No. 26-_____

CAPITAL CASE

Execution Scheduled for Nov. 12, 2026 at 10 a.m. Central Time

IN THE

Supreme Court of the United States

JAMES DWIGHT PAVATT, PETITIONER,

v.

STATE OF OKLAHOMA, RESPONDENT.

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

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI

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INDEX OF APPENDICES

APPENDIX A: Opinion & Mandate, *Pavatt v. State of Oklahoma,* No. PCD-2026-827 (Okla. Crim. App. Nov. 6, 2026) 1a-15a

APPENDIX B: Subsequent Application for Post-Conviction Relief, *Pavatt v. State of Oklahoma*, PCD-2026-827 (Okla. Crim. App., Oct. 28, 2026) 16a-320a

APPENDIX C: Motion for Evidentiary Hearing, *Pavatt v. State of Oklahoma*, PCD-2026-827 (Okla. Crim. App., Oct. 28, 2026) 321a-327a

APPENDIX D: Motion for Discovery, *Pavatt v. State of Oklahoma*, PCD-2026-827 (Okla. Crim. App., Oct. 28, 2026) 328a-336a

APPENDIX E: Excerpts from Jury Trial Transcript, Vol. XV of XV, *State of Oklahoma v. Pavatt*, CF-2001-6189 (Okla. Cnty. Dist. Ct., Sep. 16, 2003) 337a-394a

APPENDIX F: Excerpts from Jury Trial Transcript, Vol. XVII of XX, *State of Oklahoma v. Andrew*, CF-2001-6189 (Okla. Cnty. Dist. Ct., Jul. 12, 2004) 395a-402a

APPENDIX G: Excerpts from Jury Trial Transcript, Vol. XIX of XX, *State of Oklahoma v. Andrew*, CF-2001-6189 (Okla. Cnty. Dist. Ct., Jul. 14, 2004) 403a-407a

ORIGINAL

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IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

JAMES DWIGHT PAVATT,	)	
	)	**NOT FOR PUBLICATION**
Petitioner,	)	
	)	**No. PCD-2026-827**
v.	)	FILED IN COURT OF CRIMINAL APPEALS STATE OF OKLAHOMA
	)	
THE STATE OF OKLAHOMA,	)	NOV - 6 2026
	)	
Respondent.	)	SELDEN JONES CLERK

OPINION DENYING THIRD APPLICATION FOR POST-CONVICTION RELIEF AND RELATED MOTIONS FOR DISCOVERY, EVIDENTIARY HEARING, AND STAY OF EXECUTION

HUDSON, JUDGE:

Petitioner, James Dwight Pavatt, was tried by jury in the District Court of Oklahoma County, Case No. CF-2001-6189, and convicted of First Degree Murder, in violation of 21 O.S.2001, § 701.7 (Count 1), and Conspiracy to Commit First Degree Murder, in violation of 21 O.S.2001, § 421 (Count 2). The jury found the existence of two aggravating circumstances[1] and fixed punishment at death on Count 1 and ten years imprisonment and a $5,000.00 fine on Count 2. The trial court sentenced Petitioner in accordance with the jury's verdict

[1] The jury found: (1) the murder was especially heinous, atrocious, or cruel; and (2) the murder was committed for remuneration or the promise of remuneration.

on October 21, 2003, and this Court affirmed the judgment and sentence on direct appeal. *Pavatt v. State*, 2007 OK CR 19, 159 P.3d 272, *cert. denied*, 552 U.S. 1181 (2008).

This Court denied relief on Petitioner's two previous applications for post-conviction relief. *Pavatt v. State*, No. PCD-2004-25 (Okl. Cr. April 11, 2008) (not for publication); *Pavatt v. State*, No. PCD-2009-777 (Okl. Cr. February 2, 2010) (not for publication). Petitioner then unsuccessfully challenged his convictions and sentences through federal habeas proceedings. *Pavatt v. Carpenter*, 928 F.3d 906 (10th Cir. 2019) (en banc), *cert. denied*, 589 U.S. 1180 (2020). On August 27, 2026, this Court, upon finding Petitioner had exhausted all regular state and federal appeals, issued an order setting Petitioner's execution date for November 12, 2026.

On October 28, 2026, Petitioner, through his federal habeas counsel, filed the current application for post-conviction relief with this Court. Accompanying the application are separately filed motions for discovery and an evidentiary hearing related to his post-conviction claim, as well as a motion for a stay of execution pending the resolution of this application. The State filed responses to

Petitioner's pleadings on October 30, 2026, opposing all requested relief. On November 2, 2026, Petitioner filed a motion, with an attached reply brief, seeking leave to reply to the State's response. Petitioner's motion is **GRANTED**, and the submitted reply brief has been considered by the Court.

For the reasons discussed below, Petitioner's request for relief is **DENIED**.

Proceedings under the Post-Conviction Procedure Act, 22 O.S. § 1080 *et seq.,* are not intended to provide a second appeal. *Carter v. State*, 1997 OK CR 22, ¶ 2, 936 P.2d 342, 344. Post-conviction review in capital cases is strictly limited under 22 O.S.Supp.2022, § 1089. Claims that could have been raised in previous appeals but were not are generally waived. 22 O.S.Supp.2022, § 1089(D)(2). Claims that were raised and decided in prior proceedings are *res judicata. Bench v. State*, 2021 OK CR 39, ¶ 3, 504 P.3d 592, 596.

In subsequent post-conviction proceedings, there are "even fewer grounds to collaterally attack a judgment and sentence than the narrow grounds permitted in an original post-conviction proceeding." *Martinez v. State*, 2021 OK CR 40, ¶ 4, 502 P.3d 1115, 1117 (citing *Sanchez v. State*, 2017 OK CR 22, ¶ 6, 406 P.3d 27, 29).

This Court "may not consider the merits of or grant relief based on" claims contained in a subsequent, capital post-conviction application unless:

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

22 O.S.Supp.2022, § 1089(D)(8). Furthermore, this Court will not consider a subsequent post-conviction application unless "it contains claims which have not been and could not have been previously presented in the original application because the factual or legal basis was unavailable" and "it is filed within sixty (60) days from the

date the previously unavailable legal or factual basis serving as the basis for a new issue is announced or discovered." Rule 9.7(G)(1), (3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2026).

Here, Petitioner asserts in a single proposition of error that newly discovered evidence supports that he was deprived of his federal and state constitutional rights to due process, confrontation, a fair trial, and an impartial jury as a result of the prosecution "intentionally bringing non-record, misleading, and prejudicial information to the jury's attention, which influenced at least one juror to vote for the death penalty." Appl. at 1. As the "**sole** underlying basis" for his claim, Reply Br. at 2 (emphasis added), he relies upon statements contained in the State of Oklahoma's clemency hearing packet, submitted by the Attorney General's Office to the Pardon and Parole Board in advance of Petitioner's October 14, 2026 clemency hearing (hereinafter, "clemency packet"), acknowledging uncertainty as to whether Petitioner alone, Brenda Andrew alone, or both, fired the gunshots that killed the victim.[2]

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[2] The victim, Rob Andrew, Brenda Andrew's husband, died after being shot twice with his own 16-gauge shotgun. Brenda Andrew and Petitioner were charged jointly with his murder and the conspiracy to murder him. In a separate jury

Petitioner contends this claim is proper for consideration in this, his third application for post-conviction relief, because the factual basis of the claim was unavailable prior to the State's submission of its clemency packet to the Pardon and Parole Board on September 18, 2026, and the facts underlying the claim "establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder . . . would have rendered the penalty of death." 22 O.S.Supp.2022, § 1089(D)(8)(b)(1), (2). We disagree.

The factual basis for a claim is "unavailable" only when the facts "were not ascertainable through the exercise of reasonable diligence" at the time of filing a prior application. 22 O.S.Supp.2022 § 1089(D)(8)(b)(1). Petitioner contends here that the State has "acknowledge[d] for the first time" in its clemency packet "that there are three possibilities as to who fatally shot the victim . . . with a shotgun." This, he asserts, contradicts the prosecution's arguments during his jury trial that "Mr. Pavatt was the *only* shooter."

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trial, Brenda Andrew was also convicted and sentenced to death. *Andrew v. State*, 2007 OK CR 23, 164 P.3d 176, *as corrected* (Sept. 10, 2007), *cert. denied*, 552 U.S. 1319 (2008).

Included in the appendix accompanying Petitioner's application is a copy of the State's fifty-page clemency packet.[3] The bulk of the packet provides an overview of the evidence and testimony presented during Petitioner's 2003 jury trial and, where relevant, Brenda Andrew's 2004 jury trial. Based on the record evidence, the State then sets out the "three possibilities" concerning the identity of the shooter(s): "The first is that Pavatt fired both shots." "The second possibility is that Pavatt fired the first shot and Brenda fired the second." "The third possibility is that Brenda walked away from Rob, retrieved the shotgun, and fired both shots." (Attach. 7, *Appendix*). It is this so-called "concession," as Petitioner calls it, concerning the State's indefinite position as to who pulled the trigger, particularly as to the second shot, that serves as the factual basis for his claim.

While Petitioner characterizes the State's recap of the three possible scenarios in its clemency packet as "newly discovered

[3] Petitioner has also included in this appendix three documents which he does not allege to be newly discovered: a message dated June 13, 2002, purportedly sent from an assistant district attorney on the case to an individual at the Oklahoma City Police Department (OCPD); an OCPD standard supplemental report dated December 5, 2001, and approved by a supervising officer the next day; and an OCPD Forensic Services supplemental DNA examination report, dated August 24, 2005. Each of these documents were certainly ascertainable through the exercise of reasonable diligence at the time of Petitioner's direct appeal and previous post-conviction applications; he does not argue otherwise.

evidence," it is neither new nor evidence. To be sure, as Petitioner acknowledges, prosecutors argued during the guilt phase of his jury trial that it was unnecessary for jurors to decide who pulled the trigger because as principles to the crime, Petitioner and Brenda Andrew were both "equally guilty." Petitioner, however, contends the prosecution "flipped the switch" during the penalty phase of trial, arguing that he was the "only shooter" in order to obtain a verdict of death. Having reviewed the portions of the trial transcript upon which he relies, we respectfully disagree with Petitioner's interpretation of the State's closing argument as casting Petitioner as the lone shooter. Nevertheless, even if we were to take Petitioner's view of the arguments, he still fails to demonstrate the factual basis upon which he bases his claim—*i.e.*, the State's acknowledgement of a different possible shooting scenario—was not previously discoverable through the exercise of reasonable diligence.

Indeed, prosecutors argued as early as Brenda Andrew's 2004 jury trial that she, not Petitioner, fired the second shot after reloading the shotgun. *See Andrew v. State*, 2007 OK CR 23, ¶ 102, 164 P.3d 176, 198 ("In closing the prosecution turned this [blood spatter] evidence against [Brenda Andrew] by arguing that she received this

spatter by firing the second shot and getting blow back blood spatter from Rob."). There is nothing new in counsel for the State expressing ambiguity as to whether Brenda Andrew shot her husband, or even affirmative beliefs that she did. Such arguments by counsel have been readily discoverable for more than twenty years. By outlining the three possible factual scenarios in the State's clemency packet, counsel for the State did not purport to draw from any new or previously unknown facts or evidence but instead drew reasonable inferences from the evidence as presented at Petitioner's and Brenda Andrew's jury trials.

In addition to the State's clemency packet, Petitioner further relies upon an affidavit executed on October 26, 2026, by the foreperson of his jury, M.H., discussing the jury's deliberative process during the capital sentencing stage of trial and the effect he believes the above referenced statements in the State's clemency packet would have had upon the jury's deliberations and sentencing decision. We cannot consider the affidavit as it constitutes an improper intrusion into the jury's mental processes during deliberation. Consideration of the affidavit is governed by 12 O.S.2021, § 2606(B), which provides:

> Upon an inquiry into the validity of a verdict or indictment, **a juror shall not testify as to any matter or statement occurring during the course of the jury's deliberations or as to the effect of anything upon the juror's mind or another juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes during deliberations**. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

(Emphasis added). The statute further provides that "[a]n affidavit . . . by the juror concerning a matter about which the juror would be precluded from testifying shall not be received for these purposes." *Id.*

"The central focus of section 2606(B) is upon insulation of the manner in which the jury reached its verdict, and this protection extends to all of the components of deliberation. Excluded from that focus are prejudicial extraneous information or influences *injected into* the deliberative process." *Weatherly v. State*, 1987 OK CR 28, ¶ 13, 733 P.2d 1331, 1335. "Section 2606(B) was enacted to prohibit jurors from testifying post-verdict to the motives, methods or mental processes by which they reached their verdict in an effort to preserve finality of judgments and safeguard jurors from corruption by

unhappy non-prevailing litigants." *Matthews v. State*, 2002 OK CR 16, ¶ 14, 45 P.3d 907, 915, *as corrected* (Apr. 23, 2002); *see also Young v. State*, 2000 OK CR 17, ¶ 112, 12 P.3d 20, 48 (Section 2606 "insulates the manner in which a jury reaches its verdict and prohibits inquiry into motives, methods or mental processes used to reach a verdict."). However, it is precisely for that prohibited purpose that Petitioner has submitted the foreperson's affidavit in this matter—to delve into jurors' thought processes and motivations for arriving at a verdict of death.

We find unpersuasive Petitioner's attempt to shoehorn the affidavit into Section 2606(B)'s exception for juror testimony concerning "extraneous prejudicial information" or "outside influence" that may have been injected into the deliberative process. Contrary to Petitioner's assertions, closing arguments given by counsel *during jury trial proceedings* cannot reasonably be construed as extraneous information or an outside influence improper for the jury's consideration. The proffered affidavit will not be considered.

Above, we determined the factual basis for Petitioner's sole claim of error was ascertainable through the exercise of reasonable diligence at the time of direct appeal and prior post-conviction

proceedings. Petitioner argues in the alternative that, notwithstanding the strict limitations of Section 1089, this Court has the power to grant relief under a "miscarriage of justice" exception applied in *Valdez v. State*, 2002 OK CR 20, ¶ 28, 46 P.3d 703, 710. This Court has never extended *Valdez's* equitable exception beyond its own, unique fact-bound circumstances. To the extent a miscarriage of justice exception exists, this matter does not present such extraordinary and compelling circumstances warranting its application. For these reasons, we find Petitioner's claim is procedurally barred from review.

Given our resolution of the current claim, Petitioner's motions for discovery and an evidentiary hearing are **DENIED**. *See* 22 O.S.Supp.2022, § 1089(D)(4) & (5); Rule 9.7D)(1)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2026). Petitioner's motion for a stay of execution pending resolution of the current post-conviction application is also **DENIED**. *See* 22 O.S.2021, § 1001.1(C).

DECISION

Petitioner's motion for leave to reply to the State's response brief is **GRANTED.** Petitioner's third application for post-conviction relief

is **DENIED**. Petitioner's motion for discovery is **DENIED**. Petitioner's motion for evidentiary hearing on subsequent post-conviction claims is **DENIED**. Petitioner's motion for a stay of execution is **DENIED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2026), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

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FEDERAL PUBLIC DEFENDER
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OPINION BY: HUDSON, J.

LUMPKIN, P.J.:	CONCUR
MUSSEMAN, V.P.J.:	CONCUR
LEWIS, J.:	CONCUR
ROWLAND, J.:	CONCUR

106685 1149

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

James Dwight Pavatt,
Petitioner,
v.
STATE OF OKLAHOMA,
Respondent,

SERVICE COPY

Case Number: PCD-2026-827

TCC Number(s): CF-2001-6189

MANDATE

To the Honorable Judge of the District Court in and for the County of OKLAHOMA, State of Oklahoma, Greetings:

Whereas, the Court of Criminal Appeals of the State of Oklahoma has rendered its decision in the above styled and numbered case on the 6th day of November, 2026, resolving the appeal from the District Court in Case Number CF-2001-6189.

Denied

Now, therefore, you are hereby commanded to cause such Decision to be filed and spread of record in your court and to issue such process (see 22 O.S. 2001, §§ 978 & 979, and 22 O.S. 2004 §980) and to take such other action as may be required by said Opinion (see 22 O.S. 2001 §§ 1066 and 1072). You shall then make due and prompt return to this court showing ultimate disposition of the above case.

Witness, the Honorable Gary L. Lumpkin, Presiding Judge of the Court of Criminal Appeals of the State of Oklahoma, Oklahoma Judicial Center, Oklahoma City, this 6th day of November, 2026 .

SELDEN JONES
Clerk

(seal)

By: Candace Duncan
Deputy

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
OCT 28 2026
SELDEN JONES
CLERK

James Dwight Pavatt,

Petitioner,

v.

The State of Oklahoma,

Respondent.

District Court Case No.:
CF-2001-6189

Direct Appeal Case No.:
D-2003-1183

Original Post-Conviction Case No.:
PCD-2004-25

Subsequent Post-Conviction Case No(s).:
PCD-2009-777

PCD 2026 827

SUBSEQUENT APPLICATION FOR POST-CONVICTION RELIEF
**** DEATH PENALTY CASE ****

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EXECUTION SCHEDULED FOR NOVEMBER 12, 2026

TABLE OF CONTENTS

PART A: PROCEDURAL HISTORY iv

PART B: GROUNDS FOR RELIEF x

PART C: FACTS xi

PART D: ARGUMENTS AND AUTHORITIES 1

PROPOSITION ONE 1

NEWLY DISCOVERED EVIDENCE PROVES THAT THE PROSECUTION AT JAMES PAVATT'S TRIAL VIOLATED HIS RIGHTS TO DUE PROCESS, CONFRONTATION, A FAIR TRIAL, AND AN IMPARTIAL JURY UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, SECTIONS 7 AND 20 OF THE OKLAHOMA CONSTITUTION BY INTENTIONALLY BRINGING NON-RECORD, MISLEADING, AND PREJUDICIAL INFORMATION TO THE JURY'S ATTENTION, WHICH INFLUENCED AT LEAST ONE JUROR TO VOTE FOR THE DEATH PENALTY. 1

A. Factual Background 2

1. The prosecution told James Pavatt's trial jurors that a single shooter killed Rob Andrew with two shotgun blasts in quick succession. 2

2. Before Mr. Pavatt's trial, the prosecution uncovered objective, scientific evidence that Mr. Pavatt's co-defendant Brenda Andrew was the only and actual killer of her estranged husband Rob Andrew. 2

3. The prosecution suppressed the blood spatter evidence at Mr. Pavatt's trial. 5

4. The prosecution did not single out Mr. Pavatt as the shooter in the first stage of trial, but flipped the switch at the sentencing

stage and argued at least 16 times that he was the fatal shooter despite no evidence still to support that claim. 5

5. The prosecution's claim that Mr. Pavatt was the shooter—particularly as to the second shot—was integral to its argument for a death sentence. 6

6. At Brenda Andrew's later trial, the prosecutors finally told the truth, arguing repeatedly in both stages of her case that she was the sole shooter. 7

7. The basis for the prosecution's argument at Brenda Andrew's trial that she was the sole killer was the objective, scientific evidence they kept hidden from Mr. Pavatt's jury 7

8. The prosecution also used the identity of the shooter—particularly the second shot—as an integral part of its argument for a death sentence for Brenda Andrew 8

9. In a post-trial television show, the prosecution doubled down on Brenda Andrew as the only and actual killer, based again on the blood spatter evidence 9

10. In a recent written submission in Mr. Pavatt's clemency proceeding, the State for the first time concedes that there are three possibilities as to who actually shot Rob Andrew, including Brenda Andrew alone as well as Mr. Pavatt firing the first shot then Ms. Andrew firing the second, fatal shot. 9

11. The jury foreman reviewed the clemency submissions from the State and from Mr. Pavatt and has attested that the prosecution's insistence at Mr. Pavatt's trial that he fired the second shot was key to his decision for death and that he would not have voted for death if he'd known that the State did not know the identity of the person who fired the second shot, as the State now concedes for the first time in its written clemency submission. 10

B. The trial prosecutors violated Mr. Pavatt's rights to due process, confrontation, a fair trial, and an impartial jury by intentionally bringing false, extraneous, and prejudicial information to the jury's attention in the sentencing stage by repeatedly insisting, without evidentiary support, that he fatally shot Rob Andrew. 13

1. The Legal Standard 13

2. The prosecution presented prejudicial extra-record information to the jury. 17

3. The effect of the improper argument on the jury foreman. 20

C. A reasonable juror would not have voted for a death sentence for Mr. Pavatt but for the prosecution presenting the jury with knowingly false information about who fired the second, fatal shot. 21

D. Mr. Pavatt's claim satisfies the successor postconviction requirements of Okla. Stat. Ann. Tit. 22, § 1089(D)(8)(b) and Rule 9.7 of this Court's Rules. 26

CONCLUSION 29

VERIFICATION OF COUNSEL FOR PETITIONER 30

CERTIFICATE OF SERVICE 30

PART A: PROCEDURAL HISTORY

Petitioner, James Dwight Pavatt, through undersigned counsel, submits his subsequent application for post-conviction relief under Okla. Stat. tit. 22, § 1089, based on newly discovered evidence that the prosecution intentionally misrepresented the identity of the shooter during the capital sentencing stage proceedings, which influenced at least one juror to vote for the death penalty, in violation of Mr. Pavatt's state and federal constitutional rights to due process, confrontation, a fair trial, and an impartial jury. U.S. Const. amends. VI, XIV; Okla. Const. art. 2, §§ 7, 20. The newly discovered evidence consists of: the Oklahoma Attorney General's September 18, 2026, written submission in the clemency case of *State of Oklahoma v. James Pavatt* where they acknowledge for the first time that there are three possibilities as to who fatally shot the victim Rob Andrew, and a subsequent affidavit from Mr. Pavatt's jury foreman regarding the impact of the State's new assertions.[1]

This is Mr. Pavatt's third application for post-conviction relief. Pursuant to this Court's Rules, a copy of the original and second applications for postconviction relief, and the respective unpublished opinions from this Court, are appended hereto.[2] Rule 9.7(A)(3)(d), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2026).

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[1] In accordance with the Court's Rules, this application is being filed within 60 days of when the Attorney General submitted its clemency papers in this case and provided Mr. Pavatt's counsel with a copy, such that the information became publicly available. Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2026).

[2] Pursuant to Rule 9.7(A)(3)(d), *Rules of the Oklahoma Court of Criminal Appeals,* Title 22, Ch. 18, App. (2021), a copy of Mr. Pavatt's initial application in Case No. PCD-2004-25 is appended hereto at Appx. 001. This Court's unpublished opinion denying relief is appended hereto at Appx. 097. A copy of Mr. Pavatt's subsequent application in Case No. PCD-2009-777 is appended hereto at Appx. 106. This Court's unpublished opinion denying relief on Mr. Pavatt's subsequent

The sentences from which relief is sought is: Count I: Death

1. **Court in which sentence was rendered:**

   (a) Oklahoma County District Court

   (b) Case Number: CF-2001-6189

2. **Date of Sentence:** October 21, 2003

3. **Terms of Sentence:** Death

4. **Name of Presiding Judge:** Honorable Susan W. Bragg

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

   Where? Oklahoma State Penitentiary, McAlester, Oklahoma

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

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

I. CAPITAL OFFENSE INFORMATION

6. **Petitioner was convicted of the following crime, for which a sentence of death was imposed:** First Degree Murder in violation of Okla. Stat. tit. 21, § 701.7(C)

   Aggravating factors alleged:

   1. 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;

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

   (O.R. IV, 670-71)

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application is appended hereto at Appx. 183. Mr. Pavatt has not included all the attachments to the prior applications for post-conviction relief due to their large volume. However, he will make those attachments available to the Court if deemed necessary to the resolution of any issues raised herein.

Aggravating factors found:

The jury found two of the aggravating circumstances alleged by the State in the Bill of Particulars, to wit:

1. 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;

(O.R. XI, 2063)

Mitigating factors listed in jury instructions:

The trial court gave the following instruction:

Evidence has been introduced as to the following mitigating circumstances:

The defendant did not have any significant history of prior criminal activity

The defendant is likely to be rehabilitated

The defendant's age

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

(O.R. XI, 2057)

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

7. **Check whether the finding of guilty was made:**

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

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

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

9. **Was the sentence determined by:** A jury (X) The trial judge ( )

II. NON-CAPITAL OFFENSE INFORMATION

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

Count II: Conspiracy to Commit Murder for which Mr. Pavatt received a sentence of ten (10) years and a $5,000 fine.

11. Check whether the finding of guilty was made:

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

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

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

III. CASE INFORMATION

13. Name and address of lawyer in trial court:

M. Michael Arnett
3133 N.W. 63rd Street
Oklahoma City, OK 73116

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

Justin Lowe
3133 N.W. 63rd Street
Oklahoma City, OK 73116

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

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

To what court or courts? Oklahoma Court of Criminal Appeals

Date Brief in Chief filed: January 31, 2005

Date Response filed: May 31, 2005

Date Reply Brief filed: July 20, 2005

Date of Oral Argument: May 16, 2006

Date of Petition for Rehearing: May 29, 2007

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

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

Is this petition filed subsequent to supplemental briefing after remand?

Yes ( ) No (X)

16. **Name and address of lawyers for appeal?**

M. Michael Arnett
3133 N.W. 63rd Street
Oklahoma City, OK 73116

Gloyd L. McCoy
5801 N. Broadway Ext., Ste. 101
Oklahoma City, OK 73118

17. **Was an opinion written by the appellate court?**

Yes (X)

If "yes," give citations if published:

Pavatt v. State, 159 P.3d 372 (Okla. Crim. App. 2007)

If not published, give appellate case no.: N/A

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

A Petition for Writ of Certiorari was filed in the United States Supreme Court challenging this Court's decision on direct review. The petition was denied on February 19, 2008. *Pavatt v. Oklahoma*, ___ U.S.__, 128 S. Ct. 1229 (2008).

Mr. Pavatt's original application for post-conviction relief raised the following claims: (I) Newly discovered evidence and new law renders Mr. Pavatt's conviction and sentence suspect and unreliable in violation of his due process right to a fundamentally fair trial. As such, Mr. Pavatt must be granted a new trial; (II) Petitioner, Mr. Pavatt, received ineffective assistance of appellate counsel and trial counsel in violation of the Sixth, Eighth, and Fourteenth Amendments and Article II, §§ 7, 9, and 20 of the Oklahoma Constitution; and (III) The cumulative impact of errors identified on direct appeal and post-conviction proceedings rendered the proceeding resulting in the death sentence arbitrary, capricious and unreliable. The death sentence in this case constitutes cruel and unusual punishment and a denial of due process of law and must be reversed or modified

to life imprisonment or life without parole. This Court denied the petition on April 11, 2008, in an unpublished opinion in Case No. PCD-2004-25.

On April 1, 2009, Mr. Pavatt filed a federal habeas corpus petition raising fifteen (15) grounds for relief. (I) Mr. Pavatt was denied due process of law guaranteed by the Fifth Amendment and the Right to Trial by Impartial Jury guaranteed by the Sixth Amendment because the jury pool was flooded with incendiary publicity in the months, weeks, and days before his trial; (II) Mr. Pavatt was denied the right to confrontation and cross-examination in violation of the Sixth Amendment to the U.S. Constitution through pervasive admission of hearsay evidence and was denied effective assistance of trial and appellate counsel for failure to raise the issue; (III) The evidence was insufficient to prove beyond a reasonable doubt that Mr. Pavatt was guilty of first degree murder; (IV) Mr. Pavatt was denied a fundamentally fair trial when the court excluded evidence someone else committed the murder of Rob Andrew; (V) Mr. Pavatt was denied a fair trial through the admission of unreliable expert witness opinion testimony concerning handwriting and was denied effective assistance of counsel for failure to raise the issue; (VI) The Court's failure to instruct on the lesser included offense of accessory after the fact, when the evidence warranted such instruction, violated Mr. Pavatt's rights under the Eighth Amendment; (VII) Prosecutorial misconduct by the State denied Mr. Pavatt a fair trial and violated his Fifth, Sixth, And Fourteenth Amendment Rights; (VIII) Failure to provide adequate instruction on the meaning of the sentencing options of life without the possibility of parole and life with the possibility of parole violated Mr. Pavatt's Sixth Amendment right to a fair trial by jury, his Eighth Amendment right to reliable capital sentencing, and his Fourteenth Amendment right to due process; (IX) The wrongful admission and display, in both stages of the trial, of gruesome crime scene photographs of Rob Andrew, juxtaposed with the wrongful admission, during both stages of the trial, of photographs and video recording of Rob Andrew in life deprived Mr. Pavatt of a fair trial in violation of the Eight and Fourteenth Amendments to the U.S. Constitution and injected improper victim impact evidence into the guilt phase of the trial; (X) Mr. Pavatt's sentence does not comport with the Eighth and Fourteenth Amendments to the U.S. Constitution because there is insufficient evidence to support that the murder was "especially heinous, atrocious, or cruel"; (XI) Failure to provide an adequate instruction that informs the jury that it must find "conscious physical suffering" as a fact beyond a reasonable doubt before concluding that a murder was "especially heinous, atrocious, or cruel" deprives the Petitioner of his Sixth Amendment right to a fair trial, his Eighth Amendment right to a reliable sentencing determination, and his Fourteenth Amendment right to due process of law; (XII) Mr. Pavatt's sentence does not comport with the Eighth and Fourteenth Amendments because there is insufficient evidence to support the murder for renumeration aggravating factor; (XIII) the Eighth and Fourteenth Amendments to the U.S. Constitution are violated by Oklahoma's continued use of the facially vague aggravating circumstance that a murder is: especially heinous, atrocious, or cruel; (XIV) There is no assurance that all factual findings essential to the jury's authority to impose a penalty of death were made beyond a reasonable doubt as is required by the Sixth, Eighth, and Fourteenth Amendments; and, (XV) Mr. Pavatt was denied the effective assistance of trial counsel and direct appeal counsel in violation of the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution.

On September 2, 2009, Mr. Pavatt filed a Subsequent Application for Post-Conviction Relief raising the following claims: (I) Mr. Pavatt was denied the right to confrontation and cross-

examination in violation of the Sixth Amendment to the U.S. Constitution through pervasive admission of hearsay evident and denied effective assistance of trial, direct appeal, and post-conviction counsel for failure to raise the issue; (II) Prosecutorial misconduct denied Mr. Pavatt a fair trial and violated his Fifth, Sixth, and Fourteenth Amendment rights; (III) The wrongful admission and display, in both stages of the trial, of gruesome crime scene photographs of Rob Andrew, juxtaposed with the wrongful admission, during both stages of the trial, of photographs and a video recording of Rob Andrew in life deprived Mr. Pavatt of a fair trial in violation of the Eighth and Fourteenth Amendments of the U.S. Constitution and injected improper victim impact evidence into the guilt phase of the trial; (IV) Failure to provide an adequate instruction that informed the jury that it must find "conscious physical suffering" as a fact beyond a reasonable doubt before concluding that a murder was "especially heinous, atrocious, or cruel" deprived Mr. Pavatt of his Sixth Amendment right to a fair trial, his Eighth Amendment right to a reliable sentencing determination, and his Fourteenth Amendment right to due process of law; (V) The Eighth and Fourteenth Amendments to the U.S. Constitution are violated by Oklahoma's continued use of the facially vague aggravating circumstance that a murder is "especially heinous, atrocious, or cruel"; (VI) Mr. Pavatt was denied the effective assistance of trial, direct appeal, and post-conviction counsel in violation of the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. This Court denied the application on February 2, 2010, in an unpublished opinion in Case No. PCD-2009-777.

PART B: GROUNDS FOR RELIEF

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

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

Yes (X) No ( )

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

If yes, specify what motions have been filed:

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

PROPOSITION ONE

NEWLY DISCOVERED EVIDENCE PROVES THAT THE PROSECUTION AT JAMES PAVATT'S TRIAL VIOLATED HIS RIGHTS TO DUE PROCESS, CONFRONTATION, A FAIR TRIAL, AND AN IMPARTIAL JURY UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, SECTIONS 7 AND 20 OF THE OKLAHOMA CONSTITUTION BY INTENTIONALLY BRINGING NON-RECORD, MISLEADING, AND PREJUDICIAL INFORMATION TO THE JURY'S ATTENTION, WHICH INFLUENCED AT LEAST ONE JUROR TO VOTE FOR THE DEATH PENALTY.

PART C: FACTS

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

O.R.	13-volume consecutively paginated Original Record in *State v. Pavatt*, Oklahoma Co. Case No. CF-2001-6189
PH:	the seven (7) volumes of transcripts of the preliminary hearing held June 5, 7, 10-12, July 9, 17, and 18, 2002, No. CF-2001-6189
Tr.	15-volume consecutively paginated transcripts of jury trial held August 25-27, 29, September 2-5, 8-12, and 15-16, 2003, No. CF-2001-6189
M.Tr.	Motion Hearing transcripts held April 16, 30, May 14 and 16, 2002; January 9 and 21, 2003; March 6, 2003, May 23, 2003; July 24, 2003; August 8, 2003; and August 25, 2003
Sent. Tr.	Formal sentencing hearing held on October 21, 2003
Andrew Tr.:	the volumes of transcripts of the jury trial of Mr. Pavatt's co-defendant, Ms. Brenda Andrew, held June 7-10, 14-18, 21-25, 28-30, July 1-2, 6-9, and 12-15, 2002[3]
APCR	Original Application for Post-Conviction Relief, *Pavatt v. State*, PCD-2004-25, April 17, 2006
SAPCR	Second Application for Post-Conviction Relief, *Pavatt v. State*, PCD-2009-777, September 2, 2009
Appx.	Attachments to the current Subsequent Application for Post-Conviction Relief

[3] Counsel for Mr. Pavatt filed a *Motion to Cross-Reference* Mr. Pavatt's case with that of his co-defendant, Ms. Andrew. This Court granted the Motion to Cross-Reference on January 13, 2006. *See* Order Granting Motion to Cross Reference Records, *Pavatt v. State*, Case No. PCD-2004-25 (Okla. Crim. App. Jan. 13, 2006).

PART D: ARGUMENTS AND AUTHORITIES[4]

In accordance with Okla. Stat. tit. 22, § 1089(D), which governs review of subsequent applications for post-conviction relief (SAPCR) in capital cases, Mr. Pavatt's application sets forth "facts establishing that the current claims and issues have not and could not have been presented previously in a timely original application[,]" and the facts underlying the claims "establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have . . . rendered the penalty of death." Okla. Stat. tit. 22, § 1089(D)(8)(b)(2).

PROPOSITION ONE

NEWLY DISCOVERED EVIDENCE PROVES THAT THE PROSECUTION AT JAMES PAVATT'S TRIAL VIOLATED HIS RIGHTS TO DUE PROCESS, CONFRONTATION, A FAIR TRIAL, AND AN IMPARTIAL JURY UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE II, SECTIONS 7 AND 20 OF THE OKLAHOMA CONSTITUTION BY INTENTIONALLY BRINGING NON-RECORD, MISLEADING, AND PREJUDICIAL INFORMATION TO THE JURY'S ATTENTION, WHICH INFLUENCED AT LEAST ONE JUROR TO VOTE FOR THE DEATH PENALTY.

Newly discovered evidence contained in the State of Oklahoma's September 18, 2026, written clemency submission in the case *State of Oklahoma v. James Pavatt* shows that the prosecution at James Pavatt's capital sentencing proceeding violated his state and federal constitutional rights to due process, confrontation, a fair trial, and an impartial jury by intentionally bringing prejudicial, false, and extra-record information to the jury's attention, which influenced at least one juror to vote for the death penalty. In the State's clemency submission, they acknowledge for the first time that there are three possibilities as to who fatally shot the victim Rob Andrew with a shotgun. A subsequent affidavit from Mr. Pavatt's jury foreman explains how the prosecution's injection at the sentencing stage of knowingly false information that Mr. Pavatt

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

was the actual and only shooter influenced his ultimate vote for death. Further, the juror details how the State's previously unavailable assertions regarding the uncertainty that Mr. Pavatt was the actual shooter would have caused him to reject a death sentence had they been disclosed to him at trial. The new evidence—consisting of the State's admission in the clemency submission and the consequent impact of that confession on the jury foreman—demands that Mr. Pavatt's death sentence be set aside, and his case remanded for a new sentencing proceeding. U.S. Const. amend. VI, XIV; Okla. Const. art. II, §§ 7, 20.

A. Factual Background

1. The prosecution told James Pavatt's trial jurors that a single shooter killed Rob Andrew with two shotgun blasts in quick succession.

At Mr. Pavatt's capital trial, the prosecution only presented evidence and argument that a single shooter killed Rob Andrew with two shotgun blasts in quick succession. Tr. at 3134, 3178, 3608, 3611. And at the trial of Mr. Pavatt's co-defendant Brenda Andrew, the prosecution repeated this single-shooter theory in its evidentiary presentation and argument. Andrew Tr. at 1917, 3667, 3668, 3871, 4167.

2. Before Mr. Pavatt's trial, the prosecution uncovered objective, scientific evidence that Mr. Pavatt's co-defendant Brenda Andrew was the only and actual killer of her estranged husband Rob Andrew.

Over a year before Mr. Pavatt's trial, the prosecution asked for and received permission for prosecution witness Tom Bevel to examine Brenda Andrew's jeans for blood evidence that would connect her to the shooting. Appx. 191.

Bevel had spent 27 years with the Oklahoma City Police Department, including 18 years in forensics analysis. Andrew Tr. at 3215-16. Before trial, he had co-authored a leading book on bloodstain pattern analysis. Bevel and Gardner, *Blood Stain Pattern Analysis* (2d ed. 2001). At the time of Mr. Pavatt's trial, he had received over 200 hours of training specific to bloodstain pattern

analysis. Tr. at 3165. This Court had recognized him as a blood spatter analysis expert years before Mr. Pavatt's trial. *See, e.g., Romano v. State*, 1995 OK CR 74, ¶ 2, 909 P.2d 92, 106; *Farris v. State*, 1983 OK CR 141, ¶ 8, 670 P.2d 995, 997–98. Bevel was a natural choice for the job.

"Blood spatter . . . is blood that has been broken up from the blood source due to some force or energy breaking it away from the blood source." Andrew Tr. at 3222. A person can get blood spatter on their clothing when they shoot someone from a very close distance and blood from that person's wounds flies back onto the shooter's clothing. *Sellers v. State*, 1991 OK CR 41, ¶ 53, 809 P.2d 676, 690; *cf.* Tr. at 3174.

Bevel examined Brenda Andrew's jeans, Tr. at 3169, and found blood spatter stains on them. Andrew Tr. at 3236. Prior to testifying at Mr. Pavatt's trial, Bevel asked "the prosecutor's office" to test two blood spatter stains he identified in his examination of Ms. Andrew's jeans for DNA to determine the source of the blood. Andrew Tr. 3285. But prior to trial, law enforcement only tested one of the two blood spatter locations identified by Bevel. *Id.* Bevel specifically thought that it was important to test the second area—the one that the prosecution did not test—because the blood spatter "showed some direction of travel as to where it may have originated from in space." *Id.* at 3286.

After Mr. Pavatt's trial, when the second area was tested, this Court found that the DNA analysis showed that "the major component [came] from [Brenda Andrew] and the minor component being from an unknown male (arguably the victim [Rob Andrew] because the tester cannot exclude the victim as the source of the blood)." *Andrew v. State*, 2007 OK CR 23, ¶ 102, 164 P.3d 176, 199, *as corrected* (July 9, 2007), *opinion corrected on denial of reh'g*, 2007 OK CR 36, 168 P.3d 1150, *and overruled by Williamson v. State*, 2018 OK CR 15, ¶ 102, 422 P.3d 752 (parenthetical in original).

The night of the murder, a police crime scene investigator who interviewed Ms. Andrew at the hospital also noticed blood spatter on her. Tr. at 2385; Andrew Tr. at 2042, 2044. This Court even found that a "defense expert" at Ms. Andrew's trial "testified that [she] had high velocity blood spatter on her jeans." *Andrew*, 2007 OK CR 23, ¶ 102, 164 P.3d at 198. And as this Court has previously found, Brenda Andrew "received this spatter ["on her jeans"] by firing the second shot and getting blow back blood spatter from Rob [Andrew]." *Id.* The blood spatter on Brenda Andrew's jeans is the only credible scientific evidence supporting who shot Rob Andrew; and it does not point at Mr. Pavatt as the shooter whatsoever.

The police investigator who observed blood spatter on Brenda Andrew soon after the shooting also noticed powdery marks on the top center of Ms. Andrew's left hand. Tr. at 2385-86; Appx. 193. The investigator thought the powder could be gunshot residue. Tr. at 2385, 2387. The presence of gunshot residue on Ms. Andrew's hand would also objectively confirm and corroborate that she had just fired a gun at close range. *Hancock v. State*, 2007 OK CR 9, ¶ 19 n.7, 155 P.3d 796, 805 n.7, *overruled on other grounds by Williamson v. State*, 2018 OK CR 15, ¶ 19, 422 P.3d 752. Prosecution expert Bevel consistently testified that Ms. Andrew herself could not have shot the gun that caused the wound she had on her on the upper back of her left arm the night of the murder, Tr. at 3190, Andrew Tr. at 3268; thus, the gunshot residue could only have come from Ms. Andrew shooting the shotgun when she killed Rob Andrew.

The investigator swabbed the powder on Ms. Andrew's hand, Tr. at 2385, 2387, and Appx. 197, and submitted the samples for testing but the confirmatory testing was never done.[5]

[5] Counsel has recently confirmed with the Oklahoma City Police Department that the swabbings taken from Brenda Andrew's hands have been preserved. Consequently, Mr. Pavatt is filing a

Inexplicably, the crime scene investigator reported that no testing was to be done despite also being told that Brenda Andrew was a suspect in her husband's shooting. Appx. 195.

3. The prosecution suppressed the blood spatter evidence at Mr. Pavatt's trial.

At Mr. Pavatt's trial, the prosecution never informed his jury about the blood spatter evidence showing that Brenda Andrew fired the second, fatal shot. When Bevel testified, the prosecutor only asked one question about his findings from his examination of Ms. Andrew's jeans. Tr. at 3236. And, curiously, it was a leading question on direct examination by the prosecutor trying to force Bevel to testify that he "didn't find any blood spatter on any of her clothes." *Id.* But Bevel, focusing on only one area of Ms. Andrew's jeans, did suggest there was indeed blood spatter on Ms. Andrew's clothing. *Id.* Still, the prosecutor did not follow up with questions about blood spatter on other areas of Ms. Andrew's jeans that showed she shot Rob Andrew from up close, nor did trial counsel. Thus, Mr. Pavatt's jury never heard that scientific, objective evidence shows that Brenda Andrew was Rob Andrew's actual killer. Rather, the prosecution buried this critical fact until after Mr. Pavatt's trial.

4. The prosecution did not single out Mr. Pavatt as the shooter in the first stage of trial, but flipped the switch at the sentencing stage and argued at least 16 times that he was the fatal shooter despite no evidence still to support that claim.

To gain a conviction, the prosecution simply—and repeatedly—argued that the jury did not need to decide who shot Rob Andrew because Mr. Pavatt and Ms. Andrew were "equally guilty." Tr. at 3512 ([Mr. Pavatt] didn't have to pull the trigger."), 3570, 3600, 3604 ("[W]hether

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concurrent motion for discovery with this Court to test those swabbings for gunshot residue. Mr. Pavatt seeks an order for gunshot residue testing from this Court because Oklahoma's forensic testing statute is limited to DNA testing. *See* Okla. Stat. tit. 22, §1373.2.

you pulled the trigger or not."), 3614 ("It doesn't matter which one of them did it."). And the State conceded in its clemency submission that, "[a]t [Mr.] Pavatt's trial, the State explicitly took no position as to who shot Rob [Andrew]." Appx. 236.

Despite insisting to Mr. Pavatt's jury during the first stage of trial that the jury did not need to decide who pulled the trigger to convict him of murder, the prosecution then switched tracks in the penalty phase, arguing at least 16 times that Mr. Pavatt was *the only* shooter. The prosecutor's sentencing stage arguments included that Mr. Pavatt "maliciously, needlessly snuffed out" Rob Andrew's life, Tr. at 3757, and that he "reloaded" the shotgun and then "executed" Rob Andrew. *Id.* at 3753, 3756, 3777, 3780, 3790. *See also id.* at 3742, 3745-46, 3747, 3748, 3753, 3756, 3775, 3784, 3785-86, 3788, 3789, 3791.

5. The prosecution's claim that Mr. Pavatt was the shooter—particularly as to the second shot—was integral to its argument for a death sentence.

The prosecution framed the circumstances surrounding the second shot—with the reloading of the shotgun as Rob Andrew was suffering—as they key reason Mr. Pavatt deserved to be sentenced to death:

> [It] [t]akes a special kind of person to look at another human being lying, suffering and dying on the floor, defenseless and then reloading a shotgun, aiming and executing that person from 3 inches away. That special kind of a person deserves that special punishment that's reserved for people just like James Pavatt and Brenda Andrew. And that appropriate punishment, the one reserved for special people is death. Rob Andrew didn't deserve to die. James Pavatt does.

Tr. at 3784.

6. At Brenda Andrew's later trial, the prosecutors finally told the truth, arguing repeatedly in both stages of her case that she was the sole shooter.

As this Court knows from the direct appeal proceedings in Mr. Pavatt's and Ms. Andrew's cases, the same two prosecutors who prosecuted Mr. Pavatt—Fern Smith and Gayland Gieger—prosecuted Brenda Andrew at her later trial.

At Brenda Andrew's trial, these two prosecutors argued that the "evidence is clear," Andrew Tr. at 3871—and "there's no reasonable doubt," *id.* at 4037—that Brenda Andrew was the one and only person "who actually shot Rob Andrew and killed him." *Id.* at 3871.

Among other things, lead prosecutor Fern Smith told Brenda Andrew's jury that "Brenda shot Rob twice to be sure he was dead." *Id.* at 3904, and that Ms. Andrew "pumped that second shot into Rob Andrew's body with her children 15 feet away." *Id.* at 4383. The prosecution called that second shot an "execution shot." *Id.* at 3908.

Combined, the two prosecutors argued at least 24 times that Ms. Andrew alone shot Rob Andrew. Andrew Tr. at 3871, 3886, 3904, 3908, 3909, 4037, 4077, 4081, 4084, 4086-87, 4089-90, 4125, 4126, 4382, 4383, 4385, 4394-95, 4487, 4490, 4492, 4493, 4494.

7. The basis for the prosecution's argument at Brenda Andrew's trial that she was the sole killer was the objective, scientific evidence they kept hidden from Mr. Pavatt's jury.

At Brenda Andrew's trial, the prosecution homed in on the blood spatter on Brenda Andrew's jeans coming from Rob Andrew to inculpate her as the sole shooter:

> [A]s [Rob Andrew] is on the floor realizing what is happening to him and realizing that all the people are right, he turns to look at [Brenda] one last time. And this time, *[be]cause the blood spatter shows you*, he saw her face over the barrel of a shotgun.

Andrew Tr. at 4125-26 (emphasis added).

Displaying a picture to the jury of Brenda Andrew's jeans from the night of the murder, the prosecution also argued that the blood spatter put the fatal gun in her hands:

> the spatter source [of patter number five "on her left leg"] is the guy on the ground . . . *Here is why she had the gun* . . . It's from Mr. Andrew's left to right and she's right here and *she shoots him.* [Pattern] [n]umber five is spatter and it comes in a straight line, *back spatter right onto these pants.*

Id. at 4081, 4084, 4086 (emphasis added). The prosecution then added that the "spatter on her left leg" shows that she "sho[t] him the second time." *Id.* at 4089-90.

There was no new information developed—or testing undertaken—regarding the blood spatter on Brenda Andrew's jeans between Mr. Pavatt's trial and Ms. Andrew's trials, which took place about nine months apart. Indeed, the prosecution at both trials presented the same blood spatter expert—Tom Bevel—who based his blood spatter testimony on two long-standing facts: (1) his personal examination of Brenda Andrew's jeans, which he did before Mr. Pavatt's trial; and (2) the limited DNA testing of blood on those jeans referred to above, which was also conducted before Mr. Pavatt's trial.

This Court has already determined that the forensic evidence supported the prosecution's arguments in Ms. Andrew's case that the blood spatter showed she shot Rob Andrew the second time. *Andrew*, 2007 OK CR 23, ¶ 102, 164 P.3d at 199.

8. The prosecution also used the identity of the shooter—particularly the second shot—as an integral part of its argument for a death sentence for Brenda Andrew.

Much like the two prosecutors argued at Mr. Pavatt's capital sentencing stage, they used the fact that Brenda Andrew was the actual killer to support a death sentence for her:

> And it takes a special kind of a person to look at another human being lying suffering and dying on the floor defenseless and then reloading a shotgun, aiming it, and executing that person from less than 3 feet away. And that special person deserves that special punishment that's reserved for people just like her. . . .

Andrew Tr. at 4487. One of the last things prosecutor Smith told the jury was that Ms. Andrew "deserves" the death penalty because:

> you are looking at a woman sitting right over here who can intentionally pull the trigger and watch the father of her children suffer and die without remorse. And what does that tell you about her? She's different. She's a cold-blooded, heartless killer. She's different and she deserves that different kind of punishment that's reserved for people exactly like her.

Id. at 4494.

9. In a post-trial television show, the prosecution doubled down on Brenda Andrew as the only and actual killer, based again on the blood spatter evidence.

On a post-trial television show, prosecutor Gieger was interviewed and said the following about the importance of the back spatter on Brenda Andrew's jeans:

> The *back spatter on the pants*, I think that gave us that one bit of evidence we needed in order to *put that gun in Ms. Andrew's hand.*

Forensic Files, "Sunday School Ambush," Season 10, Episode 30 (https://tubitv.com/tv-shows/447752/s10-e30-sunday-school-ambush, last accessed September 15, 2026) (emphasis added).

10. In a recent written submission in Mr. Pavatt's clemency proceeding, the State for the first time concedes that there are three possibilities as to who actually shot Rob Andrew, including Brenda Andrew alone as well as Mr. Pavatt firing the first shot then Ms. Andrew firing the second, fatal shot.

On September 18, 2026, for the first time, the State conceded that "[t]here are three possibilities" as to the shooter's identity: (1) Mr. Pavatt fired both shots; (2) Mr. Pavatt fired the first shot and Ms. Andrew fired the second shot; and (3) Brenda Andrew fired both shots. Appx. 238. A to the last two possibilities, the State has never before acknowledged these scenarios in Mr. Pavatt's case.

At Mr. Pavatt's trial, the prosecutors certainly did not present evidence—or argue to the jury—that Mr. Pavatt fired the first shot and Ms. Andrew the second. *Id.* (possibility #2). Nor did they present evidence—or argue to the jury—that they believed Brenda Andrew alone shot her husband twice. *Id.* (possibility #3). Rather, both prosecutors were emphatic, particularly in the sentencing stage of the case, that Mr. Pavatt alone shot Rob Andrew. By contrast, the State now concedes it has no idea who actually shot and killed Rob Andrew.

11. The jury foreman reviewed the clemency submissions from the State and from Mr. Pavatt and has attested that the prosecution's insistence at Mr. Pavatt's trial that he fired the second shot was key to his decision for death and that he would not have voted for death if he'd known that the State did not know the identity of the person who fired the second shot, as the State now concedes for the first time in its written clemency submission.

Mr. Pavatt's representatives recently spoke with his jury foreman Mark Haydon. He told them that he voted for a death sentence:

> because of the prosecutors' argument that Mr. Pavatt took the first shot and then had to break open the shotgun, reload, stand over Rob Andrew at point blank range with a shotgun and take another shot. Particularly, as Mr. Andrew had already been shot once by a single shot, 16-gauge shotgun, his shooter had to purposely crack the shotgun open, remove the spent shell casing, put in another shell, close the shotgun, point down, and shoot him while he was dying. It was a wicked act that was enough for me to vote for death.

Appx. 258, ¶ 3. The foreman remembered that the prosecution's' argument seemed both certain and convincing. Appx. 258-59, ¶¶ 4, 10. Their insistent argument about the circumstances of the second shot cemented in his mind that a death sentence was appropriate, Appx. 258, ¶ 3, because "[i]t was the prosecution's claim that Mr. Pavatt fired the second shot that sealed the death decision for [him]. . .." Appx. 261, ¶ 17. *See also* Appx. 260-61, ¶ 16 ("I voted for death based on the circumstances of the second, wicked shot.")

Foreman Haydon's reasoning is consistent with the prosecution's emphatic closing argument in Mr. Pavatt's capital sentencing stage that he deserved the death penalty because "[it] [t]akes a special kind of person to look at another human being lying, suffering and dying on the floor, defenseless and then reloading a shotgun, aiming and executing that person from 3 inches away." Tr. at 3784. The jury foreman even used the prosecution's argument about the "wicked[ness]" of the second shot to convince jurors who had initially expressed hesitation about voting for death to sentence Mr. Pavatt to death. Appx. 258-59, ¶ 5. The hesitant jurors ultimately agreed with foreman Hayden's reasoning and voted for a death sentence. *Id.*

After speaking with foreman Haydon, Mr. Pavatt's representatives then provided him with the clemency submissions in *State of Oklahoma vs. James Pavatt* from both the State and from Mr. Pavatt's counsel. Appx 259 at ¶ 6. After reviewing those submissions, foreman Haydon again met with Mr. Pavatt's representatives. Appx 259 at ¶ 9. He told them that the State's new position "called into question for the first time who [he][thought fired the fatal shot." Appx. 259 at ¶ 10. The foreman focused on the State's concession that there were "multiple possibilities, including that Mr. Pavatt took the first shot and Ms. Andrew took the second, as well as that Ms. Andrew fired both shots into Rob Andrew." *Id.* Given the multiple possibilities as conceded by the State, the foreman "now had doubt about who fired the shot the killed Rob Andrew." *Id.*

Because the foreman "based [his] decision to vote for death on the prosecution telling [him] that Mr. Pavatt fired the second fatal shot," Appx. 259 at ¶ 11, the State's eleventh-hour acknowledgment of multiple possibilities as to that shot meant that the foreman "no longer know[s] the answer to that question" of who fired the second shot. *Id.* And given the uncertainty created by the State's acknowledgement in its clemency submission as to whether Mr. Pavatt fired the second shot into Rob Andrew, foreman Haydon "cannot support the death sentence any longer." *Id*; *see*

also Appx. 261 at ¶ 17 (the "uncertainty in the Attorney General's packet as to whether Mr. Pavatt was the fatal shooter . . . has caused me to doubt my original decision for death."). Because the "Attorney General's clemency packet has caused [the foreman] to have significant doubt about who fired the fatal shot[,] [he] cannot continue to support a death sentence." Appx 260, ¶ 12; *see also* Appx. 260, ¶ 14 ("I have serious doubts about whether I voted for the correct sentence given all the uncertainty the Attorney General's Office raised in the packet about who fatally shot Rob Andrew.").

Simply, had the prosecution at Mr. Pavatt's capital sentencing proceeding disclosed to the jury either of the last two scenarios in its September 18, 2026, clemency submission—that Brenda Andrew fired the second shot or that Brenda Andrew fired both shots—foreman Haydon "would not have voted for death." Appx. 261, ¶ 17. For instance, if the prosecution had acknowledged at Mr. Pavatt's sentencing hearing that Brenda Andrew fired the second shot—like in the second and third possibilities in the State's clemency submission, Appx. 237— "[he] would not have voted for a death sentence." Appx. 260, ¶ 14. Or, if the prosecution had disclosed at Mr. Pavatt's sentencing hearing that the shooter was uncertain, then foreman Haydon "would not have voted for a death sentence. Appx. 261 at ¶ 17. Indeed, had the prosecution at Mr. Pavatt's sentencing hearing acknowledged the existence of any possibility other than that Mr. Pavatt fired the second fatal shot, foreman Haydon "would not have voted for death." *Id.*

Foreman Haydon further explains that he "would not have expressed any concern about my vote had [he] not been provided with the opportunity to review the clemency packets from the Attorney General's Office and from Mr. Pavatt. Appx. 260 at ¶ 16. "[T]he information in those packets [] has caused [him] to realize that the prosecution misrepresented to [him] and [his] fellow jurors the identity of the person who killed Rob Andrew." *Id.* And that misrepresentation and

uncertainty is what has undermined his "whole basis for voting for death." Appx. 261 at ¶ 17. Because foreman Haydon's affidavit is based on the State's concessions in its September 18, 2026, clemency submission as to the various possibilities on who shot Rob Andrew the second time, his affidavit could not have been created prior to September 18, 2026, when the State first argued the multiple possibilities theory. *See* Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b)(1) (requiring a subsequent postconviction application to "contain[] sufficient specific facts establishing that the current claims and issues have not and could not have been presented previously . . . because the factual basis for the claim was unavailable as it was not ascertainable through the exercise of reasonable diligence on or before that date[]").

B. The trial prosecutors violated Mr. Pavatt's rights to due process, confrontation, a fair trial, and an impartial jury by intentionally bringing false, extraneous, and prejudicial information to the jury's attention in the sentencing stage by repeatedly insisting, without evidentiary support, that he fatally shot Rob Andrew.

1. The Legal Standard

The prosecution's conduct at a criminal trial can "so infus[e] the trial with unfairness as to deny due process of law." *Lisenba v. California*, 314 U.S. 219, 228 (1941). "[I]mplicit in any concept of ordered liberty" is "[t]he principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction[.]" *Napue v. Illinois*, 360 U.S. 264, 269 (1969). Specifically, a prosecutor's false or misleading statements during closing argument violate due process if they render a capital sentencing fundamentally unfair. *Caldwell v. Mississippi*, 472 U.S. 320, 338–340 (1985); *Miller v. Pate*, 386 U.S. 1, 6 (1967). *Accord Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) (relevant question is whether the prosecutors' comments during closing argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process."); *Darden v. Wainwright*, 477 U.S. 168, 178-81 (1986) (applying *Donnelly* test to capital

cases). *Cf. Alcorta v. Texas*, 355 U.S. 28, 31-32 (1957) (prosecutors intentionally injecting a false claim of material fact into the capital sentencing decision violates due process).

Additionally, due process guarantees a criminal defendant the right to be tried by an impartial jury. *See, e.g., Skilling v. United States*, 561 U

.S. 358, 379 (2010); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966); *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963). Therefore, "[t]he integrity of jury proceedings must not be jeopardized by unauthorized invasions." *Remmer v. United States*, 347 U.S. 227, 229 (1954).

The critical issue for determining whether a court may receive information from a juror on a claim by a person alleging constitutional error in their criminal trial is whether the information from the juror is about the internal deliberative process or whether it is about "extraneous prejudicial information [that] was improperly brought to the jury's attention or [] any outside influence [that] was improperly brought to bear upon any juror." Okla. Stat. Ann. tit. 12, § 2606; *cf.* Fed. R. Ev. 606(b). If the latter, then the court may consider the juror's information. *See, e.g., Mattox v. United States*, 146 U.S. 140, 149 (1892) ("[A] juryman may testify to any facts bearing upon the question of the existence of any extraneous influence. . . .") (capital case).

The Supreme Court explained the distinction between impermissible internal matters and permissible external matters:

> Generally speaking, information is deemed 'extraneous' if it derives from a source 'external' to the jury. 'External' matters include publicity and information related specifically to the case the jurors are meant to decide, while 'internal' matters include the general body of experiences that jurors are understood to bring with them to the jury room.

Warger v. Shauers, 574 U.S. 40, 51 (2014) (citing *Tanner v. United States*, 483 U.S. 107, 117 (1987)).

The nature of the allegation is key: for instance, internal matters include "any matter or statement occurring during the course of the jury's deliberations," "the effect of anything upon the juror's mind or another juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment," or anything "concerning the juror's mental processes during deliberations." Okla. Stat. Ann. tit. 12, § 2606(B). A juror cannot testify about these internal matters.

On the other hand, because testimony is permitted by jurors as to prejudicial extraneous information or influences brought to the jury's attention, a juror is recognized as competent to testify to external influences such as statements made by the bailiff to the jury, *Parker v. Gladden,* 385 U.S. 363 (1966); *Turner v. Louisiana*, 379 U.S. 466 (1964); *Farrell v. State*, 1973 OK CR 311, ¶ 6, 512 P.2d 225, 226; the introduction of a prejudicial newspaper account into the jury room. *Mattox*, 146 U.S. 142-44; *United States v. Chandhadara*, 230 F.3d 1237 (10th Cir. 2000); or inadmissible but inculpatory polygraph test results inadvertently made known to the jury. *Weatherly v. State*, 1987 OK CR 28, 733 P.2d 1331, 1335. The underlying principle behind these cases and others involving prejudicial extraneous information or influences brought to the jury's attention is that "cases might arise in which it would be impossible to refuse [juror testimony] without violating the plainest principles of justice." *United States v. Reid*, 53 U.S. 361, 366, 13 L. Ed. 1023 (1851), *overruled in other part by Rosen v. United States*, 245 U.S. 467, 38 S. Ct. 148, 62 L. Ed. 406 (1918).

This Court draws "a line between subjective and objective events, rendering testimony concerning the former incompetent and the later admissible. The central focus of section 2606(B) is upon insulation of the manner in which the jury reached its verdict, and this protection extends to all of the components of deliberation. Excluded from that focus are prejudicial extraneous

information or influences *injected into* the deliberative process." *Weatherly*, 733 P.2d at 1335 (emphasis in original). In *Weatherly*, the extraneous information that was proper for inquiry of the jurors was improper and inculpatory polygraph evidence to which the jurors had been inadvertently exposed. *Id.* Essentially, a court can consider evidence on juror deliberations when the information is not "coming from the juror's own subjective experiences and background. . . ." *Hawkins v. State*, 2002 OK CR 12, ¶ 45, 46 P.3d 139, 148. And extraneous prejudicial information can come from inside the jury room because the focus is not on the location of the error but its nature. *Tanner*, 483 U.S. at 117.

Receipt by the jury of extra-record information also violates a defendant's confrontation and fair trial rights. "[T]he evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965). The rights of confrontation and cross-examination are among the fundamental requirements of a constitutionally fair trial. *Kirby v. United States*, 174 U.S. 47, 55, 56, (1899); *In re Oliver*, 333 U.S. 257, 273 (1948); *Pointer v. Texas*, 380 U.S. 400 (1965). *See also Crawford v. Washington*, 541 U.S. 36, 42 (2004) (the right of confrontation is a "bedrock procedural guarantee [that] applies to both federal and state prosecutions.").

Thus, when the prosecution makes an argument lacking evidentiary support in a capital sentencing stage that it knows is false or misleading, but still injects that information into the case to secure a death sentence and that information causes at least one juror to vote for a death sentence, then the result violates a defendant's rights to due process, fair trial, confrontation, and an impartial jury. Okla. Const. art. II, §§ 7, 20; U.S. Const. amends. VI, XIV. And a juror is competent to testify about the effect of the prosecution's extraneous, extra-record information on their decision.

2. The prosecution presented prejudicial extra-record information to the jury.

At Mr. Pavatt's trial, there was no evidence or witness testimony that showed that he shot Rob Andrew even once, much less twice. But the absence of evidence in the record did not stop lead prosecutor Fern Smith from arguing over and over times in the sentencing stage that Mr. Pavatt *did* fatally shoot Rob Andrew. This extensive argument injected an impermissible external influence into the jury's sentencing stage decision.

In *Parker v. Gladden*, the court bailiff assigned to shepherd the jury stated to a juror that the defendant was a "wicked fellow" who "is guilty." *Parker*, 385 U.S. at 363. The Supreme Court awarded a new trial, holding that the bailiff's comments were an "outside influence" on the jury—as opposed to evidence and testimony received in open court—in violation of the Sixth and Fourteenth Amendment rights to confrontation and an impartial jury. *Id.* at 364 (quoting *Patterson v. People of State of Colorado*, 205 U.S. 454, 462 (1907)). Much like the bailiff in *Parker* made extra-record comments that influenced the jury, the prosecutor asserted during Mr. Pavatt's sentencing stage—without any basis in the record—that Mr. Pavatt delivered the second, fatal blow to Rob Andrew.

The prosecutor's arguments about Mr. Pavatt being the fatal shooter were knowingly false because the prosecution knew from the blood spatter evidence—as the very same two prosecutors told Brenda Andrew's later jury and as Smith's colleague Gieger later stated on a television show—that Brenda Andrew was the shooter. There was no new blood spatter analysis or information developed after Mr. Pavatt's trial but before Brenda Andrew's trial that would have given the prosecution additional information about the blood spatter that it did not already have before Mr. Pavatt's trial. This Court agreed, finding that Brenda Andrew "received this spatter ["on her jeans"]

by firing the second shot and getting blow back blood spatter from Rob [Andrew]." *Andrew*, 2007 OK CR 23, ¶ 102, 164 P.3d at 198. And Smith's repeated argument about Mr. Pavatt being the shooter was never subject to cross-examination or confrontation as there simply was no evidence in either stage of the case offered to support her contention; the prosecution violated Mr. Pavatt's constitutional rights by asking the jurors to consider information from sources other than the testimony and exhibits admitted at trial.

The absence of evidence pointing to Mr. Pavatt as the shooter became obvious only at the later trial of co-defendant Brenda Andrew, when both prosecutors—the very same prosecutors who tried Mr. Pavatt—argued that the evidence in her case showed that the blood spatter showed Brenda Andrew was the shooter. Indeed, the prosecutors combined to argue at least 24 times at her trial that she was the only and actual killer, stressing that the blood spatter proved their point. Andrew Tr. at 3871, 3886, 3904, 3908, 3909, 4037, 4077, 4081, 4084, 4086-87, 4089-90, 4125, 4126, 4382, 4383, 4385, 4394-95, 4487, 4490, 4492, 4493, 4494.

Before Mr. Pavatt's trial, both prosecutors knew that Brenda Andrew alone stood over her husband—after failing to kill him with her first shotgun blast—and then fatally shot him while he looked up at her, defenseless. But the prosecutors certainly never told Mr. Pavatt's jury that, as the State recently conceded, was a possibility in their clemency submission. Appx. 238. Nor did the prosecution tell Mr. Pavatt's jury that it believed it was possible that Mr. Pavatt fired the first shot into Rob Andrew and then Brenda Andrew fired the second shot, as the State also acknowledged in their recent clemency submission. *Id.* Instead, lead prosecutor Smith still misled Mr. Pavatt's jury into believing otherwise with its false, extra-record argument about Mr. Pavatt's role in the shooting to win his death sentence.

Like the prosecutors in *Giglio v. United States*, 405 U.S. 150 (1972), who falsely told the jury its key witness "received no promises that he would not be indicted," *id.* at 152-53 and n.4, the prosecutor here similarly lied to the jury that Mr. Pavatt was *the* shooter when she knew that was simply false. Trial counsel did not object to any of the numerous times the prosecution made that argument in the sentencing stage, nor did the trial court correct the record.

Like the prosecutors in *Miller v. Pate*, the prosecutors here "deliberately misrepresented the truth." *Miller*, 386 U.S. at 6. In *Miller*, prosecutors claimed in closing argument that stains on shorts connected to the defendant were blood of the murder victim's type but not the defendant's when the prosecution knew in fact that the stains were paint. *Id.* at 3-4, 6. At a minimum, Mr. Pavatt's prosecutors knew that there was no support for their claim that he was *the* fatal shooter; at worst, they knew that Ms. Andrew was the actual and only shooter well before Mr. Pavatt's trial. In either case, the prosecution deliberately misled the jury in the sentencing stage by repeatedly claiming that Mr. Pavatt alone shot Rob Andrew when nothing in the record supported that assertion. In so doing, they presented false, prejudicial, extra-record information to the jury without first subjecting the information to the constitutional protections of confrontation and cross-examination.

The fraudulent behavior by the prosecution in Mr. Pavatt's sentencing hearing is, sadly, par for the course for Mr. Pavatt's lead prosecutor Fern Smith. She prosecuted six Oklahoma County capital defendants who have had their death sentences reversed by state and federal courts. *See Glossip v. Oklahoma*, 604 U.S. 226 (2025); *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003); *Spunaugle v. State*, 1997 OK CR 47, 946 P.2d 246; *Jones v. State*, 1995 OK CR 81, 917 P.2d 976; *Omalza v. State*, 1995 OK CR 80, 911 P.2d 286 (capital defendants Omalza and Floyd).

James Pavatt should be the seventh Oklahoma County capital defendant prosecuted by Fern Smith to have his death sentence reversed.

3. The effect of the improper argument on the jury foreman.

Oklahoma law allows inquiry into "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Okla. Stat. Ann. tit. 12, § 2606(B). By statute, "a juror may testify on [this] question." *Id.* Federal due process law is to the same effect. *Tanner*, 483 U.S. at 117 (jurors are permitted to testify as to "extraneous" or "external" influences upon them). Thus, under Oklahoma law and federal due process principles, it is permissible to inquire of a juror regarding extraneous prejudicial information presented to the jury.

As the jury foreman explains in his affidavit, Appx. 257, the State's clemency submission acknowledging for the first time that there are actually three possible shooter scenarios—when they only argued that Mr. Pavatt was the shooter at his trial to win his death sentence—would have affected his death penalty decision. Appx. 259, ¶¶ 10-11; Appx. 260 at ¶ 14; Appx. 261 at ¶ 17. The State misled him by arguing that only Mr. Pavatt was the shooter when they knew the opposite to be true, or, at least, had no basis to argue that he was *the sole* shooter. The foreman has also averred that he would not have voted for a death sentence if he knew that the State thought that Mr. Pavatt was not the shooter or had doubts about his role as such, as the State conceded in its clemency submission. Appx. 260-61, ¶¶ 16-17.

The prosecutor here presenting the jury with knowingly false, extra-record information about the shooter's identity is analogous to other improper extraneous influences such as a bailiff making negative statements to the jury about a defendant's guilt, the jury learning of the incriminatory results of the defendant's polygraph test, or a juror consulting a newspaper article,

conducting an experiment, and/or visiting the crime scene to learn extra-record information about the case and then sharing that with other jurors. Like this other extraneous information, the prosecution closing argument in Mr. Pavatt's capital sentencing stage was outside the trial testimony and exhibits. The false information affected at least one juror's vote to sentence Mr. Pavatt to death, thus violating his right to due process, right to trial by an impartial jury, right to a fair trial, and right of confrontation. Okla. Const. art. II, §§ 7, 20; U.S. Const. amends. VI, XIV.

C. A reasonable juror would not have voted for a death sentence for Mr. Pavatt but for the prosecution presenting the jury with knowingly false information about who fired the second, fatal shot.

In *Weatherly v. State*, this Court considered whether there was "a reasonable possibility" that the jury's improper exposure to an extraneous polygraph examination results showing that the defendant had been deceptive and untruthful, 733 P.2d at 1334, "contributed to the jury's verdict." *Id.* at 1335. This Court based its determination on an examination of the testimony of jurors from a hearing on the issue. *Id.* at 1336. The Court should do the same here by examining the affidavit of the jury foreman.

The recent Supreme Court case, *Cruz v. Arizona*, 598 U.S. 17 (2023), supports the subjective test for prejudice. In *Cruz*, the Court discussed what jurors would have wanted to know in considering what sentence to impose in a capital case and how that knowledge was relevant to resolving the underlying merits claim. *Id.* at 23-24. The jurors' perception of and thoughts as to what was relevant to their capital sentencing decision-making was relevant to the Supreme Court's analysis. *Id.* As in *Cruz*, subjective juror evidence is also relevant to Mr. Pavatt's due process claim.

Still, if this Court determines that it cannot consider evidence from Mr. Pavatt's foreman about the effect of the extraneous argument by the prosecutor regarding the shooter but must

instead resolve the prejudice problem only by determining how the extraneous information would affect an objective, typical juror, Mr. Pavatt can meet such a "reasonable juror" standard as well.

For at least the following reasons, but for the extraneous, unsupported, prejudicial information about the shooter that the prosecution presented to Mr. Pavatt's jury in the sentencing stage, an objective, typical juror would not have voted for death. And Mr. Pavatt only need show that one juror would not have voted for death to show a reasonable possibility that his death verdict is unconstitutional. *See* Okla. Stat. Ann tit. 21, § 701.11.

First, as this Court found on direct appeal, the jury's finding that the murder was "especially heinous, atrocious, or cruel" was supported by the suffering and "serious physical abuse" Rob Andrew experienced both from and between the two shotgun blasts. *Pavatt v. State*, 2007 OK CR 19, ¶ 76, 159 P.3d 272, 294–95. There also was expert testimony that Mr. Andrew remained conscious for several minutes after being shot and could have experienced pain during the dying process. Tr. at 2466-67. Had the prosecution told the jury the truth that Brenda Andrew—not Jim Pavatt—inflicted the fatal shots to Rob Andrew, or that it was at least plausible that Mr. Pavatt did not, there is a reasonable possibility that at least one juror would not have voted for death. Similarly, if the prosecution had simply informed the jury at the penalty phase that the shooter's identity was unknown, there is a reasonable possibility that at least one juror would not have voted for death, particularly as the jury had already rejected the continuing threat aggravator, O.R. Vol. XI at 2063.

At trial, the prosecution also used the circumstances surrounding the second shot to argue that the jury should find the "especially heinous, atrocious, or cruel" aggravating factor:

> The loss of consciousness was not instantaneous after the first shot. I submit to you that there was suffering between the first two shots when the perpetrator reloaded

> the shotgun, advanced on Rob Andrew and executed him. I submit to you the State has proved beyond any doubt that this murder was heinous, atrocious or cruel.

Tr. at 3777.

Second, the Supreme Court has addressed how critical it is for a capital jury in a multi-defendant case like here to first decide who among the co-defendants was the actual killer before making its decision on the death penalty. In the capital case *Bradshaw v. Stumpf*, 545 U.S. 175 (2005), the Court addressed the impact of the prosecution's inconsistent arguments regarding which of two defendants was the triggerman. While holding that "the precise identity of the triggerman was immaterial to [the defendant's] conviction," *id.* at 187, the Court also held that:

> [t]he prosecutor's use of allegedly inconsistent theories may have a more direct effect on [the defendant's] sentence, however, for it is at least arguable that the sentencing panel's conclusion about [the defendant's] principal role in the offense was material to its sentencing determination.

Id. Had the prosecution not falsely told the jury that Mr. Pavatt was the sole shooter—when the objective, scientific evidence known *before* trial showed otherwise—there is a reasonable possibility that at least one juror would have considered that in the sentencing calculation and not voted for death.

The seminal due process case *Brady v. Maryland*, 373 U.S. 83 (1963), is to the same effect. Brady's co-defendant Boblit admitted he had done the actual killing but the prosecution suppressed the statement at Brady's separate trial, in which he was sentenced to death. *Id.* at 84. The Supreme Court held that the shooter's identity was material to the jury's decision to impose the death penalty. Affirming the lower court's decision to remand the case for retrial on the punishment issue, the *Brady* Court quoted with approval the logic of the lower court that "it would be 'too dogmatic' for us to say that the jury would not have attached any significance to this evidence in considering the punishment of the defendant Brady." *Id.* at 88 (quoting *Griffin v. United States*,

336 U.S. 704, 709 (1949)). The Supreme Court confirmed this principle in *United States v. Agurs*, 427 U.S. 97 (1976), noting that Boblit's confession "could have affected Brady's punishment [and] was material on [that] issue. . .." *Id.* at 106.

Third, the prosecution brought the Supreme Court's concern in *Bradshaw* to bear at Mr. Pavatt's trial. The prosecutors knew how critical the shooter's identity was to securing a death sentence. After repeatedly telling the jury in the first stage of trial that it need not decide who fatally shot Rob Andrew, the prosecution then repeatedly argued at least 16 times in the sentencing stage that Mr. Pavatt alone shot and killed Mr. Andrew. The prosecution knew how critical it was to securing a death sentence to specifically name Mr. Pavatt as *the* shooter, particularly of the second shot. They flipped from ambiguity to certainty—albeit false certainty—because they knew that only an assertion of certainty would secure a death sentence. Had the prosecution stuck with its "equally guilty" theme employed to garner Mr. Pavatt's conviction or told the jury the truth—that Brenda Andrew was the sole and actual killer—there is a reasonable possibility that at least one juror would not have voted for death. Without the prosecution's bait and switch, the sentencing outcome likely would have been different.

The prosecution's tactic here is like that which the Supreme Court condemned in *Miller v. Pate*:

> The record of the petitioner's trial reflects the prosecution's *consistent and repeated misrepresentation* that People's Exhibit 3 was, indeed, 'a garment heavily stained with blood.' The prosecution's *whole theory with respect to the exhibit depended upon that misrepresentation.*

Miller, 386 U.S. at 6 (emphasis added). Just like in *Miller*, the prosecution's "whole theory" at Mr. Pavatt's capital sentencing proceeding "deliberately" and repeatedly "misrepresented the truth,"

id., to gain a death verdict. Their shift in the theory of culpability from the first stage of trial to the second was an event calculated improperly to influence the death verdict.

Fourth, the prosecution framed the circumstances surrounding the second shot—with the reloading of the shotgun as Rob Andrew was suffering—as the key reason Mr. Pavatt deserved to be sentenced to death:

> [It] [t]akes a special kind of person to look at another human being lying, suffering and dying on the floor, defenseless and then reloading a shotgun, aiming and executing that person from 3 inches away. That special kind of a person deserves that special punishment that's reserved for people just like James Pavatt and Brenda Andrew. And that appropriate punishment, the one reserved for special people is death. Rob Andrew didn't deserve to die. James Pavatt does.

Tr. at 3784. Thus, the prosecution directly connected firing the second shot to meriting a death sentence. The prosecution could only make this link through reliance on an extra-record falsehood. Given the primacy of the second shot to the prosecution's case for death, had the prosecution been forthright that Brenda Andrew, at a minimum, fired the second shot—as the pre-trial scientific blood spatter evidence shows, Andrew Tr. at 4081, 4084, 4086, 4089-90, 4125-26—it is likely that a reasonable, objective jury would not have voted for death. And that the prosecution made the same nexus argument at Brenda Andrew's trial, *id.* at 4487, as well as in their written clemency submission, Appx. 238, further supports that a reasonable juror would not have voted for death in Mr. Pavatt's case had the prosecution been honest about what it knew about the identity of the shooter.

Fifth, the source of the extraneous information supports a prejudice finding. As the Supreme Court explained in *Parker*, where the bailiff made prejudicial, extra-record comments to the jury, "the official character of the bailiff—as an officer of the court as well as the State—beyond question carries great weight with a jury." *Parker*, 385 U.S. at 365. Similarly, the word of

the prosecutor here—as an officer of the court as well as the State and, in that capacity, a minister of justice—carried great weight with Mr. Pavatt's jury. *Cf. Berger v. United State*s, 295 U.S. 78, 88 (1935) (A prosecutor's "responsibility [is] not just to win, but to see that justice is done. Hard blows, yes, foul blows no."); *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (There is a "special role played by the American prosecutor in the search for truth in criminal trials.").

Sixth, that the prosecution injected extraneous information into a capital sentencing proceeding is even more harmful and prejudicial. "It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment." *Mattox v. United States*, 146 U.S. 140, 149 (1892)

D. Mr. Pavatt's claim satisfies the successor postconviction requirements of Okla. Stat. Ann. Tit. 22, § 1089(D)(8)(b) and Rule 9.7 of this Court's Rules.

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

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

Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b).

Rule 9.7(G)(1) of this Court's rules, meanwhile, allows this Court to entertain a subsequent application for postconviction relief where it asserts claims "which have not been and could not have been previously presented in the original application because the factual or legal basis was

unavailable." Rule 9.7(G)(1), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2026).

Mr. Pavatt's present application for postconviction relief satisfies these requirements. First, the factual basis for this claim became available only on September 18, 2026, when the Oklahoma Attorney General's Office submitted their written materials in the clemency case *State of Oklahoma v. James Pavatt* and hand-delivered a copy to counsel for Mr. Pavatt. In that clemency submission, the State, for the first time in Mr. Pavatt's case, admitted that there are actually three possibilities as to who shot Rob Andrew, Appx. 238, when at his trial it repeatedly and only asserted in his sentencing stage that Mr. Pavatt was the shooter. This admission by the State in its clemency materials shows that they falsely—and intentionally—argued to Mr. Pavatt's jury that he alone was the shooter. Appx. 257.

And in response to the State's eleventh-hour acknowledgment, the jury foreman at Mr. Pavatt's trial has attested to the impact of information presented by prosecutors at the penalty phase, now known to be false, on his decision to sentence Mr. Pavatt to death. Appx. 258-61. Because the jury foreman based his affidavit on the State's admissions in their clemency submission, his affidavit was not available until he had the opportunity to read the State's packet and learn for the first time that the prosecution misled him and fellow jurors into voting for a death sentence on grounds that the State now admits are inaccurate. Thus, the foreman's affidavit meets the new evidence requirement of Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b)(1).

Mr. Pavatt is filing this application within 60 days of the State's written clemency submission and the jury foreman's related execution of an affidavit about the State's new concessions about the identity of the actual shooter, rendering it timely. Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2026).

While this claim satisfies Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b)(1) and Rule 9.7(G), it is nevertheless the case that even where the statute's standards are not strictly fulfilled, this Court always retains the ultimate "power to grant relief when an error complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right." *Valdez v. State*, 2002 OK CR 20, ¶ 28, 46 P.3d 703, 710. That power stems from this Court's recognition that "[w]hat justice can this Court guarantee and protect if it cannot correct a Constitutional violation which is fundamentally unfair?" *Id.* at n.25. Mr. Pavatt thus asks this Court to exercise that power here.

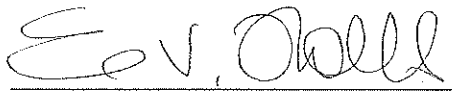
Second, the facts underlying this claim are sufficient to establish by clear and convincing evidence that Mr. Pavatt's death sentence was obtained in violation of his due process, confrontation, fair trial, and impartial jury rights under the United States and Oklahoma Constitutions; and they establish that, had prosecutors not presented the jury with false, prejudicial, extra-record information, a reasonable juror would not have sentenced him to death. *See* Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b)(2). However, to the extent that Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b)(2) imposes a more stringent standard for obtaining relief on the merits of a Fourteenth Amendment Due Process claim, it is unconstitutional. *See Montgomery v. Louisiana*, 577 U.S. 190, 204–05 (2016) ("If a state collateral proceeding is open to a claim controlled by federal law, the state court has a duty to grant the relief that federal law requires.") (quoting *Yates v. Aiken*, 484 U.S. 211, 218 (1988)).

Mr. Pavatt has satisfied the necessary requirements for this Court to consider this claim, order discovery and a hearing on his colorable allegations, and grant relief.[6]

CONCLUSION

James Dwight Pavatt respectfully requests that this Court grant this subsequent application for post-conviction relief, his accompanying evidentiary development motions, and order any other relief that it deems just and proper.

Respectfully submitted,



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[6] Further, the pendency of Mr. Pavatt's execution on November 12, 2026, makes a stay of execution appropriate so that the Court can fully consider his claim. Mr. Pavatt is concurrently filing a motion for a stay of execution.

VERIFICATION OF COUNSEL FOR PETITIONER

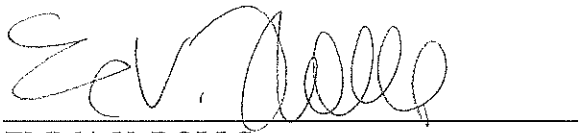
I, Emma V. Rolls, state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.



EMMA V. ROLLS

CERTIFICATE OF SERVICE

I certify that on the date of the filing of 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.



EMMA V. ROLLS

EIN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
OCT 28 2026
SELDEN JONES
CLERK

James Dwight Pavatt,

Petitioner,

v.

The State of Oklahoma,

Respondent.

District Court Case No.:
CF-2001-6189

Direct Appeal Case No.:
D-2003-1183

Original Post-Conviction Case No.:
PCD-2004-25

Subsequent Post-Conviction Case No(s).:
PCD-2009-777

PCD 2026 827

APPENDIX
TO
COURT OF CRIMINAL APPEALS FORM 13.11a
SUBSEQUENT APPLICATION FOR POST-CONVICTION RELIEF
IN DEATH PENALTY CASE

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INDEX TO APPENDIX

Att.	Description	Appx. Page No.
1.	Application for Post-Conviction Relief, *Pavatt v. State,* Case No. PCD-2004-25	001
2.	Opinion, *Pavatt v. State,* Case No. PCD-2004-25 (Okla. Crim. App., April 11, 2008) (unpublished)	097
3.	Second Application for Post-Conviction Relief, *Pavatt v. State,* Case No. PCD-2009-777	106
4.	Opinion, *Pavatt v. State,* Case No. PCD-2009-777 (Okla. Crim. App., Feb. 2, 2010) (unpublished)	183
5.	Memo from Fern Smith to OCPD (June 13, 2003) Granting Tom Bevel Access to All Evidence	191
6.	OCPD Report of Theresa Bunn (Dec. 05, 2001) Re: Gun Shot Residue Swabs Collected from Brenda Andrew	193
7.	OAG's Petition Opposing Clemency (Sept. 18, 2026)	199
8.	OCPD Supplemental DNA Examination Report (Nov. 9, 2005)	253
9.	Affidavit of Mark Haydon (Jury Foreman for Pavatt's Trial) (Oct. 26, 2026)	257

ATTACHMENT # 1

Application for Post Conviction Relief, *Pavatt v. State,* PCD-2004-25

"APCR"

Appendix 001

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

APR 17 2006
MICHAEL S. RICHIE
CLERK

James Dwight Pavatt,	**Oklahoma Co. District Court Case No. CF-2001-6189**
Petitioner,	
-vs-	**Court of Criminal Appeals Direct Appeal Case No. D-2003-1186**
State of Oklahoma,	
Respondent.	**Post Conviction Case No. PCD-2004-25**

COURT OF CRIMINAL APPEALS FORM 13.11A

ORIGINAL APPLICATION FOR POST – CONVICTION RELIEF – DEATH PENALTY CASE

PART A: PROCEDURAL HISTORY

Petitioner, James Dwight Pavatt, through undersigned counsel, submit his application for post-conviction relief under Section 1089 of Title 22. This is the first time an application for post-conviction relief has been filed.

The sentence from which relief is sought is:

Death

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

1. **Court in which sentence was rendered:**

   (a) Oklahoma County District Court.

   (b) Case Number: CF-2001-6189.

   (c) Court of Criminal Appeals: Direct Appeal Case No. D-2003-1186.

2. **Date of sentence:** October 21, 2003.

3. **Terms of sentence:** Death.

4. **Name of Presiding Judge:** Honorable Susan W. Bragg.

5. **Is Petitioner currently in custody?** Yes.

   Where? Oklahoma State Penitentiary, H-unit.

   Does Petitioner have criminal matters pending in other courts? No.

   If so, where?

   List charges:

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

   If so, where?

   List convictions and sentences:

I. CAPITAL OFFENSE INFORMATION

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

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

   Aggravating factors alleged:

   (a) The State alleged:

1. The 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;

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

(O.R. IV at 670-71).

Aggravating factors found:

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

1. 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.

(O.R. Vol. XI at 2062).

Mitigating factors listed in jury instructions:

The trial court gave instruction No. 10 to the jury which "lists" mitigating circumstances. (O.R. Vol. XI at 2057). The mitigation evidence submitted to the jury was as follows:

Evidence has been introduced as to the following mitigating circumstances:

the defendant did not have any significant history of prior criminal activity

the defendant is likely to be rehabilitated

the defendant's age

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

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

7. **Check whether the finding of guilty was made:**

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

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

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

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

II. NON-CAPITAL OFFENSE INFORMATION

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

Conspiracy to Commit Murder.

Mr. Pavatt received a sentence of ten (10) years and a $5000 fine.

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

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

III. CASE INFORMATION

13. **Name and address of lawyer in trial court:**

M. Michael Arnett
3133 N.W. 63rd
Oklahoma City, OK 73116
(405) 767-0522

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

Justin Lowe
3133 N.W. 63rd
Oklahoma City, OK 73116
(405) 767-0522

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

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

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

Date Brief In Chief filed: January 31, 2005.

Date Response filed: May 31, 2005.

Date Reply Brief filed: July 20, 2005.

Date of Oral Argument: schedule for May 16, 2006.

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

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

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

Is this petition filed subsequent to supplemental briefing after remand?

Yes ( ) No ( ) Not applicable (X).

16. **Name and address of lawyers for appeal?**

Gloyd L. McCoy
5801 N. Broadway Ext., Ste 101
Oklahoma City, OK 73118
(405) 843-9909

M. Michael Arnett
3133 N.W. 63rd
Oklahoma City, OK 73116
(405) 767-0522

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

If "yes," give citations if published: **If not published, give appellate case no.:**

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

PART B: GROUNDS FOR RELIEF

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

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

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

If yes, specify what motions have been filed:

Notice of Incomplete Capital Post-Conviction Record and Motion to Access Sealed Transcripts and Brief filed June 22, 2005.

Petitioner's Verified Application for Extension of Time to File Original Application for Post-Conviction Relief and Related Motions filed October 14, 2005.

Petitioner's Verified Application for Extension of Time to File Original Application for Post-Conviction Relief and Related Motions filed November 14, 2005.

Motion to Cross Reference Capital Post-Conviction Application with Appeal Records of Co-defendant filed December 6, 2005.

Third Verified Application for an Abeyance in Post-Conviction Proceedings, or in the Alternative an Extension of Time to File Original Application for Post-Conviction Relief and Related Motions and/or Request for Show Cause Hearing filed December 14, 2005.

Amended Third Verified Application for an Abeyance in Post-Conviction Proceedings, or in the Alternative an Extension of Time to File Original Application for Post-Conviction Relief and Related Motions and/or Request for Show Cause Hearing filed December 30, 2005.

Motion Reserving the Right to Supplement Original Application for Post – Conviction Relief Death Penalty Case filed April 17, 2006.

Motion for Request to File Oversized Application filed April 17, 2006.

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

PROPOSITION ONE

NEWLY DISCOVERED EVIDENCE AND NEW LAW RENDERS MR. PAVATT'S CONVICTION AND SENTENCE SUSPECT AND UNRELIABLE IN VIOLATION OF HIS DUE PROCESS RIGHT TO A FUNDAMENTALLY FAIR TRIAL. AS SUCH, MR. PAVATT MUST BE GRANTED A NEW TRIAL.

A. Herman Roggow Was Unable to Identify Brenda Andrew, Mr. Pavatt's Co-defendant.

B. Testimony from Bill Shadid in the Brenda Andrew Case Impeaches State's Witness David Head.

C. New Rule of Law.

D. Conclusion.

PROPOSITION TWO

PETITIONER, MR. PAVATT, RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE AND TRIAL COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND ARTICLE II, §§ 7, 9, AND 20 OF THE OKLAHOMA CONSTITUTION.

A. The Brief Appellate Counsel Filed on Behalf of Appellant, Mr. Pavatt, in and of Itself Is Indicative of Ineffective Assistance of Appellate Counsel.

B. Statements by Prospective Jurors Regarding Release of Persons Convicted of Murder Improperly Prejudiced Mr. Pavatt's Jury.

C. The Hearsay Testimony and Opinion Testimony of Federal Bureau of Investigation Agent Kurt Stoner Deprived Mr. Pavatt of a Fair Trial.

D. The District Court Should Have Granted a Change of Venue.

E. Failure of Trial Counsel to Object to Irrelevant Evidence and Failure of Appellate Counsel to Raise Issue.

F. Appellate Counsel Failed to Adequately Argue that the Evidence Presented in Mr. Pavatt's Trial Was Insufficient to Convict Mr. Pavatt Beyond a Reasonable Doubt.

G. In Violation of Mr. Pavatt's Fundamental Right to Present a Defense, the Trial Court Erred in Refusing to Allow Exculpatory Evidence to Be Presented in Petitioner's Trial and Appellate Counsel Failed to Raise Issue Properly Rendering Ineffective Assistance of Appellate Counsel.

H. Prosecutorial Misconduct Infected Mr. Pavatt's Trial Depriving Him of his Fundamental Right to a Fair Trial and Due Process.

I. Insufficient Evidence to Support the Two Aggravators Alleged by the State and Found by the Jury that the Murder Was Heinous, Atrocious, or Cruel, and that the Murder Was for Remuneration.

J. Failure of Direct Appeal Counsel to Raise Issue of the Admission of the Live Photo of the Victim Is Unconstitutional.

K. Failure of Appellate Counsel to Raise Issues that Proper Evidentiary Foundations Were Not Established Concerning Four Pieces of Evidence: Chain of Custody of "The Letter," Chain of Custody of "The Insurance Letters," Chain of Custody and Lack of Authentication of "The Bullet," and Lack of Authentication for the Audio Tapes. The Trial Court Abused its Discretion in its Admission Resulting in Reversible Error and a Violation of Mr. Pavatt's Due Process Rights and Right to a Fair Trial.

L. Trial Court Committed Reversible Error by Allowing Jurors to Leave Deliberations to Move Cars. Failure of Trial Counsel to Object to Jurors Moving Cars During Deliberations and Failure of Appellate Counsel to Raise Issue.

M. Mr. Pavatt's Trial Was Infected with Pervasive Inadmissible Hearsay, Depriving Him of His Rights of Confrontation and Cross Examination, in Violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 2, §§ 7, 9, 20 of the Oklahoma Constitution. Appellate Counsel Failed to Raise Issue.

N. Failure of Trial Counsel and Appellate Counsel to Investigate and Interview Potential Witnesses.

O. Appellate Counsel Failed to Agrue that the District Court Committed Error by Failing to Hold a *Daubert/Kumho* Hearing on Handwriting Exemplars. In Addition, Appellate Counsel Failed to Argue That the Forcing of Mr. Pavatt to Submit to Handwriting Exemplars Was a Violation of His Right Against Self-Incrimination.

P. Appellate Counsel Failed to Raise the Issue that the Trial Court Should Have Instructed the Jury on the Lesser Included Offense of Accessory after the Fact.

Q. Appellate Counsel Failed to Argue that the Trial Court Should Have Instructed the

Jury That the Aggravators Had to Outweigh the Mitigators Beyond a Reasonable Doubt Depriving Mr. Pavatt of a Fair Sentencing Determination in Violation of the Oklahoma Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

R. Appellate Counsel Failed to Argue that Oklahoma's Capital Trial Scheme Is Structurally Defective.

S. Failure to Raise Issue that the Trial Court Committed Error During the Voir Dire Process Violating Mr. Pavatt's Rights Under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and the Corresponding Provisions of the Oklahoma Constitution. Appellate Counsel Ineffective for Failing to Raise Issue.

T. Failure to Raise Issue that Medical Examiner's Investigator Acted Outside of Statutory Authorization.

U. Failure of Direct Appeal Counsel to Perform the Professional Duty Owed to Mr. Pavatt under Prevailing Professional Norms and the Mandates of the Law.

V. Mr. Pavatt's Constitutional Right to a Competent Tribunal Was Compromised Because the Judge Presiding over the Trial Was Impaired by Illness. Appellate Counsel failed to Raise this Issue.

W. Appellate Counsel Were Ineffective Because a Briefing Deadline Set by this Court Was Missed.

X. Conclusion.

PROPOSITION THREE

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

PART C: FACTS

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

1.
CITATIONS TO THE RECORD

Pursuant to Rule 9.7(D)(1)(a) of the Rules of the Court of Criminal Appeals, effective January 1, 1998, the record and transcripts in this case will be referred to using the following abbreviations:

Application: the instant Original Application for Post-Conviction Relief

O.R.: the thirteen (13) volumes of Original Record in Oklahoma County District Court Case No. CF-2001-6189.

PH: the seven (7) volumes of transcripts of the preliminary hearing held June 5, 7, 10, 11, 12, July 9, 17, and 18, 2002.

Tr.: the fifteen volumes of transcripts of the jury trial held August 25, 26, 27, 29, September 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, and 16, 2003 .

M.H. date: the transcripts of the motion hearings held April 16, 30, May 14, and 16, 2002; January 9 and 21, 2003; March 6, 2003; May 23, 2003; July 24, 2003; August 8, 2003; and August 25, 2003.

Andrew Tr.: the volumes of transcripts of the jury trial of Mr. Pavatt's co-defendant, Ms. Brenda Andrew held June 7-10, 14-18, 21-25, 28-30, July 1-2, 6-9, and 12-15, 2002.[1]

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

---

[1] Counsel for Mr. Pavatt filed a Motion to Cross-Reference Mr. Pavatt's case with his co-defendant, Ms. Andrew. This Court granted the Motion to Cross-Reference on January 13, 2006. *See* **Order Granting Motion to Cross-Reference Records**.

to be incorporated herein by reference and by operation of the rule. References to the *Appendix of Exhibits In Support of the Application For Post-Conviction Relief* will indicate the exhibit number, followed by the notation "Appendix," e.g., "Exh. 1, Appendix." Citations to briefs filed on direct appeal will be referenced by party, "Aplt." or "Aple," by identification of the brief as chief or reply, and page number, e.g., "Aplt. Brf., at 22," "Aple. Brf., at 15," "Aplt. Rpl. Brf., at 40." All citations will be separated from the regular text of the brief by parentheses.

2.
PROCEDURAL HISTORY

James Dwight Pavatt was first charged by Information in the District Court of Oklahoma County, Case No. CF-2001-6189, of First-degree Murder in violation of 21 O.S. § 701.7 and Conspiracy to Commit Murder in violation of 21 O.S. § 421. (O.R. Vol. IV at 665-666). In a bill of particulars, the State further alleged that the murders were attended by the following statutory aggravating circumstances: (1) 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) At the present time, there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society. (O.R. IV at 670-71).

Mr. Pavatt pled not guilty to the charges and requested a jury trial. He was tried by a jury before the Hon. Susan W. Bragg in District Court of Oklahoma County. The jury returned a verdict finding Mr. Pavatt guilty of First Degree Murder. After the sentencing stage of the trial, the jury returned a verdict finding the existence of two (2) of three (3) aggravating circumstances alleged by the State and imposed the death sentence for the First Degree Murder. (O.R. Vol. XI at 2062). The

District Court pronounced formal judgment and sentence on the verdicts October 21, 2003.

Procedurally, Mr. Pavatt direct appeal has not been typical. Mr. Pavatt appealed the judgments and sentences in *Pavatt v. State,* Case No. D-2003-1186. The appellant's brief in chief was filed January 31, 2005. On April 28, 2005, Mr. Pavatt sent a letter to this Court expressing his wish to terminate Gloyd McCoy's representation on the direct appeal. The appellee's brief was filed May 31, 2005, thereby making appellant's reply brief due June 20, 2005. However, two (2) days after the time ran for the reply brief to be filed, direct appeal counsel, Gloyd McCoy, filed a motion for an extension of time. Appellant's reply brief was filed on July 20, 2005.

Pursuant to 22 O.S.Supp.1996 § 1089 and Rule 9.7 of the Court of Criminal Appeals Rules, 22 O.S.Supp.1997 Ch. 18., Mr. Pavatt, by and through his appointed counsel, timely files this original verified application for post-conviction relief.

3.

FACTS RELATING TO THE OFFENSE

While James Dwight Pavatt was married to Suk Hui Pavatt, he had an affair with Brenda Andrew, who was married to Rob Andrew at the time. (Tr. Vol. VI at 1650, 1655)(Tr. Vol. XI at 2831-2832). Mr. Pavatt met Brenda and her family at the North Pointe Baptist Church where they attended church. Eventually the two taught Sunday School together. Mr. Pavatt would socialize outside of church with the Andrew family and other mutual friends. (Tr. Vol. V at 1330-1331)(Tr. Vol. VI at 1528-1529, 1534). In addition, Mr. Pavatt became one of the Andrew's family's insurance agents. (Tr. Vol. VII at 1879-1881) Late summer of 2001, Mr. Pavatt chose to divorce his wife Suk Hui. (Tr. Vol. VI at 1650, 1655). In September, Brenda Andrew chose to start divorce proceedings against her husband Rob. (Tr. Vol. VII at 1873-1874)(Tr. Vol. X at 2565).

Brenda's and Rob's divorce was not amicable. One of the contested issues in their divorce was an $800,000 life insurance policy the Andrew's had purchased from Mr. Pavatt through Prudential Insurance Company. (Tr. Vol. VII at 1879-1881). Both Brenda and Rob asserted ownership of the policy. Each claimed control of the policy and ability to designate beneficiaries. At the temporary order hearing in the divorce between Brenda and Rob, Judge Swinton ordered the owner of the policy to be Rob, the trustee to be Brenda, and the children, Tricity and Parker, to be the beneficiaries. (Tr. Vol. VII at 1885-1888).

A few weeks after the temporary order hearing, Rob went to the house he and Brenda used to live in to pick up his children for Thanksgiving break. (Tr. Vol. VI at 1552). While in the garage, Rob was shot twice with a shotgun. Either wound would have been fatal singularly. (Tr. Vol. X at 2435, 2457). Brenda was shot in her arm with a handgun. (Tr. Vol. XII at 3174).

Because Mr. Pavatt was involved in an affair with Brenda, because there was a dispute of ownership on the insurance policy that Mr. Pavatt sold them, and because he chose to leave for Mexico with Brenda and her children the day before Rob Andrew's funeral, Mr. Pavatt was convicted of murder and conspiracy to commit murder. It was purely guilt by association to Brenda Andrew and to Rob Andrew.

Additional relevant facts will be detailed and developed in the following Propositions.

PART D: PROPOSITIONS – ARGUMENTS AND AUTHORITIES

PROPOSITION ONE

NEWLY DISCOVERED EVIDENCE AND NEW LAW RENDERS MR. PAVATT'S CONVICTION AND SENTENCE SUSPECT AND UNRELIABLE IN VIOLATION OF HIS DUE PROCESS RIGHT TO A FUNDAMENTALLY FAIR TRIAL. AS SUCH, MR. PAVATT MUST BE GRANTED A NEW TRIAL.

In order for a convicted capital defendant in Oklahoma to prevail pursuant to 22 O.S. § 1089(C):

> The only issues that may be raised in an application for post-conviction relief are those that:
>
> 1. Were not and could not have been raised in a direct appeal; and
>
> 2. Support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent.

Newly discovered evidence based on the trial of co-defendant Brenda Andrew renders Mr. Pavatt's conviction suspect and unreliable based on evidence that was not or could not have been raised in Mr. Pavatt's direct appeal. This evidence supports a different result than the jury verdict of guilty and sentence of death. Based on this evidence, Mr. Pavatt respectfully requests a reversal of his conviction and sentences and a remand to district court for a new trial.

A. Herman Roggow Was Unable to Identify Brenda Andrew, Mr. Pavatt's Co-defendant.

Mr. Roggow testified at Mr. Pavatt's trial that he saw Brenda Andrew with her brother in law and another man out shooting shotguns, although he did not actually see them firing the guns. (Tr. Vol. X at 2485, 2493). In Mr. Pavatt's trial, the jury was led to infer that the unknown man with Brenda Andrew and her brother in law was Mr. James Pavatt. (Tr. Vol. X at 2481-2497). Curiously, in Ms. Andrew's trial, Mr. Roggow had difficulty in identifying Ms. Andrew in the courtroom, even

the judge was concerned with his identification. In fact, the judge said Mr. Roggow was incompetent and through the prosecution made Mr. Roggow get up from the witness stand, move closer, and physically point to Ms. Andrew. (Andrew Tr. Vol. XI at 2620-2624). And yet, from many yards away, Mr. Roggow claimed he saw Ms. Andrew. Clearly, this evidence is unreliable, speculative, and prejudicial.

The next witness after Mr. Roggow in Mr. Pavatt's trial was the sheriff of Garfield County, Bill Winchester. Mr. Roggow told Sheriff Winchester that he saw Brenda in the canyon with some unknown man. (Tr. Vol. X at 2493-2494). Sheriff Winchester went to the canyon and retrieved spent 16 gauge shells. (Tr. Vol. X at 2500-2502). Due to Mr. Roggow's suspect identification, these "facts" are purely coincidental, unreliable, speculative, and extremely prejudicial.

Neither Mr. Roggow nor Sheriff Winchester should have been allowed to testify in Mr. Pavatt's trial. Their testimony was inadmissible and prejudicial. Although Mr. Roggow was not the victim in this crime, this Court can look to **Reaves v. State**, 1982 OK CR 117. 649 P.2d 777, 780 for guidance in questionable in court identifications.

> Did the victim's identification of the appellant possess sufficient independent indicia of reliability,...? The Supreme Court in **Manson v. Brathwaite**, 432 U.S. at 114, 97 S.Ct. at 2253, stated:
>
> > We therefore conclude that reliability is the linchpin in determining the admissibility of identification testimony ... The factors to be considered ... include the opportunity of the witness to view the criminal..., the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.

Based upon the record in the Andrew trial, sufficient independent indicia of reliability is not present. Mr. Roggow had only a few minutes while he was driving to identify Ms. Andrew, and although he knew her as a child, at the time of the crime, Ms. Andrew was a grown woman. His in court

identification was wavering, at best, and that was in her trial. In Mr. Pavatt's trial he was allowed to testify that he saw her and "some other man" (Tr. Vol. X at 2481-97). He could not identify Mr. Pavatt as the "other man." His testimony was extremely prejudicial to Mr. Pavatt.

B. Testimony from Bill Shadid in the Brenda Andrew Case Impeaches State's Witness David Head.

In Mr. Pavatt's case, David Head testified. He was a plumber who had done some work for Brenda Andrew. Mr. Head testified that he had a confrontation with Brenda outside in her driveway concerning work and payment he had done at her house. He testified her "neighbor" Mr. Pavatt was there. Mr. Head did not identify Mr. Pavatt in court; however, he implied that the neighbor was Mr. Pavatt. (Tr. Vol. VII at 1833-1835).

In Brenda Andrew's trial, Mr. Head again testified to the confrontation with Brenda in her driveway. But, Bill Shadid, one of the next door neighbors to the Andrew's, testified that he was the man present when Mr. Head and Brenda had their confrontation. (Andrew Tr. Vol. XV at 3367-3369). Mr. Pavatt was not even there. Thereby, any inference of Mr. Pavatt's involvement the jury received from Mr. Head testimony was incorrect and prejudicial to Mr. Pavatt.

In addition, this testimony is completely irrelevant to the issue of whether Mr. Pavatt was guilty of murder and conspiring to murder Rob Andrew. *See also* Proposition 2, sub-proposition E.

C. New Rule of Law.

The Oklahoma Legislature enacted a truth in sentencing law which forbids someone convicted of murder with a life with parole sentence from being paroled unless 85% of his sentence had been served. 21 O.S. § 13.1. Concerning that statute, this Court recently held that

> for cases covered by this new sentencing reality--as in cases where life without parole is a sentencing option--the legislature's specific action compels a specific limitation on our

traditional prohibition of mentioning parole at trial.

***

> the 85% Rule is a specific, delineated parole provision that does apply to life sentences for murder (as well as numerous other crimes), which does not vary from one inmate to another, which can be readily defined and explained by a judge, and which is relevant and helpful information for the jury to consider.

Anderson v. State, 2006 OK CR 6, 130 P.3d 273, 278.

The trial court should have instructed Mr. Pavatt's jurors that a life sentence according to the Pardon and Parole Board is considered to be forty-five (45) years and that Mr. Pavatt if found guilty of murder in the first degree would have to serve at a minimum of 85% of that forty-five years. **Anderson** 130 P.3d at 283. Mr. Pavatt's jury should have been instructed and the trial court's failure to do so is reversible error. Mr. Pavatt respectfully requests a new trial.

D. Conclusion.

The facts and law presented above is either newly discovered evidence warranting a reversal of Mr. Pavatt's conviction and a new trial or a new rule of law warranting a reversal of Mr. Pavatt's conviction and a new trial. The granting of a new trial based on newly discovered evidence is a matter of discretion within the court and should be exercised if there is a reasonable probability that if such evidence had been introduced, a different result in the trial would have been reached. **Griffin v. State**, 1972 OK CR 224, 501 P.2d 223, 224.

> [B]efore a new trial on the ground of newly discovered evidence may be granted, the allegedly newly discovered evidence must be more than merely impeaching or cumulative. It must also be material to the issues involved and must be such as would probably produce an acquittal.

U.S. v. Kelley, 929 F.2d 582, 586 (10th Cir. 1991).

This newly discovered evidence is impeaching but not cumulative. It is material to the case. As was

stated in the facts, much of the evidence against Mr. Pavatt was guilt by association because of his affair with Brenda Andrew. Any evidence to rebut this "guilt by association" is not cumulative, is material, and very well could have changed the jury's verdict.

The Anderson instruction is a new rule of law and would have changed the outcome of Mr. Pavatt's trial if the jurors were informed of what a life sentence with parole truly is especially in light of Mr. Pavatt's prospective jurors during voir dire speculated as to what life with parole means. *See also* Proposition 2, sub-proposition B. Mr. Pavatt respectfully requests a reversal of his conviction, and a new trial.

PROPOSITION TWO

PETITIONER, MR. PAVATT, RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE AND TRIAL COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND ARTICLE II, §§ 7, 9, AND 20 OF THE OKLAHOMA CONSTITUTION.

INEFFECTIVE ASSISTANCE OF COUNSEL

In order for a convicted capital defendant in Oklahoma to prevail pursuant to 22 O.S. § 1089(C):

> The only issues that may be raised in an application for post-conviction relief are those that:
>
> 1. Were not and could not have been raised in a direct appeal; and
>
> 2. Support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent.
>
> ***

Pursuant to 22 O.S. §1089(D)(4)(b)

> For purposes of this subsection, a ground could not have been previously raised if:
> (1) it is a claim of ineffective assistance of trial counsel involving

a factual basis that was not ascertainable through the exercise of reasonable diligence on or before the time of the direct appeal, or

(2) it is a claim contained in an original timely application for post-conviction relief relating to ineffective assistance of appellate counsel.

"All claims of ineffective assistance of counsel shall be governed by clearly established law as determined by the United States Supreme Court."[2] Therefore,

> The proper standard for assessing a claim of ineffectiveness of appellate counsel is that set forth in **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). **Smith v. Robbins**, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (following **Smith v. Murray**, 477 U.S. 527, 535-36, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986)). The petitioner must show both (1) constitutionally deficient performance, by demonstrating that his appellate counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error(s), the result of the proceeding--in this case the appeal--would have been different. **Id.** at 285, 120 S.Ct. 746 (applying *Strickland*).

Cargle v. Mullin, 317 F.3d 1196,1202 (10th Cir. 2003). [3]

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> [I]n analyzing an appellate ineffectiveness claim based upon the failure to raise an issue on appeal, "we look to the merits of the omitted issue," **Neill v. Gibson**, 278 F.3d 1044, 1057 (10th Cir.2001) (quotation omitted), *cert. denied,* 537 U.S. 835, 123 S.Ct. 145, 154 L.Ed.2d 54 (2002), generally in relation to the other arguments counsel did pursue. If the omitted issue is so plainly meritorious that it would have been unreasonable to winnow it out even

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2 In **Davis v. State**, 2005 OK CR 21¶5 this Court held "that procedural bars applied to other habeas claims were not suitable for ineffective assistance of counsel claims." Also in **Davis**, ¶6 "...the importance of the Sixth Amendment compels us to consider all claims of ineffective assistance of trial counsel raised in a timely application for post-conviction relief and no longer apply a procedural bar when appellate counsel and trial counsel were the same." In Mr. Pavatt's case, trial counsel was listed as a participating member of the direct appeal. (Exh. 3, Appendix).

3 According to 22 O.S §1089(A), in an Capital Post-Conviction Application, there are many instances in which the post-conviction application is filed while the Capital Direct Appeal is still pending. Unless counsel can predict the future, arguing ineffective assistance of counsel is rather difficult when the direct appeal is still being reviewed, oral argument has not taken place, and/or when issues have been remanded to the district court in the direct appeal stage.

from an otherwise strong appeal, its omission may directly establish deficient performance; if the omitted issue has merit but is not so compelling, the case for deficient performance is more complicated, requiring an assessment of the issue relative to the rest of the appeal, and deferential consideration must be given to any professional judgment involved in its omission; of course, if the issue is meritless, its omission will not constitute deficient performance. [FN4] *See, 1203 e.g.*, **Smith**, 528 U.S. at 288, 120 S.Ct. 746; **Banks v. Reynolds**, 54 F.3d 1508, 1515-16 (10th Cir.1995); **Mayo v. Henderson**, 13 F.3d 528, 533 (2d Cir.1994).

Cargle v. Mullin, 317 F.3d 1196, 1202 -1203 (10th Cir. 2003).

Mr. Pavatt's appellate counsel were wholly ineffective because appellate counsel failed to raise several meritorious claims. The following sub-propositions are all examples of ineffective assistance of counsel, either by trial counsel, appellate counsel, or both. Mr. Pavatt's convictions and sentences should be reversed. Capital post-conviction counsel respectfully request reversal of Mr. Pavatt's convictions and a remand for new trial, new sentencing,[4] or a new direct appeal.[5]

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[4] **Garrison v. State**, 2004 OK CR 35, 103 P.3d 590, 620 "due to ... the waiver of the these issues by appellate counsel, we are required to reverse Appellant's sentence and remand for a resentencing trial,..."

[5] "The Sixth Amendment, made applicable to the States by way of the Due Process Clause of the Fourteenth Amendment (*see* **Gideon v. Wainwright**, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)), entitles a criminal defendant to the effective assistance of counsel not only at trial, but during his first appeal as of right. **Evitts v. Lucey**, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). As the Court explained in **Evitts**: In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that-like a trial-is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appellant-like an unrepresented defendant at trial-is unable to protect the vital interests at stake. To be sure, respondent did have nominal representation when he brought this appeal. But nominal representation on an appeal of right-like nominal representation at trial-does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all. 469 U.S. at 396, 105 S.Ct. at 836. A defendant whose lawyer does not provide him with effective assistance on direct appeal and who is prejudiced by the deprivation is thus entitled to a new appeal. *See, e.g.*, **Mayo v. Henderson**, 13 F.3d 528, 537 (2d Cir.), *cert. denied*, 513 U.S. 820, 115 S.Ct. 81, 130 L.Ed.2d 35 (1994); **Claudio v. Scully**, 982 F.2d 798, 806 (2d Cir.1992), *cert. denied*, 508 U.S. 912, 113 S.Ct. 2347, 124 L.Ed.2d 256 (1993); **Fagan v. Washington**, 942 F.2d 1155, 1156 (7th Cir.1991); **Barry v. Brower**, 864 F.2d 294, 300-01 (3d Cir.1988); **Matire v. Wainwright**, 811 F.2d

A. The Brief Appellate Counsel Filed on Behalf of Appellant, Mr. Pavatt, in and of Itself Is Indicative of Ineffective Assistance of Appellate Counsel.

1. Failure to cite properly and adhere to proper rules and generally accepted research and writing techniques for effective appellate advocacy.

Direct appeal counsel for Mr. Pavatt failed to properly cite to the record in the brief in chief in violation of **Court of Criminal Appeals Rules 3.5(C)(1)** which states

> Both parties must provide a brief argument, exhibiting a clear statement of the point of law or fact to be discussed, with reference to the pages of the record file and the authorities relied upon in support of each point raised.

Unfortunately for Mr. Pavatt, failure to properly cite to the record can result in issues raised and yet to be orally argued, forfeited. **Court of Criminal Appeals Rule 3.5(C)(6)**. Also, counsel failed to sufficiently argue propositions with supporting citations, failed to explain how Mr. Pavatt's rights were violated in trial, and failed to adequately argue errors in the trial which can result in forfeiture of claims. "Counsel must support allegations of error with argument and citations of authority." **Walton v. State**, 1987 OK CR 227, 744 P.2d 977, 979. This Court has stated

> ... in **Sandefur v. State**, 461 P.2d 954 (Okl.Cr.1969): It is necessary for counsel ... not only to assert error, but to support his contentions by both argument and the citations of authorities. Where this is not done, and it is apparent that the defendant has been deprived of no fundamental rights, this court will not search the books for authorities to support the mere assertion that the trial court has erred.

Bowers v. State, 1982 OK CR 103, 648 P.2d 835, 838. Even if the Court wanted to "search the books" or internet search for the cases, it would be extremely difficult considering that much of what appellate counsel cited was wrong.

1430, 1439 (11th Cir.1987); **Grady v. Artuz**, 931 F.Supp. 1048, 1053-54 (S.D.N.Y.1996); **Laffosse v. Walters**, 585 F.Supp. 1209, 1214 (S.D.N.Y.1984)." **Mason v. Hanks**, 97 F.3d 887, 892 (7th Cir. 1996). (Internal quotation marks omitted).

Mr. McCoy and Mr. Arnett are seasoned lawyers and failing to cite properly is both surprising and inexcusable. Any issue forfeited due to the failure to cite properly clearly means that appellate counsel were ineffective.

Capital post-conviction counsel consulted with Emma Rolls, professor of Legal Research and Writing at Oklahoma City University's School of Law, concerning Mr. Pavatt's direct appeal and reply brief. In addition to Professor Rolls experience as a legal research and writing professor, she used to prepare and file capital direct appeals in this Court. Succinctly, Professor Rolls's opinion of the briefing in Mr. Pavatt's case is that there are six (6) areas of numerous deficiencies: case citation, citation to the trial record, use of Westlaw head notes, quotation, factual assertions, and other miscellaneous areas. (Exh. 4, Appendix).

Counsel realize that everyone is human and makes mistakes. Counsel would not be surprised to learn of a few mistakes made in briefs (including this one). However, a few mistakes on almost every page is evidence of inattentiveness and insincerity. These mistakes trivialize the seriousness of a capital case. It is inexcusable and it is ineffective. (Exh. 4, Appendix).

2. Failure to sufficiently and adequately develop issues for effective appellate advocacy.

Capital post-conviction counsel on behalf of Mr. Pavatt respectfully request this Court to consider the issues raised on the direct appeal level. In order to prevent forfeiture of claims in Mr. Pavatt's brief in chief on direct appeal and in order to show prejudice, post-conviction counsel will be re-raising most of the claims in this application in addition to the claims that should have been raised in the direct appeal.

Capital post-conviction counsel respectfully request reversal of Mr. Pavatt's convictions and

a remand for new trial, new sentencing, or a new direct appeal.

B. Statements by Prospective Jurors Regarding Release of Persons Convicted of Murder Improperly Prejudiced Mr. Pavatt's Jury.[6]

While post-conviction counsel agree with the overall premise and theme of Proposition II of the Direct Appeal Brief in Chief, appellate counsel failed to argue and inform this Court of some facts and some law.

First, trial counsel filed a motion to preinstruct the jury on parole misconceptions. (O.R. Vol. VII at 1329-34)(M.H. 8/8/03 at 31-32). Trial counsel were fearful that this very problem would occur and taint the jury. Trial counsel's fear was justified. Prospective Juror Walker in response to the question of whether he could impose the penalty of life imprisonment stated in front of the entire prospective jury pool: "With a chance that he would be on the street in ten years, no." Trial counsel immediately moved for a mistrial which was overruled. Then trial counsel asked for a cautionary instruction which was denied. (Tr. Vol. II at 373-377).

Second, during voir dire of prospective alternate juror Brown, Mr. Brown when asked if he could impose all three available punishments for murder in the first degree, Mr. Brown said he had a problem with life with parole. He said his imposition of the sentence life with the possibility of parole would depend "upon the number of years given before he [Mr. Pavatt] was eligible for parole." (Tr. Vol. V at 1137-1138). Mr. Brown continued to ask if life with parole means forty-five (45) or fifty (50) years. Judge Bragg answered, "We truthfully do not know what that is." (Tr. Vol. V at 1138). The trial court further said that the meaning of the sentence of life with parole would be up to the Department of Corrections and the Pardon and Parole Board. (Tr. Vol. V at 1139). In

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[6] Aplt. Brf., at 6-22.

response, prospective juror Brown:

> I guess I was looking at it maybe, you know, it's **ten years** and he could possibly, you know, be eligible for parole. That's what I was looking at.

(Emphasis added). The State of Oklahoma in the Brief of Appellee stated, "The trial court stated that it doubted very seriously the prospective juror would believe what [prospective juror] Walker said was true,..." (Aple. Brf. at 24). Clearly, prospective juror Walker's statement on parole was heard and was not just an expression of opinion as shown by prospective alternate juror Brown's comment.

Third, although trial counsel asked for a mistrial or an admonishment and both were denied, trial counsel failed to ask the trial court to instruct jurors pre-evidence or post- evidence for an instruction on the definition of life with parole. The Oklahoma Legislature enacted a truth in sentencing law which forbids a prisoner with a sentence of life with parole on a murder conviction from being paroled unless 85% of his sentence had been served. 21 O.S. § 13.1 This Court recently held that

> ...for cases covered by this new sentencing reality--as in cases where life without parole is a sentencing option--the legislature's specific action compels a specific limitation on our traditional prohibition of mentioning parole at trial.
>
> ***
>
> ...the 85% Rule is a specific, delineated parole provision that does apply to life sentences for murder (as well as numerous other crimes), which does not vary from one inmate to another, which can be readily defined and explained by a judge, and which is relevant and helpful information for the jury to consider.

Anderson v. State, 2006 OK CR 6, 130 P.3d 273, 278.

Mr. Pavatt's jurors, similarly to Anderson's jurors, asked specifically how long a life sentence will keep someone in prison. **Anderson** at 279. The trial court should have instructed Mr.

Pavatt's jurors that a life sentence according to the Pardon and Parole Board is considered to be forty-five (45) years and that Mr. Pavatt, if found guilty of murder in the first degree, would have to serve at a minimum of 85% of that forty-five years. **Id.** at 283. Mr. Pavatt's jury should have been instructed. The trial court's failure to do so is reversible error.

Appellate counsel were ineffective for omitting some facts and law in this issue in the direct appeal brief in chief. **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and **Evitts v. Lucey**, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). Mr. Pavatt should receive a new trial. Mr. Pavatt respectfully requests a new trial.

C. The Hearsay Testimony and Opinion Testimony of Federal Bureau of Investigation Agent Kurt Stoner Deprived Mr. Pavatt of a Fair Trial.[7]

Appellate counsel argued that the hearsay testimony and opinion testimony of the Federal Bureau of Investigation Agent Kurt Stoner deprived Mr. Pavatt of a fair trial. Agent Stoner testified that in his opinion Mr. Pavatt was guilty of murder. Agent Stoner was not the investigating officer on the case. In addition, Mr. Stoner was not portrayed as an expert witness.

Q. (By Mr. Gieger): Although you weren't responsible for the murder investigation itself, based upon your working with the Oklahoma City Police Department, Janna Larson and the other evidence you may have come across in your role as an investigator, have you formed an opinion as to Mr. Pavatt's involvement in the murder of Robert Andrew?

A. (Agent Stoner): I have.

MR. ARNETT: Objection. Calls for speculation.

THE COURT: No, that question doesn't. That's overruled.

Q. (By Mr. Gieger): And that opinion is based upon your experience in working as a Federal Bureau of Investigator agent for six years now working on several hundred

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7 Aplt. Brf., at 23-26.

cases; is that correct?

A. (Agent Stoner): Correct.

Q.: Comes from your experience in doing that?

A.: Correct, and I was also a police officer for six years before the Bureau so...

Q.: And do you, in fact, have an opinion at this point as to Mr. Pavatt's involvement in the murder of Robert Andrew?

A.: I do.

Q.: What is it?

MR. ARNETT: Your Honor, may –

THE WITNESS: **That he's directly involved.** (Emphasis added).

MR. ARNETT: – we approach?

THE COURT: Yes. Ah-ah.

MR. ARNETT: Judge, may we approach?

THE COURT: Yes.

(Tr. Vol. XII at 3059, line 20-3060, line 24).

Mr. Arnett continued his objection to the prosecution question, Mr. Stoner's answer, and asked for a mistrial. (Tr. Vol. XII at 3061-3062). Although the judge issued a curative instruction, because of Mr. Stoner's evidentiary harpoon on the ultimate conclusion invading the province of the jury, the damage was done. (Tr. Vol. XII at 3065). Agent Stoner deliberately gave his personal opinion as to Mr. Pavatt's guilt; thereby harpooning his opinion as to the ultimate fact in question.

1. Evidentiary harpoon.[8] [9]

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[8] Evidentiary harpoon. Exists where prosecution through its witnesses successfully places before the jury improper evidence, ... in situations where such evidence would not be admissible. **Black's Law**

The statement of Agent Stoner, "[t]hat he is directly involved," is an ultimate conclusion and an evidentiary harpoon that has been condemned by this Court. This Court forbids witnesses from making evidentiary harpoons. "The Court has described evidentiary harpoons as voluntary statements generally made by experienced police officers or by lay witnesses that 'are willfully jabbed rather than inadvertent' to inject other crimes evidence calculated to prejudice the defendant and which do in fact prejudice the defendant." **Lambert v. State**, 1999 OK CR 17, 984 P.2d 221, 235.

> An "evidentiary harpoon" is a metaphorical term of art that has been used by several state courts to describe the situation where a government witness, while testifying in a criminal case, deliberately offers inadmissible testimony with the purpose of prejudicing the defendant. **Pillow v. State**, 479 N.E.2d 1301, 1305 (Ind.1985); **English v. State**, 481 N.E.2d 413, 415 (Ind.App.1985); **Bruner v. State**, 612 P.2d 1375, 1378 (Okl.Crim.1980); **Mathis v. State**, 553 P.2d 525, 528 (Okl.Crim.1976); **Sandersfield v. State**, 461 P.2d 1019, 1020.

United States v. Hooks, 780 F.2d 1526, 1535 (10th Cir.1986).

Agent Stoner is an experienced law enforcement officer, his statement was given voluntarily after the defense had made a proper objection to the question, willfully jabbed, and prejudicial to Mr. Pavatt. And although the evidentiary harpoon referred to the crime Mr. Pavatt was currently on trial for, it nonetheless put improper evidence before the jury that was otherwise inadmissible. Defense counsel did not invite the error; in fact, defense counsel objected to several impermissible questions by the prosecution before the question on the officer's opinion as to guilt of the defendant. (Tr. Vol.

Dictionary 6th Ed. 1990.

9 During first stage testimony, Rob Andrew's brother, William Randall Andrew, testified that Mr. Pavatt could not miss a target the size of a man. Trial counsel objected to speculation, but the witness answered before Judge Bragg ruled. (Tr. Vol. VII at 1941). Not only was the witness speculating, but the witness harpooned his opinion.

XII at 3043-3060). The prosecution intentionally elicited this improper evidence. *See* sub-proposition G. The District Court gave a curative instruction; but Mr. Stoner's harpoon was still in front of the jury. (Tr. Vol.XII at 3065). There are "some occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect." **Donnelly v. DeChristoforo**, 416 U.S. 637, 644, 94 S.Ct. 1868, 1872, 40 L.Ed.2d 431 (1974). Agent Stoner's harpoon was just such an occurrence.

2. Opinion on ultimate conclusion.

Agent Stoner was not examined as an expert witness, nor was he voir dired as to his credentials as an expert witness. He was not a properly qualified expert. "Any properly qualified expert testifying in accordance with standards governing the admissibility of expert testimony may offer an opinion on the ultimate issue if it would assist the trier of fact." **Johnson v. State**, 2004 OK CR 25, 95 P.3d 1099, 1104. As such, Agent Stoner could not testify as his opinion on the ultimate conclusion in Mr. Pavatt's case. His testimony invaded the province of the jury.

It has been suggested that witness testimony of his or her opinion on the ultimate merits of the case is not to be allowed because, "[t]hese matters are within the province of the jury after hearing the testimony and the instructions of the trial court." **Wagnon v. Brown,** 1934 OK 561, 36 P.2d 723, 724. The Tenth Circuit has held "when the purpose of testimony is to direct the jury's understanding of the legal standards upon which their verdict must be based, the testimony cannot be allowed." **United States v. Oles**, 994 F.2d 1519, 1523 (10th Cir. 1993). Agent Stoner's testimony went to the ultimate issue of law in the case: whether Mr. Pavatt was guilty of murder and conspiracy to commit murder.

"[I]t is not permissible to have a witness comment on the testimony or to give conclusions

which result in testifying as to the ultimate questions which the jury is called upon to answer." **United States v. Gutierrez**, 576 F.2d 269, 275 (10th Cir. 1978). Agent Stoner, an experienced law enforcement officer, knew he should not be testifying to the ultimate issue in the case. The prosecution knew soliciting an answer on the ultimate issue on the case was inappropriate, wrong, and a violation of Mr. Pavatt's right to due process and a fair trial. *See* Proposition 2, sub-proposition H.

In addition, Agent Stoner's testimony was improper because if it was considered non-scientific but expert testimony because he relied on his experience then his testimony would have been subjected to **Daubert/Kumho** standards of reliability and relevance. See Proposition 2, sub-proposition O for a discussion on **Daubert/Kumho**. Even so, Agent Stoner's appeared to be his personal opinion rather than his "expert" opinion.

Appellate counsel were ineffective for failing to argue completely, sufficiently, and adequately why Agent Stoner's testimony was so egregious, prejudicial and a violation of Mr. Pavatt's due process rights and his right to a fundamentally fair trial. **Strickland v. Washington,** 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) **Evitts v. Lucey**, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). Mr. Pavatt should receive a new trial.

D. The District Court Should Have Granted a Change of Venue.[10]

In Proposition IV of the direct appeal brief in chief, appellate counsel argue that a change of venue should have been granted by the trial court. The trial court held a hearing on the issue of change of venue on January 9 and 21, 2003. Mr. Pavatt's trial began in August, 2003, seven (7) months after the hearing. Trial counsel renewed its motion for a change of venue. (Tr. Vol. I at 51-

[10] Aplt. Brf., at 26-27.

60). (O.R. Vol. X at 1933-35). However, trial counsel provided no evidence of extensive and continuing media coverage that occurred after the change of venue hearing but before a jury was seated, although trial counsel and the court were aware of the continuing coverage.[11] In addition, appellate counsel did not provide this Court with that evidence either. Post-Conviction counsel have attempted to obtain some of it; however, without subpoena power, post-conviction counsel were unable to obtain the bulk of it. (Exh. 5, Appendix). Post-conviction counsel have obtained numerous articles that were published by The Oklahoman showing that the publicity surrounding this case was massive and continued to be massive up until Mr. Pavatt's trial, during his trial, and long afterwards. (Exh. 6, dates from 1/22/03 through 8/24/03; Exh. 7, 8/26/03-10/22/03; and Exh. 8, 10/25/03-3/11/06; Appendix). Trial counsel were ineffective for not showing the trial court the continued media attention on Mr. Pavatt's case and appellate counsel were ineffective for not showing this Court the extensive press coverage of the case and how it affected the jurors.

> Counsel contend that the media coverage was so pervasive that prejudice must be presumed.
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> [A]t times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process. Such a case was **In re Murchison**, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), where Mr. Justice Black for the Court pointed up with his usual clarity and force:
> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. * * * (T)o perform its high function in the best

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[11] MR. ARNETT: Also, the other event that transpired during that period of time was the that letter somehow wound up being distributed to the media. Without going into specific details of how that occurred the Court is well aware that it was published in full in the Daily Oklahoman and was read virtually in full on Channel 9 News and ostensibly publicized.

THE COURT: Including the Internet. But go ahead.

(M.H. 7/24/03 at 5).

way justice must satisfy the appearance of justice. **Offutt v. United States**, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (99 L.Ed. 11). At 136, 75 S.Ct. at 625.

Estes v. State of Texas, 381 U.S. 532, 542-543, 85 S. Ct. 1628,1633, 14 L. Ed.2d 543 (1965). (Internal quotation marks omitted).

In the absence of pervasive media influence a presumption of prejudice may be based the totality of the circumstances surrounding the trial.

> indications in the totality of the circumstances that petitioner's trial was not fundamentally fair. **Murphy v. Florida**, 421 U.S. 794, 799, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589 (1975). Fundamentally unfair circumstances may be indicated by an inflammatory atmosphere within the community or courtroom, by specific statements of jurors, or by the difficulty with which an impartial panel was selected. **Id.** at 800-03, 95 S.Ct. at 2036-38.

Brecheen v. Reynolds, 41 F.3d 1343, 1351 (10th Cir. 1994). (Internal quotation marks omitted).

In Mr. Pavatt's case, the district court used the "struck method" for voir dire. Sixty-four (64) jurors were examined before a jury was finally empaneled. Of those sixty-four (64) jurors, fifty-two (52) had at the very least heard or read about the case. Fifteen (15) of those jurors saw or read something within the week before the trial. Six (6) jurors could not put their opinions aside to be impartial. Only six (6) jurors affirmatively stated that they had not seen or read anything in the media about Mr. Pavatt's case. Six (6) other jurors said they had formed no opinions on the case, but do not state whether they have heard about the case or not. Over 80% of the juror pool knew something about the case clearly demonstrating pervasive media coverage. (Tr. Vol. I-IV at 74-1042).

In the alternative, a defendant seeking relief on appeal must show that the trial court abused its discretion and that, as a result, the defendant was denied his right to a fair trial before an impartial jury. This Court has recognized that in order to evaluate such a claim, review should focus on (1)

the voir dire statements of individual jurors, (2) voir dire statistics, and (3) the atmosphere within the community, as reflected in the news media. **DeRosa v. State**, 2004 OK CR19, 89 P.3d 1124, 1136. As stated above, of the examined potential jurors, over 80% had heard of the case. And even though many of them stated they could set their opinions aside, subconsciously, the prospective jurors knew about the case and had opinions on it before evidence was ever presented to them.

> The prejudice that may deny a fair trial is not limited to a bias or discriminatory attitude. It includes an impairment of the deliberative process of deductive reasoning from evidentiary facts resulting from an attribution to something not included in the evidence. That something has its most powerful effect if it generates strong emotional responses and fits into a pattern of normative values.

United States v. McVeigh, 918 F.Supp. 1467, 1472 (W.D.Okl.,1996).

Mr. Pavatt's due process rights were violated and he was denied a fundamentally fair trial. Appellate counsel were ineffective for failing to argue sufficiently and adequately why the venue should have been changed in Mr. Pavatt's case constituting trial error. **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and **Evitts v. Lucey**, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). Mr. Pavatt should receive a new trial.

E. Failure of Trial Counsel to Object to Irrelevant Evidence and Failure of Appellate Counsel to Raise Issue.

Much of the evidence presented to the jurors of Mr. Pavatt, was misleading, confusing, cumulative and completely and wholly irrelevant to the issue of whether Mr. Pavatt committed murder and conspiracy to commit murder. Oklahoma Statute title 12 § 2401 defines relevant evidence. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence." Oklahoma Statute title 12 § 2402 says that irrelevant evidence is

not admissible. Oklahoma Statute title 12 § 2403 says "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence..." Trial counsel asked for a continuing objection to any hearsay statements on Brenda Andrew's part. The objection was overruled. (Tr. Vol. V at 1336-1337).

Norman Richard Nunley testified he had only met Mr. Pavatt one time, the day Brenda Andrew filed for divorce. The rest of his testimony was about Brenda and his relationship with her. (Tr. Vol. V at 1361-1389; Tr. Vol. VI at 1424-1459). He even testified that he did not know Mr. Pavatt had anything to do with the disputed life insurance policy.

Q. Did she (Brenda Andrew) say, ever say anything about Mr. Pavatt having anything to do with that policy?

A. No. I had no knowledge of Mr. Pavatt's involvement with an insurance policy until I read it in the newspaper after the murder.

And although Mr. Nunley testifies that he had no knowledge of Mr. Pavatt having anything to do with the disputed life insurance policy, his statement about him reading about Mr. Pavatt's involvement in the newspaper is extremely prejudicial and irrelevant. It implies that the newspaper reports were true.[12] His statement was also not probative to the issue of a conspiracy to commit murder and the murder.

James Tracy Higgins was the next witness. The bulk of his testimony was completely irrelevant to Mr. Pavatt. (Tr. Vol. VI at 1460-1523). His only testimony concerning Mr. Pavatt and

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[12] Mr. Nunley's statement reinforces Mr. Pavatt's change of venue argument. His statement of not knowing Mr. Pavatt's involvement until he read it in the newspaper reinforces the subconcious knowledge of the jurors who had heard or read about the case, especially when over half of the jurors who decided Mr. Pavatt's case affirmatively said that they had seen or read about the case. *See* Proposition 2, sub-proposition D.

any connection to Mr. Pavatt had to Brenda Andrew was when he stopped Brenda's and helped unload Mr. Pavatt's washer and dryer into Brenda's garage because Mr. Pavatt was in the process of moving. (Tr. Vol. VI at1472-1473). Trial counsel did not object to the irrelevancy of this testimony; rather trial counsel pointed out to the jury that Mr. Higgins had no evidence connecting Mr. Pavatt to Rob Andrew's murder. (Tr. Vol. VI at 1523).

Another witness's testimony was also completely irrelevant to Mr. Pavatt. Mary Anna Loper's testimony mentioned nothing about Mr. Pavatt. The subject matter of her testimony dealt with her observations of Brenda and Rob and hearsay testimony of Brenda. (Tr. Vol. VI at 1599-1611).

The next witness was Cynthia Balding. Her testimony was also completely irrelevant. Her only testimony concerning Mr. Pavatt was that she had met him three times. No evidence connecting Mr. Pavatt to the murder and no evidence of conspiracy involving Mr. Pavatt was presented through this witness. (Tr. Vol. VI-1611-1649).

David Lee Head was a plumber who had done some work for Brenda Andrew. Brenda was very upset at Mr. Head and had a verbal altercation with him outside of her house. Mr. Head testified that Brenda's neighbor friend was present. He never identified Mr. Pavatt in court, but the jury was left to infer that the neighbor was Mr. Pavatt. However, as discussed earlier in Proposition 1, sub-proposition B, the neighbor was not Mr. Pavatt, but Mr. Shadid. Mr. Head's testimony was completely irrelevant in Mr. Pavatt's trial. (Tr. Vol. VII at 1827-1836).

Herman Roggow who testified he saw Brenda Andrew out with her brother- in- law and another man. The jury was left to infer the other man was Mr. Pavatt. But, as shown earlier in Proposition 1, sub-proposition A, Mr. Roggow had trouble identifying Brenda at her trial in the

courtroom. His testimony was suspect. He could not identify Brenda, much less Mr. Pavatt. His testimony was also irrelevant.

There were other witnesses who testified about the crime, but had no evidence connecting Mr. Pavatt to it: Rod Lott, who worked at the same place Rob Andrew worked, testified about Brenda and Rob, not about Mr. Pavatt (Tr. Vol. VII at 1845-1850); Bee J. Garrison, a neighbor of Brenda's, testified about nothing concerning Mr. Pavatt (Tr. Vol. VIII at 2094-2108); Joseph B. Hill, record custodian for 911, also said nothing about Mr. Pavatt (Tr. Vol. IX at 2143-2150); Roger Frost, police officer, admitted that he found no evidence connecting Mr. Pavatt to the crime (Tr. Vol. IX at 2152-2214); and Sheriff Bill Winchester, who talked to Herman Roggow, had no evidence against Mr. Pavatt (Tr. Vol. X at 2498-2505).

In addition, there were demonstrative pieces of evidence admitted into evidence that had no relevance to Mr. Pavatt. For example, State Exhibits 47 A, B, and C were Prudential Financial letters with the envelope allegedly found in Brenda Andrew's house. Those letters showed Brenda having ownership of the disputed life insurance policy, not Mr. Pavatt. (Tr. Vol. IX at 2281-2285).

However, all of the above witnesses testified to either bad acts, bad feelings, or bad behavior of Mr. Pavatt's co-defendant. However, none of it connects Mr. Pavatt to the murder or conspiracy to commit Rob Andrew's murder. The evidence presented against and about Brenda was extremely prejudicial and irrelevant to Mr. Pavatt. As stated in the facts in this application, Mr. Pavatt was largely convicted because of his association with Brenda Andrew and due to the irrelevant evidence presented in his trial. Trial counsel should have objected on the basis of irrelevancy. The non-objection and resulting admission to this evidence cannot be deemed harmless. Mr. Pavatt suffered a miscarriage of justice as a result. *See* **Keahey v. Craig**, 1939 OK 419, 96 P.2d 521. Because trial

counsel did not object to the irrelevant testimony, violating Mr. Pavatt rights to present a defense, plain error is apparent. **Simpson v. State**, 1994 OK CR 40, 876 P.2d 690, 695.

Consequently, trial counsel were ineffective. Appellate counsel should have raised the error; consequently, appellate counsel were ineffective. **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) **Evitts v. Lucey**, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). Mr. Pavatt should receive a new trial.

F. Appellate Counsel Failed to Adequately Argue that the Evidence Presented in Mr. Pavatt's Trial Was Insufficient to Convict Mr. Pavatt Beyond a Reasonable Doubt.[13]

Appellate counsel in the Direct Appeal Brief in Chief stated that there was insufficient evidence to convict Mr. Pavatt for the crime of malice murder or the crime of conspiracy to commit murder. Appellate counsel wholly failed to argue how the evidence is insufficient.

The evidence was insufficient. Much of Mr. Pavatt's case was not evidence of Mr. Pavatt's guilt, but rather of co-defendant, Brenda Andrew's guilt. Mr. Pavatt was convicted because of his association with Ms. Andrew and because of the improperly introduced "letter." *See also* Proposition 2, sub-proposition K and O.

The jury was instructed with Instruction number 7:

> No person may be convicted of murder in the first degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:
>
> First, the death of a human;
>
> Second, the death was unlawful;
>
> Third, the death was caused by the defendant;
>
> Fourth, the death was caused with malice aforethought.

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[13] Aplt. Brf., at 28-29.

(O.R. Vol. XI at 2024).

After the State rested in the first stage, trial counsel demurred to the evidence which was overruled. (Tr. Vol. XIII, 3413). The evidence presented in Mr. Pavatt's trial was deficient to prove beyond a reasonable doubt that Mr. Pavatt caused Rob Andrew's death. As stated above, much of the evidence presented at his trial was irrelevant to him. *See also* Proposition 2, sub-proposition E. What the prosecution did prove was 1) Mr. Pavatt was having an affair with Brenda Andrew,[14] 2) there was a dispute between Rob and Brenda Andrew on the ownership of an life insurance policy in which Mr. Pavatt was the agent that sold the policy to them,[15] 3) Mr. Pavatt bought a .22 hand gun,[16] 4) Mr. Pavatt had shot 16 gauge shot gun before,[17] 5) Mr. Pavatt asked his daughter to call Rob Andrew to tell Mr. Andrew his family was at Norman Regional Hospital,[18] 6) Mr. Pavatt investigated leaving the country,[19] 7) Mr. Pavatt ultimately left the country with Brenda,[20] and 8) he allegedly wrote a letter confessing his guilty in Rob Andrew's murder.[21] However, this evidence does not prove beyond a reasonable doubt that Mr. Pavatt caused the death of Rob Andrew. It does prove beyond a reasonable doubt that Mr. Pavatt was associated with Brenda Andrew. There is no

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14 Tr. Vol. VI at 1650, 1655; Tr. Vol. XI at 2831-2832.

15 Tr. Vol. VII at 1879-1881.

16 Tr. Vol. X at 2505-2560.

17 Tr. Vol. VII at 1931-1934.

18 Tr. Vol. XI at 2839.

19 Tr. Vol. XII at 3088; Tr. Vol. XI at 2877..

20 Tr. Vol. XI at 2888, 2897.

21 State's Exh. 222

evidence to suggest what circumstances were involved in writing "the letter" or even if it was true. There is no evidence to suggest the Mr. Pavatt did not believe Brenda Andrew and her children were not at Norman Regional Hospital.

Concerning the elements of conspiracy to commit murder, the jury was instructed:

> No person may be convicted of Conspiracy to Commit a Felony, to wit: Murder in the First Degree with Malice Aforethought, unless the State has proved beyond a reasonable doubt each element of the crime. These elements are as follows:
>
> First, an agreement by two or more persons,
>
> Second, to commit the crime of Murder in the First Degree with Malice Aforethought,
>
> Third, the defendant was a party to the agreement at the time it was made,
>
> Fourth, an overt act by one or more of the parties performed subsequent to the formation of the agreement.

(O.R. Vol. XI at 2028).

The prosecution presented no evidence of when Mr. Pavatt made an agreement to commit murder or when he became a party to the agreement. This Court

> adopted a unified standard of review for direct and circumstantial evidence in claims of insufficient evidence. Accordingly, this Court must determine whether, viewed in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Mitchell v. State**, 2005 OK CR 15, 120 P.3d 1196, 1209.

Viewed in the light most favorable to the State, a rational trier of fact could have found some of the required elements of the two crimes beyond a reasonable doubt, but not all of the elements. There has to be more evidence than merely implied innuendo and speculation. In order for a conviction to stand on either the murder or the conspiracy to commit murder, all of the elements must be proved beyond a reasonable doubt. *See* **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L. Ed. 2d 560

(1979).

Appellate counsel wholly failed to show why the evidence in Mr. Pavatt's case does not rise to the level of beyond a reasonable doubt resulting in prejudice to Mr. Pavatt. Appellate counsel were ineffective. **Strickland v. Washington**, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984), **Evitts v. Lucey**, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed.2d 821 (1985), and **Garrison v. State**, 2004 OK CR 35, 103 P.3d 590. Mr. Pavatt should receive a new trial.

G. In Violation of Mr. Pavatt's Fundamental Right to Present a Defense, the Trial Court Erred in Refusing to Allow Exculpatory Evidence to Be Presented in Petitioner's Trial and Appellate Counsel Failed to Raise Issue Properly Rendering Ineffective Assistance of Appellate Counsel.[22]

Sealed per this Court's instructions on July 8, 2005 Order Granting Petitioner's Counsel Access to Sealed Records and Pleadings. Filed in conjunction with this application.

H. Prosecutorial Misconduct[23] Infected Mr. Pavatt's Trial Depriving Him of his Fundamental Right to a Fair Trial and Due Process.[24]

1. The prosecutor's improper remarks during the closing argument of the punishment phase denied Mr. Pavatt a fair sentencing hearing.

The prosecuting attorney made numerous improper remarks during second stage closing arguments; thereby, violating Mr. Pavatt's right to due process and a fundamentally fair trial. "The primary duty of a lawyer engaged in the public prosecution is not to convict" and obtain as many

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22 Aplt. Brf., at 31-35.

23 Trial counsel filed a **Motion in Limine RE: Prosecutor Misconduct.** (O.R. Vol. VIII at 1458-1460). Trial counsel also filed a **Motion in Limine–Leading, Vouching for Credibility of Witnesses, Bolstering, Self-Serving Statements, and Hearsay Statements.** (O.R. Vol VII at 1388-1389).

24 Aplt. Brf., at 36-42.

death sentences as possible. **Tobler v. State**, 1984 OK CR 90, 688 P.2d 350, 354. In Mr. Pavatt's trial, the Oklahoma County prosecutors did not adhere to this duty. This Court has repeatedly condemned improper remarks and argument, such as those in **Omalza v. State**, 1995 OK CR 80, 911 P.2d 286, 309. There, this Court reversed a lengthy murder trial involving several defendants, in part, because of improper remarks by the Oklahoma County prosecutors. Additionally, any doubt concerning whether the remarks were improper should be resolved in favor of the accused. **Sykes v. State**, 95 Okl. Cr. 14, 238 P.2d 384, 388 (1951).

There are other examples of prosecutorial misconduct during the closing arguments that direct appeal counsel failed to mention. First, the prosecutor states at least two times that there is a two-prong test involved in determining if there are any mitigators. (Tr. Vol. XV at 3745, 3776). This is a mischaraterization of the jury instructions. It is false and it is misleading. Second, the prosecutor refers to defense counsel by name over eleven times during closing. *See* **United States v. Holmes**, 413 F.3d 770, 77 (8th Cir. 2005)(reversing case because of prosecutorial misconduct because prosecutor repeatedly addressed defense counsel by name and framed the issue in terms of the "story" told by defense counsel and conduct of defense counsel rather than the evidence). Third, the prosecutor states Mr. Pavatt has no remorse. (Tr. Vol. XV at 3784). Mr. Pavatt's defense was actual innocence. An actually innocent person would have no remorse for a crime he or she did not commit. In addition, trial counsel filed a motion in limine requesting the prosecutor be prohibited from remarking on remorse. (O.R. Vol. VIII at 1411-1412)(M.H. 8/8/03). These are examples that direct appeal counsel failed to mention.

The heightened need for reliability in capital cases underscores the gravity of the prosecutor's misconduct at Mr. Pavatt's trial. **Caldwell v. Mississippi**, 472 U.S. 320, 323, 105 S.Ct. 2633, 86

L.Ed.2d 231 (1985). The due process violations arise from the same principles of fundamental fairness that set the boundaries for prosecutorial conduct. **Donnelly v. DeChristoforo,** 416 U.S. 637, 94 S. Ct. 1868, 40 L.Ed.2d 431 (1974); **United States v. Young,** 470 U.S. 1, 105 S. Ct. 1038, 84 L. Ed.2d 1 (1985); **Darden v. Wainwright,** 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed.2d 144 (1986).

This Court has explained in dicta that the meaning of due process evolves "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." **Cooper v. State,** 1995 OK CR 2, 889 P.2d 293, 301, quoting **Stuart v. Palmer,** 74 N.Y. 183, 191 (1878). The relevant question in a particular case is whether the government's misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." **Darden v. Wainwright,** 477 U.S. at 181, 106 S.Ct. at 2471, citing **Donnelly v. DeChristoforo,** 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

Improper argument to the jury by the state's attorney may rise to the level of a due process violation under certain circumstances. *See,* e.g., **McCarty v. State,** 1988 OK CR 271, 765 P.2d 1215, 1221 (effect of improper prosecutorial comments "was so prejudicial as to adversely affect the fundamental fairness and impartiality of the proceedings"); **Tobler v. State,** 1984 OK CR 90, 688 P.2d 350, 353 ("... there is no right which is more essential to an accused's defense than the right to a fair trial free from prejudice."). The appellant's right to a fair trial may also be "the victim of an overzealous prosecutor" because of improper conduct during another phase of the proceedings besides first-stage closing argument. **Brewer v. State,** 1982 OK CR 128, 650 P.2d 54, 57-58 (stabbing victim's photograph during first-stage cross-examination of defense expert was "designed purely for its unfair prejudicial impact on the jury"; ridiculing defense attorney's objections during

first-stage cross-examinations demonstrated "a lack of respect for the appellant's constitutional right to a fair trial"; improper second-stage argument injected arbitrary factor into sentencing decision); **Brown v. State**, 1988 OK CR 59, 753 P.2d 908, 913 (second-stage argument resulted in modification of death sentence to life imprisonment).

On appeal, the State must establish the due process violation was harmless beyond a reasonable doubt. **McCarty**, 765 P.2d at 1221; **Chapman v. California**, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); **Rose v. Clark**, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986) (due process violations subject to **Chapman** harmless error rule); **Simpson v. State**, 1994 OK CR 40, 876 P.2d 690 (State must show constitutional errors are harmless beyond a reasonable doubt unless the error is one not subject to the harmless error doctrine); **O'Neal v. McAninch**, 513 U.S. 432, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995).

2. Failure of trial counsel to object to prosecutorial misconduct.

As shown previously, Mr. Pavatt was denied a fair trial and a fair sentencing proceeding due to the improper comments of the prosecutors. Many of these comments were not objected to by trial counsel. The Court should not find that Mr. Pavatt waived these arguments by the failure of defense counsel to interpose an objection. If the lawyer failed to object to improper comments, Mr. Pavatt is entitled to relief based on the failure of his trial lawyer to provide effective assistance of counsel. **Strickland v. Washington**, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This Court has acknowledged that the failure of a trial lawyer to interpose proper objection can amount to ineffective assistance of counsel. *See* **Collis v. State**, 1984 OK CR 80, 685 P. 2d 975; **Aycox v. State**, 1985 OK CR 83, 702 P. 2d 1057.

3. **Structural error.**

Prosecutorial misconduct affects the framework of a trial. It affects a defendant's fundamental right to a fair trial. As such, it is structural error.

In **Arizona v. Fulminante**, 499 U.S. 249, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), the Supreme Court distinguished between trial error, which is subject to harmless error analysis, and structural error, which can never be harmless. According to the **Fulminante** opinion, in creating harmless error analysis, **Chapman v. State of California**, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967) recognized that total deprivation of the right to counsel at trial could never be harmless error. **Fulminante** at 309, 111 S. Ct. at 1264-65. In addition, **Chapman** recognized that trial by a judge who was not impartial was structural defect. **Id.**

Significantly, the Supreme Court's examples of structural constitutional error in **Chapman** are illustrative, not exhaustive. Subsequent to **Chapman**, the Supreme Court has identified additional specific structural constitutional errors. Other examples mentioned in **Fulminante** include unlawful exclusion of members of the defendant's race from a grand jury, the right to self-representation at trial, and the right to a public trial. **Fulminante** at 310, 111 S.Ct. at 1265.

Current pronouncements do not rule out the existence of other structural constitutional defects. The hallmark of a structural constitutional error is a "structural defect affecting the ***framework*** within which the trial proceeds, rather than simply an error in the trial process itself." **Fulminante** at 310, 111 S.Ct. at 1265 (emphasis added). If prosecutorial misconduct were sporadic, unintentional and inadvertent, that behavior might be properly evaluated totally within the context of the individual trial, and thereby subject to harmless error analysis under **Chapman**. *See, e.g.*, **Donnelly v. DeChristoforo**, 461 U.S. 637, 94 S. Ct. 1868, 40 L. Ed.2d 431 (1974). However,

misconduct on the part of the assistant district attorney throughout an individual trial and allowed by the trial court regardless of whether or not the defense objects is a structural defect and should not be subject to harmless error analysis.

4. **Conclusion.**

Appellate counsel were ineffective for not sufficiently raising the issue of prosecutorial misconduct. **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) , **Evitts v. Lucey**, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), **Garrison v. State**, 2004 OK CR 35, 103 P.3d 590. Mr. Pavatt should receive a new trial.

I. Insufficient Evidence to Support the Two Aggravators Alleged by the State and Found by the Jury that the Murder Was Heinous, Atrocious, or Cruel, and that the Murder Was for Remuneration.

1. Heinous, atrocious, or cruel.[25]

Although appellate counsel argued that there was insufficient evidence for the jury to find that Rob Andrew's murder was heinous, atrocious, or cruel for a page in the brief in chief, appellate counsel failed to show this Court why there is insufficient evidence. Appellate counsel were ineffective.

In order for an heinous, atrocious, or cruel aggravator to withstand an insufficiency of evidence challenge, this Court reviews the evidence in the light most favorable to the State and looks to see if there was any competent evidence for the aggravator. **Myers v. State**, 2006 OK CR 12, ¶ 75, _ P.3d _ . In this case, there is no competent evidence for the aggravator. Dr. Jeffrey Gofton, the medical examiner, testified that either of the two shotgun blasts to Rob Andrew's body would have been fatal within a matter of minutes and that once Rob Andrew was shot, he would have been

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[25] Aplt. Brf., at 47.

unconscious. After losing consciousness, Rob Andrew died. (Tr. Vol. X at 2457-2458; 2461-2462, 2466). Rob Andrew's death was recorded as 6:20pm. (Tr. Vol. X at 2433).

In closing argument for the second stage, the prosecution argues that Rob Andrew was conscious and knowing of his impending death. (Tr. Vol. XV at 3741-3742). The prosecution argues that Brenda Andrew while on the phone to 911 states that Rob is alive and breathing and is trying to get him to talk and that Brenda Andrew is shot in between the two 911 calls. (Tr. Vol. XIV Part B at 3611)(Tr. Vol. XV at 3741). Yet, the print out time log of 911 calls[26], only seven (7) seconds occurred between the two 911 calls. (Exh. 9, Appendix). In addition, the police arrived while Brenda was still on the phone to 911 saying Rob is breathing. State's Exhibit 34 admitted through Joseph Hill, the 911 records custodian showed Brenda called 911 at 6:20pm. The exact time recorded for Rob Andrew's death. (Tr. Vol. X at 2433). Ronald Stump testified he was on the phone with Rob approximately at 6:00pm the night he is murdered until the garage door of Brenda's house went up sometime after that. Ron Stump and Ron Stump's son were doing a Bible study with Rob while Rob waited in the driveway. (Tr. Vol. VI at 1551-1553). Throughout Mr. Pavatt's trial, the State provided the jury with numerous lies of Brenda Andrew including showing that what happened in the garage at 6112 Shaftsbury was inconsistent with the evidence. Brenda Andrew was lying about how Rob Andrew was shot; and yet while she is on the phone to 911, she was telling the truth? Reasonably doubtful, especially in light of the fact that the Medical Examiner said his time of death was at the exact same time Brenda called 911. Rob Andrew was dead within a matter of moments just as the medical examiner testified; and thus, his death was not preceded with torture

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[26] The print out time log for 911 calls shows a call from 6112 Shaftsbury Road at 6:19:44 pm which lasted 2 minutes 36 seconds. It ended at 6:22:19 pm The second call was received at 6:22:26 pm. There were only 7 seconds between the calls. (Exh. 9, Appendix).

or serious physical abuse. His death was not heinous, atrocious or cruel.

Just recently, this Court reiterated its prior holdings on the heinous, atrocious, or cruel aggravator in **Myers v. State**, 2006 OK CR 12, ¶ 74_ P.3d _.

> This Court has limited the heinous, atrocious, or cruel aggravating circumstances to those cases where the State proves beyond a reasonable doubt that the murder of the victim was preceded by torture or serious physical abuse, which may include the infliction of either great physical anguish or extreme mental cruelty. **Cheney v. State**, 1995 OK CR 72, ¶ 15, 909 P.2d 74, 80.

Similarly to the **Myers** case, the evidence in this case does not prove beyond a reasonable doubt that Rob Andrew was conscious and suffering in pain after he was shot. In **Cheney v. State**, 1995 OK CR 72, 909 P.2d 74, 80, this Court held that evidence necessary to prove the heinous, atrocious, or cruel aggravator encompasses:

> that the murder of the victim was preceded by torture or serious physical abuse, which may include the infliction of either great physical anguish or extreme mental cruelty. Absent evidence of conscious physical suffering of the victim prior to death, the required torture or serious physical abuse standard is not met. As to the extreme mental cruelty prong of this aggravating circumstance, torture creating extreme mental distress must be the result of intentional acts by the defendant. The torture must produce mental anguish in addition to that which of necessity accompanies the underlying killing. Analysis must focus on the acts of the defendant toward the victim and the level of tension created. (footnote cites and internal quotation marks omitted).

In the **Cheney** case, the victim had a protective order against the defendant and the defendant. In addition, the defendant physically struggled with the victim and he had a gun one month before her murder. **Cheney** at 78. This Court found insufficient evidence to prove heinous, atrocious, or cruel aggravator beyond a reasonable doubt. **Id.** at 79.

In contrast, in **Hain v. State**, 1996 OK CR 26, 919 P.2d 1130, 1146, the aggravator of heinous, atrocious, or cruel was upheld when evidence by the medical examiner showed that the victims died from thermal burns and smoke inhalation. The victims died suffering painful burns

while starving for oxygen. **Hain** at 1147.

The Tenth Circuit has held "[w]e have previously stated that the evidence must support anguish that goes beyond 'that which necessarily accompanies the underlying killing.' **Jones v. Gibson**, 206 F.3d 946, 953 (10th Cir.2000)." **Hamilton v. Mullin**, 436 F.3d 1181, 1195 (10th Cir. 2006). Rob Andrew was killed with a shotgun. He was not killed while suffering severe mental anguish because he was about to be killed or because others were about to be killed.[27] "Conscious[ness] ... is the critical inquiry in determining whether a murder was especially heinous, atrocious or cruel." **Spears v. State**, 1995 OK CR 36, 900 P.2d 431, 443. Rob Andrew was only conscious a few minutes, at best, after he was shot. His murder was not heinous, atrocious, or cruel. This aggravator cannot stand against Mr. Pavatt.

2. For remuneration aggravating circumstance.[28]

In addition to the jury improperly finding that Rob Andrew's murder was heinous, atrocious, or cruel, the jury also concluded that the murder was committed for remuneration. The statute says "[t]he 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;" 21 O.S. § 710.12(3). Although Mr. Pavatt was having an affair with Brenda Andrew, the estranged wife of the victim, and although there was evidence presented suggesting that a life insurance policy worth

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27 In **Hamilton v. Mullin**, Mr. Hamilton was convicted of killing four (4) people by shooting them in the back of their heads. The heinous, atrocious, or cruel aggravator was upheld because the individuals were forced to kneel in the back room uncertain of their fate, while each but the first listened to his co-workers being killed. **Hamilton**, 937 P.2d at 1014. Accordingly, [t]he evidence substantially supports the finding of the four aggravators. Id. 436 F.3d 1181, 1194 -1195 (10th Cir. 2006). (Internal quotations omitted).

28 Aplt. Brf., at 48-50.

$800,000 was written and managed by Mr. Pavatt through his employer, Prudential Insurance Company, there was no evidence to suggest that Rob Andrew's murder, if committed by Mr. Pavatt, was for remuneration or promise of remuneration. First, the life insurance policy was either owned by Rob or Brenda Andrew. (Tr. Vol. VII at 1879-1881). Mr. Pavatt did not own the policy, nor was he listed as a beneficiary. Second, there was no evidence presented showing a promise for remuneration or even a discussion between Brenda Andrew and Mr. Pavatt for remuneration for Rob Andrew's murder. The evidence does show that at the time of Rob Andrew's murder, there was a question of who owned the policy, and thus who were the beneficiaries was still not settled.[29] There simply could never be a promise of remuneration of the insurance proceeds as the State alleged. Third, Brenda Andrew opened an account worth $82,000 with Janna Larson's help. Ms. Larson testified that the account was for Brenda with Rob being the beneficiary. (Tr. Vol. XI at 2837). Ms. Andrew's actions opening an account for herself with her estranged husband being the beneficiary is not consistent with "remuneration or promise of remuneration" for Rob Andrew's murder. Fourth, Mr. Craig Box, Rob Andrew's attorney, testified that Mr. Pavatt never tried to claim the proceeds of the policy. (Tr. Vol. VII at 1920-21). Once again, Mr. Pavatt was convicted because of his association with Brenda Andrew.

This Court has upheld the "for remuneration" aggravator being "applied to killings

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[29] Because of the dispute of ownership and dispute of whom the beneficiaries were, The Prudential Insurance Company of America was unsure what to do with the proceeds of the insurance policy when Rob Andrew died and filed an interpleader action in the United States District Court for the Western District of Oklahoma, CIV-02-1405 C. Ultimately, the funds were given to Rob Andrew's brother, Tom, in an irrevocable trust for the minor children of Rob and Brenda Andrew. (Exhs. 10 11, and 12, Appendix). (Although Craig Box testified that in the event of Rob Andrew's death before the finalization of Brenda Andrew's and Rob Andrew's divorce, the effect would be as if there was no temporary order in the divorce action. (Tr. Vol. VII at 1888)). However, clearly the insurance company was not sure who was the owner of the policy.

motivated *primarily* to obtain proceeds from an insurance policy. Two of the cases in which the "for remuneration" aggravator dealing with an insurance policy were upheld are **Bryson v. State**[30] and **Plantz v. State.**[31] Mr. Pavatt's case is distinguishable from the **Plantz** and **Bryson** cases. (Emphasis added). In those two cases evidence was presented about dividing and using the insurance proceeds after the death of the victim.[32] There is no such evidence in Mr. Pavatt's case; thus, the "for remuneration" aggravatoar cannot stand.

3. Conclusion.

Should this Court find insufficient evidence of either the "heinous, atrocious, or cruel" aggravator or the "for remuneration" aggravator, but not both, the Court according to **Stringer v. Black**, 503 U.S. 222, 232, 112 S. Ct. 1130, 117 L. Ed.2d 367 (1992) must then reweigh the remaining aggravator against the mitigators beyond a reasonable doubt, or vacate Mr. Pavatt's death sentence and remand his case for a resentencing.

But, as argued above, because the heinous, atrocious, or cruel aggravator cannot stand, and because the "for remuneration" aggravator cannot stand, and because the jury acquitted Mr. Pavatt of the continuing threat to society aggravator[33], Mr. Pavatt's death sentence cannot stand and his sentence must be vacated and modified.

Appellate counsel were ineffective for failing to argue sufficiently and adequately why the

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30 1994 OK CR 32, 876 P.2d 240, 259.

31 1994 OK CR 33, 876 P.2d 268, 281.

32 In **Plantz** at 281 and **Bryson** at 259, both juries were given instructions on the definition of the aggravator for remuneration. In Mr. Pavatt's case, no jury instruction was given. (O.R. Vol. XI at 2047-2061).

33 O.R. Vol. XI at 2062.

two aggravators found by the jury in Mr. Pavatt's case were not proved beyond a reasonable doubt. **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and **Evitts v. Lucey**, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). Mr. Pavatt should receive a new trial.

J. Failure of Direct Appeal Counsel to Raise Issue of the Admission of the Live Photo of the Victim Is Unconstitutional.

This Court has long recognized the potentially prejudicial impact of photographs taken of a homicide victim prior to death. In **Boutwell v. State**, 1983 OK CR 17, 659 P.2d 322, 326, this Court condemned the admission of such photographic exhibits stating:

> We fail to see the relevancy of these exhibits because the victim's identity was not at issue. With increasing frequency prosecutors in this state have been introducing for no relevant purpose photographs of the victim taken when they were alive. This practice should cease as it has little bearing on the issues of guilt or innocence to be decided by the trier of fact.

Moreover, this Court "has held that where there is no purpose in introducing such pictures into evidence, such admission invokes the sympathy of the jury and constitutes error." **Staggs v. State**, 1991 OK CR 4, 804 P.2d 456, 458 (citing **Hayes v. State**, 1987 OK CR 106, 738 P.2d 533, 538-39, *vacated on other grounds* 486 U.S. 1050, 108 S.Ct. 2815, 100 L.Ed.2d 916 (1988); **Whittmore v. State**, 1987 OK CR 192, 742 P.2d 1154, 1156). This Court has also found that photographs of homicide victims taken while alive are inadmissible "unless they are relevant to some material issue and their relevancy outweighs the danger of prejudice to the defendant." **Thornburg v. State**, 1999 OK CR 32, 985 P.2d 1234, 1244 (citing **Tilley v. State**, 1998 OK CR 43, 963 P.2d 607, 615; **Valdez v. State**, 1995 OK CR 18, 900 P.2d 363, 381.

Despite this Court's assessment of the issue, the Oklahoma legislature passed the Kristie LeGrange Bill in 2002. This Bill amended 12 O.S. 2001, § 2403, to provide:

However, in a prosecution for any criminal homicide, an appropriate photograph of the

victim while alive shall be admissible evidence when offered by the district attorney to show the general appearance and condition of the victim while alive.

Pursuant to amended Section 2403, the State introduced a live photograph of Rob Andrew into evidence *during the first stage of trial.* (Tr. Vol. IX at 35; St. Ex. 219). In addition, the State incorporated all of the evidence presented in first stage of the trial in the second stage. (Tr. Vol. XV at 3671). The live photograph was admitted between witnesses; and therefore not sponsored by any witness.

1. Amended section 2403 is unconstitutional on its face.

It is telling that the Kristie LeGrange Bill is not found in Section 2401, which defines relevant evidence, but in Section 2403, which otherwise allows for exclusion of unduly prejudicial evidence even *if* relevant. This Court has already made clear that pre-mortem photographs *may* be admissible *if* they are relevant to some material issue. *See* **Rawlings v. State**, 1987 OK CR 135, 740 P.2d 153, 161-62 (finding that "although this Court does not favor admissions of photographs showing the victim alive, we are of the opinion that the photograph was relevant as to its existence and the location of its discovery"). Amended Section 2403, however, does not seek to ensure that relevant, highly probative evidence is presented to the jury, but rather ensures that a specific type of evidence is admitted without regard to relevance and without regard to whether the evidence would unfairly prejudice the defendant.

Amended Section 2403 is also decidedly one-sided in its application. If, for instance, a criminal defendant wanted to offer a photograph of the victim, perhaps as pictorial evidence of the particular victim's bad character, the defendant could not avail himself of amended Section 2403, because admissibility under this provision is strictly limited to photographs "offered by the district

attorney."

In enacting the Kristie LeGrange Bill as it did, without reference to its relevance and potential effect on the fairness of the proceedings, the Legislature has clearly overstepped its bounds. As this Court has aptly noted:

> Under our system of jurisprudence there is but one standard by which our laws are interpreted and enforced. That standard is known as Due Process of Law. It guarantees a fair and impartial trial to the guilty and innocent alike. It is the unique symbol of freedom and democracy and when denied to any citizen, it results in a denial to all.

Cody v. State, 1961 OK CR 43, 361 P.2d 307, 324.

Statutory enactments such as amended Section 2403 erode the fundamental right to a fair trial by injecting irrelevant and highly prejudicial "evidence" into the proceedings. There must be a limit to admissibility by legislative fiat, and that limitation is logical relevance within the framework of the basic purposes of a criminal trial.

At least in the second stage of trial, we have a provision allowing the jurors to see a "quick glimpse" of the victim's life. *See* 12 O.S. 2001, § 984.1. Nevertheless, victim impact evidence could still be so prejudicial as to constitute a denial of due process. **Payne v. Tennessee**, 501 U.S. 808, 825, 111 S.Ct. 2597, 2608, 115 L.Ed.2d 720 (1991). When used in the second stage of a trial, a posed photograph of the victim adds nothing to this "quick glimpse" except sympathy for the victim and yet more prejudice to the capital defendant. *See, e.g.*, **Al-Mosawi v. State**, 1996 OK CR 59, 929 P.2d 270, 285 (finding admission of photos of victims while alive was error because they "did not demonstrate any information about the victims, did not show how their deaths affected the survivors and in no way showed the financial, psychological, or physical impact on their survivors."); **Cargle v. State**, 1995 OK CR 77, 909 P.2d 806, 830 (probative value of the one "arguably" relevant

photograph was substantially outweighed by the danger of unfair prejudice; other photograph was irrelevant as it "in no way showed the financial, psychological or physical impact on their survivors or any particular information about the victim").

Relevant evidence already has an avenue for admission into evidence in both stages of trial. By its terms, the amendment of Section 2403 comes into play only when the probative value of such evidence is substantially outweighed by the danger of unfair prejudice, as an exception to the rule of exclusion of such evidence. The inevitable result of injecting such highly prejudicial and unnecessary evidence into the first and second stage of capital trials is to infect the proceedings with such unfairness as to make the resulting conviction a denial of due process and to undermine the reliability of the death sentence. **Darden v. Wainright**, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed.2d 144(1986); **Donnelly v. DeChristoforo**, 416 U.S. 637, 643, 94 S. Ct. 1868, 1871, 40 L. Ed.2d 431(1974).

2. The lack of limiting guidelines for admissibility of pre-mortem photographs leads to highly inflammatory prosecutorial abuse, as occurred in this case.

Amended Section 2403 provides no guidance for its application. Without procedural safeguards, the potential for abuse and undue prejudice to the defendant is significantly heightened. As there are no guidelines for determining what constitutes an "appropriate" photograph, prosecutors are theoretically free to admit photos of the victim in any number of contexts — in the company of small children or animals; on their wedding day; posing for a "glamour" portrait. There is no limit on the size of the photo, making it possible that a large poster or life-sized cut-out might be admitted. Moreover, the amendment does not specify which stage of the proceeding in which a life photo is admissible. So, the photograph of the victim in life can be admitted in the first stage of a capital trial

as in this case, and then referred to again in the second stage. Once admitted, the photo may then go back to the jury room. Without any corresponding instruction as to the proper consideration of a photograph that has no relationship to any relevant issue related to either guilt or victim impact, the jury is free to evaluate it for its purely emotional value. This creates a real danger of a verdict based on sympathy rather than a rational review of the evidence.

Mr. Pavatt respectfully asks this Court to find amended Section 2403 unconstitutional, under both the state and federal constitutions; to find that the admission of a pre-mortem photograph of the victim, under the facts and circumstances of this case, rendered Mr. Pavatt's trial fundamentally unfair, depriving him of the Due Process of Law, *see, e.g.,* **Donnelly v. DeChristoforo**, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed.2d 431 (1974); **Darden v. Wainwright**, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed.2d 144 (1986), and unconstitutionally injected passion, prejudice, and other arbitrary factors into the sentencing proceeding, *see, e.g.,* **Furman v. Georgia**, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed.2d 346 (1972); **Gregg v. Georgia**, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed.2d 859 (1976); and therefore to reverse Mr. Pavatt's conviction for a new trial or, at least, to vacate his death sentence. Appellate counsel were ineffective for failing to raise this issue of unconstitutionality. **Strickland v. Washington**, 466 U.S. 668, 104 S. Ct. 2052, 80 L .Ed.2d 674 (1984) **Evitts v. Lucey**, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed.2d 821 (1985).

K. Failure of Appellate Counsel to Raise Issues that Proper Evidentiary Foundations Were Not Established Concerning Four Pieces of Evidence: Chain of Custody of "The Letter," Chain of Custody of "The Insurance Letters," Chain of Custody and Lack of Authentication of "The Bullet," and Lack of Authentication for the Audio Tapes. The Trial Court Abused its Discretion in its Admission Resulting in Reversible Error and a Violation of Mr. Pavatt's Due Process Rights and Right to a Fair Trial.

1. "The letter."

David Parrett, a question document examiner with the Oklahoma County District Attorney's Office, examined a letter given to him by Mr. Greg McCracken, to determine who was the author. (Tr. Vol. XII at 3239-34). During Mr. Parrett's testimony in Mr. Pavatt's trial, State's Exhibit 222 was admitted. (Tr. Vol. XII at 3240). State's Exhibit 222 was a color copy of an allegedly original letter. (Tr. Vol. XII at 3234). Mr. Parrett saw the letter for two (2) days pursuant to a court order, then he returned the document to Mr. McCracken. (Tr. Vol. XII at 3234, 3262).

PROSECUTOR Q. Tell us how you saw that original letter.

DAVID PARRETT A. Myself and Investigator Glenn Despain accompanied Mr. McCracken and, I believe George Miskovsky, the cocounsel for Brenda Andrew, to the Bank of Oklahoma where they had represented to us that the original letter was being kept in a safety deposit box. We accompanied them there and the – an envelope, what appeared to be an overnight mailing envelope, was removed by Mr. McCracken, I believe it was, from the safety deposit box.

This letter was extracted from that envelope. We were then, ultimately, given possession of the letter by Mr. McCracken. From that point we took – I was given possession of the letter. I took the letter to my laboratory and locked it up.

(Tr. Vol. XII at 3234).

Mr. Pavatt's defense attorney objected to the admission of the letter on the basis of not a proper foundation, insufficient chain of custody, and not the best evidence. (M.H. 5/23/03 at 17; Tr.

Vol. XII at 3235-3236, 3238-3239). The State did not call Mr. McCracken as a witness to explain to the jury where, how, what manner, or under what circumstances he received "the letter." "The letter" was admitted into evidence without a proper foundation.

2. "The insurance letters."

State's exhibits 47 A, B, and C were insurance letters allegedly found in the Andrew's home, the night of Rob Andrew's murder. Kevin Roland, an investigator for the Medical Examiner's office, searched the Andrew's home the night of the murder. He supposedly found these insurance letters and gave them to Theresa Bunn, one of the investigating officers of the crime. Bunn identified these letters as the ones Mr. Roland gave her while they were in the foyer of the Brenda Andrew house. They were admitted into evidence without objection. (Tr. Vol. IX at 2281-2285). The State did not call Mr. Roland as a witness to explain to the jury where, how, or under what circumstances he obtained "the insurance letters." "The insurance letters" were admitted into evidence without a proper foundation or authorization. *See* Proposition 2, sub-proposition V. In addition, these letter were irrelevant to Mr. Pavatt's guilt or innocence. *See* Proposition 2, sub-proposition E.

3. "The bullet."

Janna Larsen, Mr. Pavatt's daughter, testified that Mr. Pavatt had her car the day of Rob Andrew's murder. When her car was returned to her, she found a bullet on the floorboard of the passenger side that was not there previously. (Tr. Vol. XI at 2867). While Mr. Pavatt's case was pending, Ms. Larson informed defense counsel that she was not the only individual who handled the bullet before it was turned over to the police. Consequently, trial counsel filed a motion to suppress and/or motion in limine. (O.R. Vol. VI at 1157)(M.H. 8/8/03 at 91-95). Mr. Pavatt's stepfather held

the bullet and compared it with other .22 caliber bullets he had in his possession. Ms. Larson does not know if the bullet she handed to her step-grand-father was the same one returned to her by her step-grand-father. Thus, the chain of custody is unclear. The bullet she received from her grandfather was the bullet she turned over to police, but whether or not it is the same bullet she found in her car is questionable. (Tr. Vol. XI at 2952-2954). The bullet was admitted into evidence through Detective Gary Damron during his testimony in Mr. Pavatt's trial. (State's Exh. 171)(Tr. Vol. XIII at 3362-3365). Trial counsel for Mr. Pavatt objected to its admission. (Tr. Vol. XIII at 3365). The bullet was not properly authenticated and nor was its chain of custody maintained. The bullet should have been suppressed.

The State must be able to prove the evidence's location at all pertinent times. **Faulkenberry v. State**, 1976 OK CR 131, 551 P.2d 271. "The purpose of the chain of custody rule is to guard against substitution of or tampering with the evidence between the time it is found and the time it is analyzed." **Alverson v. State**, 1999 OK CR 21, 983 P.2d 498, 509. The State has the burden of proving the evidence was substantially in the same condition at the time of the crime and at its offering in court. **Alverson**, at 509. A necessary foundation for admissibility of this evidence is proof that the chain of possession was maintained. **Wilson v. State**, 1977 OK CR 251, 568 P.2d 342, 344. The burden of showing, to a reasonable certainty, that evidence has not been tampered with or altered rests upon the party offering it. **Grider v. State**, 1987 OK CR 212, 743 P.2d 678; **Wilson v. State**, 1987 OK CR 86, 737 P.2d 1197.

In determining whether an adequate foundation has been laid for the chain of custody of an item, the trial court should consider the nature of the article, the circumstances surrounding its preservation, and the likelihood of contamination or alteration. **Driskell v. State**, 1983 OK CR 22,

659 P.2d 343, 354-55. A more exhaustive foundation is required where the evidence consists of contraband or bodily specimens. **Fixico v. State**, 1987 OK CR 64, 735 P.2d 580, 582. Because of the difficulty in identifying the substance in such cases, "a break in the chain of custody ... would be of a grave concern." **Brown v. State**, 1974 OK CR 16, 518 P.2d 898, 901-02. Because of the breaks in the chain of custody or because of improper foundation laid for the admission of these items, Mr. Pavatt's due process rights were violated.

4. "The tapes."

In Mr. Pavatt's trial, audio tape recordings of supposedly Rob Andrew, Brenda Andrew, and James Pavatt talking to various individuals at call centers for Prudential Insurance Company were admitted into evidence without proper authentication. (State's Exhs. 28, 29, 30, 31, and 32). Larry Frotten, Prudential's record custodian, testified that in Prudential's normal course of business recording of telephone calls are made. These audio tapes were part of everyday course of business. (Tr. Vol. VIII at 2044). Mr. Frotten said, "These are tape recordings that were made as a result of calls received in the call center by individuals." (Tr. Vol. VIII at 2062, line 19-21)(Emphasis added). Unfortunately, trial counsel failed to object. No evidence was presented that the "individuals" were indeed in fact Rob Andrew, Brenda Andrew, and/or James Pavatt. There was no evidence presented of any forensic examination to determine or verify the identities of the individuals.

"The tapes" evidence was not self-authenticating. Under Title 12 O.S. § 2901, [t]he requirement of authentication or identification as a condition precedent to admissibility..." No one who was "minimally familiar" with the voices on the tapes testified to authenticate the voices on "the tapes." **United States v. Bush**, 405 F.3d 909, 919 (10th Cir.2005).

In the present case, the jurors only had the testimony from the custodian of Prudential records

that the tape recordings were found among Prudential's records. A records keeper is not sufficient for authentication purposes. Mr. Pavatt was entitled under Oklahoma law to have "the tapes" authenticated. 12 O.S. 2001, § 2901. Because of the lack of authentication of "the tapes," Mr. Pavatt was deprived of due process of law. Mr. Pavatt's convictions should be reversed and his death sentence should be vacated.

3. Conclusion.

Critical pieces of evidence were admitted against Mr. Pavatt in violation of his right to due process and a fundamentally fair trial. Three pieces, "the letter," "the insurance letters," and "the bullet" were admitted despite their respective questionable chain of custodies. "The letter" allegedly was a confession to committing murder by Mr. Pavatt. Its admission without a proper chain of custody was extremely prejudicial and a violation of Mr. Pavatt's due process rights. "The insurance letters" admission was error because there was not a proper foundation laid for their admission and in addition they were irrelevant to the issue of whether Mr. Pavatt committed first degree murder. "The insurance letters" admission was prejudicial and a violation to Mr. Pavatt's due process rights. The admission of "the bullet" was also prejudicial. "The bullet" was not properly authenticated and its chain of custody was suspect. "The tapes" were admitted without proper authentication. Mr. Pavatt's conviction should be vacated and his case remanded for a new trial based on the failure of appellate counsel to raise this meritorious issue. Appellate counsel was ineffective. **Strickland v. Washington**, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984) **Evitts v. Lucey**, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed.2d 821 (1985).

L. Trial Court Committed Reversible Error by Allowing Jurors to Leave Deliberations to Move Cars. Failure of Trial Counsel to Object to Jurors Moving Cars During Deliberations and Failure of Appellate Counsel to Raise Issue.

At the end of the second stage, while the jurors were in deliberations, at 6:30 pm, the judge allowed six (6) jurors to move their cars into different parking spaces. The jurors were escorted by the bailiff and some deputies. There is no record of whom was with the other six (6) jurors who remained behind. Trial counsel failed to object, the prosecution was not present[34] for the discussion between the trial court and defense counsel, and the record was not made until after the verdict was read and the jury discharged. (Tr. Vol. XV at 3796-3798).

> Title 22 O.S.2001, § 857 provides:
> After hearing the charge, the jury may either decide in court, or may retire for deliberation. If they do not agree without retiring, one or more officers must be sworn to keep them together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor do so themselves, unless it be by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, or when ordered by the court.

In 2004 this Court, in **Johnson v. State**, 2004 OK CR 23, 93 P.3d 41, 47, held that the above statute is mandatory and designed to preserve the purity of jury trials. While the law providing for juror sequestration for deliberation is not protected under the federal constitution, it is specifically mandated by Oklahoma statute. Deprivation or deviation of this statute, constitutes a due process violation. *See also,* **Golden v. State,** 2006 OK CR 2, 127 P.3d 1150, 1153 (holding that deprivation of statutorily prescribed peremptory strikes was a violation of due process).

In addition, the bailiff for Judge Bragg was sworn after the first stage evidence and argument had been presented to the jury. (O.R. Vol. XI at 2016). However, according to the record, the bailiff

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[34] The State, in their response to Defendant's Motion #63, requested the jury be sequestered in both stages of the trial after they begin [sic] deliberation. (O.R. Vol. VIII at 1544).

was not sworn before the second stage deliberations began. Second stage of a capital jury trial "is more like a separate trial in that it involves new findings of fact." **Castro v. State**, 1987 OK CR 182, 745 P.2d 394, 406. Thus, the bailiff should have been sworn again after the charge to the jury. This Court has held that "the fact that the bailiff in the present case was not immediately sworn to keep the jury together after they had heard the charge does not eliminate the error but rather compounds it." **Johnson v. State**, 2004 OK CR 23, 93 P.3d 41, 48. The fact that the bailiff was not sworn after the charge given for second stage deliberations combined with the fact that the jurors were allowed to break during second stage deliberations to move their cars is reversible error, a violation of due process, and also structural error affecting the framework of the trial and the sanctity of the jury function in our court system. *See* **Hicks v. Oklahoma**, 447 U.S. 343, 100 S. Ct. 2227, 65 L. Ed.2d 175 (1980) and *See* **Arizona v. Fulminante**, 499 U.S. 279, 111 S. Ct. 1246, 113 L .Ed.2d 302 (1991). Mr. Pavatt's conviction should be overturned and he should receive a new trial. Trial counsel were ineffective for not objecting to the jurors breaking in the middle of deliberations. Appellate counsel were ineffective for not raising this issue. **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) **Evitts v. Lucey**, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). Mr. Pavatt should receive a new trial.

M. Mr. Pavatt's Trial Was Infected with Pervasive Inadmissible Hearsay, Depriving Him of His Rights of Confrontation and Cross Examination, in Violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article 2, §§ 7, 9, 20 of the Oklahoma Constitution. Appellate Counsel Failed to Raise Issue.

Mr. Pavatt's trial was replete with inadmissible hearsay. Trial counsel objected to most of it and had a continuing objection to it as well. (Tr. Vol. V at 1336). As such, error was preserved for appellate review; however, appellate counsel failed to raise the issue of inadmissible hearsay

constituting ineffective assistance of appellate counsel in violation of **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and **Evitts v. Lucey**, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). Mr. Pavatt should receive a new trial.

1. **State of mind exceptions and the deceased's pervasive hearsay statements.**

The State filed a notice of its intent to offer statements made by Rob Andrew pursuant to the state of mind exception to the hearsay rule at 12 O.S. § 2803 and /or the residual exception at 12 O.S. 2804.1. (O.R. Vol. VI at 1138-1139)(M.H. 8/803 at 96). Throughout most of the trial, Mr. Pavatt's jury heard from Rob Andrew through many witnesses. And although trial counsel objected to some of Rob's testimony, it was still admitted anyway, constituting reversible trial error. (Tr. Vol. VI at 1545-1546).

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 preceding statements by crime victims that are not admissible under this exception. 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.

Shepard 290 U.S 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 preceding accusations of misconduct as evidence upon which to obtain a conviction.

The prosecution did however improperly use this state of mind exception for the purpose of proving who killed Rob Andrew. For instance, Ronald Stump testified that Rob Andrew "was afraid that Brenda had finally found somebody that would kill him." (Tr. Vol. VI at 1550, line17-18). Then Mr. Stump goes on to say that the somebody was Jim Pavatt. (Tr. Vol. VI at 1550, line20). According to the **Shepard** case, Rob Andrew's state of mind of being afraid would be acceptable admissible testimony; however, the declaration of whom would kill him is inadmissible hearsay. Another example of inadmissible hearsay is found in Mr. Bobby McDaniel's testimony. Mr. McDaniel was a pastorial counselor who had counseled Brenda and Rob Andrew. He testified that Rob Andrew's state of mind was fearful and alarmed, but then he testified that Rob told him that Mr. Pavatt said to Rob Andrew "if you think you have problems with Brenda you haven't seen anything until you messed with me..." (Tr. Vol. VII at 1858-1859). First, this is double hearsay, and second this statement is also a violation of **Shepard** and should not have been admitted.[35]

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[35] Professor Whinery states that "[h]owever, if the victim's mental state is not in issue in such cases, the statement is necessarily offered for the purpose of inferring the further fact that some past conduct of the defendant, such as the murder of the victim, is responsible for the fear. The statement falls directly within the exception to Section 2803(3) prohibiting statements of mental state to prove the fact remembered of believed. Under these circumstances, such statements should be excluded under Sections 2401, 2402 and 2403 due to the weakness and speculative nature of the inference, its unfairly prejudicial nature and the risk that the jury will use the evidence for the prohibited purpose of proving past conduct." 1 L. Whinery, Courtroom Guide to the Oklahoma Evidence Code 622 (2004-2005)(Emphasis added). Clearly, Rob Andrew's statements naming his murderers from the grave should have been excluded.

In addition, 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)). Rob Andrew's voluminous recitations of his speculations does not make the pervasive hearsay statements trustworthy or reliable. It was error to admit this hearsay and a violation of Mr. Pavatt's right to confront witnesses. Appellate counsel was ineffective for failing to raise this error. **Strickland v. Washington**, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984), **Evitts v. Lucey**, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed.2d 821 (1985), and **Garrison v. State**, 2004 OK CR 35, 103 P.3d 590. Mr. Pavatt respectfully requests a new trial.

N. Failure of Trial Counsel and Appellate Counsel to Investigate and Interview Potential Witnesses.

Appellate counsel and trial counsel failed to interview and investigate potential witnesses rendering ineffective assistance of counsel in violation of **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). As stated above in Proposition 1, sub-proposition A, Herman Roggow could not readily identify Brenda Andrew at her trial. (Andrew Tr. Vol. XI at 2618-2625). First, trial counsel should have interviewed potential witnesses and investigated their potential testimony. Trial counsel could have done a photo array with Ms. Andrew's picture with a few others and see if Mr. Roggow could identify her. Second, appellate counsel could have attended Ms. Andrew's trial to listen for inconsistencies in testimony between the witnesses of the

two trials.

Another witness in both Mr. Pavatt's and Ms. Andrew's trial was Ms. Andrew's neighbor, Bill Shadid. In Ms. Andrew's trial, Mr. Shadid 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, 2001. (Andrew Tr. at 990-93, 997-99, 3363, 3367-68). Mr. Arnett, trial counsel and appellate counsel, states in his affidavit that his private investigator interviewed neighbors not contacted by the police. The private investigator did not interview those neighbors whom the police did interview. (Exh. 3, Appendix). The private investigator could have easily interviewed Mr. Shadid and learned that Mr. Pavatt was not present at the argument between Mr. Head and Ms. Andrew, but that Mr. Shadid was present. Mr. Head's testimony was not only prejudicial, but irrelevant to Mr. Pavatt. *See* Proposition 1, subproposition B; Proposition 2; subproposition E. Appellate counsel and trial counsel were ineffective. Petitioner, Mr. Pavatt should receive a new trial.

O. Appellate Counsel Failed to Agrue that the District Court Committed Error by Failing to Hold a *Daubert/Kumho*[36] Hearing on Handwriting Exemplars. In Addition, Appellate Counsel Failed to Argue that the Forcing of Mr. Pavatt to Submit to Handwriting Exemplars Was a Violation of His Right Against Self-Incrimination. Also, Handwriting Expert's Testimony was Improper.

After Mr. Pavatt's arrest in Texas, he was in the Oklahoma County jail awaiting adjudication on the state charges. On July 3, 2003, in the presence of Mr. Justin Lowe, his attorney, Mr. Pavatt was forced to physically construct evidence against himself in violation of the his Fifth Amendment

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36 **Daubert v. Dow Merrell Pharmaceuticals, Inc.**, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and **Kumho Tire Co., Ltd. v. Carmichael**, 526 U.S. 137, 143 L.Ed.2d 238, 119 S.Ct. 1167 (1999).

right against self-incrimination. (Tr. Vol. XII at 3196, 3203). Although handwriting samples have been treated similarly to taking blood, the two types of evidence are not similar in respect to scientific analysis. DNA or other properties of blood cannot be changed by the subject involved in the investigation. For instance, a person cannot alter his DNA pattern; however, a person can change his handwriting. Objective scientific analysis is used to determine a person's DNA, whereas to determine the source of unknown handwriting is a subjective opinion.

Trial counsel objected to ordering of Mr. Pavatt to submit to handwriting exemplars, trial counsel moved for suppression of the evidence obtained against Mr. Pavatt, and trial counsel also moved for a **Daubert/Kumho** hearing on handwriting analysis. (O.R. Vol. IX at 1690, 1769-1780)(M.H.8/8/03 at 74-78). The State's response stated that because handwriting analysis was not "novel," a **Daubert/Kumho** hearing was not necessary. (O.R. Vol. X at 1875-1882)(M.H.8/8/03 at 74-78). However, just because handwriting evidence may not be novel, it does not mean it is reliable. The theme and point of the **Daubert/Kumho** cases is reliability.

David Parrett, a question document examiner with the Oklahoma County District Attorney's Office, testified on behalf of the State. Mr. Parrett testified

> that no two people write exactly alike. And each person's handwriting, if it's naturally prepared, that handwriting contains repeated individual characteristics. And finally, each person has a level of skill in their handwriting...

(Tr. Vol. XII at 3230).

He testified that he compared the exemplars Mr. Pavatt did and the documents in question: the change in ownership on the insurance policy and the confession letter Mr. Pavatt allegedly wrote. His conclusions were, "Mr. Pavatt did indeed prepare the letter which was the questioned item,

State's Exhibit 222."(Tr. Vol. XII at 3244, line 12-13). Mr. Parrett also concluded that the signature on the change of ownership form dated 3/22/01 on the life insurance policy originally owned by Rob Andrew (State's Exhibit 24) was not signed by Rob Andrew. (Tr. Vol. XIII at 3326).

The issue of handwriting uniqueness has been questioned in other courts in this country. In **United States v. Julio Hidalgo Sr.**, et al, 229 F. Supp.2d 961, 967,(D.Ariz.,2002), [37] the Court held that the theory that handwriting is unique is unproven and thus it fails to satisfy **Daubert**.

> We therefore find and conclude that the principle of uniqueness of handwriting or handprinting fails to satisfy a **Daubert/Kumho** analysis. If the principle of uniqueness could be proven, then one would know how to analyze handwriting or handprinting with an error rate of zero percent.
>
> ***
>
> The foundation for a document examiner's identification between a known document and a questioned document is the principle of uniqueness. Because the principle of uniqueness is without empirical support, we conclude that a document examiner will not be permitted to testify that the maker of a known document is the maker of the questioned document. Nor will a document examiner be able to testify as to identity in terms of probabilities. **Id.** at 967.

See also Lynn C. Hartfield, *Daubert/Kumho Challenges to Handwriting Analysis*, 26 November Champion 24, 25 (2002) handwriting analysis is a discipline in which expertise is largely self-declared, and no attempt has been made to develop a system for verifying the accuracy of any given document examiner's work.

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[T]here are no standards governing what qualifies as a "similarity," or how many similarities

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37 As of 2005, some courts have determined that the forensic document examiner's testimony was not based on sufficiently reliable principles and methodologies under **Daubert/Kumho**. These courts fully excluded the expert's testimony. **United States v. Lewis**, 220 F.Supp.2d 548 (S.D.W.Va.2002); **United States v. Brewer**, 2002 WL 596365 (N.D.Ill. 2002); **United States v. Saelee**, 162 F.Supp.2d 1097 (D.Alaska 2001); **United States v. Fujii**, 152 F.Supp.2d 939 (N.D.Ill.2000). Other courts allowed the forensic document examiner to testify to particular similarities and dissimilarities between the documents, but excluded the ultimate opinion as to authorship. **United States v. Rutherford**, 104 F.Supp.2d 1190 (D.Neb.2000); **United States v. Santillan**, 1999 WL 1201765 (N.D.Cal. 1999); **United States v. Hines**, 55 F.Supp.2d 62 (D.Mass.1999);**United States v. Oskowitz**, 294 F.Supp.2d 379,384 (E.D.N.Y. 2003); **United States v. Van Wyck**, 83 F.Supp2d 515 (D.N.J. 2000).

need be present to declare a match. A determination that a letter or word is written similarly on the questioned and known documents is entirely subjective. Compounding the problem is the fundamental premise that people do not write the same on different occasions, with different instruments, or in different positions relative to the paper. Hartfield, at 25.

Mr. Parrett's conclusions that "no two people write exactly alike." is hard to believe. (Tr. Vol. XII at 3230). He suggests it is not possible for two people to write exactly alike. Art forgeries of paintings have occurred for years. Sometimes the forgery was so believable that the one of the ways the art was deemed a forgery was by x-raying the canvas. (Exh. 13, Appendix). Works of art are hundreds or thousands of brushstrokes. A signature is one to a few pen strokes.

In addition, Mr. Parrett's testimony was improper. "[I]t is improper for a forensic expert to state an opinion with absolute certainty where such is beyond the present state of the art of forensic science. *See* **McCarty v. State**, 765 P.2d 1215, 1218- 19 (Okl.Cr.1988)." **Moore v. State,** 1990 OK CR 5, 788 P.2d 387, 399-400. Mr. Parrett said, "Mr. Pavatt did indeed prepare the letter which was the questioned item, State's Exhibit 222."(Tr. Vol. XII at 3244, line 12-13). He stated his opinion in unequivocal terms, not in terms that handwriting in "the letter" was consistent with the handwriting exemplars taken from Mr. Pavatt, but that it was his handwriting. Handwriting, as stated above, is not an exact science, if it can even be considered a science. Its analysis is not based on objective properties that do not change. It is purely a subjective analysis that can never be absolute. The admission of Mr. Parrett's conclusions was error. **McCarty v. State,** 1988 OK CR 271, 765 P.2d 1215, 1218 (holding that "admission of this opinion testimony was error, because Ms. Gilchrist did not, and could not, testify that such opinion was based on facts or data 'of a type reasonably relied upon by experts in the particular field' in forming such an opinion."). 12 O.S. § 2703.

Any basis for Mr. Parrett's opinions was not tested by the trial court. His testimony was a violation of Mr. Pavatt's Fifth Amendment rights as well as his right to a fair trial. Because appellate counsel failed to raise this issue, appellate counsel were ineffective. **Strickland v. Washington**, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984), **Evitts v. Lucey**, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed.2d 821 (1985), and **Garrison v. State**, 2004 OK CR 35, 103 P.3d 590. Mr. Pavatt's case should be reversed and remanded for a new trial.

P. Appellate Counsel Failed to Raise the Issue that the Trial Court Should Have Instructed the Jury on the Lesser Included Offense of Accessory after the Fact.

In defendant's proposed jury instructions filed on September 15, 2003, trial counsel asked for a jury instruction on accessory to murder, accessory after the fact of murder or aiding and abetting instruction. (O.R. Vol. X at 1944-2013)(Tr. Vol. XIV Part B at 3475-3477). The trial court denied Mr. Pavatt's request committing reversible error in violation of Mr. Pavatt's due process rights and right to fundamentally fair trial. 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." **Glossip v. State**, 2001 OK CR 21, 29 P.3d 597, 603-04. The question is "whether the evidence might allow a jury to acquit the defendant of the greater offense and convict him of the lesser." **Harris v. State**, 2004 OK CR 1, 84 P.3d 731, 750. *See* **Beck v. Alabama**, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). In Mr. Pavatt's case, the evidence most certainly would have allowed the jury to acquit on the murder in the first degree and the conspiracy to commit murder charges. According to Mr. Pavatt's daughter, Mr. Pavatt did not do the murder and was only assisting Brenda in leaving the country. (Tr. Vol. XI at 2951). There is no evidence connecting Mr. Pavatt directly to Rob Andrew's murder. The jury should have been instructed on the lesser related charges. Appellate

counsel failed to raise this issue in the direct appeal constituting ineffective assistance of appellate counsel. **Strickland v. Washington**, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984), **Evitts v. Lucey**, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed.2d 821 (1985), and **Garrison v. State**, 2004 OK CR 35, 103 P.3d 590.

Q. Appellate Counsel Failed to Argue that the Trial Court Should Have Instructed the Jury that the Aggravators Had to Outweigh the Mitigators Beyond a Reasonable Doubt Depriving Mr. Pavatt of a Fair Sentencing Determination in Violation of the Oklahoma Constitution and the Sixth, Eighth, and Fourteenth Amendments to the United StatesConstitution.[38]

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

Juries in Oklahoma are instructed, as was the jury in Mr. Pavatt's case, the only fact in the second stage that must be found beyond a reasonable doubt is whether the State has proved an

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[38] Trial counsel properly preserved this error for appeal numerous times. Trial counsel filed a **Motion Requesting a State Instruction that the Jury Must Unanimously Find Aggravating Factors Outweigh Mitigating Factors Beyond a Reasonable Doubt before Imposing a Death Sentence.** (O.R. Vol.VIII at 1461-1464)(M.H. 8/8/03 at 68-69). In addition, trial counsel filed a **Motion to Declare Oklahoma Death Penalty Statutes Unconstitutional under Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and Brief in Support.** (O.R. Vol.VIII at 1444-1451)(M.H. 8/8/03 at 66). Also, trial counsel filed **Defendant's Objection to Uniform Jury Instructions RE: The Weighing of Aggravating Circumstances against Mitigation and Standard of Proof.** (O.R. Vol.VII at 1360-1362)(M.H. 8/8/03 at 35-36).

aggravating circumstance. The jury in this case was given the following instructions concerning its sentencing authority:

> Aggravating circumstances are those which increase the guilt or enormity of the offense. In determining which sentence you may impose in this case, you may consider only those aggravating circumstances set forth in these instructions.
>
> Should you unanimously find that one or more aggravating circumstances existed beyond a reasonable doubt, you are authorized to consider imposing a sentence of death.
>
> If you do not unanimously find beyond a reasonable doubt that one or more of the aggravating circumstances existed, you are prohibited from considering the penalty of death. In that event, the sentence must be imprisonment for life without the possibility of parole or imprisonment for life with the possibility of parole.

(O.R. Vol XI. at 2054; Instruction 7).

> If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt, the death penalty shall not be imposed unless you also unanimously find that any such aggravating circumstance or circumstances outweigh the finding of one or more mitigating circumstances. Even if you find that the aggravating circumstance(s) outweigh(s) the mitigating circumstance(s), you may impose a sentence of imprisonment for life with the possibility of parole or imprisonment for life without the possibility of parole.

(O.R. Vol. XI at 2058; Instruction 11).

The jury was informed it had two critical facts to determine: 1) whether one or more of the aggravating circumstances exist, and 2) if one or more aggravating circumstances were found to exist, whether those outweighed the mitigating circumstances. The jury was instructed that only the first fact had to be found "beyond a reasonable doubt." (O.R. Vol. XI at 2051; Instruction 4). The failure to inform the jury the second critical fact had to likewise be found "beyond a reasonable doubt" renders the resulting death sentences unconstitutional and unreliable in violation of the Sixth,

Eighth, and Fourteenth Amendments. See **Apprendi v. New Jersey**, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); **Ring v. Arizona**, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

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

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

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

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

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

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

Because of the nature of Oklahoma's capital sentencing scheme, **Jones**, **Apprendi**, and **Ring** require the capital jury be instructed it must find the aggravating circumstances outweigh any mitigating circumstances *beyond a reasonable doubt* before it may impose the punishment of death.[39] The trial court's failure to instruct the jury in this manner violated Mr. Pavatt's state and federal constitutional rights. Because the jury's critical factual determination of whether the aggravating circumstances outweigh any mitigating circumstances is just such a "fact that increases the penalty for a crime beyond the prescribed statutory maximum." **Apprendi**, 530 U.S. at 490, 120 S. Ct. at 2362-63. The trial court's instructions, which failed to define properly the required burden of proof, run afoul of the Sixth and Fourteenth Amendments.

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

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

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

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

parole or imprisonment for life.

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

The instructions given to the jury in this case bear witness to the actual way in which sentencing authority is conferred in capital cases. After the finding of guilt, the jury is instructed it must find one or more aggravating factors before it is authorized to consider, not impose, increasing the penalty to death. As the trial court instructed the jury in Instruction 7: "Should you unanimously find that one or more aggravating circumstances existed beyond a reasonable doubt, you are authorized to consider imposing a sentence of death..." (O.R. Vol. XI at 2059).

Instruction 11 further circumscribes the sentencing authority of the jury, prohibiting a sentence of death unless the jury makes the further finding: "If you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doub, the death penalty shall not be imposed unless you also unanimously find that any such aggravating circumstance or circumstances outweigh the finding of one or more mitigating circumstances." (O.R. Vol.XI at 2058). The cases of this Court have also read the statutes to this effect. In **Paxton v. State**, 867 P.2d 1309, 1322 (Okl. Cr. 1993), the Court stated, "only when the aggravating circumstances clearly outweigh the mitigating may the death penalty be imposed."

The reasoning of **Jones, Apprendi**, and **Ring** demonstrate the trial court's instructions failed to comport with the Sixth Amendment's requirement that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a

reasonable doubt." **Apprendi**, 530 U.S. at 490, 120 S. Ct. at 2362-63; also **Ring**, 536 U.S. 602, 122 S. Ct. at 2439. The trial court's instructions did require the jury to find the alleged aggravating circumstances only upon proof beyond a reasonable doubt. Yet the jury was not instructed the weighing determination, the most critical factual inquiry and the one which actually authorizes the jury to return a verdict of death, must also be proved to its satisfaction beyond a reasonable doubt.

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

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

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

(O.R. Vol. XI at 2061; Instruction 14). (emphasis added). The failure to instruct the jury properly concerning the rigorous burden of proof therefore renders the death sentence imposed against Mr. Pavatt unconstitutional. The trial court's error in its instructions resulted in a sentence which

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

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

R. Appellate Counsel Failed to Argue that Oklahoma's Capital Trial Scheme Is Structurally Defective.[40]

Oklahoma's capital trial scheme is structurally defective because the procedure for capital cases in Oklahoma is arbitrary and capricious. The District Attorney alone decides whether a defendant charged with murder in the first degree case is going to be subject to the death penalty. The District Attorney charges either malice murder or felony murder, and then at some time prior to trial, sometimes even after preliminary hearing, the District Attorney files a Bill of Particulars listing the aggravating circumstances. There is no judicial review of probable cause of aggravators in a capital case. The decision to seek the death penalty is completely up to the State. The arbitrary and capricious infliction of capital punishment violates the prohibition against cruel and unusual punishment found in the Eighth Amendment and violates the guarantee of due process found in the Fourteenth Amendment. **Furman v. Georgia,** 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Appellate counsel and trial counsel failed to argue that it is structural error not to have a

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[40] Trial counsel did file **Defendant's Motion to Dismiss Bill of Particulars or, in the alternative, remand to the Special Judge for a Preliminary Hearing on the Bill of Particulars.**(O.R. Vol. VIIat 1314-1323)(M.H. 8/8/03 at 30-31).

probable cause determination by a magistrate on aggravators alleged by the State. In Oklahoma, every felony case is subjected to a magistrate determination of probable cause that the crime charged by the State was committed and that there is probable cause to believe the defendant committed said crime. Okla. Const. Art. II, § 17. In a capital case in Oklahoma, a magistrate must still determine whether the crime of first degree murder was committed and if there is probable cause to determine that the defendant charged committed the murder. 22 O.S. §258. However, in order for the punishment for murder in the first degree to be enhanced to the death penalty, no judicial finding of probable cause of an aggravator is required. In the Bill of Particulars, the State merely alleges the aggravation, gives notice to the defense that a sentence of death will be sought against the defendant, and specifies what aggravators the State is alleging without specifying the evidence warranting the alleged aggravators.[41]

Because "death is different"[42] and because death is the ultimate penalty, a probable cause determination of the alleged aggravators should be required. The omission of a probable cause determination of aggravation is a structural defect in Oklahoma's capital trial process. Pursuant to **Apprendi v. New Jersey**, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and **Ring v. Arizona**, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), aggravating circumstances are elements of the offense of capital murder. As elements of a crime, aggravating circumstances are subject to the same notice and charging requirements as required by state law consistent with

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41 Defense counsel filed two **Motions to Make Bill of Particulars More Definite and Certain** (O.R. Vol.I at 90-91 and O.R. Vol. II at 359-360).

42 **Gregg v. Georgia**, 428 U.S. 153, 188, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

constitutional notice and due process guarantees, as well as Fourth Amendment protections against arrests and confinement without probable cause.

Because aggravating circumstance are elements of the offense of capital murder, due process requires each element of the specific offense charged be stated plainly. A magistrate should determine whether there is probable cause to support the aggravators because the aggravators are elements. "[A]n accusation which lacks any particular fact which the law makes essential to the punishment is ... no accusation within the requirements of the common law, and it is no accusation in reason, 1 J. Bishop, Criminal Procedure §§ 87, p. 55 (2d ed. 1872)." **Blakely v. Washington,** 524 U.S. 296, 124 S.Ct. 2531, 2536, 159 L.Ed.2d 403 (2004). (Internal quotations omitted). Oklahoma law forbids the prosecution of a felony by Information without having had a preliminary examination before an examining magistrate. Okla. Const. Art. II § 17. Thus, prosecution of murder in the first degree with aggravation should also have a preliminary hearing. In addition, a bindover order from an examining magistrate after finding probable cause upon preliminary examination of evidence adversarially tested by defense counsel is the only way in which the district courts are vested with jurisdiction in felony cases charged by Information, and yet, the same is not true for murder in the first degree with aggravation. **Harper v. District Court of Oklahoma County,** 1971 OK CR 182, 484 P.2d 891, 892; **State v. Weese,** 1981 OK CR 19, 625 P.2d 118. Such procedural protections serve to provide notice to the defendant of what he must be prepared to defend against at trial, as well as to provide a check on prosecutorial discretion in filing charges. *See* **United States v. Cotton,** 535 U.S. 625, 122 S.Ct. 1781, 1786-87, 152 L.Ed.2d 860 (2002).

Oklahoma death penalty procedures violate the Fourth, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution protection against unreasonable detentions and

guarantees of notice and due process, because they do not require a preliminary hearing for aggravating circumstances or properly confer jurisdiction upon the district court with respect to aggravating circumstances. Oklahoma's death penalty trial and sentencing procedures have never required that the evidence in support of aggravating circumstances be subject to adversarial testing by a preliminary examination by a magistrate or that district court jurisdiction over aggravating circumstance be dependent upon a bindover upon preliminary examination or finding of probable cause. *See* **Nuckols v. State**, 1984 OK CR 92, 690 P.2d 463, 469, **Wilson v. State**, 1988 OK CR 111, 756 P.2d 1240, **Newsted v. State**, 1986 OK CR 82, 720 P.2d 734, 738-9, **Brewer v. State**, 1982 OK CR 128, 650 P.2d 54, 61; 21 O.S. §§ 701.10, 701.12. No pre-trial hearing concerning the validity of the alleged aggravating circumstances in Mr. Pavatt's case was held. The United States Supreme Court made it clear in its recent cases of **Jones v. United States**, 526 U. S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999), **Apprendi v. New Jersey**, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); **Ring v. Arizona**, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), and **Blakely v. Washington**, 524 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) that aggravating circumstances must be subjected to the same procedural requirements of any element in any charge. Therefore, concerning aggravation, the defendant should have the formality of notice, a preliminary examination by magistrate, submission of the all of the elements of fact to the jury, and the burden of proof beyond a reasonable doubt on all factual determinations. Pursuant to Oklahoma law, juries are allowed to sentence a defendant to death without the aggravators being adversarially tested by a magistrate and in which the aggravators never properly become the part of district court jurisdiction and renders Oklahoma procedure as arbitrary and capricious. **Furman v. Georgia**, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

The omission of a probable cause determination of aggravation is a violation of the due process rights of the defendant, in this case, Mr. Pavatt, and therefore, the error is not harmless. Mr. Pavatt should be granted a new trial with constitutionally adherent trial scheme.

S. Failure to Raise Issue that the Trial Court Committed Error During the Voir Dire Process Violating Mr. Pavatt's Rights Under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and the Corresponding Provisions of the Oklahoma Constitution.[43] Appellate Counsel Ineffective for Failing to Raise Issue.

Twenty percent[44] of the prospective jurors for Mr. Pavatt's trial were excused because they said they could not impose death. These jurors were excused in violation of the principles set forth in **Witherspoon v. Illnois,**[45] **Adams v. Texas,**[46] and **Wainwright v. Witt.**[47]

In **Witherspoon v. Illinois**, 391 U.S. 510, 522, 88 S.Ct. 1770, 1777, 20 L. Ed.2d 776 (1968), the United States Supreme Court held that a capital defendant's right under the Sixth and Fourteenth Amendment to an impartial jury prohibited the exclusion of venire members simply because they voiced "general objections to the death penalty or expressed conscientious or religious scruples against its infliction." According to **Witherspoon**, the exclusion of prospective jurors must be limited to those who were irrevocably committed to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings or to those whose views on the death penalty would prevent them from making an impartial decision as to guilt. **Id.** at 552,

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43 Trial counsel filed a **Motion to Prohibit Prosecution from Excluding Potential Jurors who Express Reservations Regarding the Death Penalty and Brief in Support.** (O.R. Vol.VII at 1233-1237).

44 Thirteen of the sixty-four prospective jurors were excused.

45 391 U.S.510, 88 S. Ct. 1770, 20 L. Ed.2d 776 (1968).

46 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

47 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).

n.21.

The Supreme Court reexamined the **Witherspoon** standard in **Wainwright v. Witt**, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), and adopted the standard set forth in **Adams v. Texas**, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). The relevant inquiry is "whether the juror's views could 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" **Wainwright**, 469 U.S. at 424 (quoting **Adams**, 448 U.S. at 45).

In Mr. Pavatt's case a number of jurors were improperly excused for cause in violation of **Wainwright**. For example, the following exchange occurred between Judge Bragg and prospective juror Naccarato:

THE COURT: If you should find the defendant guilty of murder in the first degree can you consider all three of the legal punishments: Death, imprisonment for life without the possibility of parole, and imprisonment for life, and impose the one warranted by the law and the evidence?

PROSPECTIVE JUROR NACCARATO: Not in good conscience.

THE COURT: Okay. Well, let me ask you this, if you found beyond a reasonable doubt that the defendant was guilty of murder in the first degree and if under the evidence, facts and circumstances of the case the law would permit you to consider a sentence of death, imprisonment for life without the possibility of parole and imprisonment for life, are your reservations about, and I'm assuming you have reservations about what, sir?

PROSPECTIVE JUROR NACCARATO: The death penalty.

THE COURT: About the penalty of death so strong that regardless of the law, the facts and circumstances of the case, you would not impose the penalty of death?

PROSPECTIVE JUROR NACCARATO: I could not.

THE COURT: Let me ask you once again. Let me make sure that I'm understanding you. You're telling me that your reservations about the death penalty are so strong that regardless of the law or any facts and circumstances of the case you could not impose the death penalty?

PROSPECTIVE JUROR NACCARATO: My moral and religious belief does not allow me to do that.

Trial counsel objects to Mr. Naccarato's excusal. (Tr. Vol. I at 175-177). Twelve (12) other prospective jurors were excused as well. Trial counsel objected to the excusals and was not permitted a chance to rehabilitate any of these jurors. (Tr. Vol. I at 182-184; 190-192; 198-199; 205-207; 283-285)(Tr. Vol. II at 337-357; 363-365; 383-386; 484-489; 543-545; 592-594)(Tr. Vol. III at 698-700).

The trial court automatically excused those jurors who asserted any type of reservation concerning the imposition of the death penalty without allowing either questioning or rehabilitation by defense counsel. Erroneous exclusion for cause of even one capital venire member cannot be harmless error, as it undermines the basic constitutional requirement of an impartial adjudicator. **Gray v. Mississippi**, 481 U.S. 648, 668, 107 S.Ct. 2045, 2057, 95 L.Ed.2d 622 (1987). *See also*, **Arizona v. Fulminante**, 499 U.S. 279, 111 S. Ct. 1246, 113 L .Ed.2d 302 (1991) and **Golden v. State,** 2006 OK CR 2, 127 P.3d 1150.

Appellate counsel failing to raise this constitutional error was ineffective. **Strickland v. Washington**, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984) **Evitts v. Lucey**, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed.2d 821 (1985). Accordingly, Mr. Pavatt's convictions should be reversed and his case remanded for a new trial.

T. Failure to Raise Issue that Medical Examiner's Investigator Acted Outside of Statutory Authorization.

Oklahoma Statute title 63 § 941 states:

> Upon receipt of notice of death of any person which under this act is subject to investigation, the medical examiner shall immediately conduct an investigation into the cause and manner of death, and shall comply in detail with the instructions of the Chief Medical Examiner as

provided for in Section 939 of this title. He may have fingerprints and photographs taken. He may take charge of any object or writing found on or near the body which he deems necessary for the purpose of establishing the cause and/or manner of death.

(Emphasis added).

According to Theresa Bunn, a crime scene investigator for the Oklahoma City Police Department, Kevin Roland, an investigator for the Medical Examiner went inside the Andrew house and searched it. Rob Andrew was shot in the garage, not inside the house. His body remained in the garage. According to Ms. Bunn, Mr. Roland in his search of the house found some insurance letters and turned them over to Ms. Bunn. These letters became State's Exhibits 47 A, B, and C. (Tr. Vol. IX at 2281-2285). An intact chain of custody for the insurance letters was not established for the jury; and in addition, these letter were irrelevant to Mr. Pavatt's guilt or innocence. *See* Proposition 2, sub-proposition E and K.

The Medical Examiner testified that Rob Andrew's cause of death was listed as shotgun wounds and his manner of death was homicide. (Tr. Vol. X at 2435, 2460). The Medical Examiner's investigator looking inside the house at papers or inside the house for anything else for that matter is clearly outside the scope of statutory authorization -- inside the house was not "on or near the body." "The insurance letters" had nothing to do with investigating the cause of death nor the manner of death. Also, Brenda Andrew signed a waiver for her house to be searched by law enforcement, not the Medical Examiner. (State's Exhibit 35). Mr. Roland exceeded his statutory authority. His conduct was a violation of due process and anything seized by him should have been suppressed. Trial counsel and appellate counsel were ineffective for failing to raise and argue this issue. **Strickland v. Washington**, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984) **Evitts v. Lucey**, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed.2d 821 (1985). Mr. Pavatt's case should be

reversed. He should receive a new trial.

U. Failure of Direct Appeal Counsel to Perform the Professional Duty Owed to Mr. Pavatt under Prevailing Professional Norms and the Mandates of the Law.

Mr. Pavatt was denied effective assistance of counsel when his appellate defense counsel, Gloyd L. McCoy failed to perform the professional duty owed to him under prevailing professional norms and the mandates of the law. Mr. McCoy only visited with his client once, or at least only asked for permission to visit with his client one time. Also, Mr. McCoy only sent mail to Mr. Pavatt one time. (Exh. 14, Appendix). That was the extent of communication between appellate counsel responsible for composing the brief in chief and the client.

In **McGregor v. State**, 1997 OK CR 10, 953 P.2d 332, *cert. denied*, 521 U.S. 1108, 117 S. Ct. 2489, 138 L. Ed.2d 996 (1997), this Court established that ineffective assistance of appellate counsel claims are properly before this Court only if this Court finds that if the allegations are true and the performance of the appellate defense counsel would constitute the denial of reasonably competent assistance of counsel under prevailing professional norms, such as in this case. Mr. Pavatt's appellate counsel's performance constituted denial of reasonably competent assistance of counsel under prevailing professional norms.

Rule 1.1 of the Rules of Professional Conduct gives guidance as to what professional norms are:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, **thoroughness, and preparation** reasonably necessary for the representation. (Emphasis added).

In addition, the comments to Rules of Professional Conduct Rule 3.1 indicate that an advocate has a legal duty to use legal procedure for the benefit of the client's cause.

In 1997, this Court changed death penalty appeals in Oklahoma with its interpretation of the Oklahoma Post-Conviction statute[48] in the case of **Walker v. State**, 1997 OK CR 3, 933 P.2d 327. This interpretation had ramifications on not only in the post-conviction process, but also in the direct appeal procedure by adding additional duties to the traditional direct appeal. Direct appeal counsel can no longer base the appellate brief strictly on the record of the trial. The direct appeal attorney must now fully investigate all possible and conceivable claims. Failure to do so can result in the default of meritorious issues traditionally raised in post-conviction. However, in this case Mr. Pavatt's direct appeal counsel failed to fulfill his duty by failing to conduct an investigation and merely preparing a "record" appeal. The comments to the Rules of Professional Conduct 1.1 include the following:

> **Thoroughness and Preparation.** Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake...

In this case, a case involving the very life of Petitioner, it can be said that there is no greater stake than an individual's life. Therefore, it would seem that the required preparation would be quite high.[49] However, according to Mr. Arnett, trial counsel and appellate counsel for Mr. Pavatt, Mr. McCoy was responsible for preparation, writing, and filing of Mr. Pavatt's direct appeal. Although Mr. Arnett's name appears on Mr. Pavatt's direct appeal brief, his responsibilities were limited to finding an experienced appellate attorney. Once Mr. McCoy was retained to do Mr. Pavatt's appeal,

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48 Okla. Stat. tit. 22 § 1080, *et seq.*

49 Mr. McCoy's brief in chief is evidence of Mr. McCoy's lack of thoroughness and preparation, see Proposition 2, sub-proposition A in this application.

Mr. Arnett's role in the direct appeal process was limited to monitoring. Mr. Arnett tried to communicate with Mr. McCoy, but he had extreme difficulty in contacting Mr. McCoy. And although Mr. Arnett visited with Mr. Pavatt on a regular basis before and after the direct appeal brief in chief was filed, any information that Mr. Pavatt imparted to Mr. Arnett for the direct appeal was of no benefit to Mr. Pavatt case, because Mr. Arnett's communication with Mr. McCoy was virtually negligble. (Exh. 3, Appendix). Mr. Gloyd McCoy met Mr. Pavatt in person one time. (Exh. 14, Appendix). Therefore, any discussion, strategy, investigation, or anything for that matter that was communicated between Mr. Pavatt and Mr. Arnett was lost and to no avail, because Mr. McCoy would not communicate with either Mr. Pavatt or Mr. Arnett. (Exh. 3, Appendix).

As a result of appellate counsel's failure to perform the professional duty owed to Mr. Pavatt under prevailing professional norms, Mr. Pavatt received ineffective assistance of appellate counsel. **Strickland v. Washington**, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). **Evitts v. Lucey**, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed.2d 821 (1985). **Garrison v. State**, 2004 OK CR 35, 103 P.3d 590. Mr. Pavatt respectfully requests a new trial or a new sentencing trial.

V. Mr. Pavatt's Constitutional Right to a Competent Tribunal Was Compromised Because the Judge Presiding over the Trial Was Impaired by Illness. Appellate Counsel failed to Raise this Issue.

The Honorable Susan Bragg passed away July 17, 2005 from cancer. (Exh. 15, Appendix). She was initially diagnosed with lung cancer in 2003, either right before or during Mr. Pavatt's trial. (See Exhs. 3 and 16, Appendix).[50] According to Mr. Arnett, both counsel for the State and for the defense informally requested that Judge Bragg continue the trial and attend to her personal situation

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50 Mr. Arnett believes this occurred before the trial commenced. Ms. Fisher believes Judge Bragg received the diagnosis during the trial.

and health. However, Judge Bragg declined to continue the Mr. Pavatt's trial.

While Judge Bragg's illness may not have required her disqualification under Cannon 3 of the Code of Judicial Conduct, the circumstances more than likely rendered her impaired, even if only subconsciously, during the trial. Understandably, the news of being diagnosed with cancer would be distracting to anyone. The circumstances of the trial indicate there were times she was not able to pay full attention to the proceedings. This impairment could have caused the judge to be less than completely impartial and fully mentally competent, as required by due process.

Judge Bragg could have continued the trial, as requested by the parties, or even declared a mistrial to allow the case to be reassigned to another judge. The declaration of a mistrial would not have created double jeopardy concerns for Mr. Pavatt since it would have been for manifest necessity. *See* **U.S. v. Lunch**, 598 F.2d 132, 135 (D.C. 1978) ("illness of judge is an exigency which may support the declaration of a mistrial and a finding of manifest necessity, thus allowing retrial."); **Commonwealth v. Robson**, 337 A.2d 573, 621-22 (Penn. 1975); **Allen v. State**, 165 P. 745 (Okl.Cr. 1917).

The Supreme Court has recognized that the due process clause requires a fair trial in a fair tribunal. **Bracy v. Gramley**, 520 U.S. 899, 117 S. Ct. 1793, 138 L. Ed.2d 97 (1997). "[A] defendant has a right to 'a tribunal both impartial and mentally competent to afford a hearing.'" **Tanner v. United States**, 483 U.S. 107, 126, 107 S. Ct. 2739, 2751, 97 L. Ed.2d 90 (1987), *quoting* **Jordan v. Massachusetts**, 225 U.S. 167, 176, 32 S. Ct. 651, 652, 56 L. Ed. 1038 (1912). The Ninth Circuit has recognized that a trial before "a mentally incompetent judge would be so fundamentally unfair as to violate federal due process under the Constitution." **Summerlin v. Stewart**, 267 F.3d 926, 950 (9th Cir. 2001), *op'n withdrawn* 281 F.3d 836 (9th Cir. 2002). An impartial judge is

essential to due process. *See* **Republican Party of Minnesota v. White**, 536 U.S. 765, 776, 122 S.Ct. 2528, 153 L.Ed.2d (2002).

This is a structural error which affected the entire trial, therefore, prejudice need not be demonstrated. **Arizona v. Fulminante**, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 1265, 113 L. Ed.2d 302 (1990) (structural errors are "defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards. The entire conduct of the trial from beginning to end is obviously affected by . . . the presence on the bench of a judge who is not impartial."); *see also* **Tumey v. Ohio**, 273 U.S. 510, 535, 47 S. Ct. 437, 445, 71 L. Ed.2d 749 (1927) ("No matter what the evidence was against him, [the defendant] had the right to have an impartial judge."). "Structural errors, which defy harmless error standards, are those deficits in the trial itself which affect the framework in which the trial proceeds." **Golden v. State**, 2006 OK CR 2, 127 P.3d 1150, 1154 *(citing* **Arizona v. Fulminante**). The impairment of Judge Bragg affected the entire framework of the trial.

If this Court finds this is not structural error, then there are numerous examples as shown above in the record that demonstrate Judge Bragg was not able to pay full attention to the proceedings because of her illness.

Appellate counsel failed to raise this issue on direct appeal. Counsel's failure to raise this issue renders his performance deficient. This issue also involves facts outside the record. Appellate counsel's failure to investigate the issue fully and then raise this meritorious claim renders his performance deficient for which Mr. Pavatt has been prejudiced. **Mann v. State**, 856 P.2d 992, 994 (Okl.Cr. 1993) ("[F]ailure to raise an issue warranting reversal, modification of sentence, or remand for resentencing may well prove counsel was ineffective."). This issue warrants relief, therefore, this

Court should not find this issue procedurally barred and should address the same on the merits. See **Strickland v. Washington**, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); **Cargle v. Mullin**, 317 F.3d 1196, 1202 (10th Cir. 2003). This issue is properly before this Court and warrants post conviction relief. If this Court finds there are unresolved issues of fact, then the matter should be remanded to the district court for an evidentiary hearing. Counsel have demonstrated by clear and convincing evidence that error has occurred.

This Court should grant post conviction relief by reversing the conviction and sentence and remanding for a new trial.

W. Appellate Counsel Were Ineffective Because a Briefing Deadline Set by this Court Was Missed.

In the direct appeal, the State of Oklahoma timely filed their brief on May 31, 2005. According to Rule 9.3(C) "A reply brief may be filed by the appellant within twenty (20) days of the filing of the appellee's brief in chief." Therefore, the reply brief was due June 20, 2005. Appellate counsel submitted a motion for an extension of time two (2) after the reply was due. The chief of the Capital Post-Conviction Division at the Oklahoma Indigent Defense System had to remind Mr. McCoy to do the reply brief. (Exh. 17, Appendix). The reply brief itself was nine (9) pages[51] (including the Certificate of Service page) and most of it was simply Mr. McCoy reurging the arguments in the appellant's brief in chief and not counterarguing the State's arguments.

Although it can be argued that Mr. McCoy's missing the reply brief deadline was not per se prejudicial to Mr. Pavatt's direct appeal because this Court granted his untimely extension request, when viewed in light of the numerous errors in Mr. McCoy's brief in chief, his unpersuasive

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51 "The reply brief shall only respond to the appellee's brief in chief, and is limited to twenty (20) pages in length." Court of Criminal Appeals Rule 9.3(C).

arguments, and the omission of meritorious arguments, Mr. Pavatt was deprived of effective appellate representation in violation of **Strickland v. Washington**, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). Mr. Pavatt respectfully asks for a new trial or in the alternative a new sentencing hearing.

X. Conclusion.

Mr. Pavatt was denied the effective assistance of trial counsel and of appellate as shown by the numerous due process errors. **Strickland v. Washington**, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984), **Evitts v. Lucey**, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed.2d 821 (1985), and **Garrison v. State**, 2004 OK CR 35, 103 P.3d 590. The enumerated errors discussed above is by no means all of the errors that were committed. Other errors were committed, but due to time constraints, page limit constraints, and man power constraints, post-conviction counsel could not raise every issue. Counsel respectfully requests a new trial, a new sentencing trial, or a modification of Mr. Pavatt's sentence.

PROPOSITION THREE

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

In **United States v. Rivera**, 900 F. 2d 1462 (10th Cir. 1990), the Tenth Circuit held the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. **Rivera**, 900 F. 2d at 1469. *See* **Walker v. Engle**, 703 F.2d 959, 963 (6th Cir. 1983). A valid death sentence must be free of any passion,

prejudice or arbitrary factors that taint the reliability of the outcome. The decision to impose a death sentence must reflect a reasoned moral judgment as to the defendant's actions and character in light of the offense and the defendant's background. **Penry v. Lynaugh**, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

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

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

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

According to the Tenth Circuit,

> Cumulative error analysis is an extension of harmless error, *see* **Rivera**, 900 F.2d at 1469, and [the court should] conduct the same inquiry as for individual error, *id.* at 1470, focusing on the underlying fairness of the trial, *id.* at 1469 (quoting *Van Arsdall*, 475 U.S. at 681); *see also* **United States v. Wood**, 207 F.3d 1222, 1237 (10th Cir.2000). [T]he cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. *Hooper*, 314 F.3d at 1178; (quoting **Duckett v. Mullin**, 306 F.3d 982, 992 (10th Cir.2002), *petition for cert. filed*, (U.S. Feb. 25, 2003) (No. 02-9257); *see also* **Rivera**, 900 F.2d at 1469. As in assessing the harmlessness of individual errors, therefore, this court evaluate[s] whether cumulative errors were harmless by determining whether a criminal defendant's substantial rights were

> affected. **Moore v. Reynolds**, 153 F.3d 1086, 1113 (10th Cir.1998). A cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless. Unless an aggregate harmless determination can be made, collective error will mandate reversal, just as surely as will individual error that cannot be considered harmless. **Rivera**, 900 F.2d at 1470; *see* **Duckett**, 306 F.3d at 992; **Willingham**, 296 F.3d at 935. **Darks v. Mullin**, 323 F.3d 1001, 1018 (10th Cir. 2003) (Internal quotations omitted).

See also **United States v. Toles**, 297 F.3d 959, 972, 1207 (10th Cir. 2002) (quotation omitted); *see* **United States v. Rivera**, 900 F.2d 1462, 1470 (10th Cir.1990) (en banc), *see* **Cargle v. Mullin**, 317 F.3d 1196, 1206 -1207 (10th Cir. 2003).

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

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

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

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

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

PRAYER FOR RELIEF

Wherefore, Mr. Pavatt respectfully requests that this Court enter an order vacating the conviction and death sentence and remand for a new trial or new sentencing. In the alternative, Mr. Pavatt respectfully requests this Court to impose a sentence of life imprisonment or life imprisonment without parole, or remand this case for a full and fair evidentiary hearing on the issues presented.[52]

Respectfully submitted,

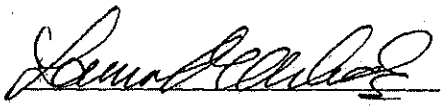
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[52] Mr. Pavatt's Appendix to the Original Post-Conviction Application, Sealed Proposition, Motion Reserving the Right to Supplement the Original Post-Conviction Application, Motion for Request to File Oversized Application, Motion for Discovery, and the Motion for Evidentiary Hearing, and all attachments thereto, filed in this case contemporaneously with this original application, is hereby incorporated by reference as if fully set forth.

VERIFICATION OF COUNSEL FOR PETITIONER

I, Laura M. Arledge, state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.



Laura M. Arledge, OBA #15462 Date

CERTIFICATE OF SERVICE

By my signature below, I certify that a copy of the foregoing was served on the Attorney General of the State of Oklahoma by depositing a copy of the same with the Clerk of the Court of Criminal Appeals this 17th day of April, 2006.

Laura M. Arledge, OBA #15462
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ATTACHMENT # 2

Opinion, *Pavatt v. State,* PCD-2004-25 (Okla. Crim. App., April 11, 2008)

"APCR Op."

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES DWIGHT PAVATT,	)	NOT FOR PUBLICATION
Petitioner,	)	
v.	)	Case No. PCD-2004-25
THE STATE OF OKLAHOMA,	)	
Respondent.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
APR 11 2008
MICHAEL S. RICHIE
CLERK

OPINION DENYING APPLICATION FOR POST-CONVICTION RELIEF AND RELATED MOTIONS

C. JOHNSON, VICE-PRESIDING JUDGE:

Petitioner, James Dwight Pavatt, was convicted by a jury in Oklahoma County District Court, Case No. CF-2001-6189, of First Degree Murder (21 O.S.2001, § 701.7) (Count 1) and Conspiracy to Commit First Degree Murder (21 O.S.2001, § 421) (Count 2). The jury found the existence of two aggravating circumstances, and recommended a sentence of death on Count 1.[1] As to Count 2, the jury recommended ten years imprisonment and a $5000 fine. The trial court sentenced accordingly on October 21, 2003. This Court affirmed Petitioner's convictions and sentences on direct appeal. *Pavatt v. State*, 2007 OK CR 19, 159 P.3d 272.[2] Petitioner sought *certiorari* review by the United States Supreme Court, which was denied. *Pavatt v. Oklahoma*, ___

[1] The State alleged three aggravating circumstances in support of the death penalty on Count 1: (1) that the murder was especially heinous, atrocious, or cruel; (2) that the murder was committed for remuneration or the promise of remuneration; and (3) that the defendant constituted a continuing threat to society. The jury found the first and second circumstances existed.

[2] The record from Petitioner's trial was received by this Court in May 2004. Petitioner's brief in chief was filed in January 2005. The State's response brief was filed in May 2005. Petitioner filed a reply brief in July 2005. Oral argument was held in May 2006.

U.S. ___, ___ S.Ct. ___, 2008 WL 425560.

Currently before the Court is Petitioner's Original Application for Post-Conviction relief, filed April 17, 2006, and several related motions filed simultaneously therewith.[3] Our review of Petitioner's application is governed by the Post-Conviction Procedure Act, 22 O.S.Supp.2006, § 1080 *et seq.* The Act provides applicants with very limited grounds upon which to attack their convictions. Claims which could have been raised on direct appeal, but were not, are generally considered waived. Claims which were raised and addressed on direct appeal are barred from being relitigated by the doctrine of *res judicata*. Furthermore, claims which are properly raised in a post-conviction application may only afford relief if they "[s]upport a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent." 22 O.S.Supp.2006, § 1089(C).

Petitioner's numerous claims are grouped into three propositions of error. We address each proposition in turn.

In Proposition 1, Petitioner claims that two pieces of evidence not mentioned in his direct appeal, and an intervening change in the law, require relief. The evidence consists of testimony from two witnesses at the trial of Petitioner's co-defendant, Brenda Andrew, which took place after Petitioner's

[3] Petitioner's request to file an "oversize" application (exceeding the page limit set forth in our Rules) is **GRANTED**. His request to file Proposition 2(G) under seal is **DENIED**, and the Clerk of this Court is **DIRECTED** to unseal that portion of the application. *See Pavatt*, 2007 OK CR 19 at ¶ 40 n. 10, 159 P.3d at 286 n. 10. His motion (filed April 17, 2006) requesting 30 days to supplement his application with additional matters, pending oral argument and other events in his direct appeal, is **DISMISSED AS MOOT**.

trial but before his direct appeal brief was filed.[4] At Petitioner's trial, Herman Roggow testified that he had known Brenda Andrew since she was a child. Roggow claimed that in November 2001, about a week before the murder, he saw Andrew, her brother-in-law, and another unidentified man, carrying firearms, as if preparing to engage in target practice, by the side of the road in rural Garfield County. Petitioner notes that subsequently, at Andrew's trial, Roggow had difficulty identifying Andrew in the courtroom. Thus, Petitioner claims, Roggow's testimony at Petitioner's trial was suspect, and the implication that Petitioner was the third, unidentified person engaged in target practice was unfairly suggested to the jury.

Contrary to Petitioner's claim, Roggow's testimony at Andrew's trial in mid-2004 is not "newly discovered evidence"; it was available to direct appeal counsel, since the direct appeal brief was not filed until January 2005. Because the evidence was discoverable through reasonable diligence, Petitioner must show (1) that appellate counsel's failure to present it timely, during the pendency of the direct appeal, was professionally unreasonable, and (2) that the failure casts doubt on the outcome of Petitioner's appeal. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see also Slaughter v. State*, 1998 OK CR 63, ¶¶ 5-6, 969 P.2d 990, 993-94.

The thrust of Roggow's testimony was that he witnessed Brenda Andrew, not Petitioner, preparing to engage in target practice. Roggow did not know

[4] Brenda Andrew and Petitioner were charged jointly with murdering Andrew's husband and conspiring to do so. Andrew was also sentenced to death for the murder. *Andrew v. State*, 2007 OK CR 23, 164 P.3d 176.

Petitioner, and he never identified Petitioner as being in Andrew's company on the occasion in question. Any inference that Petitioner was present was of course possible, but not required to support the State's theory that Petitioner and Andrew concocted a plan to kill Andrew's husband, and that each did a number of things to effect that result. Petitioner does not dispute that Roggow was personally familiar with Andrew, having known her since she was a child. Nor does he take issue with Roggow's identification of Andrew's brother-in-law at the same encounter, or with the fact that shotgun shells found at that location were consistent with the unusual gauge of shotgun used to kill Andrew's husband. Andrew's trial was held almost three years after Roggow claimed to have seen her from the roadway. This Court has no information as to what kind of changes in physical appearance Andrew might have undergone during that time. Roggow was allowed to leave the witness stand, move closer to Andrew and did, in fact, identify her at her trial, with no further dispute by Andrew's defense counsel. Finally, the State's case by no means hinged on Roggow's testimony. Any initial difficulty Roggow might have had identifying Andrew at her trial is simply not material enough to have made any difference in the outcome of Appellant's appeal.

The second item of evidence Petitioner presents as "newly discovered" is the testimony of Bill Shadid at Andrew's trial. At Petitioner's trial, David Head testified about an altercation he had with co-defendant Andrew over work he performed at her home. Head testified that an unidentified man was present during the altercation. Subsequently, at Andrew's trial, one of Andrew's

neighbors, Shadid, testified that he was the man who witnessed the altercation between Andrew and Head. Petitioner complains that, given Shadid's testimony at Andrew's trial, any implication from Head's testimony at Petitioner's trial, that Petitioner was the unidentified bystander, was unfair.

Again, this evidence was discoverable by direct appeal counsel, because Andrew's trial was held several months before Petitioner's appeal brief was filed. And again, Petitioner is unable to meet the *Strickland* criteria for ineffective assistance of appellate counsel. As Petitioner concedes, Head did not know the male bystander and never positively identified him. Most importantly, the identity of the bystander was irrelevant, because he took no part in the altercation or the threat that Andrew made to Head. In fact, Head testified at Petitioner's trial that the man attempted to quell the dispute. There is no reasonable possibility that Shadid's testimony would have changed the outcome of Petitioner's trial or appeal.

Finally, Petitioner asks this Court to apply the new rule announced in *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273, to his case. Oklahoma law provides that for certain enumerated crimes, a defendant must serve at least 85% of any sentence imposed before becoming eligible for any type of early release. In *Anderson*, this Court held that when a defendant is tried for a crime subject to the 85% Rule, the jury must be given that information. The rule in *Anderson* applied prospectively, and to any case pending on direct appeal at the time *Anderson* was announced. *Carter v. State*, 2006 OK CR 42, ¶ 4, 147 P.3d 243, 244. Petitioner's case was pending on direct appeal at the time

Anderson was decided.[5] However, we have made it clear that failure to instruct on the 85% Rule is not automatic grounds for reversal in every case. *Eizember v. State*, 2007 OK CR 29, ¶ 73, 164 P.3d 208, 229. As to Count 1, the jury in Petitioner's case had three punishment options – life with the possibility of parole, life without the possibility of parole, and death. It chose the most severe option, to which the notion of parole is irrelevant. We can confidently conclude that, had the jury been instructed on the 85% Rule, that information would not have affected the verdict. *See Cole v. State*, 2007 OK CR 27, ¶ 65, 164 P.3d 1089, 1102. Proposition 1 is denied.

In Proposition 2, Petitioner attacks the performance of his retained counsel on direct appeal. In approximately two dozen sub-arguments, Petitioner reformulates or supplements claims that direct appeal counsel did raise, and advances some new claims that direct appeal counsel did not raise. The first group of claims are not accompanied by newly-discovered facts or new controlling case law. They are therefore barred by *res judicata*.[6] Post-

[5] This Court cited *Anderson* in Petitioner's direct appeal. *Pavatt*, 2007 OK CR 19, ¶ 30 n. 6, 159 P.3d at 283 n. 6.

[6] The following claims are barred by *res judicata*: (B), alleging that appellate counsel failed to present all facts and law relevant to his argument concerning prospective juror's comment on parole during *voir dire*; (C), alleging that counsel failed to challenge Agent Stoner's testimony "completely, sufficiently, and adequately"; (D), faulting counsel for not continuing to present evidence of media coverage after the change-of-venue hearing and before trial; the record shows that those who actually served on Petitioner's jury could be fair and impartial (*Pavatt*, 2007 OK CR 19 at ¶¶ 17-18, 159 P.3d at 280); (E) and (F), challenging the sufficiency of evidence supporting Petitioner's convictions; (G), alleging that counsel failed to argue "sufficiently and adequately" concerning alternative-suspect evidence; (H), alleging that counsel failed to advance his prosecutorial misconduct claim "sufficiently"; (I), challenging the sufficiency of evidence supporting the aggravating circumstances; (J), faulting scope of counsel's argument concerning admission of a "live" photograph of the victim; *see also Marquez-Burrola v. State*, 2007 OK CR 14, ¶ ¶ 30-31, 157 P.3d 749, 760 (rejecting similar argument).

conviction may not be used to reformulate or supplement a claim that was made on direct appeal. *See Browning v. State*, 2006 OK CR 37, ¶ 4, 144 P.3d 155, 157; *Davis v. State*, 2005 OK CR 21, ¶ 17, 123 P.3d 243, 248. As for the second group of claims, Petitioner has failed to demonstrate either (1) that appellate counsel's performance was professionally unreasonable,[7] or, assuming deficient performance only for the sake of argument, (2) any outcome-determinative prejudice caused thereby.[8]

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[7] In the following claims, Petitioner fails to show that appellate counsel's performance was professionally unreasonable: (K), faulting appellate counsel for not challenging the admissibility of four pieces of evidence at trial; (i) the confession letter purportedly written by Petitioner required no additional evidence of chain of custody, given the trial testimony and the fact that it was a unique, non-fungible item; (ii) any appellate challenge to introduction of insurance documents found at the victim's home was waived by trial counsel's failure to object, and Petitioner offers no information to dispute the trial testimony on this issue; (iii) trial testimony concerning a bullet found by Petitioner's daughter (including Petitioner's command that she "throw it away") was sufficient to establish its admissibility; (iv) as for the admissibility of various tape-recorded conversations, *see Andrew v. State*, 2007 OK CR 23, ¶¶ 68-71, 164 P.3d at 194 (rejecting similar argument in co-defendant's direct appeal); (L), regarding separation of jurors during deliberations to move their cars; the trial record confirms that trial defense counsel had no objection to this procedure; (N), faulting appellate counsel for not interviewing two witnesses about their testimony at co-defendant Andrew's trial (see discussion in Proposition 1); (Q), faulting counsel for not challenging trial court's instruction on assessment of aggravating and mitigating circumstances; *see Wood v. State*, 2007 OK CR 17, ¶ 16, 158 P.3d 467, 475 (rejecting same argument); (R), faulting counsel for not alleging "structural" defects in Oklahoma's capital sentencing scheme; *see Harris v. State*, 2007 OK CR 32, ¶ 19, 167 P.3d 438,445 (rejecting same argument); (S), faulting appellate counsel for not challenging trial court's excusal of certain prospective jurors for cause; record shows that trial court thoroughly inquired to determine whether each panelist could impose the death penalty under any circumstance, and trial defense counsel made only *pro forma* objections and did not offer any reason for further inquiry; (V), faulting counsel for not claiming denial of fair tribunal due to trial judge's illness; Petitioner's claim is entirely speculative and not supported by any specific example of bias or impairment.

[8] In the following claims, Petitioner fails to show that appellate counsel's alleged deficiencies likely made a difference in the outcome of the appeal: (A), alleging that counsel's brief contained citation and other editorial mistakes; Petitioner cannot show that any issues raised were forfeited due to these mistakes; (M), alleging that counsel failed to raise a claim about certain allegedly hearsay statements at trial; *see Andrew*, 2007 OK CR 23, ¶¶ 26-35, 164 P.3d at 188-190, rejecting similar argument in co-defendant's direct appeal, particularly given substantial evidence of guilt; (O), faulting counsel for not challenging testimony of handwriting expert; Petitioner fails to cite any controlling authority which would require exclusion of this evidence; (P), faulting counsel for not arguing that an instruction on accessory after the fact was appropriate; (T), alleging that medical examiner's staff had no authority to seize documents from victim's home, even though victim's wife/ co-defendant consented to a search; (U),

We have reviewed the materials properly included with Petitioner's application, and conclude that they do not raise new matters which would require either an evidentiary hearing or discovery. 22 O.S.Supp.2006, § 1089(D)(3), (5); Rule 9.7(D), (E), *Rules of the Oklahoma Court of Criminal Appeals*, 22 O.S. Ch. 18, App. (2008).

Having found no grounds for relief in Petitioner's current claims, we likewise reject his cumulative-error argument in Proposition 3. Finally, we cannot say that the claims made in Petitioner's application and related pleadings suggest either a miscarriage of justice or the substantial violation of a constitutional or statutory right. *Slaughter*, 2005 OK CR 6, ¶ 19, 108 P.3d at 1055; 20 O.S.2001, § 3001.1.

DECISION

Petitioner's application for post-conviction relief, and requests for evidentiary hearing and discovery, are **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2008), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

OPINION BY C. JOHNSON, V.P.J.
LUMPKIN, P.J.: CONCURS
CHAPEL, J.: CONCURS
A. JOHNSON, J.: CONCURS
LEWIS, J.: CONCURS

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alleging that counsel did not communicate with Petitioner frequently enough during the pendency of the appeal; (W), alleging that counsel filed a reply brief out of time (with leave of this Court).

ATTACHMENT # 3

Second Application for Post Conviction Relief, *Pavatt v. State,* PCD-2009-777

"SAPCR"

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
SEP - 2 2009
MICHAEL S. RICHIE
CLERK

IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

JAMES DWIGHT PAVATT,	)	**Oklahoma Co. District Court**
	)	**Case No. CF-2001-6189**
Petitioner,	)	
	)	**Court of Criminal Appeals**
	)	**Direct Appeal Case No.**
vs.	)	**D-2003-1186**
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	**Post Conviction Case No. _____**

COURT OF CRIMINAL APPEALS FORM 13.11A

SECOND APPLICATION FOR POST – CONVICTION RELIEF – DEATH PENALTY CASE

PART A: PROCEDURAL HISTORY

Petitioner, James Dwight Pavatt, through undersigned counsel, submits his application for post-conviction relief under Section 1089 of Title 22 and Section 3001.1 of Title 20. This is the second time an application for post-conviction relief has been filed.

The sentence from which relief is sought is:

Death.

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

1. **Court in which sentence was rendered:**

   (a) Oklahoma County District Court.

(b) Case Number: CF-2001-6189.

(c) Court of Criminal Appeals: Direct Appeal Case No. D-2003-1186.

2. **Date of Sentence:** October 21, 2003.

3. **Terms of Sentence:** Death.

4. **Name of Presiding Judge:** Honorable Susan W. Bragg.

5. **Is Petitioner currently in custody?** Yes.

Where? Oklahoma State Penitentiary, H-unit.

Does Petitioner have criminal matters pending in other courts? No.

If so, where?

List charges:

Does Petitioner have sentences (capital or non-capital) to be served in other states or jurisdiction? No.

If so, where?

List convictions and sentences:

I. CAPITAL OFFENSE INFORMATION

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

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

Aggravating factors alleged:

(a) The State alleged:

1. The 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;

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

(O.R. IV at 670-71).

Aggravating factors found:

(a) The jury found two of the aggravating circumstances alleged by the State in the Bill of Particulars, to wit:

1. 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.

(O.R. Vol. XI at 2062).

Mitigating factors listed in jury instructions:

The trial court gave instruction No. 10 to the jury which "lists" mitigating circumstances. (O.R. Vol. XI at 2057). The mitigation evidence instruction submitted to the jury was as follows:

Evidence has been introduced as to the following mitigating circumstances:

the defendant did not have any significant history of prior criminal activity

the defendant is likely to be rehabilitated

the defendant's age

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

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

7. Check whether the finding of guilty was made:

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

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

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

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

II. NON-CAPITAL OFFENSE INFORMATION

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

Conspiracy to Commit Murder.

Mr. Pavatt received a sentence of ten (10) years and a $5000 fine.

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

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

III. CASE INFORMATION

13. Name and address of lawyer in trial court:

M. Michael Arnett
3133 N.W. 63rd
Oklahoma City, OK 73116
(405) 767-0522

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

Justin Lowe
3133 N.W. 63rd
Oklahoma City, OK 73116
(405) 767-0522

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

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

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

Date Brief In Chief filed: January 31, 2005.

Date Response filed: May 31, 2005.

Date Reply Brief filed: July 20, 2005.

Date of Oral Argument: May 16, 2006.

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

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

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

Is this petition filed subsequent to supplemental briefing after remand?

Yes ( ) No ( ) Not applicable (X).

16. **Name and address of lawyers for appeal?**

Gloyd L. McCoy
5801 N. Broadway Ext., Ste. 101
Oklahoma City, OK 73118
(405) 843-9909

M. Michael Arnett
3133 N.W. 63rd
Oklahoma City, OK 73116
(405) 767-0522

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

If "yes", give citations if published: *Pavatt v. State,* 159 P.3d 372 (Okla. Crim. App. 2007).

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

If "yes", state when relief was sought, the court in which relief was sought, the nature of the claim(s) and the results:

A Petition for a Writ of Certiorari was filed in the United States Supreme Court challenging this Court's decision on direct review. The petition was denied on February 19, 2008. *Pavatt v. Oklahoma,* __U.S.__, 128 S.Ct. 1229 (2008).

Mr. Pavatt also petitioned this Court for post-conviction relief, raising the following claims: (I) Newly discovered evidence and new law renders Mr. Pavatt's conviction and sentence suspect and unreliable in violation of his due process right to a fundamentally fair trial. As such, Mr. Pavatt must be granted a new trial; (II) Petitioner, Mr. Pavatt, received ineffective assistance of appellate and trial counsel in violation of the Sixth, Eighth, and Fourteenth Amendments and Article II, §§ 7, 9, and 20 of the Oklahoma Constitution; and (III) The cumulative impact of errors identified on direct appeal and post-conviction proceedings rendered the proceeding resulting in the death sentence arbitrary, capricious, and unreliable. The death sentence in this case constitutes cruel and unusual punishment and a denial of due process of law and must be reversed or modified

to life imprisonment or life without parole. This Court denied the petition on April 11, 2008, in an unpublished opinion in Case No. PCD-2004-24. Mr. Pavatt's federal habeas corpus petition was filed on April 1, 2009 and is currently pending in the U.S. District Court for the Western District of Oklahoma, Case No. CIV-08-470-R.

PART B: GROUNDS FOR RELIEF

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

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

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

If yes, specify what motions have been filed:

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

PROPOSITION ONE

MR. PAVATT WAS DENIED THE RIGHT TO CONFRONTATION AND CROSS-EXMANINATION IN VIOLATION OF THE SIXTH AMMENDMENT TO THE UNITED STATES CONSTITUTION THROUGH PERVASIVE ADMISSION OF HEARSAY EVIDENCE. MR. PAVATT WAS DENIED EFFECTIVE ASSITANCE OF TRIAL, DIRECT-APPEAL, AND POST-CONVICTIONCOUNSEL FOR FAILURE TO RAISE THE ISSUE.

PROPOSITION TWO

PROSECUTORIAL MISCONDUCT DENIED JAMES PAVATT A FAIR TRIAL AND VIOLATED HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

A. **First Stage Victim Sympathy.**

B. **Use of Bullet Evidence.**

C. **Prosecution's Fundamentally Inconsistent Evidence and Theories – The Confession Letter**

PROPOSITION THREE

THE WRONGFUL ADMISSION AND DISPLAY, IN BOTH STAGES OF THE TRIAL, OF GRUESOME CRIME SCENE PHOTOGRAPHS OF ROB ANDREW, JUXTAPOSED WITH THE WRONGFUL ADMISSION, DURING BOTH STAGES OF THE TRIAL, OF PHOTOGRAPHS AND A VIDEO RECORDING OF ROB ANDREW IN LIFE

DEPRIVED MR. PAVATT OF A FAIR TRIAL IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND INJECTED IMPROPER VICTIM IMPACT EVIDENCE INTO THE GUILT PHASE OF THE TRIAL.

A. Gruesome Photographs.

B. The Photographs and Video Recording of Rob Andrew in Life.

C. Gruesome Photographs: Second Stage

PROPOSITION FOUR

FAILURE TO PROVIDE AN ADEQUATE INSTRUCTION THAT INFORMED THE JURY THAT IT MUST FIND "CONSCIOUS PHYSICAL SUFFERING" AS A FACT BEYOND A REASONABLE DOUBT BEFORE CONCLUDING THAT A MURDER WAS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" DEPRIVED THE PETITIONER OF HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL, HIS EIGHTH AMENDMENT RIGHT TO A RELIABLE SENTENCING DETERMINATION, AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCES OF LAW.

PROPOSITION FIVE

THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION ARE VIOLATED BY OKLAHOMA'S CONTINUED USE OF THE FACIALLY VAGUE AGGRAVATING CIRCUMSTANCE THAT A MURDER IS: ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

PROPOSITION SIX

MR. PAVATT WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL, DIRECT APPEAL, AND POST-CONVICTION COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

A. Trial Counsel

B. Counsel Failed to Adequately Present Evidence that Mr. Pavatt did not Author the "Confession Letter".

C. Counsel failed to Adequately Challenge the State's Forensic Case.

D. Counsel Failed to Object to the Admission of Live Photographs of Rob Andrew.

E. Trial Counsel failed to object to Prosecutorial Misconduct.

F. **Failure to Conduct a meaningful Mitigation Investigation and failure to present a meaningful Case for Life.**

G. **Direct Appeal Counsel.**

H. **Post-Conviction Counsel.**

PART C: FACTS

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

1. CITATIONS TO THE RECORD

Pursuant to Rule 9.7(D)(1)(a) of the Rules of the Court of Criminal Appeals, effective January 1, 1998, the record and transcripts in this case will be referred to using the following abbreviations:

O.A.:	the Original Application for Post-Conviction Relief, filed April 17, 2006.
O.R.:	the thirteen (13) volumes of Original Record in Oklahoma County District Court Case No. CF-2001-6189.
PH:	the seven (7) volumes of transcripts of the preliminary hearing held June 5, 7, 10, 11, 12, July 9, 17, and 18, 2002.
Tr:	the fifteen volumes of transcripts of the jury trial held August 25, 26, 27, 29, September 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, and 16, 2003.
M.H. date:	the transcripts of the motion hearings held April 16, 30, May 14 and 16, 2002; January 9 and 21, 2003; March 6, 2003; May 23, 2003; July 24, 2003; August 8, 2003; and August 25, 2003.
Andrew Tr.:	the volumes of transcripts of the jury trial of Mr. Pavatt's co-defendant, Ms. Brenda Andrew held June 7-10, 14-18, 21-25, 28-30, July 1-2, 6-9, and 12-15, 2002.[1]

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

[1] Counsel for Mr. Pavatt filed a Motion to Cross-Reference Mr. Pavatt's case with his co-defendant, Ms. Andrew. This Court granted the Motion to Cross-Reference on January 13, 2006. *See* **Order Granting Motion to Cross Reference Records,** in Case No. PCD-2004-25.

considered to be incorporated herein by reference and by operation of the rule. References to the *Appendix of Exhibits In Support of the Application for Post-Conviction Relief* will indicate the exhibit number, followed by the notation "Appendix", e.g., "Exh. 1, Appendix."

2. INTRODUCTION

It was not reasonable to believe Mr. Pavatt could receive a fair trial in Oklahoma County in August 2003. In the months, weeks, and days before Mr. Pavatt's trial for First Degree Murder, the jury pool was flooded with sensational reports about the investigation of Mr. Pavatt and his co-defendant, Brenda Andrew, and Mr. Pavatt's flight with her and her children to Mexico after the homicide. In the days before the trial, the media reported Mr. Pavatt had written a letter confessing to the crime. All potential jurors indicated they had seen the stories concerning the case. Mr. Pavatt's motion for change of venue was denied.

The State's evidence at trial included testimonial and non-testimonial hearsay from Robert Andrew, the victim of the homicide, and his "belief" that James Pavatt was out to kill him. Rob Andrew's family and friends were allowed to testify repeatedly concerning his nature and character as a man. His life was presented through photographic evidence and a video recording of his last hunting trip, narrated by his brother. The State's evidence included the opinion of an FBI agent that Mr. Pavatt was guilty. The trial court excluded Mr. Pavatt's proffered defense evidence that someone else had written three letters confessing to the murder for which Mr. Pavatt was on trial.

Defense counsel's level of preparation, investigation, and basic knowledge of the rules of evidence failed to meet the constitutional standards required by the United States Supreme Court for effective assistance of counsel in a capital case. Mr. Pavatt's trial counsel conducted no meaningful second stage investigation, made no preparation for the punishment phase, and failed

to present compelling mitigating evidence on Mr. Pavatt's behalf. Trial counsel served as co-counsel on direct appeal, and many of these errors and omissions were perpetuated on direct review.

A review of the record establishes Mr. Pavatt was denied a fundamentally fair trial, a constitutionally sound sentencing hearing, and an effective direct appeal, and post-conviction application. Absent prior counsels' failures, a reasonable probability exists that Mr. Pavatt would have been acquitted, convicted of a lesser included offense, or at a minimum would not have been sentenced to death.

This is Mr. Pavatt's Second Application for Post-Conviction Relief. The claims asserted herein were discovered and developed by counsel appointed by the United States District Court for the Western District of Oklahoma to pursue federal habeas corpus relief on Mr. Pavatt's behalf. During the record review, investigation, and preparation of Mr. Pavatt's federal petition, it became clear that these claims had not been adequately addressed in Mr. Pavatt's direct appeal or first application for post-conviction relief. The factual and legal bases for these claims were completely unavailable to Mr. Pavatt, as a layman. They should have been discovered earlier by trial, appellate, or post-conviction counsel, but were not. This failure stems from trial counsel's lack of experience and absolute failure to prepare and present a second stage defense, appellate counsel's complete ineffectiveness, and post-conviction counsel's lack of resources and time to provide meaningful assistance to Mr. Pavatt.

Eighth Amendment jurisprudence relating to capital proceedings requires that the Oklahoma statutes and this Court's rules assure "evenhanded, rational, and consistent imposition of death sentences under law." *Jurek v. Texas,* 428 U.S. 262, 276 (1976). These procedures must operate "so as to minimize the risk of wholly arbitrary and capricious action." "Capital

proceedings [must] be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of fact-finding." *Monge v. California*, 118 S.Ct. 2246, 2252 (1998), *citing Strickland,* supra, at 704. (Brennan, J., concurring in part and dissenting in part). "[O]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Burger v. Kemp,* 483 U.S. 776, 785,(1987); *see also Kyles v. Whitley,* 514 U.S. 419, & n. 1, (1995). When the Due Process interest is life itself, it "is almost uniquely compelling." *Ake v. Oklahoma*, 470 U.S. 68,77 (1985).

Under the facts and circumstances of this case counsel for Petitioner could not continue the investigation and preparation of his Federal Habeas Petition for filing, and at the same time prepare and file his Second Application for Post-Conviction Relief in this Court. Adding to this difficulty, the factual bases for these new claims were discovered at different times and the investigation concerning Mr. Pavatt continues. If Petitioner were to comply with this Court's Rule 9.7 (G)(3), he would have been required to file multiple applications when the factual basis for claims was discovered, as this Court does not permit amendments to Applications for Post-Conviction Relief. *Gilbert v. State*, 1998 OK CR 17, 955 P.2d 727 (1998). This application is being filed as soon as possible after discovery and receipt of all supporting documentation believed to be necessary to support the claims.

The State of Oklahoma has provided by statute that Petitioner Pavatt is entitled to Post-Conviction review. By this Court's statement in *Manous v. State*, 797 P.2d 1005 (Okl. Cr. 1990), the procedural rules for this review must comport with Due Process and Equal Protection principles. If Rules 9.7 (G) (2)and (3), are applied to procedurally bar Petitioner's claims, he will be denied his "first right of appeal" on these compelling Constitutional issues in direct violation of the principles of *Bounds v. Smith*, 430 U.S. 817, 822 (1977), *Douglas v. California*, 372 U.S.

363 (9163) and *Evitts v. Lucey*, 469 U.S. 387 (1985). Should this Court determine Petitioner's claims are procedurally barred, they should nevertheless be reviewed on the merits because not to do so would result in a fundamental miscarriage of justice. *Valdez v. State*, 2002 OK CR 20, 46 P.3d 703 (2002), citing this Court's power of review under 20 O.S. 2001, § 3001-1.

An objective review of the record establishes that Mr. Pavatt was not sentenced to death upon a valid finding of a constitutionally sufficient aggravating circumstance, but instead because of the sensational nature of the case and an effective plea to the jury to decide the punishment upon the basis of emotion. In order to provide a constitutionally valid ground for imposition of the death penalty, an aggravating "circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder". *Zant v. Stephens*, 462 U.S. 862, 876 (1983).

In Mr. Pavatt's case, the only evidentiary support for the aggravating circumstance that the murder was especially heinous, atrocious, or cruel, was the possibility the victim suffered physical pain prior to death as a result of two shotgun wounds, either of which would have been fatal. This possibility exists in virtually every murder case in which some form of intentional physical violence leads to the victim's death. Unless we engage in legal and factual fiction, we must acknowledge this possibility does nothing to narrow the class of death eligible defendants. The death penalty must be reserved for those cases which are truly qualitatively different. Mr. Pavatt's case does not meet that description.

3. PROCEDURAL HISTORY

Brenda Andrew and James Pavatt were charged by Information in the District Court of Oklahoma County, Case No. CF-2001-6189, with the First Degree Murder of Brenda Andrew's

husband, Rob Andrew, in violation of Okla. Stat. tit. 21, § 701.7, and Conspiracy to Commit the Murder of Rob Andrew in violation of Okla. Stat. tit. 21, § 421. (O.R. Vol. 4 at 665-66). In a subsequently filed Bill of Particulars, the State alleged the following statutory aggravating circumstances: (1) Mr. Pavatt 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) at the present time, there exists a probability that Mr. Pavatt will commit criminal acts of violence that would constitute a continuing threat to society. (O.R. Vol. 4 at 670-71).

Mr. Pavatt pled not guilty to the charges and requested a jury trial. Mr. Pavatt's Motion to Sever Defendants, (O.R. Vol. 5 at 815-19), was granted, and Mr. Pavatt's trial was conducted between August 25, 2003, and September 16, 2003, with the Honorable Susan W. Bragg presiding. (O.R. Vol. 5 at 815-19). The jury found Mr. Pavatt guilty of both counts and recommended he be sentenced to death on Count I and ten years on Count II. (Tr. Vol. 15 at 3793). (O.R. Vol. 11 at 2062-63). The jury rejected the continuing threat aggravating circumstance, but found that the murder was committed for purposes of remuneration and that the murder was especially heinous, atrocious, or cruel. (Tr. Vol. 15 at 3793-94). On October 21, 2003, the trial court entered formal judgment and sentence in accordance with the jury's recommendation and ordered the ten year sentence on Count II to run consecutively to the sentence on Count I. (Sentencing Tr. at 7-9); (O.R. Vol. 12 at 2249).

Mr. Pavatt appealed his convictions and sentence of death to this Court. The Court denied all grounds for relief and affirmed Mr. Pavatt's convictions and sentences. *Pavatt v. State*, 159 P.3d 272 (Okla. Crim. App. 2007).

A Petition for a Writ of Certiorari was filed in the United States Supreme Court challenging the state court decision. The certiorari petition was denied on February 19, 2008. *Pavatt v. Oklahoma*, __ U.S. __, 128 S. Ct. 1229 (2008).

Mr. Pavatt also petitioned this Court for post-conviction relief. The Court denied the petition on April 11, 2008, in an unpublished opinion in Case No. PCD-2004-25.

4. EVIDENCE PRESENTED AT TRIAL

A. First Stage Evidence

The State's first witness was Mark Sinor, pastor of the North Pointe Baptist Church in Oklahoma City. In early September, 2001, Mr. Sinor became aware of an improper relationship between Brenda Andrew and Jim Pavatt during the time Brenda Andrew was married to Rob Andrew and Jim Pavatt was married to Suk Hui Pavatt. (Tr. Vol. 5 at 1327-31). Jim Pavatt told Mr. Sinor he intended to seek a divorce, but also said he would step down as a deacon for the church. *Id.*

Mr. Sinor was good friends with Rob Andrew. *Id.* at 1331. People at the church were concerned about Jim Pavatt's relationship with Brenda Andrew, and Rob Andrew was concerned Brenda was having an extra-marital affair. (Tr. Vol. 5 at 1331-32). In the fall of 2001, Rob and Brenda Andrew were separated. Mr. Sinor testified that Rob Andrew telephoned him on one occasion and stated he feared for his life because his brake lines had been cut. (Tr. Vol. 5 at 1334). Mr. Sinor testified that Rob Andrew spoke with him about Jim Pavatt failing to provide paperwork on an insurance policy that Mr. Pavatt had written through Prudential for Rob and Brenda Andrew prior to the separation. (Tr. Vol. 5 at 1340). On the day before he was killed, Rob Andrew told Mr. Sinor he was fearful about going to his home. (Tr. Vol. 5 at 1340-41).

Craig Box was a lawyer in Enid, Oklahoma, who had represented Rob Andrew's family for years. In September 2001, Rob Andrew asked Box to represent him in a divorce. (Tr. Vol. 7 at 1873). Rob did not want the divorce, but was distraught and wanted reconciliation. (Tr. Vol. 7 at 1874). The parties were able to agree upon a temporary custody order, visitation, and child support, but there was a disagreement about the $800,000 life insurance policy with Prudential. (Tr. Vol. 7 at 1878). Mr. Box testified that by the time a hearing was held, Mr. Andrew was fearful for his life and wanted to make sure he could change the beneficiary on the policy. (Tr. Vol. 7 at 1882). On October 26, 2001, Rob told Mr. Box he was distressed because his brake lines had been cut. *Id.* He said he believed Brenda Andrew and Jim Pavatt were trying to kill him. *Id.*

Norman Richard Nunley testified he had been good friends with Rob and Brenda Andrew. (Tr. Vol. 5 at 1362-63). Beginning in 1997, Mr. Nunley had a romantic sexual relationship with Brenda Andrew, which lasted for three to six months. (Tr. Vol. 5 at 1364-65). Two weeks prior to November 20, 2001, the night Rob Andrew was killed, Brenda Andrew stopped by Mr. Nunley's home in Edmond. (Tr. Vol. 5 at 1368-69). Brenda Andrew told Mr. Nunley she was upset because her children were with Rob Andrew that night. *Id.* She also explained she was having a disagreement with Rob about the beneficiary of their insurance policy. (Tr. Vol. 5 at 1370). According to Mr. Nunley, Brenda Andrew was upset about temporary child support and not having the children for the Thanksgiving holiday. (Tr. Vol. 5 at 1373, 1376). The day after Rob Andrew was killed, Brenda telephoned Mr. Nunley and stated she and Rob had been shot the previous night and that Rob was dead. Brenda said two masked men came into the garage and shot her and Rob. (Tr. Vol. 5 at 1381-83).

Brenda Andrew did not attend Rob Andrew's funeral, and Mr. Nunley next heard from Brenda on February 28, 2002. (Tr. Vol. 5 at 1303, 1305). Brenda said she wanted Mr. Nunley to get in touch with her attorney because there was a written confession letter in her children's luggage that needed to be placed in the proper hands. (Tr. Vol. 5 at 1386). Apparently, in order to provide a motive, Brenda Andrew told Mr. Nunley that Jim Pavatt was irritated about Rob Andrew and his attorney badgering Mr. Pavatt at his place of business about his failure to appear in response to a subpoena in the Andrew's divorce case. (Tr. Vol. 5 at 1386-89).

Ronald Stump testified he was familiar with Jim Pavatt, Rob Andrew, Brenda Andrew, and Mike Sinor through his attendance at the North Pointe Baptist Church. Mr. Stump was good friends with Rob Andrew and used to eat dinner with him and spend time with the Andrews after church on Sundays. (Tr. Vol. 6 at 1527-31). On October 26, 2001, Rob Andrew telephoned Mr. Stump and said his brake lines had been cut. Later, Rob Andrew called and said his wife and kids were in the Norman Regional Hospital. (Tr. Vol. 6 at 1541-44). Rob Andrew said he was scared, and he feared for his life. On the day Rob Andrew was killed, he left a message for Mr. Stump saying that he had been busy but was looking forward to picking up his kids for the weekend. Rob Andrew expressed fear of Jim Pavatt and stated he was afraid that Brenda had finally found somebody who would kill him. (Tr. Vol. 6 at 1580-82).

Detective Barry Niles of the Oklahoma City Police Department met with Rob Andrew on November 19, 2001. Rob Andrew told Detective Niles that on the morning of October 26, 2001, he had backed out of his garage, but the brakes on his car did not feel right. He observed brake fluid leaking from the brake lines and then called Bob Howard Nissan. (Tr. Vol. 7 at 1775-77). Rob Andrew told Detective Niles he went to Brenda Andrew's house to pick up the kids, but she was not there. He then received a call on the phone at his office from a female telling him that

Brenda Andrew was in Norman Regional Hospital having a breakdown. Rob Andrew told Detective Niles he received two additional phone messages. The second message was from a male caller telling Rob Andrew to travel to the Norman Regional Hospital. Rob Andrew told Detective Niles that he had an $800,000 insurance policy, but that the beneficiary had been changed and he felt threatened. (Tr. Vol. 7 at 1782). Rob Andrew told Detective Niles he suspected Brenda was having an affair with Jim Pavatt, and he suspected Jim Pavatt might have had something to do with the brake line incident. (Tr. Vol. 7 at 1784-86).

Detective Niles tried to determine who had placed the calls to Rob Andrew and spoke to Janna Larsen, Jim Pavatt's daughter, on December 4, 2001. Ms. Larsen told Detective Niles her father had asked her to call Rob Andrew to tell him that Brenda was in Norman Regional Hospital. Mr. Pavatt said he did not want to make the call himself because he did not think Rob Andrew would believe him. Ms. Larsen placed the call. (Tr. Vol. 7 at 1795-96). Ms. Larsen told Detective Niles that later Mr. Pavatt called back and asked her if she had made the call and then asked her to have a male friend make a similar call. Ms. Larsen told Detective Niles she made a second call to Rob Andrew's office from the Conoco station nearby. (Tr. Vol. 7 at 1797). Detective Niles testified that Janna Larsen identified her own voice and said the second voice sounded like her father disguising his voice. Detective Niles tried to interview Brenda Andrew and Jim Pavatt, but could not locate them. (Tr. Vol. 7 at 1798-1801).

Bill Andrew, Rob Andrew's brother, testified Rob Andrew owned a shotgun. In the fall of 2001, they were planning a hunting trip for quail over Thanksgiving weekend, and Rob hoped to use his 16 gauge shotgun. Rob said Brenda would not let him retrieve it from the house. (Tr. Vol. 7 at 1922-24).

Bee Garrison lived two houses down from the Andrew home. On the night of November 20, 2001, Mr. Garrison was in the bedroom and heard a "boom and a scream and a boom and a scream" at about 6:30 p.m. (Tr. Vol. 8 at 2095-99). The tape of the 911 call placed from 6112 Shaftsbury on November 20, 2001 at 6:20 in the evening, ending at 6:26 p.m., was admitted into evidence as State's Ex. 34. State's Ex. 219, a live photograph of Robert Andrew was admitted without objection. (Tr. Vol. 9 at 2150).

Sergeant Roger Frost of the Oklahoma City Police Department responded to the call at 6112 Shaftsbury at about 6:15 p.m. on November 20, 2001. There was a black Nissan in the driveway with the door open and a red van in the garage. (Tr. Vol. 9 at 2164-69). Sergeant Frost observed a man on the floor of the garage with a shotgun wound to the chest and neck area. Paramedics arrived three (3) or four (4) minutes later. Sergeant Warren tried to help the man on the floor. He removed Brenda Andrew from the crime scene. He asked her who she had seen and what they looked like. He took her to the curb, and the fire department provided first aid to her arm. (Tr. Vol. 9 at 2171-75). Ms. Andrew said that around 3:30 in the afternoon she had picked up the kids from school. Rob Andrew was supposed to pick them up at about 6:15 that evening. (Tr. Vol. 9 at 2191). They were in the garage because the pilot light had gone out, and she asked Rob to help her light it. (Tr. Vol. 9 at 2192). Ms. Andrew stated they were confronted by two gunmen, all in black and wearing black ski masks. She said they only spoke six (6) or seven (7) words, but she could not recall what they were. As the intruders came around the corner, Rob Andrew turned and grabbed a sack of aluminum cans from the wall, but the men fired a shot. (Tr. Vol. 9 at 2175-76). She did not indicate who shot her. She said that after the shots were fired, the men ran out the garage door and went towards the back of the house towards the drainage ditch. (Tr. Vol. 9 at 2178-79). Ms. Andrew said the men had grabbed Rob's pants, but

she did not know if they stole anything. After the shots were fired, she went to the kitchen and telephoned 911. (Tr. Vol. 9 at 2194-97). Ms. Andrew received a gunshot wound in the back of the arm which appeared to be a contact wound. (Tr. Vol. 9 at 2199-2200). Ms. Andrew related most of these details to Sergeant Frost at the emergency room. (Tr. Vol. 9 at 2191). She was later transported to the Balding residence where her children had been taken. During the entire course of his interaction with Ms. Andrew, she never asked Sergeant Frost about the condition of her husband. (Tr. Vol. 9 at 2205).

The assistant chief medical examiner for the State of Oklahoma, Dr. Jeffrey Gofton, testified that he performed an autopsy on Rob Andrew's body on November 21, 2001. Mr. Andrew's death occurred November 20, 2001, at 6:20 p.m. Mr. Andrew suffered a shotgun wound to the left neck and a shotgun wound to the right chest. (Tr. Vol. 10 at 2432-34).

The cause of Mr. Andrew's death was two gunshot wounds. Dr. Gofton could not say which wound occurred first, but both would have been lethal. Mr. Andrew could have sustained life for several minutes, but it would have been less than ten. Mr. Andrew would have lost consciousness prior to the time he died. Dr. Gofton could not say how long he would have remained conscious after the gunshot wounds. It would have been a shorter period of time than the few minutes it took him to die. Mr. Andrew suffered damage to his lung, the aorta, and his liver. (Tr. Vol. 10 at 2434-59).

Because there were two shotgun wounds and separate injuries to different organs, Mr. Andrew's blood loss would have been quick. The more rapid the blood loss, the sooner the body would have lost consciousness. Mr. Andrew would have lost consciousness in less than five minutes, and he would have been going into shock, which would have shut down everything

including messages to his brain. (Tr. Vol. 10 at 2461-62). It was possible Mr. Andrew was conscious for less than a minute after he was shot. (Tr. Vol. 10 at 2465-66).

Roland Garrett, Homicide Detective for the Oklahoma City Police Department, became aware that Brenda Andrew and Jim Pavatt had been arrested by the FBI trying to come back into the United States from Mexico. Apparently, Mr. Pavatt and Brenda Andrew were traveling in a Chevy Beretta owned by Suk Hui Pavatt. Brenda Andrew's sister, Kim Bowlin, had taken possession of the luggage left in the car on February 28, 2002. From the vehicle, police obtained a Phillips Magnavox TV, VCR, a child's diary, and name change papers for Jim Pavatt, including three birth certificates. (Tr. Vol. 11 at 2679-2771).

Janna Larsen, Jim Pavatt's daughter, testified during the period from August to November of 2001, Jim Pavatt borrowed her 1996 Green Plymouth Neon in order to go to Brenda Andrew's house. (Tr. Vol. 11 at 2851-52). During the same period of time, she saw Mr. Pavatt with a revolver. He asked Janna if she wanted the gun because she had been contemplating obtaining one. (Tr. Vol. 11 at 2853).

On November 20, 2001, when Janna Larsen got home from work, her car was gone. Mr. Pavatt had a key. She tried to reach Mr. Pavatt on his cell phone but only obtained his voice mail. She left a message and asked him to call. He did not return the call. (Tr. Vol. 11 at 2854-2855). The next day, she learned Mr. Pavatt had left her a voice mail at work. He said he was going to pick up her car and get it fixed, and he would talk to her later. He returned her car on November 21, 2001, but the car had not been fixed. Mr. Pavatt said that on the night of November 20, 2001, he had been at Lake Thunderbird fishing. (Tr. Vol. 11 at 2858-59).

On November 21, 2001, the day after Rob Andrew's death, Janna called Jim Pavatt and left him a message. He called her right back and wanted to know if she wanted to go have

breakfast. They agreed to have lunch. During lunch, they discussed the fact that Rob Andrew had been murdered, and Jim Pavatt said he had been at Lake Thunderbird or Lake Draper getting drunk and fishing. (Tr. Vol. 11 at 2860-63).

On the weekend after November 20, 2001, Janna Larsen found a bullet in the floorboard of her car on the passenger side. She called Jim Pavatt and told him about it, and he told her to throw it away and not tell anyone. (Tr. Vol. 11 at 2867). Ms. Larsen put the bullet in her purse and gave it to the police on or about November 27, 2001. (Tr. Vol. 11 at 2869).

On November 24, 2001, Brenda Andrew was at Janna's apartment with Mr. Pavatt. Brenda asked Janna to place $25,000.00 from Brenda's checking account into Janna's account and $10,000.00 into Jim Pavatt's account. Janna agreed to do so, but ultimately did not. (Tr. Vol. 11 at 2882).

On November 25, 2001, Brenda Andrew came to Janna's apartment in a red minivan. She had Tricity and Parker and two dogs. The van was packed full of luggage. Brenda Andrew kept telling Jim to hurry up or they would not get across the border in time. She said they were going to Mexico. Brenda Andrew and Jim Pavatt left, with Mr. Pavatt driving his Ford F-150 pickup truck and Brenda driving the van. (Tr. Vol. 11 at 2889). Janna contacted the police on November 27, 2001. She then began cooperating with the police and the FBI. About two weeks later, Jim Pavatt called and asked Janna to send him money. She told Jim Pavatt her place of work was recording her calls and asked him to telephone back on her cell phone. She actually gave him an FBI agent's cell phone number. (Tr. Vol. 11 at 2894-96). Mr. Pavatt told Janna he needed $5,000.00 and also said that he was not guilty. (Tr. Vol. 11 at 2896-97).

Special Agent Kurt Stoner of the FBI became involved in the investigation of Brenda Andrew and Jim Pavatt's interstate flight to avoid prosecution in December 2001. (Tr. Vol. 12 at

3036). He came into contact with Janna Larsen on December 4, 2001, and worked with her for about two (2) months trying to locate Jim Pavatt in Mexico. Ms. Larsen would tell the FBI every time she was contacted by Jim Pavatt. Most of the calls were a request for money. (Tr. Vol. 12 at 3041-50).

Agent Stoner was surprised that Janna Larsen had reinitiated contact with her father after his arrest because for a period of time she was angry with him. Agent Stoner expressed the opinion that Jim Pavatt was involved in the murder of Rob Andrew. Based upon his experience in working with the FBI, he testified his opinion was "that he's directly involved." (Tr. Vol. 12 at 3059-60). The defense motion for a mistrial was overruled, but the jury was admonished to disregard the opinion of Agent Stoner. (Tr. Vol. 12 at 3062-65).

Questioned document examiner David Parrett testified that he had been with the Oklahoma County District Attorney's office for three (3) years. Mr. Parrett examined State's Ex. 222, which was the "confession letter" given to him by Mr. McCracken, a defense attorney representing Brenda Andrew. Mr. Parrett read the letter, which was supposedly from Jim Pavatt to Tricity Andrew, into the record. The letter stated that Jim Pavatt's friend shot Rob Andrew and that Jim Pavatt shot Brenda Andrew. The letter indicated Brenda had nothing to do with the crime and was angry that he had taken this action. (Tr. Vol. 12 at 3241-43). Mr. Parrett concluded that Jim Pavatt wrote the confession letter. (Tr. Vol. 12 at 3244). On cross-examination, Mr. Parrett stated he could not tell whether the letter was composed by someone else and that Mr. Pavatt had simply written it down. (Tr. Vol. 12 at 3342).

The defense's effort to call Zjaiton Wood as a witness was denied. Mr. Wood had written a letter confessing to the murder of Rob Andrew. The Court quashed the defense subpoena. (Tr. Vol. 13, Part B at 19-28). The defense's effort to call the detention officers who heard Mr. Wood

confess was also thwarted. The defense proffered that Officer Holisack and Ken Whiteburg had written reports concerning the confession. The Court denied the defense's motion to endorse these witnesses. (Tr. Vol. 14, Part A). The jury returned verdicts of guilty on both counts. (Tr. Vol. 14, Part B at 3617).

B. Second Stage Evidence

The State incorporated all the evidence from the first stage into the second stage of the trial. (Tr. Vol. 15 at 3671).

In addition, E.R. Andrew testified that Rob Andrew was his son. Mr. Andrew described the events of November 20, 2001, and conversations he had with his other son, Tom Andrew, concerning a report on the 10:00 o'clock news that said someone had been shot on Shaftsbury Street. Finally, the family learned that Rob was dead. (Tr. Vol. 15 at 3677). Mr. Andrew described attempting to get details from the police department and how eventually Brenda Andrew claimed Rob Andrew's body, but refused to let Rob be buried in Enid. He said that thousands of mourners attended Rob's funeral, but Brenda, Parker, and Tricity did not show up for the service. He described the extensive search and television newspaper reports and interviews asking for the safe return of the children. (Tr. Vol. 15 at 3678).

Mr. Andrew described how the children were found at the border on February 28, 2002, and indicated they were in a state of panic upon seeing Mr. Andrew and his wife. They began to chant "I want my mommy's family." The next day the children were taken to a medical doctor and a psychiatrist. The psychiatrist determined the children had suffered severe trauma and some sort of hypnotism programming. (Tr. Vol. 15 at 3678). The children were enrolled in a private Christian school because they had missed three (3) months of public school. Parker could not read and was held back in the first grade. Mr. Andrew described how he and his wife took the

children to school, dance lessons, cub scouts and doctor's appointments. He was resolved to see that those responsible for Rob Andrew's death were convicted and punished and would never walk free. (Tr. Vol. 15 at 3679).

Timothy Andrew testified that he was Rob Andrew's brother. Their mother and father had been married for fifty (50) years. Tim Andrew described how Rob Andrew had helped him through difficult times, including the occasion when Tim Andrew's twins had been born prematurely. According to Tim Andrew, Rob's humor kept the family going. (Tr. Vol. 15 at 3680-83). After Brenda had kicked Rob out of the house, Tim stayed with Rob on the night of November 6, 2001. The two of them took Parker and Tricity bowling, and Rob Andrew showed Tim a house he wanted to purchase in order to be close to his kids. A week later, Rob called and asked Tim to keep Tricity and Parker in the event something happened to Rob. On November 20, 2001, Tim learned his brother was dead. (Tr. Vol. 15 at 3684).

William Randall Andrew testified he was Rob Andrew's oldest brother. He explained that holidays were especially difficult for his family and that his parents struggle with doing what's best for Rob's kids. (Tr. Vol. 15 at 3685-86). Thomas Wayne Andrew testified he was Rob Andrew's youngest brother. He sponsored a photograph of Rob, State's Ex. 219, and then a photograph of Jim Pavatt with Brenda Andrew and the Andrew children. (Tr. Vol. 15 at 3687). (State's Ex. 219, 195 respectively). Thomas Andrew testified his family could not sleep at night and they cried every day. He attempted to tell Rob Andrew's children about their father, but they did not respond. (Tr. Vol. 15 at 3689).

For the defense, Willie Veteto testified that she was Jim Pavatt's mother. Jim was a gentle and kind child. He spent 18 years in the Air Force and received "awards and medals." She testified she did not believe Jim committed the crime and offered this as a reason to spare his

life. (Tr. Vol. 15 at 3692-94).Debra Vaughn asked the jury to spare Jim's life because she did not believe he committed the crime. (Tr. Vol. 15 at 3695-97). Justin Studebaker testified he did not believe he had committed the crime. (Tr. Vol. 15 at 3698-3704).

Norma Jean Zickefoose was a family friend of Jim Pavatt. She named her own son after Jim. She asked the jury to spare Mr. Pavatt's life because the Jim she knew would not be capable of committing the crime. She said he did not deserve what he was getting. (Tr. Vol. 15 at 3716-18).

Wade Veteto testified Jim Pavatt was his stepson. He married Jim's mother after Jim's natural father, an Arkansas Highway Patrolman, had been killed by a bank robber. Mr. Veteto testified Jim Pavatt was "a good kid." Mr. Veteto said to the jury that "if there is any mercy in your heart, please show it on my son. And if there ain't, I hope God will show mercy on you." (Tr. Vol. 15 at 3724).

In imposing a death sentence, the jury found the existence of the "heinous, atrocious, or cruel" aggravating circumstance and the "person committed the murder for remuneration or the promise of remuneration" aggravating circumstance. The jury rejected the continuing threat aggravator. (Tr. Vol. 15 at 3793-3794). (O.R. Vol. 11 at 2062-63).

Additional facts will be discussed as necessary to the errors addressed, *infra.*

PART D: PROPOSITIONS – ARGUMENTS AND AUTHORITIES

PROPOSITION ONE

MR. PAVATT WAS DENIED THE RIGHT TO CONFRONTATION AND CROSS-EXAMINATION IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION THROUGH PERVASIVE ADMISSION OF HEARSAY EVIDENCE. MR. PAVATT WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL, DIRECT-APPEAL AND POST-CONVICTION COUNSEL FOR FAILURE TO RAISE THE ISSUE.

Out of court statements attributed to Rob Andrew were admitted throughout the course of the trial. When defense counsel objected "to the continuous hearsay about what he did and where he went," the Court ruled ". . . your objection is well taken but right now it's overruled." (Tr. Vol. 6 at 1545-46). With the one exception noted above, trial counsel did not object inadmissible hearsay. Hearsay admitted in violation of Mr. Pavatt's rights can be summarized as follows:

1. Mark Sinor, the pastor at North Pointe Baptist Church, testified that Rob Andrew telephoned him and said he feared for his life because his brake lines had been cut. (Tr. Vol. 5 at 1334). Mr. Sinor testified that Rob Andrew said Jim Pavatt had not been willing to provide Mr. Andrew with the paperwork on his insurance policy. (Tr. Vol. 5 at 1340).

2. Richard Nunley testified that Brenda Andrew told him she had a disagreement with Rob Andrew about who was the beneficiary of the insurance policy. (Tr. Vol. 5 at 1370). Mr. Nunley was permitted to testify that Brenda Andrew was upset about child support and was not happy about Rob Andrew having the children for the Thanksgiving holiday in 2001. (Tr. Vol. 5 at 1373-76).

3. James Higgins, who had an affair with Brenda Andrew, testified that Brenda Andrew told him she stayed with Rob Andrew because of his money. Brenda Andrew told Mr. Higgins she wished Rob Andrew was dead so that she could get the money and go on with her

life. (Tr. Vol. 6 at 1469-70). Brenda Andrew told Mr. Higgins how much she hated Rob Andrew. (Tr. Vol. 6 at 1473-74). Mr. Higgins also testified about a long conversation he had with Rob Andrew about loving Brenda and wanting her back. (Tr. Vol. 6 at 1485).

4. Ronald Stump testified about conversations with Rob Andrew in which Rob Andrew stated he wanted to reconcile with Brenda Andrew and that he suspected Brenda Andrew was having an affair with Jim Pavatt. (Tr. Vol. 6 at 1541). Mr. Stump testified the day after Brenda kicked Rob Andrew out of the house, Rob said he was afraid that Brenda Andrew had finally found someone that would kill him. He expressed fear of Jim Pavatt. (Tr. Vol. 6 at 1550). Mr. Stump testified Rob Andrew told him he owned a shotgun, which Brenda would not give back to him. He said that he had spoken to Rob two or three times about the shotgun. Rob Andrew wanted to get the shotgun, first so that no one would get hurt and then so that he could go bird hunting. (Tr. Vol. 6 at 1554-55). Mr. Stump testified that Rob Andrew had said Jim Pavatt told him that if he thought Brenda Andrew was tough, it would be even tougher to deal with Jim Pavatt. (Tr. Vol. 6 at 1580).

5. Barbara Murcer-Green, one of Rob Andrew's co-workers, testified that Rob Andrew was fearful that James Pavatt was trying to kill him. (Tr. Vol. 6 at 1597).

6. Mary Anna Loper testified Brenda Andrew said she had been able to obtain custody of the children, but Rob was going to be able to put his brother on the $800,000.00 insurance policy. She testified Brenda Andrew said she was "pissed." (Tr. Vol. 6 at 1600-06).

7. Cynthia Balding testified that Brenda Andrew had told her Rob Andrew was driving himself crazy trying to find out where Brenda had hidden money. Brenda Andrew said her friend Jim had helped her hide the money from Rob Andrew. (Tr. Vol. 6 at 1612-14). Ms. Balding testified Brenda Andrew told her she did not want Rob Andrew to have a relationship

with his children, and on November 19, 2001, Brenda Andrew telephoned and said "I hate him! I hate him! I hate him!" (Tr. Vol. 6 at 1624-28).

8. Phillip Rogers, a service supervisor at Bob Howard Nissan, testified that on October 16, 2001, he received a telephone call from Rob Andrew. Mr. Andrew told Mr. Rogers his brake lines had been cut and said he thought somebody was "out to take my life." (Tr. Vol. 7 at 1735). Mr. Rogers testified Rob Andrew said he had received a call telling him it was important for him to go to Norman, Oklahoma. (Tr. Vol. 7 at 1736).

9. Detective Barry Niles of the Oklahoma City Police Department testified that Rob Andrew had told him that on October 26, 2001he had observed brake fluid leaking from his brake lines. He then received a phone call from a female telling him that Brenda Andrew was in Norman Regional Hospital having a breakdown. Rob Andrew said he had received two additional phone messages. One was from a male caller telling him to come to the Norman Regional Hospital. A second call was from a female indicating his wife was at the hospital. (Tr. Vol. 7 at 1777-80). Rob Andrew told Detective Niles he had an $800,000.00 insurance policy and probably had over one million dollars worth of total coverage. Rob Andrew told Detective Niles that the beneficiary on the $800,000.00 policy had been changed, and Rob Andrew felt threatened. (Tr. Vol. 7 at 1783-84). Detective Niles testified that Rob Andrew told him he suspected Brenda was having an affair with Jim Pavatt and that Jim Pavatt might have something to do with his brake lines being cut. (Tr. Vol. 7 at 1785-86).

10. David Head testified that he was a plumbing contractor who performed some work on the Andrew home. While he was there, he heard Brenda Andrew saying, in reference to Rob Andrew, that "she was going to have him fucking killed." (Tr. Vol. 7 at 1831).

11. E. Daniel Powers testified Rob Andrew told him that he was scared and said "I'm afraid my estranged wife and her boyfriend are trying to kill me." (Tr. Vol. 7 at 1839). Rob Andrew told Mr. Powers he was having difficulty changing the beneficiary on his life insurance policy and that he did not want Brenda Andrew to benefit from his death. (Tr. Vol. 7 at 1843).

12. Rod Lott testified Rob Andrew told him that Brenda Andrew had said she wished he was dead. He also testified that Rob Andrew told him that Brenda Andrew refused to return his shotgun. (Tr. Vol. 7 at 1849-50).

13. Bobby McDaniel, a marriage counselor that had worked with Rob and Brenda Andrew, testified that Rob Andrew told him his brake lines had been cut. Rob Andrew said he felt like he was being followed, and he was suspicious that Jim Pavatt was following him. Rob Andrew said he had received a phone call after his brake lines had been cut telling him he was needed at Norman Regional Hospital. (Tr. Vol. 7 at 1856). Rob Andrew told Mr. McDaniel that he had telephoned Mr. Pavatt, and Mr. Pavatt said he did not change the beneficiary on the insurance policy. Rob Andrew said that he had called Mr. Pavatt's supervisor and that Mr. Pavatt became furious. Rob Andrew told Mr. McDaniel that Jim Pavatt had said if you think you had trouble with Brenda, you haven't seen trouble until you deal with me. Rob Andrew said he was concerned about what Mr. Pavatt might be capable of doing. (Tr. Vol. 7 at 1858-60).

14. Craig Box, Rob Andrew's divorce lawyer, testified Rob Andrew said he did not want the divorce, he wanted to reconcile with Brenda Andrew. (Tr. Vol. 7 at 1874). Rob Andrew was fearful for his life and wanted to make sure he could change the beneficiary on his insurance policy. (Tr. Vol. 7 at 1879). Mr. Box testified that on October 26, 2001, Rob Andrew telephoned and stated he believed his wife and Mr. Pavatt were trying to kill him. (Tr. Vol. 7 at 1882-84).

Rob Andrew told Mr. Box that Brenda Andrew had practiced signing his name and bragged that she could sign Rob Andrew's name better than he could. (Tr. Vol. 7 at 1891-92).

15. Rob Andrew's brother, William Andrew, testified that Rob Andrew told him Brenda Andrew would not let him have his shotgun for a hunting trip in the fall of 2001. Rob Andrew said he had asked Brenda for the gun on a number of occasions, but she refused to let him have it. (Tr. Vol. 7 at 1924-25).

16. Ralph Burnett, one of Jim Pavatt's co-workers, testified he had received a telephone call from Rob Andrew on October 26, 2001. Mr. Andrew accused Jim Pavatt of cutting his brake lines. Rob Andrew said Jim Pavatt told him he could not change the beneficiary on his insurance policy. (Tr. Vol. 7 at 1986).

At the second stage of the trial, all evidence from the first stage was incorporated. (Tr. Vol. 15 at 3671). The hearsay evidence that pervaded the trial violated the Oklahoma Evidence Code and Sixth Amendment to the United States Constitution. Because the hearsay evidence involved both testimonial and non-testimonial hearsay, analysis of Mr. Pavatt's claims requires review under different standards. The evidence admitted through the testimony of Detective Niles concerning statements made by Robert Andrew was testimonial and subject to Sixth Amendment Confrontation Clause analysis. In *Davis v. Washington*, 547 U.S. 813 (2006), the Supreme Court explained:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. ***They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.***

Id. at 2273-74 (emphasis added).

All of the statements made by Robert Andrew to Detective Niles concerned past events and were not related to any "ongoing emergency." They fall clearly within the description of testimonial hearsay established by the Court in *Davis*. All of Agent Niles' testimony concerning these statements by Robert Andrew violated Mr. Pavatt's Sixth Amendment right to confrontation, as explained by the Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004).

> Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; ***and to police interrogations***. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.
>
> In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment.

Id. at 68 (emphasis added). Because *Crawford* was decided in 2004, prior to the filing of Mr. Pavatt's direct-appeal brief, appellate counsel was ineffective. Further, post-conviction counsel was ineffective for failing to raise an appellate ineffectiveness claim concerning appellate counsel's failure to raise the testimonial hearsay issue. (*See* Exhibit 5), Affidavit of Laura Arledge. Due to post-conviction counsel's ineffectiveness, this second application for post-conviction relief is Mr. Pavatt's first available opportunity to raise the issue. *See Hale v. State*, 1997 OK CR 16, 934 P.2d 1100; *Spears v. State*, No. PC-99-1099 (Oct 13, 1999) (unpub., copy attached as exhibit #20).

Mr. Pavatt's case is similar in many respects to the case of *Giles v. California*, 128 S. Ct. 2678 (2008). In *Giles*, the petitioner shot his ex-girlfriend, Brenda Avie, six (6) times causing her death, and then claimed self-defense. Giles fled the scene after the shooting, but was later

apprehended and charged with murder. In order to refute Giles' claim of self-defense, the State of California relied upon hearsay statements made previously by Avie. The Supreme Court explained:

> Prosecutors sought to introduce statements that Avie had made to a police officer responding to a domestic violence report about three weeks before the shooting. Avie, who was crying when she spoke, told the officer that Giles had accused her of having an affair, and that after the two began to argue, Giles grabbed her by the shirt, lifted her off the floor, and began to choke her. According to Avie, when she broke free and fell to the floor, Giles punched her in the face and head, and after she broke free again, he opened a folding knife, held it about three feet away from her, and threatened to kill her if he found her cheating on him. Over Giles objection, the trial court admitted these statements into evidence under a provision of California law that permits admission of out-of-court statements describing the infliction or threat of physical injury on a declarant when the declarant is unavailable to testify at trial and the prior statements are deemed trustworthy.

Id. at 2681-82.

The Court rejected the State of California's claim that Giles had forfeited his right to confront Avie because he had committed the murder for which he was on trial and determined there could be no forfeiture of confrontation clause protections upon this basis. The Court held that, pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), the confrontation clause requires that a defendant have the opportunity to confront the witnesses who give testimony against him or her, except in cases where an exception to the confrontation right was recognized at the time the Bill of Rights was drafted. The Court rejected the dissent's submission that *Crawford* recognized the doctrine of forfeiture of Sixth Amendment rights by wrong doing. The Court stated:

> We decline to approve an exception to the Confrontation Clause unheard of at the time of the founding or for 200 years thereafter.

Giles, 128 S. Ct. at 2693.

Crawford is instructive for another reason. In *Crawford*, the Court overruled *Ohio v. Roberts*, 448 U.S. 56 (1980), which held that the Sixth Amendment does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears "adequate indicia of reliability." *Id.* at 66. In *Crawford*, the Supreme Court overruled *Roberts* and held:

> *Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

Id. at 68. (emphasis supplied). Thus, Detective Niles' testimony concerning statements made by Robert Andrew was subject to Sixth Amendment protection, and was admitted in violation of Mr. Pavatt's constitutional rights.

The remaining hearsay, made to non-law enforcement officers, was admitted in violation of the most basic hearsay rules. No reliability determination was made upon the basis of Okla. Stat. tit 12, § 2804.1. None of the statements related purely to state of mind, and none of them could be considered dying declarations. The case is similar to *Shepard v. United States*, 290 U.S. 96 (1933), wherein the Supreme Court explained why a declaration by a homicide victim implicating the defendant, made three weeks prior to her death, was inadmissible hearsay. The Supreme Court reversed the conviction upon this basis. *Id.* at 104.

While the hearsay statements attributed to Rob Andrew by his friends and associates and his divorce lawyer may not have been "testimonial" in nature, and thus subject to Confrontation Clause analysis, they were definitely hearsay and inadmissible through basic application of the rules of evidence. Because trial counsel failed to object to the admission of this testimony, Mr. Pavatt received ineffective assistance of counsel in both stages of the trial. [2]

[2] In *Gonzales v. McKune*, 247 F.3d 1066, 1073 (10th Cir. 2001) (overruled on other grounds), the Court held that the failure to object to hearsay evidence can satisfy the first prong of an ineffective assistance of counsel claim under the doctrine of *Strickland v. Washington*, 466 U.S. 668 (1984).

Mr. Pavatt was prejudiced by counsel's failures. In *Stouffer v. Reynolds*, 214 F.3d 1231 (10th Cir. 2000), the Court explained the prejudice prong analysis that must be conducted in assessing an ineffective assistance of counsel claim under *Strickland*. The Court stated:

> The question is not whether counsel's ineffectiveness must be demonstrated by showing the trial would have resulted in a defense verdict, but whether the omitted evidence "creates a reasonable doubt that did not otherwise exist." Upon such a showing, constitutional error has been committed. In this case, it cannot be fairly said that the omissions and failures of trial counsel, while argumentatively explainable, do not raise a reasonable doubt in the guilty verdict.

Id. at 1234-35 (internal citations omitted). In Mr. Pavatt's case, without all of the hearsay evidence there was a reasonable doubt as to guilt, and as to punishment that did not otherwise exist.

Trial counsel also served as co-counsel on the appeal, and again the hearsay issue was not raised. As a result, Mr. Pavatt received ineffective assistance of appellate counsel. In *Smith v. Workman*, 550 F.3d 1258 (10th Cir. 2008), the Court explained:

> "In order to evaluate appellate counsel's performance, 'we look to the merits of the omitted issue.'" While counsel should not omit "plainly meritorious" claims, counsel need not raise meritless issues. Petitioner must show an "objectively unreasonable" decision by the appellate counsel as well as a "reasonable probability that the omitted claim would have resulted in relief."

Id. at 1268 (internal citations omitted). In Mr. Pavatt's case, appellate counsel failed to raise a clearly meritorious issue concerning trial counsel's failure to object to hearsay. Had such an argument been made, there is a reasonable probability that Mr. Pavatt would have obtained relief. As a result, Mr. Pavatt was denied effective assistance of appellate counsel.

Recently in *Hunt v. State*, 2009 OK CR 21, this Court reaffirmed its position disallowing testimonial hearsay. *See also Miller v. State*, 2004 OK CR 29, 98 P.3d 738; *Hanson v. State*, 2009 OK CR 13, _P.3d_; *Mitchell v. State*, 2005 OK CR 15, 120 P.3d 1196; *Folks v. State*, 2008

OK CR 29, _P.3d_; and *Thompson v. State*, 2007 OK CR 38, 169 P.3d 1198. In light of *Hunt*, to allow Mr. Pavatt's conviction and death sentence to stand, would violate the most basic rules of procedural fairness, and would be an arbitrary denial of a constitutional protection. In *Hunt* this Court held admission of the homicide victim's out of court statements in a 911 tape violated the defendant's confrontation clause rights:

> These accusatory statements, relating past events, would be the same as live testimony if Appellant had gone to trial for the assault on the decedent. Therefore, those portions of the 911 tape were inherently testimonial and subject to the confrontation requirement. . . .
> In the face of such an evidentiary error, the proper inquiry on appellate review is whether the appellate court has grave doubts that the outcome of the trial would have been materially affected had the error not occurred. We have just such doubts in this case.

Id., slip op. at 3, 4 (internal citations omitted).

In upholding the sufficiency of the evidence to establish the heinous, atrocious and cruel aggravating factor in Mr. Pavatt's case, this Court stated:

> Rob Andrew correctly suspected his wife was having an affair with the man he trusted as his insurance agent. He correctly suspected his wife and her lover of trying to wrest control of his life insurance away from him. He correctly suspected his wife and her lover of attempting to kill him several weeks before by severing the brake lines on his car. He confided in others that he was in fear of his life. Having separated from his wife, Rob Andrew was murdered as he returned to his family home to pick up his children for Thanksgiving holiday. From the evidence, a rational jury could have concluded, beyond a reasonable doubt, that Mr. Andrew had time to reflect on this cruel state of affairs before he died. The evidence supported this aggravating circumstance, and this proposition is denied.

Pavatt v. State, 2007 OK CR 19, 159 P.3.d 272, 295.

The "evidence" to which this Court referred was all inadmissible hearsay. In light of the decision in *Hunt,* the Court should vacate Mr. Pavatt's death sentence, which was premised in large part upon evidence admitted in violation of Mr. Pavatt's Sixth Amendment rights. It cannot

be concluded beyond a reasonable doubt this evidence had no impact upon the jury's decision to sentence Mr. Pavatt to death, and this application should be granted.[3]

PROPOSITION TWO

PROSECUTORIAL MISCONDUCT DENIED JAMES PAVATT A FAIR TRIAL AND VIOLATED HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS

A prosecutor's misconduct may "so infect a trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974). When prosecutorial misconduct negates a specific constitutional right, a "claim may be established without requiring proof that the entire trial was thereby rendered fundamentally unfair." *Mahorney v. Wallman,* 917 F.2d 469, 472 (10th Cir. 1990). The standard governing appellate review of closing arguments in the sentencing stage of a capital case is whether the comments might have affected the sentencing decision. *Coleman v. Brown,* 802 F.2d 1227, 1238 (10th Cir 1986). Some of the misconduct in closing argument has been previously raised, but this Court has not been directed to the pervasive misconduct identified below.

A. First Stage Victim Sympathy

Beginning with the first witness in the guilt innocence phase of the trial, the prosecutors improperly elicited victim impact testimony to prejudice the jury against Mr. Pavatt. The guilt case was dominated by the testimony of Rob Andrew's friends, marital and religious counselors, and family. Mark Sinor, Ronald Stump, Daniel Powers, Craig Box, Bobby McDaniel, and William Andrew relayed improper hearsay statements from Rob Andrew himself. They went beyond evidence of his knowledge about the affair between his wife and James Pavatt, and his

3 Mr. Pavatt raised an ineffective assistance of counsel claim based upon failure to object to the hearsay in his initial application or for post-conviction relief. (APCR at 61-64), but did not argue the effect of such evidence in the second stage of the trial. The Court rejected the argument in a footnote, which did not address the scope or effect of the inadmissible hearsay. (*Pavatt v. State,* No. PCD-2004-24 at p.7).

fears they intended to harm him. Their testimony was presented solely to establish sympathy for Rob Andrew – the man and his life.

Mark Sinor, Rob Andrew's "real good friend" (Tr. Vol. 5, at 1331) had an "ongoing counseling relationship with Rob." (Tr. Vol. 5, at 1331) He testified how Rob loved his wife and wanted reconciliation. (Tr. Vol. 5, at 1332, 1333). He last spoke to Rob on the afternoon he was killed, and Rob still spoke of his love of Brenda and his excitement over spending time with his children over the Thanksgiving holiday. (Tr. Vol. 6, at 1340-1341). Ronald Stump, Rob Andrew's "very good friend", rode mountain bikes with Rob, talked to him "constantly", and had Bible study with him every morning. (Tr. Vol. 6, at 1530, 1540, 1541) He had a Bible study on October 26th and on November 20th as Rob Andrew sat in the driveway of his home. The last Bible study involved a verse chosen by Rob Andrew. Stump knew Rob Andrew loved Brenda "very much" and wanted to reconcile, (Tr. Vol. 6, at 1541, 1551) and knew he was looking forward to picking his children up for a long weekend. (Tr. Vol. 6, at 1549). Craig Box represented Rob Andrew in his divorce. Box described Rob as being young and in good health - a man who decided not to fight for temporary custody of his children because it might be detrimental to the children. (Tr. Vol.7 at 1884, 1891) He said Rob Andrew did not want a divorce, and wanted to make sure his children would benefit in the event of his death. (Tr. Vol.7 at 1873, 1891).

Rob Andrew's brother, William, gave commentary throughout a video recording of Rob on a hunting trip a year prior to his death. He pointed and described how his brother was sitting in a rocking chair, firing his shotgun, riding on an all terrain vehicle, and hunting quail along the river bottom with James Pavatt. The prosecutor's use of the evidence in this way was intentionally designed to inject prejudicial victim sympathy evidence into the jury's

guilt/innocence determination, resulting in manifest prejudice. Photographs of Rob Andrew happily smiling in the company of his wife Brenda (States' exhibit's #184, and #205) were also introduced. A studio photograph of Rob Andrew (State's exhibit # 219) was introduced without a sponsoring witness. The true purpose of all this evidence was to inflame the jury against Jim Pavatt and to have sympathy for Rob Andrew and his extended family and friends.

This improper presentation was not reigned in by the court. *Thornburg v. Mullin,* 422 F.3d 1113, 1136 (10th Cir 2005). The prosecution's circumstantial case was bolstered by the injection of sympathy for Rob Andrew to Mr. Pavatt's prejudice. This application should be granted for this violation, individually and in combination with other prosecutorial misconduct.

B. Use of Bullet Evidence

On March 14, 2002, Oklahoma City Detective Gary Damron wrote a letter to the FBI requesting a "comparative lead analysis" on the three (3) live .22 caliber rounds recovered from the Gigstad home, the live .22 caliber round from the Larsen automobile, and the projectile recovered at the crime scene. (Exhibit #1; letter from Damron to FBI lab).

On May 7, 2002, Charles Peters sent Detective Damron his "Report of Examination" in which he determined that the projectile from the crime scene was "analytically distinguishable" from all of the live rounds. (Exhibit #2; FBI Report of Examination; Exhibit #3; William Tobin affidavit).

On July 18, 2002, Oklahoma City Police Sergeant Gregory Karim, a firearm and tool mark examiner, testified that the "copper washed projectile" from the scene is by weight and design "consistent" with 22 caliber long rifle rounds made by CCI. (PH Tr., Vol. 7 at 1734)

On April 14, 2003, Gordon Robertson of the OSBI was endorsed as an additional prosecution witness. (OR Vol 5, at 889). Then on May 2, 2003, Charles Peters with the FBI was

endorsed as an additional prosecution witness. (OR Vol 6 at 1019) On May 15, 2003 Fern Smith received Charles Peters' raw data. (Exhibit #4; letter from Peters to Smith). Next on July 25, 2003, Charles Peters of the FBI and Gordon Robertson of the OSBI were identified by the prosecution as witnesses on "ballistics". (O.R. Vol. 9, at 1723)This course of events clearly shows that the prosecution knew both by preliminary hearing and prior to the August 8, 2003 motion hearing, in which the defense was requesting a *Daubert* hearing on the comparative lead bullet analysis, that Peter's report was helpful to the defense and contradictory to Karim's testimony at preliminary hearing. Despite this knowledge, the prosecution argued that no *Daubert* hearing was required for lead analysis, because it is ***not*** a novel issue. (M.Tr. of 8-8-03, at 79) Prosecutor Smith stated:

> Mr. Charles Peters with the FBI has been doing this kind of work for years and years, and he has testified as an expert in this very field making these exact same kinds of opinions using the same technology with advancements over the years. **He is an expert. His methodology is correct...**

(M.Tr. 8-8-03, at 80; emphasis added) Smith then indicated that she provided "pages and pages and pages of reports" concerning Peters' lead composition analysis, but said:

> We also asked our chemist to analyze the fragments in the door but I don't have the report in front of me, but **I don't believe that he was able to make a conclusive analysis as to that bullet...he's going to say he can't make that determination.**

(M.Tr. 8-8-03 at 83; emphasis added).

Smith knew that Peters had made a conclusive determination – a conclusive determination that the bullet fragment at the scene **did not match** the live rounds from the Gigstad home or James Pavatt's daughter's car. She never intended to call Peters as her witness, even though during voir dire she said otherwise. (Tr. Vol 1 at 130). Instead of calling the expert whose credentials she found unassailable at the Daubert hearing, she turned to Gordon

Robertson. Robertson admitted he did no testing on the live .22 caliber rounds. He merely looked at them. (Tr. Vol. 13 at 3380, 3382). The prosecution asked him to determine if the projectile found in the garage door (State's #183) was from the same manufacturer as the other .22 caliber rounds. (Tr. Vol. 13 at 3385). Based upon the color, the caliber, the hollow point design, and the concave base, he said the projectile was "consistent" with the live .22 caliber rounds. (Tr. Vol. 13 at 3385).[4]

Knowing that their FBI expert had not made a match between the projectile and the live rounds, the state each overreached in order to mislead the jury. In the guilt stage closing argument, Assistant District Attorney, Gieger stated:

> You know what else you know really beyond any doubt that's reasonable? Is that whoever carried that gun over there also carried those live rounds that ***match up*** to the crime scene as well. Oh, and by the way, ***match up*** to Janna Larson's car. And the only one who had access, from the testimony you've heard, to Janna Larson's car that night was Jim Pavatt..."

(Tr. Vol 14, at 3521; emphasis added).

In the final guilt stage argument, Assistant District Attorney Fern Smith first stated that Robertson examined the bullet fragment from the door with the live rounds from Larsen's car and the Gigstad attic and that it was "consistent", (Tr. Vol. 14, at 3588), but then stretched her argument to unconstitutional lengths by offering this:

> A .22 bullet was found in that car that ***matched*** the ones in the Gigstad's attic and the door at Rob Andrew's house.

(Tr. Vol. 14 at 3602 ; emphasis added)

Presenting misleading evidence and making misleading arguments offend the Constitution. *Napue v. Illinois*, 360 U.S. 264 (1959); *Paxton v. Ward*, 199 F.3d 1197, 1217-1218

[4] The determination that the bullets and the projectile were from the same manufacturer based upon a visual examination of the color of the copper jacket could not scientifically be made. (Exhibit # 4, Affidavit of William Tobin).

(10th Cir 1999); *Mitchell v. Gibson,* 262 F.3d 1036, 1064 (10th Cir. 2005)(Oklahoma County prosecutor's misleading argument misrepresenting DNA results struck a heavy blow to public's confidence in the judicial system). The presentation of the testimony of Robertson concerning the bullet fragment being consistent with the .22 rounds was misleading, when the prosecutors knew that their own FBI expert had found it to be inconsistent with the other .22 caliber rounds. Presenting the evidence and then arguing that there was a "match", directly violated the foregoing cases and the American Bar Association Standards for Criminal Justice. *ABA Standards for Criminal Justice Prosecution Function and Defense Function, Std.3-5.6 Presentation of Evidence (3d.Ed. 1993)* provides:

> (a) A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of falsity.

ABA Standards for Criminal Justice Prosecution Function and Defense Function, Std. 3-5.8 Argument to the Jury (3d.Ed. 1993) provides:

> (a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.

Additionally, in the commentary to the ABA standard, the "intentional misstatement of evidence" is noted to be "particularly reprehensible".

There was no physical evidence that tied James Pavatt to the garage where Rob Andrew was killed. In order to create evidence where none existed, the prosecution ignored the evidence provided by its own FBI expert, presented "junk science" testimony from an OSBI firearm and tool mark examiner, and then misled the jury into believing that their expert had testified there was a "match" between the projectile at the scene and the bullet found in the car that James

Pavatt drove the night of the offense. In the process they took a position directly contrary to the FBI evidence in their possession. These actions led to a fundamentally unfair trial.

Prejudice clearly exists. The State used the ballistics evidence from Gordon Robertson to place Mr. Pavatt at the scene. Exculpatory information remained hidden because trial counsel failed to turn over his complete file to post-conviction counsel – a file which contained the Peters information and the helpful conclusion. (See Exhibit #5, Affidavit of Laura Alredge). Mr. Pavatt has been denied the opportunity to present this issue to this Court through no fault of his own. This issue should now be considered and the application should be granted.

C. <u>Prosecution's Fundamentally Inconsistent Evidence and Theories</u>

The due process clause of the United States Constitution is violated when there is a reasonable probability that the prosecutor's use of inconsistent, irreconcilable theories renders a conviction unreliable. *See Williams v. Coyle,* 260 F.3d 684, 706-707 (6th Cir. 2001); *Brady v. Maryland,* 373 U.S. 83 (1963). The presentation of false testimony by the prosecution violates the Due Process clause. *Napue v. Illinois,* 360 U.S. 264 (1959) When the prosecution presents conflicting evidence or theories in separate trials of co-defendants, or in separate trials involving a witness, the evidence presented cannot be true at each trial. The inconsistency establishes the Due Process violation.

On February 7, 2002 Gregory E. McCracken, attorney for Brenda Andrew, wrote a letter to District Attorney Wes Lane, in which he stated he had a letter of confession from James Pavatt written to Tricity Andrew. He offered the letter in exchange for dismissal of the charges against Brenda Andrew. (Exhibit #6) On February 8, 2002 Wes Lane responded to the McCracken letter, by stating:

> [M]y better judgment tells me that Mr. Pavatt and Mrs. Andrew have concocted this letter in an effort to get her out of trouble."

(Exhibit #7)

At Mr. Pavatt's trial (August 25, 2003 – September 16, 2003) the "confession letter" was championed by the prosecution as direct evidence of Mr. Pavatt's guilt. While at Brenda Andrew's trial, (June – July, 2004) the "confession letter" was characterized by the prosecution as "concocted."Fern Smith and Gayland Gieger, the prosecutors in both the Pavatt trial and the Andrew trial treated the letter differently in the separate trials. In Mr. Pavatt's trial the jury was told that direct evidence is – "the letter that Mr. Pavatt wrote confessing to this crime." (Tr. Vol. 14B, at 3576) The prosecutors argued: "in the letter the defendant admits that he shot Brenda, so why is that in dispute?" (Tr. Vol. 14B at 3587) The jury was encouraged to "read the letter" to prove that Mr. Pavatt wanted Rob Andrew dead. (Tr. Vol. 14B at 3595) The prosecutors argued:

> Mr. Arnett says the State of Oklahoma has never placed this defendant at the scene. Read the letter. He tells you right where he was when this was committed. He was right there shooting Brenda in the arm, just like the evidence shows you that he was.

(Tr. Vol. 14B, at 3599)

The prosecutors dramatically shifted at Brenda Andrew's trial. In Andrew's trial, Gieger stated the "confession letter" is:

> "***concocted***" ... in the State's opinion. It goes to show there is no truth to what his letter says.

(Exhibit #9; BEA Tr. Vol. 16 at 3797) (emphasis added). The prosecutor concluded that "Brenda Andrew asked her boyfriend James Pavatt to write that letter;" (Exhibit #9; BEA Tr. Vol. 17 at 3894) and, she "convinced" and "helped" Mr. Pavatt to write the letter. (Exhibit #9; BEA Tr. 17, Vol. at 3895) Finally, after the defense for Andrew argued that the State had used the "confession letter" to convict James Pavatt, Gieger stated:

> And [Brenda Andrew's attorney talked about how offended he was the State of Oklahoma would use that letter to convict Jim Pavatt and now act like it's not true.
>
> ***The State of Oklahoma has never, ever believed that letter was anything but just what Ms. Smith told you, a concoction.***

(Exhibit #9; BEA Tr Vol 17 at 4105 (emphasis added). Again the prosecutor argued:

> Jim Pavatt's hand absolutely wrote this letter. No doubt about it. The words came from that woman right over there. It is a **concoction.**
>
> ***The State of Oklahoma did not argue this letter was truthful in the Pavatt trial and convict him using this letter.***

(Exhibit #9; BEA Tr. Vol. 17 at 4120 (emphasis added).

The same prosecutors asserted the "confession letter" was true in Mr. Pavatt's case and was "concocted" and "bogus" and "untruthful" in Brenda Andrew's case. Geiger was directly dishonest in telling Jim Pavatt's jury that the letter was direct evidence of guilt, when the state believed the letter was false. The use of inherently factually contradictory theories violates the principles of Due Process. *Smith v. Groose,* 205 F.3d 1045, 1052 (8th Cir. 1999); *Thompson v. Calderon,* 120 F.3d 1045, 1059 (9th Cir. 1997) (defendant prejudiced by due process deprivation that infected the conflicting prosecutions), rev'd on procedural grounds, 523 U.S. 538 (1998).

Prosecutorial misconduct in argument was raised in direct appeal and supplemented in the initial application for post-conviction relief. The additional prosecutorial misconduct addressed above invades specific Constitutional rights which require relief on their own. A fair trial analysis requires that the prosecution's actions and commentary be considered cumulatively and in the context of the trial . *Bland v. Sirmons,* 459 F.3d 999 (10th Cir 2006):

> In death penalty cases, we review whether the improper comments as a whole so infected the trial with unfairness as to make the resulting conviction a denial of due process or rendered the sentencing fundamentally unfair in light of the heightened degree of reliability demanded in a capital case.

Id. at 1029.

In this case there was a series of intentional prosecutorial actions that undermined the fairness of Mr. Pavatt's trial and the reliability of his death sentence. The death penalty was not a foregone conclusion. The pervasiveness of the prosecutorial misconduct impacted specific Constitutional rights and when viewed in context amounted to cumulative Due Process error. This injustice requires relief. *Donnelly v. DeChristoforo,* 416 U.S. 637 (1974); *Cargle v. Mullin,* 317 F.3d 1196 (10th Cir 2003). While some of this improper commentary in closing argument has previously been raised, this Court has not had the opportunity to review the improper prosecutorial argument along with the other claims of prosecutorial misconduct in order to analyze the effect on the outcome of Mr. Pavatt's trial. It should do so now, and grant the post-conviction application.

PROPOSITION THREE

THE WRONGFUL ADMISSION AND DISPLAY, IN BOTH STAGES OF THE TRIAL, OF GRUESOME CRIME SCENE PHOTOGRAPHS OF ROB ANDREW, JUXTAPOSED WITH THE WRONGFUL ADMISSION, DURING BOTH STAGES OF THE TRIAL, OF PHOTOGRAPHS AND A VIDEO RECORDING OF ROB ANDREW IN LIFE DEPRIVED MR. PAVATT OF A FAIR TRIAL IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND INJECTED IMPROPER VICTIM IMPACT EVIDENCE INTO THE GUILT PHASE OF THE TRIAL.

A. Gruesome Photographs: First Stage

Direct appeal counsel argued that gruesome photographs were introduced into evidence, but failed to explicitly argue that the photographs were unnecessarily cumulative and repetitive. Because Mr. Pavatt never contested the fact that Rob Andrew died from wounds suffered from two shotgun blasts, nor disputed the manner of death. The introduction of multiple gruesome color photographs of Mr. Andrew's body taken from different locations and from different angles and distances was extremely prejudicial. The photographs showed the deceased

from a distance and up close; with his entire body in view and with portions of his body in view; with his shirt manipulated to view the wounds on his torso; and with his body turned to see the bloody pool surrounding his wounds. (State's Ex. 58, 63, 64, 65, 66, 69, 73, 74, 75, 76, 77). (Tr. Vol. 9 at 2295). The prosecutor provided no reason the photographs were necessary to prove a contested issue.

The State's purpose in displaying these gruesome and cumulative photographs was to inflame the jurors' passions against Mr. Pavatt and to garner sympathy for Rob Andrew. The prosecutor displayed these photographs during closing argument and said "This was the first shot to Rob Andrew. This is what happened to him. This is the way he looked after he was shot the first time when Brenda Andrew was making that 911 call. And this was the second shot. Mr. Pavatt saw this wound as well. This is an intentional, malice aforethought murder." (Tr. Vol 14B at 3614-15).

The photographs were not relevant to whether the killing was intentional. The photographs were not relevant to the cause of death or to the kind of weapon used. The gruesome color photographs served to illustrate the vacant death stare and bloody mess associated with Rob Andrew's death. In order for gruesome photographs to be admissible, they must be relevant to some fact at issue, and their relevance must outweigh their prejudicial effect. OKLA. STAT. tit. 12, §§ 2402, 2403. *Smith v. State,* 1987 OK CR 94, 737 P.2d 1206, 1210 *Nguyen v. State*, 1988 OK CR 240, 769 P.2d 167 (overruled on other grounds). When photographs of a dead victim are gruesome and carry the danger of unfair prejudice, they are not admissible unless they are significantly relevant to some material issue and would reasonably assist the jury in the determination of that issue. The trial court must find that this relevancy outweighs the danger that the jury will allow its reason to be overcome by the emotional impact of the gruesome

photographs. *Oxendine v. State,* 1958 OK CR 104, 335 P.2d 940, 943 The introduction of gruesome photographs after all issues of relevance have been resolved constitutes reversible error. *See Mann v. State,* 1988 OK CR 7, 749 P.2d 1151, 1156

There are instances when the admission of prejudicial evidence constitutes a denial of fundamental fairness and denies a defendant due process of law. *Darden v. Wainwright,* 477 U.S. 168, 180, 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). See U.S. CONST. amend. VIII and XIV.

B. <u>The Photographs and Video Recording of Rob Andrew in Life.</u>

Against the backdrop of the admission of needlessly cumulative gruesome photographs of Rob Andrew in death, the prosecution successfully admitted four (4) photographs and a video recording of Rob Andrew in life in the guilt phase of the trial. The prosecution presented duplicative evidence that Rob Andrew owned a 16 gauge shotgun that had been at the home of Brenda Andrew; that Brenda Andrew had not allowed her husband to retrieve the shotgun; and that the shotgun was not found after Rob Andrew's death. (Tr. Vol. 6 at 1554-55; 1512-13; Vol. 7 at 1849-50). Rob Andrew's brother, William Andrew, described a hunting trip a year before Rob Andrew's death. (Tr. Vol 7 at 1923-1932). The prosecution, in a thinly concealed guise to show Rob Andrew in life, successfully admitted a video recording of that same hunting trip from the year prior to Rob Andrew's death. (Tr. Vol. 7 at 1931-32). (State's Ex. 118). The court admitted the video recording, without explaining why it overruled trial counsel's objections. (Tr. Vol. 7 at 1932). The prosecutor argued that the videotape showed Mr. Pavatt firing Rob Andrew's gun, (Tr. Vol. 14 at 3587); however, during William Andrew's testimony, he repeatedly stated that James Pavatt was only shooting his own gun in the video. (Tr. Vol. 7 at 1928; 1931-32).

This video recording of a happier time in Rob Andrew's life was especially prejudicial. The jury viewed a scene of Rob Andrew seated by James Pavatt in front of a roaring fire in the company of his hunting buddies in William Andrew's log cabin on the night before the hunt. They saw Rob Andrew the following morning preparing for the morning hunt. They saw him loaded into an all terrain vehicle with three of his friends, smiling and waving at the camera as they proceed to hunt on a beautiful sunny Oklahoma winter day. They saw him throwing skeet for the other hunters to practice their shooting. They saw him fire his shotgun. They saw James Pavatt and him following behind the bird dogs along the South Canadian River bottom. Throughout the recording, the jury heard the witness sponsoring the exhibit, the victim's brother, William Andrew, give an emotional dialogue which maximized the already prejudicial effect of the video: "That's my brother right there. That's my Rob in that rocking chair." (Tr. Vol. 7 at 1933). "There he is again. There's Rob. There's Rob. He's not shooting his gun here. I don't know whose he's shooting. That's Rob's gun there that was just handed to him. The one he's holding now, in that pink shirt, is his shotgun. There's Rob right there. He's got his gun right there with it broke open. That's Rob. That's Jim Pavatt beside Rob." (Tr. Vol. 7 at 1934).

In addition to the video recording of Rob Andrew in life, four (4) other live photographs of Rob Andrew were admitted during the guilt phase of the trial. One 8 X 11 studio photograph was admitted during the first phase of the trial without a sponsoring witness. (Tr. Vol 9 at 2150); (State's Ex. 219). Rob Andrew's driver's license photograph was introduced along with other contents of his wallet. (Tr. Vol. 9 at 2261); (State's Ex. 46). The third photograph was a smiling shot of Rob Andrew and his wife Brenda Andrew. (Tr. Vol. 12 at 3094); (State's Ex. 184). The fourth photograph, one of Rob and Brenda Andrew, was included in the materials that were compiled from Rob Andrew's computer. (Tr. Vol. 12 at 3112-13); (State's Ex. 205). The

sole purpose in the introduction of this record of Rob Andrew's life was to encourage the jury to allow its sympathy for the victim to sway its reasoned judgment concerning whether Mr. Pavatt was guilty or not.

This Court has long recognized the potentially prejudicial impact of photographs taken of a homicide victim prior to death. In *Boutwell v. State*, 1983 OK CR 17, 659 P.2d 322, 326 (Okla. Crim. App. 1983) (overruled on other grounds), the Court condemned the admission of such photographic exhibits stating:

> We fail to see the relevancy of these exhibits because the victim's identity was not at issue. With increasing frequency prosecutors in this state have been introducing for no relevant purpose photographs of the victims taken when they were alive. This practice should cease as it has little bearing on the issues of guilt or innocence to be decided by the trier of fact.

In *Staggs v. State,* 1991 OK CR 4, 804 P.2d. 456, 458 (Okla. Crim. App. 1991) (superseded by statute), the Court held that "where there is no purpose in introducing such pictures into evidence, such admission invokes the sympathy of the jury and constitutes error." Live photographs of deceased victims are inadmissible under Oklahoma law "unless they are relevant to some material issue and their relevancy outweighs the danger of prejudice to the defendant." *Thornburg v. State,* 1999 OK CR 32, 985 P.2d 1234, 1244 (Okla. Crim. App. 1999).

Petitioner recognizes that this court assessed the admission of a single live photograph introduced under OKLA. STAT. tit.12, § 2403 (2001) in connection with the initial Application for Post-Conviction relief. However, while the introduction of State's exhibit # 219 was presumably pursuant to this statute, the additional photographic and video recording of Rob Andrew in life cannot be justified by the same statute.

Amended § 2403 does not address the admission of State's Exhibits 118, 46, and 205 and does not rectify the improper admission of State's Exhibit 219. The admission of the four (4)

photographs and the video recording, all capturing Rob Andrew in life, rendered Mr. Pavatt's trial fundamentally unfair, depriving him of Due Process of law. *See e.g.*, D*onnelly v. DeChristoforo,* 416 U.S. 637, 94 S. Ct. 1868, 40 L.Ed.2d 431 (1974); *Darden v. Wainwright,* 477 U.S. 168, 106 S. Ct. 2464, 91 L.Ed.2d 144 (1986). Both direct appeal counsel and post-conviction counsel were ineffective for failing to raise the issues fully surrounding the impermissible use of photographic and video evidence. Post-conviction relief should be granted.

C. <u>Gruesome Photographs: Second Stage</u>

The prosecution incorporated all of the evidence presented in the first stage of Mr. Pavatt's trial into the second stage. (Tr. Vol. 15 at 3671). It is in the context of the prosecution's quest for the death penalty that the true motive behind the introduction of the gruesome crime scene photographs can be seen. Although direct appeal counsel raised in general the argument concerning the photographs, this Court was not directed to the prosecutor's inflammation of the jury with them:

> I submit to you when you read Instruction No. 5, it defines the terms heinous, atrocious or cruel, that you look at the photographs of Rob Andrew' body as he lay on the garage floor. And we discussed in the voir dire in the first stage of the trial that we were going to have to ask you to look at unpleasant photographs. And you don't have to dwell on them. We know you don't want to. But it's necessary for you to look at them and you all agreed that you would and that's part of your job is to look at those photographs and to help you make the determination as to whether or not the death of Robert Andrew was heinous, atrocious or cruel as Rob laid [sic] dying on the floor, and you look at the photographs and you'll see him there. And look at the wound in his side. Look at the wound in his neck.

(Tr. Vol. 15 at 3740-41).

The prosecutor then reminded the jury that they could consider all of the evidence they heard during the first stage of the trial as well as the second stage, but that they could also "consider sympathy or sentiment for the defendant in determining whether to impose the death

penalty." (Tr. Vol. 15 at 3753). She then questioned why the jury would consider any sympathy for the defendant by stating:

> The defendant didn't consider any sympathy or any sentiment for Rob Andrew when Rob Andrew was executed. I submit to you that this defendant deserves from you the same sympathy and sentiment that he gave to Rob Andrew when Rob Andrew was executed lying in pain on that garage floor needlessly murdered.

(Tr. Vol. 15 at 3753). In the final argument by the prosecutor, she ramped up the display of the gruesome photographs by stating:

> Mr. Arnett says to you the State of Oklahoma has not proven its case that Rob Andrew suffered serious, physical abuse. Is this (Display Photo) serious, physical abuse? Is this (Display Photo) serious, physical abuse? Is this (Display Photo) serious, physical abuse?

(Tr. Vol. 15 at 3776).

The gruesome photographs admitted and displayed by the prosecution in the second stage were not relevant to show whether Rob Andrew consciously suffered prior to his death. The Tenth Circuit has recognized that "[w]hen a victim dies or loses consciousness early on in an assault, photographs of all of [his] injuries might involve irrelevant and/or unduly prejudicial material at the penalty phase, since the [heinous, atrocious or cruel] aggravator focuses on the conscious suffering of the victim." *See Willingham v. Mullin,* 296 F.3d 917, 929 (10th Cir. 2002) (citing *Powell v. State,* 1995 OK CR 37, 906 P.2d 765, 780 (Okla. Crim. App. 1995). Here, the prosecution argued the photographs showed "serious physical abuse." The prosecution equated the photographs with the vague language that the murder was "especially heinous, atrocious, or cruel." This tactic cemented in the minds of the jury that what they had seen was enough.

Faced with a similar claim in *Spears v. Mullin,* 343 F.3d 1215 (10th Cir 2003), the Circuit Court found that photographs showing the victim's wounds, swollen face and black eye rendered the second stage of the trial fundamentally unfair. Here, the gruesome photographs offered no proof that Rob Andrew suffered serious physical abuse prior to his death. The jury was misled in

its finding of the aggravating circumstance that the murder was "especially heinous, atrocious, or cruel."

Mr. Pavatt's right to a reliable capital sentencing process was violated by the admission and improper use of the gruesome photographs of Mr. Andrew in death. The "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Zant v. Stephens,* 462 U.S. 862, 888, 103 S. Ct. 2733, 77 L.Ed.2d 235 (1983) (quoting *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1982)). The sentence imposed should have reflected a reasoned, moral response to the defendant's background, character, and crime, rather than mere sympathy or emotion. The gruesome photographs created an impermissible risk that the death sentence was based on considerations totally irrelevant to the sentencing process in violation of *Zant.* This error focused the jury's attention on the bloody scene in which Rob Andrew's body was found, which should not have been considered in deciding whether the prosecution had proved beyond a reasonable doubt that the murder was especially heinous, atrocious, or cruel.

Mr. Pavatt's constitutional rights to due process of law and a fair and reliable sentencing trial under the Eighth Amendment to the U.S. Constitution were infringed. Accordingly this application for post-conviction relief should be granted.

PROPOSITION FOUR

FAILURE TO PROVIDE AN ADEQUATE INSTRUCTION THAT INFORMED THE JURY THAT IT MUST FIND "CONSCIOUS PHYSICAL SUFFERING" AS A FACT BEYOND A REASONABLE DOUBT BEFORE CONCLUDING THAT A MURDER WAS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" DEPRIVED PETITIONER OF HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL, HIS EIGHTH AMENDMENT RIGHT TO A RELIABLE SENTENCING DETERMINATION, AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

This Court concluded on direct appeal that the evidence at Mr. Pavatt's trial "tended" to show that Rob Andrew suffered serious physical abuse and that he was conscious for several minutes prior to death. However, there is no assurance that the jury reached a similar conclusion beyond a reasonable doubt. The jury had no guidance that "conscious physical suffering" was a required element of the aggravating circumstance "especially heinous, atrocious, or cruel." In fact, the jury was given no instruction defining what is required for "serious physical abuse" to exist. And, without a narrowing instruction to sufficiently channel the sentencer's discretion, there is a grave risk of arbitrary and capricious action. *Lewis v. Jeffers,* 497 U.S. 764, 774, 110 S. Ct. 3092, 111 L.Ed.2d 606 (1990); *Gregg v. Georgia,* 428 U.S. 153, 189, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1976). Mr. Pavatt's death sentence is not supportable because Oklahoma has failed to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Jeffers,* 497 U.S. at 774 (citing *Godfrey v. Georgia,* 446 U.S. 420, 428, 100 S. Ct. 1759, 64 L.Ed.2d 398 (1980)).

The instruction, OUJI-CR (2d) 4-73, given to the jury in Mr. Pavatt's case provided:

INSTRUCTION NUMBER 5

> As used in these instructions, the term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.
>
> The phrase "especially heinous, atrocious, or cruel" is directed to those crimes where the death of the victim was preceded by torture of the victim or serious physical abuse.

(O.R. Vol. 11 at 1286). Mr. Pavatt's trial counsel objected to the use of the patterned instruction and the related verdict form. (O.R. Vol. 7 at 1286). (M. Tr. of Aug. 3, 2003, at 69). The trial court made it clear that if an instruction on an aggravating circumstance was not found in the

Uniform Jury Instruction Criminal section, she was not going to give one: "If they didn't put it in there they must not want us to have it." (Tr. Vol. 15 at 3735).

Mr. Pavatt's death sentence, under Oklahoma's statutory scheme, is contingent upon a finding that the murder was "especially heinous, atrocious, or cruel." Because the terms themselves are vague and have been held to be so by the United States Supreme Court in *Cartwright v. Maynard*, 486 U.S. 356, 108 S. Ct. 1853, 100 L.Ed.2d 372 (1988), it is critical that the jury be given proper guidance regarding what facts it must find to support proof beyond a reasonable doubt that this aggravating circumstance exists. To reach the "serious physical abuse" arm of the aggravating circumstance, Oklahoma has determined that the jury must find that there was "conscious physical suffering." *Cheney v. State,* 1995 OK CR 72, 909 P.2d 74, 80; *Booker v. State,* 1993 OK CR 16, 851 P.2d 544, 548; *Stafford v. State,* 1992 OK CR 33, 832 P.2d 20, 23; *Battenfield v. State,* 1991 OK CR 82, 816 P.2d 555, 565. In *Battenfield,* the Court specifically held that the required torture or serious physical abuse element was not met unless there was evidence of conscious physical suffering of the victim prior to death. 816 P.2d at 565.

Despite this line of cases, however, no instruction was given to Mr. Pavatt's jury informing it that conscious physical suffering must be proven beyond a reasonable doubt before the "especially heinous, atrocious, or cruel" aggravator could be found. Judge Hartz, concurring in *Spears v. Mullin,* 343 F.3d 1215, 1256-59 (10th Cir. 2003), recognized the gap between controlling law and the uniform jury instructions when he noted that the term "conscious suffering" appears nowhere in the Oklahoma instructions. In *DeRosa v. State,* 2004 OK CR 19, 89 P.3d 1124, 1155, this Court applauded a trial court for modifying the existing uniform jury instruction defining "especially heinous, atrocious, or cruel" to require the jury to find beyond a reasonable doubt that "the victim experienced conscious physical suffering." 89 P.3d at 1155, n.

156. The Court has also adopted an instruction to replace the instruction used in Mr. Pavatt's case, namely OUJI-CR (2d) 4-73, for all future capital murder trials. The following language must now be included: "You are further instructed that you cannot find that 'serious physical abuse' or 'great physical anguish' occurred unless you also find that the victim experienced conscious physical suffering prior to his/her death." *Id.* at 1156. Mr. Pavatt did not get the benefit of this instruction.

While it was not until 2005 that OUJI-CR (2d) 4-73 was amended in an attempt to conform to existing law, *Ring v. Arizona*, 536 U.S. 584, 589, 122 S. Ct. 2428, 153 L.Ed.2d 556 (2002), existed prior to Mr. Pavatt's trial.[5] *Ring* holds that a capital defendant is entitled to have the jury determine beyond a reasonable doubt any fact that increases his sentence to the possibility of death. *Ring* was specifically acknowledged by the Court in *DeRosa.* Despite the Court's recognition of the fundamental, central Sixth Amendment right in *Ring,* however, the Court previously found no constitutional problem with failure to provide the instruction.

Mr. Pavatt was entitled to have his jury specifically instructed concerning what facts it had to find beyond a reasonable doubt in order to make Mr. Pavatt eligible for the sentence of death. While insufficiency of the evidence to support the aggravator of "especially heinous, atrocious, or cruel" was raised previously, this Court should reverse in light of these instructional developments and imperatives. It is impossible to determine whether the jury would have found the aggravating circumstance "especially heinous, atrocious, or cruel" had they been given an

[5] In addition to the same definitions of the central terms, OUJI-CR 4-73 now states the prosecution is required to prove beyond a reasonable doubt: First, that the murder was preceded by either torture of the victim or serious physical abuse of the victim; and Second, that the facts and circumstances of this case establish that the murder was heinous, atrocious, or cruel. You are instructed that the term "torture" means the infliction of either great physical anguish or extreme mental cruelty. You are further instructed that you cannot find that "serious physical abuse" or "great physical anguish" occurred unless you also find that the victim experienced conscious physical suffering prior to his/her death.

instruction that properly narrowed the otherwise facially vague terms. It is critical that the sentencing jury in a capital case be properly instructed on what law applies. *Simmons v. South Carolina,* 512 U.S. 154, 114 S. Ct. 2187, 129 L.Ed.2d 133 (1994); *Walton v. Arizona,* 497 U.S 639, 110 S. Ct. 3047, 111 L.Ed.2d 511 (1990) (overruled on other grounds).

Had Mr. Pavatt been tried seven (7) months later, such an instruction would have been required under *DeRosa.* Mr. Pavatt's constitutional right to have his jury properly guided in its life and death decision should not turn on vagaries in this state's jurisprudence. Because there was no instruction properly limiting and channeling the jury's discretion, Mr. Pavatt's constitutional rights were violated and post-conviction relief should be granted.

PROPOSITION FIVE

THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION ARE VIOLATED BY OKLAHOMA'S CONTINUED USE OF THE FACIALLY VAGUE AGGRAVATING CIRCUMSTANCE THAT A MURDER IS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL."

This Court's efforts to adopt a narrowing construction of the phrase "heinous atrocious or cruel" after *Cartwright v. Maynard,* 822 F.2d 1477 (10th Cir. 1987) and *Maynard v. Cartwright,* 486 U.S. 356, 108 S. Ct. 1853, 100 L.Ed.2d 372 (1988), have not been consistent. *Stouffer v. State,* 1987 OK CR 166, 742 P.2d 562, 563 (Okla. Crim. App. 1987) appeared to limit the aggravating circumstance to murders in which "torture or serious physical abuse" is present. In the wake of *Stouffer,* this Court attempted to formulate additional limitations by holding that unless there was evidence of conscious physical suffering of the victim prior to death, the required torture or serious physical abuse standard is not met. *Perry v. State,* 893 P.2d 521, 533-534 (Okla. Crim. App. 1995); *Booker v. State,* 851 P.2d 544, 548 (Okla. Crim. App. 1993); *Stafford v. State,* 832 P.2d 20, 23 (Okla. Crim. App. 1992); *Battenfield v. State,* 816 P.2d 555, 565 (Okla. Crim. App. 1991); *Brown v. State,* 753 P.2d 908, 912 (Okla. Crim. App. 1988) (finding requisite torture or

serious physical abuse not shown by death from multiple gunshot wounds); *Davis v. State,* 888 P.2d 1018, 1020-21 (holding requisite torture or serious physical abuse was not shown by death of two victims, both shot twice with a .38 caliber handgun at relatively close range, after two other surviving victims were shot); *Cheney v. State,* 909 P.2d 74, 80 (Okla. Crim App. 1995) (concluding serious physical abuse required more than showing that estranged wife of defendant, after being confronted by the defendant in parking garage, maced him and ran before being shot and killed). Thus, there seemed to be recognition by this Court that some suffering naturally accompanies any homicide and that the especially heinous, atrocious, or cruel aggravator was only appropriate in cases of undue or substantial conscious suffering. *Crawford v. State,* 840 P.2d 627 (Okla. Crim. App. 1992) (overruled on other grounds).

In *Hawkins v. State,* 891 P.2d 586, 592, 596 (Okla. Crim. App. 1994), the Court indicated something more is required than the abuse that necessarily occurred in the act of killing itself. Inexplicably, this Court found serious physical abuse in Mr. Pavatt's case, even though there was no gratuitous violence, and the killing was much like that in *Cartwright.* The ever-changing analysis of what is or is not an especially heinous, atrocious, or cruel murder has resurrected the vagueness challenge supported in the *Cartwright* cases. Accordingly, this post-conviction application should be granted and the Petitioner's death sentence should be vacated.

PROPOSITION SIX

MR. PAVATT WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL, DIRECT APPEAL, AND POST-CONCTION COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This Court has not been presented with complete evidence of ineffectiveness of Mr. Pavatt's trial and appellate counsel. Here, trial counsel remained as an attorney of record on appeal, and participated in the oral argument. Two instances of trial level ineffectiveness were

raised on appeal, but were based solely on the record and raised without any independent investigation. At post-conviction, counsel raised additional instances of trial and appellate counsel ineffectiveness, but did not have the resources or time to effectively investigate a case of mitigation and present it. This Court denied discovery and an evidentiary hearing. Until now, no counsel has done a thorough investigation into mitigation as is required by the United States Supreme Court. With a hearing, Mr. Pavatt can show this Court that he has not received the effective assistance of counsel at any stage of the proceedings.

A. **Trial Counsel**

Counsel must perform adequately, despite the deferential review of counsel's performance discussed in *Strickland v. Washington. Williams v. Taylor,* 529 U.S. 362 (2000); *Wiggins v. Smith,* 539 U.S. 510, 534 (2003); *Rompilla v. Beard,* 545 U.S. 374 (2005).

In ruling upon ineffective assistance in capital cases, the Supreme Court has relied on the ABA Guidelines for the Appointment and Performance of Counsel in Capital Cases, which the Court has said are "guides to determining what is reasonable." *Wiggins,* 539 U.S. 510, 524 (2005). *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (2003) (reprinted in 31 HOFSTRA L. REV. 913, 1045 (2003)).[6] Thus, the Court is clearly stating that it is reasonable to expect counsel to perform up to these standards. The very objective of the Guidelines is to establish a national standard of practice for the defense of capital cases, which will "ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence." *ABA Guidelines,* Guideline 1.1(A).

From the outset it was unlikely Mr. Pavatt would receive effective representation. A defense team, as required under the guidelines, was never assembled. *ABA Guidelines,* Guideline 4.1 – The Defense Team and Supporting Services. The "team" consisted of Michael Arnett, lead

6 Herein after, ABA Guidelines.

counsel, who had attended one seminar dealing specifically with the defense of capital cases, and Justin Lowe, a lawyer just two years out of law school, who had no capital case experience or knowledge of the relevant standards for capital trial counsel. (Exhibit #8, Affidavit of Michael Arnett); (Exhibit #10, Affidavit of Justin Lowe). Neither attorney was qualified under the Guidelines. *ABA Guidelines,* Guideline 8.1 – Training. The "team" had no "mitigation specialist." (Exhibit #8). There was no investigator in any real sense of that word. (Exhibit #8); (Exhibit #11; Affidavit of Terry Felts). Without the integral components of an effective defense team, it is not surprising that the performance of trial counsel failed to meet constitutional standards for both stages of the trial.

B. Counsel Failed to Adequately Present Evidence that Mr. Pavatt did not Author the "Confession" Letter.

The prosecution obtained a copy of the "confession" letter from Brenda Andrew's trial attorney and submitted it to David Parrett who testified at trial that the letter was conclusively written by James Pavatt. (Tr. Vol. 12 at 3244).

Defense counsel argued at trial that Brenda Andrew would not be a codefendant in this case "if anybody really believed [the confession letter]." (Tr. Vol. 14B at 3565). He further argued that "the State of Oklahoma knows that what's in [the confession letter] is not the truth because if it was the truth Brenda's not involved and if Brenda wasn't involved then she wouldn't be on trial for murder." (Tr. Vol. 14B at 3567). Counsel presented no evidentiary support for his argument. District Attorney Wes Lane authored a letter in which he said it was his opinion that the confession letter was "concocted." (Exhibit # 7) He also made a statement to the press that the letter was "fabricated." (Tr. Vol. 1 at 248). Wes Lane prosecuted both Mr. Pavatt and Brenda Andrew at the preliminary hearing, but was walled off from the case after defense counsel identified Wes Lane as a witness who would be called to testify that in his opinion the

"confession letter" was concocted. (P.H. Tr. of July 17, 2002 at 1372; O.R. Vol. 9 at 1733; M. Tr. of Aug. 8, 2003 at 73). Inexplicably, Wes Lane was never called as a witness by the defense. No evidence was ever presented that the District Attorney for Oklahoma County – a party in interest – made a statement against interest (and against the argument of his assistants trying the case) that the purported confession letter was "concocted."

It was not objectively reasonable for defense counsel to fail to call the only witness he had to support his theory that the "confession letter" had not been authored by his client. Trial counsel had no prior experience with a forensic linguist. (Exhibit #8). Further, post-conviction counsel did not consider retaining a forensic linguist. (Exhibit #5) No attempt was made to retain an expert who could have scientifically studied the questioned letter and compared it with many other of Mr. Pavatt's letters and with letters from Brenda Andrew. Such an expert, whose science has been held to meet the *Daubert* standard, could have testified concerning his analysis of the "confession letter":

> I find isolated language patterns in the questioned document that correlate with Andrew's grammatical language patterns, which would provide support to the hypothesis that Brenda Andrew dictated the letter to Pavatt which he wrote verbatim in her words;

(Exhibit #12; Declaration of Robert Leonard, PhD).

Once defense counsel decided to argue that the "confession letter" was not authored by his client, he had the duty to present evidence on that claim as forcefully as possible. *ABA Guidelines,* Guideline 10.8(B)(1) – the Duty to Assert Legal Claims. Mr. Arnett did not have the necessary skill or experience with the use of the expert witness who could have assisted him in presenting his defense. *ABA Guidelines*, Guideline 5.1(B)(2)(e) – Qualifications of Defense Counsel. He not only failed to present this defense theory with the witness he had (Wes Lane), but also with the witness he could have had (Robert Leonard). The defense failures here,

dovetailing with the prosecution's conflicting arguments concerning the "letter" at the separate trials of Mr. Pavatt and Ms. Andrew contributed to the State obtaining the conviction of Mr. Pavatt on proof less than beyond a reasonable doubt. Prejudice is shown here by the reliance of the jurors on what they considered to be strong evidence. (Exhibit #5). Direct appeal counsel and post-conviction counsel were ineffective in not raising this deficiency of trial counsel.

C. Counsel Failed to Adequately Challenge the State's Forensic Case.

The only "forensic" evidence that the State of Oklahoma had to tie Mr. Pavatt to the murder of Rob Andrew was 1) the testimony of the hand-writing expert concerning the "confession" letter and 2) the testimony of Gordon Robertson concerning the "consistency" of the projectile in the garage door and the .22 caliber live round turned over by Janna Larsen. While the prosecution's actions in presenting false and misleading evidence were improper, defense counsel failed to challenge the evidence.

Defense counsel should not have been lulled by the prosecutor into believing that the FBI report was "inconclusive," as Assistant District Attorney Smith relayed to the court. (M. Tr. of Aug. 8, 2003 at 83). The language in the report was clear enough to have sparked a fire under any *effective* counsel, as the report said "the Q1 bullet is analytically distinguishable from the specimens in groups 2 and 3." (Exhibit #2). Despite his duty to do so, defense counsel failed to challenge this critical bit of evidence. *See e.g., ABA Guidelines*, Guideline 1.1 and accompanying commentary (indicating that counsel "must be able to challenge zealously the prosecution's evidence"). He did not challenge the expertise and reliability of the "observation" science of Gordon Robertson, even though, had he done so, he could have shown the jury it was junk. (Exhibit #3) He did not cross-examine Gordon Robertson with the information that the FBI expert had arrived at a conclusion concerning the projectile and the .22 caliber bullet that was

directly contrary to his own. He did not object to Assistant District Attorney Fern Smith and Assistant District Attorney Gayland Gieger's arguments to the jury that there was a ***"match"*** between the projectile and the live rounds. And, he did not present a witness of his own and to provide testimony that the projectile and the bullets did not come from the same manufacturer.

The State was able to cast an aura of science around their "bullet evidence" in part because the defense did nothing to counter these efforts. The introduction of scientific evidence that is inaccurate and unreliable renders a trial fundamentally unfair. *Brown v. Farwell,* 525 F.3d 787, 796 (9th Cir. 2008). When trial counsel fails to mount a challenge to unreliable scientific evidence he is ineffective. *See e.g., Chatom v. White,* 858 F.2d 1479 (11th Cir. 1988) (holding defense counsel ineffective for failing to challenge prosecution's forensic evidence); *Williams v. Quarterman,* 551 F.3d 352 (5th Cir. 2008) (remanding for an evidentiary hearing on ineffective assistance of counsel claim where counsel failed to seek independent review of State's ballistic and pathological evidence).

Trial counsel did nothing to challenge the "scientific" testimony presented as reliable; did nothing to cross-examine the expert on a directly contrary finding by the FBI; did nothing to present an expert of his own; and then failed to object when the prosecution argued that the scientific evidence was conclusive. These failures relating to physical evidence linking Mr. Pavatt to the crime scene, resulted in the deprivation of his Sixth Amendment right to counsel. Direct appeal counsel and post-conviction counsel were ineffective in failing to raise this element of trial counsel's ineffectiveness. (*See* Exhibit #5).

D. Counsel Failed to Object to the Admission of Live Photographs of Rob Andrew.

Trial counsel objected to the admission of the video recording of the hunting trip. (Tr. Vol. 7 at 1931-32). Yet, he failed to object to the admission of the other live photographs of Rob

Andrew and of Rob and Brenda Andrew together. All of this evidence was used by the prosecution as impermissible victim impact evidence in the guilt stage and had a prejudicial impact upon both the finding of guilt and the sentence. Counsel's performance was deficient as there was no strategic reason for failing to object to this highly prejudicial evidence. The introduction of victim impact evidence in the guilt phase of the trial is objectionable under Oklahoma law. *Pickens v. State,* 850 P.2d 328, 342 (Okla. Crim. App. 1993); *See also Carol v. State,* 756 P.2d 614, 617 (Okla. Crim. App. 1988), and *Spears v. State,* 900 P.2d. 431, 445. (Okla. Crim. App. 1995).

Id. at 445.

Trial counsel's failure to object indicates his lack of knowledge of victim impact evidence. Upon review of counsel's conduct, it appears that, on the one hand, he filed some "canned" motions, prepared by his novice co-counsel, dealing with live photographic evidence.[7] (O.R. Vol. 7 at 1390, 1397); However, on the other hand, it reveals that he seemed to misunderstand the potential for harm such photographs cause when called upon to argue his own motion. (M. Tr. of Aug. 8, 2003 at 48-49). A review of his conduct further reveals that trial counsel allowed multiple witnesses, who were friends and family of Rob Andrew, to testify to entirely irrelevant matters that could only raise sympathy in the minds of jurors. It was trial counsel's duty to keep such irrelevant and prejudicial evidence from being considered by the jury Direct appeal counsel and post-conviction counsel were ineffective in failing to raise this part of trial counsel's deficiencies.

[7] Upon review of Defendant's motions, it becomes apparent that trial counsel used boilerplate forms. Indeed, though represented by independent counsel, some of Defendant's motions have not even been edited enough to delete the boilerplate reference that "[t]he Defendant is a poor person, represented by the Public Defender of Oklahoma County, with no personal funds or access to funds in which to hire an expert." *See e.g.*, O.R. Vol. 7 at 1354-56.

E. Trial Counsel Failed to Object to Prosecutorial Misconduct.

Mr. Pavatt was denied a fair trial and a fair sentencing proceeding due to prosecutorial misconduct, which impacted Mr. Pavatt's right to due process of law. *See* Proposition Two, above. There was pervasive prosecutorial misconduct, some of which has been previously raised before this Court. The prosecutorial misconduct in the presentation of first stage victim sympathy evidence, and in the use of the bullet evidence, and use of the "confession" letter were not adequately challenged by trial counsel, nor arguably raised adequately by direct appeal and post conviction counsel. These issues should be considered by the Court at this time.

F. Failure to Conduct a Mitigation Investigation and Failure to Present a Meaningful Case for Life

Trial counsel failed abjectly to present a meaningful sentencing stage case that could have saved James Pavatt's life. As lead counsel Michael Arnett was ultimately responsible for the investigation and presentation of the mitigation case. He had no mitigation specialist on the defense– The Defense Team and Supporting Services. In the commentary to the *ABA Guidelines*, a mitigation specialist is recognized as "an indispensable member of the defense team throughout all capital proceedings." Arnett could have requested funds for such a specialist, but did not do so. (Exhibit #8).

Arnett did not conduct an independent investigation into Mr. Pavatt's life history, and did not independently gather any records on Mr. Pavatt's life. Arnett claimed that "it was Mr. Lowe's responsibility to interview and prepare the mitigation witnesses for trial," (Exhibit #8) and yet Mr. Lowe not only did not consider this "to be in the range of [his] responsibilities", but also considered himself to be unqualified "to prepare and present a mitigation case." (Exhibit #10). Mr. Arnett "focused" his planning on the "guilt/innocence phase of the case" (Exhibit 8). Having a qualified mitigation specialist as an integral part of the defense team could have

"insure[d] that the presentation to be made at the penalty phase [was] integrated into the overall preparation of the case rather than being hurriedly thrown together by defense counsel still in shock of the guilty verdict." *See* Commentary to *ABA Guidelines 4.1. See* Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases,* 18 N.Y.U. REV. L & SOC CHANGE 245, 250 (1991).

The end result was the presentation of an ill-prepared anemic case to save Mr. Pavatt's life. Most of the second stage witnesses were family members and friends testified that they believed Mr. Pavatt to be innocent. Each of these witnesses shared a common experience in being asked at the last minute to provide testimony. According to Wade Veteto, stepfather to Mr. Pavatt;

> [t]he only conversation I had with Jim's lawyer, Mr. Arnett, prior to trial was about financial arrangements for his fee. I did not talk with any lawyers about my testimony, what questions would be asked or what to expect before trial. No lawyer or investigators ever came to my home or called me or Willie....I was subpoenaed to testify.... When I arrived, along with some other people from the Sand Springs area, we went to the courtroom. The lawyer, or someone associated with the lawyer, gathered the witnesses together in the courtroom and talked to everyone at the same time. I was told I would be called to testify but no one ever told me what I would be asked.

(Attachment 12 to Exhibit 13, Affidavit of Wade Veteto); *See also* attachments 14, 19, and 20 to Exhibit 13.

There was no one on the defense team conducting the "ongoing, exhaustive independent investigation of every aspect of the client's character, history, record and any circumstances of the offense, or other facts, which may provide a basis for a sentence less than death." *Supplementary Guidelines for the Mitigation function of Defense Teams in Death Penalty Cases (2008),* Guideline 10.11(B). Not until the second stage witnesses

were assembled in the courtroom to testify were they ever interviewed by anyone on the defense team – and even that was a "group" interview.

The Defense presentation was incomplete, and ultimately ineffectual. Had counsel performed as the Sixth Amendment requires a strong mitigation case could have been presented. But to present a case in mitigation, trial counsel would have needed to know what mitigation is:

> Mitigation evidence includes, but is not limited to, compassionate factors stemming from the diverse frailties of humankind, the ability to make a positive adjustment to incarceration, the realities of incarceration and the actual meaning of a life sentence, capacity for redemption, remorse, execution impact, vulnerabilities related to mental health, explanations of patterns of behavior, negation of aggravating evidence regardless of its designation as an aggravating fact, positive acts or qualities, responsible conduct in other areas of life (e.g. employment, education, military service, as a family member), any evidence bearing on the degree of moral culpability, and any other reason for a sentence less than death.

Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases, (2008) Guidelines 1.1. It is clear that Mr. Arnett never prepared for what he would need to do if the jury convicted his client. Mr. Arnett had the obligation to formulate a defense theory, one that would be effective in connection with both guilt and penalty. *ABA Guidelines,* Guideline 10.10.1, Trial Preparation. The commentators to the *ABA Guidelines* conclude: "[i]t is critical that, well before trial, counsel formulate an integrated defense theory that will be reinforced by its presentation at both the guilt and mitigation stages." No such integrated theory was formulated or implemented, and yet it was available to defense counsel had he acted effectively.

There is a persuasive theme that fits with both the guilt stage defense and the punishment phase defense. (Exhibit #13; Mitigation Investigation Report). James Pavatt is a man who was deprived of a sense of belonging and identity from childhood. His mother, supported by her extended family, lied to him about who his father was and the circumstances of his illegitimate birth. He grew up desperately wanting to please his critical mother, and always hoped to create

for himself some of the hero worship he saw bestowed on Trooper Sidney Pavatt - his brother's father, and the man he had been told was his father. (Algin Sydney Pavatt, a Trooper with the Arkansas State Police died in the line of duty on September 26, 1948, five years before James Pavatt was born.) *See* Exhibit #13, p. 3; Appendix # 8 to Attachment #13; Trooper Algin Sidney Pavatt's gravesite at the Halbrook) These circumstances developed in him a strong need for unconditional love, and made him vulnerable to manipulation by others – especially a woman. (Exhibit #13, pp. 36-38) Despite these circumstance that ultimately pulled him into Brenda Andrew's snare, and tied him to her, there are good and honorable things about James Pavatt's life that the jury never heard.

DIVERSE FRAILTIES OF HUMANKIND

Jim Pavatt is a Christian. He was raised in church by his mother. Throughout his life he made commendable efforts to better himself, being involved in church activities, actively pursuing further education, and being a respected co-worker. (Exhibit #13, p. 37). He is described by so many who know him well, in the kindest and fondest of terms. His former wife, **Suk Hui Yang**, who was divorced by James Pavatt immediately prior to the Rob Andrew murder and who was a witness for the prosecution describes Jim as being "a very sweet and caring husband... [with] a big heart.... (Appendix #23 to Exhibit #13). **Norma Zickefoose**, a long time friend of Jim's, with whom he shares a love of sports, finds Jim to be "soft hearted" and "compassionate". (Appendix # 20 to Exhibit #13). **Justin Studebaker**, Jim's childhood friend describes Jim as "honest, trustworthy, loyal, and respectful as a child and as an adult". (Appendix # 19 to Exhibit #13). **Gary McBride**, another of Jim's childhood friends knows Jim to be "a good person", a person who is "smart", has "high morals" and was never "violent". (Appendix #21 to Exhibit #13). **Anthony Adigwe**, who worked with Jim at Prudential knew Jim

to be "good natured, cordial, supportive, and knowledgeable" and always willing to help those who needed it. (Appendix #26 to Exhibit #13). **H.D. Wheeler**, Jim's friend and mentor in the insurance business describes Jim as being "polite" and "honest" with a "nice personality." (Appendix #25 to Exhibit #13).

Despite these glowing terms, these same individuals saw defects in Jim that help explain how he was led into involvement with Brenda Andrew.

> **Justin Studebaker**: "From my observations, when it came to women, Jim was easily influenced by a pretty face. Jim was so shy that if a pretty girl paid any attention to him he was just amazed and very grateful. He would do anything for them. It was like he had blinders on. He couldn't see any of their faults. In high school, Jim lost all good sense when it came to girls."

(Appendix #19 to Exhibit #13).

All of this mitigation evidence was readily available, but was not presented.

MR. PAVATT SUFFERS FROM SIGNIFICANT PSYCHOLOGIAL IMPAIRMENTS

In May, 2003, shortly before Mr. Pavatt's trial was originally set, Mike Arnett hired Dr. J.R. Smith to do a psychiatric evaluation of Mr. Pavatt. Dr. Smith was sent to the jail to interview Mr. Pavatt without a referral question and without any background information, social history records, military records, or information from family members. (See Exhibit #14). Dr. Smith interviewed Mr. Pavatt in the jail on May 16, 2003, and in August, 2003 sent Michael Arnett his written report and his handwritten notes of his interview with Mr. Pavatt. Mr. Arnett never discussed the case or Dr. Smith's report with him. Arnett did not interview Dr. Smith or prepare him to testify in the sentencing phase of Mr. Pavatt's trial. In Dr. Smith's interview he recognized potential mental health problems, and vulnerability and susceptibility in Mr. Pavatt. Had Dr. Smith had access to the additional information developed by a propter mitigation specialist, and the military records indicating symptoms associated with post-traumatic stress

disorder, and statements from family and friends, he would have found that Mr. Pavatt suffers from mental impairments.

After recently discovering Dr. Smith's report and notes, and having an opportunity to speak with him, federal habeas counsel made arrangements to have Mr. Pavatt further evaluated by a psychiatrist. Dr. Manuel Saint Martin determined that Mr. Pavatt suffers from psychological impairments which make him especially susceptible to manipulation by someone like Brenda Andrew. Even so, in a structured environment like prison, Mr. Pavatt demonstrates exemplary behavior. (See Exhibit #15, Affidavit of Dr. Saint Martin). Development and presentation of this evidence in the second stage of Mr. Pavatt's trial would have been considered with the defense theme in the first stage, and could have given the jury a compelling reason to give Mr. Pavatt a sentence less than death.

The mental condition of a person facing a death sentence is powerful mitigation. Michael Arnett has previously been found ineffective in a case in which his deficiencies were very similar. *Marquez-Burrola v. State,* 157 P.3d 749, 763-69 (Okla. Crim. App. 2007). In *Marquez-Burrola* Arnett did not have a mitigation specialist; he did not have co-counsel who was qualified in a death penalty case; he did not investigate his client's background or his mental health. After an evidentiary hearing, this Court was able to look at the entire picture, and see clearly that Michael Arnett's deficiencies prejudiced the defendant. There is a need here for the same relief. An evidentiary hearing can illustrate for this Court that trial counsel was ineffective, and that his ineffectiveness prejudiced Mr. Pavatt.

AIR FORCE CAREER AND HONORABLE DISCHARGE

Jim Pavatt served his country with a career in the United States Air Force for 18 years. His DD214 shows that he received the following medals and honors: Air Force Training

Ribbon; National Defense Service Medal with a Bronze Star, Air Force Good Conduct Medal with 5 oak leaf cluster; Longevity Service Award Ribbon with 3 oak leaf cluster; USAF NCO Graduate Ribbon, and Air Force Outstanding Unit Award. (Exhibit #16; Air Force Records). In addition, Petitioner received additional commendations, certificates of appreciation, meritorious service awards, and the Beacon of Freedom Award. (See Attachments 15.1-1 through 15.1-19 to Exhibit #13). Throughout his career he was commended by his superiors and praised for qualities of leadership, integrity, clear thinking, hard work, and devotion to duty. (Exhibit #13 and #16; Mitigation Investigation Report and Air Force Records). He was recognized by those servicemen who know him in the Air Force to be: 1) "competent, a very capable man. He was devoted to the military and had a great work ethic. I'd call him fair minded with the men. He was very capable and competent." (Appendix #27 to Exhibit #13; Affidavit of Glen Coleman), 2) Sergeant Pavatt was responsible for supervising the individuals providing security for the airplanes and other hardware located on base. We knew many of the same people and had associations with many of the same persons during our Tinker assignment. We both worked at Tinker in our separate divisions for several months prior to Jim being sent to First Sergeant School. In my dealings with Mr. Pavatt while at Tinker, he was a quiet, unassuming kind of person." (Exhibit #17; Affidavit of Jim Telles).

Mr. Arnett only gave passing reference to Mr. Pavatt's distinguished military career. He failed to present the powerful mitigation he had at his fingertips. The distinguished military career, especially when explained in terms of Mr. Pavatt's mental health, could have given the jury strong reasons to find Mr. Pavatt deserving of a life sentence.

ABILITY TO MAKE POSITIVE ADJUSTMENT TO INCARCERATION

James Pavatt had no prior criminal record of any kind. While he remained in jail awaiting trial, his ability to make a positive adjustment to incarceration became readily apparent. A minimal investigation by trial counsel would have revealed this mitigating evidence. While incarcerated in the Oklahoma County Jail, James Pavatt befriended another inmate, Tony Green. Jim was a working as a trustee and was "diligent and hard working". He was kind and considerate of the men being held in the mental health unit who were often distraught, despairing and crying. Jim talked to them and genuinely cared how they were doing....He treated them with kindness. Mr. Green admired Jim because he maintained a positive, confident attitude throughout his legal proceedings, which Tony attributed to Jim's faith in God. (See Exhibit #18, Affidavit of Paula Alfred).

Similar information could have been provided by Jim Telles. Officer Telles was responsible for transporting Jim to the courtroom for proceedings. He'd known Mr. Pavatt when they had been stationed at Tinker Air Force Base. Mr. Pavatt was always cooperative and never caused any trouble. In Officer Telles' opinion: "Jim Pavatt would not be a continuing threat to any inmate or correctional officer if he received a life sentence with possibility of parole or a life sentence without the possibility of parole." (Exhibit #17).

Charles Jennings, who ministered to the Oklahoma County Jail inmates, developed a special relationship with Mr. Pavatt while he awaited trial. He described Jim as getting along well with the correctional officers, and Jim was always eager and willing to talk with him about their faith. Mr. Jennings found Jim to be sincere in his religious beliefs, and noted that he was especially helpful to the inmates who were housed on the mental health unit. (Exhibit # 19, Affidavit of Charles Jennings).

Dr. J.R. Smith could likewise have confirmed that James Pavatt could be a productive and non-dangerous inmate, who would never be a threat to prison personnel or other inmates.The mitigation defense could have been consistent with the guilt phase defense that Mr. Arnett presented. Arnett acknowledged that Mr. Pavatt had become intimately involved with Brenda Andrew; that he may have helped her with the insurance policy, that he was influenced by her to flee to Mexico after Rob Andrew's death, that she manipulated him as she had manipulated other men (Nunley, Higgins, and Rob Andrew), possibly to the point of getting him to write a letter that implicated himself but exonerated her. The mitigation defense that could have been presented with proper investigation does not conflict with Arnett's guilt phase defense.

In *Marquez Burrola v. State,* 2007 OK CR 14, 157 P.3d 749, 763-69, as with this case, no substantial mitigation work was completed until immediately before trial and the mitigation case presented was nothing more than three family members telling the jurors the appellant had been a good person and asked them to spare his life. *Id.* at 766-67. The Court recognized that "[a]n aggressive mitigation effort, initiated early in the case, would not only have humanized Appellant in the eyes of the jurors, but might also have helped explain his conduct." *Id.* at 767.

The trilogy of United State Supreme Court cases cement the overarching importance of investigating and presenting mitigating evidence. *Williams v. Taylor,* 529 U.S. 362 (2000); *Wiggins v. Smith,* 539 U.S 510 (2003); *Rompilla v. Beard,* 545 U.S. 374 (2005) Had the jury been presented with the powerful mitigation evidence available there is a reasonable probability that at least one juror would have voted for a sentence of less than death.

These failures were the result of the lack of preparedness for the punishment stage of the trial as shown above. When this Court previously addressed these issues, it did so without the

benefit of the information on the woeful inadequacy of trial counsel's investigation and preparation and without the benefit of the wealth of mitigation evidence available.

G. DIRECT APPEAL COUNSEL

Trial counsel continued to represent Mr. Pavatt through direct appeal. He engaged Gloyd McCoy to be primarily responsible for the appellate writing. Mr. Arnett was not pleased with the quality of Mr. McCoy's work and/or he was concerned about what issues were neglected. (Exhibit #8). Trial counsel, although arguing a portion of the appeal before the Oklahoma Court of Criminal Appeals, did not seek to file a supplemental brief raising additional issues, nor did he file a motion requesting to present evidence outside the record. Direct appeal counsel failed to perform effectively in presenting issues involving state law as well as Constitutional law.

There are multiple errors of direct appeal counsel in failing to raise reasonable and potentially winning issues, and in failing to effectively raise issues that were presented to this Court. Many of these failures were presented in Mr. Pavatt's initial post-conviction application. The deficiencies of direct appeal counsel not previously included are: 1. Appellate counsel did not identify all the prosecutorial misconduct that there was; 2. Appellate counsel did not raise the issue of the admission of live photographs and live video recording of Rob Andrew; 3. Appellate counsel failed to conduct any investigation or interview any potential witnesses; 4. Appellate counsel failed to challenge the "confession" letter with expert evidence; 5. Appellate counsel failed to challenge the junk science of the prosecution's ballistic evidence; and 6. Appellate counsel failed to supplement the record with the powerful mitigation evidence that trial counsel failed to discover.

Appellate counsel failed to effectively represent Mr. Pavatt. It is likely that had appellate counsel effectively presented viable and meaningful issues to this Court relief would have been

granted. A criminal defendant is entitled to effective assistance on his first appeal as a matter of right. *See Evitts v. Lucy*, 469 U.S. 387 (1985). Further it is clear that trial counsel and appellate counsel were one in the same, although an additional attorney, did participate in the direct appeal. This Court does not apply a procedural bar to IAC claims brought subsequent to a defendant's direct appeal where trial and appellate counsel are the same. *Davis v. State*, 2005 OK CR 21, 123 P.3d 243, 244-46 (relying heavily on *Kimmelman v. Morrison*, 447 U.S. 365 (1986)).

H. POST-CONVICTION COUNSEL

Finally, this Court has held that the state statutory right to post-conviction counsel in capital cases carries with it a requirement that post-conviction counsel perform effectively. *Hale v. State*, 934 P.2d 1100 (Okl. Cr. 1997) *See also* Okla. Stat. tit 22, § 1356. *Hale* recognized the unfairness in providing a lawyer, but not requiring that lawyer to be effective. This holding provides a Due Process interest in effective post-conviction counsel *Evitts,* 469 U.S. 387*; Hicks v. Oklahoma,*447 U.S. 343, 100 S.Ct. 2237, 65 L.ed 2d 175 (1980); *Hatch v. Oklahoma,*58 F.3d 1447, 1460 (10th Cir 1995). In *Hale,* this Court held that a claim of ineffective assistance of post-conviction counsel was cognizable on a second post-conviction application since this was the "first available opportunity" for the petitioner to raise such a claim. *Id.* At 1102. Similarly, in *Spears v. State,* No. PC-99-1099 (Oct 13, 1999) (unpub, copy attached as exhibit #20), this Court reached the merits of the petitioner's claim that his post-conviction counsel was ineffective, which claim was presented in a second post-conviction application.

Post-conviction counsel in Mr. Pavatt's case challenged the effectiveness of trial counsel and appellate counsel on some important grounds. However, a complete mitigation investigation was not done, and time and money constraints prevented post-conviction counsel from properly

challenging the "confession" letter and the ballistics. (*See* Exhibit #5). Post-conviction counsel was also undermined by trial counsel's failure to turn over his entire file, including the FBI report that indicated that the projectile in the garage did not come from the same kind of bullets as the live rounds in Janna Larsen's car. If post-conviction counsel could and should have discovered all the information now known with reasonable diligence, she performed deficiently.

REQUEST FOR RELIEF

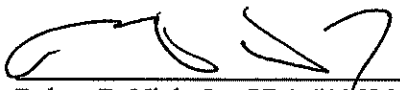
Mr. Pavatt requests:

1. A full and fair evidentiary hearing as to the effectiveness of trial counsel, direct appeal counsel, and post-conviction counsel; a full and fair evidentiary hearing concerning the prosecutorial misconduct, in order to show the prosecution deliberately presented false evidence; and on the Petition as a whole and particularly as to any issues which involve facts not apparent from the existing record and to any issues which involve facts disputed by the state.

2. That the Application for Post-Conviction Relief be granted.

Respectfully submitted,

Brewster & DeAngelis, P.L.L.C.



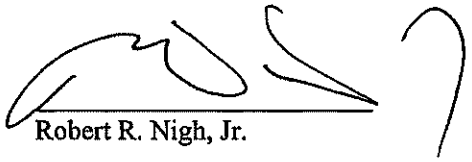
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COUNSEL FOR PETITIONER JAMES PAVATT

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day ~~August~~ Sept, 2009, I mailed the foregoing Second Application for Post-Conviction Relief by U.S. Mail to the following:

Seth S. Branham
Assistant Attorney General
313 NE 21st Street
Oklahoma City, OK 73105



Robert R. Nigh, Jr.

ATTACHMENT # 4

Opinion, *Pavatt v. State,* PCD-2009-777 (Okla. Crim. App., Feb. 2, 2010)

"SAPCR Op."

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

JAMES DWIGHT PAVATT,	)	NOT FOR PUBLICATION
Petitioner,	)	
v.	)	Case No. PCD-2009-777
THE STATE OF OKLAHOMA,	)	
Respondent.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
FEB - 2 2010
MICHAEL S. RICHIE
CLERK

OPINION DENYING SECOND APPLICATION FOR POST-CONVICTION RELIEF AND APPLICATION FOR EVIDENTIARY HEARING

C. JOHNSON, PRESIDING JUDGE:

Petitioner, James Dwight Pavatt, was convicted by a jury in Oklahoma County District Court, Case No. CF-2001-6189, of First Degree Murder (21 O.S.2001, § 701.7) (Count 1) and Conspiracy to Commit First Degree Murder (21 O.S.2001, § 421) (Count 2). The jury found the existence of two aggravating circumstances, and recommended a sentence of death on Count 1.[1] As to Count 2, the jury recommended ten years imprisonment and a $5000 fine. The trial court sentenced accordingly on October 21, 2003. This Court affirmed Petitioner's convictions and sentences on direct appeal. *Pavatt v. State*, 2007 OK CR 19, 159 P.3d 272. Petitioner sought *certiorari* review by the United States Supreme Court, which was denied. *Pavatt v. Oklahoma*, ___ U.S. ___, 128 S.Ct. 1229, 170 L.Ed.2d (2008). Petitioner sought post-conviction

[1] The State alleged three aggravating circumstances in support of the death penalty on Count 1: (1) that the murder was especially heinous, atrocious, or cruel; (2) that the murder was committed for remuneration or the promise of remuneration; and (3) that the defendant constituted a continuing threat to society. The jury found the first and second circumstances existed.

SCANNED
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relief from this Court, which was denied. *Pavatt v. State*, Case No. PCD-2004-25 (April 11, 2008; not for publication). In 2008, Petitioner sought *habeas corpus* relief in the United States District Court for the Western District of Oklahoma (Case No. CIV-08-470-R). That case is pending.

Our consideration of Petitioner's claims is circumscribed by the provisions of the Post-Conviction Procedure Act, 22 O.S.Supp.2006, § 1080 *et seq.* The Act provides applicants with very limited grounds upon which to attack their convictions. Claims which could have been raised on direct appeal, but were not, are generally considered waived. Claims which were raised and addressed on direct appeal are barred from being relitigated by the doctrine of *res judicata*. Furthermore, claims which are properly raised in a post-conviction application may only afford relief if they "[s]upport a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent." 22 O.S.Supp.2006, § 1089(C).

Currently before the Court is Petitioner's Second Application for Post-Conviction Relief, Application for Evidentiary Hearing with Brief in Support, and two bound volumes of exhibits in support thereof.[2] Under the Post-Conviction Procedure Act, our consideration of successive applications for relief is even more limited than the review afforded to initial applications. We may

[2] On September 9, 2009, Petitioner's counsel filed a "Motion to Supplement Exhibits." Counsel noted that a copy of Petitioner's first Application for Post-Conviction Relief (Case No. PCD-2004-25) had inadvertently been omitted from the exhibit package previously filed on September 2, 2009, and asked this Court to accept a tendered copy at that time. Our Rules require that copies of all prior post-conviction applications be appended to a new post-conviction application. *See* Rule 9.7(A)(3)(d), *Rules of the Oklahoma Court of Criminal Appeals*, 22 O.S., Ch. 18, App. (2009). Petitioner's motion to supplement his exhibits with a copy of his first Application for Post-Conviction Relief is therefore **GRANTED**.

not consider the merits of any claim made in a subsequent application for post-conviction relief, unless (1) the legal basis for that claim was previously unavailable, or (2) the facts supporting the claim were not previously ascertainable through the exercise of reasonable diligence, and those facts, "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death." 22 O.S.Supp.2006, § 1089(D)(8).

Petitioner raises numerous issues in this most recent application; they are grouped into six propositions of error. In Proposition 1, Petitioner claims he was denied a fair trial by a long list of inadmissible hearsay. Petitioner concedes that this issue was raised, and rejected, in his first application for post-conviction relief, but claims prior post-conviction counsel "did not argue the effect of such evidence in the second stage of trial." (Petitioner's Application at 11 & n. 3) The facts and law supporting the new slant on this claim were available to Petitioner in prior proceedings. We may not consider it at this time. 22 O.S.Supp.2006, § 1089(D)(8).

In Proposition 2, Petitioner lists several instances of alleged prosecutor misconduct. He concedes that both appellate counsel, and first post-conviction counsel, made claims of prosecutor misconduct in prior proceedings (Petitioner's Application at 20), but he offers some new arguments. We have reviewed the three categories of prosecutor misconduct presented, but all of

them could have been raised in prior proceedings.[3] We decline to review them further at this time. 22 O.S.Supp.2006, § 1089(D)(8).

In Proposition 3, Petitioner claims he was denied a fair trial by the combined effect of gruesome photographs of the murder victim, and photo and video evidence showing the victim before his demise. Petitioner concedes that on direct appeal, we rejected his claim that the post-mortem photographs of the victim were not unfairly gruesome. Nevertheless, he claims we have not considered whether the same photos were "unnecessarily cumulative and repetitive." (Petitioner's Application at 20) Petitioner also concedes that pre-mortem visual images of the victim, introduced at trial, were complained about in his previous post-conviction application. The current arguments merely modify or expand claims made, and rejected, in prior proceedings, and are therefore barred by the doctrine of *res judicata*.[4] *Turrentine v. State*, 1998 OK

[3] Petitioner groups the alleged misconduct into three categories. First, he complains that many of the questions posed to various witnesses in the guilt stage of the trial elicited answers that could be characterized as "victim impact" evidence, which, when presented in the capital sentencing stage of a trial, is subject to certain restrictions. Second, he complains that the prosecutors misled the jury concerning forensic ballistics analyses made in the case. Petitioner does not allege that the State withheld any evidence from the trial defense team. While Petitioner's first post-conviction counsel has provided an affidavit that she "[does] not believe" she received all information from trial counsel's file relating to this issue, Petitioner offers no information as to whether direct appeal counsel considered the issue and rejected it. Third, Petitioner faults the State for using his written "confession" letter as substantive evidence of guilt at his trial, while in his co-defendant's trial, the prosecutors characterized the letter as "concocted." In the letter, Petitioner attempted to absolve his co-defendant of any involvement in the murder, and admitted some limited involvement of his own (although he denied being the triggerman). Not surprisingly, the prosecutors believed that the letter was relevant as an admission against Petitioner's interest – but that the details of the letter were not particularly reliable.

[4] Petitioner's complaint about the post-mortem photographs is something of a moving target. As we noted on direct appeal, Petitioner's concern at trial was more about the number of photographs than their nature. On direct appeal, Petitioner shifted focus, complaining about the gruesome nature of the photos individually, not about any cumulatively adverse effect. We noted that the trial court did exclude some of the proffered photos at defense counsel's request,

CR 44, ¶ 12, 965 P.2d 985, 989. Finally, Petitioner claims the prosecutor improperly used the post-mortem photographs as evidence that the murder was especially heinous, atrocious, or cruel. This argument, based entirely on the trial record, could have been raised in prior proceedings but was not. It cannot be considered at this time. 22 O.S.Supp.2006, § 1089(D)(8).

In Proposition 4, Petitioner complains about one of the trial court's punishment-stage instructions. He contends that while the jury was instructed on the prevailing definition of "heinous, atrocious, or cruel" (referring to one of the aggravating circumstances alleged by the State), a more elaborate definition of that term was constitutionally required. He also claims the jury should have been instructed that any facts supporting that circumstance must be proven beyond a reasonable doubt before the circumstance could support a death sentence. Because this argument is based on the trial record, it could have been made in prior proceedings, and may not be considered now.[5] 22 O.S.Supp.2006, § 1089(D)(8).

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and concluded that the remaining photos were not unfairly prejudicial. *Pavatt*, 2007 OK CR 19 at ¶¶ 54-55, 159 P.3d at 289-290.

[5] In any event, we have rejected the same argument several times in the past. Petitioner essentially asks this Court to retroactively require an instruction that we promulgated – after Petitioner's conviction – in *DeRosa v. State*, 2004 OK CR 19, ¶¶ 91-97, 89 P.3d 1124, 1154-57. That instruction elaborates on the meaning of "heinous, atrocious, or cruel," and the relevant Uniform Jury Instruction already in existence (No. 4-73) was amended a year later. *DeRosa* was handed down several months after Petitioner's trial. *DeRosa* does not hold that the Uniform Jury Instruction on this issue, being used at the time of DeRosa's and Petitioner's trials, was materially deficient. *DeRosa*, 2004 OK CR 19, ¶ 97, 89 P.3d at 1156 ("This opinion should not be interpreted as a ruling that the former uniform instruction was legally inaccurate or inadequate"). This same attack on the pre-*DeRosa* version of OUJI-CR (2nd) No. 4-73 has been rejected several times by this Court. *Jackson v. State*, 2006 OK CR 45, ¶¶ 36-38, 146 P.3d 1149, 1161-63; *Browning v. State*, 2006 OK CR 8, ¶¶ 52-56, 134 P.3d 816, 843-45; *Rojem v. State*, 2006 OK CR 7, ¶¶ 68-73, 130 P.3d 287, 300-01.

In Proposition 5, Petitioner claims that the prevailing standards for finding a particular murder to be "especially heinous, atrocious, or cruel" are vague, and therefore, constitutionally inadequate. This legal argument could have been raised in prior proceedings, but was not. It is therefore waived.[6] 22 O.S.Supp.2006, § 1089(D)(8).

In Proposition 6, Petitioner makes a number of claims about the effectiveness of trial counsel, direct appeal counsel, and counsel on his first post-conviction proceeding. Petitioner reiterates many of the complaints listed above, and faults each of his preceding attorneys for either not raising these issues, or not raising them in a particular fashion. He takes trial counsel to task for not presenting a more thorough case in mitigation of sentence, and faults every attorney since for not making the same argument.

Again, given the posture of Petitioner's case – a successive post-conviction proceeding – we must focus on whether he has shown that current claims could not have been presented previously, in the exercise of reasonable diligence, and whether these new claims cast doubt on either the jury's finding of guilt, or its imposition of the death sentence. 22 O.S.Supp.2006, § 1089(D)(8)(b)(1), (2). Petitioner must also demonstrate that the instant application was filed within sixty days from the date that the new information could reasonably have been discovered. Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, 22 O.S., Ch. 18, App. (2009).

[6] We have rejected the same argument many times in the past. *See e.g. Cole v. State*, 2007 OK CR 27, ¶ 37, 164 P.3d 1089, 1098.

We have reviewed Petitioner's complaints, and the evidentiary materials he has proffered to support them. Petitioner concedes that none of these claims are based on newly-discovered evidence, or on any material change in the law. He admits that all of the information he presents as the product of a more complete mitigation investigation was, in fact, available at the time of trial. (Petitioner's Application at 43) We are barred by the provisions of the Post-Conviction Procedure Act from considering these arguments and materials now. 22 O.S.Supp.2006, § 1089(D)(8).

DECISION

Petitioner's Second Application for Post-Conviction Relief, and his request for an evidentiary hearing, are hereby **DENIED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2009), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE SUSAN BRAGG, DISTRICT JUDGE

APPEARANCES ON POST-CONVICTION

ROBERT NIGH, JR.
BREWSTER & DEANGELIS, P.L.L.C.
2617 E. 21st ST.
TULSA, OK 74114
ATTORNEY FOR PETITIONER

NO RESPONSE REQUESTED FROM THE STATE

OPINION BY C. JOHNSON, P.J.
A. JOHNSON, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR
CHAPEL, J.: SPECIALLY CONCUR
LEWIS, J.: CONCUR

PA

ATTACHMENT # 5

Memo from Prosecutor Fern Smith to OCPD re: Tom Bevels Granted Access to All Evidence

(June 13, 2022)

TO: BARRY CLARK, OCPD

FROM: FERN L. SMITH, ASST. DISTRICT ATTORNEY
OKLAHOMA COUNTY, (405) 713-1621

DATE: JUNE 13, 2002

SUBJECT; PHYSICAL EVIDENCE REVIEW BY EXPERT WITNESS
RE: ANDREW/PAVATT INCIDENT # 01-110635

BARRY,

TOM BEVEL HAS BEEN RETAINED BY THE OKLAHOMA COUNTY DISTRICT ATTORNEY'S OFFICE TO PERFORM A CRIME SCENE RECONSTRUCTION AND BLOOD SPATTER ANALYSIS IN THE ANDREW/PAVATT MURDER CASE, INCIDENT # 01-110635. PLEASE ALLOW MR. BEVEL TO REVIEW ANY OR ALL OF THE PHYSICAL EVIDENCE HE DEEMS NECESSARY TO MAKE HIS ANALYSIS. IF YOU NEED ADDITIONAL INFORMATION OR HAVE ANY QUESTIONS, PLEASE CONTACT ME ASAP.

THANK YOU..

ATTACHMENT # 6

OCPD Report of Theresa Bunn re: Gun Shot Residue Swabs from Brenda Andrew

(Dec. 05, 2001)

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==========================================================================
              S t a n d a r d   S u p p l e m e n t   R e p o r t
==========================================================================
Reported Date: 11/20/01  Time: 18:20          Case: 01-110635 (052)  Page: 1
Code: 21-701.7 SS       Crime: MURDER 1      Class:
Occurrence Date: 11/20/01-          Day: TUESDAY  -           Time: 18:20-
Status: AS  ASSIGNED              Closing Officer: 000127 SELLERS ROY
Location: 6112 SHAFTSBURY RD., OK                              RD:  430

========================== NARRATIVE ===================================
                          TECHNICAL INVESTIGATIONS REPORT

CASE NUMBER: 01-110635

CRIME/INCIDENT: HOMICIDE

LOCATION OF CRIME: 6112 SHAFTSBURY

LOCATION PROCESSED: INTEGRIS BAPTIST EMERGENCY ROOM

DATE PROCESSED: 11-20-01

TIME CALL RECEIVED: 1845 HOURS

10-97: 1908 HOURS

10-98(FROM SCENE): 2030 HOURS ARRIVED AT HOMICIDE SCENE

PATROL UNIT ON CALL: 2B109

OFFICER'S NAME: ROGER FROST

VICTIM'S INFORMATION: ANDREW, ROBERT W/M 9-19-62

SUSPECT INFORMATION: ANDREW, BRENDA EVERS W/F 12-16-63
                     PAVATT, JAMES W/M

PHOTOS:YES
  35MM:NO
DIGITAL:YES
SKETCH:YES
BLUE BOOK:YES
CASE JACKET:YES
PRINTS:NO

==========================================================================
ITEMS PROCESSED FOR PRINTS/HOW:                        PRINTS OBTAINED?
 -NONE FROM HOSPITAL EVIDENCE-
==========================================================================
EVIDENCE COLLECTED FROM SU-BRENDA ANDREW AT HOSPITAL:
 1.BLUE JEANS-TOMMY HILFIGER SIZE 6-BLOODY
 2.PINK SHIRT-THERMAL TYPE-MODA INTL-SIZE M-BLOODY
 3.BLACK BRA-VICTORIA SECRET 36B
 4.BLACK PANTIES-VICTORIA SECRET-SIZE M
 5.BLACK SOCKS-CREW LENGTH
 6.8 CE'S-SWABBINGS FROM SU-ANDREW'S HANDS AND CHEEK-
       -RIGHT HAND RING FINGER
==========================================================================
          S t a n d a r d   T r a i l e r  -  F i r s t   P a g e
==========================================================================
Reporting Officer: BUNN, THERESA  Number: 001017  Date: 12/05/01  Time: 20:00
        Typed by: TLYONS          Number: 1017    Date: 12/05/01  Time: 19:55
Approving Officer: STORY JIMMY    Number: 000145  Date: 12/06/01  Time: 11:36
```

-RIGHT HAND CENTER PALM AREA
-RIGHT HAND-OUTER SIDE OF PALM-BLK MARK "FROM KIDS BOTTLES"
-RIGHT HAND-WEBBING BETWEEN THUMB AND INDEX FINGER
-LEFT HAND CENTER OUTER SIDE (TOP)-BLACK POWDERY TYPE MARK
-LEFT HAND TOP SIDE OF INDEX AND MIDDLE FINGER
-LEFT HAND INNER SIDE RING FINGER
-RIGHT CHEEK OF FACE

NARRATIVE/ADDITIONAL INFORMATION:

ON 11-20-01 AT 1845 HOURS I RECEIVED A CALL RELATIVE TO A HOMICIDE AT 6112 SHAFTSBURY ROAD. WHILE ENROUTE TO THE CALL I WAS INFORMED BY DISPATCH THAT TWO SUBJECTS WERE SHOT DURING A HOME INVASION AND THAT ONE SUBJECT, A FEMALE, WAS ENROUTE TO INTEGRIS HOSPITAL. I WAS TOLD TO CALL LT. MOONEY AT 990-9708 AND HE INFORMED ME THAT THE MALE SUBJECT WAS DEAD AT THE SCENE AND HAD BEEN SHOT WITH A SHOTGUN IN THE CHEST. MOONEY REQUESTED I GO BY INTEGRIS BAPTIST HOSPITAL TO COLLECT WHATEVER EVIDENCE MIGHT BE ON SU-BRENDA ANDREW. HE INFORMED ME THAT BRENDA ANDREW, THE VI'S WIFE, WAS A SUSPECT IN THE CASE AND MAY HAVE SHOT THE VICTIM. HE PROVIDED NO FURTHER INFORMATION EXCEPT TO TELL ME THAT SHAFTSBURY WAS IN THE LANSBROOK EDITION JUST OFF OF MACARTHUR. HE SAID THAT SU-BRENDA ANDREW DID NOT KNOW THAT HER HUSBAND WAS NOW DECEASED AND NOT TO TELL HER.

I CONTACTED LT. STORY WHILE ENROUTE TO THE HOSPITAL AND PROVIDED HIM WITH THE INFORMATION I HAD RECEIVED FROM THE MDT. I CALLED SGT DINH TO ASSIST ME AT THE SCENE OF THE HOMICIDE. I WAS CLOSER TO THE HOSPITAL THAN THE SCENE I WENT BY THE HOSPITAL FIRST.

I ARRIVED AT BAPTIST INTEGRIS HOSPITAL AT 1908 HOURS AND SU-BRENDA ANDREW HAD NOT YET ARRIVED. I CONTACTED THE HOMICIDE SUPERVISOR, LT SELLERS, LISTED ON THE CALL AND TOLD HIM ABOUT LT. MOONEY'S REQUEST TO PROCESS SU-ANDREW AND PRESERVE WHATEVER EVIDENCE POSSIBLE AT THE EMERGENCY ROOM. I ASKED HIM IF WE WERE DOING GUNSHOT RESIDUE (GSR) TESTING KITS AGAIN AND HE SAID WE WERE NOT AND TO PROCESS AND PHOTOGRAPH SU-ANDREW AND COLLECT HER CLOTHES AS PER OUR USUAL PROCEDURES. THE AMBULANCE ARRIVED WITH SU-ANDREW WHILE I WAS ON THE PHONE SO I HUNG UP AND WENT INSIDE THE EMERGENCY ROOM AND MET UP WITH SGT ROGER FROST WHO HAD ACCOMPANIED SU-BRENDA ANDREW FROM THE SCENE.

I PHOTOGRAPHED SU-ANDREW AS SHE WAS BEING TREATED BY MEDICAL PERSONNEL IN THE EMERGENCY ROOM. ROGER FROST WAS INTERVIEWING HER AND GETTING HER STORY. BRENDA ANDREW APPEARED QUITE COMPOSED AND WAS NOT OVERLY EMOTIONAL OR CRYING. SHE ASKED ABOUT WHO WAS TAKING CARE OF HER KIDS AND APPEARED CONTENT THAT THE NEIGHBOR, DR. SHADID, HAD THE KIDS. SHE ASKED ABOUT HER KIDS TWICE DURING THE TIME THAT I WAS THERE. SHE DID NOT ASK ABOUT THE WELFARE OF HER HUSBAND UNTIL AFTER I HAD BEEN THERE FOR 30 MINUTES TAKING PHOTOS AND BLOOD SWABBINGS FROM HER. MEDICAL PERSONNEL ASSURED HER THAT HER HUSBAND WAS BEING TREATED AT THE SCENE. SHE DID NOT PRESS THEM FOR FURTHER DETAILS OF HIS WELFARE.

BRENDA ANDREW WAS VERY CALM AND DID NOT APPEAR TO BE IN SHOCK. IT SEEMED ODD THAT SHE COULD BE SHOT IN THE ARM AND THE ALLEGED VICTIM OF A HOME INVASION

Standard Trailer - Continuation

Reporting Officer: BUNN, THERESA	Number: 001017	Date: 12/05/01	Time: 20:00
Typed by: TLYONS	Number: 1017	Date: 12/05/01	Time: 19:55
Approving Officer: STORY JIMMY	Number: 000145	Date: 12/06/01	Time: 11:36

AND SHOOTING AND STILL BE ABLE TO LAY BACK RELAXED ON HER HOSPITAL BED WITHOUT APPEARING STRESSED OR EMOTIONAL. I NOTICED AS I WAS PHOTOGRAPHING HER THAT SHE WAS RELAYING HER STORY TO SGT FROST IN A VERY METHODICAL MANNER, SLOWLY AND STEP BY STEP USING THE SAME WORDS OVER AGAIN TO DESCRIBE THE SCENE AND CORRECTING SGT FROST WHEN HE WOULD GET SOMETHING ABOUT THE SEQUENCE OF EVENTS OUT OF ORDER. SGT FROST KEPT HAVING SU-ANDREW REPEAT THE STORY AS HE TOOK NOTES AND SHE METHODICALLY STARTED OUT EACH TIME TELLING HIM SOMETHING ABOUT THE PILOT LIGHT ON THE HEATER BEING OUT AND SHE WAS TRYING TO GET IT LIT AND THE HUSBAND WAS COMING OVER TO GET THE KIDS FOR THANKSGIVING AND THEN THE SHOOTING HAPPENED. SHE DID NOT APPEAR FEARFUL OR EMOTIONAL AS SHE WAS RETELLING THE STORY. IT DID NOT LOOK LIKE SHE WAS RELIVING ANY FEAR, STRESS OR STARTLEMENT ASSOCIATED WITH HOME INVASION OR SHOOTING OR BEING A VICTIM OF THIS ALLEGED RANDOM ACT OF VIOLENCE.

BRENDA ANDREW HAD BEEN SHOT IN THE LEFT ARM. SHE WAS HOLDING A BANDAGE ON HER UPPER LEFT ARM WITH HER RIGHT HAND. SHE STATED SHE HAD PAIN IN HER LEFT ARM AND THAT SHE COULD NOT FEEL HER FINGERS ON HER LEFT HAND. SHE STATED SHE FELT LUCKY SHE WAS RIGHT HANDED. BRENDA ANDREW HAD A BLACK CIRCULAR POWDER BURN MARK WHICH SURROUNDED A BULLET ENTRY MARK ON THE REAR CENTER OF HER UPPER LEFT ARM. THERE WAS A TEAR AND POWDER BURN MARK ON HER PINK THERMAL SHIRT THAT CORRESPONDED WITH THIS WOUND AND THE AREA ON THE SHIRT WAS BLOODY.

BRENDA ANDREW HAD AN EXIT WOUND ON THE FRONT OUTER SIDE OF HER UPPER LEFT ARM. THIS AREA ALIGNED WITH A HOLE IN THE FRONT LEFT ARM AREA OF SU-ANDREWS SHIRT. THE INSIDE OF THIS HOLE IN THE SHIRT HAD YELLOWISH BODY TISSUE ADHERED TO IT AND WAS VERY BLOODY. SU-ANDREW HAD BLOOD ON HER LEFT BREAST AREA OF HER SHIRT ADJACENT TO THE EXIT WOUND. BRENDA ANDREW ALSO HAD BLOOD ON THE RIGHT FRONT SLEEVE CUFF AND RIGHT FRONT AND REAR SLEEVE AREA BELOW THE ELBOW ON HER SHIRT.

SU-ANDREW HAD ON BLUE JEANS THAT WERE BLOOD STAINED. THERE WERE BLOOD SPATTER MARKS ON THE LOWER RIGHT LEG THAT APPEARED TO SHOW DIRECTIONALITY COMING FROM HER LEFT AND GOING TO HER RIGHT IN A DOWNWARD MOTION. SHE HAD OTHER BLOOD STAINS ON HER LOWER RIGHT AND LOWER LEFT FRONT OF HER PANTS THAT DID NOT SHOW SIGNS OF DIRECTIONALITY. SHE HAD A SMALL BLOOD STAIN ON THE RIGHT REAR OF HER PANTS BELOW THE JEANS POCKET. SHE HAD ON BLACK CREW LENGTH SOCK AND NO SHOES. I PHOTOGRAPHED SU-ANDREW'S CLOTHES ON HER AND COLLECTED THEM AS MEDICAL PERSONNEL REMOVED THEM FROM HER.

I OBSERVED THE HOSPITAL X-RAY OF SU-ANDREW'S INJURY AND PHOTOGRAPHED SAME. IT APPEARED THAT THERE WERE THREE VERY TINY BITS OF MATTER STUCK INSIDE SU-ANDREW'S WOUND AND THAT THE BULLET HAD ENTERED AND EXITED HER ARM WITHOUT BREAKING THE BONE. THE MEDICAL PERSONNEL ON SCENE STATED THAT THE INJURY WAS NOT LIFE THREATENING AND THAT THEY WOULD NOT BE REMOVING THE BITS OF MATTER. THEY FURTHER STATED THAT THEY WOULD BE GIVING HER SOME ANTIBIOTICS AND RELEASING HER SHORTLY FROM THE HOSPITAL.

BRENDA ANDREW HAD A LOT OF DRIED BLOOD ON HER RIGHT HAND. THE BLOOD WAS DRIED UP AND WAS ON THE OUTER AND INNER PARTS OF HER HAND. I ASKED HER

WHO'S BLOOD IT WAS AND SHE STATED SHE WAS NOT SURE IF IT WAS HERS OR HER HUSBANDS BLOOD. I PHOTOGRAPHED HER HANDS. I SWABBED HER RIGHT HAND RING FINGER, RIGHT HAND PALM AREA, AND RIGHT HAND WEBBING BETWEEN HER THUMB AND INDEX FINGER. I NOTICED A SMALL BLACK MARK ON THE MEATY OUTSIDE PART OF HER PALM AND ASKED HER ABOUT SAME. SHE STATED THE MARK WAS FROM AN INK PEN SHE USED TO MARK HER KIDS NAMES ON THEIR CUPS. I ASKED HER WHY SHE MARKED THE CUPS AND IF THE KIDS WENT TO DAYCARE OR SOMETHING AND SHE LOOKED AT ME DISAPPROVINGLY AND STATED THAT HER KIDS WERE NOT IN DAYCARE AND THAT SHE HAD JUST MARKED THEM TO TELL THEM APART. I SWABBED THE BLACK MARK AND IT LIGHTENED BUT DID NOT COME OFF.

THERE WAS A SMALL BLACKISH MARK ON THE TOP CENTER OF HER LEFT HAND SO I SWABBED SAME. SU-ANDREW HAD BLOOD ON THE INSIDE OF THE LEFT RING FINGER SO I SWABBED SAME.

BRENDA ANDREW HAD DRIED BLOOD ON HER RIGHT CHEEK SO I SWABBED SAME. SHE STATED SHE DID NOT KNOW SHE HAD BLOOD ON HER FACE OR WHERE IT WAS FROM.

BRENDA ANDREW HAD BLACK SHOULDER LENGTH HAIR THAT APPEARED TO BE DIED BLACK AND TREATED.

WHILE MEDICAL PERSONNEL WERE EXAMINING SU-ANDREW I NOTED THAT SHE HAD NO MARKS ON HER BACK. BRENDA ANDREW HAD A SMALL BRUISE THAT APPEARED BROWNISH BLACK ON THE OUTSIDE OF HER RIGHT THIGH. I ASKED HER ABOUT THIS AND SHE STATED THAT SHE HAD TAKEN THE KIDS ROLLER BLADING ON FRIDAY NIGHT AND SHE FELL. SHE STATED SHE WAS OUT WITH THE KIDS AND HER HUSBAND AND THEY WERE TRYING TO PATCH THINGS UP.

SU-ANDREW SEEMED SURPRISED THAT SGT FROST WAS ASKING HER ABOUT HER RELATIONSHIP WITH HER HUSBAND. SHE ASKED HIM WHY HE WAS ASKING THOSE KIND OF QUESTIONS AND WHAT THAT HAD TO DO WITH ANYTHING. SHE STATED THEY WERE SEPARATED AND BELIEVED THAT HER HUSBAND HAD TWO GIRLFRIENDS BECAUSE THE KIDS WOULD TELL HER STORIES ABOUT THEM WHEN THEY RETURNED FROM VISITATION. SHE APPEARED ANGRY ABOUT LEARNING ABOUT THE GIRLFRIENDS FROM HER KIDS.

I TOLD BRENDA ANDREW THAT I WOULD BE GOING TO THE SCENE TO COLLECT EVIDENCE AND ASKED HER IF THERE WAS ANYTHING THERE SHE NEEDED LIKE CLOTHES. SHE ASKED ME TO CHECK ON HER KIDS. SHE DID NOT ASK ME TO CHECK ON HER HUSBAND.

I ASKED BRENDA ANDREW TO DESCRIBE WHAT HAD HAPPENED TO ME IN DETAIL SO THAT I COULD COLLECT THE APPROPRIATE EVIDENCE FROM THE SCENE. SHE TOLD ME SHE HEARD THREE SHOTS. SHE STATED A SUBJECT IN A BLACK MASK CAME FROM AROUND THE OUTSIDE OF THE OPEN GARAGE DOOR AND SHOT FIRST AT HER HUSBAND AS HE WAS STANDING IN THE GARAGE. SHE STATED HER HUSBAND THEN HELD UP A BAG OF RECYCLE CANS AND THAT THE SUBJECT THEN SHOT AT HER HUSBAND THROUGH THE BAG OF CANS. SHE STATED THE SUBJECT THEN SHOT A THIRD TIME HITTING HER IN THE ARM. I ASKED HER ABOUT THE BAG OF CANS AND SHE STATED IT WAS A BLACK PLASTIC TRASH BAG FULL OF CANS TO BE RECYCLED AND THAT IT HAD BEEN SITTING IN THE GARAGE.

I ASKED HER IF ANYTHING WAS HIT, LIKE THE WALL OR AN OBJECT IN THE GARAGE AND SHE SAID SHE DID NOT KNOW. SHE STATED THERE WERE DEFINITELY THREE SHOTS. I REVERSED THE ORDER PUTTING HER SHOT AS THE SECOND SHOT AND SHE CORRECTED ME STATING THAT THE HUSBAND WAS SHOT, THEN THEY SHOT THROUGH THE BAG OF CANS AND THEN SHE WAS SHOT.

I COLLECTED UP SU-ANDREWS CLOTHES AND THE SWABBINGS AND BROUGHT THEM TO MY TRUCK AND SECURED THEM. I RETURNED TO THE EMERGENCY ROOM WHERE BRENDA ANDREW WAS BEING TREATED BECAUSE I WAS STILL UNCLEAR HOW FAR THE SHOOTERS WERE ALLEGEDLY STANDING WHEN SHE GOT SHOT AND WHAT KIND OF WEAPON WAS USED. I ASKED HER IF THE SHOOTERS WERE IN A CAR AND SHE SAID, "NO, THERE WAS NO CAR, THEY CAME UP FROM THE SIDE OF THE GARAGE." I ASKED HER HOW CLOSE THE SHOOTER WAS WHEN SHE GOT SHOT. SHE STATED SHE DID NOT KNOW HOW CLOSE HE WAS. I ASKED HER IF SHE HAD SEEN THE GUNS USED AND SHE SAID SHE DID NOT SEE ANY GUNS. I SAID TO HER THAT HER INJURY SHOWED THAT THE SHOT WAS CLOSE AND SHE SAID "YES, HE WAS CLOSE." I ASKED HER HOW CLOSE WAS HE TO YOU, THIS CLOSE AND STOOD TWO FEET FROM HER BED. SHE LOOKED AT ME AND THE DISTANCE AND SAID NOTHING FOR A FEW SECONDS AND THEN SAID NO. I STEPPED CLOSER TO THE BED SO THAT I WAS ABOUT A FOOT FROM HER AND ASKED HER IF HE WAS THAT CLOSE, AND SHE STATED THAT SHE DID NOT KNOW AND THAT THAT DISTANCE SEEMED RIGHT BUT SHE WAS NOT SURE.

I ASKED HER IF SHE WAS SHOT WITH A SHOTGUN OR HANDGUN AND SHE STATED SHE DID NOT KNOW AND DID NOT SEE THE GUN. I ASKED HER IF THE GUN MADE A LARGE NOISE LIKE A SHOTGUN OR MORE LIKE A HANDGUN AND SHE STATED SHE DID NOT KNOW THE DIFFERENCE IN THE NOISES.

LEFT THE HOSPITAL AND ARRIVED AT THE SCENE AT 2030 HOURS. FOR DETAILS REGARDING THE SCENE SEE SEPARATE REPORT UNDER THIS SAME CASE NUMBER.

ON 11-29-01 I SUBMITTED THE ABOVE LISTED ITEMS TO SEROLOGY.

END OF REPORT

ATTACHMENT # 7

Oklahoma Attorney General's Petition Opposing Clemency for James Pavatt

(Sept. 18, 2026)

Office of Attorney General
State of Oklahoma

Gentner Drummond

State of Oklahoma vs James Pavatt

Clemency Hearing
October 14, 2026
9:00 A.M.

Submitted by:
Supervisory Assistant Attorney General
Jennifer Crabb &
Assistant Attorney General
Samantha Baggett

Address:

313 NE 21st Street
Oklahoma City, OK 73105

Phone:

(405) 521-3921

TABLE OF CONTENTS

Introduction 1

I. A Murder in Cold Blood 5

a. ***Rob Andrew had the life Pavatt wanted*** 5

b. ***The first attempt*** 8

c. ***Regrouping for the second attempt*** 15

d. ***November 20, 2001*** 16

e. ***The plan unravels*** 19

f. ***Pavatt confesses*** 25

g. ***The final piece of evidence*** 27

h. ***Death is the appropriate sentence*** 28

II. Pavatt's Dubious Assertion of Innocence 30

III. Pavatt has Extremely Little to Offer in the Way of Mitigation 38

IV. A Legacy of Pain 43

V. Remembering Rob Andrew 48

"[Pavatt] said that he was going to get me back . . . .
He said if you think Brenda is mean wait until you deal with me."

- Rob Andrew, quoting James Pavatt, October 26, 2001

* * * * *

Rob Andrew knew. He knew, and he told everyone who would listen. He told his pastor. (Tr. V 1334). He told his divorce lawyer. (Tr. VII 1882). He told his marriage counselor. (Tr. VII 1856-58). He told his brother, his friends, and a co-worker. (Tr VI 1550, 1597-98; Tr. VII 1849-50, 1930). He told a mechanic and an acquaintance. (Tr. VII 1729-35, 1843). He told a homicide detective, face-to-face, the day before he died. (Tr. VII 1777-78, 1785-86). Rob knew his wife "Brenda had finally found somebody that would kill him … Jim Pavatt." (Tr. VI 1550).

Rob was neither paranoid nor clairvoyant; he simply had eyes to see what was happening. Pavatt, formerly Rob's close friend, had been building the murder for months out of the ordinary materials of Rob's own life. (Tr. V 1331). Rob was very successful, with a good job, a nice home, and over a million dollars in life insurance, while Pavatt was deeply in debt. (State's Ex. 2, 24, 160-65, 169; Bates 158). Rob and Brenda had two young children, Tricity aged ten and Parker aged seven. (Tr. VI 1530-31). Pavatt's children were grown. (Tr. XI 2827; Tr. XV 3697, 3701). And although Pavatt was married to a woman who adored him, he apparently preferred Rob's wife. (Tr. V 1332, 1343-44; State's Ex. 4). So Pavatt and Brenda began an affair and Pavatt divorced his wife. (Tr. V 1332, 1343-44; State's Ex. 1-2).

Brenda kicked Rob out of the family home, after which Pavatt was there an increasing amount of time. (Tr. X 2572-73; State's Ex. 208). Pavatt received Brenda's affection while Rob wrote about his loneliness. (Tr. X 2574; Bates 5010). Pavatt took a family vacation with Rob's family while Rob barely saw his children. (Tr. V 1884; State's Ex. 185-98; Bates 548). Pavatt even moved his washer and dryer into the Andrew family garage. (Tr. VI 1473).

We told you earlier this year that domestic homicides are often "murders in slow motion." That was never truer than in this case.

As Rob tried to keep the shattered pieces of his family together, Pavatt and Brenda plotted. Brenda, with Pavatt's daughter's help, hid more than $80,000 from Rob. (Tr. XI 2836-37). Pavatt and Brenda tried to buy a gun "off the books" but were unsuccessful. (Bates 4573). Perhaps that's why, on October 26, 2001, they made their first attempt to kill Rob by cutting the brake lines on his car. (Tr. VII 1729-55, 1772, 1777-78; Tr. XII 3132; State's Ex. 208). They failed but were not deterred.

On November 19, 2001, Rob told his best friend that it felt like someone had a gun pointed at him. (Bates 1432-33). He said, "If they do shoot me, I hope they get me with the first shot. I do not want to feel any pain." (Bates 1433).

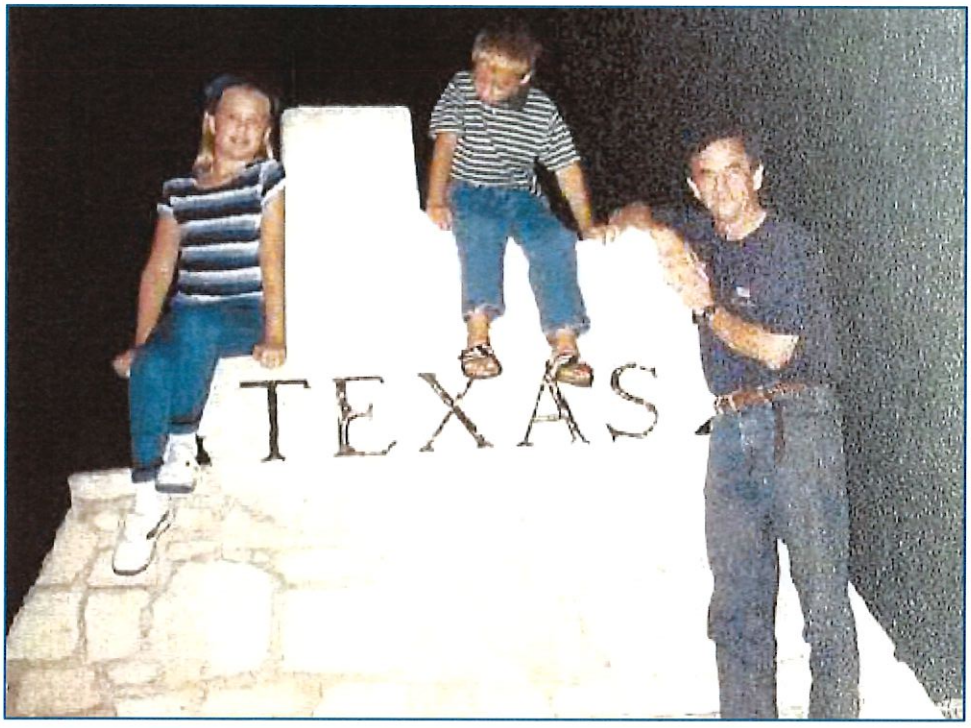
The very next day, Pavatt and Brenda permanently removed Rob from his own life, making way for Pavatt to take his place. They also denied Rob the painless death he had hoped for.

The first shotgun blast hit him in the right side of his chest but did not immediately kill him. (Tr. X 2434-37, 2457-63). The gun was single action, so someone had to break open the gun and put another shell inside. (Tr. VII 1925). As the gun was reloaded, Rob grabbed a garbage bag full of empty aluminum cans and tried to shield himself with it. (Tr. V 1382-83). He was still at least partially on his feet—bent at the waist, or on all fours, or squatting—when the second round of pellets hit him in the left side of his neck. (Tr. X 2434-36). He bled to death on the floor of his own garage, murdered by his former friend and his wife, just feet away from the children he adored. (Tr. IX 2183-84; Tr. X 2458)

In a cruel twist, Pavatt and Brenda had used Rob's own gun, a gun that was given to him by his grandfather. (Bates 473). They used Rob's gun to take Rob's life.

Lest there be any doubt that James Pavatt was erasing Rob to take his place, consider pages 11-19 of the Appendix. The month before the murder, Pavatt and Brenda took the Andrew children to Texas on vacation. (Appx. 11-19). While there, they took photographs by the Texas monument, pictured below. (Tr. XI 3092; Appx. 13). Pavatt gave the photographs to a close friend after Rob was killed. (Tr. XII 3091-92). Pavatt said: "I don't want the police to have 'em because they might discriminate (sic) me." (Tr. XII 3091).

At trial, Rob's brother Tom testified that this photograph was especially hurtful to him. (Tr. XV 3687-88; Appx. 13). Taking a picture at that monument was one of Rob's favorite things to do: "I would imagine if you were able to look through all the photo albums of my brother and his wife and the kids on their family pictures you would find one of those photos in every one of them, **except, of course, Rob in the place of Mr. Pavatt**." (Tr. XV 3687-88) (emphasis added).



Tricity Andrew, Parker Andrew, and James Pavatt

And it was all for naught. Rob Andrew is dead. His children have grown up without him. His parents died waiting for the jury's verdicts to be enforced. Pavatt and Brenda did not ride off into the sunset together, although they tried. Pavatt has been living in one prison, and Brenda has been in another.[1]

You will hear that Pavatt has worked in the prison law library and has no misconducts. Pavatt will probably tell you that he is a Christian who tries to lead other inmates to faith. Like Raymond Johnson, Pavatt was raised in church, so his faith is not new. It preceded the murder, but it did not stop him from committing the murder.

Also, like Raymond Johnson, Pavatt is, according to his own daughter, a "pathological liar." (Tr. XI 2850; Appx. 122). But unlike Johnson, James Pavatt will not even tell the truth about the most important thing. To this day, Pavatt claims he is innocent; the State has "nothing on [him]." (August 27, 2026 Telephone Call with Janna Larson). The State will show you the absurdity of this claim.

Pavatt spent at least three weeks plotting, and attempting, to kill Rob Andrew. This was not a crime of passion. He did it even though he knew the kind of person Rob was. *He did it even though he knew Rob knew it was coming.* His actions were utterly devoid of human feeling. To this day, he lacks remorse.

Clemency should be denied.

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[1] Brenda was also convicted of murdering Rob and sentenced to death. Her conviction and sentence have been affirmed at all levels. The State anticipates that Brenda will file a petition for writ of certiorari to the United States Supreme Court from the denial of federal habeas relief later this year. If the Court denies that petition, Brenda will have exhausted all appeals.

I. A Murder in Cold Blood[2]

In Oklahoma, first degree murder requires intent to kill, but that intent can be formed simultaneously with the act of killing. *Jones v. State*, 2006 OK CR 17, ¶ 8, 134 P.3d 150, 154. Premeditation—in the sense of planning the murder ahead of time—is not required. Even in capital cases, most murders are not premeditated in that sense. Pavatt and Brenda, however, acted in true cold blood.

a. Rob Andrew had the life Pavatt wanted

Rob Andrew had, from all outward appearances, an enviable life. At age thirty-nine, he was Senior Vice President at Jordan & Associates, an advertising and communications agency in north Oklahoma City. (Tr. VI 1540, 1589-90). He had two children with Brenda Andrew. (Tr. VI 1530). He was a regular member at North Pointe Baptist Church. (Tr. V 1327-32). He and his friend Ronald Stump held a Bible study together over the telephone every morning. (Tr. VI 1540-41).

But Rob and Brenda, who married in 1984, had often struggled in their marriage. (Bates 555). Rob was aware that Brenda was unfaithful to him more than once over the years. (Tr. V 1331-32, 1365; Tr. VI 1427, 1571). In 1993, the couple talked very seriously about divorce but ultimately stayed together. (Bates 509).

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[2] The evidence discussed in this packet derives principally from Pavatt's 2003 jury trial in Oklahoma County District Court Case No. CF-2001-6189, the Honorable Susan W. Bragg presiding. Transcripts citations to the jury trial will be to: "(Tr. [vol. #] [page number])." The State's trial exhibits will be cited as: "(State's Ex. __)." Citations to other evidentiary materials and appellate documents are referenced using logical abbreviations, with citations to materials that were provided by the State to the defense in pre-trial discovery cited as: "(Bates [number])." Citations to the items contained within this packet's appendix are cited using the relevant Bates stamp: (Appx. [number])." As always, the State has exercised its judgment in reducing the thousands of pieces of paper generated in this case to fit within the appendix and will provide any other documents on request.

The subject of divorce returned in 2001. This time, things ended very differently. This time, James Pavatt wanted Rob Andrew's life.

Pavatt, who was forty-eight years old when he committed the murder, also attended North Pointe, where he and thirty-seven-year-old Brenda taught a Sunday School class for fifth and sixth graders. (Tr. V 1346-47; Tr. XI 2747). Pavatt and Rob were close friends. (Bates 26). In 2000, Rob had even invited Pavatt to join him on a family hunting trip. (Tr. VII 1923-27). Rob was "very anxious" for his brother Bill to meet Pavatt so they could discuss their shared a love of shooting. (Tr. VII 1928-29). Pavatt told Bill (falsely) that he had been a sniper in the military. (Tr. VII 1929).

Pavatt and Brenda began having an affair in, at the latest, August of 2001. (Tr. XI 2831-32). Church members were appalled at how blatant it was; the evidence of it, Pastor Mark Sinor testified, was everywhere. (Tr. V 1332, 1343-44).

On August 21, Pavatt sued his wife of almost ten years, Suk Hui Pavatt, for divorce. (State's Ex. 1). Like Brenda, Suk Hui was more than a decade younger than Pavatt. (Bates 132). Pavatt falsely told Pastor Sinor that *she* had left *him*. (Tr. V 1331). The divorce was final on September 9, with Pavatt assuming credit card debt in excess of $19,000. (State's Ex. 2). Pavatt told his daughter that he was going to marry Brenda and that they planned to have a baby together. (Tr. XI 2835).

In early to mid-September, Pavatt and Brenda went to the home of Ron Jacobs, a licensed gun dealer and acquaintance of the Andrews. (Bates 4573). Pavatt wanted to buy a .22 caliber revolver without leaving a paper trail. (Bates 4573). Mr. Jacobs declined. (Bates 4573). On September 10, Pavatt's daughter Janna, who worked at a bank, helped Brenda open a new account with more than $80,000 that Brenda transferred from her and Rob's joint savings account. (Tr. XI 2836-37; Bates 4111).

On September 19, Rob's birthday, the church asked Pavatt and Brenda to step down from their roles in children's ministry. (Tr. V 1343-44; Tr. VI 1533). They were furious. (Tr. V 1334-35, 1342, 1350-52; Tr. VI 1470). Pavatt was specifically angry at Rob, believing he had something to do with it. (Tr. VI 1538). He said of Rob: "I hate the son of a bitch." (Tr. VI 1538).

The next day, Brenda took Rob's house key and yelled at him to get out. (State's Ex. 208; Bates 476, 478; Appx. 8). Rob moved into an apartment and both parties hired divorce attorneys. (Tr. VII 1874). But Rob was distraught and wanted to reconcile. (Tr. VI 1541, 1874; Tr. VII 1854-55, 1907-08). Pastor Sinor testified that Rob loved Brenda to his dying day. (Tr. V 1333, 1341).

For her part, Brenda absolutely loathed Rob. She told people she hated him. (Tr. VI 1468-69, 1627-28; Tr. X 2570). She told him that he had "ruined [her] whole life" and that she would "have a party" if he moved away. (Bates 182, 190). She told former lover Tracy Higgins, "[s]he wished [Rob] would just die so she could get the money and go on with her life." (Tr. VI 1470).

The day after Brenda kicked Rob out of the house was Parker's birthday party. (Tr. VI 1550). There, Rob told Ron Stump that "he was afraid that Brenda had finally found somebody that would kill him," and that person was James Pavatt. (Tr. VI 1550).

Rob was right. His belief was based, at least in part, on the fact that Pavatt (falsely) told many people that he had served in the special forces and had bragged about having killed people. (Tr. VI 1466, 1509-10, 1556, 1653; Tr. XI 2839; Tr. XIV 3464). Enough of these statements made their way to Rob for him to believe Pavatt was a dangerous sniper. (Tr. VII 1929; Bates 492). Rob also knew that Pavatt had once said it was easier to "get off a murder charge" than to "get out of a divorce." (Bates 76; Appx. 101).

What Rob did not know was that in October 2001, Pavatt told his daughter that Brenda had asked him to kill Rob. (Tr. XI 2838). Instead of ending the relationship, or warning Rob, or going

to the police, Pavatt entered into an agreement with Brenda to solve both of their perceived problems.

b. The first attempt

Pavatt and Brenda wanted Rob's money. Getting a job was one of the worst things Brenda could imagine. (Tr. VI 1468-69; Bates 119). She was "just furious" when Tracy Higgins dared to suggest that she get a job. (Tr. VI 1469). And she did not want to share **"her"** children: "I don't want him to have a relationship with them. They're my children. They're not his." (Tr. VI 1451, 1624). In a conversation about the divorce, Brenda told Rob, "I will have the kids and all the money[.]" (Bates 169). Brenda was stalking Rob and telling him she knew things about where he went and what he was doing. (Tr. X 2568; Bates 252, 268, 308, 484, 1406). At least some of the time, it was Pavatt who was doing the stalking. (Tr. VII 1856-58; Tr. X 2568).

For his part, Pavatt wanted it all: Rob's wife, Rob's kids, Rob's house, and Rob's money. (Tr. VI 1471). After the murder, police found in Pavatt's apartment a homemade birthday card Brenda made for Pavatt's forty-eighth birthday, signed by Rob Andrew's children, in which Brenda referred to herself as "Mommy." (Tr. XI 2748-49; Appx. 52-53).

Rob was young and healthy. (Tr. VII 1890). There was no reason to suspect he would not be around for decades to come. Yet, Pavatt and Brenda were obsessed with an $800,000 Prudential insurance policy on Rob's life; a policy that Pavatt, an insurance agent, sold to Rob and Brenda in March of 2000. (Tr. VII 1878; Tr. VIII 2073-74; State's Ex. 26). Brenda was initially the sole beneficiary and Rob was the owner of the policy. (Tr. VIII 2047).

On September 24, 2001, only four days after Brenda made Rob move out, Pavatt called Prudential. (Tr. VIII 2086). He said that Prudential's records were incorrect, that Brenda was the

owner of the policy. (Tr. VIII 2086). He claimed to have sent a change of ownership form in March of 2000, but Prudential had no record of it. (Tr. VIII 2047-49, 2086).

In early October, Rob began trying to get paperwork for the Prudential policy, and an annuity he had through Prudential. (Bates 518-19). Brenda would not give it to him, so he turned to Pavatt. (Tr. VII 1878-79; Bates 518; Appx. 44). Pavatt promised to turn the documents over but never did. (Bates 518). Pavatt also told Rob that he had "set it up where [Brenda] owned" the life insurance policy so Rob could not change the beneficiary. (Bates 518; Appx. 44).

On October 26, 2001, Rob took the day off work to spend time with the children. (Bates 597-98). Brenda knew he was going to a parent-teacher conference and then coming at about 10:00 a.m. to pick up the children from the family home. (Tr. VI 1542). As he attempted to back out of his driveway that morning, his brake pedal went all the way to the floorboard. (Tr. VII 1755, 1772, 1777-78; Tr. XII 3132; State's Ex. 208). Rob drove the car to the dealership and told mechanic Phillip Rogers, before anyone had looked at the vehicle, that he thought someone was trying to kill him. (Tr. VII 1729-35). Examination confirmed that *both* brake lines had been cut. (Tr. VII 1738, 1745-46; Appx. 22-24). Not cracked by dry rot, not worn, but cut, and it would have taken considerable effort to get up under the car and do it the way it was done. (Tr. VII 1738, 1745-46).

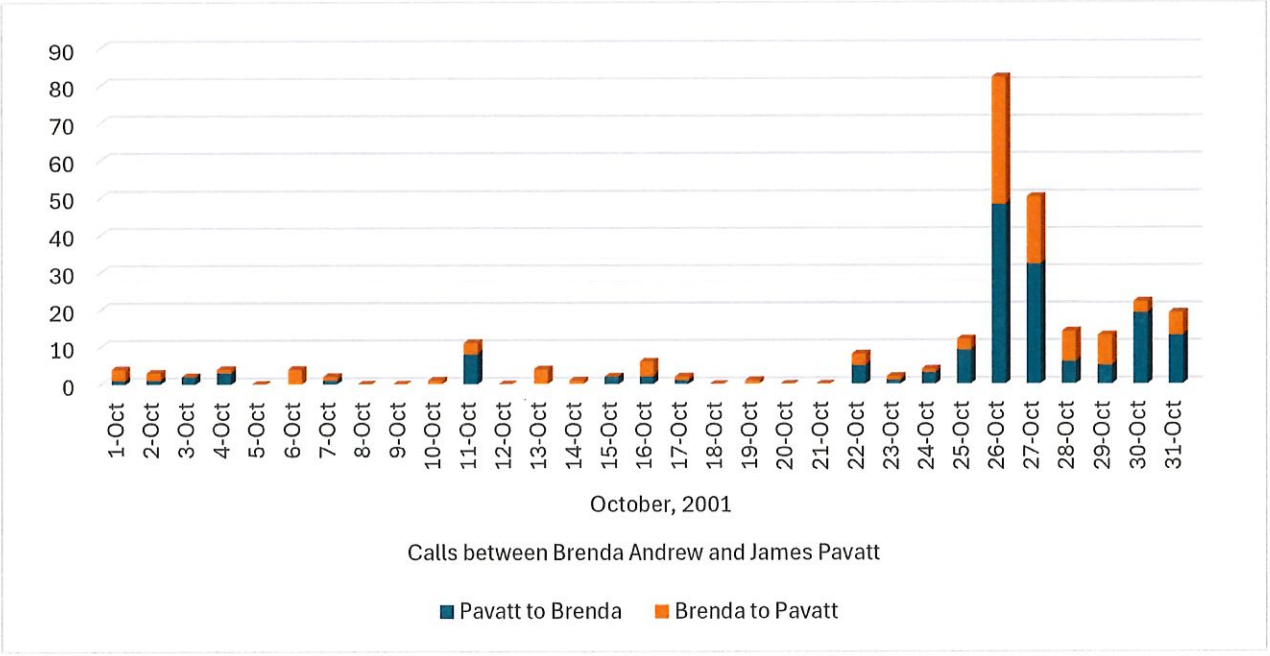
Mr. Rogers saw a terrified man that day. (Tr. VII 1767). Rob pulled into the dealership panicked and visibly uncomfortable. (Tr. VII 1734-35). He did not want to be out in open space. (Tr. VII 1734-35). When the rental company came in a van to take Rob to get a car, he asked that the van be brought as close to the door as possible; he ran out, jumped in, and lay flat on the floor while the driver shut the door and drove away. (Tr. VII 1736).

Rob nonetheless went to the parent-teacher conference. (Tr. VI 1543-44; Tr. VII 1778; Bates 492). Rob then went to the family home, where he sat in the driveway for forty-five minutes

until a woman called his cell phone and said Brenda was at Norman Regional Hospital "having some sort of breakdown." (Tr. VII 1778; Bates 492, 598). Rob drove to Norman, but Brenda was not at the hospital. (Bates 492). He later called his office to check his voice mail. (Bates 493).

At 9:34 a.m., a man left the following message: "Mr. Andrew, please come to Norman Regional Hospital. Your family's here. Thank you. Norman Regional Hospital." (State's Ex. 22). At 10:22 a.m., a woman said, "Hello, Rob. This message is for you. I'm calling to let you know that you need to go pick up your wife Brenda at Norman Regional Hospital." (State's Ex. 22). Someone tried very hard to get Rob to drive at a reckless speed with compromised brakes.

In the first 25 days of October, Pavatt and Brenda called each other's cell phones an average of three times per day. (State's Ex. 12-13). But on October 26, 2001, Pavatt called Brenda forty-eight times, and Brenda called Pavatt thirty-four times. (Tr. VII 1959-61; State's Ex. 12-13). **Eighty-two calls** on the same day Rob's brake lines were discovered to have been severed. (Tr. VII 1961; State's Ex. 12-13). The next day there were fifty-four more calls between the pair. (Tr. VII 1961-62; State's Ex. 12-13; Appx. 20).



But Brenda was not the only person Pavatt was calling. On the morning of October 26, he called his daughter Janna, provided her with Rob's office phone number, and asked her to call and tell Rob that Brenda was in the hospital in Norman. (Tr. VII 1796; Tr. XI 2839-42). Janna borrowed a coworker's cell phone and left the aforementioned message at Rob's office. (Tr. VII 1796; Tr. XI 2843).

Pavatt called Janna back ten to twenty minutes later, provided her with Rob's cell phone number, and told her to deliver the message again. (Tr. XI 2842). He also asked her to have a male coworker place a similar call. (Tr. VII 1796-97). She had no one who would make the call, so when her boss wanted coffee, she drove to a Conoco and made a second call from the pay telephone there. (Tr. VII 1796-97). This was the call that Rob answered. (Tr. XI 2842-43). Janna returned to her office, only to be confronted about twenty minutes later by Brenda. (Tr. VII 1797). Brenda was upset, but Janna's trial testimony did not reveal why. (Tr. XI 2845).[3] When Brenda appeared at her office, Janna knew her father had lied to her. (Bates 315; Appx. 28). Janna's statement to police was not specific, but she likely meant that Pavatt had lied about Brenda being in the hospital.

Both of the calls to Rob's office were made from pay phones. (Tr. VII 1792). Police traced the message from the woman to a Conoco in Norman, confirming Janna's testimony. (Tr. VII 1781, 1792, 1796-97).

The other message left at Rob's office, the one from a man, was made by Pavatt himself (or by his friend at Pavatt's request). Although she denied it at trial, Janna told police, after listening

[3] Janna had told police that Brenda wanted to know about a telephone call Janna received from Rob about a month before the brake line incident. (Bates 315; Appx. 28). Rob had told Janna her number was on his caller ID, but Janna told Rob she had not called him. (Bates 315; Appx. 28).

to the answering machine message, that it sounded like it might be her father attempting to disguise his own voice.[4] (Tr. VII 1800; State's Ex. 22; Appx. 28).

Janna's suspicion is not the only evidence connecting Pavatt to this call. It was made from a 7-Eleven in south Oklahoma City. (Tr. VII 1793). Pavatt's close friend Curtis Jones testified, *through tears*, as a State's witness. (Tr. XII 3071). He thought of Pavatt as his brother. (Tr. XII 3071). He was a reluctant, and therefore credible, witness. Among other things, he told the jury that he accompanied Pavatt to a 7-Eleven in south Oklahoma City in late October of 2001. (Tr. XII 3085). Pavatt had asked him to make a telephone call. (Tr. XII 3086). Mr. Jones was not allowed to elaborate, because the State became aware of this information after the discovery deadline. (Tr. XII 3084-86). But it's clear what happened. Either Pavatt or Mr. Jones (on behalf of Pavatt) placed the telephone call to Rob's office. Pavatt engineered three telephone calls designed to get Rob on the highway with compromised brakes, heedless of the potential danger to everyone on the road.

Rob called Prudential that very day to change the beneficiary on his life insurance policy to his brother, intending to create a trust, with his brother as trustee, for the benefit of his children. (Tr. VII 1879, 1987; Bates 493; Appx. 40-43). One of the people Rob spoke with was Ralph Burnett, Pavatt's boss. (Bates 518-19).

That very same day, as Rob filled out the forms to change his beneficiary, Pavatt called Rob, asking what Rob had told Mr. Burnett. (Bates 494, 519; Appx. 30). Pavatt told Rob "that he was going to get me back and that I better be able to defend anything that I have done. He said if

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[4] After the murder and before Pavatt was arrested, Janna was very cooperative with law enforcement. (Tr. XI 2739; Tr. XII 3037-53). However, she resumed contact with her father when he was in jail. (State's Ex. 154). By trial, she was literally a hostile witness towards the State. (Tr. XII 3009).

you think Brenda is mean wait until you deal with me." (Bates 494; Appx. 30, 45). Rob perceived this as a threat. (Tr. VII 1865).

Brenda also called Rob on October 26, to tell him she knew he was trying to change the life insurance policy. (Bates 494; Appx. 30). She wanted to know who he was naming as the beneficiary. (Bates 519; Appx. 30). He refused to say. (Bates 519; Appx. 30). She called back and asked why he thought his brother would be a good person to name as the beneficiary. (Bates 519; Appx. 30). Rob was concerned that Pavatt was giving information to Brenda. (Tr. VII 1882-84).

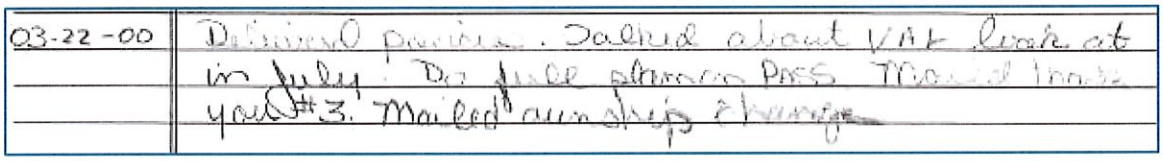
In the ensuing days, Pavatt and Brenda made frantic efforts to wrest control of the policy from Rob. They both made numerous telephone calls to Prudential. (Tr. VII 1917-20). Pavatt appears on a quarter to a third of the twenty-five to thirty recorded telephone calls to Prudential probing the status of Rob's policy; Brenda appears on the rest. (Tr. VII 1920).

Rob's attorney Craig Box issued subpoenas to Pavatt and Mr. Burnett. (Tr. VII 1765-66, 1880). Pavatt ignored the subpoena and Mr. Box filed a contempt action against him, which was later dismissed when Prudential assured Mr. Box he would get the documents. (Tr. VII 1880, 1893, 1905-06; Bates 1339). Pavatt was angry, believing Rob was trying to get him fired. (Tr. XI 2848).

Recall that Pavatt had called Prudential in September about an alleged change of ownership form. After Rob began trying to change the policy's beneficiary, Pavatt sent a change of ownership form, via fax, to the home office. (Tr. VII 1988, 2047-48). The form is dated March 22, 2001, but the first record the home office had of the form was from October 29, 2001. (Tr. VIII 2047-49; State's Ex. 24, 27; Appx. 32-36).

Prudential's agents keep logs of their activities on the inside covers of client files. (Tr. VIII 2057-58). It appears that Pavatt altered these logs to make it look as if Rob had signed the form and signed it well in advance of the attempt on his life. In an entry dated March 22 **of 2000**,

someone (presumably Pavatt, as he was the agent) wrote on Rob's file: "Delivered policies. Talked about Val look at in July. Do full plan on PASS. Mailed. Thank you. Number four. **Mailed own[er]ship change**." (Tr. VIII 2059-60; State's Ex. 26) (emphasis added). Prudential's manager for Corporate Investigations testified, with respect to the "Mailed own[er]ship change" notation, that "[i]t would appear that something was written underneath, erased, and this [Mailed own[er]ship change] was inserted on the document." (Tr. VIII 2060).



The policy began on March 22, 2000; it is impossible that ownership was changed on the day the policy was delivered. (Tr. VIII 2074-75; State's Ex. 26).

Rob's signature on this change of ownership form was forged. (Tr. XII 3268-76; Appx. 37-38). The handwriting examiner testified that the person who forged Rob's name based the forgery on an earlier version of Rob's signature, which had evolved over time. (Tr. XIII-A 3324-26). Brenda had once bragged that she could sign Rob's name better than he could. (Tr. VII 1891-92).

Pavatt submitted a forged change of ownership form, and appears to have falsified the client file, in an attempt to steal control of the policy from Rob.

On November 1, the divorce court ordered Rob to create a trust for the life insurance proceeds, with Brenda as the trustee, for the benefit of the children. (Tr. VII 1885-90; State's Ex. 25). On November 2, Brenda called Prudential. (Bates 370). The comment on the call log prepared by Prudential said, "Confirmed owner and bene[ficiary] changes were completed today 11/2." (Bates 370).[5] Thus, Pavatt and Brenda had reason to think that, as far as Prudential was concerned,

[5] Also on November 2, Pavatt listed Brenda as his "fiancée" on a life insurance application. (Bates 2729-35; Appx. 48-51).

Brenda was the policy's owner and beneficiary. And Mr. Box testified that, in his legal opinion, if Rob died before the divorce became final, the temporary order would be null and void. (Tr. VII 1888).

To recap, Pavatt was angry and he was broke. But he thought Brenda was the beneficiary of Rob's life insurance. And he told Suk Hui that his financial problems would soon be solved by some unspecified special forces work he was going to do. (Tr. VI 1672-73).

c. Regrouping for the second attempt

Rob Andrew's 16-gauge shotgun was in the master bedroom closet of the family home in September when Tracy Higgins helped him move his things; Rob did not take it with him. (Tr. VI 1486-88). It had been given to Rob by his grandfather and he wanted it back; he wanted to use it quail hunting with his children over Thanksgiving. (Tr. VII 1923-24; Bates 473). Brenda would not return it. (Tr. VI 1555-56; Tr. VII 1849-50, 1924). Rob told his brother about a week and a half before the murder that he still did not have the gun. (Tr. VII 1924-25; Appx. 97).

Pavatt knew that gun. A year earlier, on the Andrew family hunting trip, Pavatt had taken the opportunity to fire it. (Tr. VII 1928-31, 1936). Sixteen-gauge shotguns and their shells are not common; they are less popular and more expensive than 12- or 20-gauge versions. (Tr. X 2554).

About a week before Rob Andrew was murdered, Herman Roggow saw Brenda Andrew out near her family's place in Enid with two men who appeared to be headed to practice shooting, as was common in that location. (Tr. X 2485-94). Mr. Roggow returned to the area after hearing about the murder and found 16-gauge shotgun shells on the ground. (Tr. X 2491-93).

Pavatt and Brenda had decided to use Rob's own gun against him. But they apparently knew that Brenda would be the prime suspect in her estranged husband's murder. So they decided that it needed to look like Brenda was also a victim.

Recall that in September, Pavatt had tried to illegally purchase a .22 caliber revolver. With that avenue blocked, Pavatt made the purchase legally. On November 14, 2001, six days before the murder, he walked into the H&H Gun Range and bought a .22 caliber revolver. (Tr. X 2508-09, 2521; State's Ex. 113-15; Appx. 54-58). As will be discussed, Pavatt would later use this gun to shoot Brenda in the arm.

The owner of the store testified that Pavatt came in knowing what he was looking for, and that the gun he bought was, she suspected, the cheapest one in the store that day. (Tr. X 2551-53). She also testified to the obvious: someone who wants to use a gun and then dispose of it buys a cheap one. (Tr. X 2560). Pavatt did not buy ammunition. (Tr. X 2538).

After the murder, investigators recovered from his apartment a ledger labeled "Weapons and Ammo," listing weapons, serial numbers, and ammunition including an entry for fifty rounds of .22 Stinger ammunition, manufactured by CCI. (Tr. IX 2324-25, 2366-68; Tr. X 2545; State's Ex. 173; Appx. 96). The gun Pavatt purchased was capable of firing a .22 Stinger round. (Tr. X 2524-25).

d. November 20, 2001

What Rob wanted for Thanksgiving was simple: he wanted to take his children quail hunting with his brother at their family place in Seiling, Oklahoma. (Tr. VII 1923). Pastor Sinor warned Rob not to go to the family home, but Rob wanted to be with his kids. (Tr. V 1341). In the six weeks after Brenda made him move out, she had only let him spend about eight hours with them. (Tr. V 1884; Bates 548). So, on November 20, he was determined to pick up his children, regardless of the risk.

Around midday, Pavatt brought his washer and dryer to the Andrew house and put them in her garage. (Tr. VI 1471). Mr. Higgins came over to help unload. (Tr. VI 1471). Pavatt then left,

and Mr. Higgins and Brenda went to lunch. (Tr. VI 1472). Brenda explained that Pavatt was moving out of his apartment and needed somewhere to store the washer and dryer. (Tr. VI 1473).

Brenda was, in Mr. Higgins's words, very upset that the children were going with Rob for the Thanksgiving break. (Tr. VI 1473). She had been upset about it for weeks. (Tr. VI 1451). Mr. Higgins stayed with Brenda while she packed the children's clothes and left when she said she had to go pick them up. (Tr. VI 1473-74).

What happened next struck Mr. Higgins as strange enough that he remembered it in detail. Driving away, he ended up traveling the same direction as Brenda for a while. (Tr. VI 1476). Brenda, recognizing this, called Mr. Higgins' cell phone, which she almost never did for fear his wife would discover their former affair. (Tr. VI 1476). She asked where he was and why he was following her instead of going home. (Tr. VI 1476-77). He explained where he was headed and, in turn, asked why she was not driving toward the school, where she had said her children were. (Tr. VI 1476-77). She said she needed to turn around, made another comment, and then hung up abruptly. (Tr. VI 1477). Two minutes later she called back and asked again where he was. (Tr. VI 1477). When he said he was nowhere nearby, she said she thought she had seen his car. (Tr. VI 1477). Mr. Higgins never saw Brenda again. (Tr. VI 1478).

At some point that afternoon—perhaps when Brenda left Mr. Higgins—she drove Pavatt to Janna's apartment, where he picked up Janna's car. (Tr. XI 2859-60). He told Janna he was going to get the car fixed. (Tr. XI 2859, 2866-67).

Around 5:00 p.m., Brenda called Rob at work. Rob's own contemporaneous log—the last entry he ever made—records that she asked him to pick the children up at 6:15, rather than 6:00, so she could finish packing their things. (Tr. XII 3132; State's Ex. 208).

When Rob arrived, he parked in the driveway and waited for his children. (Tr. VI 1551). He called Ron Stump, and the two men went through their Bible study. (Tr. VI 1551-53). Mr. Stump put his youngest son on the phone to recite verses that he had memorized from Hebrews. (Tr. VI 1550-53). Then Mr. Stump heard the garage door open in the background. (Tr. VI 1552).

Rob said he had to go because "they're coming out," but he never saw his children again. (Tr. VI 1552-53; Tr. IX 2183). Brenda told police that the pilot light had gone out on the heater in the garage, and she asked Rob to light it. (Tr. IX 2192). Rob agreed, in spite of all the animosity he had faced. That's the kind of man Rob was.

Bee Garrison, who lived on the same cul-de-sac, heard two booms. A scream followed each one. (Tr. VIII 2097-98, 2104). Two to four seconds elapsed between them. (Tr. VIII 2105). She looked across at the Andrew house and saw the garage door standing open and Rob's car in the driveway. (Tr. VIII 2011-02). She heard someone moaning. (Tr. VIII 2100-02).

The first shotgun blast struck Rob Andrew in the right side while he was squatting, kneeling, or on all fours. (Tr. XII 3178-80; Appx. 77, 80). It was fired from intermediate range—three to fourteen feet away. (Tr. XII 3181).

The second blast struck Rob in the left side of the neck, traveling downward and left to right. (Tr. X 2435-37; Appx. 76, 82). It was fired from considerably closer range, leaving stippling on his skin. (Tr. XII 3179-83). The trajectory indicates that he was still at least partially upright. (Tr. XII 3179-80).

Pavatt then shot Brenda from very close range through the back of her left arm. (Tr. IX 2198-2200; State's Ex. 222). There was a visible burn on her arm from the gun powder. (Tr. IX 2199-2200; Appx. 75). The bullet exited Brenda's arm and lodged in the door leading from the garage to the house. (Tr. IX 2265-66; Appx. 71-73).

Brenda called 911 twice in the aftermath of the shooting, at 6:20 and 6:26 p.m. (Tr. IX 2148-49; State's Ex. 34). She reported that she and Rob had both been shot by masked intruders, that she did not know who they were, that she did not know where they had gone, and that Rob's shirt was all red. (State's Ex. 34). On the second call she reported that Rob was breathing, conscious, and trying to talk to her, and that she had not put anything on him to stop the bleeding. (State's Ex. 34). Rob bled to death before first responders arrived. (Bates 7).

Responding officers found Tricity and Parker in the back bedroom of the house, about as far from the garage as one could possibly get, with the door closed. (Tr. IX 2184-85). The television was turned up so loud that it was uncomfortable to stand in the room. (Tr. IX 2184-85).

e. The plan unravels

In spite of Brenda's willingness to take a bullet to get away with Rob's murder, police were immediately suspicious. (Tr. IX 2220-23). The account Brenda gave that night was of two men dressed in all black, in ski masks and gloves, both armed; they shot Rob first, then shot her, and ran out of the garage. (Tr. IX 2175-77). She could recall that they said six or seven words but could not remember any of them. (Tr. IX 2180). She could not say what kind of weapon was used and could not—she said—tell the difference between the sound of a handgun being fired and that of a shotgun. (Tr. IX 2231-35). She also could not recall how far away her shooter was when he fired. (Tr. IX 2232). She said that after she was shot, she went into the house to call 911 and check on her children, then came back out to the garage. (Tr. IX 2197).

Officer Theresa Bunn found no blood anywhere inside the house; no trail matching Brenda's account of walking inside to get the telephone. (Tr. IX 2245, 2256-57). A person bleeding from that wound would have dripped. (Tr. IX 2257). The telephone Brenda used had no blood

transfer on it either, which would be expected given it had been handled by someone who had just been shot. (Tr. IX 2254-55; Tr. XII 3173, 3188-89; Appx. 74).

Brenda was shot on the inside back of her arm, a location inconsistent with her account of turning to run into the house. (Tr. IX 2198-99). It was a near-contact wound, heavy with powder and burn marks. (Tr. IX 2199, 2224; Tr. IX 2317-18). Officer Bunn estimated the muzzle was less than six inches away, and at most eighteen. (Tr. X 2365). Crime scene reconstructionist Tom Bevel put it at two to four inches away. (Tr. XII 3183-84; Appx. 112-19). The wound was superficial. (Tr. XII 3185). Yet, Rob was shot twice with a shotgun. (Bates 2103). The discrepancy is telling.

Mr. Bevel testified that there was staging in this case and that Rob's homicide did not happen the way Brenda said it did. (Tr. XII 3184-85, 3190). If Brenda's account were accurate, she was shot at point-blank range, fell to the ground, and then in a very short span of time got back up and went inside her home without anyone grabbing her or firing at her again. (Tr. XII 3185-86). It was, he said, almost as though she had called "time out" after being shot so she could go inside. (Tr. XII 3185). Then, having fled a life-threatening situation into a house containing her two children, she did not lock the door. (Tr. XII 3185-86). Instead, she came back out to the crime scene moments later, unarmed...but did not render first aid to Rob. (Tr. XII 3185-86).

Brenda's affect was also suspicious to lay persons and veteran officers, alike. (Tr. VI 1636-38; Tr. IX 2180-82, 2222-23; Tr. X 2468-74, 2480; Tr. XI 2735). She was calm and her tears looked fake. (Tr. IX 2180-81, 2222). With her husband mortally wounded, she expressed relief that she had been shot in her left arm rather than her right, because she was right-handed. (Tr. IX 2223-24).

Police found a spent 16-gauge shotgun shell on top of the minivan parked in the garage and a .22 caliber bullet embedded in the door from the garage to the house. (Tr. IX 2248-50; Tr. XIII-A 3385-86; Appx. 71). Brenda told police that Rob's shotgun should have been in a closet in

the house. (Tr. XI 2749-50). *She did not claim to have returned the gun to Rob.* Neither Rob's 16-gauge shotgun nor the .22 revolver Pavatt bought on November 14 was ever found. (Tr. XI 2749, 2751).

Eighteen feet from the Andrew house stood the home of Dean and Judy Gigstad. (Tr. XI 2725). The houses backed up to a greenbelt. (Tr. IX 2166). A person could travel from the Andrews' back yard to the Gigstads' back yard by going around a partial fence or jumping over a short fence that was about three feet tall. (Tr. IX 2167-68). The Gigstads traveled often, and they had given Brenda a key so she could check on their house and bring in the mail. (Tr. X 2576-77). They left on a trip just before Thanksgiving. (Tr. X 2577). Mr. Gigstad was certain the house was secure when they left. (Tr. X 2590).

Brenda told police the "two men" ran in the direction of her neighbors, the Shadids. (Tr. IX 2177-79). The Shadids lived on the north side of the Andrew house and the Gigstads lived on the south side. (Tr. IX 2179, 2211; Appx. 62).

When the Gigstads came back from their trip early for Rob's funeral, they found that someone had been in their house. (Tr. X 2596-98). One corner of their bed had been knocked off the blocks supporting it. (Tr. X 2598). The shoe stand that was in the closet had been damaged and pushed under the bed. (Tr. X 2599). In that closet was an access board to the attic, which looked as though it had been moved. (Tr. X 2599). And in a spare bedroom, by the closet, was a spent shotgun shell. (Tr. X 2599). It was 16-gauge and had been fired by the same gun as the shell found on Brenda's van. (Tr. XIII-A 3375-77).

Crime scene investigators went into the Gigstads' attic where they found, on top of the insulation between the attic ladder in the garage and the access door in the master closet, three live

rounds of .22 caliber ammunition. (Tr. X 2612; Tr. XI 2681-82, 2687). The insulation showed what looked like a trail where someone had moved through it. (Tr. XI 2682-83; State's Ex. 135).

Dean Gigstad did not own a 16-gauge shotgun and did not keep 16-gauge ammunition in his house. (Tr. X 2619-20). He had never kept a firearm or ammunition in his attic and could think of no reason any would be there. (Tr. X 2621). In fact, he had not been in that attic since the early 1980s. (Tr. X 2623-24).

The three live rounds from the Gigstad attic were .22 Stinger ammunition, the same type documented on Pavatt's ledger and capable of being fired by the revolver he had recently purchased. (Tr. XIII-A 3383-84; State's Ex. 173). There was no sign of forced entry. (Tr. XI 2691).

Pavatt turned his phone off the night Rob Andrew was murdered. (Tr. XI 2856-57). Janna left a message at 5:47 p.m. asking him to call back. He did not call until the next morning, which was unusual. (Tr. XI 2856-59). On November 21, he took Janna to lunch, at which time he threatened to kill her if she ever repeated that Brenda asked him to kill Rob. (Tr. XI 2864-65; Tr. XII 3008).

Pavatt returned Janna's borrowed car without any noticeable repair work being done to it. (Tr. XI 2859). The next time Janna drove it, she found a live .22 caliber round on the floorboard. (Tr. XI 2866-67). She did not own a firearm. (Tr. XI 2866-67). When Janna called and asked Pavatt about the bullet, he told her to throw it away and to not say anything to anyone about it: "Throw away the bullet. They'll lock me up." (Tr. XI 2866-68; Tr. XII 3002). Janna gave the bullet to police. (Tr. XI 2867-69).

Pavatt told both Janna and Curtis Jones that he had been at Lake Thunderbird the night of the murder, fishing and drinking. (Tr. XI 2862-63). They both found the story unusual, as Pavatt was not one to drink. (Tr. XI 2931; Tr. XII 3082-83). After the murder, Pavatt spent several

evenings at Mr. Jones's home, where he used Mr. Jones's personal computer to search for information about banks in Argentina, a non-extradition country. (Tr. XII 3072-73).

Pavatt never returned to his job. (Tr. VII 1993). On Friday, November 23, he added Janna to his checking account. (Tr. XI 2869-70). He also directed Janna to remove his computer and "all of his guns and bullets" from his apartment. (Tr. XI 2870-71). Pavatt met her at his apartment, retrieved his passport, and told Janna to delete emails from his computer between him and a friend he (falsely) claimed worked for the CIA. (Tr. XI 2871-73). When detectives searched Pavatt's apartment, there were no firearms or ammunition left inside. (Tr. XI 2750-51).

On Saturday, November 24, Pavatt came to Janna's apartment and talked about going to Argentina with Brenda and the Andrew children. (Tr. XI 2876-77, 2879). On Sunday, November 25, Pavatt came over again and asked Janna to notarize a document, purportedly signed by Rob, authorizing Brenda to take the children out of the country; Janna refused. (Tr. XI 2877-79, 2885-86; Appx. 86). The document had been typed on Pavatt's computer. (Tr. XII 3114-15; State's Ex. 207). It was purportedly notarized by Candace Whitmarsh, a coworker of Pavatt. But Ms. Whitmarsh testified that she did not sign it. In fact, her name is misspelled on the document. (Tr. XIV-B 3464-65; State's Ex. 207). Prudential's records establish that Pavatt had entered the building on that day, a Sunday. (Tr. XIV-B 3465-66). Ms. Whitmarsh stored her notary stamp in that office. (Tr. XIV-B 3465).

Brenda joined Pavatt at Janna's apartment that same day, asking Janna to transfer $35,000 from Brenda's account to Janna's and Pavatt's accounts so Janna could wire money to Brenda and Pavatt; Janna said no. (Tr. XI 2882-83). Brenda had the children and the family dogs with her. (Tr. XI 2886-87). Her car was packed. (Tr. XI 2887). She told Pavatt to hurry so they would have time to get across the border. (Tr. XI 2887-88).

Also on November 25, Pavatt asked to borrow the car Suk Hui was driving. (Tr. VI 1679-80). She met him at a grocery store. (Tr. VI 1680). He retrieved a "big military duffel bag" that he usually carried when hunting, a black bag, and a gun from his truck and put them in her car. (Tr. VI 1680-83, 1691). He took the car and never returned. (Tr. VI 1681).

Rob's funeral was held on November 26. (Appx. 83). There were more than 1,000 people there to mourn him. (Appx. 128). Pavatt and Brenda were conspicuously absent, and they deprived Rob's children of the chance to attend. (Appx. 83).

A Mexican vehicle permit was issued to Pavatt on November 26, 2001. (Tr. XI 2778; State's Ex. 175-76). Pavatt and Brenda were fugitives from justice, and they had taken Rob's children with them. (Bates 886-91). The FBI put out wanted posters. (Bates 886-91; Appx. 88-93). Rob's father issued a statement asking for help, expressing the family's "desperat[ion] to locate [the children] and to know they [we]re out of harm's way." (Bates 1037; Appx. 87).

Janna notified the FBI when Pavatt called her from Mexico. (Tr. XI 2895-97). He claimed that he, Brenda, and the children were being held captive, and he needed $5,000. (Tr. XI 2897-99). When Janna did not comply, Pavatt told her that Brenda was going to kill herself or the children because they had run out of money. (Tr. XI 2900). He also said they needed the money so they could return to Oklahoma because "the person that had killed Rob Andrew" had written an email. (Tr. XI 2900-01). The State assumes this is a veiled reference to Pavatt's own confession letter, discussed below.

On January 18, 2002, Pavatt accused Janna of cooperating with the authorities. He told her that if she was, he would kill Janna, Janna's five-year-old daughter, and Janna's mother. (Tr. XI 2829, 2907-08; Appx. 100). Janna believed that threat. (Tr. XI 2910).

On February 28, 2002, Pavatt and Brenda were taken into custody at the border. (Tr. XI 2768-70). They had given the children to Brenda's brother-in-law, who separately brought them across the border. (Bates 4766-67). Two Oklahoma County deputies drove Pavatt and Brenda back to Oklahoma. (Tr. XIII-A 3409). Pavatt and Brenda were in good spirits. (Tr. XIII-A 3409; Appx. 103). There was no animosity between them; they talked and laughed together. (Tr. XIII-A 3409). Neither appeared frightened of the other. (Tr. XIII-A 3409). They talked about the things they had done and the places they had visited in Mexico. (Tr. XIII-A 3410). In their few months on the lam, "they had went to the beach and they enjoyed the beach a lot and the kids enjoyed the beach. They had went to the mountains. And [they said] that Mexico was very beautiful. The people there were a lot friendlier than here in the United States. **They just had a good time.**" (Tr. XIII-A 3410) (emphasis added). Pavatt had succeeded in replacing Rob. But it didn't last.

f. Pavatt confesses

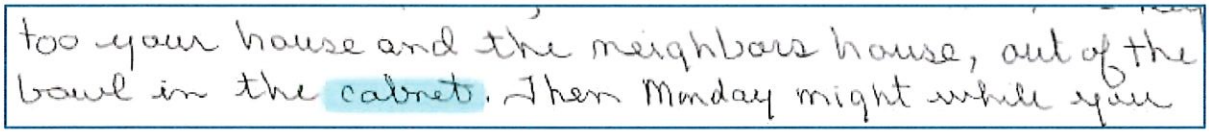
While in Mexico, Pavatt wrote a letter to Tricity. It read:

> Dear Tricity
>
> First I must tell you I love you. I regret that my actions have caused you to lose the life you were [illegible] to. I wish your dad would have moved to Maine like you wanted. We would be enjoying a great life. If that would have happened. Your dad was personally attacking me. He was trying to make me lose my job. He wanted to destroy in every area of my life. Your [mom] hated being away from you, for even one second. Your dad knew it and was using you and Parker to get to her. She told me the Friday before Thanksgiving, she was going to beg him, to come back after Thanksgiving. This meant I could no longer be part of her life. I decided to do something about it. I couldn't stand losing your mother. I contacted a friend and he said he would help me take care of my problem. The Sunday before Thanksgiving while you and your mother were out, riding bikes, I took the extra key to your house and the neighbors' house, out of the bowl in the cabinet. Then Monday night while you and your mother were out getting Tricy [a puppy], my friend and I came by your house, and got your dad's gun. We looked over the house, and made a quick plan of what we were going to do the next day.

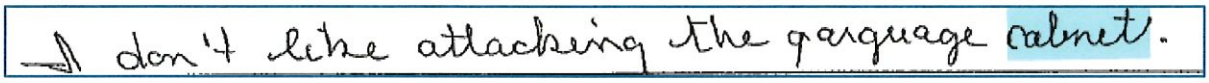
> The next day I . . . went to the house next door, and made sure the door was unlocked. I knew your dad was going to pick you and Parker up, around six P.M. My friend and I got to your house and waited outside. Your dad was late getting there for some reason.
>
> We came into the garage, and my friend shot your dad and I shot your mother. We then ran to the house next door, and stayed until the police left your house. We then jogged off and split up. I told your mother while on this trip . . . . She was very angry and hurt by my actions. . . . All I know is you don't miss your dad or seem to care he is dead. I understand this because of how he treated you and Parker. You don't love him. Someday I hope your life is back to normal in Oklahoma. I don't understand what happened to me, but I love you and will always think of you as my daughter.

(State's Ex. 222; Appx. 104-05) (cleaned up).

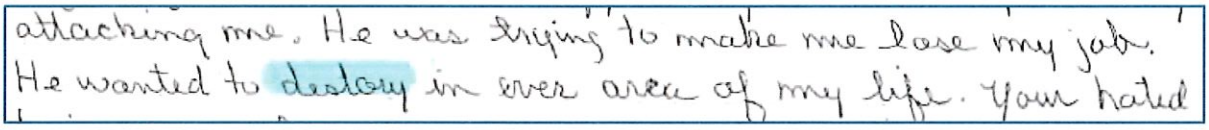
A handwriting analyst confirmed the letter was written by Pavatt. (Tr. XII 3241, 3244). Among other things, Pavatt misspelled the words "cabinet"—c-a-b-n-e-t—and "destroy"—d-e-s-t-o-r-y—in the letter and in exemplars he was asked to write. (Tr. XIII-A 3357-58).


too your house and the neighbors house, out of the bowl in the cabnet. Then Monday might while you

Letter


don't like attacking the garguage cabnet.

Exemplar


attacking me. He was trying to make me lose my job. He wanted to destory in ever area of my life. Your hated

Letter

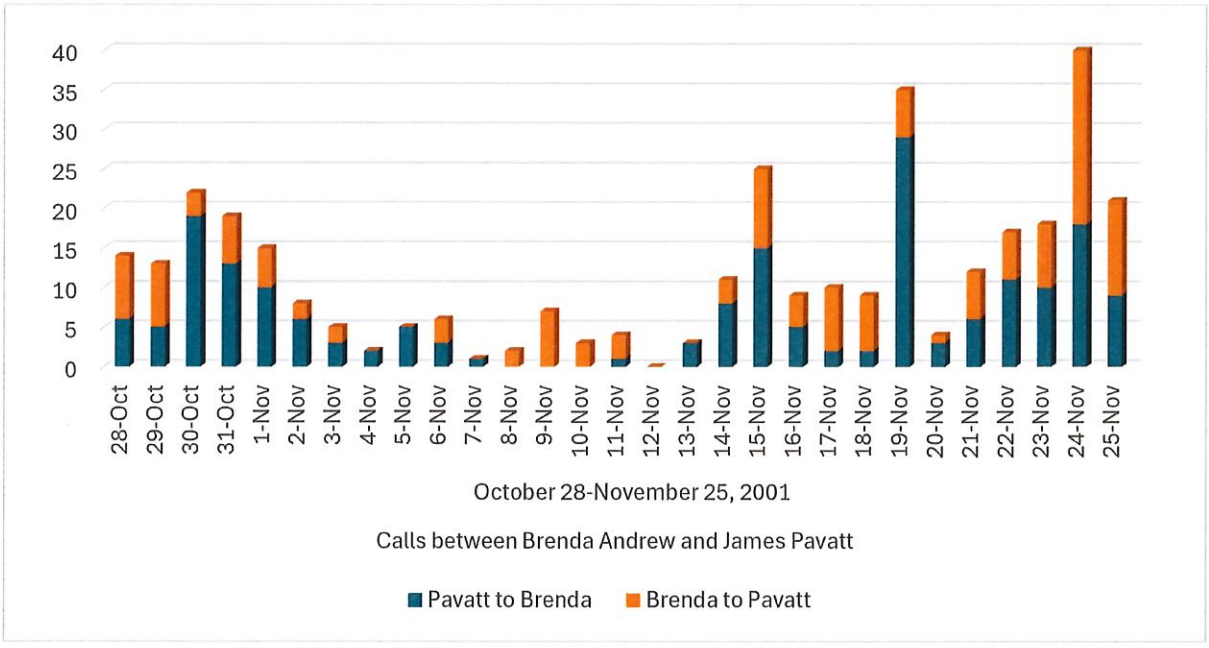

Dear Jim don't destory the garguge.

Exemplar

In his second post-conviction appeal, Pavatt suggested that Brenda provided the words in the letter, but he did not deny that he wrote it. (2nd PC App. 35-36). Given that the two conspired to kill Rob, it is no surprise that they conspired to write the letter. Brenda's likely participation does not exonerate Pavatt.

g. The final piece of evidence

Finally, lest there be any doubt that Pavatt and Brenda murdered Rob, the phone calls once again tell the tale. From October 28 through November 19, Pavatt and Brenda called each other an average of 10 times per day. (State's Ex. 12-13). This was a notable increase from before their first attempt on Rob's life. (State's Ex. 12-13). The call volume was high at the beginning of November, then tapered off, only to dramatically increase as November 20 approached. (State's Ex. 12-13). The calls peaked on November 19, dropped to only 4 on the day of the murder, and then picked up again dramatically as the pair tried to plan their escape. (State's Ex. 12-13; Appx. 46).



With this overwhelming evidence before it, the jury deliberated for only two-and-a-half hours before convicting Pavatt of First Degree Murder and Conspiracy to Commit Murder. (Tr. XIII-A 3617-18).

h. Death is the appropriate sentence

The jury sentenced Pavatt to death after finding two of the three alleged aggravating circumstances: that Rob Andrew's murder was especially heinous, atrocious, or cruel, and that Pavatt committed the murder for remuneration. *Pavatt*, 2007 OK CR 19, ¶ 1, 159 P.3d at 276.

A murder is especially heinous, atrocious, or cruel if it is preceded by conscious mental or physical suffering. *Id.*, 2007 OK CR 19, ¶ 75, 159 P.3d at 294. Rob suffered physically. After he was shot the first time, *with a shotgun*, Rob grabbed a garbage bag full of cans in an apparent attempt to shield himself. *Id.* Rob was shot a second time and fell to the floor of his garage where he bled to death. *Id.* He was still grasping the bag of cans when first responders arrived and found him deceased. *Id.*

Brenda called 911 at about 6:20 p.m., hung up after about 2 minutes, and called back at approximately 6:26 p.m. (Tr. IX 2148-49; State's Ex. 34). In the second call, she told the 911 operator that Rob was still conscious and trying to speak. (State's Ex. 34). The medical examiner testified that Rob would have felt pain from the pellets that tore through his lungs, aorta, and liver. (Tr. X 2463-64).

Rob also suffered mentally, and for more than a few minutes. Rob considered Pavatt a friend. He trusted Pavatt as his insurance agent. In September, his beloved wife threw him out of their home, and he suspected she was having an affair with this trusted friend. Brenda then largely kept him from his children, telling him that they did not want to see him and he should just move

away and have nothing to do with them. (Bates 190, 267). She told him, "[n]either one of them care if they ever see you again." (Bates 300).

Rob struggled financially because Pavatt (through Janna) helped Brenda hide more than $80,000. (Tr. XI 2836-37; Bates 486). Pavatt used Brenda's credit card—meaning Rob would foot the bill, since Brenda had no separate income—to pay to send Suk Hui Pavatt to Korea and get her out of the way. (State's Ex. 159). Pavatt made the divorce more complicated and expensive by refusing to provide the Prudential documents.

After his brake lines were cut, Rob struggled daily with fear, while battling Pavatt and Brenda over the life insurance, agonizing over the loss of his marriage, and missing his children. (Bates 476-504). On November 19, he told Mr. Stump that it felt like someone had a gun pointed at him. (Bates 1432-33). He said, "If they do shoot me, I hope they get me with the first shot. I do not want to feel any pain." (Bates 1433).

On November 20, Rob was finally supposed to spend an extended amount of time with his children, for the first time in two months. He was kneeling in his own garage, with his still-beloved wife next to him and his cherished children feet away, when the first shotgun blast hit him. He tried to protect himself, facing his armed executioners with a plastic bag full of aluminum cans. His nightmare had come true. Pavatt and Brenda were killing him. And they didn't get him with the first shot; at least not in a way that was immediately fatal.

Two days before Thanksgiving, in the home he was so proud to provide for his family, Rob Andrew bled out on the cold garage floor. Pavatt erased Rob Andrew from his own life, figuratively and then literally. This murder was especially heinous, atrocious, and cruel.

And Pavatt's motives were base. He wanted Rob's wife and children, and he wanted Rob's money. Pavatt was deeply in debt and "clearly hoped to partake of the insurance proceeds, even if

he was not a contractual beneficiary." *Pavatt*, 2007 OK CR 19, ¶ 83, 159 P.3d at 296. The murder was committed for remuneration.

The jury rejected the State's argument that Pavatt would pose a continuing threat to society. However, they still unanimously decided that death was the appropriate sentence.

II. Pavatt's Dubious Assertion of Innocence

There is a mountain of evidence against Pavatt. Means, motive, and opportunity abound. He hated Rob, he threatened Rob, he stalked Rob, he wanted Rob's family and money, he told his daughter that Brenda asked him to kill Rob, he orchestrated three telephone calls to induce Rob to drive on the interstate on the same day Rob's brake lines were cut, he had access to the murder weapon, he bought a .22 caliber handgun 6 days before Brenda was shot with a .22 caliber bullet, he had .22 Stinger rounds on an inventory in his apartment, he borrowed his daughter's car on the day of the murder and returned it with a .22 Stinger round inside, he had access to the Gigstad residence where three .22 Stinger rounds and a 16-gauge shotgun shell were found, he tried to prevent Rob from controlling Rob's life insurance policy, his telephone was unusually dormant during the time of the murder, his communications with Brenda peaked before and after both murder attempts, he told his daughter to destroy potential evidence, he threatened the lives of his daughter and five-year-old granddaughter, he fled to Mexico, and he confessed in writing. *See Pavatt*, 2007 OK CR 19, ¶ 38, 159 P.3d at 285 ("In short, the evidence against Appellant was largely circumstantial, but that is not unusual in any kind of criminal case. What may be unusual was how large a quantity of circumstantial evidence the State was able to present.").

Over the years, Pavatt has made ineffectual attempts to chip away at a few of these pieces of evidence. For instance, Pavatt has claimed that the State did not believe his confession letter and admitted it was a "concoction." (2nd PC App. 17-19). On February 7, 2002, Brenda's attorneys

wrote a letter to District Attorney Wesley Lane. (Bates 4466-68). They had possession of the letter, and they had conditions they wanted satisfied—including dismissal of Brenda's charges *with prejudice*—before they would provide the letter to the State. (Bates 4466-67). Mr. Lane responded that he was willing to review the letter with an open mind but would not agree to Brenda's terms. (Bates 4469-70). He wrote that, "my better judgement tells me that Mr. Pavatt and Mrs. Andrew have concocted this letter in an effort to get her out of trouble." (Bates 4469).

During trial, Pavatt argued the State believed the confession, as a whole, was untrue. The trial court readily rejected that claim:

> **THE COURT:** My understanding, from the argument about that letter, has always been is that the State may have said they feel it's a concoction on the basis that the only part that they feel is untrue, that is not true in that letter is the fact that she [Brenda] wasn't involved.
>
> **[ADA] SMITH:** That's exactly right.
>
> **THE COURT:** They have always said from the very beginning -- he [Pavatt] can put that in there [the letter] if he wants to. But they always had believed, have always, the State, that she was involved in the murder. And the fact he put in there that she wasn't didn't matter a hill of beans to them because they didn't believe it. They have never said that they didn't believe that Mr. Pavatt was involved in it. They just said they didn't believe that some other dude did it with him. Am I right?
>
> **MS. SMITH:** That's correct.
>
> **THE COURT:** I mean, every single time we've had a discussion about the letter they have never backed off their position on that, including Wes Lane. His whole thing was the basis that he didn't believe. . . he said it was a concoction because she -- Mr. Pavatt was trying to show that she had no involvement whatsoever, and he said, oh no, she was just as involved as Mr. Pavatt. He's never -- their position has never, ever changed. It's always been that flat out. They have never said anything else.

(Tr. XIII-A 3356-57). The State has never taken the position that Pavatt's confession, written in his own hand, is anything other than true as to his own involvement.

Pavatt has also argued that the murder was committed by Zjaiton Wood, the brother (and accomplice) of former death row inmate Tremane Wood. During Pavatt's trial, Zjaiton wrote letters to the trial judge, prosecutors, and Pavatt's attorneys confessing to killing Rob Andrew. (Tr. XIII-B 1-31; Defendant's Exhibit 1 & 2; Court's Exhibit 3; Tr. XV 3798). The trial court found the letters, and Zjaiton's confession to correctional officers, unreliable. (Tr. XIII-B; Tr. XIV-A).

The court was correct. As this Board is aware, Zjaiton testified falsely at Tremane's trial that Tremane had nothing to do with the robbery and murder of Ronnie Wipf. Tremane admitted to this Board that it was he, and not Zjaiton's invented friend "Alex," who accompanied Zjaiton that night. So Zjaiton is not trustworthy.

And there are specific reasons not to trust his so-called confessions in this case. Zjaiton was being held in the same pod as Pavatt at the Oklahoma County Jail. (Tr. XIII-B 19). Pavatt was a trustee and "would have had contact with Zjaiton Wood." (Bates 1514; WDOK Doc. 44-3 at ¶¶ 5-6). Zjaiton also knew Brenda in jail, and Brenda attempted to intimidate a prosecution witness in Zjaiton's case, so the "confessions" in this case may have been part of a quid pro quo. (Tr. XIII-B 19; Bates 1733-41).

The Oklahoma Court of Criminal Appeals ("OCCA") noted that Zjaiton's confessions were made after the State's evidence was made public. *Pavatt*, 2007 OK CR 19, ¶ 47, 159 P.3d at 288. As the OCCA said,

> a substantial amount of evidence, both direct and circumstantial, from a variety of witnesses and other sources, coalesced into a web of proof strongly implicating [Pavatt] in a murderous conspiracy to kill Rob Andrew. We fail to see how a jury could possibly have discounted all of this evidence in favor of a theory that Zjaiton Wood—with no known connection to anyone in this case—

> happened to drive up and murder Rob Andrew for his wallet, in his garage, using the same unusual gauge of shotgun that used to be in the Andrews' home but which is now nowhere to be found.

Pavatt, 2007 OK CR 19, ¶ 53, 159 P.3d at 289. The Western District similarly rejected Zjaiton's confessions:

> Mr. Wood's confession could have easily been compiled from the media reports. Moreover, the confession actually contradicts the known facts. As examples, (1) Mr. Wood states that the 16–gauge shotgun he used to kill Rob was "discarded" after he shot Rob a second time but before he shot Brenda; however, the murder weapon was never recovered (J. Tr. XI, 2751); (2) Mr. Wood states that he patted down Rob's pockets for a billfold but could not find anything; however, Rob's wallet was in his front pants pocket and it contained $60 in cash and several credit cards (J. Tr. IX, 2258–59, 2307–08; State's Exhibits 46 and 69); and (3) Mr. Wood states that he entered the Gigstad residence through a window and hid in the attic; however, Mr. Gigstad's testimony was that the house was secure when he left it (J. Tr. X, 2589–90). Finally, it is simply beyond rational comprehension that Brenda just got lucky and in the midst of her overwhelming desire to see her husband killed (and enlisting [Pavatt]'s to help her do so), Mr. Wood, a complete stranger, randomly selected Rob as his victim at the very moment he was coming to a residence where he had ceased living some two months before to pick up his kids for a long holiday weekend that Brenda did not want to happen.

Pavatt v. Trammell, No. CIV-08-470-R, 2014 WL 1745019, at *26 (W.D. Okla. May 1, 2014). Zjaiton's "confessions" are not credible.

Petitioner has also sought to challenge the significance of the bullet Janna found in her car after Pavatt borrowed the car to commit the murder. Before trial, the State asked the FBI to do a lead comparison analysis on the bullet that shot Brenda, the three bullets recovered from the Gigstad's attic, and the bullet in Janna's car. (2nd PC App. Ex. 1-2).

Lead comparison analysis was meant to determine whether separate bullets were manufactured from the same source of lead. *See Jones v. State*, 2006 OK CR 5, ¶ 59, 128 P.3d 521, 542. According to a witness hired by Pavatt after his conviction, the FBI analyst who did the lead

comparison concluded that the bullet that went through Brenda's arm was from one source, two of the bullets found in the Gigstad's attic were from a second source, and the third bullet from the Gigstad's attic *as well as* the bullet from Janna's car came from a third source. (2nd PC App. Ex. 3).

Pavatt did not dispute that the State provided him with the FBI's analysis before trial. Neither the State nor Pavatt introduced the results of the comparison at trial. However, Pavatt claimed in his second post-conviction application that, in light of the FBI analysis, the State should not have told the jury that the five bullets "match." (2nd PC App. 36-37).

As a reminder, Gordon Robertson testified that the five bullets at issue were of the same caliber and brand (.22 Stinger), made by the same manufacturer (CCI), and had the same characteristics (hollow point, concave hollow base, color of the copper wash, rim fire). (Tr. XIII-A at 3380-86). In closing arguments, the prosecutors said the five bullets were "consistent" and "matched." (Tr. XIV-B 3518, 3522, 3588, 3603).

Pavatt has claimed this is misleading. But Mr. Robertson testified that he made visual observations of the five bullets and did no other analysis. (Tr. XIII-A at 3380-86). He also told the jury that there are, at a minimum, hundreds of thousands of similar bullets made each year. (Tr. XIII-A at 3399). The prosecutors' statements were not misleading.

Further, to the extent Pavatt relies on the FBI analysis to suggest the bullet found in Janna's car was not incriminating, this defies common sense. Pavatt was in possession of Janna's car when Brenda was shot with a .22 caliber Stinger bullet (and Rob was shot with a 16-gauge shotgun), three .22 caliber Stinger bullets and a 16-gauge shotgun shell were found in the Gigstad residence (to which Pavatt, through Brenda, had access), and Pavatt returned Janna's car the day after the murder with a lone .22 caliber Stinger round that wasn't there before. Pavatt purchased a .22

revolver six days before the murder. That revolver has never been seen again, nor did police find a box of .22 Stinger rounds in Pavatt's apartment. The bullets were all of the same brand with matching characteristics (and of the same brand Pavatt owned at some point). And, according to the FBI analysis, the three bullets found in the Gigstad's attic came from two different sources of lead. But they *were* found together in a highly unusual place (the attic insulation), making it virtually impossible to reach any conclusion other than that they were possessed by the same person at the same time. And one of the bullets in the Gigstad attic *was* from the same source of lead as the bullet in Janna's car. The FBI analysis does not weaken the evidence against Pavatt.

Further, in 2005, the FBI discontinued lead comparison analysis after concluding that "neither scientists nor bullet manufacturers are able to definitively attest to the significance of an association made between bullets in the course of a bullet lead examination."[6] Pavatt is trying to suggest the State misled the jury. But he is using a method that has been rejected as unproven to make that accusation. The bullets remain incriminating.

Pavatt has also accused the State of presenting inconsistent theories as to who shot Rob. This is incorrect. At Pavatt's trial, the State explicitly took no position as to who shot Rob:

> He didn't have to pull the trigger. Okay? If you'll notice on the Court's Instruction No. 7, one of the elements is not that we have to prove Mr. Pavatt fired the shotgun. . . . He helped her. He helped her. Whether or not he actually pulled the trigger of that shotgun or whether or not he just helped her in setting up the chain of events that occurred and then shot her, I don't know. But you know that's what happened. You know he was involved in that.

[6] https://archives.fbi.gov/archives/news/pressrel/press-releases/fbi-laboratory-announces-discontinuation-of-bullet-lead-examinations.

(Tr. XIV-B at 3512-13; Tr. XIV-B at 3614 ("Mr Pavatt was advancing [after the first shot]. If you believe he did it, or if you believe Brenda did it, whichever one did it -- they both hated him. It doesn't matter which one of them did it. They're equally guilty under the law.")).

At Brenda's trial, prosecutors had new evidence. There were two areas on Brenda's jeans that crime scene expert Tom Bevel, who also testified in Pavatt's trial, wanted tested for DNA; only one of the areas was tested. (Brenda Tr. XIV 3284-85). Mr. Bevel believed the one stain that was tested had the highest possibility of being spatter from Rob, but that stain had female DNA. (Brenda Tr. XIV 3294). Thus, Mr. Bevel's testimony did not place Brenda close enough to Rob when he was shot for his blood to have ended up on her jeans.

After Pavatt's trial, Brenda provided prosecutors with a report from her own expert, who appears to have identified other areas of potential spatter. (Brenda Tr. XV 3574-87). He seemed to think Brenda's jeans were struck by blood from the second shot to Rob. (Brenda Tr. XV 3584-88). The defense argued Brenda was a bystander when this shot was fired but the State believed the evidence supported a finding that she pulled the trigger. (Brenda Tr. XIII 3224-25, 3236; Brenda Tr. XIV 3284-92; Brenda Tr. XV 3590-92; Brenda Tr. XVI 3674-76, 3690-97; Brenda Tr. XVII 4004-08, 4022, 4076-87, 4089-90).

Thus, based at least in part on this new evidence, the prosecutors argued at Brenda's trial that Brenda fired one or both shots. (Brenda Tr. XVII 3871, 3886, 3896, 3909, 4074, 4076-87, 4089-90, 4126). However, they also left open the possibility that Brenda did not fire the shots. (Brenda Tr. XVII 3881 ("Brenda Andrew had to remain in the garage and either reload the shotgun herself or remain there while Mr. Pavatt reloaded the shotgun."), 3882 ("Now what was Brenda Andrew doing if she wasn't doing the shooting and reloading?")). Either way, prosecutors told the

jury that Brenda and Pavatt were equally guilty. (Brenda Tr. XVII 3871, 3886, 3896, 3909, 4074, 4076-87, 4089-90, 4126).

There are three possibilities. The first is that Pavatt fired both shots. Pavatt had extensive experience with firearms and he would have had the element of surprise, whereas Rob knew Brenda was in the garage. Pavatt could have been hiding with the guns beside Brenda's van, which was parked in the garage, or beside the house.

The second possibility is that Pavatt fired the first shot and Brenda fired the second shot. Under this scenario, Pavatt took advantage of the element of surprise, then handed the gun to Brenda after the first shot. The second shot was fired from a closer distance than the second. Brenda was seen by Mr. Roggow, shortly before the murder, driving up to the area in which her brother-in-law and another man appeared about to engage in target practice.

The third possibility is that Brenda walked away from Rob, retrieved the shotgun, and fired both shots. But if that was the case, Pavatt was present and was a willing participant. Brenda *did not* shoot herself. (Tr. XII 3190). So Pavatt was standing by, with the gun he had purchased in advance, to shoot Brenda and stage the scene.

The prosecutors did not engage in misconduct. They had new evidence in Brenda's trial, and their statements were not inconsistent. They told Pavatt's jury that no matter who fired the shots, both were equally guilty. They told Brenda's jury that the evidence showed she fired at least one of the shots, but that even if she did not, Pavatt and Brenda were equally guilty. Further, it's unclear how Pavatt could have been prejudiced by prosecutors *not* arguing he was the person who shot Rob.

Pavatt has not cast doubt upon his guilt or the fairness of his trial.

III. Pavatt has Extremely Little to Offer in the Way of Mitigation

At trial, the defense called eight mitigating witnesses, most of whom were members of Pavatt's family. (Tr. XV 3692-3731). These witnesses informed the jury that he: (1) had a very good childhood, surrounded by a loving family; (2) lost his father at a young age[7]; (3) was very ill at one point in his childhood and spent six months in bed; (4) was loving and kind, and had been since childhood; (5) was well behaved his entire life, even as a teenager; (6) was a very patriotic man who served 18 years in the Air Force, earning "a big box full of awards and medals;" (7) was devoted to his family and a very good father (8) had a son in the military and his children had turned out well; (9) was there for anyone who needed him; (10) was a Christian all his life and "likes to help other people to be Christian;" and (11) has a family who loves him and wants his life spared. (Tr. XV 3692-3731).

Pavatt did not have poverty, abuse, or neglect in his childhood. He was forty-eight years old at the time of the murder. Trial counsel had him evaluated by a psychologist and a psychiatrist, and he has been evaluated since trial, but he has never presented evidence of a mental health diagnosis. (8/8/2003 Tr. 99; 2nd PC App. Ex. 14-15). He has no known head injuries. Pavatt committed this murder because he wanted what Rob Andrew had. It's as simple as that.

Pavatt has tried to present additional mitigating evidence in his appeals. But those attempts have been quite weak. They have involved four general areas. (2nd PC App. 39-48).

First, Pavatt's mother lied about his paternity. Trooper Sidney Pavatt was not his father. His mother conceived him out of wedlock, possibly with Trooper Pavatt's former partner. *Second*, Pavatt felt he never lived up to the high standards set by his mother and her influential family.

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[7] The jury was told that Pavatt's father was a law enforcement officer, killed in the line of duty (Tr. XV 3722). While this turned out not to be the truth, it was a sympathetic piece of testimony for the jury to consider, and it established that Pavatt grew up without his biological father.

Third, Pavatt's first marriage was complicated by his wife's terminal illness and her controlling nature.[8] *Fourth*, two psychiatrists have provided affidavits, neither of which diagnoses Pavatt with any mental illness. This evidence is no more persuasive than the evidence presented at trial, particularly when it is considered in its full context.

First, there seems to be no question that Trooper Algin Pavatt, who died years before Pavatt was born, is not Pavatt's father. And it appears Pavatt never knew his real father, and likely was lied to by his mother about the identity of his father. But the jury knew that Pavatt was fatherless for much of his childhood, until his mother married Wade Veteto when Pavatt was twelve. (Tr. XV 3721-22).

Moreover, Pavatt was exceedingly fortunate in that Mr. Veteto was a very good man. (Tr. XV 3721). He testified at trial that Pavatt "was my son. I mean he -- I filled the void that he never had." (Tr. XV 3723). He also said Pavatt was "everything a son should be," "everything that anybody ever wanted in a son," turned into "[a] man that I was proud of," and "if everybody's son was as good as Jim the world will be a helluva lot better place." (Tr. XV 3724). In every document Pavatt has provided since trial, no one has ever uttered a bad word about Mr. Veteto.

No doubt the issue of Pavatt's paternity was difficult for him. But no one gets through life without facing pain and hardship. Pavatt was 48 years old when he killed Rob. He was a law-abiding citizen until he decided he wanted what Rob Andrew had, no matter the cost. And, contrary

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[8] Pavatt also argued that counsel failed to adequately present his service in the Air Force and failed to present witnesses regarding his good behavior in jail. As to Pavatt's military service, there was evidence presented in both stages of trial. (Tr. VI 1651; Tr. X 2405; Tr. XI 2890; Tr. XII 3070-71, 3073-75, 3095; Tr. XV 3693, 3697, 3702, 3714, 3726). The jury knew he served long, proudly, and honorably. As to Pavatt's good behavior in jail, the jury rejected the continuing threat aggravating circumstance, mooting that issue.

to what the defense has argued, he was deeply loved by many people in his childhood. His parentage is not mitigating.

Second, Pavatt's appeals paint a portrait of a life devoid of unconditional love, which allegedly made him uniquely vulnerable to supposed manipulation by Brenda. *See* (2nd PC App. Ex. 13, p. 32 ("With Brenda, Jim was accepted and loved just the way he was.")). A mitigation report prepared for the second post-conviction application opines that Pavatt "wondered if there was anyone who really loved him[.]" (2nd PC App. Ex. 13, p. 9).

The evidence is overwhelmingly to the contrary. As discussed, Mr. Veteto loved Pavatt like his own son. Pavatt's cousin Debra Vaughan testified that Pavatt "means so much to us[.]" (Tr. XV 3697). His uncle Chester Veteto, who was not related to Pavatt by blood, testified that "if [he] had a son [he] would have liked to have had one like [Pavatt.]" (Tr. XV 3708). His aunt Mary Ann Veteto said that Pavatt "was just one of our kids[.]" (Tr. XV 3713). Norma Jean Zickefoose took care of Pavatt when he was three years old while his mother worked. (Tr. XV 3716, 3719). She told Pavatt's jury that when Pavatt's mother took him to Arkansas for the summer, "it just seemed like Willie was taking my boy, you know. And the following year I had a boy and I named him Jim. . . . [b]ecause he -- I loved him [Pavatt] so much. He was just like my own son." (Tr. XV 3716-17).

The evidence presented post-trial was more of the same. Pavatt's maternal grandmother loved him so much she wanted to adopt him. (2nd PC App. Ex. 13, p. 4). This was his "Grandma Alice." (2nd PC App. Ex. 13, Appendix 17). He was also close to Mr. Veteto's mother, "Grandma Margie." (2nd PC App. Ex. 13, Appendix 17).

And, contrary to the impression given by the mitigation report, Pavatt's mother also loved him tremendously. Ms. Zickefoose said Ms. Veteto was "crazy about her children" and that they

"were her life." (2nd PC App. Ex. 13, Appendix 20). Another witness, Gary McBride, described Pavatt as a "momma's boy." (2nd PC App. Ex. 13, Appendix 21). Suk Hui's impression was that, "[i]n some ways, [Pavatt's mom] gave Jim more attention than she gave his brother Sid. I think she thought of Jim as her favorite son." (2nd PC App. Ex. 13, Appendix 23, p. 4). In fact, in a letter he wrote to Janna from jail, Pavatt said, "until the last year [when Brenda apparently changed his perception] I never saw myself as last place or saw myself as a step-child[.]" (Bates 1495).

Finally on this subject, Pavatt was married to a woman who seemingly adored him when he decided to have an affair with Brenda. (2nd PC App. Ex. 13, Appendix 22). In a 2009 affidavit, Suk Hui said, "Even today, if I were to meet Jim, I would know that he was the man I wanted to marry and spend my life with." (2nd PC App. Ex. 13, Appendix 23, p. 2). The narrative that Pavatt was unloved is proven false by Pavatt's own witnesses.

Third, Pavatt was divorced from Pam, and later married Suk Hui, for approximately ten years before the murder. If the purpose of this argument was to suggest that Pavatt was susceptible to Brenda's alleged influence because his first wife was insufficiently loving, it ignores the countless other people who have poured love into Pavatt's life, including and especially the woman to whom he was married when he met Brenda.

Fourth, Pavatt has been unable to develop a mental health defense. As indicated above, trial counsel hired both a psychiatrist and a psychologist, but neither testified. The psychiatrist, Dr. John Smith, prepared an affidavit for Pavatt's second post-conviction application. (2nd PC App. Ex. 14). In it, he stated that his proposed trial testimony would have explored Pavatt's "relationship with women, his desire to please them, and the damage caused by his illness[.]" (2nd PC App. Ex. 14, p. 2). Unfortunately, Dr. Smith never revealed what that "illness" is. He said that he needed more information to rule in or out a diagnosis of Post-Traumatic Stress Disorder ("PTSD"). (2nd

PC App. Ex. 14, p. 2).[9] He suggested the possibility that Pavatt might have "bipolar disease" or borderline personality disorder but made no diagnosis. (2nd PC App. Ex. 14, p. 4).

In a very puzzling sentence, Dr. Smith suggested that Pavatt might have brain damage, leading to impulsivity, because he did not know the identity of his biological father: "His internal confusion over his identity would impact his brain function, making him less likely to be able to predict consequences from his actions, and cause him to act impulsively." (2nd PC App. Ex. 14, p. 3). This assertion is nonsensical, and it ignores Pavatt's long history of commendable military service, stable employment, and law-abiding behavior.

The other affidavit was from psychiatrist Dr. Manuel Saint Martin. He only provided "preliminary findings" based on an interview in which he administered personality inventories to Pavatt. (2nd PC App. Ex. 15, ¶ 3). He indicated an intention to "conduct interviews with persons familiar with Mr. Pavatt in order to expand on and refine [his] opinions." (2nd PC App. Ex. 15, ¶ 3). But only this preliminary information was provided to the OCCA. In light of the obvious deficiencies in this report, the State will make only two brief observations.

First, Dr. Saint Martin wrote that Pavatt "receiv[ed] treatment for post traumatic stress disorder while in the Air Force." (2nd PC App. Ex. 15, ¶ 10). This is incorrect. (Appx. 123-27). In fact, the evaluation found that Pavatt lacked even "reasonably supportive evidence of a stressor." (Appx. 126).

Second, Dr. Saint Martin opined that Pavatt "is not likely to hold a position of authority[.]" (2nd PC App. Ex. 15, ¶ 12). This is flatly contradicted by Pavatt's military records. (2nd PC App. Ex. 16, unnum. 1 (Pavatt spent thirteen years as "security supervisor" and retired as a Master

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[9] As will be discussed, Pavatt had been evaluated for PTSD in the military and the diagnosis was unsubstantiated. (Appx. 123-27).

Sergeant), unnum. 7 (Pavatt served as a flight chief, security supervisor, security force supervisor, and security alert team leader), unnum. 8 (Pavatt received a citation for "aid[ing] immeasurably in developing and implementing projects capable of solving problems on flight"), unnum. 9 (Pavatt received another citation for his leadership), unnum. 10 (Pavatt received another citation for his leadership and for "set[ting] the standard for all Squadron members"), unnum. 18-25 (Pavatt was consistently ranked as "The exception. Absolutely superior in all areas" in the "LEADERSHIP" category), unnum. 29 ("An uncanny ability to 'make things happen.'")). The foregoing barely scratches the surface of the extent to which the records demonstrate Pavatt's competence in holding positions of authority. There is simply no credible evidence that Pavatt suffers from any mental illness, much less that there is any connection between an alleged illness and the murder.

Finally, Pavatt may ask for clemency because he has been a law library clerk with a clean disciplinary record, and he purportedly shares his faith with other inmates. As for his behavior in prison, the jury expected as much. They rejected the continuing threat aggravator. But they still believed that Pavatt's actions warranted the death penalty.

And as for Pavatt's faith, as the State has told this Board before, that is not a matter for the State to judge. What we can say is that, like Raymond Johnson, Pavatt was raised in church but he did not let that deter him from committing one of the most premeditated murders imaginable. Further, unlike Johnson, Pavatt does not have the heart to admit what he did or apologize to Rob's family. And his claim of innocence is so tenuous as to be an act of bad faith.

IV. A Legacy of Pain

Pavatt hurt a lot of people. He used his own daughter to aid in committing murder and in his attempt to escape justice. When he suspected that she, to avoid her own potential accountability, was helping authorities, he threatened to kill her and his five-year-old granddaughter.

After his arrest, Janna nonetheless sent him money, bought a newspaper subscription for him, and maintained correspondence for a time. (State's Ex. 154). Pavatt used Janna again, not only for the money but also to pass messages to Brenda. (State's Ex. 154). On May 11, 2002, Pavatt repaid Janna's kindness by ordering her to give all of his property to his parents: "I want you to have nothing of mine[.] . . . give everything and I mean everything to them as soon as possible. Again you are not to keep anything that belongs to me." (State's Ex. 154). Recent prison calls establish that Janna has again forgiven Pavatt and she helps him financially to this day.

Pavatt deeply hurt his second wife, Suk Hui. She was in college, but when she found out Pavatt had not been paying her school bills, she quit and got a job to help make ends meet. (Bates 132). In spite of her faithfulness, Pavatt abruptly threw her to the side when Brenda Andrew came along. On August 6, 2001, he faxed a travel agent a request to "process quickly" a plane ticket to send Suk Hui to Korea on August 7. (State's Ex. 159). He had given Suk Hui about four days' notice that he was sending her out of the country. (Tr. VI 1655-56). He told her Korea was the only safe place for her in the entire world; it had something to do with his "special forces" history. (Tr. VI 1655-56).

Suk Hui sent him an email in October in which she discussed her love for him, her trust in him, and his betrayal of that trust. (State's Ex. 4). Pavatt told Suk Hui that he was sending her away for her own safety, but that he "love[d] [her] more than anyone, anything in this world and you are my best friend." (Tr. VI 1655; State's Ex. 4). Suk Hui believed him and told him she suffered "nightmares everyday since I left that you are having [a] hard time and I felt so bad that I left you alone to go through all th[e]s[e] problems. . and I prayed to God that He will lead you in His way and your s[a]fety and bring us back together[.]" (State's Ex. 4).

She was checking her email multiple times a day for messages from him. (State's Ex. 4). She even checked the newspaper obituaries to see if he was still alive. (State's Ex. 4). She was "killing [her]self" with worry…until she learned about Brenda. (State's Ex. 4). Then she realized that the man she trusted most kicked her out of their home with "2-suitcases of clothes and [a] one way ticket to Korea and $200.00" for another woman. (Tr. VI 1657; State's Ex. 4). She felt as if she'd lost her dreams, her hope, her trust, and her life. (State's Ex. 4). She told Pavatt that she was coming back to Oklahoma and begged him to let her have her personal property so she could start over. (State's Ex. 4). But in a follow-up email, Suk Hui wrote: "I am so sorry that you did get rid of all my stuff. . You even killed my memories. . "where my eleme[n]t[a]ry school and high school photo album[]s. . . and everything else." (State's Ex. 5). Pavatt was even so selfish as to ask Sui Hui not to move back to Oklahoma. (State's Ex. 5).

Yet, Pavatt then emailed her, saying he had made a mistake and wanted her to come back. (Tr. VI 1658; State's Ex. 11). Suk Hui returned to Oklahoma in October, only to have Pavatt threaten that the car she drove was awarded to him in the divorce so if she used it without his permission, he would put her in jail. (Tr. VI 1666). He essentially abandoned her at a motel, visiting at times and letting her use the car. (Tr. VI 1666-71). He also repeatedly threatened her; she was very afraid. (Bates 228, 238, 240-41, 245, 248, 250).

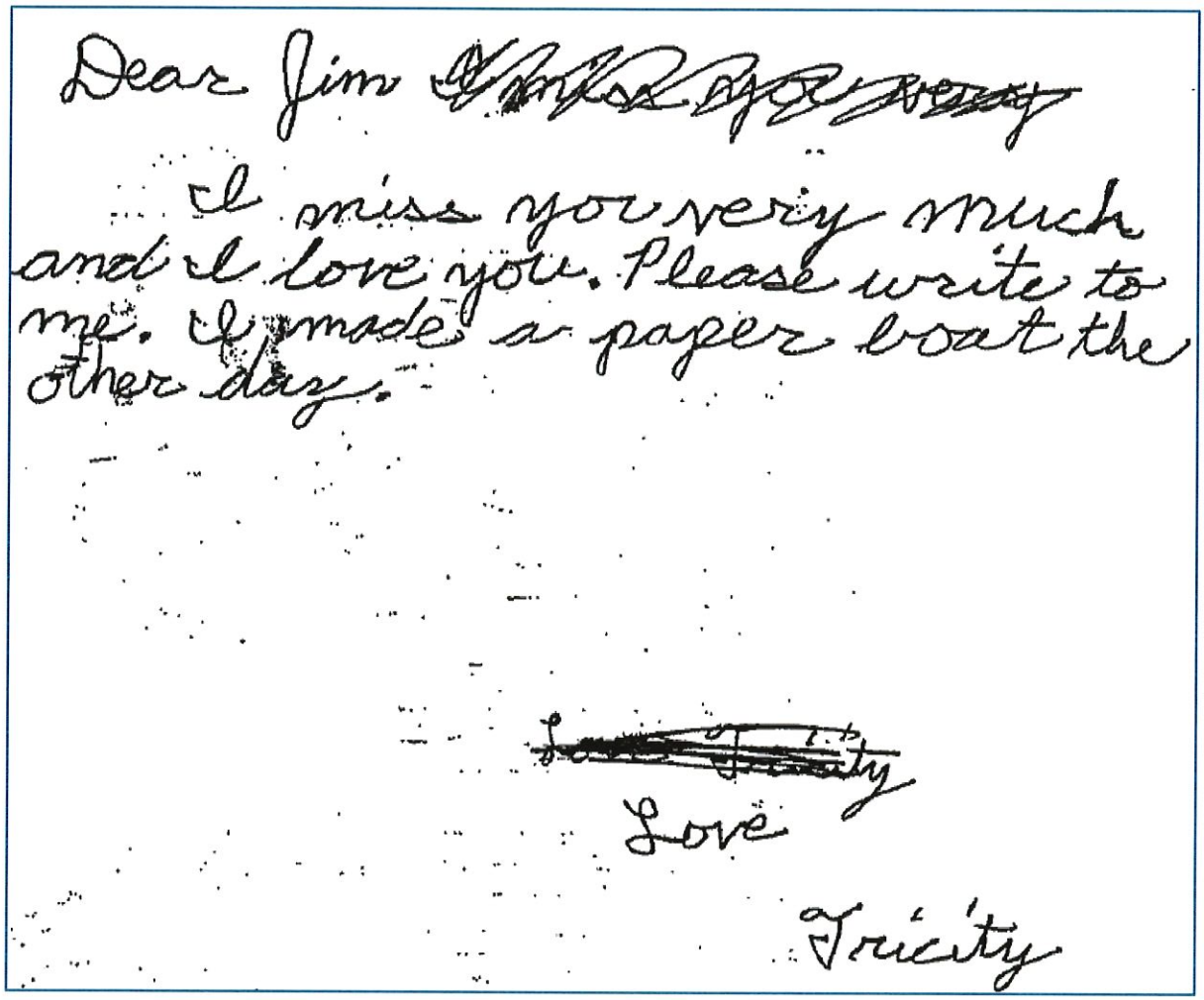
Pavatt hurt Tricity and Parker. He left them fatherless. He helped their mother remove them from everyone who cared about them. They were deeply traumatized when they returned to the United States. The National Guard member who encountered the children at the border said, "You could just see it in their faces that they'd been through a lot." (Bates 1164). Both children cried nonstop for about three hours. (Bates 1166, 1168). When they were taken to see Rob's parents,

they "were in a state of panic" and began chanting, "I want my mommy's family." (Tr. XV 3678). A psychologist who saw them a few days later said the children:

> [w]ere acting in an extremely unusual way, probably one of the most unusual presentations of any kids that I've had in the office. They came in and silently sat in their chair kind of stiff backed, without making eye contact, tears streaming down their face and chanting, which they continued to do for over 15 minutes before I was able to get out to the appointment.
>
> And they were, for the most part, unresponsive. . . . They were, for the most part, fully nonfunctional in terms of my ability to relate to them.

(May 15, 2002 Deposition of Dr. Stephen Close, p. 4). He believed it was a learned behavior, akin to programming. (Close Depo, pp. 10-11). Their chanting behavior "looked very effortful. It looked painful. It looked -- they were very distraught. I would have taken them to be petrified of something. They looked extremely frightened, extremely stressed, and extremely distressed[.]" (Close Depo, p. 11).

Yes, Brenda Andrew was the mother of these children. But James Pavatt had assumed a huge role in their lives. He told Tricity that he loved her like a daughter. (State's Ex. 222). Whether or not he personally participated in this mental abuse, he was an adult, he was in a position to help, and he did nothing.


Dear Jim

I miss you very much and I love you. Please write to me. I made a paper boat the other day.

Love

Tricity

Pavatt hurt Rob's parents and brothers. Rob was murdered at about 6:15 p.m., but no one notified them. (Appx. 128). They heard from the 10:00 p.m. news that there was a shooting on Rob's street, then spent a frantic three hours trying to find out if Rob was the victim. (Appx. 128, 132). Instead of grieving, they were forced to spend the next three months worrying about and searching for Tricity and Parker. (Appx. 87, 128-29). As a result of Pavatt's submission of the fraudulent change of ownership form, they also had to fight in court to make sure the money Rob had set aside for his children made its way to the children. (Appx. 130).

Murder always has ripple effects. Everyone who loves the victim is harmed. But murderers don't always *directly* hurt people other than the intended victim. Pavatt did. Over the course of

months, he systematically destroyed Rob and caused immense suffering to many other people. Twenty-five years later, he refuses to accept responsibility for any of it. He insists that the State has "nothing on [him]." (August 27, 2026 Telephone Call with Janna Larson). And in an email he sent approximately ten months ago, he flippantly called Rob, "the guy I am in here for[.]" (11/11/2025 Email to Joanna Gilbert). The State respectfully submits that someone with such a pitiless attitude should not receive clemency.

V. Remembering Rob Andrew

Rob's mother was too hurt to testify at Pavatt's trial, but his father and three brothers did. (Tr. XV 3754). They testified about the pain suffered by Rob's children, his devastation over the divorce, about Rob's sense of humor that "kept the family going," that he "was a friend to everyone," his cheerful outlook, their own personal pain and loss, and what a "great person" he was. (Tr. XV 3675-91).

And he *was* a great person. His brother Tim wrote about receiving Rob's support when his twins were born premature: "He lifted me up and helped me to focus on the positives of our new babies. Rob always had a way with looking at things and bringing out the good." (Appx. 131). He "was a friend to everyone" and "could always find something to say to make you laugh." (Appx. 131). He was "the center of [the family] in more ways than one." (Appx. 134). He played jokes, told stories, and made others feel special. (Appx. 131-34).

Rob's loss is still deeply felt today. His brothers lost their best friend. (Appx. 138). They grieve the loss of the life Rob should be living. (Appx. 138). They miss him desperately. (Appx. 138).

Rob also ministered to other men. (Appx. 136). He was "instrumental" in building the faith of his good friend Ron Stump. (Appx. 136). Ron was the last person, aside from Brenda, to speak

to Rob. (Appx. 136). He knew immediately who had killed his friend. (Appx. 137). His life has never been the same. (Appx. 137).

* * *

On October 17, Rob wrote, "I miss my kids." (Bates 4966-67). On October 23, he wrote, "My heart wants my wife at all costs." (Bates 4982). On October 25, Rob wrote the following prayer: "Please protect me from being vindictive please save me from the pain. Please allow your will to be done. Please p[r]otect my kids. Please help Brenda." (Bates 5005). On November 2, he wrote that he was hurting, mad, and lonely. (Bates 5010). On November 6, Rob wrote a letter to Mr. Stump asking him to "keep praying for me & my kids . . . and Brenda, and (I fight this one a little), Jim." (Bates 4567). On November 12, he wrote, "I am in great pain." (Bates 5017).

11/20/01
Hebrews 11
Matt: 1
Thought: Now faith is the assurance of things hoped for, the conviction of things not seen.
To me: I have faith in God. I should walk w/ assurance of the things I hope for — a relationship w/ my kids, a loving wife, a home that worships, laughs & plays & loves. A good job where I provide for my family & have the respect as a man of God working in a secular world. I can have the conviction — the knowledge, the belief that I will have these things even though I cannot see them. They do not go against God's will & they are the things I hope for. Now I have faith to know it will come to pass. Stay faithful. God will be glorified.

Rob Andrew was so much more than "the guy" that Jim Pavatt murdered. We respectfully ask you to deny clemency.

Respectfully submitted,

GENTNER F. DRUMMOND
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ATTORNEYS FOR THE STATE

ATTACHMENT # 8

OCPD Supplemental DNA Examination Report

(Nov. 9, 2005)

EXHIBIT A

OKLAHOMA CITY POLICE DEPARTMENT

FORENSIC SERVICES

SUPPLEMENTAL DNA EXAMINATION REPORT

DEFENDANT(S): ANDREW, BRENDA	**SUBMITTED BY: DET. R. GARRETT**
VICTIM(S): ANDREW, ROBERT	**DATE RECEIVED: AUGUST 24, 2005**
DATE REPORTED: NOVEMBER 9, 2005	**INCIDENT NUMBER: 01-110635**
LABORATORY NUMBER: SD01-417	**CLASSIFICATION: HOMICIDE**

ITEMS SUBMITTED

Sgt. Dale Reed transferred the following item in person August 24, 2005:

One (1) large box containing among other items:

Item #21	One (1) unsealed brown paper sack containing one (1) pair of jeans with stains designated by the Oklahoma Indigent Defense System and the Attorney General's Office as follows:
#21-1	Stain #1 located on the upper left leg of jeans.
#21-2	Stain #2 located on the middle left leg area of jeans.
#21-3	Stain #3 located on the lower left leg of jeans (previously analyzed).
#21-4	Stain #4 located on the middle right leg area of jeans (not analyzed).
#21-5a	Stain #5a located on the middle right leg area of jeans.
#21-5b	Stain #5b located on the middle right leg area of jeans.
#21-5c	Stain #5c located on the middle right leg area of jeans.

SUPPLEMENTAL DNA EXAMINATION REPORT SD01-417

#21-6 Stain #6 located on the lower right leg of jeans.

Sgt. Mike Jones submitted the following item in person October 28, 2005:

Item #51A/B One (1) sealed evidence envelope containing four (4) reference buccal swabs obtained from Brenda Evers Andrew.

REQUESTED ANALYSIS

Per court order to perform DNA analysis on Stains #1, #2, #5a-#5c and #6 located on Item #21 jeans.

RESULTS OF ANALYSIS

Deoxyribonucleic Acid (DNA) was isolated from Items #21-1, #21-2, #21-5a, #21-5b, #21-5c, #21-6 and #51A and characterized through the Polymerase Chain Reaction (PCR) at the Short Tandem Repeat (STR) genetic loci listed in the attached table. The DNA profile from Item #21-1, #21-2, #21-5a, #21-5b and #21-6 matches the DNA profile of Item #51A Reference Brenda Andrew at all genetic loci tested.

The DNA profile of Item #21-5c is a mixture. The major component of the mixture matches the DNA profile obtained for Item #51A Reference Brenda Andrew at all genetic loci tested. The contributor to the minor component is an unknown male; however the profile is not suitable for comparison purposes.

DISPOSITION OF EVIDENCE

DNA cuttings, extracts and dilutions are retained frozen in the DNA Laboratory evidence freezer. All bulk evidence is currently housed in the DNA Laboratory's temporary evidence vault.

Note Stains #5a, #5b and #5c were consumed during DNA analysis however the DNA cuttings and extracts are retained frozen by this laboratory.

Kyla L. Marshall

Kyla L. Marshall, Forensic Scientist II

Pursuant to Title 22 O.S. Section 751, I hereby certify that I am maker of this document, and that it is a true and correct report to the findings of The Oklahoma City Police Department Forensic Laboratory.

KLM:bl

Oklahoma City Police Department
Laboratory Services Division
DNA Analysis Laboratory

LAB NUMBER: SD01-417
ANALYST: KYLA L. MARSHALL
DATE OF REPORT: NOVEMBER 9, 2005
PAGE NUMBER: 3 OF 3 KLM

SAMPLE NAME/NUMBER	D3S1358	THO1	D21S11	D18S51	Penta E	D5S818	D13S317	D7S820	D16S539	CSF1PO	Penta D	AMEL	vWA	D8S1179	TPOX	FGA
#21-1	14,18	6,9	28, 31.2, *	14,17	12,12	11,11	11,12	7,8	11,13	10,11	9,11	X,X	17,19 *	13,14	8,11	20,21
#21-2	14,18	6,9	28, 31.2	14,17	12,12	11,11	11,12	7,8	11,13	10,11	9,11	X,X	17,19 *	13,14	8,11	20,21
#21-5a	14,18	6,9	28, 31.2	14,17	12,12	11,11	11,12	7,8	11,13	10,11	9,11	X,X	17,19	13,14	8,11	20,21
#21-5b	14,18	6,9	28, 31.2	14,17	12,12	11,11	11,12	7,8	11,13	10,11	9,11	X,X	17,19 *	13,14	8,11	20,21
#21-5c	14,18	6,9	28, 31.2	14,17	12,12	11,11	11,12	7,8	11,13 *	10,11	9,11	X,X (Y)	17,19	13,14	8,11	20,21
#21-6	14,18	6,9	28, 31.2	14,17	12,12	11,11	11,12	7,8	11,13	10,11	9,11	X,X	17,19 *	13,14	8,11	20,21
#51A B. Andrew	14,18	6,9	28, 31.2	14,17	12,12	11,11	11,12	7,8	11,13	10,11	9,11	X,X	17,19	13,14	8,11	20,21

* Other possible allele at locus below call standard
( ) Denotes minor component

ATTACHMENT 8

APPENDIX 256

ATTACHMENT # 9

Affidavit of Mark Haydon (Jury Forman for Pavatt's Trial)

(Oct. 26, 2026)

AFFIDAVIT OF MARK HAYDON

STATE OF OKLAHOMA)
)
COUNTY OF OKLAHOMA) **ss.**

I, Mark Haydon, being of legal age and sound mind, do solemnly swear and state as follows:

1. My name is Mark Haydon. I was the jury foreman in the capital trial *State of Oklahoma vs. James Pavatt*, Oklahoma County District Court Case No. CF-01-6189.

2. On September 13, 2026, I received a telephone call from Julie Gardner, an investigator with the Federal Public Defender's Office. Ms. Gardner told me she was working on Mr. Pavatt's case and that his execution was scheduled for November 12, 2026. She also told me that his clemency hearing was scheduled for October 14, 2026. She asked whether I would meet with her to discuss my experiences as a juror in his case. I agreed.

3. On September 16, 2026, I met with Ms. Gardner and another investigator. They asked me questions about why I voted to convict Mr. Pavatt and why I voted to sentence him to death. Specifically, on the death penalty issue, I told Ms. Gardner that I voted for death because of the prosecutors' argument that Mr. Pavatt took the first shot and then had to break open the shotgun, reload, stand over Rob Andrew at point blank range with a shotgun and take another shot. Particularly, as Mr. Andrew had already been shot once by a single shot, 16-gauge shotgun, his shooter had to purposely crack the shotgun open, remove the spent shell casing, put in another shell, close the shotgun, point down, and shoot him while he was dying. It was a wicked act that was enough for me to vote for death. I felt firmly that the circumstances of the second shot meant that Mr. Pavatt deserved the death penalty.

4. The prosecution's argument that Mr. Pavatt had fired both shots was very convincing. I was sure based on what the prosecution argued that their scenario as to who was the fatal shooter was correct. I also recall that the prosecution argued at Mr. Pavatt's trial that there was only one shooter of Rob Andrew.

5. I also explained to Ms. Gardner and her colleague that, during sentencing deliberations, four or five jurors had initially expressed that they did not want to impose the death penalty. As the jury foreman, I reminded the jurors that we knew



from the prosecutors' arguments to us that Mr. Pavatt was the shooter. I also explained to them how a single-shot shotgun operates as I described above. My explanation and reasoning influenced the other jurors, and we ultimately voted to sentence Mr. Pavatt to death.

6. Ms. Gardner reached back out to me on September 24, 2026. She told me that the Attorney General's Office and the Federal Public Defender's Office had submitted clemency packets in the case on September 18, 2026. She asked whether I would review both packets and meet with her again. I agreed.

7. On September 24, 2026, Ms. Gardner delivered both clemency packets to my residence and asked me to contact her after I reviewed them.

8. On October 5, 2026, I let Ms. Gardner know that I had reviewed both packets. We agreed to meet the following afternoon.

9. On October 6, 2026, I met with Ms. Gardner and Mr. Pavatt's attorney, Hunter Labovitz.

10. During that October 6th meeting, I told Ms. Gardner and Mr. Labovitz that I now had doubt about who fired the shot that killed Rob Andrew. Specifically, the packet from the Attorney General's Office called into question for the first time who I thought fired the fatal shot. The Attorney General's packet argued multiple possibilities, including that Mr. Pavatt took the first shot and Ms. Andrew took the second, as well as that Ms. Andrew fired both shots into Rob Andrew. I am confident that the prosecution did not make either of these arguments at Mr. Pavatt's trial as they kept emphasizing that, because he fired both shots, he deserved the death penalty. Indeed, I recall both prosecutors being so certain about that when they asked the jury to sentence Mr. Pavatt to death.

11. I also told Ms. Gardner and Mr. Labovitz that because of that doubt, I no longer supported my decision to vote for the death penalty. I based my decision to vote for death on the prosecution telling me that Mr. Pavatt fired the second fatal shot, but after reading the Attorney General's packet, I no longer know the answer to that question. If I cannot be certain that Mr. Pavatt fired the second shot into Rob Andrew—which is now the case from what I read in the Attorney General's packet—then I cannot support the death sentence any longer.

12. I took my responsibilities as a juror seriously, particularly as the foreman during our sentencing deliberations. I recognize that, as jury foreman, my statements during deliberations helped persuade other jurors to vote for the death penalty, and I accept



the seriousness of that responsibility. However, I no longer have confidence in my original decision, and I cannot, in good conscience, continue to support Mr. Pavatt's execution when the Attorney General's clemency packet has caused me to have significant doubt about who fired the fatal shot. I cannot continue to support a death sentence given those doubts.

13. I also expressed my concern to Ms. Gardner and Mr. Labovitz that, after reading the State's clemency submission, the prosecution had been focused on securing a conviction and death sentence regardless of the truth and, in my view, had used us the jurors to achieve that objective. Having reviewed the State's clemency packet, where they are now creating as to the shooter, unlike what they told us at Mr. Pavatt's trial, it feels like the prosecution was playing games at Mr. Pavatt's trial telling the jury he was the shooter but then telling Ms. Andrew's jury that she was the shooter. The prosecution played both sides and I think that is dirty. It is potentially costing someone their life that may not deserve it. And I do not like that the prosecution put that on my soul.

14. To be clear, if the prosecution had argued at Mr. Pavatt's trial that Brenda Andrew fired the second shot, I would not have voted for a death sentence. Whether Mr. Pavatt fired the second shot or not would not have changed my vote to convict him because the prosecution explained that did not matter for conviction purposes as Mr. Pavatt was acting with Ms. Andrew. But I have serious doubts about whether I voted for the correct sentence given all the uncertainty the Attorney General's Office raised in the packet about who fatally shot Rob Andrew.

15. At the conclusion of the October 6th meeting, Ms. Gardner and Attorney Labovitz asked whether I would appear before the Oklahoma Pardon and Parole Board to explain why I no longer supported Mr. Pavatt's execution and make a request for a recommendation for clemency. Because I had a pre-planned trip out of town, I told them I could not attend the hearing in person, but I agreed to provide a videotaped statement explaining my change in position.

16. I would not have expressed any concern about my vote had I not been provided with the opportunity to review the clemency packets from the Attorney General's Office and from Mr. Pavatt. It is the information in those packets that has caused me to realize that the prosecution misrepresented to me and my fellow jurors the identity of the person who killed Rob Andrew. Specifically, having read the clemency packets, I now understand the fatal shooter's identity is far more likely to be Brenda Andrew. Had the prosecution argued at Mr. Pavatt's trial, as they did in their clemency packet, that Brenda Andrew fired both shots, I would not have voted for

a death sentence because I voted for death based on the circumstances of the second, wicked shot.

17. At the very least, there is uncertainty in the Attorney General's packet as to whether Mr. Pavatt was the fatal shooter, which was my whole basis for voting for death. This uncertainty is what has caused me to doubt my original decision for death. Alternatively, even if the prosecution had not argued at Mr. Pavatt's trial that Brenda Andrew fired both shots but had said the shooter was uncertain, I would not have voted for a death sentence. It was the prosecution's claim that Mr. Pavatt fired the second shot that sealed the death decision for me; had they argued any other scenario at Mr. Pavatt's trial—like those multiple possibilities the Attorney General's Office detailed in their clemency packet—I would not have voted for death.

FURTHER AFFIANT SAYETH NOT.

MARK HAYDON

Subscribed and sworn to before me this 26th day of October 2026.

JULIE GARDNER NOTARY PUBLIC # 25011217 EXP. 09/24/29 STATE OF OKLAHOMA

NOTARY PUBLIC

My commission number is: 25011217
My commission expires: 9/24/29

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
OCT 28 2026
SELDEN JONES
CLERK

James Dwight Pavatt,

Petitioner,

v.

The State of Oklahoma,

Respondent.

District Court Case No.:
CF-2001-6189

Direct Appeal Case No.:
D-2003-1183

Original Post-Conviction Case No.:
PCD-2004-25

Subsequent Post-Conviction Case No(s).:
PCD-2009-777

P C D 2026 8 27

MOTION FOR EVIDENTIARY HEARING ON POST-CONVICTION CLAIMS

Petitioner, James Dwight Pavatt, respectfully requests an order remanding this case to the Oklahoma County District Court for an evidentiary hearing on the claims raised in his concurrently filed Subsequent Application for Postconviction Relief ("Application"). *See* Okla. Stat. tit. 22, §§ 1084, 1089(D)(5); Rule 9.7(D)(5)–(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2025).

The claims raised in Mr. Pavatt's Application arise out of new evidence demonstrating that trial prosecutors intentionally injected non-record, misleading, and prejudicial information into the jury's deliberative process that influenced at least one juror to vote for the death penalty in violation of Mr. Pavatt's state and federal constitutional rights. U.S. Const. amend. VI, XIV; Okla. Const. art. II, §§ 7 and 20. The new evidence consists of the Oklahoma Attorney General's September 18, 2026, submission in the clemency case of *State of Oklahoma v. James Pavatt* clemency packet. There, the State acknowledges *for the first time* that—contrary to what prosecutors told the jury at Mr. Pavatt's death penalty trial—that there are three possibilities as to

who fatally shot the victim Rob Andrew. The new evidence also consists of a subsequent affidavit from Mr. Pavatt's jury trial foreman regarding the impact of the State's new assertions, which expose the State's assertions at Mr. Pavatt's trial on which the juror based his vote for the death penalty, as false.

The seriousness of the constitutional errors that this new evidence brings to light, and which demonstrates a breakdown in the very framework within which jurors determined Mr. Pavatt's deservingness of the ultimate punishment, warrants not only relief but also, at a minimum, an evidentiary hearing to resolve any disputed issues of material fact raised by the allegations and evidence presented in support of Mr. Pavatt's Application. *See Gilbert v. State*, 1998 OK CR 17, ¶ 17, 955 P.2d 727, 733 (recognizing that a postconviction petitioner is entitled to evidentiary hearing where "the application for a hearing and affidavits contain sufficient information to show this Court by clear and convincing evidence the materials sought to be introduced have or are likely to have support in law and fact to be relevant to an allegation raised in the application for post-conviction relief." (internal quotation marks omitted)). The need for an evidentiary hearing is especially urgent here where Mr. Pavatt's life hangs in the balance, and where his death sentence is a product of the State's introduction of information to jurors, through argument, that it *knew* to be false—all to win Mr. Pavatt's death sentence in defiance of the Oklahoma and United States Constitutions' fair trial, impartial jury, confrontation and due process guarantees. U.S. Const. amend. VI, XIV; Okla. Const. art. II, §§ 7 and 20.

Under these circumstances, an evidentiary hearing is warranted on Mr. Pavatt's colorable claims that his death sentence was obtained in violation of the United States and Oklahoma Constitutions' due process and fair trial guarantees. Okla. Stat. tit. 22, §§ 1084, 1089(D)(5); Rule 9.7(D)(5)–(6), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2025).

In the related context of claims alleging that an external influence impacted a juror's ability to be fair and impartial, the Supreme Court has held that the proper remedy is a hearing to determine the extent to which a defendant was prejudiced. *See Smith v. Phillips*, 455 U.S. 209, 217 (1982); *Remmer v. United States*, 347 U.S. 227, 229–30 (1954). Here too this Court should order a hearing to assess the nature and prejudicial effect of the prosecutors' interjection of false, extraneous information into the decision making of Mr. Pavatt's jury. *See Thompson v. Krantz*, 2006 OK CIV APP 60, ¶ 14, 137 P.3d 692, 697 ("While Oklahoma law does not allow for evidentiary hearings generally to inquire about juror conduct and deliberations, it does allow inquiry into 'whether extraneous prejudicial information was improperly brought to the jury's attention.'").

Mr. Pavatt has supported the allegations raised in his Application with the following evidence, including affidavits:

Att. No.	Document and Appendix Page No.
1.	Application for Post-Conviction Relief, *Pavatt v. State,* Case No. PCD-2004-25 [Appx. 1]
2.	Opinion, *Pavatt v. State,* Case No. PCD-2004-25 (Okla. Crim. App., April 11, 2008) (unpublished) [Appx. 97]
3.	Second Application for Post-Conviction Relief, *Pavatt v. State*, Case No,. PCD-2009-777 [Appx. 106]
4.	Opinion, *Pavatt v. State,* Case No. PCD-2009-777 (Okla. Crim. App., Feb. 2, 2010) (unpublished) [Appx. 183]
5.	Memo from Fern Smith to OCPD Granting Tom Bevel Access to All Evidence (June 13, 2003) [Appx. 191]
6.	OCPD Report of Theresa Bunn (Dec. 05, 2001) Re: Gun Shot Residue Swabs Collected from Brenda Andrew [Appx. 193]
7.	OAG's Petition Opposing Clemency (Sept. 18, 2026) [Appx. 199]
8.	OCPD Supplemental DNA Examination Report (Nov. 9, 2005) [Appx. 253]
9.	Affidavit of Jury Foreman Mark Haydon (Oct. 26, 2026) [Appx. 257]

The evidence and affidavits submitted in support of Mr. Pavatt's Application show that, for the first time on September 18, 2026, the State of Oklahoma acknowledged in its submission in the clemency case of *State of Oklahoma v. James Pavatt* that—contrary to what prosecutors told the jury at Mr. Pavatt's death penalty trial—that there are three possibilities as to who fatally shot the victim Rob Andrew. This new acknowledgement squarely contradicts the State's insistence at the penalty phase of Mr. Pavatt's capital trial that he, and he alone, inflicted the fatal shots that extinguished Rob Andrew's life which rendered him deserving of the ultimate punishment. In response to the State's eleventh-hour acknowledgment, the jury foreman at Mr. Pavatt's trial has attested to the impact of information presented by prosecutors at the penalty phase, now known to be false, on his decision to sentence Mr. Pavatt to death.

While this evidence is sufficient to entitle Mr. Pavatt to relief for the reasons set forth in his Application, an evidentiary hearing at which additional evidence and the testimony of relevant witnesses, including forensic experts, can be compelled will further aid this Court's review of the allegations raised therein. The relevant testimony that can be examined at an evidentiary hearing includes but is not limited to testimony from:

- An expert in DNA testing on the results of DNA testing on the jeans Brenda Andrew was wearing on November 20, 2001, the night of victim Rob Andrew's murder.
- An expert in gunshot residue testing regarding the results of testing from swabbings taken of Brenda Andrew's left hand on November 20, 2001, the night of victim Rob Andrew's murder.
- Jurors from Mr. Pavatt's trial, such as foreman Mark Haydon.

Mr. Pavatt has developed his claims to the best of his ability with evidence presented in his Application. If, however, this Court grants a hearing, in addition to the information presented in

the attachments to his Application, Mr. Pavatt requests permission to bring forth other evidence as needed to further support the propositions raised in his Application.

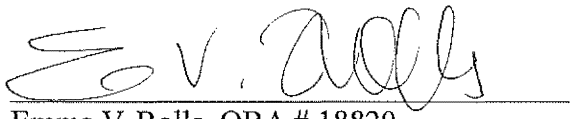
While Mr. Pavatt submits that 1) the record presented in support of his Application is sufficient to demonstrate his entitlement to relief, and 2) he has demonstrated, at a minimum, the need for further factfinding—including discovery and an evidentiary hearing—under Okla. Stat. Ann. tit. 22, §§ 1084, 1089(D)(4)–(5) and Rule 9.7(D)(4)–(6), he also respectfully submits that further factfinding on his colorable Sixth and Fourteenth Amendment claims is required under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Although states are under no obligation to provide defendants with a collateral review process, when they elect to do so, the fundamental fairness mandated by the Fourteenth Amendment's Due Process Clause governs their administration. *Pennsylvania v. Finley*, 481 U.S. 551, 557–78 (1987) ("[W]hen the State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and it particular, in accord with the Due Process Clause[.]" (internal quotations omitted)). The Due Process guarantee "emphasizes fairness between the State and the individual dealing with the State[.]" *Ross v. Moffitt*, 417 U.S. 600, 609 (1974). Justice Marshall distilled this Due Process guarantee down to its simplest definition: "[F]undamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system[.]" *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (internal quotations omitted). Justices Clark and Brennan also concurred "on a straightforward proposition: the states owe both the people and the federal courts fair procedures by which federal rights may be vindicated in state court." Christopher Flood, *Closing the Circle: Case v. Nebraska & the Future of Habeas Reform*, 27 N.Y.U. Rev. L. & Soc. Change 633, 634 (2001–2002). That is because states are the first, and

primary, forum for vindicating federal constitutional guarantees. *Mooney v. Holohan*, 294 U.S. 103, 113 (1935) (per curiam) ("Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution.").

Here, fundamental fairness requires that, at a minimum, Mr. Pavatt be afforded a full and fair opportunity to vindicate his due process and fair trial rights in Oklahoma's courts. U.S. Const. amends. VI, XIV; Okla. Const. art. II, §§ 7, 20.

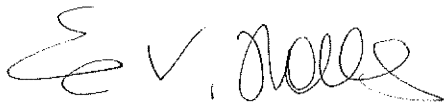
Respectfully submitted,



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Western District of Oklahoma
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CERTIFICATE OF SERVICE

I certify that on October 28, 2026, an original and 10 copies of the foregoing Motion for Evidentiary Hearing on Postconviction Claims were filed in this Court by delivering them to the Clerk of this Court with instructions to deliver one copy of said documents to the Office of the Attorney General of the State of Oklahoma.



EMMA V. ROLLS

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
OCT 28 2026
SELDEN JONES
CLERK

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

James Dwight Pavatt,

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District Court Case No.:
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Subsequent Post-Conviction Case No(s).:
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PCD 2026 827

MOTION FOR DISCOVERY ON POST-CONVICTION CLAIMS

Petitioner, James Dwight Pavatt, respectfully requests an order authorizing discovery pursuant to Okla. Stat. tit. 22, § 1089(D)(3) and Rules 9.7(D)(2) and 9.7(D)(4), *Rules of the Oklahoma Court of Criminal Appeals*. Mr. Pavatt concurrently submits this motion and a request for an evidentiary hearing with his Subsequent Application for Postconviction Relief ("Application").

The claim raised in Mr. Pavatt's Application arises out of newly discovered evidence that the prosecution intentionally injected prejudicial, false extra-record information regarding the identity of the shooter into his jury's capital sentencing deliberation process which influenced at least one juror to vote for the death penalty, in violation of his state and federal constitutional rights to due process, confrontation, a fair trial, and an impartial jury. U.S. Const. amend. VI, XIV; Okla. Const. art. II, §§ 7 and 20. The newly discovered evidence consists of the Oklahoma Attorney General's September 18, 2026, submission in the clemency case of *State of Oklahoma v. James Pavatt* clemency packet and a subsequent affidavit from Mr. Pavatt's jury foreman regarding the impact of the State's new assertions.

The crux of the new evidence, as detailed in the Application, is that the prosecution intentionally lied to Mr. Pavatt's jury at the sentencing stage of his trial when they told the jury repeatedly and consistently that Mr. Pavatt alone shot the victim Rob Andrew twice. The prosecution particularly focused on the second shot, fired at close range, Tr. at 3181, while Mr. Andrew was conscious and suffering according to the prosecution's experts, Tr. at 2458, 2464, as rendering Mr. Pavatt deserving of a death sentence:

> [It] [t]akes a special kind of person to look at another human being lying, suffering and dying on the floor, defenseless and then reloading a shotgun, aiming and executing that person from 3 inches away. That special kind of a person deserves that special punishment that's reserved for people just like James Pavatt and Brenda Andrew. And that appropriate punishment, the one reserved for special people is death. Rob Andrew didn't deserve to die. James Pavatt does.

Tr. at 3784.

Yet the State now acknowledges in its clemency submission that there are three different possibilities as to the shooter's identity. Application Appx. 238.[1] Based on this new admission, Mr. Pavatt's jury foreman has provided an affidavit attesting that he based his decision to vote for death specifically on the prosecution's insistence that Mr. Pavatt fired the second shot and the deliberate, methodical, wicked nature of that shot, which the prosecution called an "execution shot," Tr. at 3908:

> Mr. Pavatt took the first shot and then had to break open the shotgun, reload, stand over Rob Andrew at point blank range with a shotgun and take another shot. Particularly, as Mr. Andrew had already been shot once by a single shot, 16-gauge shotgun, his shooter had to purposely crack the shotgun open, remove the spent shell casing, put in another shell, close the shotgun, point down, and shoot him while he was dying. It was a wicked act that was enough for me to vote for death.

[1] References to "Application Appx." are to the Appendix Mr. Pavatt filed concurrently with his with his Subsequent Application for Postconviction Relief followed by the appropriate page number in the Appendix.

Application Appx. 258, ¶ 3. Thus, the identity of the person who fired the second shot was the hinge point for the jury foreman in deciding Mr. Pavatt's punishment.

The seriousness of the constitutional errors that this new evidence brings to light, and which demonstrates a breakdown in very framework within which jurors determined Mr. Pavatt's deservingness of the ultimate punishment, warrants not only relief but also, at a minimum, discovery and further fact-finding to resolve any disputed issues of material fact raised by the allegations and evidence presented in support of Mr. Pavatt's Application. The need for discovery is especially urgent here where Mr. Pavatt's life hangs in the balance, and where his death sentence is a product of the State's introduction of information to jurors, through argument, that it *knew* to be false—all to win Mr. Pavatt's death sentence in defiance of the Oklahoma and United States Constitutions' fair trial, due process, confrontation, and impartial jury guarantees. *See, e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320, 338–340 (1985); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *Napue v. Illinois*, 360 U.S. 264, 269 (1969); *Miller v. Pate*, 386 U.S. 1, 6 (1967); *Parker v. Gladden,* 385 U.S. 363 (1966); *Turner v. Louisiana*, 379 U.S. 466 (1964) *Remmer v. United States*, 347 U.S. 227, 229 (1954); *Farrell v. State*, 1973 OK CR 311, ¶ 6, 512 P.2d 225, 226.

Mr. Pavatt is aware of the limited nature of discovery in capital post-conviction cases and this Court's reluctance to permit "unfettered discovery in post-conviction proceedings." *Walker v. State*, 1997 OK CR 3, ¶ 43, 933 P.2d 327, 340. However, unfettered discovery is not what Mr. Pavatt seeks. Rather, Mr. Pavatt seeks the following limited discovery which will aid this Court's review of his Application, *see* Okla. Stat. tit. 22, § 1089(D)(3) ("Subject to the specific limitations of this section, the Court of Criminal Appeals may issue any orders as to discovery or any other

orders necessary to facilitate post-conviction review."); *see also* Rule 9.7(D) (contemplating discovery requests in capital postconviction cases):

1. Gunshot residue testing of swabbings taken of co-defendant Brenda Andrew's left hand on November 20, 2001, by Oklahoma City Police Department Officer Theresa Bunn.

The police crime scene investigator who interviewed Brenda Andrew soon after Rob Andrew's murder shooting noticed powdery marks on the top center of Ms. Andrew's left hand. Tr. at 2385-86. The investigator thought the powder could be gunshot residue. *Id.* at 2385, 2387; Application Appx. 194-95, 197. The investigator took swabbings of Ms. Andrew's hands and secured them in evidence but they have never been tested for gunshot residue. Application Appx. 195, 198.

The presence of gunshot residue on Ms. Andrew's hand would objectively confirm that she had just fired a gun at close range. *Hancock v. State*, 2007 OK CR 9, ¶ 19 n.7, 155 P.3d 796, 805 n.7, *overruled on other grounds by Williamson v. State*, 2018 OK CR 15, ¶ 19, 422 P.3d 752. Prosecution expert Tom Bevel consistently testified that Ms. Andrew herself could not have shot the gun that caused the wound she had on the upper back of her left arm the night of the murder, Tr. at 3190, Andrew Tr. at 3268; thus, if Ms. Andrew indeed had gunshot residue on her hand, it could only have come from Ms. Andrew shooting the shotgun when she killed Rob Andrew. The presence of gunshot residue on Ms. Andrew's left hand, which she would have used to brace the shotgun as she is right-handed, Andrew Tr. at 2190, would strongly support that she was the shooter and not Mr. Pavatt. This confirmation would bolster the constitutional claim in Mr. Pavatt's Application that the prosecution at Mr. Pavatt's trial violated his rights to due process, confrontation, a fair trial, and an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and Article II, Sections 7 and 20 of the Oklahoma Constitution by

intentionally bringing non-record, misleading, and prejudicial information that Mr. Pavatt was the sole shooter, and Rob Andrew's actual killer, to the jury's attention, which influenced at least one juror to vote for the death penalty.

Counsel has confirmed that the swabbings are still in the custody of the Oklahoma City Police Department and have never previously been tested.

2. DNA testing on the stains found on the jeans that Brenda Andrew wore on November 20, 2001, that were taken into police custody.

Oklahoma City Police Department Forensic Scientist Kyla Marshall conducted DNA testing in May 2003 and November 2005 on numerous stains found on the jeans Brenda Andrew wore on November 20, 2001, the night of Rob Andrew's murder. The stains were from blood, Tr. 2318-19, and the testing produced a DNA profile of "an unknown male." Application Appx. 255.

Over a year before Mr. Pavatt's trial, the prosecution asked for and received permission for prosecution witness Tom Bevel to examine Brenda Andrew's jeans for blood spatter evidence that would connect her to the shooting. Application Appx. 191. This Court had recognized Bevel as a blood spatter analysis expert years before Mr. Pavatt's trial. *See, e.g., Romano v. State*, 1995 OK CR 74, ¶ 2, 909 P.2d 92, 106; *Farris v. State*, 1983 OK CR 141, ¶ 8, 670 P.2d 995, 997–98.

"Blood spatter . . . is blood that has been broken up from the blood source due to some force or energy breaking it away from the blood source." Andrew Tr. at 3222. A person can get blood spatter on their clothing when they shoot someone from a very close distance and blood from that person's wounds flies back onto the shooter's clothing. *Sellers v. State*, 1991 OK CR 41, ¶ 53, 809 P.2d 676, 690; *cf.* Tr. at 3174.

Bevel examined Brenda Andrew's jeans, Tr. at 3169, and found blood spatter stains on them. Andrew Tr. at 3236. A defense expert at Ms. Andrew's trial agreed. Andrew Tr. at 3574-79, 3582-87, 3694-97; 3720 (expert testifying that the second shot to Rob Andrew is the source of

blood spatter on Brenda Andrew's jeans). The blood spatter on Brenda Andrew's jeans is the only credible scientific evidence supporting who shot Rob Andrew; and it does not point at Mr. Pavatt as the shooter whatsoever.

At Brenda Andrew's trial, the prosecution homed in on the blood spatter on Brenda Andrew's jeans coming from Rob Andrew to inculpate her as the sole shooter:

> [A]s [Rob Andrew] is on the floor realizing what is happening to him and realizing that all the people are right, he turns to look at [Brenda] one last time. And this time, *[be]cause the blood spatter shows you*, he saw her face over the barrel of a shotgun.

Andrew Tr. at 4125-26 (emphasis added).

Displaying a picture to the jury of Brenda Andrew's jeans from the night of the murder, the prosecution also argued that the blood spatter put the fatal gun in her hands:

> the spatter source [of pattern number five "on her left leg"] is the guy on the ground . . . *Here is why she had the gun* . . . It's from Mr. Andrew's left to right and she's right here and *she shoots him.* [Pattern] [n]umber five is spatter and it comes in a straight line, *back spatter right onto these pants.*

Id. at 4081, 4084, 4086 (emphasis added). The prosecution then added that the "spatter on her left leg" shows that she "sho[t] him the second time." *Id.* at 4089-90.

The issue now for discovery is that the "unknown male" DNA found on Ms. Andrew's jeans has never been identified. If DNA testing shows that it is indeed the blood of victim Rob Andrew that would corroborate that Brenda Andrew fired the second shot, at a minimum. That finding in turn would undermine the prosecution's repeated and consistent assertion at Mr. Pavatt's capital sentencing hearing that he alone shot Rob Andrew. Doing so would bolster the constitutional claim in Mr. Pavatt's Application that the prosecution at Mr. Pavatt's trial violated his rights to due process, confrontation, a fair trial, and an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and Article II, Sections 7 and 20 of the Oklahoma Constitution by intentionally bringing non-record, misleading, and prejudicial

information that Mr. Pavatt was the sole shooter, and Rob Andrew's actual killer, to the jury's attention, which influenced at least one juror to vote for the death penalty.

Mr. Pavatt's Application raises colorable claims that his death sentence was obtained in violation of the United States and Oklahoma Constitutions' due process and fair trial guarantees. U.S. Const. amends. VI, XIV; Okla. Const. art. II, §§ 7, 20. Mr. Pavatt has supported those allegations with the following evidence, including affidavits:

Att. No.	Document and Appendix Page No.
1.	Application for Post-Conviction Relief, *Pavatt v. State*, Case No. PCD-2004-25 [Appx. 1]
2.	Opinion, *Pavatt v. State*, Case No. PCD-2004-25 (Okla. Crim. App., April 11, 2008) (unpublished) [Appx. 97]
3.	Second Application for Post-Conviction Relief, *Pavatt v. State*, Case No,. PCD-2009-777 [Appx. 106]
4.	Opinion, *Pavatt v. State*, Case No. PCD-2009-777 (Okla. Crim. App., Feb. 2, 2010) (unpublished) [Appx. 183]
5.	Memo from Fern Smith to OCPD Granting Tom Bevel Access to All Evidence (June 13, 2003) [Appx. 191]
6.	OCPD Report of Theresa Bunn (Dec. 05, 2001) Re: Gun Shot Residue Swabs Collected from Brenda Andrew [Appx. 193]
7.	OAG's Petition Opposing Clemency (Sept. 18, 2026) [Appx. 199]
8.	OCPD Supplemental DNA Examination Report (Nov. 9, 2005) [Appx. 253]
9.	Affidavit of Jury Foreman Mark Haydon (Oct. 26, 2026) [Appx. 257]

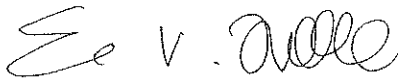
While this evidence is sufficient to entitle Mr. Pavatt to relief for the reasons set forth in his Application, the following discovery will further aid this Court's review of the allegations raised therein. Mr. Pavatt respectfully asks the Court to order the State to make available to Mr. Pavatt, or an expert to be designated by him, the following items of physical evidence for inspection and assessment for forensic testing:

- Swabbings taken from Brenda Andrew's left hand on November 20, 2001, by Oklahoma City Police Officer Theresa Bunn.

- The jeans Brenda Andrew wore on November 20, 2001, which were taken into police custody.

For the reasons set forth herein and in Mr. Pavatt's Application, he respectfully requests the Court to order the foregoing discovery which will aid its review of the allegations raised in Mr. Pavatt's Application. *See* Okla. Stat. tit. 22, § 1089(D)(3); Rule 9.7(D), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2026).

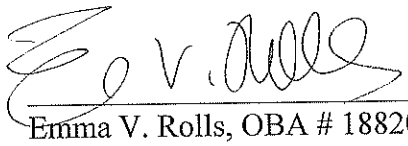
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on October 28, 2026, an original and 10 copies of the foregoing Motion for Discovery on Postconviction Claims were filed in this Court by delivering them to the Clerk of this Court with instructions to deliver one copy of said documents to the Office of the Attorney General of the State of Oklahoma.



Emma V. Rolls, OBA # 18820

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

LMA

THE STATE OF OKLAHOMA,	)	03-1186
Plaintiff,	)	
vs.	)	CASE NO. CF-01-6189
JAMES DWIGHT PAVATT,	)	**VOLUME XV of XV**
Defendant.	)	

* * * * * *

TRANSCRIPT OF CONTINUATION OF

JURY TRIAL PROCEEDINGS

HAD ON THE **16TH** DAY

OF **SEPTEMBER, 2003,** BEFORE

THE HONORABLE SUSAN W. BRAGG

* * * * * *

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
MAR 17 2004
PATRICIA PRESLEY, COURT CLERK
by _____ Deputy

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAY 12 2004
MICHAEL S. RICHIE
CLERK

Reported by:

Tara Nixon, RPR, CRR
321 Park Avenue
Oklahoma County Courthouse
Oklahoma City, Oklahoma

COPY

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TABLE OF CONTENTS
I N D E X

Volume XV of XV-Tuesday, September 16, 2003

	PAGE
CONTINUATION OF WITNESSES ON BEHALF OF DEFENDANT	
DEBRA ANN VAUGHAN - testified:	
Direct Exam by Mr. Arnett	3695
JUSTIN W. STUDEBAKER - testified:	
Direct Exam by Mr. Arnett	3698
Cross-Exam by Mr. Gieger	3704
CHESTER L. VETETO - testified:	
Direct Exam by Mr. Arnett	3707
Cross-Exam by Ms. Smith	3710
MARY ANN VETETO - testified:	
Direct Exam by Mr. Arnett	3712
NORMA JEAN ZICKEFOOSE - testified	
Direct Exam by Mr. Arnett	3716
Cross-Exam by Ms. Smith	3718
WADE F. VETETO - testified:	
Direct Exam by Mr. Arnett	3721
Cross-Exam by Ms. Smith	3725
ALGIN SIDNEY PAVATT - testified:	
Direct Exam by Mr. Arnett	3727
Cross-Exam by Ms. Smith	3731
Defense Rest	3731
Settling of Instructions	3736
Lunch Recess	3738
CLOSING ARGUMENTS	
By Ms. Smith	3738
By Mr. Arnett	3758
By Ms. Smith	3775
Jury Deliberations	3793
Verdict	3793
Polling of the Jury	3794

in there.

THE COURT: Yes. We do. Everything else okay?

MS. SMITH: Yeah.

THE COURT: Okay. Good. Thank you.

MR. ARNETT: May we be excused?

THE COURT: Yes.

MS. SMITH: What time are we supposed to be back?

(An off the record discussion was here had.)

(A recess was here had.)

AFTER RECESS

(Whereupon, the jury entered at 1:15 p.m. and the following transpired in open court.)

(Whereupon, Stage Two instructions were hereby read to the jury by the Court but were not reported.)

THE COURT: Ms. Smith.

MS. SMITH: Thank you. May it please the Court?

THE COURT: Yes.

MS. SMITH: Ladies and gentlemen of the jury, just like in the first stage of the trial it goes the same way. I don't get anymore time to argue to you. Mr. Arnett has the same amount of time. He's not restricted in any way. But I get to argue twice because the State of Oklahoma bears the

burden of proof so our arguments are split up. We get to go first, Mr. Arnett and then the State.

And again, like I said in the first stage of the trial, if I say something to you that you heard differently from the witness stand then you must disregard what I say and remember the way that you heard it.

First of all I want to go over some of the instructions with you and I won't go over all of them because just like in the first stage of the trial you'll have them. They're in the jury room with you to refer to. And as the Judge has told you, I'm going to pick out some of these instructions but you are to consider all of them as a whole. And when I pick certain ones out to point out to your attention I in no way am trying to divert your attention from the others. You must consider all of them. But you'll have them back there with you so I don't intend to go over all of them.

I want to call your attention to Instruction No. 5 when the Judge defines for you the term heinous, atrocious or cruel. That is one of the aggravating circumstances that the State must prove. We only have to prove one. We have proven

to you three. We've alleged and I submit to you proven three, but we only have to prove to you one of the aggravating circumstances in order for this to be a proper case for you to consider the death penalty under the law. The Judge tells you that in her instructions.

We have alleged and proven, I submit to you, that this murder of Rob Andrew was heinous, atrocious or cruel. The Judge tells you heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means pitiless or designed to inflict a high degree of pain, utter indifference to or enjoyment of the suffering of others. The phrase especially heinous, atrocious or cruel is directed to those crimes where the death of the victim was preceded by torture of the victim or serious, physical abuse.

I submit to you when you read Instruction No. 5, it defines the term heinous, atrocious or cruel, that you look at the photographs of Rob Andrew's body as he lay on the garage floor. And we discussed in the voir dire in the first stage of the trial that we were going to have to ask you to look at unpleasant photographs. And you

don't have to dwell on them. We know you don't want to. But it's necessary for you to look at them and you all agreed that you would and that's part of your job is to look at those photographs and to help you make the determination as to whether or not the death of Robert Andrew was heinous, atrocious or cruel as Rob laid dying on the floor, and you look at the photographs and you'll see him there. And look at the wound in his side. Look at the wound in his neck.

And listen to the 911 tape when Brenda Andrew tells you that Robert Andrew is alive. And remember the testimony of the Medical Examiner when he said that Rob Andrew could have lived several minutes, maybe even up to six minutes. And as he was laying there conscious, as Brenda Andrew was talking to the 911 operator and she's telling the operator yes he's conscious; he's alive; he's breathing, that is evidence to you that Rob Andrew was suffering as he lay dying on that floor. Look at the wounds and ask yourselves whether or not he could have suffered a wound like that and not be suffering and feeling pain.

Imagine the fear that Robert Andrew felt after he was shot that first time as Mr. Pavatt or

Brenda Andrew, whichever one of them did it, reloaded that shotgun while he was laying there suffering. Imagine the emotional fear and pain that he was suffering. He was alive, aware, conscious and contemplating his death when he was executed, ending his life.

I submit to you, ladies and gentlemen, that this murder was wicked and vile and that his death was preceded by physical abuse and by torture. And we know by the defendant's attitude at the hospital the next day, when he was giggling and laughing in the emergency room with Brenda Andrew, as you heard Rosita Ingerson testify to, we can conclude from that that he enjoyed the suffering and the murder that he had committed of Rob Andrew.

Judge tells you the State has alleged that there exist a probability that the defendant will commit future acts of violence that would constitute a continuing threat to society. Judge tells you that in order for us to prove that we must show you first that the defendant has demonstrated a threat to society.

He's murdered, executed an innocent man. He has made threats to his own daughter and granddaughter to murder them. He has attempted to

murder Rob Andrew on October the 26th when he cut his brake lines and he was ready to kill Jeff Gigstad in the closet of his father's home. I submit to you there is no doubt that the State of Oklahoma has proven to you that this defendant has demonstrated a threat to society.

The second thing that we must prove to you is a probability that this threat will continue to exist in the future. I submit to you that this defendant's past behavior is an indicator of his future behavior. He hated Rob Andrew enough to kill Rob Andrew, to murder him and to execute him. Rob didn't do anything to this defendant. He didn't do anything to provoke his murder. Rob had a right to be mad at Mr. Pavatt. Mr. Pavatt was sleeping with his wife.

Rob had a right to call Rob's boss. I'm sorry. Rob had a right to call the defendant's boss Mr. Burnett and complain because he couldn't get the insurance policy changed because Mr. Pavatt was telling the insurance company that the ownership had already been changed. But Mr. Pavatt hated Rob for those things even though Rob had a right to do them.

How little it took for this defendant, how

little it took to raise that hatred in him. I submit to you that should be proof to you beyond a reasonable doubt that this defendant is a continuing threat to society.

Judge tells you in Instruction No. 7 that aggravating circumstances are those which increase the guilt or enormity of the offense. We told you at the very beginning of this trial, and there are only eight of them and we've alleged three and proven all three against this defendant.

The Judge tells you that should you unanimously find one or more of those aggravating circumstances then you're authorized to consider imposing death and I submit to you we have proven all three, but as the Judge has told you in Instruction No. 7 we only have to prove one for it to be a proper case for you to consider the death penalty.

Judge tells you in Instruction No. 8 that the State relies in part on circumstantial evidence for the proof of the aggravating circumstance that there exist a probability that the defendant will continue to commit criminal acts in the future. And I've already talked to you about that, but when you consider Instruction No. 8, the circumstantial

part, it's the same as you had in the first stage of the trial. You go through, you put the pieces together and use your common sense to determine whether or not the State has proven that aggravating circumstance. And when you go through that instruction it's just like in the first stage of the trial, the instruction on circumstantial evidence only applies to the circumstantial evidence and not the direct evidence.

The Judge tells you that mitigating circumstances are those which in fairness, sympathy and mercy may extenuate or reduce the degree of moral culpability or blame. That's the test. Do the mitigating circumstances that the defendant has proposed for you to consider, do they extenuate or reduce the moral culpability or blame for the murder of Rob Andrew.

I submit to you the defendant has proposed for you three mitigating circumstances. That first mitigating circumstance is the defendant did not have any significant history of prior criminal activity. Well I submit to you, number one, it's a two prong test. You have to determine whether or not the mitigating circumstance is true. The second prong is if it's true does it extenuate or

reduce the moral culpability or blame for the murder of Rob Andrew.

The Defendant says because I did not have any significant history of prior criminal activity then you should consider that as extenuating or reducing my culpability or the blame of murdering Rob Andrew. Well, I submit to you, number one, it's not true because he did have a significant history of criminal activity. He had already attempted to murder Rob Andrew on October the 26th. He had made threats to his daughter Janna and he had attempted to change an insurance policy using forged documents. Those are at least three instances where he has a history of committing prior criminal activity.

But even if those -- he didn't have a significant history, even if you didn't find that those things existed, does the fact that he didn't have any significant criminal history extenuate or reduce what he did to Rob Andrew on November 20th of 2001? How in the world could that happen? How in the world could the fact that he may not have had a criminal history excuse him, extenuate or reduce his degree of moral culpability or blame for the murder of Rob Andrew? I submit to

you that mitigator number one does not exist. If it existed it does not extenuate his degree or blame for the murder of Rob Andrew.

Number two, the defendant wants you to consider that he is likely to be rehabilitated. Well, I submit to you number one you have to ask yourselves whether or not that's true. And number two, does that extenuate or reduce his degree of moral culpability or blame.

First of all, we have had no evidence, none whatsoever that this defendant can be rehabilitated for what he has done. So I submit to you, number one, that's not true. And I ask you to consider, when you consider that mitigator, how in the world do you rehabilitate for a murder. What do you do to rehabilitate someone for committing a murder and all of the other things that he's done?

But even if he could be rehabilitated how does that extenuate or reduce the degree of moral culpability or blame for murdering Rob Andrew? I submit to you that mitigator number two is not true. Even if it were true it does not extenuate or reduce the degree of moral culpability or blame.

Number three, he says because the defendant's age that that is somehow a mitigating circumstance.

I believe there's been evidence that the defendant was 48 years old. And I submit to you, when you're 48 years old and in the position that Mr. Pavatt was in, he knew the difference between right and wrong. And he chose to do wrong. How does the fact that he's 48 years old reduce the degree of moral culpability or blame for what he did to Rob Andrew? I submit to you he knew the difference between right and wrong and because he was 48 years old that doesn't give him a reason, that doesn't extenuate or reduce the moral culpability for what he did to Rob Andrew.

So I submit to you that none of the three mitigators that the defendant has proposed for you are true -- well, number three is true because he was 48 years old. I don't dispute that. But all three of them do not extenuate or reduce the degree of moral culpability or blame. Therefore, I submit to you, there are no mitigators in this case. There is no mitigation for what this defendant did to Rob Andrew.

The Judge tells you if you unanimously find that one or more of the aggravating circumstances existed beyond a reasonable doubt that the death penalty shall not be imposed unless you unanimously

find that any such circumstances outweigh the finding of one or more mitigating circumstances. Well, I submit to you that there aren't any mitigating circumstances.

And the Judge goes on to tell you that even if you find that the aggravating circumstances outweigh the mitigating circumstances, which I submit to you there are none, then you may impose a sentence of either life or life without parole, and you can do that. You can go ahead and impose either one of those other two sentences even if you don't find that the mitigators outweigh the aggravators. But I submit to you, would that be justice? You can do that but would that be justice? And that's your job. That's what you're here to do, is not to do the easy thing, not to do the hard thing, but to do the right thing. And the right thing is justice. That's what your job is here to do.

Judge tells you in Instruction No. 12 that if you unanimously find one, you only have to find one, or more aggravating circumstances existed beyond a reasonable doubt that the law requires you to reduce those findings to writing. And what she means is she gives you another paper that says we,

the jury, empaneled and sworn in the above-entitled cause do upon our oaths unanimously find the following aggravating circumstances as shown by the circumstance or circumstances checked. And you'll have this with you. And what she means when she says that you have to reduce those aggravating circumstances to writing, what she means is you go down and read 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, if you find that the State of Oklahoma has proven that aggravating circumstance to you beyond a reasonable doubt then your foreman should just place a check by that aggravating circumstance. And that's what the Judge means when she says you have to reduce it to writing.

You don't have to write out a summary or anything like that as to why you think it's aggravating. All you have to do is place that check in the box right here. And there will be three of 'em because we've alleged to you three aggravating circumstances, and you are to check all of the aggravating circumstances that you find beyond a reasonable doubt.

One of the aggravating circumstances that you see here is the person committed the murder for remuneration. I submit to you that the term remuneration means money. Person committed the murder for money, $800,000 in insurance, or the promise of remuneration, or employed another to commit the murder for remuneration, or the promise of remuneration.

I submit to you that there can't be any doubt in your minds after you've heard the evidence in the first stage of this trial which is proper for you to consider in this stage of the trial that part of the motive for this murder was $800,000 in insurance money and that is remuneration and that is an aggravating circumstance that the laws of the state of Oklahoma say that it is proper for you, if you find that, to consider the death penalty.

The Judge tells you in Instruction No. 13 that the prosecution has introduced what is known as victim impact evidence. That evidence has been introduced to show the financial, emotional, psychological or physical effects that Rob Andrew's death had on his immediate family members. I'm not going to dwell on that because there can't be any question in your mind after you saw them testify

here before you the effect that it's had on his family.

They are devastated by his loss. They miss him. They love him. He's left behind two children ages eight and ten now to be cared for and reared by their grandparents, without the companion of their loving father. All of those are things that you may consider when determining the appropriate punishment.

Judge tells you that this victim impact evidence is intended to remind you that the victim, too, as well as the defendant, is an individual whose death may represent a unique loss to society and to the family. I submit to you that Rob Andrew's death is a unique loss not only to his family but to society.

You've heard the evidence about his character throughout this trial. He was loved by many people. Over a thousand people came to his funeral to pay their respects to him. He loved his wife and he loved his children and his death is a unique loss to this society and his family and that is something that you may consider in determining the appropriate punishment.

Judge tells you in Instruction No. 14 that you

are to consider all of the evidence that you heard in open court presented by both the State and the Defendant and all of the previous instructions that have been given to you in the trial in the first stage as well as in the second stage, except that in this part of the trial you may consider sympathy or sentiment for the defendant in determining whether to impose the death penalty.

Now, the Judge doesn't tell you that you must consider death. The Judge doesn't tell you that you shall consider that. She says you may consider that. And I would like to ask you why would you?

The defendant didn't consider any sympathy or any sentiment for Rob Andrew when Rob Andrew was executed. I submit to you that this defendant deserves from you the same sympathy and sentiment that he gave to Rob Andrew when Rob Andrew was executed lying in pain on that garage floor needlessly murdered.

At the beginning of the trial, of the case, the second stage, I believe I read to you the incorrect case number. The court reporter called it to my attention so I need to correct that before I go on. The date, the case number was 2001-6189. I believe I read it to you 2002-6189, so for the

record I need to correct it.

I want to submit to you during this stage of the trial the defendant's mother took the stand and told you that she's been devastated and that she's sorry for the Andrew family. Well, I submit to you that Lou Andrew, sitting right out here with the blue earrings on, is Rob Andrew's mother and she's been devastated by the needless murder of her son. She wasn't even able to walk to the witness stand and read a victim impact statement for you. And I submit to you, Mr. Pavatt's mother may be sorry for the Andrew family but Mr. Pavatt isn't sorry and that's the test.

Debbie Vaughan, the cousin of this defendant stepped before you on this witness stand and she told you when we were kids the defendant was the instigator when we got into trouble. She told you that Jim is a family oriented person and devoted family man. I submit to you we can see that devotion to Brenda Andrew and the children of the man that he murdered in the photographs when he was on a Texas vacation taking Rob's place near the Texas granite stone and going across the border from Oklahoma to Texas.

Ms. Vaughan tells you that this defendant has

strong Christian values. I submit to you, he does not have strong Christian values. All of the behavior that he has exhibited doesn't indicate that he has strong Christian values.

Justin Studebaker, friend of the defendant, told you that I'm going to be 51 years of age in November. Rob Andrew will be 38 years old forever. He will never reach 51.

Chet Veteto, the defendant's uncle, tells you that the defendant is a Christian man, a Sunday school teacher. I submit to you, so was Brenda Andrew. Chet Veteto only saw the defendant on holidays and leave, when the defendant wasn't doing his secret missions.

Mary Ann Veteto was asked, what was the defendant like when he was a kid? Her answer was he was a great kid. I submit to you, this defendant hasn't been a kid for 30 years when he murdered Rob Andrew.

Norma Zickefoose, she said that she knew him, the defendant, before he started school and that the defendant left Keystone to go to OU when he was 18 years old. Went to OU for four years and then joined the Air Force. Well, we know that as one of the other witnesses told us, well, she's a little

mixed up about that, that he didn't really go to OU. What he actually did was later on, according to the other witness, when he was at Tinker he attended OU. But I submit to you that's significant because as all of the witnesses that have testified to you on behalf of the defendant, these are all people who knew the Defendant Pavatt when he was a kid, 30 or 32 years before he murdered Rob Andrew.

Ms. Zickefoose said he left when he was 18 years old and joined the Air Force and that's the extent of how she knows him.

Wade Veteto, the defendant's father, he says that he is sorry for the Andrew family and he wants mercy for his son James. I submit to you that his son James did not show any mercy for Rob. The defendant deserves the same mercy from you that he showed to Rob Andrew when he was executed.

Sidney Pavatt, the brother, is the only person who told you on the witness stand that he had an adult relationship with the defendant. And he said if you give the death penalty it will kill his mother. Well, I submit to you, what about Rob's mother? What has the death of Rob done to Rob Andrew's mother? He was the innocent one.

Rob's mother didn't get to ask James Pavatt to have mercy on her son. Bill Andrew, Tom Andrew, Tim Andrew and Rob's father didn't get to ask Mr. Pavatt to have mercy on their son Rob Andrew. Mr. Pavatt just maliciously, needlessly snuffed out Rob Andrew's life. And Rob Andrew himself didn't get a chance to beg Mr. Pavatt for mercy. He was ambushed and murdered. He was blind sided and murdered. And Mr. Pavatt does not deserve mercy for this needless killing.

Mr. Pavatt has committed the highest of all crimes: Murder in the first degree, and he deserves the highest of all punishments: Death.

Mr. Pavatt, I submit to you, is guilty of all three of the aggravating circumstances for which he is charged. It is a proper case for the death penalty. There is no mitigation, no reason for him to have done this. Under the law the mitigators do not extenuate or reduce his culpability for blame.

This is a proper case for the death penalty. It is an appropriate case for the death penalty. And under the law and the circumstances on behalf of the State of Oklahoma I ask you to sentence him to death.

THE COURT: Thank you, Ms. Smith.

MS. SMITH: Thank you, Judge.

MR. ARNETT: May it please the Court, Counsel, ladies and gentlemen of the jury. I think this task is probably one of the hardest for a defense attorney to do because it puts you in a position of talking to a jury that obviously didn't agree with your assertion of your defense. But nonetheless it's my obligation to stand here and to go over some of the same issues that we've had to talk about before, because as you've heard, all of the evidence incorporated from the first stage of the trial is brought to bear, if you will, as part of this second stage of the trial.

What I will ask you to do is to look at it in a somewhat different light, in light of the instructions that are being given to you, that have been given to you orally and that will be given to you in writing when you go into the jury room, in terms of how those instructions should apply to the evidence that you've already heard and additionally how those instructions should apply to the evidence that you've heard on the second stage of the trial.

All of you told me in voir dire or told the Judge, or told someone that asked you a question, depending on who you are, all of you agreed with us

that the death penalty is not instantly the penalty that should be given in every murder case. And you agreed with me that, in fact, that's what our legislature envisioned whenever they set out this system of aggravating circumstances, mitigating circumstances, and the balancing test that's found in our law and that is set out in the jury instructions that you're going to have.

And I, too, like Ms. Smith, am going to go over a few of the instructions and call your particular attention to those and as she pointed out, not suggesting that those should be singled out but that all of these instructions should be considered as a whole in their entirety.

First of all, as to the aggravating circumstances, I think it's easy to occasionally get confused and think, well, if the aggravating circumstances exist then that proves that the death penalty is appropriate in that particular case. I'm going to suggest to you, and I'll go through these one by one, the three aggravating circumstances. But I'm going to suggest to you first of all that the State of Oklahoma has not proved any of those aggravating circumstances beyond a reasonable doubt.

But even if you disagree with me I think that there are going to be mitigating circumstances, including the three that are set out in the instruction, but you're going to also see that one of the things that instruction on mitigating circumstances says to you is that you're free to decide about any other mitigating factors and consider those in reaching your decision.

In other words, you are not limited to the three mitigating circumstances that are set out in the jury instructions. You're not limited to anything besides what you feel may be a factor in determining whether or not the jury, you as a jury should return the death penalty or return one of the other punishments provided for by law.

And finally, and we'll go over it in a minute, but as Ms. Smith pointed out there is additionally an instruction that says even in spite of all that, even if you believe that one or more of the aggravating circumstances has been proven, even if you believe those aggravating circumstances are not outweighed by the mitigating circumstances, even under those circumstances you are still not required to return a death penalty.

So while under these instructions you'll see

that there are circumstances under which you cannot give the death penalty, such as when the mitigating circumstances outweigh the aggravators, there is no circumstance and you won't find an instruction in this packet that says if you find this, this and this, you must sentence the defendant to death. You're not going to find that. It's not in there because that's not the law.

And you certainly won't find anything in the jury instructions that says simply because the defendant has been found guilty of first degree murder he deserves the death penalty because that is also not the law. And all of you agreed with me and with the Judge and with Counsel when you were selected as jurors that that not only is the law but that should not be the law.

The three aggravating circumstances in this case as alleged by the State, as alleged by the prosecution, are that the death was especially, extremely heinous, atrocious and cruel, especially heinous, atrocious and cruel. Essentially that Mr. Pavatt poses a continuing threat to society and that the homicide was committed for remuneration.

First of all, I will call your attention particularly with respect to the heinous, atrocious

and cruel aggravator, to the jury instruction. And while there are a number of words in there that are defined by other words I think that the important thing to look at is the last sentence of that instruction that tells you what the phrase especially heinous, atrocious and cruel, what kind of crimes that language is directed toward. And what it says is, "the phrase especially heinous, atrocious or cruel is directed to those crimes where the death of the victim was preceded by torture of the victim or serious physical abuse."

Now, I think probably all of you can think of stories we've heard on the news, things we've seen on television, or read in the newspaper where homicides occur under those kind of circumstances. But I would submit to you that this homicide does not fit within the definition of being preceded by torture or by serious physical abuse.

To some degree I suppose all homicides are heinous, atrocious and cruel. I think that's the reason why the legislature has included the term especially prior to that phrase.

In this case the State of Oklahoma, hard to believe as it is, relies on what Brenda Andrew says in the 911 call to prove what Rob Andrew's

condition was while she's on the phone talking to the 911 operator. I don't think I have to remind you that hours and hours of testimony were given in this case by prosecution witnesses for the sole purpose of proving that Brenda Andrew is a liar and that this homicide was staged.

If you'll remember Tom Bevel who took the witness stand, the accident reconstructionist, pardon me, the crime scene reconstructionist. His whole analysis was that this crime did not occur the way Brenda Andrew said it occurred. And if you'll recall there was even testimony and they played the 911 tapes and pointed out that there was a 911 call and it was hung up and then another call was made. And there was even argument made to you about what happened during the gap between those two 911 calls.

But now the State of Oklahoma says well Brenda Andrew told the 911 operator that Mr. Andrew was conscious and breathing, so it must be true. I don't think it's difficult to discount whatever Brenda Andrew told the 911 operator as part of this situation.

I think it more prudent to listen to the testimony of the Medical Examiner, Dr. Gofton, who

analyzed Mr. Andrew's death from a scientific point of view and in no way does that diminish the effect of it. But he analyzes it in a scientific way. And if you'll recall what Dr. Gofton said was that either one of those wounds would have been fatal. That death occurred within a matter of minutes and that he really couldn't say how much less than the time of death was the time that Mr. Andrew remained conscious, but that he believed he lost consciousness some time before he passed away.

Finally, the State says well, obviously, Mr. Pavatt enjoyed Mr. Andrew's suffering. There is simply no evidence of that. There's simply no evidence of that. So I would suggest to you, first of all, that the State has not proven that this homicide falls within the definition of especially heinous and atrocious or cruel as set out by our law.

And even though you may think as I do that there isn't such a thing as a kind homicide, there isn't such a thing as a homicide that's not cruel, but our law provides for this to be an aggravator in certain extreme cases and the law tells you that those extreme cases are those where the crime, those crimes where the death of the victim was

preceded by torture of the victim or serious physical abuse.

And I think if you look even at the evidence in the light most favorable to the State of Oklahoma's case, assume everything they have told you is true, I think this homicide still does not fit, and will submit to you that it is not the type of crime, the type of murder for which this particular aggravator was designed and drafted by our lawmakers.

The next aggravator that the State has alleged is that there is a continuing threat posed by Mr. Pavatt to society. Here again, I think that in almost any homicide obviously there is some threat to society or the homicide would not have occurred. But again, this aggravator is for special circumstances, obviously not -- this aggravator doesn't exist in every murder or the law would have been written in such a way that the death penalty would be given in every case.

The two prong test is first that the defendant's behavior has demonstrated a threat to society. And you may say well any time a defendant commits the crime of murder in the first degree they have demonstrated a threat to society. But

then the second prong of the test is that that threat continues to exist in the future. And in this respect I would ask that you consider Jim Pavatt's age not only in terms of mitigators but in terms of whether or not he poses a continuing threat to society.

Now, Ms. Smith argues well, yes, he's engaged in prior criminal activity. But I would ask you to read the instruction on mitigators and this instruction and see if you believe that that's the kind of thing that is described in these instructions.

As far as the evidence shows Mr. Pavatt has never been arrested for anything. He has never, according to this instruction, committed any type of crime much less had any kind of priors, criminal record. The State argues that well he cut the brake lines. And they have also argued that that was part of the continuing conspiracy, but the State of Oklahoma has never charged him with attempted murder in connection with that.

They said well he was involved in this forgery on the insurance ownership change but he's never been charged in connection with that. And they said, well, he threatened Janna Larson.

Janna Larson told you she took the threat at the time serious but that later she did not consider it serious and in fact was so comfortable that if her father had been acquitted she was offering him a place to come and live with her and her granddaughter (sic). So you have to ask, if his own daughter considered that threat serious why would she make that offer?

I submit to you that somebody that's 48 years old and there hasn't been evidence of any criminal activity, much less violent criminal activity, does not represent a continuing threat to society. And the State of Oklahoma has proved nothing beyond a reasonable doubt other than with respect to this particular crime and the circumstances it surrounded.

The other discussion with respect to continuing threat was that Mr. Pavatt was getting ready to shoot Jeff Gigstad. And without going through all the problems with the evidence in the Gigstad home I'd submit to you that there's simply no evidence that that was going on. Again, I'd ask you to look at the phone records and ask you whether you really think that at the time Jeff Gigstad was in the house that Jim Pavatt was

kicking a shell out of the shotgun, reloading it and talking on his cell phone all at the same time.

Assume for a minute that somebody really was hiding in the closet and they had a shotgun and a .22 caliber pistol. Why would they choose to sit there and try to unload and reload a shotgun when they had a handgun, if they were going to shoot somebody? But I submit to you that regardless of what your verdict was, and I don't know what you felt about that, but I submit to you that the evidence just proves -- those phone records that are indisputable just prove that Jim Pavatt was not in that attic and was not in that closet. And there's been absolutely no evidence, no evidence whatsoever that he intended to do anything to Jeff Gigstad. It's pure speculation on the part of the prosecutors. So based on all that, again, I would urge you and submit to you that the State has failed to prove that Mr. Pavatt represents any kind of continuing threat to society in the future whatsoever.

Finally, the third aggravating circumstance is that this crime was committed for remuneration. Somebody was going to make money off of it. And, of course, you've already been instructed that the

actions of the principal apply to all principals in the case. I would submit to you that there has still been no evidence presented that Jim Pavatt was going to get a dime from Brenda Andrew. And even if you listen to Counsel's argument and Counsel's theory, Suk Hui Pavatt said well he'd do anything for love. And I guess the State's position is that he killed Rob Andrew, because as Counsel said he loved Brenda Andrew, he loved being a family man and he wanted his wife and wanted his kids. But that's not what this aggravator goes to. This aggravator goes to remuneration.

And while it's true that Brenda Andrew may have wanted the money, probably did want the money, and while it's true that the acts of one principal apply to another, as a mitigating circumstance remember you can consider anything you want in this case. And I would urge you to seriously consider who was going to benefit financially from this. Who was assured to benefit financially from this? And I suggest to you it was not James Pavatt.

With respect, again, to the mitigating circumstances there are three that are set out in the instruction. You're not limited to the three. The defendant did not have any significant history

of prior criminal activity other than what the State has set out which is again all associated with this crime. There is no evidence that he had ever committed any crimes at any time in the past, much less any violent crimes. There's been no evidence presented with respect to that whatsoever.

Is he likely to be rehabilitated? Well, Ms. Smith says, how can anybody ever be rehabilitated if they have been convicted of murder? But I suggest to you that this Instruction No. 10 and this mitigator, the defendant is likely to be rehabilitated, is only given in murder cases. So obviously, our legislature when they passed this envisioned circumstances where somebody could be found guilty of first degree murder and be successfully rehabilitated and that's one of the mitigators that you're told you can consider. If it wasn't a possible mitigator in a first degree murder case it wouldn't be part of the law in a first degree murder case.

Ms. Smith says there is no evidence that he could be rehabilitated. There is also no evidence that he could not. And if you will review the jury instructions closer, remember that the aggravators have to be proven beyond a reasonable doubt. The

mitigators do not. The aggravators must be decided upon by all of you unanimously. The mitigation does not have to be unanimous.

The final factor is the defendant's age. We've discussed that previously and why that is a mitigating factor. And in case you're looking for it Instruction No. 11 is the instruction that says even if you find that the aggravating circumstances outweigh the mitigating circumstances you can still impose a sentence of imprisonment for life without the possibility of parole or imprisonment for life without the possibility of parole. So either one of those life sentences can be considered by you even if you believe that the aggravators exist, one or more. Even if you believe they outweigh any mitigating factors you still have the option of returning a sentence of something less than the death penalty.

Now I want to say a little bit about the victim impact statements and about Instruction No. 13 which covers those. There is no doubt that everyone in this courtroom was moved by the statements of the Andrew family. I was. I know you all were because I could see you were. I think everybody in the courtroom was. And I, as I'm sure

you do, have the utmost sympathy for them. What I will ask you to do is to look at the instruction and follow the law with how you should treat those victim impact statements. And one of the parts of the instruction says your consideration must be limited to a moral inquiry into the culpability of the defendant not an emotional response to the evidence.

And believe me, I know that's hard to do. How do you not have an emotional response to the evidence? But the instruction says that the victim impact statements are given for limited purposes. It makes it clear and says it, in fact, word for word "proof of an adverse impact on the victim's family is not proof of an aggravating circumstance."

So is it hard to separate out your emotions and follow the law? You bet. You bet. I know that as much as anybody. Yeah, it's hard. But I'm going to ask you to do it because you told us all that you could follow the law even if you didn't agree with it. Remember when we asked all of you that? That's what I'm asking you to do with respect to this victim impact statement and with respect to this instruction, is to follow the law.

Finally, Instruction No. 14 tells you essentially that all the other instructions in the case still apply. The only difference is that in this part of the trial you may consider sympathy or sentiment for the defendant in deciding whether to impose the death penalty.

And Ms. Smith says in her closing argument, was an argument that I've heard before and it's an argument that a lot of prosecutors make. Well, did this defendant have any sympathy for the victim? And I submit to you that in every single first degree murder case that's ever filed there's hardly ever, if ever, any sympathy by the killer for the victim because if there were it wouldn't be a first degree murder case. If there were the crime wouldn't have happened.

And we talk about justice and Counsel tells you, you need to do justice for everybody, and nobody can argue with that. The hard part is there's not an instruction in here that tells you what justice is, that tells you what that means. And I've been practicing law since 1987 and that's what I'm supposed to do every day is to help justice be administered. I don't know what it means. Because what's justice for one may not be

justice for the other. What's right for one may be wrong for the other.

There are two sides, I'd submit to you, in every case that comes in this courtroom, not just murder cases but in every case. There are very few cases where somebody is simply pure evil. They do exist. Those cases exist. Sure they do. Like we were talking about earlier those are the kind of cases that you wind up seeing on some magazine show on TV.

If you can listen to all of the family members of Jim Pavatt and say well I've heard all of that and I still don't think there's an ounce of good in him, then fine. So be it. If you can sit there and listen to that testimony and say I don't care. Water off a duck's back. I don't care what they say, I still want to give him the death penalty because I think that's the only thing that will bring justice in this case, so be it.

And if you already feel that way, really, if any of you feel that way there's nothing much I'm going to say up here that's going to change your mind. But I suggest to you there's justice beyond simply killing the offender in the name of the State of Oklahoma.

I'd suggest to you that there is a justice that raises us to a higher level than the circumstances between a killer and his victim. There is a justice that shows mercy. There is a justice that shows compassion, if you will, and there is a justice that shows that we're better than those that we're often called to judge.

So what I'm asking you is to give that justice in the form of mercy and compassion and to not return a death penalty but rather to sentence my client to either life without parole or life with the possibility of parole. Thank you.

THE COURT: Thank you, Mr. Arnett. Ms. Smith.

MS. SMITH: Thank you, Judge. Ladies and gentlemen of the jury, Mr. Arnett has asked you to consider any other mitigating circumstances that you can find, that you can think of, and I submit to you that there are no extenuating circumstances which mitigate the murder of Rob Andrew. Nothing that you have heard reduces his degree of moral culpability or blame for what he did to Rob Andrew.

When you're discussing that remember to go back to the Judge's instruction. You may think of some things that you thought of that the defendant didn't think of to put in his instruction more than

those three things, but if you should come to some conclusion that you think there might be another mitigating circumstance, go back and read the law and whatever that mitigator is that you might believe, ask yourselves that two prong question that you are required by law to do.

Number one, does that mitigator exist and number two if it does exist does it extenuate or reduce his degree of moral culpability or blame. That's the test.

Mr. Arnett says to you the State of Oklahoma has not proven its case that Rob Andrew suffered serious, physical abuse. Is this (Display Photo) serious, physical abuse? Is this (Display Photo) serious, physical abuse? Is this (Display Photo) serious, physical abuse? Remember, this is the second shot. What's going on in between the time that Rob Andrew was executed by that second shot? Mr. Arnett wants you to believe that he wasn't conscious, that he didn't know what was going on. Well, I submit to you, can't be true. He was conscious enough to grab a trash sack full of soda pop cans and was still hanging on to it when he got executed.

Mr. Arnett says well we shouldn't believe

anything that Brenda Andrew says because she's a liar. Well, she's not the only one. Remember what the Medical Examiner told you when you consider heinous, atrocious or cruel. Not only do you have the photographs and the 911 tape but the Medical Examiner told you there was some amount of time following the shots before the loss of consciousness and death. During that time Robert Andrew experienced pain.

The loss of consciousness was not instantaneous after the first shot. I submit to you that there was suffering between the first two shots when the perpetrator reloaded the shotgun, advanced on Rob Andrew and executed him. I submit to you the State has proved beyond any doubt that this murder was heinous, atrocious or cruel.

Mr. Arnett tells you that not all homicides are heinous, atrocious or cruel. We agree with that, but this one is.

Mr. Arnett says that there is no evidence that Mr. Pavatt enjoyed the suffering of Rob Andrew but when you read the instructions we don't have to prove all of the things. They're disjointed by or's. We only have to prove heinous, atrocious or cruel. And the Court defines to you what those

are. We don't have to prove all of those. Even so, I submit to you that there has been absolutely no evidence. This case has been void of any remorse on the part of this defendant for what he did. None whatsoever.

Mr. Arnett wants you to give this defendant some points for not being a continuing threat to society because he was not arrested prior to the murder of Rob Andrew when he cut the brake lines. You remember the testimony of Barry Niles the police officer who was investigating the case? One day before Rob Andrew was murdered they were closing in. They had interviewed Rob Andrew and were getting ready to complete their investigation on November the 19th, one day before Rob Andrew was murdered. Mr. Andrew, sorry, Mr. Pavatt just beat him to the punch. They didn't get a chance to arrest him. You shouldn't give him any points for that.

Mr. Arnett says well Janna took the threat from Mr. Pavatt seriously at the time it was made but later on she changed her mind. Consider the scenario of how that threat came about. This defendant and Brenda Andrew had been gone to Mexico for two months. They were desperate. They were

calling every day, some 50 times during the time period trying get the money. We're desperate. We need money.

And Mr. Pavatt says to Janna if you don't send me that money I'm going to kill you and I'm going to kill Hope and I'm going to kill your mother. And then Brenda Andrew gets on the phone and says yeah, you little bitch, send me the money. Now, do you think that he was serious or he was just kidding around with her when he said I'm going to do that? It's not like Janna tried to tell you later on oh, you know, my dad, he just tells me that all the time. I'm just going to kill you. Use your common sense. Consider the scenario when that threat happened. They were desperate for money. They needed money. It was a serious threat.

Gigstad's house. Why did the defendant break open the gun and hide in the closet? How did the closet door get closed when Jeff Gigstad was in there and why was it opened when Dean Gigstad came home? Remember there was only one shotgun shell at the Andrew's house on top of that van and there were two shots fired. Rob Andrew was shot twice with that shotgun.

The other shell was found at the Gigstad's and it positively was fired from the same gun as the one that was left on the van at 6112 Shaftsbury. Why did the defendant break open the gun and eject the shell? It was only one reason. He needed to reload. And I submit to you, circumstantially, if Jeff Gigstad had opened that door we would be here on two murders instead of one.

Mr. Arnett says we didn't prove remuneration because the defendant wasn't going to get the money. Well, I think we've been over that thoroughly. I think we've proven beyond any doubt that this defendant wanted Rob's wife, he wanted Rob's money and he wanted Rob's children. And you listen to the tapes and you read the Prudential letter and then you ask yourselves if he wasn't going to benefit from that why was he so bent on getting that money for Brenda Andrew.

Remember, when you read those instructions remember your instruction from the first part of the trial. If they're acting conjointly they're equally guilty. If Brenda Andrew was going to get the money, if she was going to do this murder for remuneration and he helped her, he's just as guilty. So we've proven that circumstance,

aggravating circumstance beyond a reasonable doubt.

Mr. Arnett said everyone in this courtroom was obviously moved by the statements of the Andrew's family when they took the stand and told you what impact the death of Rob Andrew has had on their family. I disagree. Everyone in this courtroom teared up or out and out cried except for one person, that one right over there. I watched him. Didn't affect him at all, that's because he's different.

Mr. Arnett says that no defendants give sympathy to their victims and therefore you shouldn't consider that against Mr. Pavatt because he didn't give sympathy to Rob Andrew. Well, we're not here to consider what happened in other cases. We're here to consider what happened in this case and I submit to you that the fact that Mr. Pavatt did not give any sympathy to Rob Andrew is for you to consider.

Mr. Pavatt tells you that justice raises us to a higher level. That's what we're here for is justice. This is the highest level. This is as far as it goes right here. He said that justice requires compassion and mercy and I submit to you that he's exactly right. But who is it that you're

going to show compassion and mercy for? Which one of these people involved in this crime, Rob Andrew, Brenda Andrew, James Pavatt, who deserves the compassion and mercy? I ask you for the same justice that Mr. Arnett has asked you for.

As I stand here before you this is the last opportunity that I'll have to address you as a jury. And on behalf of the citizens of Oklahoma County, as a representative of the people of Oklahoma County and Mr. Wesley Lane, the District Attorney of Oklahoma County, I want to thank you for the sacrifices that you had to make since this case has dragged on. We know that we have taken much of your time out of your lives and that it has created a hardship for many of you and we're sorry for that.

In spite of the hardships you've been here every day and you've given this trial the attention that it deserves in spite of the interruption and delays that are necessarily inherent in a capital murder case. And equally important we realize the psychological impact that this kind of a trial has had on all of us, on each of you.

The Judge in this case, Judge Bragg, defense lawyers and the prosecutors, we regularly come into

court and we engage in this kind of trial and we are somewhat accustomed to the emotional impact of the testimony and the exhibits, although not altogether. On the other hand, for many of you this is your first exposure to violence and the impact that it's had on families and on individuals. And there's no way that we can prepare you in advance for what you have heard and what you have seen. We tried to tell you a little bit in voir dire examination about what you were going to be exposed to but it's impossible to prepare you in advance for what you've seen in this courtroom.

We just call you in from your everyday lives and we seat you in the jury box and we present the evidence to you. And it's clear that this case has been stressful for everyone involved and maybe that's the way it should be, because as you know Rob Andrew was violently murdered. He was executed as he lay on the garage floor of his own home with his children, whom he loved dearly, pinned up in a bedroom just a few feet away from where he took his final breath.

James Pavatt and Brenda Andrew watched Rob Andrew take that final breath, or at least

Brenda Andrew did. Both of them were seen the next day giggling and touching each other over what Rosita Ingerson described as a little bit too friendly. That was about 24 hours or less after they had murdered Rob Andrew.

James Pavatt was not remorseful on the day that he murdered Rob Andrew. He was not remorseful on the day after he murdered Rob Andrew. He was not remorseful when he was having a good time on the beach in Mexico and he wasn't remorseful or sorry about Rob Andrew's death or what he had done when he was riding in a sheriff's car on his way back to Oklahoma City, when Beverly Matthews told you that Brenda Andrew and he were whispering and laughing in the back seat and they had to separate them, and he's not remorseful now.

Takes a special kind of person to look at another human being lying, suffering and dying on the floor, defenseless and then reloading a shotgun, aiming and executing that person from 3 inches away. That special kind of a person deserves that special punishment that's reserved for people just like James Pavatt and Brenda Andrew. And that appropriate punishment, the one reserved for special people is death.

Rob Andrew didn't deserve to die. James Pavatt does. Friday, September -- First of all, as I was sitting here just a few minutes before you all came in I was looking over the instructions and contemplating what I might say to you and I heard from this table sitting here a birthday celebration. I don't know if it was you or someone else out in the foyer there, but I heard someone singing happy birthday and it made me think Friday, September the 19th, Rob Andrew would have been 41 years old. Three days from now if he had lived it would have been his 41st birthday. There won't be any celebrating on September 19th this year or any other year at the Andrew's household because James Pavatt robbed Rob Andrew of his birthdays when he took Rob's life. He also Robbed the Andrew family of their precious son, brother, and Tricity and Parker's father.

Rob Andrew will never be 41. He's been robbed of his life and he is now only a memory to his mother and his dad and his brothers and his children, children that he loved so much.

Why should an innocent and a decent and a good man be dead and the person responsible for his death live on? I submit to you, he shouldn't live

on. He should suffer the same punishment that he's earned.

Due to the seriousness and the senselessness of this crime the State of Oklahoma is asking you to return a verdict of death for this defendant.

In entering into your deliberations the State respectfully suggest that there is a logical procedure for you to follow. You cannot render a death verdict unless you unanimously find the existence of one or more aggravating circumstances and further that those aggravating circumstances outweigh any mitigating circumstances. We've already gone through that procedure.

First, consider the aggravating circumstances and determine whether or not they exist. And I submit to you that there is no question, no doubt that each of those aggravating circumstances exist beyond a reasonable doubt. Check off the boxes as I've indicated to you before, that you have found those aggravating circumstances.

Next, go and consider the mitigating circumstances that are listed in the instructions and go through the procedure and weigh those, if you find them. As the Judge has told you, it's up to you to decide if these circumstances exist and

if they do exist whether they are outweighed, whether they are mitigating in nature.

How do you mitigate a crime like this one? How do you make it any less serious, any less important, any less heinous than it is? How do you make this defendant's involvement in this murder any more palatable? There isn't any way, I submit to you. And if you find the aggravating circumstances outweigh these mitigating circumstances then it's a proper case for the death penalty under the law.

In this case, during the voir dire, you told us that you believed that there was a proper case in society for the death penalty. We asked each of you that individually. You said that you could vote for the death penalty if it was a proper case and you've also told us, each one of you individually, that people should be held accountable for their acts and be responsible for their actions.

And we know as representatives of the State of Oklahoma that what we ask you to do is difficult and it would be easier for you just to give this defendant a sentence of life without parole and not have to address the issue of the death penalty, and

I know you won't do that. The State submits to you, ladies and gentlemen, that such an action on your part might be the easier way out but it wouldn't be proper and it wouldn't be justice in this case.

And we're not asking you to do the easy thing. We're not asking you to do the hard thing. We're asking you to do the right thing. And I submit to you the right thing in this case under the law and the evidence is a sentence of death.

The defendant obviously has a nice family. You've seen them on the witness stand and unfortunately every murderer has a family and as often as not they're usually nice people. But that should not deter you from doing justice in this case. Because you see, the defendant's families are victims, too. But who are they victims of? They are victims of the same person as Rob Andrew and his family. They are victims of their own son, James Pavatt.

There's been a lot of tears shed in this courtroom during the trial but you need to remember every one of those tears, all of them have been shed, have been caused by one person, James Pavatt. You need to remember something else when you're

considering the evidence in this case. The victim of this tragedy had no choice. No one asked him if he wanted to be included in this crime or involved in this crime. But this defendant did have a choice. Some point in his life he decided to become a murderer and he made a conscious decision to murder Rob Andrew.

You, the jury, Judge, lawyers and the police, we're all here because it's our duty to be here. Some of you it's been a hardship but you've remained here. You've remained vigilant, diligent because it was your duty to do so. Every one of you told us on voir dire you felt like it was your civic duty and you were willing to forego the hardships to be here as a citizen and do your duty. But this defendant is here, he's here as a volunteer. He set up this whole drama. He set this whole drama in motion by committing a crime so vile and senseless that the death penalty is the only appropriate punishment.

Maybe at some time in his life, like you've heard his family testify to you, he was a law abiding citizen. Unfortunately, that time has long passed and we have to deal with what he is today, a man who can kill, who can execute an innocent

victim without mercy and without remorse. Submit to you James Pavatt needs to be on death row where he can't hurt anyone else.

The police have investigated this crime, District Attorney's office has prosecuted it. The Judge has provided you with the applicable law that you are to consider in making your decision. But you as the jury you're the only ones who can see that justice is done.

There used to be a good Christian man named Rob Andrew who had beautiful children, Parker and Tricity. You see their pictures as you go through the evidence. Rob Andrew worked hard all throughout his life and he made a good life for his family. His life was snuffed out by James Pavatt and Brenda Andrew in such a horrible way. He was ambushed, shot, and then executed as he lay defenseless. The last faces he saw before he took his last breath were that of the woman he loved and the man who loved her.

When Rob Andrew lay dying on that garage floor, James Pavatt and Brenda Andrew looking at the sight that you see in those pictures, what do you believe his last words were? What do you believe he was trying to say when he was laying

there on the floor looking up at Brenda Andrew's face? He was probably trying to say I love you, Brenda, because that's the kind of man he was.

I want you to read when you go back there, when you're considering your decision I want you to take out that exhibit, I believe it's entitled Marriage Beautiful. It's a document that was printed off of Rob Andrew's computer. It was what he considered to be a beautiful marriage and he loved Brenda Andrew even though she treated him so mean and so hateful, so badly. But you read from that Marriage Beautiful document and that will tell you the kind of man that Rob Andrew was. That's the kind of life that Pavatt snuffed out.

Rob Andrew didn't deserve to die. James Pavatt does. James Pavatt chose to murder and he must suffer the consequences for his actions. Justice needs to be done and it needs to be justice for everyone. There needs to be justice for this defendant, for the victims, and there are many, the victim's family and for society.

On behalf of the people of the State of Oklahoma we ask you to go into the jury room. We ask you to discuss the evidence. We ask you to cry if you need to. But when you come back into this

courtroom once again we ask you to bring justice with you. We ask you to come in here and give James Pavatt the justice that he deserves and that's the death sentence. Thank you very much.

THE COURT: Thank you, Ms. Smith.

MS. SMITH: Thank you, Judge.

THE COURT: Ladies and gentlemen of the jury, once again you are now to retire and deliberate until a decision is reached as to punishment. You've been read the instructions of this court as to the law in this case and you will take additional written instructions and forms of verdict with you into the jury room so that you will have all of them.

During the course of your deliberations you are to stay together until a decision is reached as to punishment or this court decides to discharge you. Once again you will be in the custody of the bailiff. Fellow jurors excepted you are to communicate with no one and are to permit no one to communicate with you as to the punishment in this case.

If you need to communicate with the Court write out your communication on a piece of paper and give it to the bailiff. The bailiff will give

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

MAR - 7 2005

PATRICIA PRESLEY, COURT CLERK
By _____ Deputy

THE STATE OF OKLAHOMA, Plaintiff, vs. BRENDA EVERS ANDREW, Defendant.	CASE NO. CF-01-6189 **VOLUME XVII of XX** **JURY TRIAL**

* * * * * *

TRANSCRIPT OF CONTINUATION OF

JURY TRIAL PROCEEDINGS

(CLOSING ARGUMENTS)

PRESENTED ON THE **12TH** DAY

OF **JULY, 2004,** BEFORE

THE HONORABLE SUSAN W. BRAGG

* * * * * *

(FIRST STAGE)

Reported by:

Tara Nixon, RPR, CRR
321 Park Avenue
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Oklahoma City, Oklahoma

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TABLE OF CONTENTS
I N D E X

July 12, 2004

	PAGE
Request by Mr. Miskovsky, III.....	3856
Motion-Mistrial by Mr. Miskovsky, III...	3856
Ruling of the Court.....	3856
Jury Entered.....	3856
Instructions to the Jury.....	3857
CLOSING ARGUMENTS By Ms. Smith.....	3857
Jury Exited for Morning Recess.....	3911
Objection by Mr. McCracken.....	3911
Morning Recess.....	3912
CLOSING ARGUMENTS - continued: By Mr. McCracken.....	3913
Lunch Recess.....	3988
CLOSING ARGUMENTS - continued: By Mr. McCracken.....	3988
Afternoon Recess.....	4033
CLOSING ARGUMENTS - continued: By Mr. Gieger.....	4033
Further Instructions-The Court.....	4126
Jury Deliberations.....	4127
Reporter's Certificate.....	4130

here. That blood had to come in at high velocity and turn to here. Here is why she had the gun. Ms. Andrew is right-handed. 16-gauge shotgun, that's a long gun. A right-handed person shooting a 16-gauge shotgun is not standing like that. A right-handed person with a 16-gauge shotgun stands like this (Indicating). Ms. Andrew --

MR. MCCRACKEN: Your Honor, I'm going to object. Those are facts outside the evidence. More speculation, Your Honor.

MR. GIEGER: It's argument, Your Honor.

THE COURT: Well, you see, he can comment on what he thinks occurred just like you could. And you can object if you want to but it's going to be overruled.

MR. GIEGER: She's standing here. You can see why I didn't put those gloves on now, can't ya? It's all over my pants. As you can see the shots narrow in distance. It's from Mr. Andrew's left to right and she's right here and she shoots him. Number five is spatter and it comes in a straight line, back spatter right onto these pants. And the evidence in this case tells you who pulled the trigger. First one, maybe Mr. McCracken is right. Maybe I'm speculating. But the physical evidence

She's got to be right here and her arm has got to be at her side.

MR. MISKOVSKY, III: Judge, now that is a mischaracterization of the evidence. Clear from the testimony that was represented by Mr. Gardner that's not the case, so I object to that. Because he is now assuming facts not in evidence that has to be the case, and there was testimony to the exact opposite.

MR. GIEGER: Continue?

THE COURT: Yeah.

MR. GIEGER: Thank you. Mr. Gardner drew the picture. Mr. Gardner put this into evidence. He says her arm is at her side. Am I speculating? Her arm could have been out here, could have been on that path, could have been a little farther if she moved it this way. But it's got to be within this line.

Folks, Mr. Andrew was shot for the first time with this bag in his hand and he falls to the ground, excuse me, he's on the ground and he turns just like Mr. Gardner said. He either goes down like this, like Mr. Bevel thought or he goes back like this, like Mr. Gardner thought, and Brenda Andrew because of the spatter on her left

leg shoots him the second time. It is high velocity, small, smaller than 3 millimeters spatter. That's what it is. And it did not do a U-turn.

Then she steps around him so Mr. Pavatt can shoot her. And let me show you why that happened. Because if you look at these crime scene photos, let's go back to this one. Now she says that she's over here and she's running for the door in fear of her life because the first shot has already come, according to her, and the second, third shot are almost instantaneous and she is running for the door.

Look right here. What do you see? What do you see? You see his foot and a whole bunch of cans and hoes and bottles. And is there a one of 'em that's knocked over like someone would do in a panic running for the door? Nope. But look at the other side. Look up here. What do you see? You see a suitcase that clearly has been knocked over. You see a step stool that's lying on top of the suitcase. You see some other debris that's been kicked around.

She didn't come this way, folks. She went that way and that's what the evidence shows. And

loved her.

And the same woman who after 17 years called him up and accused him on a tape of having a slut puppy, which there is no evidence of, and accuse him on a tape blatantly of how he can't be a man of God and she 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, and have no twinge of conscience? When she has had sex on him over and over and over and at the time of the phone calls is still keeping a boyfriend on the side.

Rob told his best friend Ronnie Stump I think she's finally found someone that's going to help her kill me. This case is very unusual because very seldom do you have so many statements from the victim talking to the jury two and a half years after his death.

The same kind of woman who can coldly accuse her husband of having an affair and in a righteous, indignant fashion use profane language and accuse him of being the adulterer is the same woman that could murder him in cold blood.

The evidence that I have outlined for you is that as he is on the floor realizing what is

happening to him and realizing that all the people are right, he turns to look at her one last time.

MR. MCCRACKEN: Objection, Your Honor. Assuming facts not in evidence. Outside the evidence. Speculation again.

THE COURT: Sort of like what you did. Move on.

MR. GIEGER: And this time, cause the blood spatter shows you, he saw her face over the barrel of a shotgun. Mr. McCracken is right. The State of Oklahoma wants you to convict this woman and make it so that she never, ever is free again.

Punishment is not before you at this point but guilt is. Convict her and then I'll tell you what the State of Oklahoma wants you to do for punishment and I'll tell you what this case deserves. Thank you so much for your attention.

THE COURT: Thank you, Mr. Gieger. Ladies and gentlemen of the jury, you are now to retire and deliberate until a verdict is reached. You have been read the instructions of this court as to the law in this case and you may take the written instructions and form of verdict with you into the jury room. You are to mark only the appropriate space on the verdict forms.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

MAR - 7 2005

PATRICIA PRESLEY, COURT CLERK
By _____ Deputy

THE STATE OF OKLAHOMA, Plaintiff,	
vs.	CASE NO. CF-01-6189
BRENDA EVERS ANDREW, Defendant.	**VOLUME XIX of XX JURY TRIAL**

* * * * * *

TRANSCRIPT OF CONTINUATION OF

JURY TRIAL PROCEEDINGS

HAD ON THE **14TH** DAY

OF **JULY, 2004,** BEFORE

THE HONORABLE SUSAN W. BRAGG

* * * * * *

(SECOND STAGE)

Reported by:

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TABLE OF CONTENTS
I N D E X

July 14, 2004-continued:

	PAGE
DR. STEVEN R. CLOSE - continued:	
Direct Exam by Mr. Gieger.....	4356
In-Camera Hearing Concluded.....	4361
Afternoon Recess.....	4361
WITNESSES ON BEHALF OF THE DEFENDANT CONTINUED:	
TRICITY MARIE PARKER - testified:	
Direct Exam by Mr. McCracken.....	4352
Cross-Exam by Mr. Gieger.....	4367
ROSE M. EVERS - testified:	
Direct Exam by Mr. Miskovsky, III.....	4368
Defense Rest.....	4376
Instructions to Jury - Stage Two.....	4376
CLOSING ARGUMENTS	
By Ms. Smith.....	4377
Motion-Mistrial by Mr. Miskovsky, III...	4397
Ruling of the Court.....	4397
CLOSING ARGUMENTS - continued:	
By Ms. Smith.....	4397
Evening Recess.....	4416
CLOSING ARGUMENT - continued:	
By Mr. McCracken.....	4417
By Mr. Miskovsky, III.....	4432
Evening/Dinner Recess.....	4474
CLOSING ARGUMENTS - continued:	
By Ms. Smith.....	4474
Further Instructions of the Court.....	4495
Jury Deliberations.....	4495

overjoyed about it. Both of them seen the next day at Baptist Hospital giggling and touching each other that was a little too friendly.

Brenda Andrew was not remorseful on the day that Robert Andrew was murdered and she was not remorseful on the day after he was murdered and she's not remorseful now. She wasn't remorseful when she was laying on the beach in Mexico having a good time.

And it takes a special kind of a person to look at another human being lying suffering and dying on the floor defenseless and then reloading a shotgun, aiming it, and executing that person from less than 3 feet away. And that special person deserves that special punishment that's reserved for people just like her and James Pavatt and that's death. Rob Andrew didn't deserve to die, Brenda Andrew does.

Friday, September the 19th will be Rob Andrew's 41st birthday. There won't be any celebrating on September the 19th this year or any other year at the Andrew household. Brenda Andrew robbed Rob Andrew of his birthdays when she took his life and she robbed the Andrew family of their precious son, brother and father.

I submit to you, you as people who are different from her if you ran over a complete stranger on your way home tonight and accidentally killed that person you would be devastated, even though it was a complete accident and you had no control over it. You would be devastated. But you are looking at a woman sitting right over here who can intentionally pull the trigger and watch the father of her children suffer and die without remorse. And what does that tell you about her? She's different. She's a cold-blooded, heartless killer. She's different and she deserves that different kind of punishment that's reserved for people exactly like her.

And yes, Mr. McCracken told you, we don't seek the death penalty in every case. We save it for those special cases just like this one.

Mercy? Brenda Andrew, I submit to you, should be shown the same mercy that she showed Rob Andrew on November 20th of 2001. She should be extended the same sympathy that she showed to Rob Andrew. Justice needs to be done in this case. Nobody can do it but you and it should be justice for everyone. It should be justice for this defendant. It should be justice for Rob Andrew. It should be