrew with an evidentiary hearing.

I. The State's Case Against Ms. Andrew

Mr. Andrew was fatally shot on a November evening. At the time, the couple was separated and Ms. Andrew was having an affair with Mr. James Pavatt. Mr. Pavatt later admitted committing the murder without any involvement by Ms. Andrew. But the police suspected that Ms. Andrew had helped arrange the shooting, and the district attorney's office charged her with murder and conspiracy to commit murder.

A. The Murder and the Aftermath

On the night of the shooting, Mr. Andrew came to Ms. Andrew's house to pick up their children for Thanksgiving. When he arrived, Ms. Andrew asked him to come into the garage to help light a burned-out

pilot light on the furnace. Mr. Andrew was soon killed by two shotgun blasts, and Ms. Andrew was shot in her arm.

Ms. Andrew called 911, which led to the quick arrival of police officers and emergency medical technicians. But Mr. Andrew was already dead. The medical technicians took Ms. Andrew to a hospital, where she obtained treatment for the gunshot wound. After getting this treatment, Ms. Andrew was taken to the police station, where officers interrogated her for over two hours.

The police not only interrogated Ms. Andrew but also searched her garage, finding a 16-gauge shotgun shell on the ground and a .22-caliber bullet lodged in a doorway. The shell matched a 16-gauge shotgun that Ms. Andrew had kept when the couple separated.

Another 16-gauge shotgun shell was found in a neighbor's house, along with three .22-caliber bullets. Ms. Andrew had a key to that house, and there were no signs of forced entry. Still another .22-caliber bullet was found in a car belonging to Janna Larson, Mr. Pavatt's daughter. That bullet matched a revolver that Mr. Pavatt had bought six days before the murder.

B. The Changes to Mr. Andrew's Life Insurance Policy

Before the murder, Mr. Andrew tried to remove Ms. Andrew as a beneficiary. In response, Ms. Andrew presented a document—purportedly bearing Mr. Andrew's signature—that gave her ownership of the policy.

Stripped of ownership, Mr. Andrew couldn't change the beneficiary. But the police suspected that Ms. Andrew had forged the change in ownership.

At roughly the same time, someone cut the hydraulic brake lines on Mr. Andrew's car. After discovering the cut, Mr. Andrew received two telephone calls telling him to pick up Ms. Andrew at a local hospital. At least one of the calls came from Mr. Pavatt's daughter. After getting the calls, Mr. Andrew rented a car and drove to the hospital. When he arrived, he learned that Ms. Andrew wasn't there.

C. The Trip to Mexico

Five days after the murder, Mr. Pavatt, Ms. Andrew, and her two children went to Mexico. Shortly after their entry into Mexico, Oklahoma authorities charged Ms. Andrew and Mr. Pavatt with murder.

While in Mexico, Ms. Andrew repeatedly consulted her attorney, who tried to negotiate a surrender in exchange for a reduction in charges. The negotiations faltered; and Mr. Pavatt and Ms. Andrew returned to the United States, where they were arrested.

II. Standard for Habeas Relief

When the state's highest court rejects a constitutional claim on the merits, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) limits eligibility for habeas relief to three circumstances:

> Two appear in [28 U.S.C.] § 2254(d)(1), which provides that a state prisoner can qualify for habeas relief by showing a state court decision was (1) "contrary to" or (2) "involved an unreasonable application of" federal law that was clearly established by the Supreme Court. The third way, in § 2254(d)(2), requires a state prisoner to show that a state court decision was based on an unreasonable factual determination . . . . "Each of AEDPA's three prongs . . . presents an independent inquiry."

Murphy v. Royal, 875 F.3d 896, 913 (10th Cir. 2017) (citations and alteration omitted) (quoting 28 U.S.C. § 2254(d) and *Budder v. Addison*, 851 F.3d 1047, 1051 (10th Cir. 2017)), *aff'd sub nom. Sharp v. Murphy*, 140 S. Ct. 2412 (2020) (per curiam).

III. Ms. Andrew's Challenge to the Convictions

Ms. Andrew challenges her convictions based in part on three arguments:

1. deprivation of due process based on the erroneous admission of evidence about her sex life,
2. deprivation of due process from the exclusion of witnesses, and
3. use of statements elicited in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966).

Besides these three arguments, Ms. Andrew claims cumulative error. For cumulative error, two or more individually harmless errors can cumulate to create prejudice, justifying habeas relief. *Bush v. Carpenter*,

926 F.3d 644, 686 (10th Cir. 2019); *Workman v. Mullin*, 342 F.3d 1100, 1116 (10th Cir. 2003).[2]

The Oklahoma Court of Criminal Appeals acknowledged that the trial court had erred in

- allowing the introduction of evidence of Ms. Andrew's sex life, which was far more unfairly prejudicial than probative, and
- excluding defense witnesses.

In my view, the trial court also erred by allowing the State to present evidence of Ms. Andrew's incriminating statements elicited without *Miranda* warnings.

The majority properly applies the AEDPA to each of these individual claims. But Ms. Andrew has raised not only these individual claims but also a distinct constitutional claim of cumulative error. And we've held that the accumulation of errors can result in a denial of due process. *Darks v. Mullin*, 327 F.3d 1001, 1017 (10th Cir. 2003).

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[2] Ms. Andrew also alleged

- violation of the Confrontation Clause and
- failure to conduct an evidentiary hearing on claims involving withholding of exculpatory evidence and ineffective assistance of counsel for failing to get blood tests on Ms. Andrew's jeans.

For the sake of argument, I assume that the district court properly rejected these allegations.

The Oklahoma Court of Criminal Appeals recognized the existence of multiple evidentiary errors and combined them to consider the fairness of the trial. But the Oklahoma Court of Criminal Appeals never considered the impact of the *Miranda* violation on the other trial errors. Our precedents thus require de novo review of Ms. Andrew's distinct claim involving the denial of a fair trial through cumulative errors. Conducting that review, I would find a denial of fundamental fairness at the guilt stage.

A. The trial court committed three categories of errors.

Ms. Andrew has established three categories of errors that combined to prevent a fair trial: (1) the introduction of evidence about Ms. Andrew's sex life, (2) the exclusion of defense witnesses, and (3) the introduction of testimony about statements obtained in violation of *Miranda v. Arizona*. We may assume, for the sake of argument, that each category of errors would individually have been harmless.

1. The trial court erred in introducing evidence about Ms. Andrew's sex life.

Ms. Andrew argues that the trial court allowed the introduction of inadmissible evidence about her sex life. I agree.

The prosecution presented nine categories of evidence relating to Ms. Andrew's sexual conduct:

1. testimony from James Higgins about the details of his past affair with Ms. Andrew,

2. testimony about Rick Nunley's past affair with Ms. Andrew,

3. testimony that Ms. Andrew had dyed her hair red because she heard that a friend of her husband liked redheads,

4. testimony that Ms. Andrew had worn revealing clothing to a restaurant and a customer had called her a "hoochie,"

5. testimony that Ms. Andrew had trained her children to be discreet about men visiting her at home,

6. testimony that Ms. Andrew had flirted with Mr. Higgins's college-aged sons when they were working at her house,

7. testimony that Mr. Andrew would find new lingerie that he never saw Ms. Andrew wear,[3]

8. evidence that Ms. Andrew had taken sexy underwear when accompanying Mr. Pavatt on a trip to Mexico, and

9. excerpts from Mr. Andrew's journal describing Ms. Andrew's infidelity during their engagement.[4]

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[3] The State argues that in her direct appeal, Ms. Andrew did not challenge the use of this evidence. This argument is incorrect. In the direct appeal, Ms. Andrew argued: "Lott [a prosecution witness] also told the jury that [Mr. Andrew] claimed not to have had sex in years and was upset that [Ms. Andrew] would never wear for him the lingerie he found in her bedroom." Direct Appeal, Brief of Appellant at 29.

[4] The State argues that when Ms. Andrew appealed, she did not challenge the use of this evidence. But "not every new piece of evidence makes a claim a new one." *Fairchild v. Workman*, 579 F.3d 1134, 1148 (10th Cir. 2009). For example, the claim isn't new when the evidence

- just "'add[s] color'" to a claim presented in state court and
- does not "so change[] the legal landscape that the state court's prior analysis no longer addresses the substance of the petitioner's claim."

The Oklahoma Court of Criminal Appeals acknowledged that the trial court had erred in allowing the introduction of evidence involving Ms. Andrew's sexual advances to Mr. Higgins's sons, Ms. Andrew's provocative clothing at a dinner, and her decision to dye her hair red after learning that her husband's friend liked redheads. *Andrew v. State*, 164 P.3d 176, 192 (Okla. Crim. App. 2007). For all of this evidence, the court "struggl[ed] to find any relevance" except as to Ms. Andrew's character. *Id*. In this appeal, the State doesn't try to defend the admissibility of any of this evidence.

I agree with the Oklahoma Court of Criminal Appeals that the trial court erred in introducing this evidence. The evidence not only lacked relevance but also cast Ms. Andrew as a woman fixated on seducing nearby men. In my view, the state appellate court correctly condemned the State's broadside on Ms. Andrew's sex life.

Id. at 1149 (quoting *Gardner v. Galetka*, 568 F.3d 862, 881 (10th Cir. 2009)).

Though Ms. Andrew did not discuss the journal entries about infidelity during their engagement, her direct-appeal brief did challenge other entries from Mr. Andrew's journal; and the entries involving the engagement do not change the claim that Ms. Andrew had presented in the direct appeal.

2. The trial court erred in excluding three defense witnesses.

Ms. Andrew's second argument is that the trial court erred by excluding three defense witnesses as a sanction for discovery violations. In my view, the Oklahoma Court of Criminal Appeals correctly found that the trial court had erred in excluding these witnesses.

a. The Oklahoma Court of Criminal Appeals concluded that the trial court had erred.

The trial court excluded testimony by Ronald Warren, Carol Shadid, and Lisa Gisler. Ms. Andrew's proffer explained what these witnesses would have said:

1. A police officer, Officer Ronald Warren, would have testified that Ms. Andrew had asked the officers to help Mr. Andrew after he was shot.

2. A neighbor, Carol Shadid, would have testified that she had heard three shots.

3. Another neighbor, Lisa Gisler, would have testified that she had heard only a single loud noise.

The trial court disallowed the use of these witnesses, concluding that the defense had failed to provide notice of their testimony.

The Oklahoma Court of Criminal Appeals found an abuse of discretion in the trial court's exclusion of these witnesses, viewing the sanction as excessive. *Id.* at 197. But the Oklahoma Court of Criminal Appeals regarded the erroneous exclusions as harmless. *Id*.

b. The excluded testimony could have cast doubt on the State's theories.

Ms. Andrew proffered the testimony to challenge two of the State's theories.

First, to counter Mr. Pavatt's insistence that he had acted alone, the State tried to show that Ms. Andrew had reacted coldly to her husband after the shooting. For example, the State presented testimony by Officer Frost that Ms. Andrew

- had stayed away from Mr. Andrew in the garage and
- had never asked about his condition after the shooting.

To counter that testimony, Ms. Andrew proffered testimony by Officer Warren. He would have testified that when he arrived at the scene, Ms. Andrew was kneeling at Mr. Andrew's side and pleading for someone "to help her husband." Trial Trans. vol. 16, at 3779.

Second, the State argued that Ms. Andrew had tried to divert suspicion by arranging for Mr. Pavatt to shoot her in the arm. The State's argument, however, would have required spacing between the gunshots: After shooting Mr. Andrew, Mr. Pavatt would have needed to race toward Ms. Andrew and then hold her arm to shoot her carefully enough to avoid permanent damage.

In response, Ms. Andrew argued that the gunman had fired so rapidly that the shooting couldn't have been staged. For this argument,

Ms. Andrew relied on the testimony of two neighbors: Carol Shadid and Lisa Gisler. Ms. Shadid had heard three shots; Ms. Gisler had heard only a single loud noise.

The combination of their testimony could have cast doubt on the State's theory of the gunshot wound to Ms. Andrew's arm. If there were three shots (as Ms. Shadid heard) and only a single loud noise (as Ms. Gisler heard), the jury could reasonably conclude that the shots had been fired in quick succession, leaving too little time to stage the shot to Ms. Andrew's arm.

c. We are bound by the Oklahoma Court of Criminal Appeals' conclusion that the trial court had erred.

The Oklahoma Court of Criminal Appeals concluded that the trial court had erred in excluding the testimony by Officer Warren, Ms. Shadid and Ms. Gisler. And the State does not defend the trial court's exclusion of any of these witnesses. *See* Answer Br. at 56–58 (arguing that Officer Warren's exclusion was harmless); Supplemental Br. of Respondent/Appellee, filed June 1, 2017, at 5–7 (arguing that exclusion of Ms. Gisler and Ms. Shadid's testimony about the timing of the gunshots was harmless).

In characterizing the rulings as erroneous, the Oklahoma Court of Criminal Appeals was acting as the final arbiter of Oklahoma law on the consequences of a failure to adequately disclose the subject-matter of

expected testimony. So we are bound by the Oklahoma Court of Criminal Appeals' conclusion that these exclusions were erroneous. *See Fultz v. Embry*, 158 F.3d 1101, 1103 (10th Cir. 1998). Because of that binding conclusion, I'd recognize errors when the trial court excluded testimony by Officer Warren, Ms. Shadid, and Ms. Gisler.

3. The trial court erred by allowing the use of Ms. Andrew's statements obtained without *Miranda* warnings.

But there was still another error: the use of incriminating statements elicited in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). This error bears on Ms. Andrew's distinct constitutional claim of cumulative error.

Under *Miranda*, warnings are required before a "custodial interrogation." *Miranda*, 384 U.S. at 478–79. An interrogation is custodial "when an individual is taken into custody or otherwise deprived of [her] freedom by the authorities in any significant way and is subjected to questioning." *Id.* at 444, 478.

The police questioned Ms. Andrew after the murder, and the State showed the jury a videotape of the interrogation, using excerpts to argue that Ms. Andrew had lied. But no one had ever advised Ms. Andrew of her *Miranda* rights. Without this advisement, the trial court should have excluded her statements.

a. Ms. Andrew was in custody during the interrogation.

The *Miranda* issue turns on whether Ms. Andrew had been in "custody" when questioned at the police station. If she had been, the State needed to supply *Miranda* warnings; if she had not been in custody, warnings would have been unnecessary. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam).

To determine whether Ms. Andrew was in custody, we focus on whether a reasonable person would have felt "at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). "The ultimate inquiry" is whether there was "'a formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam)).

The trial court and the Oklahoma Court of Criminal Appeals concluded that Ms. Andrew had not been in custody during the questioning at the police station. This conclusion involves a mixed question of law and fact. *Thompson*, 516 U.S. at 102.

In reviewing this conclusion, we consider three non-exhaustive factors:

1. whether the police informed Ms. Andrew that she could refuse to answer questions or end the interview,

2. whether the questioning was long and accusatory or coercive, and

3. whether the circumstances showed a police-dominated atmosphere.

See United States v. Revels, 510 F.3d 1269, 1275 (10th Cir. 2007). Under these factors, Ms. Andrew was in custody.

The first factor supports a finding of custody because the police admitted that they had never told Ms. Andrew that she could leave.

The second factor also supports a finding of custody. The questioning took over two hours, suggesting that Ms. Andrew was in custody. *See Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004) (treating the two-hour duration of questioning as support for a conclusion that the individual was in custody); *Tankleff v. Senkowski*, 135 F.3d 235, 244 (2d Cir. 1998) (concluding that the defendant was in custody when he had been "subjected to increasingly hostile questioning at the police station" for two hours and had been "accused . . . of showing insufficient grief"); *Moore v. Ballone*, 658 F.2d 218, 226 (4th Cir. 1981) (concluding that the defendant was in custody when he had been subjected to "almost an hour of repetitive leading questions"). In addition, many of the questions were accusatory, like these five examples:

1. Roughly 30 minutes into the interview, the police detective asked Ms. Andrew what had been going on with Mr. Andrew, why he had moved out, and what they had fought about.

2. The detective left the room for roughly 20 minutes. When he returned, he asked Ms. Andrew if she had loved or hated

her husband, expressing a belief that she seemed to lack emotion: "Did you hate him that much that you don't show any emotion about it?" He followed up with: "How do you feel about the fact that he's dead now?"

3. The detective also pressed Ms. Andrew on her affairs, her relationship with Mr. Pavatt, and the increases in Mr. Andrew's life insurance policy.

4. The detective then quizzed Ms. Andrew about the incident with her husband's brake lines, asking if Mr. Andrew had suspected her.

5. Near the end of the interview, the detective questioned Ms. Andrew about her promiscuity: "How many guys did [Mr. Andrew] accuse you of having affairs with?" The detective then asked Ms. Andrew if she was currently having an affair.

The third factor also suggests Ms. Andrew was in custody. The interview took place at the police station, where psychological compulsion or intimidation "is most apt to exist." *Steigler v. Anderson*, 496 F.2d 793, 799 (3d Cir. 1974). This was "the paradigmatic *Miranda* situation": "a person arrested . . . and whisked to a police station for questioning." *Howes v. Fields*, 565 U.S. 499, 511 (2012). The coercion arises in this "paradigmatic *Miranda* situation" because the individual is "'cut off from [her] normal life and companions,' and abruptly transported . . . into a 'police-dominated atmosphere.'" *Id.* (quoting *Maryland v. Shatzer*, 559 U.S. 98, 106 (2010), and *Miranda v. Arizona*, 384 U.S. 436, 456 (1966)).

The State suggests that the statements were voluntary because Ms. Andrew wanted to help the police, but there's nothing to suggest that

she agreed to go to the police station. Ms. Andrew was being treated at the hospital when Officer Frost told her that she would be taken to the police station. Officer Frost confirmed that Ms. Andrew had no choice about going:

> Q. Did you give her a choice of whether she could go home or she could go to the station?
>
> A. No.
>
> Q. She had no choice on that, did she?
>
> A. I told her we were going down to the station, Detective Garrett wanted to talk to her some more.
>
> Q. And so she did not have any choice on that, did she, Officer Frost?
>
> A. No.

Tr. of Mtn. Hr'g Proceedings at 113 (June 7, 2004). Ms. Andrew confirmed that the police officers had told her that she needed to accompany them to the police station. *Id*. at 138. And as the questioning grew increasingly accusatory, Ms. Andrew repeatedly told the officers that she needed to leave. These statements triggered more questions rather than permission to leave.

The State relies on testimony by Detective Garrett. According to the State, Detective Garrett testified that Ms. Andrew could have left at any time. His actual testimony was different:

> Q. She certainly wasn't allowed to go home, check on her children, was she?

A. No.

Id. at 59. Detective Garrett also confirmed Ms. Andrew's inability to leave:

Q. She was required to come [from] the hospital in an . . . open-backed hospital smock and not allowed to go home . . . ?

A. Correct. She didn't go back home.

Id.

The recording of the interrogation shows that the police forced Ms. Andrew to stay even after she had told the officers that she needed to leave to see her kids. The first example occurred about one hour and twenty minutes into the interview. At that time, Ms. Andrew asked: "Can I go see my kids?"[5] The detective acknowledged this question, but continued to press: "I have to ask you another question . . . ." About 40 minutes later, Ms. Andrew repeatedly insisted that she needed to leave to see her kids. The detective again refused to let her leave, telling her that she could see her kids only after they had finished.[6] The interrogation continued.

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[5] These statements are audible on the videotape, which was introduced as State's Exhibit 204a.

[6] The State argues that Ms. Andrew couldn't return home because it was a crime scene. But she said that she needed to see her kids, not go home.

Though the police admittedly forced Ms. Andrew to stay, the Oklahoma Court of Criminal Appeals found that Ms. Andrew had voluntarily participated in the questioning. Applying the "reasonable person" standard, the court concluded that "a reasonable person in the same position [as Ms. Andrew] would not conclude that he or she was in custody." *Andrew v. State*, 164 P.3d 176, 195 (Okla. Crim. App. 2007). Ms. Andrew challenges this conclusion.

A reasonable person in Ms. Andrew's position would not have felt free to leave. The police officers admitted under oath that Ms. Andrew couldn't leave, and they ordered her to stay after she had repeatedly asked to leave.

Not only did the police admit that Ms. Andrew couldn't leave, but the prosecutor also capitalized on Ms. Andrew's repeated requests to leave:

> And you know what? She did ask to go home. Think about this. At the end of that tape, and she doesn't like the questions this detective . . . is starting to ask her, and she's not a stupid lady. She's starting to realize he's asking her about insurance, he's asking her about boyfriends, he's asking about shotguns, he's asking about child custody. Oh my God, she's thinking to herself. I want to leave.

Trial Trans. vol. 17, at 4071.

The Oklahoma Court of Criminal Appeals thus stood alone in regarding Ms. Andrew as free to leave. Everyone else—the prosecutor, the police officers, and Ms. Andrew herself—agreed that she had been forced to remain at the police station for further questioning after stating that she

needed to leave. In my view, Ms. Andrew was in custody when subjected to the two-hour interrogation at the police station.

* * *

The evidence shows that Ms. Andrew was in custody when she made the incriminating statements during the interview. Because she was not advised of her *Miranda* rights, the trial court erred in allowing the introduction of her statements elicited in the interrogation.

As with the other claims, the State argues that any error was harmless. For the sake of argument, we may assume that a *Miranda* violation alone would be harmless. Even with that assumption, however, we must consider the combined effect of

- the *Miranda* violation and
- the other errors—acknowledged by the Oklahoma Court of Criminal Appeals—in excluding three defense witnesses and allowing the introduction of irrelevant and unfairly prejudicial evidence about Ms. Andrew's sex life.

These errors bear on Ms. Andrew's distinct constitutional claim of cumulative error.

B. The existence of cumulative errors resulted in a denial of due process.

Apart from the prejudice caused by each individual violation, a petitioner may bring a separate claim of cumulative error. *See Hanson v. Sherrod*, 797 F.3d 810, 852 & n.16 (10th Cir. 2015). The availability of a distinct claim of cumulative error reflects every criminal defendant's right

to a fair trial. *Darks v. Mullin*, 327 F.3d 1001, 1017 (10th Cir. 2003). That right may be violated not only by individual trial errors but also by a combination of rulings that result in a denial of due process. *Hancock v. Trammell*, 798 F.3d 1002, 1025 (10th Cir. 2015); *see also Collins v. Sec'y of Penn. Dep't of Corrs.*, 742 F.3d 528, 542 (3d Cir. 2014) ("The cumulative error doctrine allows a petitioner to present a standalone claim asserting the cumulative effect of errors at trial so undermined the verdict as to constitute a denial of his constitutional right to due process.").

1. We consider the combined impact of the trial court's errors.

Because the right involves a fair trial, we aggregate "all errors found to be harmless." *Cargle v. Mullin*, 317 F.3d 1196, 1206 (10th Cir. 2003) (quoting *United States v. Toles*, 297 F.3d 959, 972 (10th Cir. 2002)). So we consider errors even when they wouldn't individually warrant habeas relief. *Id.* at 1207.

In considering whether cumulative errors denied a fair trial to Ms. Andrew, we'd ordinarily apply the AEDPA, which restricts our review when the state appeals court rejects a claim on the merits. *See* Part II, above. And the Oklahoma Court of Criminal Appeals rejected the claim of cumulative error on the merits. In rejecting this claim, the court considered the cumulative effect of the trial court's errors in

- introducing evidence involving Ms. Andrew's sexual advances to Mr. Higgins's sons, her sexy clothing at a dinner, and her dying her hair red to attract a friend of her husband's and

- excluding testimony by Officer Warren, Ms. Shadid, and Ms. Gisler.

Andrew v. State, 164 P.3d 176, 188–92, 196–98, 205 (Okla. Crim. App. 2007).

But the state appeals court did not find error, as I would, in the introduction of the statements that Ms. Andrew had made after a *Miranda* violation. Because the Oklahoma Court of Criminal Appeals did not consider the effect of the *Miranda* violation, we must engage in de novo review. *See Bush v. Carpenter*, 926 F.3d 644, 686 (10th Cir. 2019) (conducting de novo review of a claim of cumulative error because the appellate court had not recognized errors that we later recognized); *Cargle v. Mullin*, 317 F.3d 1196, 1224 (10th Cir. 2003) (stating that because the Oklahoma Court of Criminal Appeals had not recognized certain errors, we would conduct de novo review of the claim of cumulative error); *see also Lockett v. Trammel*, 711 F.3d 1218, 1245 (10th Cir. 2013) ("AEDPA deference does not apply because the [Oklahoma Court of Criminal Appeals] failed to consider all of the constitutional errors present in the case.").

The majority acknowledges that we should consider all of the errors that the Oklahoma Court of Criminal Appeals recognized. But the majority disagrees with my assessment of Ms. Andrew's *Miranda* claim. In the

majority's view, we shouldn't combine the effect of a *Miranda* violation if it wouldn't individually merit habeas relief under the AEDPA.

The majority's approach overlooks the separate existence of a constitutional claim involving the denial of a fair trial through cumulative error. As we've previously recognized, the Supreme Court has clearly established a distinct constitutional claim of cumulative error. *See Hanson v. Sherrod*, 797 F.3d 810, 852 n.16 (10th Cir. 2015) (concluding that the Supreme Court has clearly established a "separate constitutional violation" involving the denial of a fair trial and due process through cumulative error); *see also Darks v. Mullin*, 327 F.3d 1001, 1017 (10th Cir. 2003) (stating that the claim of cumulative error involves a clearly established constitutional right "under due process principles").

The majority errs by conflating the distinct constitutional claims involving cumulative error and *Miranda*. For the *Miranda* claim itself, we'd need to apply the AEDPA. *See* Part II, above. But here Ms. Andrew isn't asserting a separate *Miranda* claim; she's instead claiming that the *Miranda* violation combined with the other errors to prevent a fundamentally fair trial. That claim requires an "unqualified reference to *all* errors." *Cargle v. Mullin*, 317 F.3d 1196, 1207 (10th Cir. 2003) (emphasis in original). We've never said that when considering a distinct constitutional claim of the denial of a fair trial, we can consider errors only if they would individually overcome the AEDPA.

Because we must consider "all errors," we've acknowledged the need to accumulate constitutional claims even when they might not individually represent constitutional violations due to an inadequate showing of prejudice. *See Cargle v. Mullin*, 317 F.3d 1196, 1207 (10th Cir. 2003) ("[T]o deny cumulative-error consideration of claims unless they have first satisfied their individual substantive standards for actionable prejudice 'would render the cumulative error inquiry meaningless, since it [would] . . . be predicated only upon individual error already requiring reversal." (quoting *Willingham v. Mullin*, 296 F.3d 917, 935 (10th Cir. 2002))). So we've accumulated constitutional claims even after concluding that they haven't surpassed the AEDPA hurdle.

An example is *Bush v. Carpenter*, 926 F.3d 644 (10th Cir. 2019). There we relied on the AEDPA to reject a constitutional claim of ineffective assistance of appellate counsel, concluding that the petitioner had failed to show an unreasonable application of Supreme Court precedent. *Id.* at 682–86. Even though this claim didn't individually surpass the AEDPA hurdle, we included this claim when considering the petitioner's distinct claim involving the denial of a fair trial through cumulative error. *Id.* at 686–87.

We did the same in *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003). There we regarded the Oklahoma Court of Criminal Appeals' decision on a claim of prosecutorial misconduct as "suspect" under controlling federal

law, but we didn't suggest that the state court had committed an error that would have surpassed the AEDPA hurdle. *Id.* at 1218–20. Although we could say only that the decision was "suspect," we included the claim of prosecutorial misconduct when considering the distinct constitutional claim of cumulative error. *Id.* at 1220.

Despite the teachings in *Bush* and *Cargle*, the majority conflates the distinct constitutional claims being pressed individually and collectively. Here we're considering a distinct constitutional claim involving the denial of a fair trial. Under the AEDPA, we would consider whether the state court reasonably applied Supreme Court precedent on the distinct constitutional right to a fair trial. Though a *Miranda* violation might not alone surpass the AEDPA hurdle—like the claims of ineffective assistance of appellate counsel in *Bush* and prosecutorial misconduct in *Cargle*—we must consider the *Miranda* violation when determining whether the accumulation of errors resulted in the denial of a fair trial.

2. We need not decide whether to defer to the Oklahoma Court of Criminal Appeals' assessment of the accumulated errors.

Because the Oklahoma Court of Criminal Appeals didn't consider the *Miranda* violation when assessing the claim of cumulative error, we must conduct de novo review on that claim. *See* p. 22, above. But we must also consider whether to defer to the Oklahoma Court of Criminal Appeals' assessment of the impact from the other errors.

Our case law is not entirely consistent on whether to accord deference to the state appeals court's characterization of some errors as harmless. For example, we held in *Bush v. Carpenter* that when we conduct de novo review on a habeas claim of cumulative error, we "afford no deference to the [Oklahoma Court of Criminal Appeals'] decisions." 926 F.3d 644, 686 (10th Cir. 2019).

But we had earlier said in *Le v. Mullin* that when we conduct de novo review of a claim of cumulative error, "we give some deference to the Court of Criminal Appeals' cumulative error analysis as far as it went." 311 F.3d 1002, 1023 (10th Cir. 2002) (per curiam). *Le* thus required the habeas court to consider whether the other errors (overlooked by the state appeals court) would have tipped the scales toward the defendant. *See id.* (stating that when we consider cumulative error de novo, "we focus on whether the . . . errors not addressed by the Oklahoma courts . . . would tip the scales in light of the Court of Criminal Appeals' ruling on the cumulative impact of the other errors").

I wouldn't resolve the difference in approaches[7] because I'd regard Ms. Andrew's trial as unfair either with or without deference to the state appeals court's consideration of some errors as harmless.[8]

3. The cumulative errors rendered the trial unfair.

In conducting de novo review of a decision on cumulative error, we consider whether the errors affected the petitioner's substantial rights. *Simpson v. Carpenter*, 912 F.3d 542, 602 (10th Cir. 2018). A petitioner's substantial rights are affected when they "had a substantial and injurious effect or influence in determining the jury's verdict." *Hanson v. Sherrod*, 797 F.3d 810, 852 (10th Cir. 2015) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). In considering the effect of the errors, we can consider them together whether or not they have "an inherent synergistic effect." *Grant v. Trammell*, 727 F.3d 1006, 1026 (10th Cir. 2013)

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[7] When our precedents conflict, we typically adhere to the earlier one. *Haynes v. Williams*, 88 F.3d 898, 900 n.4 (10th Cir. 1996). But the two opinions might be reconcilable based on a change in the law. When we issued *Le v. Mullin*, we hadn't decided whether cumulative errors could impinge on a clearly established right to due process. *See Hooks v. Workman*, 689 F.3d 1148, 1194 n.24 (10th Cir. 2012) ("[W]e have never expressly held in other contexts that cumulative-error analysis is clearly established federal law."). But we recognized such a right by the time that we decided *Bush v. Carpenter*. *See Hanson v. Sherrod*, 797 F.3d 810, 852 n.16 (10th Cir. 2015).

[8] The majority argues that consideration of the *Miranda* violation would reduce AEDPA deference "to a stump." Maj. Op. at 87. But we're bound by our precedents in *Bush* and *Le* regardless of their impact on AEDPA deference.

(Gorsuch, J.) (quoting *Cargle v. Mullin*, 317 F.3d 1196, 1221 (10th Cir. 2003)).[9]

In Ms. Andrew's trial, the evidence of guilt was undoubtedly sufficient for a conviction; but the sufficiency of the evidence doesn't mean that the trial was fair or the errors harmless. *See United States v. Lane*, 474 U.S. 438, 450 n.13 (1986) (stating that the inquiries for harmlessness and sufficiency of the evidence are distinct and "the threshold of overwhelming evidence is far higher than mere sufficiency to uphold conviction"). Cumulative errors are considered prejudicial if they

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[9] In *Grant v. Trammell*, then-Judge Gorsuch explained why errors need not be synergistic to accumulate:

> The reason why becomes clear if we understand prejudice in terms of probabilities. One might "accumulate" probabilities by adding them together, taking into account the disjunctive probabilities of each error. One might also "accumulate" probabilities by multiplying them and finding reversible error only in the space where all errors are conjunctively appearing all at once. If the cumulative error doctrine means anything, it must be that prejudice can be accumulated disjunctively—that all a defendant needs to show is a strong likelihood that the several errors in his case, when considered additively, prejudiced him. If it were otherwise, the cumulative error doctrine would be a nullity. A finding that one error wasn't prejudicial would necessarily preclude a finding that all of the errors were prejudicial. So while one error may make another error in the same direction more egregious, a defendant can still show cumulative error by accumulating unrelated errors if their probabilistic sum sufficiently undermines confidence in the outcome of the trial.

Id. (citation and emphasis omitted).

"had substantial influence" on the jury or leave us in "grave doubt" about their impact. *Kotteakos v. United States*, 328 U.S. 750, 765 (1946). Grave doubt exists when the impact of the error leaves us in "equipoise" about the effect. *Bland v. Sirmons*, 459 F.3d 999, 1009–10 (10th Cir. 2006) (quoting *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995)).

I am in equipoise about the combined effect of the trial errors involving the State's focus on Ms. Andrew's sex life, the introduction of statements elicited after a *Miranda* violation, and the trial court's exclusion of defense witnesses. Given the combined effect of these trial errors, I would reverse the district court's denial of habeas relief on the convictions.

Evidence about Ms. Andrew's sex life. From the outset of the trial, the State lasered in on Ms. Andrew's sex life. For example, soon after beginning her opening statement, the prosecutor promised to "present evidence that throughout the marriage [Ms. Andrew] had a boyfriend on the side." Trial Trans. vol. 1, at 13.

Ms. Andrew's babysitter testified on the second day of the trial, recounting a suspicion that Ms. Andrew was cheating on Mr. Andrew. Most of the other sexualizing evidence also came early in the trial. For example, on the second day of the trial, Mr. David Ostrowe testified about a dinner with Mr. Andrew and Ms. Andrew. The dinner itself had nothing to do with the case except for one observer's comment that Ms. Andrew's dress had

been "very tight" and "very short," exposing "a lot of cleavage." Trial Trans. vol. 2, at 323. The clothing led another individual to call Ms. Andrew a "hoochie," a slur referring to a promiscuous woman. *Id.*

The third day of trial continued with more tales of Ms. Andrew's promiscuity. Ronald Stump testified that

- his wife had told Ms. Andrew that he liked red hair on women and
- the next time he saw Ms. Andrew, she had dyed her hair red.

The opening of the trial with this evidence surely left an imprint on the jurors, who generally give great weight to information they learn early in a trial. *See* Lawrence S. Wrightsman, *The Place of Primacy in Persuading Jurors: Timing of Judges' Instructions and Impact of Opening Statements*, 8 U. Bridgeport L. Rev. 431, 432–36 (1987). At the beginning of a trial, jurors are "anxious, curious, receptive, and looking for someone to trust." Michael Frost, *Ethos, Pathos & Legal Audience*, 99 Dick. L. Rev. 85, 111 (1994).

The State not only opened the trial with the evidence of Ms. Andrew's sex life but harped on that evidence when finishing the closing arguments. Before the judge sent the jury to deliberate, the prosecutor read from Mr. Andrew's journal about Ms. Andrew's infidelity during their engagement. This evidence of infidelity closed the loop, creating "an outsized effect due to [its] temporal proximity to jury

deliberations." *United States v. Starks*, 34 F.4th 1142, 1165 n.7 (10th Cir. 2022).

The State focused from start to finish on Ms. Andrew's sex life. This focus portrayed Ms. Andrew as a scarlet woman, a modern Jezebel, sparking distrust based on her loose morals. The drumbeat on Ms. Andrew's sex life continued in closing argument, plucking away any realistic chance that the jury would seriously consider her version of events.

***Miranda* violation**. With this relentless attack on Ms. Andrew's morals, the State pounced in closing argument on what she'd told the police during her custodial interrogation.[10] In closing argument, defense counsel argued that Mr. Pavatt had admitted acting without Ms. Andrew's involvement. In response, the State pointed to what Ms. Andrew had told the police when denying affairs, admitting anger toward Mr. Andrew, and acknowledging clashes over his life insurance policy:

- "And you know what else you can't change? She lies to [Detective] Garrett, and you know that . . . . She lies about her boyfriends." Trial Tr. vol. 17, at 4064.

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[10] Given its reliance on the AEDPA, the majority doesn't address

- whether the state trial court had violated *Miranda* by allowing the testimony about Ms. Andrew's statements during the interrogation or
- whether the introduction of that testimony resulted in prejudice to Ms. Andrew.

- "[Detective Garrett] asked her . . . ['][Mr. Andrew] have any enemies? Anybody looking out for [Mr. Andrew]? Anybody interested in harming [Mr. Andrew]?['] And her answers were no. But then he realizes . . . there's a police report . . . where [Mr. Andrew] is saying I think Jim Pavatt and my wife are trying to kill me." *Id.* at 4064–65.

- "So he goes in and he says, '[I]s there anybody that's been angry with [Mr. Andrew]?['] You know what she says? She says no." *Id.* at 4065.

- "She tells the police officers that this man that she is now building her hopes back on, just been gunned down, and . . . I can't think of anybody that's been upset with him lately. She lies. Why? You know why." *Id.* at 4065–66.

- "[Detective Garrett] asks her specifically because he's got the information now[:] ['']Is there something going on with the life insurance policy?' And you know what she says? . . . . ['']Well yeah we talked about it but it's not a big deal.['] That's what she says." *Id.* at 4066.

- "And yet at this point she has just witnessed horror upon horrors exactly what she was afraid of, that [Mr. Andrew] might have something happen to him, and I'm not going to be able to provide for my children and myself and so when the detective, assuming that she's innocent of all this, says tell me what's going on with the policy, she sits there with her leg up and says well it was no big deal. She lied. She lied. Why did she lie? Because it was a big deal. It was a big deal. It's a motive for murder." *Id.* at 4067.

The State also pointed to Ms. Andrew's statements that it had been too dark to see the gunmen:

> She tells [Detective Garrett] she can't give him any leads on these two unidentified gunmen because it was dark. She says it over and over again on that video. It was dark. Dark mask, dark shirt. It was dark. Dark pants. I didn't see their shoes. It was dark.

> Well folks, the light's on in the garage, isn't it? The lights are on outside. How dark is it? What's your common sense tell you about this?

See id. at 4071–72.

Given the defense's theory that Mr. Pavatt had acted without any involvement by Ms. Andrew, her statements played a critical role for the prosecution by showing a motive for the murder and consciousness of guilt. *See Al-Adahi v. Obama*, 613 F.3d 1102, 1107 (D.C. Cir. 2010) ("[It is a] well-settled principle that false exculpatory statements are evidence—often strong evidence—of guilt."). The prosecution's closing argument crystallized the effect of the statements elicited in violation of *Miranda*.

Exclusion of defense witnesses. In opposing a death sentence, Ms. Andrew had to confront evidence of her icy indifference to Mr. Andrew even after he'd been shot. This evidence led the prosecutor to argue that Ms. Andrew hadn't approached her husband after the shooting or asked about his condition, proving that she was "a coldblooded killer." Trial Trans. vol. 17, at 4098. The jury never got to hear Officer Warren explain that Ms. Andrew had sat at her husband's side, pleading for someone to help him even though he was obviously dead. The state appeals court admitted that the trial judge had erred in excluding this testimony. *See* p. 10, above.

With Ms. Andrew unable to counter the State's portrayal of indifference to the killing, the prosecution also capitalized on her inability

to counter the State's theory of the shooting itself. Everyone agreed that there were three gunshots: two came from a shotgun and struck Mr. Andrew; one came from a .22-caliber handgun and struck Ms. Andrew's arm.

The State's theory was that (1) either Ms. Andrew or Mr. Pavatt had shot Mr. Andrew and (2) the shot to Ms. Andrew's arm had been staged. This theory was feasible only if Mr. Pavatt had enough time to get close enough to Ms. Andrew to shoot her arm at close range. So the State argued in closing that Ms. Andrew "had to stand still long enough for Pavatt to shoot her and to be sure that she wasn't seriously wounded." Trial Trans. vol. 17, at 3895.

One neighbor (Ms. Shadid) heard three shots, and another neighbor (Ms. Gisler) heard only a single loud noise. Ms. Shadid was right according to the prosecution: There were three distinct shots. Why, then, did Ms. Gisler hear only a single loud noise? One possibility was that the three shots had come so quickly that they sounded like only a single loud noise. But the jury never got to hear this explanation because the trial court had disallowed testimony by Ms. Shadid and Ms. Gisler. The Oklahoma Court of Criminal Appeals acknowledged that the trial court had erred in excluding this testimony. *See* p. 10, above.

Would the jury have rejected Ms. Andrew's explanation even if the trial court had allowed Ms. Shadid and Ms. Gisler to testify? Perhaps. But

we have no way of knowing because the trial court didn't allow Ms. Andrew to counter the State's theory with the testimony of Ms. Shadid or Ms. Gisler.

* * *

The combination of trial errors rendered the trial fundamentally unfair from the start to the end. So I would reverse the denial of habeas relief on Ms. Andrew's separate claim of cumulative error. With this reversal, I would instruct the district court to grant habeas relief on Ms. Andrew's convictions.

IV. Ms. Andrew's Challenge to the Death Sentence

Even if the convictions were to remain, we should at least reverse the denial of habeas relief on Ms. Andrew's death sentence. In challenging the sentence, Ms. Andrew claimed ineffective assistance of counsel and requested an evidentiary hearing based on a plethora of factual disputes. The district court erroneously refused Ms. Andrew's request.

A. Ms. Andrew claimed ineffective assistance of counsel.

In claiming ineffective assistance, Ms. Andrew points out that she was in Mexico when the State filed the charges. Ms. Andrew knew about these charges, so she could have either turned herself in to Mexican authorities or returned to the United States.

Returning to the United States left Ms. Andrew exposed to the death penalty. On the other hand, turning herself in to the Mexican authorities

might have enabled Ms. Andrew to avoid the possibility of a death sentence. Mexico could still extradite her, but it could have conditioned extradition on Oklahoma's agreement to forgo the death penalty. Extradition Treaty, Mex.-U.S., art. 8, May 4, 1978; *see also* Bruce Zagaris & Julia Padierna Peralta, *Mexico-United States Extradition and Alternatives: From Fugitive Slaves to Drug Traffickers—150 years & Beyond from the Rio Grande's Winding Courses*, 12 Am. U. J. Int'l L. & Policy 519, 539 (1997) ("In cases of extradition, Mexico's Law on International Extradition states a preference for severe incarceration rather than the death penalty, when feasible.").

In Ms. Andrew's view, her attorney was ineffective by failing to advise her about the option to turn herself in to the Mexican authorities. If she had turned herself in while in Mexico, she could have avoided extradition as long as Oklahoma pursued the death penalty.

Ms. Andrew requested an evidentiary hearing on this claim in both the state appeals court and in federal district court. Both courts refused. In my view, the federal district court should have allowed an evidentiary hearing before resolving Ms. Andrew's claim of ineffective assistance.

B. Ms. Andrew's Sixth Amendment right to counsel had attached.

The Oklahoma Court of Criminal Appeals rejected the ineffective-assistance claim on the ground that Ms. Andrew had not shown prejudice.

Opinion Denying Petitioner's Original Application for Post-Conviction Relief and Denying Petitioner's Application for Discovery and for an Evidentiary Hearing at 3–5 (Okla. Crim. App. June 17, 2008). One judge concurred, concluding that Ms. Andrew's right to counsel had not yet attached. *Id.* (Lumpkin, P.J., concurring in result) at 1. The dissenting judge regarded this issue as unresolved and concluded that it should be considered in an evidentiary hearing. *Id.* (Chapel, J., dissenting).

The federal district court agreed with the concurring state judge, rejecting Ms. Andrew's ineffective-assistance claim on the ground that her "Sixth Amendment right to effective counsel had not yet attached" when she was in Mexico. *Andrew v. Moham*, No. CIV-08-832-R, 2015 WL 5254525, at *30 (W.D. Okla. Sept. 9, 2015). Unless the Sixth Amendment had attached, Ms. Andrew could not base her claim of ineffective assistance on the attorney's error. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991). In my view, the district court erred in concluding that the Sixth Amendment right had not attached when Ms. Andrew was in Mexico.[11]

The Sixth Amendment right to counsel attaches "only at or after the time that adversary judicial proceedings have been initiated against" a

[11] The majority in the state appellate court did not decide whether the Sixth Amendment right had attached. So we conduct de novo review of the district court's decision. *See Hooks v. Workman*, 606 F.3d 715, 728 (10th Cir. 2010).

defendant. *Kirby v. Illinois*, 406 U.S. 682, 688 (1972) (plurality opinion); *see United States v. Gouveia*, 467 U.S. 180, 189 (1984). Under *Kirby v. Illinois*, the initiation of "adversary judicial criminal proceedings" can be manifested through a "formal charge, preliminary hearing, indictment, information, or arraignment." 406 U.S. at 689; *see Moran v. Burbine*, 475 U.S. 412, 431 (1986) (noting that the Sixth Amendment right to counsel attaches at "the initiation of formal charges," such as an indictment).

Kirby settles the issue because Oklahoma filed an information charging Ms. Andrew with the murder before the allegedly deficient performance by her attorney. The filing of the information marked the start of "adversary judicial proceedings," triggering the right to counsel.

In response, the State relies on *Rothgery v. Gillespie County*, 554 U.S. 191 (2008). One sentence in *Rothgery* states that "a criminal defendant's initial appearance before a judicial officer . . . marks the start of adversary judicial proceedings." 554 U.S. at 213. The State used that sentence from *Rothgery* to argue that Ms. Andrew's right had not attached because she did not appear before a judicial officer until returning to the United States.

But the State misreads *Rothgery*. That opinion did not

- say that the initial appearance is the *only* way to mark the start of adversary judicial proceedings or
- overrule *Kirby*.

Instead, *Rothgery* tracks *Kirby* and repeatedly relies on it.

The sentence appears in *Rothgery* because the defendant had not faced a formal charge, indictment, information, or arraignment before his first appearance in front of a judicial officer. *Id.* at 195. The police had taken Mr. Rothgery to a magistrate judge on a charge involving unlawful possession of a firearm. *Id*. The *Rothgery* Court had no reason to mention the other ways to initiate adversary proceedings because the defendant's appearance before the magistrate judge had triggered the Sixth Amendment. Indeed, the Court noted that the right attaches "whether the machinery of prosecution was turned on by the local police or the state attorney general." *Id*. at 208. In *Rothgery*, the "machinery of prosecution" had started when authorities brought the defendant to a magistrate judge.

For Ms. Andrew, the machinery of prosecution started when Oklahoma prosecutors filed the information; this filing triggered her Sixth Amendment right to effective assistance of counsel. *See United States v. Williston*, 862 F.3d 1023, 1033–34 (10th Cir. 2017) (stating that the Sixth Amendment's right to counsel attaches upon the start of adversarial proceedings, which is itself "triggered by a formal charging event, such as an . . . information").[12]

[12] The majority also suggests that the Sixth Amendment might not have applied because the prosecution had not developed to a critical stage. Maj. Op. at 72. But the State doesn't make this argument on appeal, and I would

C. The Oklahoma Court of Criminal Appeals unreasonably applied *Strickland*.

The state appellate court rejected Ms. Andrew's claim of ineffective assistance of counsel based on a lack of prejudice. Opinion Denying Petitioner's Original Application for Post-Conviction Relief and Denying Petitioner's Application for Discovery and for an Evidentiary Hearing at 3–5 (Okla. Crim. App. June 17, 2008). In rejecting the claim, the court regarded two of Ms. Andrew's assumptions as debatable:

1. that Mexican officials would have refused to extradite Ms. Andrew unless Oklahoma prosecutors declined to seek the death penalty and

2. that Oklahoma prosecutors would have agreed to forgo the death penalty.

The Oklahoma Court of Criminal Appeals pointed out that the language in an existing extradition treaty had allowed discretion:

> [The treaty] contains the discretionary phrase "may be refused." Mexico is under no obligation to refuse extradition, and without any specific statement from the Mexican authorities saying they would have refused to extradite Andrew, she cannot show a

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address only the arguments that the State presents. *See United States v. Woodard*, 5 F.4th 1148, 1154–55 (10th Cir. 2021) (declining to sua sponte consider an argument for affirmance because we rely on the parties to frame the issues); *United States v. Chavez*, 976 F.3d 1178, 1203 n.17 (10th Cir. 2020) (stating that we don't typically "craft[] arguments for affirmance completely *sua sponte* and, more specifically, without the benefit of the parties' adversarial exchange").

> prejudicial result which is necessary to any ineffective assistance of counsel claim.[13]

Id. at 4.

Ms. Andrew argues that the state appellate court unreasonably applied Supreme Court precedent by rejecting Ms. Andrew's two assumptions. To assess this argument, we must confine ourselves to the state-court record. *See Cullen v Pinholster*, 563 U.S. 170, 181–82 (2011); *Milton v. Miller*, 744 F.3d 660, 673 (10th Cir. 2011).

We consider not only the record but also the AEDPA, which bars habeas relief unless the state appellate court unreasonably applied Supreme Court precedent. *See* Part II, above. The applicable precedent here is *Strickland v. Washington*, where the Supreme Court held that the Sixth Amendment is violated when an attorney creates prejudice to a defendant through deficient legal representation. 466 U.S. 668, 687–96 (1984).

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[13] At the time, a U.S.-Mexican treaty provided:

> When the offense for which extradition is punishable by death under the laws of the requesting Party and the laws of the requested Party do not permit such punishment for that offense, extradition may be refused unless the requesting Party furnishes such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

Extradition Treaty, Mex.-U.S., art. 8, May 4, 1978.

Under *Strickland*, legal representation is deficient when an attorney's performance falls below an "objective standard of reasonableness." *Id*. at 688. The deficiency is prejudicial if a reasonable probability exists that the outcome was affected by the deficiency. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* But "[t]he result of a proceeding can be rendered unreliable . . . even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.*

In the Oklahoma Court of Criminal Appeals, Ms. Andrew argued that

- she would have turned herself in to authorities in Mexico to avoid a possible death sentence,
- Mexico had the right to refuse extradition when the requesting jurisdiction intended to pursue the death penalty, and
- Mexico would have exercised this right.

In response, the State pointed to "uncertainties attendant to the extradition process." Response to Petitioner's Original Application for Post-Conviction Relief at 13.

The State's reliance on uncertainties entailed an unreasonable misapplication of *Strickland*'s standard of a reasonable probability. A reasonable probability doesn't require the elimination of contrary possibilities. *See Mosley v. Atchison*, 689 F.3d 838, 852 (7th Cir. 2012) (concluding that "[a] theoretical possibility d[id] not defeat [the

petitioner's] showing of prejudice under *Strickland"*). So Ms. Andrew could show prejudice without disproving every possibility theorized by the State.

Relying on uncertainty without any evidentiary basis, the state appellate court surmised that Mexico might have extradited Ms. Andrew without requiring Oklahoma to forgo the death penalty. The state court unreasonably relied on this surmise in the face of Ms. Andrew's undisputed evidence of Mexican policy on extradition in capital cases. *See Allen v. Stephan*, 42 F.4th 223, 249–52 (4th Cir. 2022) (concluding that the state court acted unreasonably under the AEDPA by disregarding the petitioner's affidavit and the lack of any contrary evidence), *cert. pet. filed* (U.S. Nov. 23, 2022) (No. 22-490). Mexico's policy was based on judicial and statutory prohibitions against extradition of an individual facing a possible death sentence.

The judicial prohibition had emerged weeks before Ms. Andrew went to Mexico, when the Mexican Supreme Court had "issued a ruling that declared unconstitutional the extradition of an accused into the United States for any capital offense." Speedy Rice & Renée Luke, *U.S. Courts, the Death Penalty, and the Doctrine of Specialty: Enforcement in the Heart of Darkness*, 42 Santa Clara L. Rev. 1061, 1095 (2002); *see* Pleno de la Suprema Corte de Justicia de la Nacion, Semanario Judicial de la Federación y su Gaceta, Novena Epoca, tomo, XIV, Octubre de 2001, Tesis

P./J 125/2001 at 227. This ruling prevented Mexican authorities from allowing any extradition of U.S. citizens, like Ms. Andrew, who faced the possibility of the death penalty. *See* Richard J. Wilson, *International Law Issues in Death Penalty Defense*, 31 Hofstra L. Rev. 1195, 1201 (2003) ("Mexico not only refuses persons facing the death penalty extradition to the U.S., but also any accused facing a potential life sentence.").

For capital defendants, extradition was prohibited not only by the Mexican Supreme Court's decision but also under a Mexican law that required the requesting state to forgo the death penalty: "In dealing with an extradition request, the Mexican state shall require the requesting state, whenever the suspect's crime is punishable by death or any of the punishments enumerated in Article 22 of the Mexican constitution, to commute a prison sentence or substitute a punishment that is less severe." Francisco J. Ortega, *De Facto Life Imprisonment in Mexico and the United States–Mexico Extradition Treaty of 1978*, 24 Wis. Int'l L. J. 1017, 1036 n.104 (2007) (translating Ley de Extradición Internacional, as amended, Artículo 10 § 5, Diario Oficial de la Federación [D.O.], 18 de Mayo de 1999 (Mex.), available at http://www.diputados.gob.mx/LeyesBiblio/pdf/36.pdf [http://web.archive.org/web/20170622021847/http://www.diputados.gob.mx/LeyesBiblio/pdf/36.pdf]).

Given these judicial and statutory restrictions, Mexico could not and did not extradite anyone to the United States in 2002 for capital prosecutions. Ms. Andrew proved this fact in an affidavit from an attorney who had represented the Mexican government in extradition cases:

> The Government of Mexico will not extradite a person, regardless of their citizenship, to the United States, either to a state government or the federal government, if that person could then be sentenced to death and executed. In numerous cases, the Government of Mexico has successfully persuaded a prosecuting authority in the United States to drop death penalty attempts . . . .
>
> Had Brenda Andrew been arrested by Mexican authorities in Mexico, or turned herself in to Mexican authorities at any time during her ninety-five day stay in Mexico, she would have been detained in a Mexican penal institution pending extradition to Oklahoma. Ms. Andrew would not have been extradited to Oklahoma unless competent state authorities removed the possibility of capital punishment if and when she was convicted of the crimes for which extradition was sought.
>
> This has been the policy of the Mexican government for many years. It was the policy when Robert Andrew was killed; it was the policy when Brenda Andrew entered Mexico on or about November 26, 2001; and it was the policy when Brenda Andrew returned to the United States in February 2002.

State Post-Conviction, Petitioner's Application for Post-Conviction Relief-Death Penalty at 48.

Scholars made the same point in 2002, when Ms. Andrew had the chance to turn herself in to Mexican authorities:

> The Mexican Constitution states that every individual is capable of rehabilitation. Hence, no defendant extradited from Mexico to the United States can receive a sentence greater than forty years (sixty years for extreme cases), and certainly no death penalty.

> In just two months, the ruling "has stopped the extradition of more than 70 high-profile defendants." The consequence of this ruling is that prosecutors in the United States are forced to either reduce the sentences extradited defendants receive, or not prosecute the defendants at all.

Speedy Rice & Renee Luke, *U.S. Courts, the Death Penalty, and the Doctrine of Specialty: Enforcement in the Heart of Darkness*, 42 Santa Clara L. Rev. 1061, 1095 (2002) (quoting Tim Weiner, Extraditions Are Limited by a Ruling In Mexico, N.Y. Times, Jan. 20, 2002, at A9)) (footnotes omitted); *see* Mex. Const. art. 22, *translated in* William Schabas, *The Abolition of the Death Penalty in International Law* 250 n.4 (1993) (quoting the Mexican Constitution's limit on the death penalty). The Oklahoma Court of Criminal Appeals didn't address the *impossibility* of extraditing Ms. Andrew in the face of the judicial and statutory prohibitions against extradition of U.S. citizens facing capital charges.

The State contests these prohibitions with two examples of Mexico returning suspects to the United States without extraditing them. These two examples come from a Louisiana case (*State v. Sanders*, 648 So. 2d 1272 (La. 1994)) and press releases regarding Mexico's return of a suspect to Texas. Response to Petitioner's Original Application for Post-Conviction Relief at 10–13. But neither example casts doubt on Ms. Andrew's evidence. Her evidence had come from an attorney who represented the Mexican government. This attorney attested to Mexico's policy on extradition in early 2002, when Ms. Andrew had been in Mexico. In

contrast, the State's examples addressed two isolated incidents at other times.

In the State's first example, the defendant had been charged in Louisiana in 1990—more than a decade before the Mexican Supreme Court had banned extradition for capital crimes. *Sanders*, 648 So. 2d at 1276, 1283. The treatment of the *Sanders* defendant doesn't address Mexico's policy during the pertinent period.

The State's second example involved a deportation, not an extradition. When a U.S. citizen violates Mexico's immigration law, the individual can be deported to the United States without the need for extradition. *See* Yvonne M. Dutton, *U.S.-Mexico Extradition & Cross-Border Prosecution* 6 (Trans-Border Inst. 2004) ("[T]he United States may seek deportation only of non-nationals of Mexico and those who have otherwise violated some immigration law of Mexico.").

These circumstances existed for the State's second example. In that example, Mexico was able to deport a U.S. citizen because he had been arrested for violating Mexican laws involving possession of firearms, ammunition, and narcotics. Response to Petitioner's Original Application for Post-Conviction Relief, Exh. B. This example tells us little. Mexico could deport Ms. Andrew only on specific grounds. *See The Immigration Law of Mexico: Statute Regulations and Procedures Manual* III-10 (Nov.

2003). And no one has suggested the existence of grounds to deport Ms. Andrew.[14]

The State's two isolated examples not only failed to address Ms. Andrew's undisputed evidence of Mexican policy but also lacked admissible evidence. For the first example, the State relied on the facts of a Louisiana case. That court based its decision on the record there. Our record is different and contains no mention of the incident from the Louisiana case. And the Oklahoma Court of Criminal Appeals couldn't and didn't take judicial notice of the facts summarized in another case. *See McIvor v. Credit Control Servs., Inc.*, 773 F.3d 909, 914 (8th Cir. 2014) ("Judicial notice of another court's opinion takes notice of the 'existence of the opinion, which is not subject to reasonable dispute over its authenticity,' but not of the facts summarized in the opinion." (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001))).

The State's second example came from a press release and newspaper article, which constituted inadmissible hearsay. *See Turner v. State*, 505 P.2d 516, 518 (Okla. Crim. App. 1973) (Bliss, P.J., specially concurring) (concluding that a newspaper article was "pure hearsay" and therefore

[14] The majority mistakenly says that I have overlooked the state appellate court's reliance on the possibility of deportation. Maj. Op. at 70 n.43. To the contrary, neither the state appellate court nor the majority has explained how Mexico could have deported Ms. Andrew without any grounds under Mexican immigration law.

"incompetent"); *Martinez v. State*, 992 P.2d 426, 431 (Okla. Crim. App. 1999) (disallowing the use of hearsay in post-conviction proceedings).

The state court thus had undisputed evidence that Mexico's policy in 2002, consistent with the decision of the Mexican Supreme Court, prohibited extradition unless Oklahoma were to forgo the death penalty.

The majority questions Ms. Andrew's willingness to turn herself in to Mexican authorities. In state court, Ms. Andrew said in an affidavit that she would have surrendered to Mexican officials if she had been advised of a chance to avoid a death sentence:

> Had I been advised by [my attorney] to surrender to Mexican law enforcement officials or other Mexican government authorities and not cross back into the United States, and that by doing so I would be able to prevent the State of Oklahoma from seeking a death sentence against me, of course I would have done so.

Id. at 53.

The majority questions the credibility of Ms. Andrew's affidavit, calling it "nothing more than a self-serving attestation." Maj. Op. at 76. But affidavits don't become inherently incredible just because they're "self-serving." *See Martin v. United States*, 889 F.3d 827, 833 (6th Cir. 2018) (stating that when a district court considers whether to grant an evidentiary hearing, the court shouldn't regard "a 'self-serving' affidavit" as "inherently incredible"); *Sawyer v. United States*, 874 F.3d 276, 279 (7th Cir. 2017) (stating that when considering whether to grant an evidentiary hearing, district courts may not discount a petitioner's

declarations simply because they may be "self-serving"). In my view, the majority's skepticism of Ms. Andrew's affidavit—without any contrary evidence—shouldn't prevent an evidentiary hearing.

Even if we could decide the credibility of Ms. Andrew's affidavit, why is it difficult to believe that she would have turned herself in to avoid a possible death sentence? Everyone agrees that Ms. Andrew knew that Oklahoma had charged her with first-degree murder. Under Oklahoma law, first-degree murder required either imprisonment or the death penalty. Okla. Stat. tit. 21 § 701.9(A). The Mexican Supreme Court had just prohibited extradition when the prosecuting state sought the death penalty, and Mexican law forbade extradition to jurisdictions seeking the death penalty. *See* pp. 43–46, above. So if Ms. Andrew had turned herself in to Mexican authorities, she could have avoided extradition to Oklahoma unless it were to drop the death penalty.

Her only other option was to return to the United States, where she knew that she would be arrested and face the possibility of a death sentence or life imprisonment.[15] Given Ms. Andrew's obvious benefit from

[15] The majority responds that Oklahoma could have waited for Ms. Andrew to run out of cash and return to the United States. Maj. Op. at 70 n.43. The State doesn't make this argument here, and the majority's response is based on a misunderstanding of Ms. Andrew's claim. She claims that she should have turned herself in to Mexican authorities, not remain on the lam in Mexico. Ms. Andrew couldn't run out of cash and return to the United States if she had turned herself in to Mexican

turning herself in to Mexican authorities, I wouldn't so readily assume—as the majority does—that she would have bypassed that benefit and returned to face the possibility of a death sentence. At a minimum, Ms. Andrew's uncontested affidavit should have entitled her to an evidentiary hearing.[16]

The Oklahoma Court of Criminal Appeals nonetheless rejected Ms. Andrew's claim, reasoning that it had been based on debatable assumptions on what Mexico and Ms. Andrew would have done. But Ms. Andrew based her contentions on undisputed evidence. Given the lack of any contrary evidence, I would regard the state appeals court's application of *Strickland* as unsupportable and unreasonable. *See Mosley v. Atchison*, 689 F.3d 838, 848 (7th Cir. 2012) (concluding that the state court's rejection of a claim of ineffective assistance of counsel entailed an unreasonable application of *Strickland* because the court had disregarded the petitioner's uncontroverted affidavits); *Gray v. Zook*, 806 F.3d 783, 791 (4th Cir. 2015) ("When a state court apparently ignores a petitioner's

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authorities. As the majority points out elsewhere, Ms. Andrew would have been detained in Mexico to await extradition. Maj. Op. at 76 n.48; *see* State Post-Conviction, Petitioner's Application for Post-Conviction Relief-Death Penalty at 48; *see also* p. 45, above (quoting an affidavit by an attorney who had represented the Mexican government in extradition cases).

[16] The majority also questions whether Ms. Andrew would have left her children with Mr. Pavatt. Maj. Op. at 76. But the State has never argued that Ms. Andrew would have declined to turn herself in to Mexican authorities to avoid leaving her children with Mr. Pavatt.

properly presented evidence, its fact-finding process may lead to unreasonable determinations of fact.").

D. Ms. Andrew is entitled to an evidentiary hearing.

In the Oklahoma Court of Criminal Appeals and in federal district court, Ms. Andrew sought an evidentiary hearing on her claim of ineffective assistance of counsel. Both courts denied the requests. The Oklahoma court concluded that Ms. Andrew couldn't establish prejudice, and the federal district court concluded that her right to counsel hadn't attached when she was in Mexico. *See* Rec. vol. 1, at 1191–94, 1239–40.

We'd ordinarily review that decision for an abuse of discretion. *See* Maj. Op. at 76. But the court exercised its discretion based on a legal error, which would necessarily constitute an abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.").

The district court's legal error prevented examination of Ms. Andrew's allegations of ineffective assistance of counsel. In my view, those allegations merited an evidentiary hearing.

Under federal law, an evidentiary hearing is available only when the petitioner sought to "develop the factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2). We thus consider whether Ms. Andrew

- showed diligence "in developing the factual basis for [her] claim of ineffective assistance in state court" and
- asserted a factual basis that, "if true, would entitle [her] to habeas relief."

Boyle v. McKune, 544 F.3d 1132, 1135 (10th Cir. 2008).

The first requirement is satisfied by Ms. Andrew's unsuccessful request for an evidentiary hearing in state court. *See id.* at 1136 ("The petitioner can prove [her] diligence by showing [she] 'could reasonably have believed' [her] request for an evidentiary hearing in state court met the requirements for such a hearing under then-existing state law." (quoting *Barkell v. Crouse*, 468 F.3d 684, 695 (10th Cir. 2006))).

The second requirement is satisfied by the evidence presented in state court. The State has questioned Ms. Andrew's account with factual arguments, but a court could resolve the factual issues only after allowing both sides to present their evidence. Ms. Andrew has not had that opportunity; and we have unresolved factual issues about what Ms. Andrew would have done, what her attorneys knew or should have known about Mexico's extradition treaty, what Mexico would or wouldn't have done if Ms. Andrew had surrendered to the Mexican authorities, and what Oklahoma would have done if Mexico had refused to extradite Ms. Andrew to face the death penalty.

If the evidentiary hearing would yield findings favoring Ms. Andrew, she could obtain habeas relief for ineffective assistance of counsel. For

example, her attorney's failure to advise her of the advantages of surrendering to the Mexican authorities could constitute deficient performance if the attorney should have known of these advantages and the value of presenting these options to Ms. Andrew. *See Harrington v. Richter*, 562 U.S. 86, 104 (2011). That deficiency could have proved prejudicial if Ms. Andrew would have stayed in Mexican custody or otherwise avoided extradition until Oklahoma prosecutors agreed to forgo the death penalty. Ms. Andrew's undisputed evidence entitled her to an evidentiary hearing on these factual questions.

* * *

In summary, I would remand the claim of ineffective assistance of counsel for the district court to conduct an evidentiary hearing. At an evidentiary hearing, the parties should be able to present evidence on (1) whether defense counsel had advised Ms. Andrew of her right to turn herself in to Mexican authorities and (2) whether Ms. Andrew could have avoided the death penalty by turning herself in to Mexican authorities. We lack enough information to resolve these factual questions. So the district court should reconsider this claim after conducting an evidentiary hearing.

V. Conclusion

I would reverse the denial of habeas relief on the convictions. In my view, the combination of errors deprived Ms. Andrew of a fundamentally fair trial.

Even if the trial had been fair, however, I would reverse as to the death sentence. Many unresolved factual issues bear on the reasonableness and impact of defense counsel's failure to advise Ms. Andrew about the potential opportunity to avoid a death sentence. The district court resolved these factual issues without allowing an evidentiary hearing. In my view, the denial of an evidentiary hearing compels reversal as to the death sentence.

Appendix E: Court of Criminal Appeals Post-Conviction Decision (June 17, 2008)

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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BRENDA EVERS ANDREW,	)	
	)	
Petitioner,	)	NOT FOR PUBLICATION
	)	
	)	No. PCD 2005-176
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUN 17 2008
MICHAEL S. RICHIE
CLERK

OPINION DENYING PETITIONER'S ORIGINAL APPLICATION FOR POST-CONVICTION RELIEF AND DENYING PETITONER'S APPLICATION FOR DISCOVERY AND FOR AN EVIDENTIARY HEARING

Petitioner, Brenda Evers Andrew, was convicted of First-Degree (malice) Murder in violation of 21 O.S.2001, § 701.7(A), and Conspiracy to Commit First Degree Murder in violation of 21 O.S.2001, § 421, after a jury trial before the Honorable Susan W. Bragg, District Judge, in Oklahoma County District Court Case No. CF-2001-6189.[1] The jury set punishment at death for first degree (malice) murder after finding the existence of two aggravating circumstances: the murder was for remuneration and the murder was especially heinous, atrocious, or cruel. *See* 21 O.S.2001, § 701.12(3), and (4). The jury set punishment at ten (10) years and a $5000.00 fine on the conspiracy count. Judge Bragg formally sentenced Andrew in accordance with the jury verdict on September 22, 2004.

[1] Andrew was charged conjointly with James Dwight Pavatt. The two defendants were severed for trial. Pavatt was convicted of both counts, received the death penalty, and appealed his Judgment and Sentence, which was affirmed in *Pavatt v. State*, 2007 OK CR 19, --- P.3d --- .

This Court affirmed Andrew's convictions and sentences in *Andrew v. State*, 2007 OK CR 23, 164 P.3d 176, *rehearing denied with order correcting Opinion*, 2007 OK CR 36, 168 P.3d 1150. Andrew is now before this Court with her original application for post-conviction relief. We ordered that the State respond to the application, and the State filed its response on March 14, 2008.

Pursuant to 22 O.S.Supp.2007, § 1089 (C), the only issues that may be raised in an application for post-conviction relief are those that were not and could not have been raised in a direct appeal; and support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent. On review, this Court must determine: "(1) whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist, (2) whether the applicant's grounds were or could have been previously raised, and (3) whether relief may be granted . . . ." 22 O.S.Supp.2007, § 1089(D). We will not treat the post-conviction process as a second appeal, and will apply the doctrines of *res judicata* and waiver where a claim either was, or could have been, raised in the petitioner's direct appeal. *Davis v. State*, 2005 OK CR 21, ¶ 2, 123 P.3d 243, 244; *Hooks v. State*, 2001 OK CR 7, ¶ 2, 22 P.3d 231, 232. In this Original Application for Post-Conviction Relief, Andrew raises three grounds for relief.

In proposition one, Andrew claims that counsel was ineffective because counsel did not have knowledge of Mexico's treaty with the United States dealing with the extradition of individuals being charged for capital offenses. In

this proposition, Andrew must show that trial counsel's failure amounted to deficient performance which resulted in a prejudice that deprived her of a fair trial with a reliable result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). A brief description of this treaty is necessary for our review.

The treaty, known as the "Extradition Treaty" which was signed by President Jimmy Carter and ratified by the Senate on November 30, 1979, and finally approved by President Carter on December 13 1979, is found at 31 UST. 5059, T.I.A.S. No. 9656. The treaty reads, in relevant part,

> When the offense for which extradition is requested is punishable by death under the laws of the requesting party and the laws of the requested party do not permit such punishment for that offense, extradition may be refused unless the requesting party furnishes such assurances as the requested party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

According to Andrew, capital punishment is not permitted in Mexico for first degree murder. Therefore, she concludes that, had her attorney known of this treaty and told her to turn herself over to the Mexican authorities; she could have availed herself of the treaty's protections and would not have been subjected to the death penalty.[2]

Andrew makes two assumptions which are necessary to her argument. Her first assumption is that Mexico would have invoked the provisions of the treaty had Oklahoma authorities refused to agree to not seek the death

[2] Appellant also argues that she would not have faced the punishment of life without parole, because Mexico does not recognize imprisonment for life without the possibility of parole for any crime.

penalty. In reading this treaty we find that the language of the treaty is not mandatory. The language contains the discretionary phrase "may be refused." Mexico is under no obligation to refuse extradition, and without any specific statement from the Mexican authorities saying they would have refused to extradite Andrew, she cannot show a prejudicial result which is necessary to any ineffective assistance of counsel claim.

Her second assumption is that Oklahoma would have sought extradition and would have agreed to the terms of the treaty before extraditing Andrew to Oklahoma. However, Oklahoma authorities could have simply remained patient and not sought extradition, planning instead on some other means of rendition.[3]

Had Andrew surrendered to Mexican authorities, there is no guarantee that Oklahoma would have sought extradition, because of the possible agreement they would have to make with Mexico. The result would be that she would both be released from Mexican custody and be faced with the possibility of life on the lamb in Mexico, or the Mexican authorities could simply deport her to the United States as an illegal alien. With deportation, there is no triggering of the extradition treaty. Again, her speculation does not provide evidence that she suffered a prejudicial result from counsel's conduct.

[3] For example, Oklahoma could have simply waited on Andrew and Pavatt to run out of money and attempt to return to the United States, where their families resided. It is interesting to note that this is exactly what happened and the pair were apprehended by United States border agents when they tried to enter the United States.

What Andrew is asking this Court to do is to give murder defendants *carte blanch* authority to flee to Mexico, turn themselves over to the Mexican authorities, and claim immunity from the penalties of death and life without parole. Public policy aside, the discretionary language of the treaty would allow Mexico to curtail this type of behavior by extraditing those seeking to avoid justice. Andrew has neither made a compelling argument nor provided sufficient evidence that she would have escaped the death penalty had her attorney advised her to turn herself in to the Mexican authorities. Therefore, regardless of counsel's knowledge of the treaty, Andrew cannot show that she was prejudiced by counsel's conduct.[4]

In proposition three, Andrew claims that a new rule of law announced after her direct appeal brief was filed renders her sentence unconstitutionally unreliable and a violation of due process of law. The new rule of law she refers to is our pronouncement in *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273, that juries should be informed that a person convicted of an enumerated crime would be required to serve eighty-five percent of their sentence before becoming eligible for parole. *See* 21 O.S.2001, §§ 12.1 & 13.1. Andrew also claims that, should this Court determine that this issue was waived on direct appeal; direct appeal counsel was ineffective for failing to raise it in the original brief or in a

[4] Andrew's second proposition merely claims that direct appeal counsel was ineffective for failing to raise this issue on direct appeal, as we have disposed of this issue on the merits, we need not discuss this issue here.

supplemental brief, as required by the Court's rules.[5] See Rule 3.4(F), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007). Thus, in order to prevail on this issue, Andrew must show ineffective assistance of appellate counsel. This she cannot do.

The jury had three sentencing options: death, life without the possibility of parole, and life with the possibility of parole. There is no indication that the jury was deciding between life and life without parole. Andrew cannot show that the outcome would have been different had an 85% instruction been given. *See Cole v. State*, 2007 OK CR 27, ¶ 65, fn. 15, 164 P.3d 1089. Thus the second prong of *Strickland* cannot be met.

CONCLUSION

After carefully reviewing Andrew's application for post-conviction relief, we conclude that Andrew is not entitled to relief. Accordingly, Andrew's Original Application for Post-Conviction Relief is **DENIED**, and her applications for an evidentiary hearing and discovery are also **DENIED**.

POST-CONVICTION COUNSEL

STEVEN M. PRESSON
PRESSON LAW OFFICE
P.O. BOX 5392
NORMAN, OKLAHOMA 73070
ATTORNEY FOR PETITIONER

W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA

[5] No motion to supplement was filed by direct appeal counsel within thirty (30) days from the date *Anderson* was first published as required by this Court's rules.

SETH S. BRANHAM
ASSISTANT ATTORNEY GENERAL
313 NORTHEAST 21st STREET
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR THE STATE

OPINION BY: LEWIS, J.

LUMPKIN, P.J.: Concur in Results
C. JOHNSON, V.P.J.: Concur
CHAPEL, J.: Dissent
A. JOHNSON, J.: Concur in Results

LUMPKIN, PRESIDING JUDGE: CONCUR IN RESULTS

I concur in the results reached by the Court in this case, however, I disagree with the treatment of the ineffective assistance of counsel claim in Proposition one.

The opinion makes the mistake of assuming the Sixth Amendment right to counsel applies to the issue of whether to surrender to Mexican authorities. First, the Petitioner fails to cite any case that applies the Sixth Amendment to extradition proceedings. Petitioner's brief relies on general references to the analysis of ineffective assistance of counsel claims based on *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 2d 674 (1984), and makes strong philosophical arguments that the right should apply to advice given regarding extradition options. However, as the State responds, several Federal Circuit courts have held extradition proceedings are not "criminal proceedings" within the meaning of the Sixth Amendment and therefore the right to effective counsel does not extend to those proceedings; citing *United States v. Yousef*, 327 F.3d 56, 142 n.66 (2nd Cir. 2003); *Desilva v. Dileornandi*, 181 F.3d 865, 868 (7th Cir. 1999); and *Judd v. Vose*, 813 F.2d 494, 497 (1st Cir. 1987). And, the Sixth Amendment itself "clearly applies only to domestic criminal proceedings". *United States v. Balsys*, 524 U.S. 666, 672, 118 S.Ct. 2218, 2222, 141 L.Ed.2d 575 (1998).

Second, the State also makes a strong point that "*Strickland* and its progeny" apply to the defense of criminal charges in the adversarial setting of

trial. State's brief at Pg. 15, citing to *United States v. Cronic*, 466 U.S. 648, 655, 104 S.Ct. 2039, 2044, 80 L.Ed 2d 657 (1984). So, if the *Strickland* requirements for effective assistance of counsel " 'is to make the adversarial testing process work in the particular case', *Strickland*, 466 U.S. at 690, 104 S.Ct at 2066, and that 'the purpose of the effective assistance guarantee of the Sixth Amendment . . . is simply to ensure that criminal defendants receive a fair trial'. *Id.*, 466 U.S. at 689, 104 S.Ct. at 2065", Respondent brief at Pg. 16, we must ask how that guarantee extends to a defendant on the run from the law who happens to be in a foreign country. The Petitioner fails to provide any authority that it does. On this basis alone, we should deny the application for post-conviction relief and not address the issue on the merits, assuming that somehow the right to effective assistance of counsel exists.

Finally, ineffective assistance of counsel claims have profligated over the years to where the issue has faded from guilt or innocence at trial to holding attorneys to unforeseeable standards of competence that often do not impact the fact finders decision. This appears to be one of those cases because the claim boils down to an allegation of ineffective assistance of counsel because counsel, while Petitioner was on the run, did not advise her how to subvert the laws of the State of Oklahoma by surrendering herself to Mexican authorities who would extort the State not to punish her according to the law if Mexico would release her to authorities. I do not believe that action incorporates the "core purpose" of the Sixth Amendment right to counsel set out in *Strickland* and does not invoke Sixth Amendment rights in this case.

CHAPEL, J., DISSENTING:

I agree with that portion of the majority opinion which resolves Proposition III. Given the current state of the record, I cannot, however, agree with the resolution of Propositions I and II. Andrew was in close contact with counsel during the months she spent in Mexico. She claims counsel should have told her that, if she turned herself in to the Mexican government, she might receive the benefit of Mexico's extradition policy with the United States. Under this policy Mexico may refuse to extradite a prisoner unless it is first guaranteed that person will not be subject to death penalty proceedings in the United States. It seems to me at least plausible that, where the alternatives are life and death, effective counsel might be required to give this advice. I believe we should explore this issue further.

The State's brief does a good job of setting forth some of the ethical problems raised by these propositions, and of its position with respect to when the right to effective counsel attaches in a criminal case. Is a fugitive suspect entitled to effective assistance of counsel? Andrew had been charged with the crime of murder and a warrant was issued for her arrest. Did she have a right to effective assistance of counsel during the international extradition proceedings? Does that calculation change when the issue at stake is whether a potential defendant will be eligible for capital punishment? In a capital punishment case, is effective assistance of counsel confined to issues of guilt, innocence, and appropriate application of the death penalty to that defendant? If an accused capital fugitive has counsel before and during extradition

proceedings, as Andrew did, does that counsel have no obligation to act effectively? Counsel is required by Oklahoma's professional rules of conduct both to zealously represent his client and to avoid conduct prejudicial to the administration of justice. Do these separate requirements create an ethical conflict under these circumstances? Is counsel ethically required to advise a client as Andrew suggests, prohibited from giving such advice, or legitimately uncertain of the correct course of action based on different ethical requirements?

The State also describes and attaches documents showing that Mexico recently has extradited to the United States persons accused of capital offenses. However, recent news reports have indicated in at least one case (the Marine accused of killing his pregnant girlfriend, a fellow Marine in North Carolina) that Mexico extracted an agreement before extradition that the death penalty would not be pursued in a high profile capital offense. It appears that there is no way to determine what action Mexico will take in a particular situation without asking representatives of that government. That is what Andrew asks this Court to do.

The Opinion in this case suggests that Andrew asks this Court to speculate regarding both the possible outcome had she been told about Mexico's policies, and the consequences if we agree with her argument. I disagree. First, Andrew is asking this Court for an evidentiary hearing during which the factual questions raised by the Opinion, along with other questions, would be resolved. It is the Court which engages in speculation when it

assumes that Mexico might not have refused extradition, Oklahoma might not have sought extradition, or that Andrew might have been deported from Mexico. The majority worries that, if we require counsel to inform clients under these circumstances of Mexico's extradition policies, we encourage murder defendants to flee to Mexico. There is nothing before us to support this fear. In fact, the majority itself dispels it by recognizing that nothing requires Mexico to refuse extradition and Mexico might well choose to grant extradition to non-Mexican citizens who flee to Mexico merely to avoid justice.

I am of the opinion that we need a better record to resolve issues presented by these propositions and I would, therefore, remand this matter for an evidentiary hearing. There are several waiver and procedural bars that might be applied to resolve these propositions, but I do not think we should take that approach. Nor have I concluded that these propositions are "dead bang winners." I think we need more information. An evidentiary hearing to develop the record as to what Mexico's policy was at the time Andrew was in Mexico, what her trial counsel and appellate counsel did or didn't do, and why, with respect to the extradition treaty, along with briefs fully developing the legal and ethical issues would help me in deciding the issues.

Appendix F: Court of Criminal Appeals Direct Review Decision (June 21, 2007)

ORIGINAL

1050104323

2007 OK CR 23

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BRENDA EVERS ANDREW,	)	
	)	
Appellant,	)	FOR PUBLICATION
	)	
v.	)	No. D 2004-1010
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUL 2 1 2007
MICHAEL S. RICHIE
CLERK

OPINION

LEWIS, JUDGE

¶1 Appellant, Brenda Evers Andrew, was charged with First-Degree (malice) Murder in violation of 21 O.S.2001, § 701.7(A), and Conspiracy to Commit First Degree Murder in violation of 21 O.S.2001, § 421, in Oklahoma County District Court Case No. CF-2001-6189.[1] The State filed a Bill of Particulars alleging the existence of three (3) aggravating circumstances: (1) that the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration; (2) the murder was especially heinous, atrocious, or cruel; and (3) the existence of the probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society. *See* 21 O.S.2001, § 701.12(3), (4) and (7).

[1] Andrew was charged conjointly with James Dwight Pavatt. The two defendants were severed for trial. Pavatt was convicted of both counts, received the death penalty, and appealed his Judgment and Sentence, which was affirmed in *Pavatt v. State*, 2007 OK CR 19, --- P.3d --- .

¶2 A jury trial was held before the Honorable Susan W. Bragg, District Judge, in June and July 2004. The jury found Appellant guilty of both counts, and found the existence of two aggravating circumstances: the murder was for remuneration and the murder was especially heinous, atrocious, or cruel. The jury set punishment at death on the first-degree murder count and ten (10) years and a $5000.00 fine on the conspiracy count. Judge Bragg formally sentenced Appellant in accordance with the jury verdict on September 22, 2004.[2]

I. FACTS

¶3 Appellant's husband Robert ("Rob") Andrew was shot to death at their Oklahoma City home sometime around 7:00 p.m. on November 20, 2001. Appellant was also shot in the arm during this incident.

¶4 The Andrews were separated at the time and Rob Andrew was at the home to pickup the two minor children for visitation over the Thanksgiving holiday. The custom was that Appellant would bring the children out to the car and Rob would take them from there. However, on this night, Appellant asked Rob Andrew to come into the garage to light the pilot light on the furnace because it had gone out.

¶5 Appellant's version of the events from that point on was that as Rob was trying to light the furnace, two masked men entered the garage. Rob turned to face the men and was shot in the abdomen. He grabbed a bag of

[2] Andrew's appeal brief was filed on February 21, 2006 and the State's brief was filed on June 21, 2006. Andrew filed a reply brief on July 10, 2006. Oral argument was held on January 30, 2007.

aluminum cans to defend himself and was shot again. Appellant was hit during this second shot.

¶6 Undisputed facts showed that after that, Appellant called 911 and reported that her husband had been shot. Emergency personnel arrived and found Rob Andrew's body on the floor of the garage; he had suffered extensive blood loss and they were unable to revive him. Appellant had also suffered a superficial gunshot wound to her arm. The Andrew children were not, in fact, packed and ready to leave when Rob Andrew arrived; they were found in a bedroom, watching television with the volume turned up very high, oblivious to what had happened in the garage.

¶7 Appellant was taken to a local hospital for treatment. Her behavior was described by several witnesses, experienced in dealing with people in traumatic situations, as uncharacteristically calm for a woman whose husband had just been gunned down.

¶8 Rob Andrew was shot twice with a shotgun. A spent 16-gauge shotgun shell was found in the garage on top of the family van. Rob Andrew owned a 16-gauge shotgun, but had told several friends that Appellant refused to let him take it when they separated. Rob Andrew's shotgun was missing from the home. One witness testified to seeing Appellant at an area used for firearm target practice near her family's rural Garfield County home eight days before the murder and he later found several 16-gauge shotgun shells at the site.

¶9 Appellant's superficial wound was caused by a .22 caliber bullet, apparently fired at close range, which was inconsistent with her claim that she was shot at some distance. About a week before the murder, Pavatt purchased a .22 caliber handgun from a local gun shop. Janna Larson, Pavatt's daughter testified that, on the day of the murder, Pavatt borrowed her car and claimed he was going to have it serviced for her. When he returned it the morning after the murder, the car had not been serviced, but Larson found one round of .22 caliber rimfire ammunition on the floorboard. In a conversation later that day, Pavatt told Larson never to repeat that Appellant had asked him to kill Rob Andrew, and he threatened to kill Larson if she did. He also told her to throw away the .22 round she found in her car.

¶10 Police searched the home of Dean Gigstad, the Andrews' next-door neighbor, after the Gigstads reported finding suspicious things in their home. Police found evidence that someone had entered the Gigstads' attic through an opening in a bedroom closet. A spent 16 gauge shotgun shell was found on the bedroom floor, and several .22 caliber rounds were found in the attic itself. There were no signs of forced entry into the Gigstad home. Gigstad and his wife were out of town when the murder took place, but Appellant had a key to their home. The .22 caliber round found in Janna Larson's car was of the same brand as the three .22 caliber rounds found in the Gigstads' attic; the .22 caliber bullet fired at Appellant and retrieved from the Andrews' garage appeared consistent with bullets in these unfired rounds. These rounds were capable of being fired from the firearm that Pavatt purchased a few weeks

before the murder; further testing was not possible because that gun was never found. The 16 gauge shotgun shell found in the Gigstads' home was of the same brand as the 16 gauge shell found in the Andrews' garage. Ballistics comparison showed similar markings, indicating that they could have been fired from the same weapon. Whether these shells were fired from the 16-gauge shotgun Rob Andrew had left at the home was impossible to confirm because, as noted, that gun remains missing.

¶11 Within days after the shooting, before Rob Andrew's funeral, Appellant, James Pavatt and the two minor children left the State and crossed the border into Mexico. They were apprehended while attempting to re-enter the United States in late February 2002.

¶12 Appellant and Pavatt met while attending the same church. At some point they began teaching a Sunday school class together. Appellant and Pavatt began having a sexual relationship.[3] Around the same time, Pavatt, a life insurance agent, assisted Rob Andrew in setting up a life insurance policy through Prudential worth approximately $800,000. In late September 2001, Rob Andrew moved out of the family home, and Appellant initiated divorce proceedings a short time later.

¶13 Janna Larson, Pavatt's adult daughter, testified that in late October, Pavatt told her that Appellant had asked him to murder Rob Andrew. On the night of October 25-26, 2001, someone cut the brake lines on Rob Andrew's

[3] The State presented evidence that the Andrews' marriage had been strained for several years, and that Appellant had had a number of extramarital affairs.

automobile. The next morning, Pavatt persuaded his daughter to call Rob Andrew from an untraceable phone and claim that Appellant was at a hospital in Norman, Oklahoma, and needed him immediately. An unknown male also called Rob that morning and made the same plea. Rob Andrew's cell phone records showed that one call came from a pay phone in Norman (near Larson's workplace), and the other from a pay phone in south Oklahoma City. Rob Andrew discovered the tampering to his car before placing himself in any danger. He then notified the police. The next day, Appellant told Rob that she read in the newspaper that someone cut his brakes, but no media coverage of this event had occurred.

¶14 One contentious issue in the Andrews' relationship was control over the insurance policy on Rob Andrew's life. After his brake lines were cut, Rob Andrew inquired about removing Appellant as beneficiary of his life insurance policy. Rob Andrew spoke with Pavatt's supervisor about changing the beneficiary. He also related his suspicions that Pavatt and Appellant were trying to kill him. At trial, the State presented evidence that in the months preceding the murder, Appellant and Pavatt actually attempted to transfer ownership of the insurance policy to Appellant without Rob Andrew's knowledge, by forging his signature to a change-of-ownership form and backdating it to March 2001.[4]

[4] According to one witness, Appellant had told her husband that she could sign his name "better than he could." Among other evidence, the State presented recordings of telephone conversations from Appellant and Pavatt to the insurance company's home office, inquiring about the status of the policy and attempting to persuade them that a legitimate ownership change had been made.

¶15 In the days following the murder, Pavatt obtained information over the Internet about Argentina, because he had heard that country had no extradition agreement with the United States. Larson also testified that after the murder, Appellant and Pavatt asked her to help them create a document, with the forged signature of Rob Andrew, granting permission for his children to travel with Appellant out of the country. Appellant also asked Larson to transfer funds from her bank account to Larson's own account, so that Larson might wire them money after they left town.

¶16 Appellant did not attend her husband's funeral, choosing instead, to go to Mexico with Pavatt and the children. Pavatt called his daughter several times from Mexico and asked her to send them money. Larson cooperated with the FBI and local authorities in trying to track down the pair.

¶17 After her apprehension, Appellant came into contact with Teresa Sullivan, who was a federal inmate at the Oklahoma County jail. Sullivan testified that Appellant told her that she and Pavatt killed her husband for the money, the kids, and each other. Appellant also told her that Pavatt shot her in the arm to make it look as if she was a victim.

¶18 Expert testimony opined that the wound to Appellant's arm was not self-inflicted, but was part of a scheme to stage the scene to make it look like she was a victim, just like her husband. Additional facts will be discussed as relevant to Appellant's propositions of error.

II. CHANGE OF VENUE ISSUE

¶19 In proposition ten, Appellant claims the trial court erred in not granting her request for a change of venue. Prior to trial, Appellant filed a motion for a change of venue. The trial court held a hearing on the motion January 9 and 21, 2003. The defense presented evidence of the extensive coverage of the case in the local media, as well as polling data showing that a substantial number of Oklahoma County residents were somewhat familiar with the case and had opinions about the case. After considering this evidence, the trial court denied the motion, stating:

> I don't think we're going to know [whether unbiased jurors can be seated] until such time as we bring in a large panel, put them up in the jury box and *voir dire* them. It's unfortunate but that's actually the only way . . . that you can make that determination.

¶20 We review the trial court's denial of Appellant's motion for change of venue for an abuse of discretion. *DeRosa v. State*, 2004 OK CR 19, ¶ 21, 89 P.3d 1124, 1135-36. Pretrial publicity alone does not warrant a change of venue. *United States v. McVeigh*, 918 F.Supp. 1467, 1473 (W.D.Okl. 1996) ("Extensive publicity before trial does not, in itself, preclude fairness"). The influence of the news media must be shown to have actually pervaded the trial proceedings. *Hain v. State*, 1996 OK CR 26, ¶ 8, 919 P.2d 1130, 1136. We consider all relevant evidence to determine whether a fair trial was possible at that particular place and time, keeping in mind the ultimate issue: whether the trial court was in fact able to seat twelve qualified jurors who were not prejudiced against the accused. *DeRosa*, 2004 OK CR 19, ¶ 19, 89 P.3d at

1135 ("if a trial court denies a defendant's change of venue motion and the defendant is then tried and convicted, the question is no longer about hypothetical and potential unfairness, but about what actually happened during the defendant's trial").

¶21 From the beginning, this case received considerable attention in the local media. That fact cannot be disputed. Appellant refers us generally to the record of the hearing on her change-of-venue motion, but she does claim that air of prejudice pervaded the trial proceedings themselves. Again, our chief concern is not how, or how often, the case played in the media, but whether, at the end of the day, the trial court was able to empanel twelve fair and impartial jurors.

¶22 The trial court is entitled to considerable discretion on issues involving jury selection, because it personally conducts *voir dire* and has the opportunity to observe the demeanor of the panelists – so much of which is lost in the transcription of the proceedings. *Harris v. State*, 2004 OK CR 1, ¶ 11, 84 P.3d 731, 741. Nowhere in her brief does Appellant claim, much less demonstrate, that any juror actually seated was biased against her due to adverse pretrial publicity. Instead, Appellant invites this Court to hold that, because of extensive media coverage, prejudice should be presumed. We decline that invitation and hold that the trial court did not abuse its discretion in denying a change of venue.

III. FIRST STAGE ISSUES

¶23 In propositions two through five and seven through nine, Appellant claims that improper, irrelevant and inadmissible evidence was introduced during the first stage of trial. The admission of evidence is reviewed under an abuse of discretion standard. The introduction of evidence is left to the sound discretion of the trial court; the decision will not be disturbed absent an abuse of that discretion. *Pickens v. State*, 2001 OK CR 3, ¶ 21, 19 P.3d 866, 876. An abuse of discretion is "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *C.L.F. v. State*, 1999 OK CR 12, ¶ 5, 989 P.2d 945, 946.

¶24 A trial court can exercise discretion only when an attempt to introduce evidence is met with a contemporaneous objection; otherwise, this Court's review is limited to a review for plain error. *Lott v. State*, 2004 OK CR 27, ¶ 69, 98 P.3d 318, 340. Plain error is that error which is plain from the record, and which goes to the foundation of the case or takes from a defendant a right essential to his defense. *Simpson v. State*, 1994 OK CR 40, ¶ 23, 876 P.2d 690, 698. Thus, alleged evidentiary errors which are preserved by objection are reviewed differently than alleged evidentiary errors which were not met with an objection.

¶25 Much of the evidence complained of here was introduced to show the relationship between Appellant and the victim and the relationship between Appellant and Pavatt. Evidence of these relationships and evidence of Appellant's prior "bad acts" was introduced to show Appellant's motive and her

intent to kill her husband. The evidence was also relevant to show Appellant's preparation prior to the killing and the schemes she used to enter into a conspiracy with Pavatt to kill Rob Andrew.

A.

¶26 We begin our discussion with Appellant's complaint about the introduction of hearsay statements of the deceased, which is raised in proposition two. Appellant claims that the introduction of the hearsay statements of the deceased allowed the decedent to testify, through others, as an accuser. *See Shepard v. United States*, 290 U.S. 96, 104, 54 S.Ct. 22, 25-26, 78 L.Ed. 196 (1933). The statements addressed in *Shepard* are quite different from the statements here. In *Shepard*, the victim, while still alive and not anticipating death stated, "Dr. Shepard has poisoned me."[5]

¶27 Appellant's claim is broken down into different subject matters. We start with testimony concerning Rob Andrew's 16 gauge shotgun. The fact that Rob Andrew owned a 16 gauge shotgun was not in dispute. The fact that he was killed by a 16 gauge shotgun was also undisputed. This fact is significant given the fact that the 16 gauge is less common than the 12 or 20 gauge shotgun and the fact that Rob Andrew's shotgun and the murder weapon were never recovered. The statements revolve around Rob Andrew's desires, expressed to witness Ron Stump, to get his shotgun out of the marital home,

[5] The *Shepard* Court stated, "The admission of this declaration, if erroneous, was more than unsubstantial error. As to that the parties are agreed. The voice of the dead wife was heard in accusation of her husband, and the accusation was accepted as evidence of guilt. If the evidence was incompetent, the verdict may not stand." *Shepard*, 290 U.S. at 98, 54 S.Ct. at 23.

after Appellant had changed the locks and security codes. Rob told Ron that Appellant would not let him have the shotgun. The statement was made just a week prior to the murder. However, the statement was introduced to show that Rob did not have the shotgun; inferring that it was still in Appellant's control.

¶28 The State admits that statements made by Rob regarding Appellant's refusal to allow him into the house to retrieve his shotgun went beyond the state-of-mind exception. They did not address whether the statement was offered for the truth of the matter asserted. Nevertheless, any error in the admission of these statements was harmless given the fact that there was a substantial amount of evidence that the shotgun was in the possession of Appellant and not in the possession of Rob Andrew. Appellant told police that, if the shotgun were still at the house, it was in the hall or bedroom closet. Also during the first part of September, 2001, as Rob was moving out of the home, witness James Higgins saw the shotgun in the bedroom closet.

¶29 Coupled with this claim is an argument regarding Rob's statement to Ron Stump that Appellant had finally found someone to kill him (referring to Pavatt). This statement was made just shortly after Rob had moved out of the house. This statement is clearly a statement showing Rob's state-of-mind at the time. "Such antecedent declarations by a decedent are admissible in a homicide case to show the decedent's state of mind toward the defendant or to supply the motive for killing." *Welch v. State,* 2000 OK CR 8, ¶ 28, 2 P.3d 318, 370.

> Testimony showing ill feeling, threats, or similar conduct by one spouse toward another in a marital homicide case is relevant and statements by the deceased expressing fear of a spouse are admissible under the state of mind exception to the hearsay rule.

Washington v. State, 1999 OK CR 22, ¶ 36, 989 P.2d 960, 973.

¶30 Appellant next claims that hearsay evidence concerning Rob Andrew's belief that Appellant and James Pavatt tried to kill him by cutting the brake lines to his car, were inadmissible. These taped statements were introduced through Prudential employees. Again this evidence was introduced to show Rob Andrew's state-of-mind. His fear of Appellant and Pavatt, and the motive for this killing: the insurance money. The conversations Rob had with the insurance company were introduced to show why Appellant had a motive to kill Rob. He was trying to keep Appellant from being the primary beneficiary to the life insurance policy. The conversation shows why he would try to change the beneficiary to his brother. The phone calls were also introduced to show why the insurance company would not change the beneficiary over the phone at Appellant's request – increasing her anger and resentment of Rob Andrew.

¶31 Appellant also claims that Rob's statements to the police that he believed that Appellant and Pavatt were responsible were testimonial in nature, and thus, in violation of *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). *Crawford* held that testimonial hearsay violates the confrontation clause. *Id.* at 51-52, 1364. Rob's belief was supported by the evidence in this case. The jury would have reached the same conclusion absent this testimony. The introduction of this testimony was harmless beyond a reasonable doubt, considering the mountain of evidence leading to

the conclusion that Appellant was responsible, in part, for the brake line incident. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710-711 (1967). The inclusion of this evidence also showed the inadequacy of the police in their ability to stop Appellant and Pavatt before they actually carried out their plan to kill Rob Andrew. *Crawford* does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. *Crawford*, 541 U.S. at 59, fn.9, 124 S.Ct. at 1369, fn.9, *citing Tennessee v. Street*, 471 U.S. 409, 414, 105 S.Ct. 2078, 2081-82, 85 L.Ed.2d 425 (1985). The inclusion of this testimony does not require reversal.

¶32 One of Appellant's main complaints concerns the testimony of attorney Craig Box. Rob Andrew hired Box to represent him in divorce proceedings against Appellant. Box testified that Andrew told him about a series of calls from Appellant and Pavatt, which led him to believe that they were responsible for the brake line incident and attempt on his life. The State agrees that the statements constituted inadmissible hearsay, but were harmless, nonetheless.

¶33 These statements supported the conspiracy charge by showing when an agreement may have been consummated. They also support the theory that the motive for murder was the insurance money. Thus the possibility exists that they were not introduced for the truth of the matter asserted. Nevertheless, if inadmissible, overwhelming admissible evidence was introduced to support these claims, including statements by Appellant confirming her vitriolic hatred for Rob and her desire to be the beneficiary of

the insurance policy. Furthermore, tape recordings of Pavatt trying to change the ownership of the insurance policy with Prudential; his threats toward Rob; and statements he made concerning Appellant's request that he kill Rob were properly admitted.

¶34 The same can be said of other statements Rob made to others about the trouble he was having in changing the beneficiary of the policy. This is especially true in light of the evidence of falsified change of ownership papers, and Appellant's statements that she could sign Rob's name as well as he could and the fact that she routinely signed his name on employment related items.

¶35 The remainder of the statements Rob made to others about being kicked out of the house; Appellant hiding money; Rob's statements regarding Appellant's belief that he was having a homosexual affair; his statements about Appellant's affair with Nunley; and Rob's statements regarding the changing of the locks and Appellant's refusal to let him see the children, constituted inadmissible hearsay, for which no exception existed; however, they were also harmless considering the amount of admissible evidence on these issues.

¶36 Appellant next challenges the admission of Rob's computer journal. This was admitted as part of a police report admitted as State's exhibit 205, over defense objection. The State points out that defense counsel referred to the journal long before it was admitted into evidence by referring to portions which say that Appellant was a good mom and the spiritual leader of the home. Defense counsel asked questions about entries in the journal and actually read portions of the journal before it was admitted. The inclusion of this evidence

was made relevant to rebut defense counsel's use of the same evidence to show Appellant was a good mom. Appellant cannot now complain about the use of the journal. *See Malicoat v. State*, 2000 OK CR 1, ¶ 40, 992 P.2d 383, 403-04.

B.

¶37 In proposition five, Appellant claims that hearsay was improperly admitted under the guise of "co-conspirator hearsay." This claim relates to Pavatt's statement to Janna Larson. Larson was allowed to testify that Pavatt said, "[Y]ou're never going to believe what that nuttier than a fruit cake woman asked me to do. And then he told me that she asked him if he would kill her husband or if he knew someone that could do it . . . ." Defense counsel objected that the statement was hearsay within hearsay, the statement was not corroborated, and there was no evidence of an agreement.

¶38 The record indicates that this conversation occurred around the end of October, 2001. About the same time that Pavatt asked Larson to call Rob Andrew and tell him to drive to Norman, Oklahoma to pickup Appellant, after the brake lines to his vehicle had been cut.

¶39 Circumstantially, looking at the totality of the evidence introduced to that point, it could reasonably be concluded that Pavatt had entered into an agreement with Appellant to kill Rob Andrew. The conversation with Larson was meant to get her reaction to the idea. He needed Larson to make a call to get Rob Andrew to drive a long distance with faulty brakes. This conversation furthered the conspiracy by allowing Pavatt to know what tactic to take with Larson in involving her in the scheme. The trial court did not abuse its

discretion in allowing this evidence in as non-hearsay under the co-conspirator theory. *See* 12 O.S.Supp.2002, § 2801.

C.

¶40 In proposition three, Appellant claims that the trial court erred by allowing the State to introduce evidence of other crimes and bad acts which were not relevant. The admission of this evidence, as with all evidence, is reviewed under the abuse of that discretion standard spelled out above.

¶41 Evidence that a defendant committed other crimes is admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. 12 O.S.2001, § 2404(B); *Lott*, 2004 OK CR 27, ¶ 40, 98 P.3d at 334-35. Proof of "other crimes" must be clear and convincing. *Id.*

¶42 The State argues that nearly all of this "other crimes" evidence was *res gestae* evidence, which is evidence that is (a) so closely connected to the charged offense as to form part of the entire transaction, (b) necessary to give the jury a complete understanding of the crime, or (c) central to the chain of events. *See Rogers v. State*, 1995 OK CR 8, ¶ 21, 890 P.2d 959, 971 (and cases cited therein).[6]

¶43 The issue here boils down to whether the complained of evidence was relevant to prove motive, opportunity, intent, preparation, plan,

[6] "Giving the jury a complete understanding of the crime" phrase was first utilized by this Court in *Carter v. State*, 1985 OK CR 33, 698 P.2d 22, where the omission of the other crimes evidence would have left gaps in the testimony and would have likely confused the jury and left them to speculate about what happened during a single episode. *Id.* ¶ 13, at 24-25. This definition should be read in conjunction with the other two so that this exception does not swallow the rule.

knowledge, identity, or absence of mistake or accident; or whether the evidence is improper character evidence, which is generally prohibited. *See* 12 O.S.2001, § 2404. Specific instances of conduct to prove a person's character or a trait of character are admissible when the character is part of a claim or defense. 12 O.S.2001, § 2405(B).

¶44 Initially, Appellant attacks evidence concerning the cutting of the brake lines of Rob Andrew's car. Appellant claims that there was insufficient evidence which tied her to this crime under a clear and convincing standard, not that the evidence was otherwise inadmissible.

¶45 Sometime around the end of October, 2001, Appellant asked Pavatt to kill Rob Andrew. About this same time, on October 26, the brake lines to Rob Andrew's vehicle were cut. Pavatt asked his daughter to call Rob and tell him that he needed to come to Norman to pick up Appellant at the hospital; in an obvious attempt to get Rob to drive some distance from his northwest Oklahoma City home with faulty brake lines. Appellant claims that there was insufficient evidence linking her to this incident.

¶46 Appellant claims that the only particular piece of evidence linking her to the crime was inadmissible hearsay evidence concerning the fact that Appellant knew about the brake lines being cut before she could have innocently acquired the information. However, the State introduced evidence of an enormous amount of phone calls between Pavatt and Appellant on October 25 and October 26. Appellant attempts to give alternative meaning to phone calls made on October 26 by stating these are the calls during the time

Rob Andrew was trying to change the beneficiary to his policy after learning that his brake lines had been cut. However, Appellant does not try to explain the number of phone calls made on October 25 and the morning of October 26.

¶47 Other evidence, furthermore, links Appellant to this attempt on Rob Andrew's life. Appellant appeared at the bank where Janna Larson was working in Norman shortly after Larson called Rob Andrew, in an attempt to get him to drive to Norman. During this visit, Appellant asked Larson about phone calls she made to Rob Andrew. This evidence, coupled again with evidence about Brenda's hatred of Rob and her threats, show by clear and convincing evidence a link between Appellant and the attempt on Rob Andrew's life.

¶48 Certainly this evidence was relevant to the charged crime of conspiracy to commit first degree murder, which the State alleged started on September 1, 2001. The cutting of the brake lines, though not alleged as an overt act in the conspiracy was relevant to show an agreement existed between Appellant and Pavatt at the time the brake lines were cut. This evidence was also "inextricably intertwined" with the murder offense, thus it was admissible intrinsic evidence. *See United States v. Viefhaus*, 168 F.3d 392, 397-98 (10th Cir. 1999).[7] This rule allowing intrinsic evidence is similar to the *res gestae* exception used by this Court.

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[7] Rule 404(b) of the Federal Rules of Evidence does not apply to other act evidence that is intrinsic to the crime charged. "Other act evidence is intrinsic when the evidence of the other act and the evidence of the crime charged are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged." *United States v. Lambert*, 995 F.2d 1006, 1007 (10th Cir 1993), *quoting United States v. Williams*, 900 F.2d 823, 825 (5th Cir.1990).

¶49 Next, Appellant complains about evidence that she had extramarital sexual affairs with two other men. Appellant claims that this evidence, although not criminal, was evidence of bad acts, only introduced to show her bad character. This evidence was relevant to show motive.

¶50 The first affair, with Rick Nunley, started in 1997 and ended probably about four years prior to this murder; however, Appellant and Nunley kept in contact through phone conversations. Nunley met Appellant in downtown Oklahoma City around the first of October, 2001. Appellant told Nunley about the divorce proceedings. At some point between then and the murder, Appellant expressed to Nunley that she was upset about Rob trying to change the beneficiary on the life insurance policy. Cell phone records indicated eighty-seven phone calls between Appellant and Nunley during the months of September, October and November, 2001. Appellant also called Nunley from jail when she was arrested, while returning to the United States from Mexico. Evidence of their sexual affair was limited to one question during his testimony. Thus, even though, the evidence of a sexual affair between Nunley and Appellant was remote, its significance was a minimal part of the relationship, and the mention of it was harmless in this case.

¶51 The second affair, this with James Higgins, started in 1999 and ended in May 2001, just six months prior to Rob's murder. Evidence of this affair was more detailed. This sexual affair started when Appellant handed Higgins a key to a motel room and they met that afternoon at the motel room. These types of meetings occurred several times a week during those two years.

They also had sex at the Andrew home and in the car. All during this time, Appellant kept telling Higgins how much she hated Rob Andrew. She also told Higgins that she wished Rob Andrew was dead.

¶52 This Court has allowed evidence of an affair for the purpose of establishing motive. In *Allen v. State*, 1993 OK CR 49, 862 P.2d 487, this Court held that evidence that the defendant had a sexual relationship with his secretary, which ended six months prior to the murder of his wife, was relevant to show motive. *Id.* ¶ 17, at 491. This Court reasoned that evidence of a close personal relationship, where intimate details of the defendant's marriage were shared, was relevant.

¶53 This case is no different; Appellant shared with both of these men her hatred for Rob Andrew and her wish that he was dead. Her co-defendant was just the last in a long line of men that she seduced; however, this last man shared the same hatred of Rob and was willing to kill for Appellant. The evidence of Appellant's affairs proved motive and intent in this case. The trial court did not abuse its discretion in admitting this evidence.

¶54 Appellant further complains about a litany of evidence under this "other crimes evidence" claim. The complaints cover the following evidence: testimony from Rob Andrew's co-worker, Barbara Murcer-Green, concerning confrontations at the workplace between Appellant and Rob Andrew and Appellant's threats to her personally, which was met with a contemporaneous objection. This evidence was relevant to show Appellant's hatred and rage, and possible resentment toward Rob Andrew, thus it was relevant.

¶55 Other evidence included Higgins' testimony that Appellant had "come on to" his two adult sons when they were building a deck for the Andrews; David Ostrowe's testimony that she was dressed provocatively when the Andrews and the Ostrowes went to dinner together (6-8 weeks before the murder), someone in the restaurant called Appellant a "hoochie," and inappropriate talk about a trip to Mexico; Ron Stump's testimony that Appellant changed her hair color after learning what color of hair Ron liked; and David Head's testimony, over objection, about Appellant threatening to kill him.

¶56 This Court is struggling to find any relevance to this evidence, other than to show Appellant's character. The State agrees that most of this evidence was irrelevant to any issue in this case; however, even so, the introduction of this evidence was harmless due to the overwhelming evidence in this case.

¶57 Additional evidence included William Burleson's testimony about Appellant's demeanor at the funeral home; Cynthia Balding's testimony about Appellant hiding money; testimony regarding Appellant's attempt to influence the children with a puppy; Janna Larson's testimony that she told her father, James Pavatt, that she thought Appellant lied when she told him she had not slept with any other men other than her husband and Pavatt; and testimony that Pavatt told Larson that the Andrew children were well trained and would not tell of the affair between he and Appellant.

¶58 First, out of this evidence, the evidence of Appellant's demeanor at the funeral home was relevant to show a consciousness of guilt, and as such is not considered "other crimes" evidence. *See Anderson v. State*, 1999 OK CR 44, ¶ 15, 992 P.2d 409, 416. The witness testified that in all of his long experience, her flat, cold, and unemotional demeanor was the most bizarre demeanor he had ever seen from a grieving spouse.

¶59 The remaining evidence was relevant to show the relationship between Appellant and Pavatt and the relationship between Appellant and Rob Andrew, Appellant's ability to lie and influence Pavatt, and her desire to keep their sexual affair a secret from the children and others. The evidence concerning the money was relevant to show motive, and the money provided the source which Appellant was to utilize while on the run in Mexico, thus it was relevant as part of this criminal episode.

¶60 This proposition would have even less merit had the trial court instructed on the limited use of "other crimes" evidence. We shall discuss this refusal in our discussion of instructional error below.

D.

¶61 In proposition seven, Appellant raises a series of claims attacking the introduction of certain evidence which she claims was irrelevant or at least more prejudicial than probative. We restate the general rules of evidence here. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." 12 O.S.2001, § 2401.

Relevant evidence is admissible unless it is prohibited under the evidence code. One prohibition against admission is that the relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *See* 12 O.S.Supp.2002, § 2403. Again, introduction is judged under an abuse of discretion standard.

¶62 First, Appellant claims, in the first section of this proposition, that evidence was introduced which was used to cast an unwarranted veil of suspicion over Appellant and distract and confuse the jury. This evidence included documents showing that Pavatt made Appellant the primary beneficiary of two life-insurance polices. Appellant claims that there is no evidence that these policies were still valid. Next, Appellant cites to evidence consisting of a tape recording of conversations between Appellant and Rob Andrew recorded in the days before the murder. These recordings include conversations between Tricity and Rob Andrew. Appellant next cites evidence of two Agatha Christie mystery books entitled Murder is Easy and Sparkling Cyanide. Appellant also complains about the introduction of a title and registration to the Bowlins' vehicle, which was found in the 1992 Chevrolet Beretta Appellant and Pavatt used to drive to Mexico. Appellant claims that this could have been caused by a mix-up in the inventory of both vehicles by the Hidalgo police before the search warrant was served.

¶63 All of this evidence was relevant to some aspect of this case. Appellant being named as beneficiary of Pavatt's insurance, whether valid or not, was evidence of the extent of their relationship and provided support for

the fact that, at least Pavatt, intended to make their relationship permanent at some point. The tape recordings of the conversations show the way Appellant used Tricity to get Rob Andrew to come over to the house alone. The evidence of the books, considering all of the circumstances, was just one more piece of the puzzle, relevant to show Appellant's role in the children's life to rebut the claim that she was a "good mother." The relevance of these books was slight, but not substantially outweighed by the dangers found in Section 2403.

¶64 The relevance of the car ownership papers was relevant to support the State's theory that Pavatt and Appellant intended to switch cars with the Bowlins at some point in order to avoid detection while in the United States (after returning from Mexico). The admissibility was not dependent on the fact that the papers may have never made it into the Beretta while in the possession of Appellant. The Bowlins took these documents with them so that a vehicle exchange could be made.

¶65 Appellant claims the next group of evidence was cumulative of the relationship between Appellant and Pavatt. Relevant evidence may be excluded if the probative value is substantially outweighed by the danger of needless presentation of cumulative evidence. 12 O.S.Supp.2002, § 2403. Appellant complains about a birthday card to Pavatt from Appellant; photographs of Appellant, Pavatt, and the Andrew children taken while on a trip to Six-Flags over Texas; evidence of Pavatt's infatuation with Appellant; and finally the contents of Appellant's luggage, including her thong underwear. All of this evidence was introduced to show the extent and the nature of the relationship

between Pavatt and Appellant, and their intentions in fleeing to Mexico – not as a grieving widow, but as a free fugitive living large on a Mexico beach. As this trial was primarily about the motive and intent of Appellant to kill her husband with the aid of Pavatt, this evidence was highly relevant and its probative value was not outweighed by any dangers.

¶66 The final group of evidence attacked here includes a letter written by the victim to witness Ron Stump. This evidence, like the hearsay evidence cited above, was relevant to show the victim's state-of-mind and to provide a explanation of the motive. *Welch*, 2000 OK CR 8, ¶ 28, 2 P.3d at 370. Appellant also complains about the introduction of audio tape recordings of phone conversations between herself and the victim. These tapes were relevant to show the type of relationship these two people had, which would cause Appellant to kill her own husband. They were relevant to show her level of hostility, rage and hatred toward her husband, all which provide a motive for the killing. Although she did not kill in a fit of rage, she did use her hatred as a possible "I'll be better off with him dead" self justification for the murder. The relevance of this evidence was not outweighed by any dangers.

¶67 Lastly, Appellant urges this Court to consider the hearsay evidence complained of above as an attempt to introduce irrelevant evidence, only for the purpose of eliciting sympathy for the victim. We find that the trial court did not abuse its discretion in allowing the admission of any of the evidence raised in the proposition.

E.

¶68 In proposition eight, Appellant claims that the trial court abused its discretion when it allowed the admission of audio cassette tapes without the proper authentication. "Authentication may be proved by direct or circumstantial evidence, and is sufficient if evidence supports a finding that the matter in question is what its proponent claims it to be." *Hooper v. State*, 1997 OK CR 64, ¶ 29, 947 P.2d 1090, 1102. A voice on a recording may be authenticated if the witness's opinion is based on hearing the voice at any time in circumstances which connect the voice with the alleged speaker. *Id. See* 12 O.S.2001, § 2901.

¶69 Craig Box, Rob Andrew's divorce attorney, listened to all of the tapes and testified that the voice on the tapes was that of Appellant. Furthermore, Appellant gives her name, address and policy number over the phone. Appellant also allows Pavatt to converse with the Prudential Insurance office, and she identifies Pavatt as her insurance agent. Pavatt's voice was authenticated by his actions during the call. He gave his company authentication code.

¶70 Rob Andrew's voice was identified by Ron Stump on other tapes introduced earlier in the trial. Although Stump did not identify the voice on these particular tapes as those of Rob Andrew, the jury had similarly authenticated tapes from which to determine the voice was that of Rob Andrew.

¶71 The audio tapes in this case were sufficiently authenticated and the trial court did not abuse its discretion in allowing these tapes into evidence.

F.

¶72 In proposition nine, Appellant argues that her statements to police were the result of custodial interrogation, thus their introduction was unconstitutional because she had not been advised of her *Miranda*[8] rights. During the *Jackson v. Denno*[9] hearing, Appellant admitted that she agreed to speak with the police because she wanted to help the police catch those responsible for shooting her husband. Appellant was taken to the police station to be questioned by detectives. The detective interviewing her considered her to be a witness, not a suspect. She was taken to a friend's house after the interview. She was not "arrested" at any time. She was not handcuffed, shackled or placed in any type of restraint. Eye-witnesses are routinely taken to the police station for interviews. Appellant was the only living eye-witness to this crime. Under the circumstances of this case, a reasonable person in the same position would not conclude that he or she was in custody. *See Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L. Ed. 2d 317 (1984) (the relevant inquiry is how a reasonable man under the circumstances would understand the situation.) Warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L. Ed. 2d 714 (1977). The trial court did not abuse its discretion in allowing the admission of Appellant's statements.

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[8] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
[9] 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

G.

¶73 Next, in proposition four, Appellant claims that the trial was infected with improper and inadmissible opinion testimony. The admissibility of lay witness' opinions is a determination within the sound discretion of the trial court whose decision will not be disturbed unless clearly erroneous or a clear result of an abuse of discretion. *Washington v. State*, 1999 OK CR 22, ¶ 21, 989 P.2d. 960, 970. Opinion testimony of a lay witness is permissible under 12 O.S.2001, § 2701 when it is rationally based on the perception of the witness and is helpful to the determination of a fact in issue.

¶74 Appellant first claims that witnesses were improperly allowed to give their opinions of her guilt. The determination of guilt or innocence is the sole and exclusive province of the jury, and a witness may not express an opinion on this issue. *Bowie v. State*, 1991 OK CR 78, ¶ 3, 816 P.2d 1143, 1145.

¶75 Ron Stump and Rod Lott both gave testimony indicating that they believed that Appellant was responsible for killing Rob Andrew. Officer Mike Klinka, Michael Fetters and Mark Sinor testified that Rob Andrew relayed to them that he believed that Appellant was trying to kill him.

¶76 The questioning of Rod Lott came during re-direct after defense counsel was allowed to ask if Rod Lott liked Appellant, and defense counsel's questioning of Lott's motivation for testifying. The prosecutor asked why he did not like her. Rod Lott answered, "I believe she's responsible for his death." This testimony was properly admitted because Appellant opened the door on cross-examination, so that the prosecution could delve into Lott's motivation.

¶77 Stump's initial opinion, that Appellant and Pavatt killed Rob Andrew, and his testimony that he knew of no one that had a motive to kill Rob Andrew other than Appellant and Pavatt was not met with an objection. We review for plain error here, and we find none.

¶78 Mike Klinka's, Michael Fetters' and Mark Sinor's testimony was admitted to show Rob Andrew's state-of-mind as explained above. There is no reason to rehash this argument here.

¶79 Next, Appellant claims that other witnesses were allowed to give "expert" opinion evidence without being qualified to do so. An expert witness is one who possesses scientific or specialized knowledge acquired by study or practice or by both, and is, ordinarily, a person who has experience and knowledge in relation to matters which are not generally known. *Kennedy v. State*, 1982 OK CR 11, ¶ 27, 640 P.2d 971, 977.

¶80 The witnesses Appellant complains about here are police officers. Police officers are allowed to give opinion testimony based on their training and experience. *Berry v. State*, 1988 OK CR 83, ¶ 6, 753 P.2d 926, 929-30; *McCoy v. State*, 1985 OK CR 49, ¶ 14, 699 P.2d 663, 665-66.

¶81 Sgt. Frost testified that it was "very strange" that Appellant could not remember the words spoken by her alleged attackers. He also testified that she was unusually calm and he felt it unusual that she did not ask about her husband while at the hospital. Technical Investigator Teresa Bunn testified similarly. We find that the trial court did not abuse its discretion in allowing

this testimony as it was properly based on their perceptions in conjunction with their training and experience.

¶82 Frost was also allowed to testify that it was significant that Appellant was shot at close range, without explanation. Any error in relation to this testimony was harmless due to the overwhelming evidence that she was indeed shot at close range. Officer Klinka was allowed to testify that he believed that Appellant was involved in the cutting of Rob Andrew's brake lines. Appellant failed to object to this testimony, thus we review for plain error only. We find that this testimony does not rise to the level of plain error based on the context of the testimony as rebuttal to defense counsel's cross-examination regarding a link between Appellant and the brake line incident.

¶83 Appellant claims that Detective Garrett was allowed to testify that he believed that Pavatt was preparing to move into the Andrew home. The questioning regarded what Pavatt was doing the day of the murder. Garrett testified that Pavatt was moving his washer and dryer into the Andrew home. The prosecutor asked, "Moving in?" Garrett answered "Yes." An objection to this testimony was sustained, but the trial court did not admonish the jury as requested. Defense counsel objected that the answer was speculation and the trial court announced that it was speculation, but the trial court denied counsel's request to have the jury admonished. We find that the trial court's actions cured this error as an admonishment would have merely magnified the possibility of prejudice. *See Ferguson v. State*, 1984 OK CR 32, ¶ 10, 675 P.2d 1023, 1027.

H.

¶84 In proposition one, Appellant complains that she was prohibited from calling or presenting testimony from witnesses essential to her defense, due to the trial court's erroneous rulings. Some of this testimony was excluded because the trial court found that trial counsel failed to comply with the discovery code. *See* 22 O.S.Supp.2002, § 2002. The exclusion of this testimony as a sanction to a discovery code violation is reviewed under an abuse of discretion standard. *Rojem v. State*, 2006 OK CR 7, ¶ 46, 130 P.3d 287, 297.

¶85 The right to call witnesses to present a defense is a fundamental element of due process. *Id.* at ¶ 47 130 P.3d at 297, *quoting White v. State*, 1998 OK CR 69, ¶ 12, 973 P.2d 306, 311. The exclusion of evidence might be the appropriate sanction for a discovery code violation in the most severe cases, where the violation is "willful and motivated by a desire to obtain a tactical advantage." *Id.* Alternative sanctions are appropriate in other cases. *Id.*

¶86 First, Appellant claims that she was not allowed to present the testimony from Sergeant Larry Northcutt and Officer Roger Frost, both of whom worked during their off duty hours patrolling the Lansbrook neighborhood where the Andrews lived. Counsel asked Northcutt whether Appellant requested extra patrols around her house. Trial court ruled that the information had not been provided in discovery; therefore, Northcutt could not answer the question. Not until the day that Northcutt was to testify, did Appellant provide a summary of his testimony. No good reason existed for this

other than to attempt to gain a tactical advantage; therefore, the trial court did not abuse its discretion in precluding this testimony.

¶87 Counsel asked Frost, in many different ways, whether Northcutt told him that Appellant requested extra patrols at her residence. The trial court sustained each objection based on hearsay. What was evident from the testimony was that the off-duty officers were providing extra patrol near the residence. On appeal, Appellant argues that the testimony is not hearsay, it is provided to show why the officers provided extra patrol. On the contrary, counsel wanted to elicit this testimony to show that Appellant requested extra patrols in order to show that she was not a calculating murderer. This testimony was hearsay and the trial court did not abuse its discretion.

¶88 Furthermore, the jury was well aware that extra patrols were requested. The only information that was kept from the jury was that Appellant had requested those patrols. The failure to give this information to the jury did not prejudice Appellant. The jury might have believed that her request for extra patrols took place during the planning stage of this murder, and the request was just another method of deflecting suspicion away from her.

¶89 Next, Appellant cites to her attempts to present the testimony of Lisa Gisler and Carol Shadid, who were neighbors of Appellant, regarding what they heard on the night of the murder. These witnesses heard noises, which Appellant describes as a "loud noise" (Gisler) or "three shotgun blasts" and a

scream (Shadid). Appellant claims this testimony would corroborate her story of the events and rebut the staging theory espoused by the State.

¶90 Defense counsel provided the State with a list of witnesses which included these two witnesses; however, no summary of their expected testimony was provided. Nevertheless, both of these witnesses provided statements to the police. Their statements were contained in police reports that were in the custody of the State. Defense counsel made an offer of proof indicating that their testimony would be consistent with their statements to police. Preclusion of this testimony, under the circumstances was too harsh a sanction, thus there was an abuse of discretion here. The trial court had at its disposal the possibility of a short continuance, if necessary, so the State could prepare for cross-examination of these two witnesses, especially considering the limited nature of their testimony. The trial court abused its discretion in using the preclusion sanction.

¶91 Even though an abuse of discretion occurred, we find that the error was harmless beyond a reasonable doubt. *See Hooks v. State*, 2001 OK CR 1, ¶ 14, 19 P.3d 294, 307. Despite Appellant's claim, evidence that there were three shots is consistent with the State's theory of two shots fired from a shotgun and one fired from a .22 caliber handgun. The testimony is inconsistent with Appellant's story that she heard only two shots fired. Furthermore, both reconstruction experts, prosecution and defense, testified that Appellant's gunshot wound was evidence of a staged event.

¶92 Next, Appellant claims that exclusion of Officer Ronald Warren's testimony was error. The testimony was excluded, because of a lack of pre-trial notice. This officer made a written report, which was in the custody of the State. The report spells out his expected testimony. Like the above witnesses, the exclusion of the testimony constituted an abuse of discretion. However, defense counsel was able, through another witness, to elicit the same evidence; evidence that Appellant was kneeling over obviously deceased Rob Andrew attempting to aid him, while disregarding her own gunshot injury. This excluded evidence was largely cumulative; therefore, the exclusion was harmless beyond a reasonable doubt.

¶93 Lastly, Appellant claims that the exclusion of testimony from Donna Tyra was error. Donna Tyra was a detention officer at the County jail. Defense counsel listed Tyra as a second stage witness who would offer testimony about Appellant's good character while incarcerated at the County jail (the State did not list Tyra as a witness or have a report from her, unlike the above witnesses) However, defense counsel wished her to testify to rebut witness Teresa Sullivan's testimony regarding Appellant's confession.

¶94 An offer of proof indicated that Tyra would have testified that Sullivan was a known snitch, known as the "mouth of the south;" Sullivan and Appellant could not have contacted each other, either verbally or through notes; and that there were newspapers available to the inmates on the pod, so that Sullivan could have learned the facts of the case through news reports. Discovery of this testimony was not presented to the State.

¶95 Defense counsel was allowed to produce the testimony of Angela Burk, who testified that Sullivan was a known snitch. She testified that she communicated to Sullivan through the cell doors, and she testified that inmates were sometimes out in the pod together. Any error in the failure to allow Tyra to testify was harmless beyond a reasonable doubt.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

¶96 In proposition six, Appellant claims that she was denied effective assistance of counsel. In order to show that counsel was ineffective, Appellant must show both deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).[10] In *Strickland*, the Court went on to say that there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct, i.e., an appellant must overcome the presumption that, under the circumstances, counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

¶97 To establish prejudice, Appellant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

[10] The Strickland standard continues to be the correct test for examining claims of ineffective assistance of counsel where counsel fails to utilize mitigation evidence. *Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 915 (2002).

¶98 In the context of a capital sentencing proceeding, the relevant inquiry is "whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069.

¶99 Appellant first claims that counsel was ineffective for failing to provide adequate witness summaries, for which reason defense witnesses were prohibited from testifying (see proposition one). In our discussion of proposition one, we held that, where error occurred in the prohibition of this testimony, the error was harmless beyond a reasonable doubt. We further find that defense counsel's failure to provide adequate witness summaries did not prejudice Appellant, thus the second prong of *Strickland* is not satisfied. Counsel cannot be defined as ineffective.

¶100 Appellant next claims that counsel was ineffective for failing to make contemporaneous objections to damaging hearsay statements and improper opinion evidence (see propositions two and four). We addressed the substantive portion of these arguments above and found that the majority of the evidence was properly admitted. We further find that counsel was not ineffective for failing to object to this evidence, as there was no resulting prejudice.

¶101 Appellant next claims that counsel was ineffective for failing to investigate and present evidence tending to show her innocence which is

divided into three categories; (1) blood pattern evidence, (2) signature evidence, and (3) corroborating witnesses.[11]

¶102 The blood pattern evidence deals with the defense expert who testified that Appellant had high velocity blood spatter on her jeans. In closing the prosecution turned this evidence against Appellant by arguing that she received this spatter by firing the second shot and getting blow back blood spatter from Rob. However, this blood spatter had never been tested to determine its source. Now, during the pendency of this Appeal, Appellant provides DNA analysis which she argues shows that the blood stains were from her alone. The State's response points out that the blood is a mixture: the major component from Appellant and the minor component being from an unknown male (arguably the victim because the tester cannot exclude the victim as the source of the blood). Appellant claims that utilizing a defense expert without first determining the source of these stains led to the theory that she fired the second shot, making her more culpable and allowing the jury to more easily give her the death penalty. The prosecutor could have made this argument by stating that the unknown (minor component) blood spatter came from the victim, forming the basis for the same argument.

¶103 This evidence does not show by clear and convincing evidence that the outcome would have been different; consequently, no evidentiary hearing is necessary.

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[11] Appellant has filed a motion for an evidentiary hearing based on this evidence pursuant to Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007).

¶104 Next, Appellant claims that new evidence regarding the signatures on a change of ownership application (State's exhibit 24) for the $800,000.00 life insurance police shows that she did not forge the signature of Rob Andrew, but that Pavatt could have copied the signatures from other documents and pasted them to this document; a "cut and paste" theory of forgery.

¶105 Appellant had retained an expert in this area for trial, Ernie Smith. He told counsel of his "cut and paste" theory regarding Robert D. Andrew's signature. He was not called to testify. This was a sound strategic decision, based on the evidence.

¶106 Appellant maintained that the change of ownership document was genuine in conversations with the judge handling the divorce, a close friend, and the Prudential Insurance Agency. Appellant and Pavatt were working together to find some way that Appellant would receive the proceeds of the life insurance policy. No clear and convincing evidence exists for the holding of an evidentiary hearing, because in any event the documents were forged by Appellant and Pavatt working together.

¶107 Lastly, Appellant claims that additional witnesses exist who could have corroborated Appellant's story, could have bolstered Pavatt's confessional letter, and could have rebutted some of the State evidence.

¶108 Appellant provides, in the application for evidentiary hearing, an affidavit from a neighbor who would have testified that she heard two shots, she heard screaming, and she saw someone bending over in the front yard after the shots. Appellant claims that this bolsters her story that the final two shots

were simultaneous, sounding like one shot, and the story that there were two assailants as the person this neighbor saw outside could have been the second assailant. This witness testified at Pavatt's trial but did not testify at the present trial.

¶109 Another witness regards the letter from Pavatt, introduced at trial, wherein he stated that he and another assailant were responsible, and Appellant was not involved. He stated that he shot Appellant and the other assailant shot Rob Andrew. To this day, Pavatt has not named the second assailant. Appellant now provides an affidavit from Appellant's brother-in-law, James Bowlin, who states that Pavatt told him the same story when he met them in Mexico, just days prior to their arrest.

¶110 The last witness, not utilized at trial, was Appellant's sister, Kimberly Bowlin who states that it was her, not Appellant, who was present near the target practice area just days prior to the murder.

¶111 Appellant's application for evidentiary hearing shall be denied. She has not presented clear and convincing proof to this Court that counsel was ineffective for failing to present this evidence, thus entitling her to an evidentiary hearing on this extra-record evidence and to have the record supplemented with the evidence. *See* Rule 3.11 ("the application and affidavits must contain sufficient information to show this Court by clear and convincing evidence there is a strong possibility trial counsel was ineffective.")

V. FIRST STAGE INSTRUCTIONAL ERROR

¶112 In proposition eleven, Appellant claims that the trial court erred in its instructions to the jury. It is well settled that trial courts have a duty to instruct the jury on the salient features of the law raised by the evidence. *Hogan v. State*, 2006 OK CR 19, ¶ 39, 139 P.3d 907, 923. Even if a trial court fails in this duty, this Court will not reverse on instructional error unless the error resulted in a miscarriage of justice or constitutes a substantial violation of a constitutional or statutory right. 20 O.S.2001, § 3001; *Carter v. State*, 2006 OK CR 42, ¶ 5, 147 P.3d 243, 244, *citing Ashinsky v. State*, 1989 OK CR 59, ¶ 20, 780 P.2d 201, 207.

¶113 First, Appellant claims that the trial court erred in failing to give cautionary instructions on jailhouse informant testimony.[12] The instruction

[12] The relevant instruction, Oklahoma Uniform Jury Instruction Number 9-43A reads:

> The testimony of an informer who provides evidence against a defendant must be examined and weighed by you with greater care than the testimony of an ordinary witness. Whether the informer's testimony has been affected by interest or prejudice against the defendant is for you to determine. In making that determination, you should consider:
>
> > (1) whether the witness has received anything (including pay, immunity from prosecution, leniency in prosecution, personal advantage, or vindication) in exchange for testimony;
> >
> > (2) any other case in which the informant testified or offered statements against an individual but was not called, and whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for that testimony or statement;
> >
> > (3) whether the informant has ever changed his or her testimony;
> >
> > (4) the criminal history of the informant; and
> >
> > (5) any other evidence relevant to the informer's credibility.

was requested in response to witness Teresa Sullivan's testimony. Sullivan testified that Appellant confessed that she and Pavatt killed Rob Andrew for the money, house, kids and each other. Sullivan was an inmate in the Oklahoma County Jail when Appellant confided in her.

¶114 This instruction is to be given when a witness is a "professional jailhouse informant." *Wright v. State*, 2001 OK CR 19, ¶ 21, 30 P.3d 1148, 1152. Sullivan was in federal custody while at the county jail. She was not facing any State charges, and she testified that she did not expect any benefit from testifying. She did not seek out authorities with which to share her story. She, as well as others incarcerated in the county jail with Appellant, were contacted to determine whether they had information relevant to this case. The possibility that Sullivan was a jailhouse informant was not supported by the evidence presented to the trial court. The trial court did not err in failing to give this instruction.[13]

¶115 Next, Appellant claims that the trial court erred in instructing the jury on the doctrine of flight. Along with this claim, Appellant urges this Court to eliminate and discontinue the jury instructions on the doctrine of flight as it relates to consciousness of guilt. Appellant explained to Sullivan that she left for Mexico to get the kids away from everything, for a little vacation. Her statement explaining her act of departure warranted the giving of the flight instructions. *See Mitchell v. State*, 1993 OK CR 56, ¶¶ 7-8, 876 P.2d 682, 684. Appellant's argument against the doctrine of flight does not persuade this

[13] Andrew has filed a motion for a new trial related to witness Sullivan's potential bias.

Court to change its position on this issue. The trial court did not err in giving this instruction.

¶116 Appellant next claims that the trial court failed in its duty to instruct on the lesser related offense of accessory after the fact. Instructions on this offense were not requested during trial. There was no evidence that Appellant was an accessory after the fact. Her defense was that she did not know who killed her husband. She did not claim that she knew Pavatt killed her husband, so she helped him flee to Mexico to avoid capture, which might be a basis for the instruction. Furthermore, the State's evidence did not support an instruction on this offense. Therefore, the trial court did not err in failing to give this instruction *sua sponte*.[14]

¶117 Appellant next complains about the trial court's refusal to give limiting instructions on the use of "other crimes" evidence (see discussion above regarding the evidence). We find that jury instructions on the use of other crimes evidence was warranted in this case, although some of the evidence indicating that Appellant committed other crimes or "bad acts" was part of the "*res gestae*," much of the evidence was presented as "other crimes" evidence for the specific purposes spelled out in 12 O.S.Supp.2002, § 2404. However, in spite of this error, we find that the error to give the requested

[14] As recently as 1998, this Court has held that being an accessory to a felony is not a lesser included offense to the defined felony. *Cummings v.* State, 1998 OK CR 45, ¶ 40, 968 P.2d 821, 834. However, this Court's decision in *Shrum v. State*, 1999 OK CR 41, 991 P.2d 1032, wherein this Court allowed instruction on all lesser "related" offenses allowed this Court to reverse cases where evidence of the greater offense was lacking and there was some evidence of a lesser "related" offense. *See Glossip v. State*, 2001 OK CR 21, 29 P.3d 597.

A discussion regarding an all or nothing approach to a defense is not appropriate here – suffice it say that the State should be confident in their charging so that an accessory offense is not the "fall back" position.

instruction did not create the type of injury which requires reversal of this case. *See* 20 O.S.2001, § 3001.1; *also see Anderson v. State*, 1999 OK CR 44, ¶ 16, 992 P.2d 409, 416-17.

VI. SECOND STAGE ISSUES

¶118 In proposition fourteen, Appellant claims there was insufficient evidence to support the especially heinous, atrocious, or cruel aggravating circumstance. When the sufficiency of the evidence supporting an aggravator is challenged on appeal, we review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the facts necessary to support the aggravating circumstance beyond a reasonable doubt. *DeRosa*, 2004 OK CR 19, ¶ 85, 89 P.3d at 1153. This Court upholds a jury's finding of this aggravating circumstance when it is supported by proof of conscious, serious physical abuse or torture prior to death. *Davis*, 2004 OK CR 36, ¶ 39, 103 P.3d at 81.

¶119 Appellant, in her phone call to police told the emergency operator, during her second 911 call, that her husband was breathing, conscious and was trying to talk, even after being shot twice. This conversation occurred at around five minutes after Rob Andrew was shot. The medical examiner testified that Rob was shot twice. The medical examiner also testified that death would not have been instantaneous.

¶120 Although the murder weapon was never found, circumstantial evidence showed that Rob was shot with a single-shot shotgun, which would have required manual reloading between the shots. The evidence supported

the fact that Rob was conscious during this time and even after being shot the second time. When emergency personnel arrived, Andrew was still clutching a trash bag full of empty aluminum cans, which reasonably suggested that he either tried to shield himself from being shot, or attempted to ward off his attacker. All of these facts tend to show that Rob Andrew suffered serious physical abuse, and was conscious of the fatal attack for several minutes. *See Ledbetter v. State*, 1997 OK CR 5, ¶¶ 53-54, 933 P.2d 880, 896 (evidence that murder victim was likely aware that she was about to be assaulted because defendant had attempted to kill her one week earlier, that she tried to defend herself from the fatal attack, and that she attempted to communicate with a neighbor after the attack was sufficient to show that the murder was especially heinous, atrocious or cruel).

¶121 Appellant claims, in proposition twelve, that the trial court failed to properly instruct the jury during the second stage proceedings, thus depriving her of her right to fair sentencing proceeding. She first claims that the trial court failed to instruct on the necessary elements of murder for remuneration. This argument rests on the trial court's failure to give Appellant's requested instruction on the aggravating circumstance of murder for remuneration.

¶122 The trial court gave the uniform instructions on the murder for remuneration aggravating circumstance. The uniform instruction only states that "the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or

the promise of remuneration." OUJI-CR 4-72 (2000). No further defining instructions are included in the uniform instructions.

¶123 Appellant requested that the jury be instructed as follows:

> The State has alleged that the defendant committed the murder for remuneration or the promise of remuneration. This aggravating circumstance is not established unless the State proves beyond a reasonable doubt that:
>
> > First: the murder was committed by the defendant for the purpose of her financial gain.
> >
> > Second: the defendant was in a position to receive financial gain by the act of murder at the time the homicide occurred.

¶124 We initially note that this requested instruction does not fully describe or define the murder for remuneration aggravating circumstance, thus it does not accurately state the law. This Court has determined that the murder for remuneration instructions accurately state the law.

¶125 The traditional application of the "murder for remuneration" aggravating circumstance has been where a defendant has been hired or has hired another person to perform an act of murder. *Plantz v. State,* 1994 OK CR 33, ¶ 42, 876 P.2d 268, 281. Murder for remuneration has also been applied to killings motivated primarily to obtain proceeds from an insurance policy. *Id.* We find that the trial court did not abuse its discretion in refusing Appellant's proposed instruction.

¶126 Appellant next claims that the trial court's answer to the jury's question about life without parole was inadequate. During second stage deliberations, the jury sent out a note asking, "Is [sic] life without parole mean

incarceration in prison until her natural death?" The trial court answered that life without parole was self-explanatory. Trial counsel did not object to this answer, thus we review for plain error. This type of answer was one of the options recommended in *Littlejohn v. State*, 2004 OK CR 6, ¶ 11, 85 P.3d 287, 293-94, therefore, there is no plain error here.

¶127 Next, Appellant claims that the uniform instructions on mitigating circumstances, OUJI-CR 2d 4-78, ran afoul of *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973 (1978), as the prosecutor was allowed to use the language to fashion an argument which compared mitigation with culpability. The same argument made here was rejected in *Hogan v. State*, 2006 OK CR 19, ¶ 94, 139 P.3d 907, 936. We find no reason to revisit this issue, especially in light of the fact that the jury was instructed that they could decide what mitigating factors existed beyond those listed pursuant to OUJI-CR 4-79, and consider them as well. *See also Rojem v. State*, 2006 OK CR 7, ¶¶ 57-58, 130 P.3d 287, 299. Appellant's arguments regarding the second stage instructions must fail.

VII. PROSECUTORIAL MISCONDUCT

¶128 In proposition thirteen, Appellant alleges several instances of what she calls prosecutorial misconduct. We first note that no trial will be reversed on the allegations of prosecutorial misconduct unless the cumulative effect was such to deprive Appellant of a fair trial. *Garrison v. State*, 2004 OK CR 35, ¶ 128, 103 P.3d 590, 612. Many of the allegations here were not preserved at trial with contemporaneous objections, thus we review for plain error. We will

not find plain error unless the error is plain on the record and the error goes to the foundation of the case, or takes from a defendant a right essential to his defense. *Simpson*, 1994 OK CR 40, ¶ 23, 876 P.2d at 698.

¶129 Appellant first claims that the prosecutor intentionally misled the jury by pointing out to them that Tricity Andrew did not beg for her mother's life. Defense counsel had planned and had informed the Court that he intended to ask Tricity if she wanted her mother to get the death penalty, but the question was never asked, possibly due to Tricity's emotional state on the witness stand. Appellant also claims that the prosecution attacked defense counsel's choice to use Appellant's fifteen-year-old niece to ask to spare Appellant's life by asking the jury, "would you put your 15-year-old niece on the stand to do that? I wouldn't." There was no objection to either of these comments.

¶130 While these comments were "low blows" and may have constituted improper argument and casting aspersions on defense counsel, we can confidently say that they did not rise to the level of plain error.

¶131 Appellant next claims that the prosecutor improperly attacked her by stating in response to mitigating evidence indicating she was a good mother, "Would she bring men into her house with her children there and her husband at work?" This comment was not met with an objection. The comment was properly based on the evidence, and it was in response to the list of mitigating evidence, thus did not constitute error. *See Selsor v. State*, 2000 OK CR 9, ¶ 35, 2 P.3d 344, 354.

¶132 Appellant, next points us to the prosecutors comment that, "Rob Andrew's parents would like to visit him in prison . . . . The only place they get to visit is his grave." The prosecutor used this comment to rebut mitigating evidence that Appellant "has many relatives who would visit her in prison if given the opportunity." Again, no objection was lodged. This comment is similar to the ones condemned in *Duckett v. State*, 1995 OK CR 61, ¶ 46, 919 P.2d 7, 19.[15] However, as in *Duckett*, we find that the comment did not rise to the level of plain error.

¶133 Appellant next claims that the prosecutor attempted to elicit sympathy for the victim by pointing out that Appellant murdered a man with admirable attributes, noting specific aspects of his life. Again, there was no objection. This argument did not rise to the level of plain error.

¶134 Next, Appellant complains that the prosecutor, during second closing, attacked defense counsel's argument. The prosecutor pointed out that defense counsel argued that Rob would ask for forgiveness just as Jesus did on the cross, then later told them that Appellant was "a cold-blooded, heartless killer." These comments were separated by nearly fourteen pages of transcript and were in direct response to defense counsel's argument. There was no error here. *See DeRosa*, 2004 OK CR 19, ¶ 70, 89 P.3d at 1149.

¶135 Next, Appellant claims the prosecutor argued facts not in evidence by trying to get the jury to imagine what Rob's last word were, "Was it goodbye,

[15] The oft condemned argument that the defendant gets three hots and cot, while the victim lays cold in the grave.

I love you, Brenda? Was it I forgive you? Was it, take care of my children?" No objection to these comments was lodged. This was also, arguably, in response to defense counsel's argument regarding Rob's belief in forgiveness and argument regarding the aggravating circumstance of heinous, atrocious or cruel. No plain error occurred here.

¶136 Appellant claims that the prosecutor's argument that Rob's mother could not make it to the witness stand was arguing facts not in evidence. Defense Counsel objected, and the trial court interrupted the argument, allowed the prosecutor to rephrase, then, just a few lines later, after an objection to other comments, reminded the jury, in no uncertain terms, that "nothing that the attorneys say is evidence." We find that any error in these comments was cured, due to the later instruction by the court.

¶137 Appellant claims that the prosecutor misstated the evidence by inferring that the victim impact witnesses wanted the death penalty through their testimony, even though Rob's father testified that "all of our family will do everything in our power to assist for convictions and punishment for all of those who are involved in this and responsible for the murder of my son and that they will never ever walk free again." These arguments were in direct response to the defense argument that the victim impact witnesses didn't ask for the death penalty. The prosecutor informed the jury that, by law, the victim impact witnesses could not ask for a specific punishment during their victim impact testimony. There was no objection and the comments do not rise to the level of plain error.

¶138 Appellant claims that the prosecutor argued that she deserved the death penalty for things that are not "aggravating circumstances." Appellant points out that the prosecutor argued that "she killed [Rob] because she wanted the money; she wanted the custody of the children." The prosecutor also argued that she deserved the death penalty for the way she treated Rob after "[h]e had forgiven her time and time again." There was no objection here. Remember that one of the aggravating circumstances alleged was continuing threat – this argument was to establish that her motive and callousness caused her to be a continuing threat. There is no error here.

¶139 Appellant has failed to show either that her trial was so infected by misconduct as to violate due process, or that her death sentence was improperly or unconstitutionally obtained. *DeRosa*, 2004 OK CR 19, ¶ 70, 89 P.3d at 1149. Appellant was convicted and sentenced to death based upon the facts and circumstances of this case, rather than any improper remarks by the prosecutor. *Id.*

VIII. NEW TRIAL

¶140 Appellant filed a motion for new trial with this Court on September 21, 2005. Appellant's motion is brought pursuant to 22 O.S.2001, §§ 952 and 953, alleging newly discovered evidence. The State filed a response on June 21, 2006.

> The test for whether a motion for a new trial should be granted based upon newly discovered evidence is: (1) whether the evidence is material; (2) whether the evidence could not have been discovered before trial with reasonable diligence; (3) whether the evidence is cumulative; and (4) whether the evidence creates a reasonable

> probability that, had it been introduced at trial, it would have changed the outcome.

Ellis v. State, 1992 OK CR 45, ¶ 50, 867 P.2d 1289, 1303.

¶141 The motion contains information that Teresa Sullivan, who testified against Appellant, received a reduction of her federal sentence due to her cooperation with the Oklahoma County District Attorney's office in this case. Sullivan testified that she had twenty-two (22) months left on her sentence; however, a new sentence was given by the federal court after she testified, which basically allowed her release just five (5) months after testifying. The documents indicate that Sullivan was granted the early release because of her cooperation in this case.

¶142 Information attached to the motion also indicates that Sullivan received a downward departure on her federal sentence because she cooperated with the federal authorities in the investigation of her co-defendants (even though she testified that she was not a snitch). The gist of the motion is that the State knew about the potential for a benefit to Sullivan, but failed to disclose the information.[16]

¶143 Sullivan testified that Appellant confessed that she and James Pavatt killed Rob Andrew. Sullivan's attorney says in a letter written to the federal prosecutor that he had to explain to her that she might receive additional consideration on her federal sentence if she were called to testify against Appellant. It appears that Sullivan provided information to the State

[16] The motion is supported by affidavits and documents obtained from the Clerk of the Federal Court for the Western District of Oklahoma. The affidavit states that these documents were obtained on July 26, 2005.

(before testifying) with no understanding that she might receive a benefit. When she testified at trial, there were no guarantees that she would receive any benefit.

¶144 One document in particular states that Oklahoma City Police detectives contacted Sullivan at her place of federal confinement as part of their investigation (as well as others who where incarcerated with Appellant at the Oklahoma County Jail). Sullivan provided information to the detectives before contacting, William P. Earley, the federal public defender who represented her in her federal case. The documents indicate that Earley filed the motion for a reduction of sentence after Sullivan testified as any effective advocate might have done. He stated that he would have filed this motion regardless of any input from the Oklahoma County District Attorney's office.

¶145 Appellant has not presented a sufficient showing to be granted a new trial. Substantial additional evidence supports the conviction. We are further convinced that, were we to grant a new trial with this "newly discovered evidence" being introduced, the outcome of the trial would be the same.

¶146 Sullivan was thoroughly cross-examined regarding her motivation to testify against Appellant, with repeated attempts to show her bias. Defense counsel also called a witness to refute the possibility that Appellant shared any information with Sullivan. The knowledge of the fact that Sullivan was the beneficiary of an act of grace by the federal courts would not change the outcome of this trial.

IX. CUMULATIVE ERROR

¶147 In proposition fifteen, Appellant urges this Court to view the alleged errors in a cumulative fashion, should we hold that no individual error rises to the level of reversible error. We have reviewed the case to determine the effect, if any, of Appellant's alleged accumulation of error. We find, even viewed in a cumulative fashion, the errors we identified do not require relief. *Stouffer v. State*, 2006 OK CR 46, ¶ 205-06, 147 P.3d 245, 280.

¶148 We found error, although harmless, in the admission of some State's evidence and exclusion of some defense evidence. We also found error in the failure to include an instruction on "other crimes" evidence. We find that even viewed in a cumulative fashion, these errors do not require relief. Furthermore, these errors combined with alleged and unpreserved error which did not rise to the level of plain error did not cause Appellant to receive an unfair trial.

X. MANDATORY SENTENCE REVIEW

¶149 We found above that there was sufficient evidence to support the finding of the statutory aggravating circumstance of heinous, atrocious or cruel. We further find that sufficient evidence exists to support the finding of the statutory aggravating circumstance of murder for remuneration. We again note that the jury did not find the aggravating circumstance that there exists a possibility that Appellant will commit criminal acts of violence that would constitute a continuing threat to society. After reviewing the entire record in this case, we find that the sentence of death was not imposed because of any

arbitrary factor, passion, or prejudice. Appellant presented mitigating evidence, which was summarized and listed in an instruction to the jury, as follows:

> The defendant did not have any history of prior criminal activity,
>
> The defendant has never committed acts of violence in the past,
>
> The defendant is a good mother, who loves her children very much,
>
> The death penalty would deprive Tricity and Parker Andrew of their only living parent,
>
> The defendant has a family, who loves her and values her life,
>
> The defendant has many relatives, who would visit her in prison if given the opportunity,
>
> The defendant was a kind and giving neighbor and friend,
>
> The defendant has an education and might be able to help other inmates,
>
> The defendant was a dedicated employee, who worked hard,
>
> The defendant has been a model inmate since being incarcerated at the Oklahoma County Jail,
>
> The defendant has always been active in school and church activities.

¶150 In addition, the trial court instructed, that the jury could decide that other mitigating circumstances exist and they could consider them as well.

¶151 We can honestly say that the jury's verdict was not born under the influence of passion, prejudice or any other arbitrary factor, and the evidence supported the jury's findings of the aggravating circumstances. *See* 21 O.S.2001, § 701.13. Appellant's convictions and her sentences should be affirmed. We find no error warranting reversal of Appellant's conviction or

sentence of death for first-degree murder, nor do we find any error requiring the reversal of her conviction and sentence for the crime of conspiracy to commit murder; therefore, the Judgment and Sentence of the trial court is, hereby, **AFFIRMED**.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY BEFORE THE HONORABLE SUSAN W. BRAGG, DISTRICT JUDGE

BRENDA EVERS ANDREW, Appellant, was tried by jury for the crimes of Murder in the First Degree and Conspiracy to commit Murder in the First Degree in Case No. CF-2001-6189 in the District Court of Oklahoma County before the Honorable Susan W. Bragg, District Judge. Appellant was sentenced to death for murder and ten (10) years and a $5000.00 fine on the conspiracy count. She perfected this appeal. Judgment and Sentence is **AFFIRMED**.

APPEARANCES AT TRIAL

GREG McCRACKEN
GEORGE MISKOVSKY, III
210 PARK AVENUE
SUITE 2700
OKLAHOMA CITY, OK 73102
ANDREA D. MILLER
228 ROBERT S. KERR AVENUE
SUITE 550
OKLAHOMA CITY, OK 73102
ATTORNEYS FOR DEFENDANT

FERN SMITH
GAYLAND GIEGER
ASSISTANT DISTRICT ATTORNEYS
OKLAHOMA COUNTY
505 COUNTY OFFICE BUILDING
320 ROBERT S. KERR AVE.
OKLAHOMA CITY, OK 73102
ATTORNEYS FOR THE STATE

APPEARANCES ON APPEAL

WILLIAM H. LUKER
JAMES H. LOCKARD
SANDRA MULHAIR CINNAMON
CAPITAL DIRECT APPEALS DIVISION
INDIGENT DEFENSE SYSTEM
P.O. BOX 926
NORMAN, OK 73070
ATTORNEYS FOR APPELLANT

W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
SETH B. BRANHAM
ASSISTANT ATTORNEY GENERAL
313 NORTHEAST 21st STREET
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR APPELLEE

OPINION BY: LEWIS, J.

LUMPKIN, P.J.: CONCUR IN RESULTS
C. JOHNSON, V.P.J.: CONCURS
CHAPEL, J.: DISSENTS
A. JOHNSON, J.: CONCURS IN RESULTS INPART/DISSENTS IN PART

LUMPKIN, P.J.: CONCUR IN RESULT

¶1 I agree with the outcome reached in this case, which affirms Appellant's first-degree murder and conspiracy convictions and the sentences set by the jury and then ordered by the trial judge. This is an unusually strong evidentiary case, which leaves little or no doubt that Appellant is guilty of the crimes charged, crimes committed after methodical planning.

¶2 At times cases come before us where we are challenged to ascertain who is actually responsible for the crime at issue: this is not one of those cases.

¶3 Guilty or not, Appellant deserves a fair trial, one that is reliable and that is free of the sorts of errors or accumulations of error that would leave this Court with grave doubts about the outcome.

¶4 Therefore, while I agree that the propositions raised by Appellant do not merit any relief, I believe today's opinion is a bit too willing to concede error or the possibility of error with respect to what occurred in this trial. As such, I must part ways with significant portions of the analysis.

¶5 In my opinion, this case is factually unique due to the repeated attempts on the victim's life. These attempts, in turn, created a rather extended period of time when the victim was experiencing trauma and stress that was truly startling and extraordinary. As such, many of the deceased's statements, which are found to be error or potential error in today's opinion, were admissible hearsay under the state of the mind exception, 12 O.S.2001, §

2803(2). Furthermore, such statements were for the most part admissible under 12 O.S.2001, § 2804(B)(2).

¶6 In addition, much of the "other crimes" evidence went directly to the issue of motive, intent, preparation, and planning, all of which were highly relevant and intricately connected to the State's theory and burden of proof. I also find the statements regarding insurance transfers admissible.

¶7 That is not to say that this was an error-free trial. Few trials, if any are. I am thus bothered by the denial of a defense witness, despite credibility issues, and two instructions that should have been given.

¶8 Nevertheless, the evidence in this case is overwhelming and I find the errors in this case are overwhelmed by the strong evidence of guilt. I am simply not convinced that any reversible error took place in this case.

CHAPEL, JUDGE, DISSENTING:

¶1 I cannot agree to affirming the conviction in this case as I find merit in Appellant's Propositions I, II, III and IV. I would reverse and remand this case for a new trial.

A. JOHNSON, JUDGE, Concurring in Result in part and Dissenting in part:

¶1 The first stage of this capital murder trial is rife with error. That error, at 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. The jury was allowed to consider such evidence, with no limiting instruction, in violation of the fundamental rule that a defendant must be convicted, if at all, of the crime charged and not of being a bad woman.

¶2 I cannot agree with the majority's analysis of the Oklahoma Evidence Code's provisions which embody this rule.[1] That analysis is contrary to the purpose of the rule and to the jurisprudence of this Court.[2]

---

[1] 21 O.S.2001, § 2404.

[2] *Welch v. State*, 2000 OK CR 8, ¶ 8, 2 P.3d 356, 365:

> Evidence of other crimes or bad acts is not admissible as proof of bad character to show a person acted in conformity therewith but "may ... be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." 12 O.S.1991, § 2404(B). The reason other crimes evidence is so limited and its admission guarded revolves around fairness to the accused who should be convicted, if at all, by evidence of the charged offense and not by evidence of separate, albeit similar, offenses. To be admissible, evidence of uncharged offenses must be probative of a disputed issue of the crime charged, there must be a visible connection between the crimes, evidence of the other crime(s) must be necessary to support the State's burden of proof, proof of the other crime(s) must be clear and convincing, the probative value of the evidence must outweigh the prejudice to the accused and the trial court must issue contemporaneous and final limiting instructions. When other crimes evidence is so prejudicial it denies a defendant his right to be tried only for the offense charged, or where its minimal relevancy suggests the possibility the evidence is being offered to show a defendant is acting in conformity with his true character, the evidence should be suppressed.

(citations omitted). *See also Lott v. State*, 2004 OK CR 27, ¶ 40, 98 P.3d 318, 334-35; *Bryan v. State*, 1997 OK CR 15, ¶ 33, 935 P.2d 338, 356.

¶3 I concur nonetheless in the result reached by the majority opinion. The evidence of Andrew's guilt of the murder is indeed overwhelming and the fundamental principles of justice do not require a second trial on that question.

¶4 I cannot, however, stretch that rationale far enough to find this jury was unaffected by that evidence in deciding whether this defendant should live or die.

¶5 The evidence in question here included testimony about

(1) Andrew's prior adulterous affair with J.T.H., and

(2) her prior adulterous affair with another man;

(3) neighborhood boys had once told their mother that Andrew had "come on to them" when they were working at her house;

(4) on the occasion of a restaurant dinner her dress was too short, she showed too much cleavage, and someone there called her a "hoochie;"

(5) she had said she liked having workmen at her house and used them to babysit;

(6) she dyed her hair red after learning a male acquaintance was partial to redheads; and

(7) during an argument with a plumber, she threatened to kill him.

¶6 This is only a partial list of the testimony Andrew complains of on appeal, but it will suffice to demonstrate the tenor of the prosecutor's evidence.

¶7 Andrew argues that the sole purpose of this and similar evidence was to "humiliate" and "dehumanize" her. Whatever the purpose, I believe one

effect was to trivialize the value of her life in the minds of the jurors. As the prosecutor argued in closing, Andrew was "different."

Improper Statements

¶8 Citing to *Woodson v. North Carolina,* 428 U.S. 280, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976), Andrew argues that the result of the prosecution's misconduct was a sentencing procedure that did not meet the heightened standard of reliability required by the Eighth and Fourteenth Amendments.

¶9 During closing argument at the penalty stage of trial, the prosecutor made numerous improper statements.

¶10 I will address only the most immoderate of the prosecutor's statements:

1. Referring to the testimony of Andrew's distraught and sobbing 13-year-old daughter, the prosecutor told the jury, "I'm sure you noticed from the witness stand, Tricity did not beg for her mother's life."[3]

---

[3] Appeals designed to inflame the passions of the jury that divert the jury from its duty to decide a case on the evidence have long been condemned by this Court. *See Tobler v. State,* 1984 OK CR 90, ¶ 28, 688 P.2d 350, 356; *Ward v. State,* 1981 OK CR 102, ¶ 5, 633 P.2d 757, 758; *Bryant v. State,* 1978 OK CR 110, ¶ 24, 585 P.2d 377, 381. The prosecutor's argument was nothing but an attempt to enrage the jury and repeat the theme that Andrew deserved the death penalty, not because the State had proved the aggravating circumstances it alleged, but because she was a bad mother and woman. This argument was outside the record and without foundation because Tricity was never asked any questions about punishment for her mother. The freedom of speech and the range of argumentation permitted during closing argument extends only to the evidence presented at trial and to reasonable inferences drawn therefrom. *Ward,* 1981 OK CR 102, ¶ 3, 633 P.2d at 758. "Arguments beyond the scope of the evidence can only be intended to arouse the passions and prejudices of the jurors and are improper." *Id.* It is impermissible for a prosecutor to go outside the record for purposes of appealing to the jury's passions and prejudices. *Bryant,* 1978 OK CR 110, ¶ 24, 585 P.2d at 381.

2. Referring to the testimony of Andrew's niece, "Would you put your 15-year-old niece on the stand to do that? I wouldn't." [4]

3. In response to defense argument that Andrew's relatives would visit her in prison, "Rob Andrew's parents would like to visit him in prison . . . the only place they get to visit is his grave."[5]

4. In response to victim impact statements not asking for death: "Did they have to say it? Wasn't it conveyed? Wasn't their message conveyed to you what punishment they want," and, "They're [the victim's family] prohibited by law from asking for a specific punishment."[6]

¶11 The second stage of Brenda Andrew's trial was fundamentally unfair. I find it impossible to say with confidence that the death penalty here was not imposed as a consequence of improper evidence and argument. A death sentence imposed under the influence of passion, prejudice, and other arbitrary factors cannot be upheld. *See* 21 O.S.2001, § 701.13.

¶12 I would reverse and remand for resentencing.

---

[4] The prosecutor crossed the line and again went outside the record by questioning the propriety of putting on a mitigation witness who asked the jury to spare Andrew's life. The prosecutor's personal opinion that she would not have put this witness on the stand to shield the young girl from testifying in a capital sentencing proceeding reinforced the idea that Andrew was a bad person and thus she deserved the death penalty. It is improper.

[5] Not only has this Court repeatedly condemned this argument, we have done so in many cases prosecuted by this district attorney's office. *See Young v. State,* 2000 OK CR 17, ¶ 99, 12 P.3d 20, 45-46; *Powell v. State,* 2000 OK CR 5, ¶ 150, 995 P.2d 510, 539; *Le v.State,* 1997 OK CR 55, ¶ 53, 947 P.2d 535, 554; *Duckett v. State,* 1995 OK CR 61, ¶ 46, 919 P.2d 7, 19. Our 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.

[6] It is improper for the prosecutor to ask jurors to have sympathy for victims. *Warner v. State,* 2006 OK CR 40, ¶ 190, 144 P.3d 838, 890. As noted in Note 3, *supra,* references to matters outside the record is error. *See also White v. State,* 1995 OK CR 15, ¶ 24, 900 P.2d 982, 993.

Appendix G: Appellant Brief at the Oklahoma Court of Criminal Appeals (Feb. 21, 2006)

DEATH PENALTY CASE

Case No. D-2004-1010

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BRENDA EVERS ANDREW

Appellant,

vs.

THE STATE OF OKLAHOMA

Appellee.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
FEB 21 2006
MICHAEL S. RICHIE
CLERK

Appeal from the
District Court of Oklahoma

BRIEF OF APPELLANT

WILLIAM H. LUKER
Appellate Defense Counsel
Oklahoma Bar Assoc. No. 5562

JAMES H. LOCKARD
Deputy Division Chief
Oklahoma Bar Assoc. No. 18099

SANDRA MULHAIR CINNAMON
Appellate Defense Counsel
Oklahoma Bar Assoc. No. 16022

Capital Direct Appeals Division
Oklahoma Indigent Defense System
P.O. Box 926
Norman, Oklahoma 73070
(405) 801-2666

ATTORNEYS FOR APPELLANT

February 21, 2006

Case No. D-2004-1010

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WILLIAM H. LUKER
Appellate Defense Counsel
Oklahoma Bar Assoc. No. 5562

JAMES H. LOCKARD
Deputy Division Chief
Oklahoma Bar Assoc. No. 18099

SANDRA MULHAIR CINNAMON
Appellate Defense Counsel
Oklahoma Bar Assoc. No. 16022

Capital Direct Appeals Division
Oklahoma Indigent Defense System
P.O. Box 926
Norman, Oklahoma 73070
(405) 801-2666

ATTORNEYS FOR APPELLANT

February 21, 2006

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BRIEF OF APPELLANT

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

STATEMENT OF THE CASE

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

STATEMENT OF THE FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROPOSITION I

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

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

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

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

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

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

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

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

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

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

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

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

circumstances.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROPOSITION II

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

presented statements allegedly made by Robert Andrew.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

of the more prejudicial items.

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

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

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

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

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

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

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

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

renew that objection also.

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

PROPOSITION III

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROPOSITION IV

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

have come across during their careers as police officers.

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

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

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

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

C. Conclusion.

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

PROPOSITION V

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROPOSITION VI

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROPOSITION VII

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROPOSITION VIII

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

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

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

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

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

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

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

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

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

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

PROPOSITION IX

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROPOSITION X

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

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

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

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

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

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

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

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

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

PROPOSITION XI

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. Conclusion.

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

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

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

PROPOSITION XII

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROPOSITION XIII

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

The prosecution exceeded the bounds of proper prosecutorial advocacy in second

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

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

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

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

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

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

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

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

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

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

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

PROPOSITION XIV

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

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

PROPOSITION XV

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

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

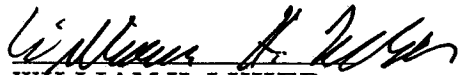
Andrew's sentence to life imprisonment with the possibility of parole. *See Suitor v. State*, 629 P.2d 1266, 1268-1269 (Okl.Cr. 1981); *see also Barnett v. State*, 853 P.2d 226, 234 (Okl.Cr. 1993) (death sentence modified to straight life imprisonment).

CONCLUSION

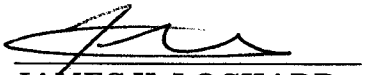
Based on the preceding errors, discussion of facts, arguments and citations of legal authority, the record before this Court and any errors that this Court may note *sua sponte*, Ms. Andrew respectfully asks the Court to reverse the Judgment and Sentence imposed against her or order any other relief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

Respectfully submitted,

BRENDA EVERS ANDREW

By: 

WILLIAM H. LUKER
Oklahoma Bar No. 5562
Appellate Defense Counsel



JAMES H. LOCKARD
Oklahoma Bar No. 18099
Deputy Division Chief



SANDRA MULHAIR CINNAMON
Oklahoma Bar No. 16022
Appellate Defense Counsel

Capital Direct Appeals Division
Oklahoma Indigent Defense System
P.O. BOX 926
Norman, Oklahoma 73070-0926
(405) 801-2666

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

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

WILLIAM H. LUKER