IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TREMANE WOOD	)	
	)	PC Case No.: PCD 2017 653
Petitioner,	)	
	)	**CAPITAL POST CONVICTION**
vs.	)	**PROCEEDING**
	)	Second Post Conviction No.: PCD-2011-590
THE STATE OF OKLAHOMA	)	First Post Conviction No.: PCD-2005-143
	)	Direct Appeal No.: D-2004-550; D-2005-171
Respondent.	)	Oklahoma County
	)	U.S. Court of Appeals Case No: 16-6001

THIRD APPLICATION FOR POST CONVICTION RELIEF
- DEATH PENALTY

DEATH PENALTY CASE

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JUN 23 2017
MICHAEL S. RICHIE
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TREMANE WOOD

June 23, 2017

PART A: PROCEDURAL HISTORY

Petitioner, Tremane[1] Wood, appearing specially through undersigned counsel, submits his third application for post conviction relief under Section 1089 of Title 22. Pursuant to Rule 9.7(A)(3) of the Rules of the Oklahoma Court of Appeals, Title 22, Ch. 18, App., a copy of the amended (first) application for post conviction relief filed April 25, 2007, is appended to this third application as Attachment 1, and the second application for post conviction relief is appended to this third application as Attachment 2. The addendum and appendix of exhibits have not been attached, but are available should the Court find them necessary for its review of this application. The sentence(s) from which relief is sought are:

Count I – Death; Count II – Life; Count III - Life

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

   (b) Case Number: CF-2002-46 Oklahoma County

2. Date of original sentence: April 2, 2004

3. Terms of sentences:

   Murder in the First Degree - Death

   Robbery with Firearms - Life

   Conspiracy to Commit a Felony - Life

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

5. Petitioner is currently in custody at Oklahoma State Penitentiary, H-Unit.

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[1] In many places in the state-court record Tremane Wood's first name is incorrectly spelled as "Termane."

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

*Tremane has a habeas corpus petition pending in United States Court of Appeals for the Tenth Circuit under *Tremane Wood v. Terry Royal*, Case No. 16-6001. This is actually a civil or quasi-civil matter but Tremane mentions it here for the sake of completeness. More information is provided in the procedural history.

I. CAPITAL OFFENSE INFORMATION

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

Aggravating factors alleged and found:

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

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

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

Mitigating factors listed in jury instructions:

a. The defendant is only 24 years old.

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

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

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

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

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

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

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

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

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

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

l. The defendant has been employed in the past.

m. The defendant has had prior drug dependencies.

n. The defendant spent time in foster care.

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

p. The defendant is of educational potential.

q. The defendant is of average intelligence.

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

7. Check whether the finding of guilty was made:

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

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

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

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

II. NON-CAPITAL OFFENSE INFORMATION

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

Robbery with Firearms – Life

Conspiracy to Commit a Felony – Life

11. Check whether the finding of guilty was made:

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

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

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

III. CASE INFORMATION

13. Name of lawyers in trial court:

Johnny Albert
3001 NW Classen Blvd.
Oklahoma City, OK 73106

Lance Phillips
7 South Mickey Mantle Dr. Suite 377
Oklahoma City, OK 73104

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

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

To what court or courts? Oklahoma Court of Criminal Appeals, Case Nos. D-2004-550 (dismissed Apr. 4, 2005 as untimely but granting permission to file a new appeal out of time) and D-2005-171.

Date Brief in Chief filed: June 28, 2005

Date Response filed: July 22, 2005

Date Reply Brief filed: August 11, 2005

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

Date of Petition for Rehearing: May 21, 2007

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

If so, what were the grounds for the remand?

Ineffective assistance of trial counsel for (1) Failure to Investigate, Develop and Present Mitigation Evidence; and (2) Failure to Properly Impeach State's Witness Brandy Warden.

Is this petition filed subsequent to supplemental briefing after remand? Yes (X) No ( )

16. Name and address of lawyers for appeal:

Perry Hudson
1315 N. Shartel Ave.
Oklahoma City, OK 73103

Jason Spanich
805 Northwest 8
Oklahoma City, OK 73106

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

Wood v. State, 158 P.3d 467 (Okla. Crim. App. 2007).

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

Petition for writ of certiorari to the United States Supreme Court:
Denied: *Wood v. Oklahoma*, 552 U.S. 999 (Mem.) (2007).

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

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

Petition for a Writ of Habeas Corpus, *Tremane Wood v. Anita Trammell*, Case No. 5:10-cv-00829-HE, United States District Court for the Western District of Oklahoma.

Denied by district court in unpublished opinion on Oct. 30, 2015. However, that decision has been appealed and that appeal is currently pending in United States Court of Appeals for the Tenth Circuit, *Tremane Wood v. Terry Royal*, Case No. 16-6001.

Issues raised in first post conviction application:

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

Issues raised in second post conviction application:

Proposition One:	The Trial Court Violated Tremane's Sixth, Eighth, and Fourteenth Amendment Rights by Impermissibly Coercing the Jury
Proposition Two:	Prosecutorial Misconduct During the State Court Proceedings Deprived Tremane of his Due Process Rights and Rendered his State Court Proceedings Unfair
Proposition Three:	Tremane Was Denied His Sixth and Fourteenth Amendment Right to the Effective Assistance of Trial Counsel Because Counsel Failed to Present Evidence Challenging the Testimony of the State's Forensic Expert

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

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

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

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

Issues raised in Habeas Petition:

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

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

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

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

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

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

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

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

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

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

PART B: GROUNDS FOR RELIEF

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

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

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

22. List propositions raised

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

PART C: FACTS

Preliminary Matters

References to the record will be made as follows:

1. The original trial record is referred to as (O.R.1 __ using the page number).

2. Transcripts of the jury trial will be referred to in this application as (Tr. ___ at ___ using the date of the transcript and the page number).

Procedural History

Tremane Wood, along with his older brother Zjaiton ("Jake") Wood, Jake's girlfriend Lanita Bateman, and Tremane's former girlfriend and mother of his child, Brandy Warden, were all charged with first-degree felony murder for the death of Ronnie Wipf that occurred around 3:30 a.m. on January 1, 2002. (O.R.1 79, 614-16.) Tremane

was also charged with one count of robbery with firearms and one count of conspiracy to commit felony (robbery). (*Id.*) A bill of particulars was filed alleging four aggravating circumstances: (1) that during the murder, the defendant knowingly created a great risk of death to more than one person; (2) that the murder was especially heinous, atrocious, or cruel; (3) that the murder was committed for purposes of preventing lawful arrest or prosecution; and (4) there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society. (*Id.* at 72.)

The jury found Tremane Wood guilty of all charges. (Tr. 4/2/04 at 214-15.) The jury found only three aggravating circumstances, rejecting the circumstance that the murder was committed for purposes of preventing lawful arrest or prosecution; the jury recommended life sentences on the non-capital counts and the death penalty on the capital count. (Tr. 4/5/04 at 163-64.) Wood was formally sentenced on May 7, 2004.

He appealed his conviction and sentences, which was denied. *Wood v. State*, No. D-2005-171 (Okla. Crim. Ct. App. Apr. 30, 2007).

Wood's first Application for Post Conviction Relief was filed on December 26, 2006. An amended application was filed on April 25, 2007. Relief was denied. *Wood v. State*, No. PCD-2005-143 (Okla. Crim. Ct. App. June 30, 2010).

Wood's Second Application for Post Conviction Relief was filed on July 6, 2011. An amended application was filed on April 25, 2007. Relief was denied. *Wood v. State*, Case No. PCD-2011-590 (Okla. Crim. App. Sept. 30, 2011).

Wood's Petition for Writ of Habeas Corpus (28 U.S.C. § 2254) was filed in the United States District Court for the Western District of Oklahoma on June 30, 2011. *Wood*

v. Trammell, No. 5:10-civ-0829-HE (W.D. Okla.). That petition was denied on October 30, 2015. Wood's appeal from that denial is currently pending in the United States Court of Appeals for the Tenth Circuit. *Wood v. Royal*, No. 16-6001 (10th Cir.).

Wood now pursues this Third Application for Post Conviction Relief.

The Record in this Proceeding

The record in this proceeding consists of the trial court and direct appeal record, the record in Wood's First and Second Applications for Post Conviction Relief and the Attachments submitted with this Application. An Appendix is filed contemporaneously with this Application containing:

1. Copy of Wood's Amended (first) Post Conviction Application, [Attachment 1].

2. Copy of Wood's Second Post Conviction Application, [Attachment 2].

3. Wood's documentation of In Forma Pauperis status, [Attachment 3].

4. Copy of Appendix IA: Race and Death Sentencing for Oklahoma Homicides, 1990-2012 (from the Okla. Death Penalty Review Comm'n, *The Report of the Okla. Death Penalty Review Comm'n* (Apr. 25, 2017), http://okdeathpenaltyreview.org/the-report/) [Attachment 4].

Factual Summary

On December 31, 2001, Ronnie Wipf and Arnold Kleinsasser, two young white men from Montana, were celebrating New Year's Eve at the Bricktown Brewery in Oklahoma City, Oklahoma. (Tr. 3/31/04 at 14-15, 102, 120-21, 264; Tr. 4/2/04 at 147.) While at the Bricktown Brewery the men met and socialized with Brandy Warden and Lanita Bateman. After the Bricktown Brewery closed, the women agreed to accompany

these men back to a motel, (*id.* at 120-24), which they did after talking to Tremane and Jake, (Tr. 4/1/04 at 146-47).

Once inside the room, the four agreed on $210.00 in exchange for sex. (Tr. 3/31/04 at 125-27.) Lanita pretended to call her mother, but actually called Jake. (Tr. 3/31/04 at 129.)

Jake and Tremane came to the motel room, and Jake banged on the door. (Tr. 3/31/04 at 129; Tr. 4/1/04 at 165-66.) Lanita and Brandy ran out of the room, and Jake and Tremane ran in. (Tr. 4/1/04 at 168.)

Jake approached Arnold with the gun; Tremane approached Ronnie with the knife, and Ronnie put up a fight. (Tr. 3/31/04 at 133-35.) Jake left Arnold to go assist Tremane who had been struggling with Ronnie. (*Id.* at 135.) After Tremane demanded more money from Arnold, he returned to the struggle and Arnold fled the room. (*Id.* at 139.) Ronnie died from a single stab wound to the chest. (Tr. 04/02/04 at 11-12, 18.) Arnold was unable to identify who stabbed Ronnie. (Tr. 3/31/04 at 172.)

At trial, Jake testified during the first stage of trial that he and another man named "Alex" committed this crime. (Tr. 04/02/04 at 89, 91-95.) Jake testified he initially had the gun when he and Alex entered the motel room. (*Id.* at 94.) Jake explained that when he saw that the victim was getting the best of Alex, he went over and punched Ronnie in his head and body. (*Id.* at 94.) Jake grabbed the knife and stabbed Ronnie in the chest. (*Id.* at 94.) At the conclusion of the first stage, the jury found Tremane guilty on all counts. (*Id.* at 214-15.)

In the second stage, the State incorporated all the evidence from the first stage. In addition, evidence of a pizza place robbery committed by Tremane, Jake, Lanita, and Brandy, earlier on December 31, 2001, was also presented. (Tr. 04/05/04 at 17-18, 24-26.)

The defense called his mother Linda Wood, her friend Andre Taylor, and Dr. Ray Hand to testify to mitigating evidence. At the conclusion of the second stage, the jury recommended death on the murder charge and recommended the maximum sentence of life on the robbery and conspiracy counts. (*Id.* at 163-64.)

Facts Supporting Third Application for Post Conviction Relief

The relevant facts supporting Wood's postconviction claims are adduced in the individual propositions raised and in the attachments to the Application referenced in those propositions.

PART D: PROPOSITIONS—ARGUMENTS & AUTHORITIES

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

I. Introduction

On April 25, 2017, the Oklahoma Death Penalty Review Commission—a bipartisan group of eleven prominent Oklahomans from varied backgrounds—released a report entitled, "The Report of the Oklahoma Death Penalty Commission" (the Report). In the Report, Commissioners identified "volum[inous]" and "serious[]" flaws in Oklahoma's system of capital punishment—flaws that they concluded pose a significant

and unacceptable risk that innocent Oklahomans are presently facing execution. Okla. Death Penalty Review Comm'n, *The Report of the Okla. Death Penalty Review Comm'n*, vii-viii (Apr. 25, 2017), http://okdeathpenaltyreview.org/the-report/.

Appended to the Report is an independent and novel study entitled "Race and Death Sentencing for Oklahoma Homicides, 1990-2012," (the Study).[1] (Attachment 4.) The Study demonstrates the way in which race plays a decisive role in who is sentenced to death in Oklahoma for homicides committed between 1990 and 2012. The comprehensive Study examines "the possibility that the race of the defendant and/or victim affects who ends up on death row." (*Id.* at 212.)

Among the Study's chief findings was the fact that "[h]omicides with white victims are the most likely to result in a death sentence." (*Id.* at 217.) This new Study illustrates that, in Oklahoma, criminal defendants like Wood who are accused and convicted of killing white victims are nearly *two times* more likely to receive a sentence of death than if the victim is nonwhite. For homicides involving only male victims, a death sentence is approximately *three times* more likely in cases where the victim is white. *Id.* at 220.

That Wood faced a greater risk of execution because of the race of the victim offends the constitutions of the United States and the State of Oklahoma. U.S. Const. amends VI, VIII, XIV; Okla. Const. art. II, §§ 7, 9, 19, 20; *see also Furman v. Georgia*, 408 U.S. 238, 310, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (Stewart, J., concurring)

[1] This study is attached hereto as Attachment 4. When citing the Attachment, the page numbers referenced are those printed on the bottom of the pages, which range from 211 to 222.

(stating that the "selection of [a] few to be sentenced to die" on the "basis of race" is "constitutionally impermissible").

The invidious role that race played both in prosecutors' decision to seek the death penalty against Wood in the first instance, and in his jury's decision to impose that ultimate sanction, renders Wood's sentence of death unconstitutional under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and under Article II, Sections 7, 9, 19 and 20 of the Oklahoma Constitution. This Court should therefore grant Wood relief from his unconstitutional sentence. Alternatively, as Wood has stated a more than colorable claim that his rights under the federal and state constitutions have been violated, this Court should grant Wood's requests for discovery and an evidentiary hearing[2] to further factually develop and support this claim.

II. Wood satisfies the successor post-conviction requirements of Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b) and Rule 9.7 of the Rules of the Oklahoma Court of Criminal Appeals.

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

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

[2] Wood is filing his Motion for Discovery and Motion for Evidentiary Hearing simultaneously herewith.

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

Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b). Rule 9.7(G)(1) of the Rules of the Oklahoma Court of Criminal Appeals, meanwhile, allows this Court to entertain a subsequent application for post-conviction 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 Okla. Court of Crim. App.*, Title 22, Ch. 18, App. Wood's present application for post-conviction relief satisfies these requirements.

First, Wood's claim—that the race of the victim who he was accused and convicted of killing operated to increase the likelihood that he would receive a sentence of death—was not previously raised either on direct appeal or in Wood's initial post-conviction proceeding. Nor could it have been. As explained above, the factual basis for this claim became available only on April 25, 2017, with the preliminary publication of the Study, which provides new and compelling evidence that race indeed plays an invidious role in death-determinations throughout Oklahoma.[3]

The Study's authors, Glenn L. Pierce, Michael L. Radelet, and Susan Sharp (alternatively, the researchers" or the authors), make the novelty of their undertaking clear. They explain that of the "race studies that had been published or released after 1990" that

[3] The study that appears in the Report is only a draft. (Att. 4 at 211 n.1.) The final version will be published in the fall of 2017 in a Northwestern University law journal. (*Id.*)

examined the impact of a criminal defendant's and a crime victim's race on death penalty decisions, "none of these post-1990 studies focused on Oklahoma." (Att. 4 at 213-14.) Rather, the "only [ ] credible study" prior to this one that explored racial disparities in Oklahoma subsequent to the Supreme Court's decision in *Furman*, examined data from just a four-year time-period—August 1976 through December 1980—rendering them nearly forty years old. (*Id.* at 214.) Subsequent to this, "a second study of death sentencing in Oklahoma was published" in 2016. (*Id.*) The 2016 study "attempted to look at death sentencing in Oklahoma in a sample of 3,395 homicide cases over a 38-year time span, 1973-2010." (*Id.*) Pierce, Radelet and Sharp explain, however, that "some of the data presented by the authors in that paper [are] incorrect, so the paper is not useful."[4] (*Id.*) Thus, the present Study is the first methodologically sound examination of the impact that race has upon death sentences in Oklahoma for homicides that occurred from 1990 through 2012.[5]

Moreover, even the raw data—the number of homicide cases, the race and gender of victims and defendants in those cases, and whether those cases resulted in death sentences in Oklahoma—that the authors utilized were not previously available or known.

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[4] "For example, in Appendix B we are told that 8 percent of the white-white homicides contained 'capital' or 'first-degree' (as opposed to 'second-degree' murder charges) (137/1,696), compared to 53 percent of the black-black cases (348/659). We are also told that the data set includes 1,030 cases 'charged capital' in which whites were accused of killing Native Americans, although the authors also report that there were only 42 white-Native American cases in their sample. In an email to Radelet dated August 18, 2016, lead author David Keys acknowledged that they undoubtedly received bad data from the State of Oklahoma." (Att. 4 at 214 (footnotes omitted).)

[5] For a full discussion of the methodology employed by Pierce, Radelet, and Sharp in the present study, see pages 215-17 of Attachment 4.

They note that "there is no state agency, organization or individual who maintains a data set on all Oklahoma death penalty cases. We thus had to start from scratch in constructing what we call the 'Death Row Data Set.'" (Att. 4 at 216.) The authors go on to detail the arduous and time-consuming task that they undertook in order to marshal the necessary data. (*Id.*) As a result, the factual basis for Wood's present claim was unavailable and undiscoverable through the exercise of due diligence prior to April 25, 2017.

Second, as explained in detail in Section III below, the facts underlying Wood's present claim are sufficient to establish that but for the unconstitutional consideration of race, he stood a far greater chance of having his life spared. *See* Okla. Stat. Ann. tit. 22, § 1089(D)(8)(b)(2). Put differently, the Pierce, Radelet, and Sharp Study establishes by clear and convincing evidence that, but for the victim's race, Wood would not have been sentenced to death.

Wood has therefore met all the requirements to have this Court consider his successor post-conviction application and grant relief.

III. Newly discovered evidence establishes that Wood faced a greater risk of execution by the mere fact that the victim who he was accused and convicted of killing was white.

The central question that researchers Pierce, Radelet, and Sharp set out to answer is whether race—either of homicide defendants and/or victims—"affects who ends up on death row" in Oklahoma. (Att. 4 at 212.) In order to answer this question, they studied all

homicides that occurred in Oklahoma from January 1, 1990 through December 31, 2012.[6] (*Id.*) They then compared these cases to the subset of cases that resulted in the death penalty being imposed.[7] (*Id.*) Importantly, the data set used by researchers included, in addition to the race and gender of the victim, information on "the number of homicide victims in each case" as well as "what additional felonies, if any, occurred at the same time as the homicide." (*Id.* at 216.) Pierce, Radelet, and Sharp explain that "[t]hese variables are key" to the Study's analysis and conclusions. (*Id.*)

Researchers found that, overall, 3.06 percent of homicides with known suspects, which occurred in Oklahoma between 1990 and 2012, resulted in the imposition of a death sentence. (*Id.* at 217.) Most troublingly, they also found that "[h]omicides with white victims *are the most likely* to result in a death sentence" in Oklahoma. (*Id.*) To be more specific: researchers found that 3.92 percent of homicides with white victims resulted in death sentences compared to just 1.88 percent of homicides that involved nonwhite victims. (*Id.*) In other words, a criminal defendant in Oklahoma is over *two times* more likely to receive a sentence of death if the victim he is accused of killing is white than if the victim is nonwhite.[8]

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[6] The authors explain that "[u]sing 23 years of homicide data allowed us to use a sample with enough cases in it to detect patterns." (Att. 4 at 215.) Throughout this 23-year period, Oklahoma recorded "some 5,090 homicides, for an annual average of 221." (*Id.*)

[7] Out of the final sample size of 4,668 cases, researchers identified 153 death sentences imposed on 151 defendants for homicides committed between 1990 and 2012. (Att. 4 at 216.)

[8] "The probability of a death sentence is [ ] 2.05 times higher for those who are suspected of killing whites than for those suspected of killing nonwhites." (Att. 4 at 218.)

In addition to this, researchers found that of those homicides with exclusively male victims, 2.26 percent of cases with white male victims resulted in death sentences compared to just 0.77 percent of cases with black male victims. (*Id.* at 219-20.) That is, a defendant, like Wood, accused of killing a white male victim in Oklahoma is nearly *three times* more likely to receive a death sentence than if his victim were a black male. (*Id.*)

When looking at the combined effect of both a homicide suspect's and victim's races and ethnicities, researchers also discovered the following. The percentages of nonwhite defendant/nonwhite victim and white defendant/nonwhite victim cases ending with death sentences were 1.9 and 1.8 percent, respectively. In sharp contrast, 3.3 percent of the white-on-white homicides resulted in a death sentence compared to 5.8 percent of the nonwhites suspected of killing white victims. (*Id.* at 219.) In other words, nonwhites, like Wood,[9] are nearly *three times* more likely to receive a sentence of death where the victim is white than if the victim is nonwhite. Moreover, in comparing cases with white victims, nonwhite defendants like Wood are nearly *twice* as likely to receive the death penalty as are white defendants. Wood's own race, when considered in conjunction with the victim's, is a significant factor in why he received the death penalty.

Even where researchers controlled for aggravating factors such as "the presence of additional felony circumstances and the presence of multiple victims," they found that cases like Wood's, which involve a white male victim, "are significantly more likely to end with a death sentence in Oklahoma than are cases with nonwhite male victims." (*Id.* at

[9] Tremane Wood and his brother were referred to at trial as black men with mixed-race heritage; his mother is white and his father was black. (Tr. 4/1/04 at 115; Tr. 4/5/04 at 90.)

221-22.) The researchers concluded that, when other variables were controlled, "[t]he odds of a death sentence for those with white male victims are 3.22 times higher than the odds of a death sentence a minority male victims." (*Id.* at 221.) They found that increase in odds was nearly the same as the 3.44 times increased likelihood in a death sentence that occurred in cases that involved the existence of a circumstance *legally permissible* for the jury to consider: either multiple homicide victims or an additional felony circumstance. (*Id.*)

If the imposition of a death sentence is indeed supposed to reflect a "community's outrage" at the crime that a defendant stands accused of committing, *Furman*, 408 U.S. at 303 (Brennan, J., concurring), this Study demonstrates that communities in Oklahoma—a majority-white state[10]—are significantly more outraged when white lives are lost than when nonwhite lives are forfeited. This is precisely the kind of race-based discrepancy in meting out death that is repugnant to the Constitutions of the United States and the State of Oklahoma. U.S. Const. amends. VI, VIII, XIV; Okla. Const. art. II, § 7, 9, 19, 20; *see also McCleskey v. Kemp*, 481 U.S. 279, 366, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987) (Stevens, J., dissenting) (noting that racial disparity in capital sentencing is "constitutionally intolerable"). In light of this, Wood's death sentence cannot stand.

IV. Additional Relevant Facts

The race of the victims and the interracial nature of the crime was never far from the surface in Wood's case. The prosecutors and the Court repeatedly emphasized that the

[10] "Oklahoma is home to some 3.75 million citizens, of whom 75 percent are white, with the black, Native American, and Hispanic population each constituting about eight percent of the population." (Att. 4 at 212.)

man killed, Ronnie Wipf, and his friend and lead witness, Arnold Kleinsasser, (who were both white) were two young men from rural Montana. (*See, e.g.*, Tr. 3/29/04 at 38; Tr. 3/31/04 at 102, 105.) The Court during voir dire repeatedly told prospective jurors that Wipf and Kleinssasser were "young men from Montana," (*see, e.g.*, Tr. 3/29/04 at 38; Tr. 3/30/04 at 7, 90; Tr. 3/31/04 at 20, 54, 61), even referring to them more than once as "the Montana boys," (Tr. 3/29/04 at 152; Tr. 3/30/04 at 26).

The prosecutor (a white man) also raised the specter of race when at least twice during the proceedings when a witness presented with an accent different than his, he told the jurors that he spoke only "red neck." (Tr. 3/31/2004 at 120; Tr. 4/2/04 at 152 ("I don't understand anything but red neck.").) In contrast, the State asserted in closing arguments a witness staying at the motel must have overheard Wood and his brother at the motel because that witness heard "black voices." (Tr. 4/2/04 at 151, 164.)

In describing Wipf and Kleinsasser the prosecutors often highlighted their rural Montana background and their background as Hutterites. (*See, e.g.*, Tr. 3/31/04 at 102, 105; Tr. 4/2/04 at 147.) At one point the prosecutor said that Kleinsasser was just "a rural kid from Montana . . . . Don't judge him too harshly." (Tr. 4/2/04 at 148.)

In addition, Judge Ray Elliott, who presided over Wood's trial (OR1 756-57), displayed troubling attitudes towards people of color, which came to light in 2011. According to the affidavit of Michael S. Johnson, Judge Elliott was overheard referring to Mexicans as "nothing but filthy animals" who "deserve to all be taken south of the border with a shotgun to their heads" and "if they needed volunteers [to do so] that he would be the first in line." Nolan Clay, *Attorney's affidavit expands on claims of unfairness against*

judge in Ersland case, NewsOK (Jan. 7, 2011), http://newsok.com/article/3530111; *see also* Nolan Clay, *Judge in OKC pharmacist's case to announce ruling Monday*, NewsOK (Dec. 8, 2010), http://newsok.com/article/3521788 (noting that Judge Elliott's former clerk, Isla Box, testified that "the judge also said … [i]f they needed somebody to hold a shotgun to their heads to get them back across the border, he'd be the first to volunteer," and that Judge Elliott "has made other derogatory statements about Hispanics"). Judge Elliott admitted that he used the racial epithet "wetbacks" to refer to Mexicans. *Id.*; *see also* American Bar Association Journal, *Okla. Judge Admits 'Wetback' Comment, But Denies Calling Workers 'Filthy Animals'* (Jan. 7, 2011).

While Judge Elliot made these remarks in 2011, a number of years after Wood was sentenced to death, they are nonetheless troubling. Indeed, Judge Elliott's comments raise concerns both as to his attitude towards people of color at the time that he presided over Wood's case, and his impartiality as a judge in cases, like Wood's, in which racial issues are implicated.

Significantly, when the jury was polled after announcing the death sentence for the count of murder and asked if those were the verdicts, the jury foreperson, a black woman, said, "Yeah, besides the one. I didn't - - but everybody else did and so I - -" (Tr. 4/5/04 at 165.) When asked to repeat herself, she said: "I signed the one for death because everybody was waiting on me. I didn't want everyone to be here." (*Id.*) Judge Elliot, then said, "My question is are those your verdicts? . . . Because if they are not, I will send you back up. And you will keep going. Are those your verdicts?" (*Id.*) In response to the court, the jury foreperson said yes. (*Id.*)

All these circumstances demonstrate how racial dynamics loomed over this interracial case and infected the proceedings.

V. Law & Argument

A. Wood was sentenced to death in violation of the Eighth and Fourteenth Amendments to the United States Constitution, and Article II Sections 7 and 9 of the Oklahoma Constitution.

The United States Supreme Court has long recognized that race is among the factors that are "constitutionally impermissible" if not "totally irrelevant to the sentencing process." *Zant v. Stephens*, 462 U.S. 862, 885, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983); *see also Rose v. Mitchell*, 443 U.S. 545, 555, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of criminal justice."). Indeed, the Supreme Court recently reaffirmed a "basic premise of our criminal justice system," which is that "[o]ur law punishes people for what they do, not who they are." *Buck v. Davis*, 137 S. Ct. 759, 778, 197 L. Ed. 2d 1 (2017). For "[d]ispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle." *Id.*; *see also Davis v. Ayala*, 135 S. Ct. 2187, 2208, 192 L. Ed. 2d 323 (2015) (explaining that racial discrimination "poisons public confidence in the evenhanded administration of justice"). This Court has likewise recognized that race is an "impermissible classification" that ought not to motivate sentencing determinations. *See Cuesta-Rodriguez v. State*, 241 P.3d 214, 235, 2010 OK CR 23 (Okla. Crim. App. 2010); *see also Williams v. State*, 542 P.2d 554, 585, 1975 OK CR 171 (Okla. Crim. App. 1975) ("When the law lays an unequal hand on those who have committed intrinsically the same quality of offense … it has made as invidious a discrimination as if it had selected a

particular race or nationality for oppressive treatment" (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942) (internal quotation marks omitted)).

In *McCleskey v. Kemp*, the Supreme Court entertained an Eighth and Fourteenth Amendment challenge to a sentence of death that was brought by Warren McCleskey—a black prisoner on death row in Georgia at the time. 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987). The central question before the Court was "whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that petitioner McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment." *Id.* at 282-83.

In support of his constitutional challenges, Mr. McCleskey put before the Court a statistical study (the Baldus study) that demonstrated a stark disparity in the imposition of death sentences in Georgia "based on the race of the murder victim and, to a lesser extent, the race of the defendant." *Id.* at 286. The Baldus study indicated that "defendants charged with killing white persons received the death penalty in 11% of the cases," however "defendants charged with killing blacks received the death penalty in only 1% of the cases." *Id.* Taking into account the races of both the defendant and victim, the study also demonstrated that "the death penalty was assessed in 22% of the cases involving black defendants and white victims; 8% of the cases involving white defendants and white victims; 1% of the cases involving black defendants and black victims; and 3% of the cases involving white defendants and black victims." *Id.* The Baldus study also determined that "prosecutors sought the death penalty in 70% of the cases involving black defendants and white victims; 32% of the cases involving white defendants and white

victims; 15% of the cases involving black defendants and black victims; and 19% of the cases involving white defendants and black victims." *Id.* at 287. In sum, "the Baldus study indicate[d] that black defendants, such as McCleskey, who kill white victims have the greatest likelihood of receiving the death penalty." *Id.*

Based on this statistical data, Mr. McCleskey challenged the constitutionality of Georgia's capital-sentencing statute generally as violating the Fourteenth Amendment's Equal Protection Clause. *Id.* at 291. First, he contended that the evidence demonstrated that "persons who murder whites are more likely to be sentenced to death than persons who murder blacks, and black murderers are more likely to be sentenced to death than white murderers." *Id.* Second, Mr. McCleskey argued that he, himself, was discriminated against as a black defendant accused of killing someone white. *Id.* at 292.

The Supreme Court articulated the standard that would guide its analysis of McCleskey's Fourteenth Amendment claim as follows: "a defendant who alleges an equal protection violation has the burden of proving 'the existence of purposeful discrimination.'" *Id.* (quoting *Whitus v. Georgia*, 385 U.S. 545, 550, 87 S. Ct. 643, 646, 17 L. Ed. 2d 599 (1967)). "Thus, to prevail under the Equal Protection Clause," the Court explained, "McCleskey must prove that the decisionmakers in *his* case acted with discriminatory purpose." *Id.* (emphasis in original). The Court rejected McCleskey's argument that the Baldus study, standing alone, "compel[ed] an inference that his sentence rest[ed] on purposeful discrimination." *Id.* at 293.

The Court also rejected McCleskey's argument that "the Baldus study demonstrates that the Georgia capital sentencing system violates the Eighth Amendment." *Id.* at 299. In

the Court's view, the statistics that McCleskey put forward "[a]t most ... indicate[] a discrepancy that appears to correlate with race." *Id.* at 312. And rather than creating a constitutionally significant risk of racial bias influencing Georgia's capital-sentencing scheme, this race-based discrepancy in sentencing is "an inevitable part of our criminal justice system," the Court pronounced. *Id.* at 312.

In the thirty years since *McCleskey* was decided, it has become clear that racial disparities are not simply "an inevitable part" of the United States' criminal justice system. Rather, these disparities persist so long as we as a society are willing to condone them. Jurisdictions around the country have rejected the "inevitability of racism" line of thinking stemming from *McCleskey* and, over the past three decades, have taken steps to confront and root-out the influence of race on criminal justice system outcomes.

Take, for example, Multnomah County, Oregon and Minnesota's Fourth Judicial District. Both of these jurisdictions have reduced racial disparities in their criminal justice system by documenting and tracking racial biases that are inherent in the risk assessment instruments that are used for criminal justice decision-making. According to a 2015 Sentencing Project report entitled, "Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System," Multnomah County developed and implemented new risk assessment technology that led to a "greater than 50% reduction in the number of youth detained and a near complete elimination of racial disparity in the proportion of delinquency referrals resulting in detention."[11] The Sentencing Project, *Eliminating Racial*

[11] In order to weed out inherent racial biases in risk assessment instruments ("RAIs"), officials in Multnomah County "examined each element of their RAI through the lens of

Inequity in the Criminal Justice System 20 (2014), http://www.sentencingproject.org/publications/black-lives-matter-eliminating-racial-inequity-in-the-criminal-justice-system/. A similar review of risk assessment instruments was undertaken in Minnesota's Fourth Judicial District. "Three of the nine indicators in the instrument were found to be correlated with race, but were not significant predictors of pretrial offending or failure to appear in court." As a result, "these factors were removed from the instrument." *Id.*

Meanwhile, in the Seattle suburb of Kent, Washington, the police department launched in 2015 an anti-bias training program for police officers called, "Fair and Impartial Policing." Martin Caste, *Police Officers Debate Effectiveness of Anti-Bias Training*, NPR, Apr. 6, 2015, http://www.npr.org/2015/04/06/397891177/police-officers-debate-effectiveness-of-anti-bias-training. The program is geared towards "teach[ing] police officers to recognize their own implicit biases" in an effort to reduce the impact of race alone in law enforcement decisionmaking. *Id.*

The efforts underway in Oregon, Minnesota, and Washington are just a few examples of the admirable steps that numerous jurisdictions across the county are taking to finally confront and eradicate the invidious influence of race on criminal justice system outcomes. It is time for the judiciary follow suit by recognizing that the constitutions of the United States and the State of Oklahoma cannot tolerate, or treat as "inevitable," racial

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race and eliminated known sources of bias, such as references to 'gang affiliation' since youth of color were disproportionately characterized as gang affiliates often simply due to where they lived." The Sentencing Project, *Eliminating Racial Inequity in the Criminal Justice System* at 20.

disparities—or *any* risk of racial bias—in the imposition of "the most awesome act that a State can perform"—that is, the deliberate taking of another life. *McCleskey*, 481 U.S. at 342 (Brennan, J., dissenting). *McCleskey* must therefore be overruled. Indeed, even Justice Powell, who provided the decisive vote against Mr. McCleskey and authored the majority opinion, has since recognized that his vote, and the reasoning that informed it, was wrong. John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.: A Biography* 451 (1994).

But even if *McCleskey* is not overruled, it still does not preclude the relief that Wood now seeks for several reasons. First, several states have, in the years since *McCleskey*, invalidated death sentences under state law based upon statistical evidence of racial discrimination in their systems of capital punishment. In 2012, for example, a North Carolina court commuted the death sentence of Marcus Robinson to life without parole based on statistical evidence of racial bias in jury selection in North Carolina over a twenty-year period. Cassy Stubbs, *A Case for Statistics and a Victory for Justice, HuffPost*, Apr. 20, 2012, http://www.huffingtonpost.com/cassy-stubbs/a-case-for-statistics-and_b_1440529.html?ref=politics#comments. Meanwhile, judges in Kentucky may determine whether race has influenced a decision to seek the death penalty. Ky. Rev. Stat. tit. L, Ky. Penal Code § 532.300. And at least one state court has explicitly rejected *McCleskey*'s notion that "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system," *McCleskey*, 481 U.S. at 312, instead holding that "our history and traditions would *never* countenance racial disparity in capital sentencing." *State v. Marshall*, 130 N.J. 109, 207, 613 A.2d 1059 (N.J. 1992), *cert. denied*, 507 U.S. 929, 113

S. Ct. 1306, 122 L. Ed. 2d 694 (1993) (emphasis added). The New Jersey Supreme Court made the following observation:

> New Jersey would not tolerate a system that condones disparate treatment for black and white defendants or a system that would debase the value of a black victim's life. Whether in the exercise of statutory proportionality review or our constitutional duty to assure the equal protection and due process of law, we cannot escape the responsibility to review any effects of race in capital sentencing.

Marshall, 130 N.J. 109 at 214.

Like the Supreme Court of New Jersey, this Court retains the power to set aside Wood's sentence of death under the Oklahoma Constitution based upon the new evidence that Wood has put forward which demonstrates that he was predisposed to receive a sentence of death merely because the victim who he was accused of killing was white. This is true notwithstanding the Supreme Court's decision in *McCleskey*, which rejected statistical evidence of racial disparities in death sentencing alone as sufficient to establish a violation of the Eighth and Fourteenth Amendments to the United States Constitution. *McCleskey*, however, said nothing about states' authority to consider, and to treat as dispositive, such evidence when evaluating race-based challenges to death determinations raised pursuant to their state constitutional guarantees.

McCleskey is no obstacle to the sentencing relief that Wood now seeks for an additional reason. Unlike the petitioner in *McCleskey* who relied on statistical evidence of racial disparities in Georgia's capital-sentencing system *alone* to establish a violation of his rights under the Eighth and Fourteenth Amendments, Wood is relying not just upon the new statistical Study demonstrating how race dictates capital sentencing outcomes in

Oklahoma. Rather, in addition to this new statistical evidence, Wood is also relying upon the ways in which "the decisionmakers in *his* case"—from prosecutors, judges, and police officers, to the jurors who ultimately sentenced him to die—"acted with discriminatory purpose." *McCleskey*, 481 U.S. at 293. Indeed, Wood has set out above how race both infected and "cast[] a large shadow," *Id.* at 321-22 (Brennan, J., dissenting), over his case.

The Supreme Court's decisions since *Furman* have delimited "a constitutionally permissible range of discretion in imposing the death penalty," *McCleskey*, 481 U.S. at 305, that is consistent with the Eighth Amendment guarantee against cruel and unusual punishment. First, the Court has required states to establish rational criteria that narrow the class of individuals eligible for the death penalty. *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S. Ct. 2909, 2932, 49 L. Ed. 2d 859 (1976) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited to as to minimize the risk of wholly arbitrary and capricious action. It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner."). Second, the Court has prohibited states from limiting a sentencer's ability to consider "relevant facets of the character and record of the individual offender or the circumstances of the particular offense" that might warrant a sentence less than death. *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S. Ct. 2978, 2991, 49 L. Ed. 2d 944 (1976); *see also Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986). While, in all of these

cases, the Supreme Court has upheld the propriety of a capital sentencer's discretion to impose a sentence of death under the appropriate circumstances, it has unequivocally condemned race playing any role in a sentencer's exercise of this discretion. *Zant v. Stephens*, 462 U.S. 862, 885, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983) (noting that race is among those factors that are "constitutionally impermissible or totally irrelevant to the sentencing process"); *Buck v. Davis*, 137 S. Ct. 759, 778, 197 L. Ed. 2d 1 (2017) (explaining that "a basic premise of our criminal justice system" is that "[o]ur law punishes people for what they do, not who they are," and that "departure[s] from [this] basic principle" are "exacerbated" where "it concern[s] race"); *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S. Ct. 1993, 61 L. Ed. 2d 739 (1979) ("Discrimination on the basis of race, odious in all respects, is especially pernicious in the administration of justice."). Where race does play such a role, capital-sentencing determinations are rendered "arbitrary and capricious" in violation of the Eighth Amendment. *See McCleskey*, 481 U.S. at 306-07; *id.* at 323 (Brennan, J., dissenting) ("[A] system that features a significant probability that sentencing decisions are influence by impermissible considerations cannot be regarded as rational."); *see also Graham v. Collins*, 506 U.S. 461, 500, 113 S. Ct. 892, 122 L. Ed. 2d 260 (1993) (Stevens, J., dissenting) ("Neither the race of the defendant nor the race of the victim should play a part in any decision to impose a death sentence.").

As set forth above, the risk that racial considerations impacted Wood's ultimate sentence of death is "constitutionally unacceptable." *Turner*, 476 U.S. at 36 n.8; *see also McCleskey*, 481 U.S. at 323 (Brennan, J., dissenting) (explaining that since *Furman*, "the Court has been concerned with the *risk* of the imposition of an arbitrary sentence, rather

than the proven fact of one"); *Caldwell v. Mississippi*, 472 U.S. 320, 343, 105 S. Ct. 2633, 2647, 86 L. Ed. 2d 231 (1985) (observing that a sentence of death cannot withstand constitutional muster whenever the circumstances under which it has been rendered "creat[e] an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' or through 'whim or mistake'" (quoting *California v. Ramos*, 463 U.S. 992, 999, 103 S. Ct. 3446, 3452, 77 L. Ed. 2d 1171 (1983)). While Wood contends that he is entitled to sentencing relief on the record before this Court, if this Court disagrees and determines that further factual development is necessary, Wood submits that he is entitled to discovery and an evidentiary hearing. This is because has set forth herein more than colorable allegations that his sentence of death violates his state and federal rights.

B. Wood was sentenced to death in violation of the Sixth and Fourteenth Amendments to the United States Constitution, and Article II, Sections 7, 19, and 20 of the Oklahoma Constitution.

The right to an impartial jury is a fundamental guarantee of both the Oklahoma Constitution and the United States Constitution. Okla. Const. art. II, § 20 ("In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury . . . ."); U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."); *see also Irvin*, 366 U.S. at 722, 81 S. Ct. at 1642 (holding that the Fourteenth Amendment to the United States Constitution also guarantees a fair, impartial jury as "a basic requirement of due process" (internal quotation marks omitted)).

"'Impartial,' as applied to a jury, means not favoring a party or an individual because of the emotions of the human mind, heart, or affections." *Tegeler v. State*, 1913 OK CR 87, 9 Okla. Crim. 138, 130 P. 1164, 1168 (Okla. Crim. App. 1913). Put another way, "an impartial jury means a jury not biased in favor of one party more than another; indifferent; unprejudiced; disinterested." *Stevens v. State*, 94 Okla. Crim. 216, 224, 232 P.2d 949, 958 (Okla. Crim. App. 1951) (internal quotation marks omitted); *see also Irvin*, 366 U.S. at 722, 81 S. Ct. at 1642 ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors.").

The United States Supreme Court has emphasized that, when it comes to jurors, racial bias must be especially guarded against. "Racial bias[is] a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 868, 197 L. Ed. 2d 107 (2017) (internal quotation marks omitted). "Permitting racial prejudice in the jury system damages both the fact and the perception of the jury's role as a vital check against the wrongful exercise of power by the State." *Id.* This Court has similarly recognized that "concerns regarding the risk of racial prejudice infecting a capital sentencing proceeding" are especially and uniquely important in ensuring the right to an impartial jury. *Frederick v. State*, No. D-2015-15, 2017 OK CR 12, ¶ 27, ___ P.3d ___ (Okla. Crim. App. May 25, 2017).

In *Turner v. Murray*, 476 U.S. 28, 106 S. Ct. 1683, 90 L. Ed. 2d 27 (1986), the United States Supreme Court vacated a defendant's death sentence because the trial court prevented that defendant from asking prospective jurors in voir dire whether the fact that the defendant was black and the victim was white would affect their ability to be

impartial. The Court held "that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." *Turner*, 476 U.S. at 36-37, 106 S. Ct. at 1688.

In reaching that conclusion, four justices further recognized that, "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." *Id.* at 35, 106 S. Ct. at 1687 (plurality opinion of White, J., joined by Blackmun, Stevens, and O'Connor, JJ.). Moreover, "[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence." *Id.* Justice Brennan similarly concluded that "[t]he reality of race relations in this country is such that we simply may not presume impartiality, and the risk of bias runs especially high when members of a community serving on a jury are to be confronted with disturbing evidence of criminal conduct that is often terrifying and abhorrent." *Id.* at 39, 106 S. Ct. at 1690 (Brennan, J., concurring in part and dissenting in part) (explaining that he would go further than the majority and vacate the conviction as well).

The Court in *Turner* hoped that questioning the jurors during voir dire about racial bias would serve to eliminate it from juries. But unfortunately, the Study by Pierce, Radelet, and Sharp demonstrates that there is significant racial bias in Oklahoma capital juries in cases involving nonwhite defendants and white victims that voir dire has failed to eradicate. "Asking prospective jurors about their racial attitudes was supposed to provide the tools necessary to rid juries of people whose decisions are likely to be influenced by race of the defendant or victim. But the tools are not working. . . . [W]hatever attempts

may have been made thanks to *Turner*, the risk of racial bias remains all too manifest." William J. Bowers et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant Is Black and the Victim Is White*, 53 DePaul L. Rev. 1497, 1532-33 (2004) [hereinafter *Crossing Racial Boundaries*].

Voir dire in a capital case may be inherently flawed because of the death-qualification process in which jurors are questioned about their willingness to sentence a convicted defendant to death. A recent study demonstrated that the "death qualification process results in jurors who are more racially biased, both implicitly and explicitly." Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. Rev. 513, 568 (2014) [hereinafter *Devaluing Death*].

In addition, despite the hope of *Turner*, because of the stigma of admitting racial prejudice, attempts to question jurors on *explicit* racial biases, not only do not work, they likely strengthen the biases. *Peña-Rodriguez*, 137 S. Ct. at 869; *see also Crossing Racial Boundaries*, 53 DePaul L. Rev. at 1533 ("People are generally reluctant to admit that they hold racist attitudes or opinions or even to acknowledge this to themselves. Researchers find that racially prejudiced people will consciously attempt to avoid appearing to be racially biased.").

Thus, death qualification in itself "actually exacerbate[s]" *implicit* racial biases "by the exclusion of less biased Americans through the death qualification process." *Devaluing Death*, 89 N.Y.U. L. Rev. at 564. Significantly, "jurors who were death-qualified displayed higher levels of bias related to implicit racial worth," i.e., they valued

the lives of white people more than that of black people. *Id.* at 559. In short, the capital-jury selection process does more to ensure biased jurors than guard against them.

Other aspects of jury selection that attempt to minimize explicit racial bias may also exacerbate implicit bias, such as the *Batson*-challenge process. U.S. District Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149, 150 (2010) ("[P]resent methods of addressing bias in the legal system—particularly in jury selection—which are directed primarily at explicit bias, may only worsen implicit bias.").

But regardless of the reason, the demonstrated increased likelihood of being sentenced to death on the basis of victim's race, raises the question posed by the plurality in *Turner*: "it is plain that there is some risk of racial prejudice influencing a jury whenever there is a crime involving interracial violence, the only question is at what point that risk becomes constitutionally unacceptable." 476 U.S. at 36 n.8, 106 S. Ct. at 1688 n.8 (plurality opinion) (Justice Marshall's opinion, joined by Justice Brennan, concurring in part and dissenting in part, agreed that with the plurality's assessment of the "plain risk" of racial prejudice in any interracial crime involving violence).

Here, "rather large disparities in the odds of the death sentence" in Oklahoma for those convicted of killing a white person as opposed to a victim of any other race, surpasses that tipping point. (Att. 4 at 222.) Where any jury judging Tremane Wood is two times more likely to sentence him to death just because of the race of the victim, he has not been sentenced by an impartial jury. Moreover, when the gender of the white victim is

male or the race of the defendant accused of killing the white victim is nonwhite, an Oklahoma jury is approximately three times more likely to be sentence a defendant to death—having nearly the same effect as legitimate aggravating factors. Oklahoma juries are therefore not impartial in issuing the death penalty.

A defendant "is . . . entitled to be tried before a jury whose minds are open on every issue and not embedded with any pre-conceived opinions." *West v. State*, 1968 OK CR 112, 443 P.2d 131, 133 (Okla. Crim. App. 1968), *overruled on other grounds by McKay v. City of Tulsa*, 1988 OK CR 238, 763 P.2d 703 (Okla. Crim. App. 1988). Wood has not been afforded that right. The process of selecting capital jurors has failed to provide him with jurors able to cast aside their implicit or explicit racial biases. Accordingly, his sentence violates his right to an impartial jury under the Oklahoma and United States Constitutions.

CONCLUSION

Mr. Wood's sentence of death was obtained in violation of his state and federal constitutional rights. He asks that this Court exercise its power to correct this fundamental injustice and grant sentencing relief. Alternatively, Mr. Wood asks this Court grant his request for discovery and an evidentiary hearing in order to allow for the further factual development of his claims.

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VERIFICATION OF COUNSEL

I, Mark Barrett, state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

MARK BARRETT June 18, 2017

CERTIFICATE OF SERVICE

I certify that a copy of this document was served on the Attorney General of Oklahoma by *depositing a copy with the Clerk of the Court of Criminal* Appeals on the date that it was filed.

MARK BARRETT

Attachment 1

IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

Termane Wood,	**Oklahoma Co. District Court Case No. CF-02-46**
Petitioner,	**Court of Criminal Appeals Direct Appeal Case No. D-05-171**
-vs-	
State of Oklahoma,	
Respondent.	**Post Conviction Case No. PCD-05-143**

COURT OF CRIMINAL APPEALS FORM 13.11A

AMENDED APPLICATION FOR POST – CONVICTION RELIEF – DEATH PENALTY CASE

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IN THE COURT OF CRIMINAL APPEALS
THE STATE OF OKLAHOMA

Termane Wood,	**Oklahoma Co. District Court Case No. CF-02-46**
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COURT OF CRIMINAL APPEALS FORM 13.11A

AMENDED APPLICATION FOR POST – CONVICTION RELIEF – DEATH PENALTY CASE

PART A: PROCEDURAL HISTORY

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

The sentence from which relief is sought is:

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, *Appendices 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-02-46.

(c) Court of Criminal Appeals: Direct Appeal Case No. D-05-171.

2. **Date of sentence:** May 7, 2004.

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

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

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

2. The murder was especially heinous, atrocious, or cruel;

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

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

(O.R. 72).

Aggravating factors found:

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

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

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. Vol. IV 617).

Mitigating factors listed in jury instructions:

The trial court gave instruction No. 54 to the jury which "lists" mitigating circumstances. (O.R. Vol. IV at 634). The mitigation evidence submitted to the jury was as follows:

Evidence has been introduced as to the following mitigating circumstances:

1. The Defendant is only 24 years old.

2. The Defendant's parents were divorced at a young age.

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

4. The Defendant has a son, Bredon, who is five (5) years old. He would like to see what his son becomes and hopefully be a positive influence on him.

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

6. The Defendant has no father figure during his childhood, and little support from his natural father.

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

8. The Defendant has a moderately severe mental health disorder.

9. The Defendant can live in a structured prison environment without hurting anyone.

10. The Defendant's previous felony conviction was non-violent. This is his first violent conviction.

11. With increased age, the Defendant could become a positive influence on others,

even in prison.

12. The Defendant has been employed in the past.

13. The Defendant has prior drug dependencies.

14. The Defendant spent time in foster care.

15. The Defendant took directions from older brother Zjaiton Wood.

16. The Defendant is of educational potential.

17. The Defendant is of average intelligence.

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 ( ) No (X).

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).

Robbery with Firearms: Mr. Wood received a Life sentence.

Conspiracy to Commit Felony: Mr. Wood received a Life sentence.

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:

John Albert (currently suspended from practice)
3133 N.W. 63rd
Oklahoma City, OK 73116
(405) 767-0522

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

Lance Phillips
1 North Hudson Suite 700
Oklahoma City, OK 73102
(405) 235-5944

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

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

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

Date Brief In Chief filed: June 28, 2005.

Date Response filed: July 22, 2005

Date Reply Brief filed: August 11, 2005

Date of Oral Argument: November 28, 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 (X) No ().

If so, what were the grounds for remand?

1) Whether the evidence identified in the Application for Evidentiary Hearing was reasonably available to trial counsel in preparation for trial;

2) What, if any, of the records contained in the exhibits were reviewed by trial counsel, or the defense expert;

3) What effect any evidence that was available but not used might have had on trial proceedings;

4) Whether trial counsel's failure to investigate and/or use the evidence was sound trial strategy; and

5) Whether the failure to use the evidence undermines confidence in the outcome of the trial.

Is this petition filed subsequent to supplemental briefing after remand?

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

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

Perry Hudson
435 North Walker, Suite 102
Oklahoma City, OK 73102
(405) 557-7800

Jason Spanich
228 Robert S. Kerr, Suite 100
Oklahoma City, OK 73102
(405) 236-0115

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

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

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

PART B: GROUNDS FOR RELIEF

19. **Has a Motion for Discovery been filed with this application? Yes (X) No ( ) filed on December 26, 2006.**

20. **Has a Motion for Evidentiary Hearing been filed with this application? Yes (X) No ( ) filed on December 26, 2006.**

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:

Appellant's Request to File Enclosed Motion Ex Parte and Under Seal filed on February 17, 2005.

Appellant's Motion to Hold Proceedings in Abeyance or in the Alternative for an Extension of Time to File an Original Application for Post-Conviction Relief in a Capital Case filed on November 9, 2005.

Appellant's Motion to Continue to Hold Proceedings in Abeyance, or, in the Alternative, for an Extension of Time to File an Original Application for Post-Conviction Relief in a Capital Case. Appellant's Notice to Court filed on July 27, 2006.

Entry of Appearance and Motion to Allow the Capital Post-Conviction Division of OIDS to Withdraw from Further Representation filed on September 7, 2006.

Appellant's Application for an Extension of Time to File Post-Conviction Application filed on October 26, 2006.

Petitioner's Application for Extension of Time to File Post-Conviction Application filed on November 22, 2006.

Motion to Cross Reference Petitioner's Post-Conviction Application with Co-Defendant's Appeal Records filed on December 26, 2006.

Motion to File Oversized Brief filed on December 26, 2006.

Motion for Discovery filed on December 26, 2006.

Motion for Evidentiary Hearing filed on December 26, 2006.

Objection to Petitioner's Motion to File Oversized Application filed on December 28, 2006.

Response to Objection to Petitioner's Motion to File Oversized Application filed on January 3, 2007.

Order Striking Petitioner's Original Application for Post-Conviction Relief for Failure to Comply with Court Rules and Order Denying Motion to File Oversized Application.

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

PROPOSITION I
TRIAL COURT ERRED BY EXCLUDING TESTIMONY FROM EXPERT WITNESS.

PROPOSITION II
NEWLY DISCOVERED EVIDENCE AND NEW LAW RENDERS MR. WOOD'S CONVICTION AND SENTENCE SUSPECT AND UNRELIABLE.

A. Hearing was held regarding whether trial counsel should be held in contempt of court.

B. Trial counsel has been suspended from the practice of law.

C. Supplemental report of Dr. Kate Allen.

D. New Rule of Law.

E. Conclusion.

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

A. Appellate counsel failed to supplement record with impeachment evidence.

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 four (4) volumes of Original Record in Oklahoma County District Court Case No. CF-02-46, and two (2) volumes from the remanded evidentiary hearing.
PH:	the three (3) volumes of transcripts of the preliminary hearing held on July 25, 2002, July 26, 2002 and August 14, 2002.
Date Tr.:	the six (6) volumes of transcripts of the jury trial held on March 29 through April 5, 2004.
Date Z.Wood Tr.:	the volumes of transcripts of the jury trial of co-defendant Zjaiton Wood, held February 22, 2005 and February 23, 2005.[1]
Vol. I-III:	the three (3) volumes of transcripts for the remanded evidentiary hearing held February 23, February 27, and March 2, 2006.
Findings:	District Court's Findings of Fact and Conclusions of Law filed on April 6, 2006 regarding the remanded evidentiary hearing.
Supplemental Brief:	Supplemental Brief of Appellant filed after the remanded evidentiary hearing on May 1, 2006.

Any additional record in this post-conviction proceeding, not otherwise mentioned above, also consists of the "record on appeal" as defined by Rule 1.13 (f), and the same shall be considered to be incorporated herein by reference and by operation of the rule. References to the *Appendix of Exhibits In Support of the Application For Post-Conviction Relief* will be cited as "Ex." followed by the number, such as "Ex. 1." All citations will be separated from the regular text of the brief by

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[1] Counsel for Mr. Wood has filed a Motion to Cross Reference Petitioner's Post-Conviction Application with Co-Defendant's Appeal Records. Petitioner's Co-defendant is Zjaiton Wood, Case No. F-2005-246.

parentheses.

2.
PROCEDURAL HISTORY

Termane Laitron Wood[2] was charged by Amended Information in the District Court of Oklahoma County, Case No. CF-02-46, of First-degree Murder in violation of 21 O.S. § 701.7; one count of Robbery with Firearms; and one count of Conspiracy to Commit a Felony To-Wit: Robbery with a Dangerous Weapon. [3] (O.R. 538-39) A Bill of Particulars was filed alleging the existence of four aggravating circumstances: 1) during the commission of the murder, the defendant knowingly created a great risk of death to more than one person; 2) the murder was especially heinous, atrocious, or cruel; 3) the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution; and 4) at the present time, there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society. (O.R. 72).

Mr. Wood was represented by John Albert and Lance Phillips. He was tried before a jury from March 29 through April 5, 2004. The Honorable Ray C. Elliott presided over the trial. Assistant District Attorneys Fern Smith and George Burnett prosecuted the case for the State. On April 2, 2004, the jury convicted Mr. Wood on all three (3) charges. After the sentencing stage of the trial, on April 5, 2004, the jury found the existence of three of the four aggravating circumstances and assessed his punishment as death on the murder charge.[4] He was also sentenced to life on the

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2 To maintain consistency for the court, Petitioner will be referred to as Termane; however, his first name is actually Tremane.

3 Termane Wood was charged with three other co-defendants in Case No. CF-2002-46. Co-defendant Lanita Bateman went to jury trial and was convicted on all three counts. She was sentenced to life on the murder count, 101 years on the robbery count, and 10 years on the conspiracy to commit a felony. Co-defendant Zjaiton Wood was tried after Tremane Wood. He was found guilty on all three counts and was sentenced to life without the possibility of parole on the murder count, and sentenced to sixty years on each of the remaining counts. Co-defendant Brandy Warden turned State's evidence and testified against each of her co-defendants. She entered a plea and was sentenced to 45 years on accessory after the fact to murder in the first degree, and 10 years on the conspiracy count. The State dismissed the robbery charge. Upon Ms. Warden's one year review, her sentence was modified from 45 years to 35 years.

4 The aggravating circumstances found were that during the commission of the murder, the defendant knowingly created a great risk of death to more than one person; the murder was especially heinous, atrocious, or cruel; and at the present time, there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society. (O.R. Vol. IV 617).

robbery charge and life on the conspiracy charge. (O.R. 614-18, 621-22) The District Court pronounced formal judgment and sentence on the verdicts on May 7, 2004.

Mr. Wood appealed the judgments and sentences in *Wood v. State,* Case No. D-2005-171. The appellant's brief in chief and Application for Evidentiary Hearing on Sixth Amendment Claim was filed June 28, 2005. The appellee's brief was filed July 22, 2005, Appellant's reply brief was filed on August 11, 2005.

This Court on November 16, 2005 issued an Order remanding Appellant's case to the district court for an evidentiary hearing regarding Appellant's claim of ineffective assistance of counsel. This remanded evidentiary hearing was held before the district court on February 23, February 27, and March 2, 2006. The District Court issued its Findings of Fact and Conclusions of Law on April 6, 2006. On April 26, 2006, the State filed its Supplemental Brief. On May 1, 2006, Appellant filed his Supplemental Brief of Appellant with this Court. As of the date of the filing of this application, this Court has not issued an opinion in this case.

Mr. Wood's application for post conviction relief was originally due to be filed in this court on July 28, 2006. However, on July 27, 2006, Mr. Wood by and through counsel Vicki Ruth Adams Werneke, Chief of the Capital Post Conviction Division of the Oklahoma Indigent Defense System, filed a Notice advising that Kevin Pate- assigned counsel for Mr. Wood had resigned. Due to Mr. Pate's resignation, counsel advised this Court that Mr. Wood's application for post conviction relief could not be filed by July 28, 2006, and requested an extension of time.

On August 7, 2006, this Court granted Appellant's request for an extension of time. This Court extended the time for filing until October 27, 2006. On September 7, 2006, the undersigned counsel entered her appearance in this case and requested this Court to allow the Capital Post Conviction Division of the Oklahoma Indigent Defense System be allowed to withdrawal from Petitioner's representation. On September 22, 2006, this Court granted the undersigned's motion allowing the Capital Post Conviction Division of the Oklahoma Indigent Defense System to withdraw from Petitioner's representation. The undersigned requested, and was granted two (2)

thirty (30) day extensions of time in which file his application. Said Application was due to be filed on December 25, 2006.

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. Wood, by and through his appointed counsel, timely filed this Original Verified Application for Post-Conviction Relief on December 26, 2006. Petitioner on this date also filed a Motion to File Oversized Brief, Motion for Discovery,Motion for Evidentiary Hearing and Motion to Cross Reference Petitioner's Post-Conviction Application with Co-Defendant's Appeal Records.

The State, on December 28, 2006, filed an Objection to Petitioner's Motion to File Oversized Application. Petitioner filed a Response to Objection to Petitioner's Motion to File Oversized Application on January 3, 2007. This Court entered an Order Striking Petitioner's Original Application for Post-Conviction Relief for Failure to Comply with Court Rules and Order Denying Motion to File Oversized Application on March 14, 2007. This order provided Petitioner had 45 days from the date the order was entered to comply with page limitations. Petitioner, by and through his appointed counsel, timely files his Amended Verified Application for Post-Conviction Relief.

3.

FACTS RELATING TO THE OFFENSE

The State's theory of the case was that four individuals, Brandy Warden, Lanita Bateman Termane Wood, and his brother Zjaiton (Jake) Wood set out on a crime spree December 31, 2000, which resulted in the death of Ronnie Wipf. The State argued Tremane Wood was guilty of felony murder. The State's star witness was Brandy Warden, who had turned State's evidence and testified against her three co-defendant's. The State's other key witness was victim Arnold Kleinsasser.

On December 31, 2000, Ronnie Wipf and Arnold Kleinsasser were celebrating New Year's Eve at the Bricktown Brewery in Oklahoma City, Oklahoma. (03/31/04 Tr. 118) While at the Bricktown Brewery the men met and began to socialize with two women, Brandy Warden and Lanita Bateman. After the Bricktown Brewery closed, the women agreed to accompany these men back

to a motel. (03/31/04 Tr. 120-24)

Since the men were not from Oklahoma, Brandy Warden drove their vehicle to a motel of the women's choice, the Ramada Inn. (03/31/04 Tr. 124) Although the men wanted separate rooms, the women wanted only one room. (03/31/04 Tr. 126) Although Mr. Kleinsasser paid for the room, the room was also listed under Ms. Warden's name because he was under twenty-one years of age. (03/31/04 Tr. 125-26)

Once inside the room, the women demanded $210.00 from the men for sex. (03/31/04 Tr. 125-27) Since the men did not have that much money on them, Brandy Warden drove Mr. Kleinsasser to an ATM to get the cash. (03/31/04 Tr. 127) When they returned to the room, the money exchanged hands, and the women excused themselves to the restroom. (03/31/04 Tr. 127) Not long after the girls had entered the restroom, someone started pounding on the motel room's door and yelled, "Brandy, are you in there? Brandy are you ready to go home?" (03/31/04 Tr. 130)

Although the women tried to exit the room, Mr. Wipf prevented them from leaving and refused to answer the door. (03/31/04 Tr. 129) Mr. Wipf demanded that the women return their money and told Mr. Kelinsasser to call the police. (03/31/04 Tr. 131) However, before he could call the police, Ms. Bateman picked up the phone and proceeded to act as if she were calling the police. (03/31/04 Tr. 118) Eventually, Mr. Wipf decided to let the girls out and opened the door. However, as soon as he did, two masked men entered the room as the two women exited. (03/31/04 Tr. 131-32)

The two men that entered the room were wearing ski masks, long black trench coats, and black leather gloves. One man was described as a black man, bigger than the other, about 5 feet 11 inches tall, weighing approximately 220 pounds, with a small caliber handgun. Other man was described as a white man, approximately 5 feet 11 inches tall, weighing about 190 to 200 lbs, and carrying a knife. (03/31/04 Tr. 131-34) Mr. Kleinsasser testified that the smaller of the two men appeared to be white. (03/31/04 Tr. 171, 173)

Mr. Kleinsasser testified that the man with the gun immediately approached him and demanded his money, which he gave him from his wallet. (03/31/04 Tr. 131, 133, 134) After taking

the money, this man then left him to go and assist the smaller man who had been struggling with Mr. Wipf since they had entered the room. (03/31/04 Tr. 135) Mr. Kleinsasser testified that he heard one of the men say "just shoot the bastard" and a shot was fired. (03/31/04 Tr. 138) Shortly thereafter he was approached by the smaller man with the knife who demanded money from him as well. After Mr. Kleinsasser informed the smaller man that he had already given the other man all his money, the smaller man went back to assist the larger man with Mr. Wipf. (03/31/04 Tr. 139) Once the smaller man turned his back, Mr. Kleinsasser made his escape from the motel room. (03/31/04 Tr. 139-40) Mr. Kleinsasser learned of his friend's death the next morning at approximately 6:00 a.m. when he returned to the motel. (03/31/04 Tr. 144) Mr. Kleinsasser was unable to testify as to which guy stabbed Mr. Wipf. (03/31/04 Tr. 172)

Chief Medical Examiner Fred Jordan testified Mr. Wipf had not been shot, but had died from a single stab wound to his chest, which he classified as a homicide. (04/02/04 Tr. 11-12, 18) He opined that this single stab wound had caused Mr. Wipf to lose a large amount of blood into his right chest cavity. (04/02/04 Tr. 11-12) Dr. Jordan also testified he observed several fresh bruises and scraps along with a number of superficial knife wounds, which appeared to be defensive wounds, on Mr. Wipf's body. (04/02/04 Tr. 14-16)

The State, through the testimony of co-defendant Ms. Warden, was able to piece together the sequence of events that occurred December 31, 2000. Ms. Warden stated that earlier that day she, Lanita Batemen, and Tremane and Zjaition Wood, had gone to Wal-Mart where she purchased ski masks and gloves. (04/01/04 Tr. 138) Ms. Warden also testified that she and Ms. Batemen knew that they were setting the two men up when they left the Bricktown Brewery. (04/01/04 Tr. 188) Ms. Warden admitted she provided identification for the motel room and that she took Mr. Kleinsasser to the ATM for the money they demanded, and that he gave her this money when they returned to the room. (04/01/04 Tr. 154-63)

Ms. Warden testified she heard Zjaiton Wood yelling at the door. (04/01/04 Tr. 166) She also testified that as she and Lanita Bateman ran out of the motel room, she observed that the smaller of

the two men had a knife, while the larger man had the gun. (04/01/04 Tr. 178) The women waited in the car until the men returned. (04/01/04 Tr. 169) Ms. Warden testified Termane Wood was the smaller of the two men, and Zjaiton Wood was the larger of the two men. (04/01/04 Tr. 134-35)

At trial, the Defendant denied any involvement. Defendant's brother Zjaiton Wood testified during the first stage of trial that he and another man named "Alex" committed this crime. (04/02/04 Tr. 89, 91-95) Zjaiton Wood testified he initially had the gun when he and Alex entered the motel room. (04/02/04 Tr. 94) Zjaiton explained that when he saw that the victim was getting the best of Alex and he went over and started punching the victim in his head and body. (04/02/04 Tr. 94) Zjaiton testified that he grabbed the knife, "I grabbed the victim by the head and I stabbed him in the chest and told him I was God.... Just to let him know, you know, he was dealing with a force to be reckoned with." (04/02/04 Tr. 94) At the conclusion of first stage, the jury found Tremane Wood guilty on all counts. (04/02/04 Tr. 214-15)

In second stage, the State incorporated all the evidence from first stage, and recalled their star witness Brandy Warden to the stand to testify. Ms. Warden testified about the armed robbery of La Franca's Pizza that had occurred at approximately 10:00 p.m. on December 31, 2000. Again, she alleged the four had been involved and that Termane Wood used a knife while Zjaiton Wood used a handgun. (04/05/04 Tr. 17-18)

The State also called Keramat Taghizadeh, the owner of the La Franca's Pizza, who had been robbed that night. He testified that he was robbed by two men. He stated that the larger man had a gun, and that the smaller man had a knife. He testified that the larger man hit him in the head with the gun after he tried to set off the alarm. (04/05/04 Tr. 24-26)

In second stage, the Defendant called his mother Linda Wood, her friend Andre Taylor, and Dr. Ray Hand. Their testimony, or lack thereof, is discussed in greater detail in the following Propositions. At the conclusion of the second stage, the jury recommended death on the murder charge and recommended the maximum sentence of life on the robbery and conspiracy counts. (04/05/04 Tr. 163-64)

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

PART D: PROPOSITIONS – ARGUMENTS AND AUTHORITIES

PROPOSITION I
TRIAL COURT ERRED BY EXCLUDING TESTIMONY FROM EXPERT WITNESS.

During the remanded evidentiary hearing (hereinafter "hearing"), defense counsel attempted to elicit expert testimony from Dr. Kate Allen. Despite her qualifications,[1] the State objected under *Daubert*[2] and expressed "I don't think that a social worker should be allowed to testify in any psychological considerations or conclusions." (*Id.* at 203) Counsel responded Dr. Allen's testimony was "prototypical mitigation evidence. This is the type of mitigation evidence that should always be presented, if available, in a capital case." (*Id.* at 208) The trial court sustained the State's objection and refused to allow Dr. Allen to testify.[3] (*Id.* at 219)

Okla.Stat.tit. 12, § 2702, provides an expert witness may testify in the form of an opinion or otherwise, "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education." An expert witness has been defined by this Court as one who has scientific knowledge acquired by study or practice, or both and are ordinarily persons who have experience and knowledge into matters which are not generally known. *See Kennedy v. State*, 1982 OK CR 11, 640 P.2d 971, 977.

In *Salazar v. State*, 1996 OK CR 25, 919 P.2d 1120, this Court was confronted with this very issue. In *Salazar*, this Court determined a social worker qualified as an expert witness under 12 O.S.

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[1] Dr. Allen has a bachelor's degree in psychology/sociology from Texas Christian University, a master's degree in clinical social work from the University of Texas, and a doctoral degree of philosophy in family sociology from American University in Washington D.C. She has practiced in the field of sociology for 35 years and has treated or worked with hundreds of people. She has been a clinical social worker and a professor. She is currently a consultant in civil and criminal trials as an expert witness. (*Id.* at 199- 200) She can make a psychiatric diagnosis through her training, experience, and her degrees; however she cannot prescribe medication or give psychometric testing. (*Id.* at 212-13) She has testified in 6 other states as to her diagnoses and she has never been prevented from testifying as an expert because she was not qualified. (*Id.* at 213-14) Dr. Allen has personally evaluated 800 clients for neurological or psychological issues, and she personally evaluated Mr. Wood. (*Id.* at 214) Dr. Allen testified that as a clinical social worker she can still make Axis I DSM IV diagnoses as to psychological and psychiatry issues. (*Id.* at 215-16)

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

[3] Dr. Allen's report was admitted as Def. Ex. 8 at the hearing, and has been attached as Ex. 3.

§ 2702, and could provide testimony during the second stage proceeding in a capital case. In *Salazar*, the social worker provided testimony she had "specialized knowledge which she acquired through formal education," and "she had developed skills through training and working in the field." *Id.* at ¶ 32 The Court also found it relevant "she was able to describe how she arrived at her opinions and that the method she used was consistent with others in her field." *Id.* The Court also noted the social worker had been recognized as an expert in another court, and " it is a factor to be considered in determining if the party offering the witness has met the foundational requirements of having the witness declared an expert." *Salazar* at ¶ 32, n.15. The Court determined she "was qualified to render relevant expert opinions within her field of expertise and that the trial erred by not permitting her to testify." *Id.* at ¶ 33.

Clearly Dr. Allen qualified as an expert witness. Because her testimony was not admitted, the trial court and subsequently this Court, was left with volumes of new records without an explanation as to its relevance or impact. Sadly, this Court remanded this case for a hearing on whether this new evidence would have impacted the trial proceedings, and, to this day, that question remains unanswered. The trial court's failure to allow Dr. Allen to testify deprived Petitioner of his due process rights to rebut the State's evidence and to present mitigating evidence in his own behalf, in violation of the 5th, 6th, and 14th Amendments to the United States Constitution. *Skipper*, 476 U.S. 1, at 4-5, 106 S.Ct. 1669, at 1671, 90 L.Ed.2d. 1 (1986); *Barefoot v. Estelle*, 463 U.S. 880, 896-97, 103 S.Ct. 3383, 3396, 77 L.Ed.2d 1090 (1983). Petitioner was also deprived of a fair and reliable sentencing proceeding guaranteed him under the 6th, 8th, and 14th Amendments. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978). It cannot be faithfully said that this error was harmless beyond a reasonable doubt and his death sentence must be vacated. *Simpson v. State,* 1994 OK CR 40, 876 P.2d 690, 701; *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

PROPOSITION II
NEWLY DISCOVERED EVIDENCE AND NEW LAW RENDERS MR. WOOD'S CONVICTION AND SENTENCE SUSPECT AND UNRELIABLE.

Petitioner has uncovered newly discovered evidence which renders his conviction unreliable. This evidence was not or could not have been raised in his direct appeal. Since this evidence supports the conclusion the outcome would have been different, Petitioner respectfully requests his convictions and sentences be reversed and his case remanded to district court for a new trial.

A. Hearing was held regarding whether trial counsel should be held in contempt of court.

On March 9, 2006, shortly after trial counsel testified as a witness at the evidentiary hearing regarding his professional performance, a contempt hearing was held in Oklahoma County District Court addressing Mr. Albert's conduct on March 1, 2006. (Ex. 4-A, at 3, 5,7) Despite the lack of a transcript from the March 1st hearing, one can ascertain Mr. Albert initially failed to appear before the court, and then when he did appear, he was not ready to proceed on the behalf of 3 clients. (*Id.* at 14) The court noted, "In one of those cases Mr. Colston is charged with murder in the first degree. He's been in jail three years and he has not seen Mr. Albert in at least a year and a half to two years and hasn't had the opportunity to go to trial." (*Id.* at 40)

The court described Mr. Albert as disheveled and disoriented. Mr. Albert admitted he had "some problems in his life," and "I need help." (*Id.* at 7, 18, 19) He represented he " would report here on Monday morning ready to go to inpatient treatment." (*Id.* at 7) However, he failed to report to the court and to go to a treatment facility. (*Id.* at 5, 7, 9, 24) Despite the fact he expressed, "I have not had a beer, anything in seven days. I know that's just seven days, but that is - - that's how it starts," his failure to follow through with the inpatient treatment resulted in a contempt proceeding being held later that afternoon. (*Id.* at 6) Mr. Albert was held without bond. (*Id.* at 39, 41-42, 53, 63) Unfortunately, the subsequent hearing held that afternoon was filed under seal.[4]

The evidence adduced at this contempt proceeding is crucial since it occurred just days after Mr. Albert testified at Petitioner's hearing on February 27, 2006. At his contempt hearing Mr. Albert admitted he has a problem, which appears to involve alcohol and possibly even drugs. Furthermore,

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[4] Petitioner requested an evidentiary hearing and filed a Motion for Discovery to be provided a copy of Volume Two of the sealed transcript in Mr. Wilson's case, Oklahoma County Case. No. CF-2004-6139 (Ex. 4-B-docket sheet).

the evidence reveals a concern by a district court as to his representation of his clients and the fact he has not even seen one of his clients in close to two years. Clearly, this information is critical in determining whether Mr. Albert rendered effective assistance of counsel in Petitioner's case.

B. Trial counsel has been suspended from the practice of law.

According to Ex. 5, which is a sworn affidavit provided by General Counsel with the Oklahoma Bar Association, trial counsel Mr. John Albert has been suspended indefinitely from the practice of law. Said suspension took effect on April 24, 2006, in a confidential proceeding before the Oklahoma Supreme Court. His suspension occurred close to two months after he testified at the evidentiary hearing and a little over a month after his contempt hearing. Additionally, this Court on April 6, 2007, remanded another death penalty case, *Keary Lamar Littlejohn vs. State of Oklahoma*, D-2005-237, for an evidentiary hearing regarding Mr. Albert's performance as trial counsel.

C. Supplemental report of Dr. Kate Allen.

As mentioned in Proposition I, the trial court erroneously prevented Dr. Kate Allen from testifying at Petitioner's hearing. Petitioner subsequently requested Dr. Allen to review additional records and the transcript testimony of the witnesses from the hearing and issue a supplemental report which is attached as Ex. 6.

For this Court's convenience, Petitioner has pulled from Dr. Allen's Supplemental Report new evidence from the following heading:

> **The Defendant's Parents Failed**: Mr. Gross, additionally, failed Tremane in his role as a *father*. .. he continues to avoid taking any responsibility for the malignant domestic violence he predicated on the family, for not financially supporting his children (often choosing not to work), and for not being available to the defendant on *any* basis as a father (all three men consistently attest to having been emotionally and physically abandoned by their father.)
>
> **Presence and Significance of Domestic Violence**: The issue of authentic presence of domestic violence has been raised... What the court documents reveal is that extreme domestic violence shaped at least the first 10 years of Tremane Wood's life... These documents are evidence of authentic, severe and ongoing violence against Ms. Wood during the early and middle childhood of the defendant, far before his legal troubles began...
>
> **Domestic Violence Lethality Checklist**: Of the 14 known indicators of domestic

> violence likely to end up in death, Tremane Wood's parents, at that time, met...eleven.
>
> **Personality Strengths**: Toward the end of our interview, Tremane expressed sorrow about what had happened to the young men who had been victimized, stating that they were completely innocent.....He felt shame and humility that the parents [of the victim] adamantly opposed the death penalty, a penalty chosen for him by the trial jury. He expressed it directly, as he lowered his head and looked down at the floor, unable to continue talking.

Clearly, the evidence presented in Dr. Allen's report should be presented to a jury for their consideration as mitigation. Especially the fact Petitioner is remorseful, which is a powerful mitigating circumstance. Additionally, since Dr. Allen was not allowed to testify at the hearing her opinions were not considered by the trial court when it issued its Findings of Fact and Conclusions of Law (hereinafter "Findings") and undermines its reliability.

D. 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.... [T]he 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. Wood's jurors a life sentence according to the Pardon and Parole Board is considered to be forty-five (45) years and Mr. Wood 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

E. Conclusion.

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). The facts and law presented above is either newly discovered evidence or a new rule of law warranting a new trial.

PROPOSITION III
PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE AND TRIAL COUNSEL IN VIOLATION OF 6th, 8th, AND 14th AMENDMENTS, AND ARTICLE II, §§ 7, 9, AND 20 OF THE OKLAHOMA CONSTITUTION.

Pursuant to 22 O.S. § 1089(C)(1)&(2), the only issues that may be raised in a capital post-conviction application are those that "were not and could not have been raised in a direct appeal; and "support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent." Pursuant to 22 O.S.§1089(D)(4)(b), the Court of Criminal Appeals shall review the post-conviction application to determine whether 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." *See* 22 O.S.§1089(D)(4)(b).

The Supreme Court has determined an ineffective assistance of counsel claim has two components: a defendant must show that trial counsel's performance was deficient, and the deficiency prejudiced the defense. *Strickland*, 466 U.S. 668 at 687, 104 S.Ct. 2052 at 2052, 80 L.Ed.2d 674 (1984). To establish deficient performance, a petitioner must demonstrate trial counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. at 2052. The Court has declined to articulate specific guidelines for appropriate attorney conduct and instead has emphasized "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* In *Williams v. Taylor*, 529 U.S. 362, 120

S.Ct. 1495, 146 L.Ed.2d 389 (2000), the Court reiterated counsel has an obligation to "conduct a thorough investigation." *Id.* at 396, 120 S.Ct. 1495 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed.1980)). *See also Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005)(holding even though the defendant and his family had suggested to defense counsel no mitigating evidence existed, counsel was still bound to obtain and review material the prosecution would rely upon in aggravation.)

In order for counsel's inadequate performance to constitute a 6th Amendment violation, the defendant must show counsel's failures prejudiced his defense. *Id.* 466 U.S. at 692, 104 S.Ct. 2052. In *Strickland*, the Court held to establish prejudice a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052.

In addressing appellate ineffective assistance of counsel, the Tenth Circuit in *Cargle v. Mullin,* 317 F.3d 1196,1202 (10th Cir. 2003) held,

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

Id. at 1202 -1203 (10th Cir. 2003). Petitioner submits due to the "expedited" review afforded under

22 O.S. §1089(A), there are many instances, such as this, wherein the post-conviction application is filed while the Capital Direct Appeal is still pending. Under these circumstances arguing ineffective assistance of counsel is rather difficult when the direct appeal is still being reviewed and/or when issues have been remanded to the district court on direct appeal. Despite this procedural hurdle, Petitioner submits his appellate counsel were wholly ineffective because they 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. Capital post-conviction counsel respectfully requests Mr. Wood's convictions and sentences be reversed, and his case remanded for new trial, or new sentencing,[5] or a new direct appeal.[6]

A. Appellate counsel failed to supplement record with impeachment evidence.

1. Trial counsel has been suspended from the practice of law.

Appellate counsel failed to supplement the direct appeal filed in Mr. Wood's case with relevant documentary evidence from the Oklahoma Bar Association that trial counsel Mr. Albert has been suspended indefinitely from the practice of law. *See* Ex. 5. Said suspension took effect on April 24, 2006, in a confidential proceeding before the Oklahoma Supreme Court. His suspension occurred almost two months after he testified at Petitioner's hearing. Clearly, this is relevant information this Court should consider before issuing its opinion on direct appeal. Additionally, this Court, at Petitioner's oral argument, commented Mr. Albert was an experienced attorney and seemed unaware of his suspension and appellate counsel should have informed the Court at that time.

2. Transcript from contempt hearing.

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[5] This Court in *Garrison v. State*, reversed and remanded for a new sentencing due to "the waiver of these issues by appellate counsel." 2004 OK CR 35, 103 P.3d 590, 620.

[6] *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); *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 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); and *Mason v. Hanks*, 97 F.3d 887, 892 (7th Cir. 1996).

As discussed in Proposition II(A), on March 9, 2006, a contempt hearing was held in an Oklahoma County District Court regarding Mr. Albert. The evidence adduced at this proceeding is crucial since it occurred just days after Mr. Albert testified at Petitioner's hearing on February 27, 2006, as to whether he provided effective assistance of counsel at trial. During his contempt hearing, Mr. Albert admitted he has a problem, which appears to involve alcohol and possibly even drugs. Furthermore, the evidence reveals a concern by a district court as to Mr. Albert's representation of his clients and the fact he has not even seen one of his clients in close to two years. Clearly, this information would have assisted this Court in determining whether Mr. Albert rendered effective assistance of counsel in Mr. Wood's case. Appellate counsel should have supplemented his direct appeal with this evidence for this Court's consideration.

B. Appellate counsel provided ineffective assistance of counsel at evidentiary hearing.

1. Failed to clarify the number of cases that had resulted in a sentence of death.

At the evidentiary hearing, Mr. Albert testified he had tried between 13 to 15 capital cases with only 3 cases resulting in a sentence of death.[7] (Vol. II Tr. 260) Although counsel requested the court to take judicial notice of a handwritten list of 8 cases wherein Mr. Albert was listed as counsel and a death sentence had been returned, the trial court denied this request.[8] (02/03/06 Tr. 409-12) Petitioner submits it was error for appellate counsel not to supplement the record documentation verifying Mr. Albert was counsel of record in the following 7 cases out of Oklahoma County- *State of Oklahoma vs. James Fisher*, CF-83-137; *State of Oklahoma vs. James Lawrence Mitchell*, CF-2000-4712; *State of Oklahoma vs. Ronald Clinton Lott*, CF-87-963; *State of Oklahoma vs. Terry Lyn Short*, CF-95-216; *State of Oklahoma vs. Richard Stephen Fairchild*, CF-93-7103; *State of Oklahoma vs. Keary Littlejohn*, CF- 2002-2384; and one case out of Stephens County- *State of Oklahoma vs. Johnny Black*, CF-99-1. (*See* Exs. 14(A-H))

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[7] The State argued the list was inaccurate and assured the court Mr. Albert had not been counsel on 2 of the 8 cases. This representation by the State was inaccurate and misleading and is addressed in Proposition IV (F).

[8] Although appellate counsel requested their investigator to bring back relevant documentation as to this inaccuracy, which she did, this evidence was never presented to the trial court. (*See* affidavit of investigator- Ex. 13)

2. Failed to utilize trial transcripts to cross-examine counsel.

At the evidentiary hearing, trial counsel testified he would have called a number of other mitigating witnesses had Petitioner allowed him to do so. He recalled, "I remember putting on the mother. She got very emotional. Okay? And we were going to put other people on. And I remember he said that he didn't want to do it to family anymore." (Vol. II Tr. 245) Mr. Albert stated he acquiesced to his client's wishes. The trial court then inquired directly of Mr. Albert, "after the testimony of Linda Wood, Mr. Tremane's mother, are you saying that your client said, no more, that's enough? Is that..." Mr. Albert interrupts, with "Family...I don't blame him, yes." (*Id.* at 288)

However, after reviewing counsel's second stage opening, it is apparent he never intended to call anyone else because he stated to the jury they would only hear evidence from Andre Taylor, Linda Wood, and Dr. Ray Hand. (04/05/05 Tr. 12) Sadly, this information was readily available and would have served as powerful impeachment evidence. Unfortunately, since Mr. Albert's self-serving testimony at the hearing went unchallenged, the court, in its Findings at ¶ 11 stated as fact, "[f]ollowing the testimony of Appellant's mother, Linda Wood, Appellant demanded that no more family members be permitted to testify in mitigation." As to this Court's question number 1- "[w]hether the evidence identified in the application was reasonably available to trial counsel in preparation for trial," the trial court responded "[a]lthough attempts by trial counsel to locate Appellant's natural father were unsuccessful, he in all probability would not have testified had he been contacted due to Appellant's desire to have no further family members testify following his mother's testimony." (Findings at page 11) Since this information is clearly incorrect, it renders the trial court's Findings unreliable.

3. Failed to show trial court was concerned trial counsel was unprepared.

Before Petitioner's trial began, the court voiced its concern counsel was not ready to proceed with Petitioner's trial. The trial court inquired "[h]ave you had adequate time to get prepared and so forth?" Mr. Albert responded he was ready for trial. (03/29/04 Tr. 5-6) Appellate counsel should have confronted Mr. Albert about his colloquy with the court, which would have reminded

the trial court of its concerns pre-trial as to whether or not counsel was ready to proceed to trial.

4. Failed to prepare for the testimony of Raymond Gross, Jr.

a. Failed to cross-examine Mr. Gross with divorce decree.

Appellate counsel called Petitioner's father Raymond Gross, Jr., as a witness at the evidentiary hearing. (Vol. I Tr. 16) He testified he had not been called as a witness, nor contacted by any member of the trial team. He expressed he would have been willing to testify. (*Id.* at 16) Although Mr. Gross stated his marriage to Linda Wood was "pretty rocky," he denied most of the allegations of abuse Ms. Wood and his sons testified had occurred. (*Id.* at 19) Although appellate counsel had in their possession a copy of the Gross' divorce decree which documented the physical abuse and the fact a permanent restraining order was in place against Raymond Gross, it was not utilized. (*See* Ex. 8-C, page 2 at ¶ 5) It also provided the children would be exchanged between the parties at the Stillwater Police Department and the Logan County Sheriff's Department . (*Id.* at ¶ 15)

b. Failed to provide trial court with relevant divorce documents.

Although appellate counsel had a copy of the Gross' "Decree of Divorce," they did not have a copy of the parties divorce file. (*See* Ex. 8 (A-C)) The "Petition for Divorce," Ex. 8-A at ¶ 4, detailed Linda Wood Gross in 1988 sought a divorce on the grounds of incompatibility and "extreme cruelty." The petition states the "defendant is a violent man and has kept the plaintiff from seeing her children" and she requested a temporary order restraining the defendant from harassing her or her children. (*Id.* at ¶ 15) A "Temporary Order" provided the children will be exchanged in front of the Stillwater Police Department or at the Logan County Sheriff's Department. (*See* Ex. 8-B)

c. Failure to investigate Raymond Gross' criminal background.

Appellate counsel also failed to investigate Raymond Gross' criminal background. If appellate counsel had performed this investigation, he would have discovered Mr. Gross had a prior criminal conviction for Feloniously Pointing a Weapon at Linda Wood and Acie A. Anderson in Payne County Case No. CRF-88-188. The Preliminary Information filed detailed Mr. Gross on June 15, 1988, "feloniously and without lawful cause point a .44 caliber Magnum Smith & Wesson

revolver at one Linda Jewel Gross for the purpose of threatening and intimidating her, and with the unlawful, malicious and felonious intent then and there on the part of said defendant to injure the said Linda Jewel Gross physically or by mental or emotional intimidation," and stated the identical language as to Acie Anderson. (*See* Ex. 12 A-C) Petitioner obtained the Case Report issued by the Oklahoma State University Police Department which further described this offense as an attempted abduction of ex-wife. [9] It noted both Linda Gross and Acie Anderson had cuts and abrasions from being pistol whipped and Mr. Gross had told them "I'm going to shoot you." (*See* Ex. 15)

d. Failed to request records detailing the abuse Ms. Wood suffered.

At the evidentiary hearing Linda Wood testified about the abuse she suffered at the hands of Raymond Gross and about their "horrific" relationship. (Vol. I Tr. 112) She expressed he was "very possessive, very jealous, very controlling" and he alienated her from contact with her family. (*Id.* at 113) He monitored her every move from going to the grocery store to going to work. He told her what she could and could not wear and accused her of having affairs. (*Id.*)

Ms. Wood testified one time he took her out into the middle of nowhere and told her to "give my baby a kiss good-bye because that was the last time I would see him, he was going to kill me." (*Id.* at 115) Another time he grabbed her by her ponytail and slung her into a patio glass window. (*Id.* at 116) She expressed, "he has hit me with his fist. He has hit me with a pipe wrench. He took a gun to my head and took all the bullets out but one, and actually pulled the trigger. And when the gun did not go off, he has hit me in the head with his gun." (*Id.*) Many of the physical incidents occurred in front of her children. She recalled one instance when he tied her to a chair with extension cords and poured alcohol on her and then threatened to set her on fire. (*Id.* at 117) She said he had handcuffed her to the car door several times. He did this so she could not protect herself as he beat her face. (*Id.*) Another time drug her down the road as she was cuffed to the car door. (*Id.* at 117-18) She testified she has a scar on the top of her head from when he hit her with the handle

[9] Petitioner received additional police reports from the Stillwater Police Department regarding this incident. These records are to the Amended Application as Exhibit 21.

of the gun. (*Id.* at 116) She has permanent whiplash from her head going backward so many times and permanent damage to the joints in her shoulders from her arms being bent behind her. She stated she has two fake front teeth from when he knocked them out. (*Id.* at 119)

Unfortunately, all the above information was elicited from Ms. Wood without any documentary support. Although appellate counsel discussed the divorce decree with Ms. Wood, it was not admitted as a separate exhibit. The State on the other hand pulled one DHS record from the volumes of records and questioned Ms. Wood about how DHS had concluded she had made a invalid complaint about him abusing her and her children. (*Id.* at 130-31) The State also made light of the fact Ms. Wood reported very few of the incidents to the police since her husband was a police officer. The State also pointed out no police reports had been provided to the court to detail the abuse, nor medical records in regards to her injuries, nor documentation that she had stayed at any of the battered women's shelters. (*Id.* at 132-33, 135, 141)

Petitioner has since requested records from the battered women's shelters where she stayed. Although, most of the shelters expressed they do not keep records for that length of time, one shelter, the Stillwater Domestic Violence Services, Inc., reported Linda Wood (Gross) "was sheltered by SDVS for one day on 5-16-88, and referred to another shelter on 5-25-94." (*See* Ex. 16) Petitioner also obtained a letter and bill for services rendered on July 29, 1996, by dentist Kelly Brown who made Ms. Wood's fake two front teeth. (*See* Ex. 11)

The most pertinent information Petitioner was able to locate are Ms. Wood's requests for Protective Orders against Raymond Gross out of Tulsa County, Oklahoma for 1986 and 1987. These documents are attached as Exs. 9 and 10. In the1986 "Petition for Protective Order," Linda Wood reported under question 7: "My husband hit me 4 times with his fist in my face. He verbally abused me. He also physically forced me to have intercourse against my will and to commit sexual acts against my will. He also threatened to kill me and to take my children. This has been a daily occurrence for sometime." (*See* Ex. 9-A)

An "Emergency Protective Order" was granted which reflected she left her home, called the

police, and visited a shelter. She checked the following abuse had occurred: slaps, kicks, punches, burns, choking, physical abuse while pregnant and he has used a weapon (gun) to abuse her. (*See* Ex. 9-B) As to the injuries received, she checked: bruises, concussions, cuts, internal injuries, complications with pregnancy, burns, and broken bones. As to medical care she received she checked: self care, doctor's care, emergency room, hospitalization, and surgery, which she wrote "had to have jaw wired." She also checked he has threatened to kill her and has access to guns. Unfortunately, the "Emergency Protective Order" was dismissed because she failed to appear to prosecute it. (*See* Ex. 9-C) This is understandable Raymond Gross was the Chief of Police of the Langston Police Department as detailed in the emergency order.

In 1987, Ms. Wood filed another "Petition for Protective Order" and listed the following:

> Raymond threatened to kill me. He kicked me in my left leg and Raymond hit me in the back of my head. Raymond forced me to have sexual intercourse against my will. (Raymond) He forced me to preform sexual acts against my will. In the past Raymond has fractured my jaw, knocked out my teeth, handcuffed me to a car and beat me. Raymond has put a gun to my head, hit me with a gun, hit me in the mouth with handcuffs. Chained me to a swingset in an abandoned park and left me there overnite. Raymond has sodomized me. Tied me to the bed with extension cords. Threatened my life with a gun, a knife, a pipe wrench. And Raymond has forced me to have sex and perform sexual acts everyday for 1 entire year. (*See* Ex. 10-A)

An "Emergency Protective Order" was granted which reflected Ms. Wood had contacted a crisis line. (*See* Ex. 10-B) She checked the following abuse occurred 3 or more times a month: slaps, kicks, punches, choking, and throwing of objects and he has used a weapon (gun) and handcuffs to abuse her. As to her injuries, she checked: bruises, concussions, cuts, and broken bones. As to medical care received, she checked: self care, doctor's care, emergency room, and hospitalization. She also checked he had threatened to kill her and had access to guns. Although a Protective Order was initially granted it was dismissed after because neither party appeared. (*See* Ex. 10 C & D) However, this can be explained by the fact Ms. Wood filed for divorce at the end of November 1988.

e. Conclusion.

Since none of the evidence listed above was presented at this hearing, the court reported the following as to the testimony of Raymond Gross:

> Raymond Gross' testimony was in direct conflict with the abuse outlined in Appellant's Application. DHS records provided to this Court indicate that reported abuse by Linda Wood was unfounded and vindictive. Raymond Gross' testimony was consistent and not impeached and was found to be credible by this Court. It would not have been beneficial for Appellant to call Raymond Gross as a witness in mitigation at his trial in order to establish that Appellant had grown up in an abusive home. Raymond Gross' testimony provided just the opposite.

(*See* Findings, page 2 at ¶ 2.) Clearly, if the court had been presented with this information, it would not have concluded the abuse reported by Linda Wood was "unfounded and vindictive." Petitioner submits appellate counsel provided ineffective assistance of counsel for not bringing these matters to the trial court's attention at the hearing, for not requesting these records to support Ms. Wood's allegations of abuse at the hearing and for not impeaching Mr. Gross with the documents that were available. This failure by appellate counsel undermines the reliability of the trial court's Findings. This Court must reverse Petitioner's case for a new trial or for a new evidentiary hearing.

5. Failed to mention trial counsel never stated he had not provided ineffective assistance of counsel.

At the evidentiary hearing, Mr. Albert testified about his performance at Petitioner's trial and admitted "I could have done better." (Vol. II Tr. 246) Since Petitioner's trial he has removed himself from the Oklahoma County list for counsel appointments in death penalty cases. (*Id.* at 247) He testified he did not have the time to adequately prepare in Petitioner's case.[10] (*Id.* at 248) As to second stage, Mr. Albert testified he did not adequately prepare a mitigation case to effectively represent or defend Petitioner. (*Id.*) He testified he could have been "better and more effective," had he been more involved. (*Id.* 248-49) Mr. Albert agreed it was his responsibility and not Dr. Hand's to develop second stage. (*Id.* at 249) He testified his affidavit contained the truth as to the steps he took to prepare for trial. (*Id.* at 252) He admitted he signed his affidavit and even made corrections to it before he signed it. (*Id.* at 246, 255-57, 268)

Although appellate counsel elicited this testimony from Mr. Albert, he failed to state in his

[10] It is unfortunate he testified at the evidentiary hearing he was not ready for trial. Especially since the court had pre-trial inquired whether he was ready to proceed. *See* Proposition III(B)(3)

Supplemental Brief that Mr. Albert was does deny signing the affidavit, or state the information contained in it is not truthful. As one would expect, Mr. Albert offered lots of explanations during the hearing that can best be described as professional self-preservation; however, he never once testified the affidavit he signed was untruthful. Appellate counsel's failure to provide this critical information to this Court, leaves the insinuation trial counsel provided effective assistance of counsel. However, that was simply not the case.

6. Failed to list all the factual inaccuracies contained in trial court's Findings.

Petitioner submits the trial court's Findings are clearly not supported by the trial record or the record developed at the hearing. Unfortunately, many of these inconsistencies were not addressed by appellate counsel in his Supplemental Brief. For the convenience of this Court, Petitioner will address the relevant factual inconsistencies in the order in which the trial court addressed them.

The trial court, in its Findings on page 4, erroneously found Dr. Ray Hand, the psychological expert who testified for Petitioner at trial, had the records from Stillwater Public Schools, Meadowlake Hospital, Office of Juvenile Affairs, DHS, and Butner School System. The trial court stated, "much of this information was made available to the jury" at trial. However, the testimony presented at the evidentiary hearing does not support this finding. Bieva Holladay, the records sponsor from Stillwater Public Schools, and Linda Marshall, the records representative for Butner Schools in Cromwell, consistently testified no request for records pertaining to Petitioner had been received prior to the request made by the appellate team. (Vol. I Tr. 10, 12, 13-14; 45) While the State attempted to give the appearance the Oklahoma Office of Juvenile Affairs ("OJA") records were contained in the DHS records since OJA used to be a part of DHS, it is clear from the testimony of OJA representative Helen Killian, their records would only have been received per a direct request to them and not a general request to DHS. (Vol. I Tr. 41-43) Ms. Killian, too, confirmed the only request for records received by OJA had been made by the appellate team.(Vol. I Tr. 86-87) It is clear Dr. Hand did not have the voluminous records from OJA much less the school records since

they were never requested in the first place.[11]

The trial court at ¶ 2 of its Findings also determined it would not have been beneficial for Appellant to have called his father, Raymond Gross, as a witness in mitigation at his trial. Although Mr. Gross did admit to some physical violence, his testimony regarding Petitioner's relationship with his older brother Zjaiton Wood, a.k.a. Jake, would have provided powerful mitigation. Mr. Gross testified Zjaiton had a strong influence over Petitioner and he explained "If Zjaiton tells Termane, 'Let's go ten blocks on your kneecaps,' Termane will follow him." (Vol. I Tr. 22). Also salient is his testimony he cares for Petitioner. (Vol. I Tr. 23).

The trial court's determination "Appellant provided no evidence that corroborates the claim made by Linda Wood that Appellant had been abused by his father," was clearly contradicted by the testimony presented by Zjaiton and Andre Wood. Andre testified Raymond Gross was abusive to all of his children, including Petitioner, and he was especially abusive to Linda Wood. (Vol. I Tr. 158) Zjaiton confirmed Raymond Gross was abusive to Petitioner. (Vol. II Tr. 331-332).

The court at ¶ 3 of its Finding concluded the evidence Dr. Ray Hand provided to the jury regarding the foster care Petitioner had received was adequate. However, the evidence presented by Petitioner's former foster mother Jan Davis, provided personal observations of his behavior. Although Dr. Hand may have testified Petitioner was at one time placed in foster care and he was successful during placement; Jan Davis offered first-hand accounts of his success. Jan Davis saw him act as a peacemaker in her home with the other foster children. (Vol. I Tr. 79) She expressed he had good manners and complied with her rules. (*Id.* at 79-80) He "seemed to do well in school. He loved football, basketball. Took on all the sports he could." (*Id.* at 80) Clearly, Dr. Hand's testimony from a stale review of records could not replace the personalization Ms. Davis provided. (*Id.* at 81-82)

The trial court at ¶ 4 of its Findings stated the testimony of Petitioner's former juvenile mentor Matthew Netherton, was "of little value as mitigation evidence," and based this on the

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[11] Counsel testified he had provided two to three hundred pages of records to Dr. Hand. (Vol. II Tr. 244). As this Court can see, the OJA records, which were admitted as Def. Exs. 3 & 4, are voluminous and in excess of 300 pages.

inconsistencies between his testimony he had a high opinion of Petitioner and saw him do many positive things, with his handwritten notes of his behavior. However, Mr. Netherton's notes must be viewed in the context Mr. Netherton mentored Petitioner (Vol. I Tr. 89). Mr. Netherton worked with troubled youth and his notes are simply a reflection of the ups and downs the treatment process. Mr. Netherton's testimony concerning Petitioner was very positive. He testified he volunteered for the Special Olympics, and spoke in front of a juvenile delinquency class. (*Id.* at 98) Regarding Petitioner's involvement with juvenile delinquency class, Mr. Netherton found, "The kids loved him. They asked him questions. He didn't want to leave. By the end of the day, he wanted them to keep asking him questions because he felt – he felt that he could help people. That's what he was doing with those students." (*Id.* at 99) When asked if his opinion of all the hundreds of kids he had mentored was as high as his opinion of him, Netherton replied, "No, not at all." (*Id.* at 105, 106).

Mr. Netherton also testified during the two years he mentored him, his father was never around. (*Id.* at 90, 93) He thought Linda Wood was more of a friend to her children than an authority figure, and found it was "fairly common" for Petitioner to be left in the care of his older brothers. Mr. Netherton stated he was personally scared of Jake Wood. (*Id.* at 94-95).

The trial court at ¶ 7 of its Findings determined Andre Wood's testimony at the hearing was consistent with his testimony at the jury trial and therefore, "the jury at Appellant's trial had the benefit of any mitigating content of his testimony." This finding is completely unsupported by the trial record. Andre was called by the State as a first stage witness. His testimony did not address any mitigation. Therefore, **none** of the mitigating testimony Andre provided at the hearing had been received by the jury at Petitioner's trial. (Emphasis added.)

Andre testified at the hearing that "growing up with my dad was pretty rough... He was a very mean man. Very, very mean. He was abusive to me, to both my brothers, and to my mom, especially my mom." (Vol. I Tr. 157-58) He testified his father put his mother in the hospital once; he broke her jaw and fractured three of her ribs; he had handcuffed her to a car and drug her down a highway, and he had even poured alcohol on her and threatened to set her on fire. (*Id.* at 158)

Andre testified Petitioner was physically abused by his father and recalled an incident where his dad "snatched him [Termane] up from the table and took a leather strap that you would sharpen a razor on and beat him, beat him pretty good. I mean to the point where he had bruises and welts and marks all over his legs and back." (*Id.* at 161)

The court also found in ¶'s 8 and 10 the testimony of both Wesley Welch and Michael Hiltzman, former friends and foster brothers of Petitioner, was not credible. It appears the court made this finding based upon the witnesses' felony criminal records. Petitioner submits the jury may have found otherwise as they had clearly accepted and given some weight to the testimony of another convicted felon called at Petitioner's jury trial –codefendant Brandy Warden.

The trial court at ¶ 11 of its Findings addressed the testimony of trial counsel John Albert. First, the court found, "Mr. Albert attempted to locate Appellant's natural father, Raymond Gross, but was unable to locate him." However, direct appeal investigator Brenda McCray testified it was not difficult to locate Mr. Gross. She simply asked his son, Andre Wood, who told her where he lived. (Vol. II Tr. 300). The court also determined Mr. Albert would have attempted to interview any potential witnesses given to him by the Appellant. This is clearly an attempt to shift the responsibility of case investigation onto Petitioner. Furthermore, and more importantly, Mr. Albert testified he relied upon Jack Stringer, an investigator employed by the Oklahoma Indigent Defense System (hereinafter "OIDS"), as his investigator. (Vol. II Tr. 241-42) Jack Stringer on the other hand testified he was assigned by OIDS to work only on the behalf of Zjaiton Wood. (Vol. II Tr. 229) Further, no one ever asked him to do any investigative work on Petitioner's case because a conflict of interest existed between the Wood brothers. (*Id.* at 229-30)

The court determined in ¶ 11 of its Findings Mr. Albert had in his possession, prior to trial, all of the same records gathered by counsel for Appellant's co-defendant, Zjaiton Wood. Then contradicted its own findings in ¶ 14 by stating "no one on the trial team for the co-defendant provided anything directly to Appellant's trial team." Lead counsel for Zjaiton, Ms. Wayna Tyner of OIDS, testified about this issue at the evidentiary hearing. Ms. Tyner testified a conflict of interest

existed between Zjaiton and Termane. (Vol. III. Tr. 396) Ms. Tyner clearly expressed there was never a time when she or anyone else on Zjaiton's defense team conducted investigation on behalf of Termane. (*Id.*) Ms. Tyner explained both trial counsel for Zjaiton and for Wood possessed some letters purportedly written by Brandy Warden. Additionally, Ms. Tyner testified counsel for Termane should have received some of the same DHS records she received since Termane's counsel had joined in her motion for their production. (*Id.* at 399) However, no other items of evidence or investigation were shared. (*Id.* at 400)

The trial court also determined that although Mr. Albert had not impeached the State's star witness Brandy Warden "with some letters allegedly written by her and sent to Appellant," he had presented to the jury all the information contained in them. Petitioner submits, had trial counsel conducted handwriting analysis on the letters prior to trial, not only would the pertinent content of the letters have come before the jury, but also, Ms. Warden would have been caught in a false statement before the jury, since she denied writing these letters at trial. The impeachment value was not just in the content of the letters, but also in demonstrating, live and in front of a jury, Ms. Warden committed perjury, which did not occur at Petitioner's trial.

The trial court at ¶ 13 of its Findings determined the testimony of handwriting expert Pat Tull would not have been admissible since Ms. Tull did not take a handwriting exemplar from Brandy Warden. Since appellate counsel did not seek an order from the trial court requesting a handwriting exemplar,[12] Tull utilized, as the "known" handwriting sample for Ms. Warden, a letter signed "Brandy Warden" that was filed in her court file for consideration at her sentencing.[13] Pat Tull concluded the known letter by Ms. Warden from the court file was written by the same person who sent the letters in question to Petitioner while he was in county jail. (Vol. II Tr. 349-50)

The court's Findings in ¶ 12 as to the testimony of Zjaiton Wood is, once again, contrary to

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[12] In sub-proposition B(8) Petitioner argues appellate counsel was ineffective for not seeking this order.

[13] At Ms. Warden's sentencing hearing, her counsel represented this letter was written by Ms. Warden. A copy of the known letter was admitted as Defendant's Exhibit 10 at the evidentiary hearing. *See* Exhibit 13 ¶ 6, affidavit of investigator Brenda McCray for further details.

the evidence presented. Zjaiton testified in the guilt/innocence phase of Petitioner's trial. His testimony concerned only first-stage issues. Therefore his hearing testimony, which included details of the physical and mental abuse he and his family suffered at the hands of their father cannot be characterized as "substantially the same" as his first-stage jury trial testimony. (Vol. II Tr. 331-32) Zjaiton testified, "I just wanted to show him [Termane] that the world we lived in is a world of cruelty." (*Id.* at 337) He admitted he physically beat Petitioner. (*Id.* at 335) He also expressed he loved him and he was his best friend. (*Id.* at 337)

The trial court, in addressing juror Jera Burton's testimony in its Findings at ¶ 15, completely disregarded her testimony because she could not remember the mitigation presented at trial and because the State had not been present when she was shown the affidavits collected by the appellate team. Petitioner submits her testimony should not be so readily dismissed. Ms. Burton testified she would have liked to have heard the type of evidence presented in the affidavits and it would have affected her decision, "I just probably would have held my ground as far as the sentencing goes," and this evidence made her look at him as a different person. (Vol. III Tr. 424-25, 414)

Clearly, the factual contradictions and inconsistencies outlined above, render the trial court's Findings and ultimate conclusions suspect and unreliable.

7. Failed to provide this Court with Dr. Allen's findings.

As discussed in Proposition I, the trial court would not allow Dr. Allen to testify at the hearing. Dr. Allen is the one witness who reviewed the hundreds of pages of mitigation-related records and court documents collected by the appellate team, and interviewed and/or reviewed affidavits by family, friends, and mentors. She is the one witness would have been able to explain how all this new evidence would have effected the outcome of the trial had she been allowed to testify. Although Dr. Allen's report was admitted as Def. Ex. 8, appellate counsel failed to include in the Supplemental Brief the trial court erred by not allowing her to testify and failed to provide what she would have testified to had she been allowed. (*See* Ex. 3)

Petitioner submits had Dr. Allen been allowed to testify she would have conveyed to the

court the following information pulled from these headings in her report:

> **Early Childhood Development and Experiences:** [his parents] together and individually, categorically failed him... His development took place amid consistent poverty, recurring moves, normalized violence and criminality both inside and outside the home, abject emotional and physical neglect, and ongoing experiences of racial hostility and rejection from both Caucasians and African-Americans. Finally, his parents allowed the criminal gang- first brought to him through his mentally ill and extremely violent older brother, Jake- to take over his upbringing at around age 11.... Mr. Wood's most basic needs continually went unmet.... The strongest indicator of Tremane's capacity at that time to function as a healthy, law-abiding young man were the consistent reports of his pro-social development and notable successful rehabilitative behaviors while in residential care. However just as remarkable were the losses in that progress as soon as he was returned to his home and community, which was overwhelmingly structured by gang violence and parental chaos. And that was the pattern of his life until he finally surrendered to the emotional and financial support that criminal gang activity provided him as an older teenager and adult.
>
> **The Defendant's Parents Failed:** The most significance force in Tremane's early life are his memories (and their corroboration by other family members) of the many incidents of extreme violence of his father toward his mother.... Not only was extreme domestic violence a central experience of the three boys: when the boys took their mother's side and tried to protect her, their father turned his violence on them, beating them sadistically.... Tremane today can easily recall the potent combination of terror, anger, and helplessness he felt as a child being forced to witness such brutality against his mother, as spilling over to himself and his brothers. Children's experience of domestic violence is well-known in the field as child abuse by proxy. It can be more pernicious in a child's development than general child abuse because it conveys to the child that not only is their home not safe, but that adults are inadequate in the world.... It is of course, the major source of his diagnosis of Post Traumatic Stress Disorder and Generalized Anxiety Disorder....When the parents split for good when Tremane was 8 years old, Linda was unable to earn a good enough living for her family and was not receiving child support. [On almost all of the treatment documentation from Tremane's life with his mother, his family's whereabouts are stated as unknown.] Linda Wood admits that she was away from home working or going to school all the hours of the day except for sleeping. The boys were left completely on their own and the neighborhood did not appreciate it in the least. CPS call about lack of supervision went by without effective responses. They were considered "outcasts" (Linda Wood's word) in the neighborhoods they lived in because of the behaviors of the youngest sons, Linda's absence, and her inclination to blame everyone else in the neighborhood but herself and her children. She taught them steadily to believe that others were to blame for their problems and that most of it was due to racial prejudice.... Linda Wood stated in her mitigation affidavit that she, indeed, made many mistakes with her children and she stated that her children "grew up in an environment of terror, deprivation and exclusion."

Dr. Allen opined Mr. Wood suffered from attachment disorder because his parents were unavailable. She stated his brother Jake was the closet figure of attachment in his early life and then later the criminal gang. Dr. Allen also determined by the time Tremane was 11, Jake had become

the defacto father and "head of the household" even up to the time of this crime. Because Jake was the his only functional bond, she reports he would endure his "bullying and beating." Dr. Allen described his mother as sadly pathetic and that the records consistently revealed he did well while in the program, but that once he was returned to his mother's home he reintegrated into the gang.

As for Tremane's "Neurological and Psychiatric Issues," Dr. Allen's review of the records documented depression, dependency, PTSD and generalized anxiety. As for "Race as a Consideration in Development" Dr. Allen explained the biracial child is placed in a rather unique situation because they live in both the "white" and the "black" world and have the expectations and rejections of both. She described when Tremane lived in a predominantly white town he was often rejected due to his skin color. However, when he lived in a black community he would be rejected because he "wasn't black enough." She concluded this section with, "I present this duality as a fundamental stressor in the defendant's life, and one for which he was never responsible and could not overcome on his own."

Her report listed his personality strengths as his "abiding love for his mother, brothers, and even his father whom he is attempting to forgive" and he has "strong love for his two children and a desire to be the best parent he can be under the circumstances." She reported "Tremane expressed sadness, feelings of helplessness, and certain remorse," as to the victim's murder. Finally, Dr. Allen felt he could positively conform to prison life.

Clearly, Dr. Allen should have been allowed to testify at the evidentiary hearing. Her testimony is clearly more thorough and detailed than Dr. Hand's. Dr. Allen's report provided mitigating circumstances not addressed by Dr. Hand, such as remorse. Appellate counsel should have provided this information in his Supplemental Brief.

8. Failed to obtain an order for handwriting exemplars from Brandy Warden.

Appellate counsel argued trial counsel had been ineffective for failing to properly impeach state's star witness, Brandy Warden, with a handwriting expert. Although Ms. Warden was the only witness that placed Petitioner at the crime scene, trial counsel had in his possession two letters,

purportedly written by Ms. Warden to Petitioner, wherein she stated she knew he did not murder the victim. However, Ms. Warden denied writing these letters. Since trial counsel had not hired a handwriting expert, his attempts to impeach her fell short. In closing argument, the State capitalized on trial counsel's failure to utilize a handwriting expert by pointing out if counsel had believed Ms. Warden had written those letters, he would have hired an expert to prove it. (04/02/02 Tr. 182-83)

On direct appeal, appellate counsel hired Pat Tull, a handwriting expert who expressed Ms. Warden had in fact written those exculpatory letters. However, Ms. Tull made her comparison of the questioned letters with a known letter purportedly written by Ms. Warden. At the time Ms. Tull made her analysis, Petitioner was on appeal to this Court, therefore the trial court was without jurisdiction to issue an order requesting Ms. Warden to provide handwriting exemplars. However, once Petitioner's case was remanded, appellate counsel should have sought this order. Since this was not done, the court in its Findings in ¶ 13 disregarded Ms. Tull's opinion because "[s]he did not take a handwriting exemplar from any person, including Brandy Warden, in connection with her comparison." Had Ms. Tull been provided with handwriting exemplars from Ms. Warden, the court would not have been able to completely ignored this damaging evidence to Ms. Warden's credibility.

9. Failed to admit videotape produced by the Stillwater Police Department .

Sandra Marshall, a former probation and parole officer with the OJA, testified she had been assigned to work with Petitioner's family while they were living in Stillwater, Oklahoma. (Vol. II Tr.183-85) She saw him once a week for about a four month period. Ms. Marshall explained some of the issues he was facing as young man growing up in Stillwater was the low tolerance for his family by the community, school, and by the Stillwater Police Department. (*Id.* at 187) However, when Ms. Marshall attempted to elaborate on each of the issues he was facing, such as "being biracial in Stillwater, Oklahoma, in the early '90's was probably not a real easy thing..." or having the police stop them every time they saw them on the street, her testimony was met by an objection by the State which was sustained by the trial court. (*Id.* at 187, 191)

Since appellate counsel was not allowed to develop Ms. Marshall's testimony or even present

the testimony of Dr. Allen, counsel should have offered into evidence a videotape made by the Stillwater Police Department which featured the Wood brothers.(*See* Ex.13) This videotape titled "Gangs in Stillwater" shows firsthand how the police viewed the Wood brothers, and the low tolerance the community had for them, which were the very obstacles Ms. Marshall testified prevented Petitioner from successfully completing his treatment/probation plan. (*See* Ex. 17-DVD)

10. Failed to present evidence Brandy Warden's sentence was reduced.

At Petitioner's trial, Brandy Warden testified she had received a deal from the State. She received 45 years for accessory to murder and 10 years for conspiracy to commit a felony. (04/01/04 Tr. 132, 201) She testified she was not charged for her participation in the robbery of the LaFranca's Pizza, although her other co-defendants were charged. (04/05/04 Tr. 21) On April 15, 2004, just 11 days after testifying in Petitioner's trial, Ms. Warden went before the trial court on her application for a one year review in which her sentence was modified from 45 years to 35 years. Interestingly, two orders were filed into the record as to her modification. The first order filed on April 15, 2004, simply reflected the outcome of the proceeding; however the second order filed on April 19, 2004, reflected her sentence modification was "granted over the strenuous objections of the State." (*See* Exs.18-A & B) There is no transcript of this proceeding. Counsel should have presented this information to the court.

Additionally, appellate counsel should have presented the court with Ms. Warden's record from Payne County Case No. 2000-202, where she pled guilty to larceny of a house and received a 3 year deferred sentence because she agreed to testify against her co-defendant. (*See* Ex. 19A) When Ms. Warden was arrested in Oklahoma County, her Payne County probation and parole officer recommended her sentence be accelerated.(*See* Ex. 19-B) Despite this recommendation, her sentence was not accelerated, but dismissed. (*See* Ex. 19-C) This evidence should clearly have been submitted for the court to consider regarding her credibility.

Furthermore, appellate counsel, on remand should have utilized the discovery mechanisms provided by the district court to seek information from the Cleveland County, Payne County, and

Oklahoma County District Attorneys Offices as to whether she received any deals or leniency in exchange for her testimony against her three co-defendants. From the record before us, it certainly appears she received leniency in Cleveland and Oklahoma County. Any information concerning any deals or leniency Ms. Warden may have received constitutes undisclosed impeachment under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), and *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), which must be disclosed at this time.[14]

11. Conclusion.

Clearly, if the trial court had been presented with the above evidence, it would not have concluded in its Findings at page 14 "that confidence in the verdict of the jury has not been undermined by any testimony presented at the evidentiary hearing." Or, in its final paragraph "this Court cannot find that trial counsel's methods of utilizing the available mitigation evidence was anything but sound trial strategy, nor that Appellant has demonstrated that he was prejudiced and deprived of a fair trial." Petitioner submits appellate counsel's failure to provide effective assistance of counsel at the hearing undermined the reliability of the trial court's Findings. Therefore, this Court must reverse Petitioner's case for a new trial or for a new evidentiary hearing.

C. Ineffectiveness of trial counsel which appellate counsel failed to raise.

Petitioner respectfully requests this Court to consider the issues raised in his direct appeal with the issues enumerated in the sub-propositions of error below which were not raised on direct appeal when addressing whether Petitioner was provided effective assistance of counsel. Petitioner submits he was not provided effective assistance of counsel at trial nor was he provided effective assistance of appellate counsel on direct appeal.

1. Trial counsel failed to present available evidence to support his defense.

During the first stage, the defense called Petitioner's brother, Zjaiton Wood, to the stand.

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[14] Petitioner previously filed a Motion for Discovery addressing this issue and requested an evidentiary hearing.

Zjaiton informed the jury he, not Tremane, murdered the victim by stabbing him in the chest. (04/02/04 Tr. 94, 97, 131) Although Zjaiton testified Tremane was not with them during the commission of the crimes, but another individual named "Alex" was present, Zjaiton's admission he was the murderer, not Tremane, was critical.

Defense counsel was ineffective for not presenting readily available evidence which supported Zjaiton's testimony. This evidence is contained in the pre-sentence investigation report ("PSI") of co-defendant Lanita Batemen prepared by probation and parole officer Margaret Little.[15] Ms. Bateman's PSI expressed Jermane (sic) Wood was involved in the crimes, but Zjaiton, a.k.a. Jake, was the person who stabbed the victim. After they left the motel, Jermane (sic) was dropped off at his girlfriend's house. Bateman reported the following occurred at Jake's mother's house, "There, me and Brandy was shaking and crying and his mom asked what had he done now? He took her to her room and told her that he thought he had killed a guy. She started screaming and crying then she watch the news til the next morning and thats when it said something about the homicide." (*See* Ex. 20 under heading "Defendant's Verison.")

Since counsel did not support Zjaiton's testimony, the State argued in first stage Zjaiton was a gang banging, dope slinging convict whose testimony was unbelievable and expressed,

> -I submit to you ladies and gentlemen, that if that defendant [Zjaiton] tells you the sun comes up in the east, in the morning every day you should get up and look out the window. That is how much credibility that gang banging, dope dealing, confessed murderer should have in this courtroom. When you weigh his testimony and his credibility about turning people's lives loose, you look carefully at someone like that. (04/02/04 Tr.7)

There can be no reasonable strategy ascribed to trial counsel's failure to challenge the State's theory of the case and failing to provide adequate evidentiary support and argument for a viable defense. *See Washington v. State*, 1999 OK CR 22, 989 P.2d 960, 979-80 (which noted adversarial testing is the bedrock of our criminal justice system which necessarily requires the effective

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[15]Although Ms. Bateman invoked her Fifth Amendment rights and did not testify at Petitioner's trial or evidentiary hearing, her probation officer, Margaret Little, could have testified at trial and actually did testify at the evidentiary hearing. Unfortunately, appellate counsel failed to elicit this information from Ms. Little.

assistance of counsel and that counsel's failure to subject the State's case to adversarial testing, deprived defendant of a fair and reliable sentencing proceeding.) Likewise here, trial and appellate counsel's failure to develop and marshal the evidence in support of a viable defense which would have resulted in acquittal, was ineffective assistance of counsel and accordingly, his conviction and sentence must be reversed. This Court has reversed where trial counsel failed to develop and assert defenses which could have been supported by the available record. *See Jennings v. State*, 1987 OK CR 219, 744 P.2d 212, 214; *Smith v. State*, 1982 OK Cr 143, 650 P.2d 904, 908. *See also Groseclose v.* Bell, 130 F.3d 1161 (6th Cir. 1997); *Harris ex rel. Ramseyer v. Wood,* 64 F.3d 1432 (9th Cir. 1995); *DeLuca v. Lord*, 858 F. Supp. 1330, 1346 ff. (S.D.N.Y. 1994); *Sims v. Livesay*, 970 F.2d 1575 (6th Cir. 1992); *Proffit v. Waldron*, 831 F.2d 1245, 1248 (5th Cir. 1987).

2. Trial counsel failed to list a crucial mitigating circumstance.

As discussed above in this sub-proposition (C)(1), Zjaiton Wood testified he, not Termane, murdered the victim by stabbing him in the chest. (04/02/04 Tr. 94, 97, 131) Although Zjaiton's admission he was the murderer, not Petitioner was critical, counsel failed to include this on the list of mitigating circumstances submitted to the jury. (O.R. Vol. IV at 634) This very circumstance, "the defendant acted under duress or under the domination of another person," is specifically listed as a mitigating circumstance the jury should consider. *See* OUJI-CR-4-79.

3. Trial counsel failed to request a *Harjo* hearing.

Before the State presented the testimony of co-defendant Brandy Warden, defense counsel approached and objected to any testimony regarding the pizza robbery and "any statements made by Zjaiton Wood or Lanita, the other girl involved in this case, as co-conspirator hearsay." (04/01/04 Tr. 128-29) The court sustained counsel's request regarding the pizza robbery and overruled counsel's objection as to co-conspirator statements. (*Id.* at 129) Petitioner submits defense counsel should have requested a *Harjo* hearing to determine whether Ms. Warden's testimony was admissible, and his failure to do so was ineffective assistance of counsel.

In *Harjo v. State* 1990 OK CR 53, ¶ 21, 797 P.2d 338 , this Court held before the State may

admit hearsay statements of co-conspirators the State must prove: "(1) a conspiracy existed, (2) the declarant and the defendant against whom the declarations are offered were members of the conspiracy, and (3) the statements were made in the course and in furtherance of the conspiracy by a preponderance of the evidence. *Id.* at ¶ 21, *citing Bourjaily v. United States,* 483 U.S. 171, at 176, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987) Since defense counsel never requested a *Harjo* hearing, the trial court never made this determination and it was error for any co-conspirator statements to be admitted without the State having to first prove a conspiracy existed. Oddly, when the State objected, based on hearsay, to a conversation Ms. Warden was present for with Zjaiton Wood, the court sustained this objection. Defense counsel then inquired, "Is your ruling that hearsay cannot come out through another co-conspirator?" The trial court responded, "The objection is hearsay and I sustained it. I think that is plenty clear." (*Id.* at 196)

Petitioner submits had trial counsel requested an actual *Harjo* hearing and not made just an objection based on co-conspirator hearsay, the trial court would have suppressed Ms. Warden's testimony. However, due to trial counsel's ineffective assistance of counsel, this improper evidence was submitted to the jury. Therefore, Mr. Wood's conviction must be reversed and his case remanded for a new trial.

4. Trial counsel failed to challenge admissibility of DNA evidence.

During the first stage, the State presented the testimony of OKC Police Department analyst Kyla Marshall who testified as to her DNA analysis of a glove recovered from the motel room. (04/02/04 Tr. 20, 24) Although there was no blood on the glove, skin cells were recovered and submitted for DNA testing. (*Id.* at 24-25) The results from this testing revealed a mixture of at least three individuals; however, the profiles were incomplete. (*Id.* at 26) Therefore, the most Ms. Marshall could say was Petitioner could be a "possible contributor" to the mixture and "he couldn't be excluded as a potential contributor to the mixture. But, again, because it is a mixture, those alleles that are consistent with him could be coming from other people." (*Id.* at 37, 40-41)

Ms. Marshall couldn't state it was his DNA on either test that she performed. (*Id.* at 47, 52)

She opined "it is not that I can't include him, I can't state it is him, but there is a failure to exclude." (*Id.* at 48) She also testified she was unable to provide statistics because "again I have a mixture and I know that I don't have all the information. So there is no way that I could do stats on that." (*Id.*) Additionally, she stated when she received the glove for testing it was not in a sealed condition, and she was uncertain as to how long it had been at the district attorney's office before it was submitted to her for analysis. (*Id.* at 49) She stated this provided the "potential for contamination," where someone could just walk by and handle the glove. (*Id.* at 50)

During the first stage closing, the State argued the DNA evidence could not exclude Petitioner and that the "DNA was consistent with him not to the exclusion of everyone else, because it is a mixture. But he has got types at every location in the glove that match his. The fact that it is a mixture can't say to the exclusion of everyone else." (*Id.* at 155) In closing argument defense counsel attempted to argue this evidence was a non-issue by pointing out it was not blood that had been tested but skin cells, and Petitioner could not be excluded or included as a donor. Further, defense counsel argued this evidence was contaminated. (*Id.* at 168)

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 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. In *Williamson v. State*, 1991 OK CR 63, 812 P.2d 384, 389-99 this Court expressed, "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. The State must lay a foundation showing that the evidence offered is in substantially the same condition as when the crime was committed."

Here, analyst Marshall admitted when she received the glove it was not in a sealed condition. She was uncertain as to how long it had been at the district attorney's office before it was submitted to her. (04/02/04 Tr. 49, 50) Given Oklahoma County's recent scrutiny and litigation due to Joyce Gilchrist, this evidence's "potential for contamination" should not be overlooked or taken lightly. Additionally, her testimony was unreliable because it provided absolutely no statistical information for the jury's consideration. In *Taylor v. State*, 1995 OK CR 10, 889 P.2d 319, this Court held, "[w]ithout the statistical component of DNA profiling evidence, juries would be unable to assess the significance of the match evidence." *Id.* at ¶ 41. Because of the breaks in the chain of custody and the testimony of analyst Marshall this evidence had the potential for contamination, and had no statistical relevance, the admission of the DNA evidence was error. Mr. Wood's due process rights were violated and his conviction should be vacated and his case remanded for a new trial.

5. Trial counsel failed to object to handwriting exemplars.

Petitioner submits he was forced to physically construct evidence (handwriting exemplars) against himself in violation of the his Fifth Amendment right against self-incrimination. (04/01/04 Tr. 254, 267-68) A letter purportedly written by Petitioner, State's Ex. 112, provided the following incriminating evidence,

> So any ways I need to know some things, you say you are pleading guilty, so what are you going to tell them bout the glove? It was mine and you got it from my house that why my D.N.A. is on it. Are you going to tell them that you called me and asked me to come picc you up at the store after the fact. Cuz its just some shit I need to know. Cuz I know my attorneys won't come talk to you shit they won't even come talk me.

This letter was admitted to the jury without objection. Petitioner submits trial counsel provided ineffective assistance of counsel for not objecting to the admission of this evidence, or at a minimum, trial counsel should have requested a *Daubert* hearing to determine its reliability.

While Petitioner was awaiting trial handwriting exemplars were taken from him. (04/01/04

Tr. 254, 267-68) The comparison in this case was performed by David Parrett, who testified,

> First of all, no two people write exactly alike. And each person's handwriting, each individual's handwriting, if it is naturally prepared, that handwriting contains repeated individual characteristics. And by individual characteristics, I mean there is a difference between class characteristics, which are general characteristics of a population. And those minute things that you do in your own handwriting that no one else does. And you have a level of skill in your handwriting. And by that, what I'm talking about is that for instance I have little short legs. I can only run so fast. Well, your handwriting is similar in that you had a level of skill in your handwriting. You can't surpass that level of skill. Now, you can write worse than you naturally write. But you can't write any better.

(*Id.* Tr. 272) Mr. Parrett was asked to make a comparison between Petitioner's and Zjaiton's handwriting exemplars and State's Exhibit No. 112. (*Id.* at 274, 277) Mr. Parrett expressed Zjaiton was excluded as the writer of the questioned document. (*Id.* at 293) As to Petitioner, he "found a sufficient number of significant, individual similarities" to conclude he wrote the letter. (*Id.* at 294)

In closing, the State capitalized on this unchallenged evidence and argued to the jury Petitioner writes a letter to his brother and says, "What about my DNA in the glove?" (04/02/04 Tr. 155) The State further argued,

> Termane says his DNA is in the glove in that letter... Why does he have to go to all of the trouble to get that letter through the sewer line or through some inmate's hands or however that happened to make sure his brother knew the truth? Have you ever thought about that? That leaves you to one conclusion, ladies and gentleman. Termane Wood did this crime. (Id. at 165)
>
> Now, Kyla Marshall, the expert, can't tell you conclusively for sure that it is Termane's DNA in the glove. But Termane Wood tells you for sure that he believes that his DNA is in the glove. And he's trying to get Zjaiton to explain that away. You read it. (Id. at 180)
>
> But it is important for Zjaiton to say that he went and got the gloves at Termane's house because again the kite letter, Number 112, suggests that Termane and Zjaiton are getting their story together about how Termane's DNA gets in that glove. (*Id.* at 191)

The issue of handwriting uniqueness has been questioned by other courts in this country. As of 2005, some courts have determined the forensic document examiner's testimony did not meet reliability of *Daubert/Kumho* and excluded this 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.*

Hidalgo, 229 F.Supp.2d 961, 967 (D.Ariz.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 examiner to testify to particular similarities and dissimilarities between the documents, but excluded their 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).

Mr. Parrett's conclusions "no two people write exactly alike" is hard to believe. (04/01/04 Tr. 272) Further, his conclusion "that the writer of the K-1, known document, Termane Wood prepared the text on the letter Q-1" is also improper. (*Id.* at Tr. 294) It is stated in unequivocal terms, not in terms that handwriting in "the letter" was consistent with the handwriting exemplars taken from Petitioner. This Court has held "it 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,* 1988 OK CR 271, 765 P.2d 1215, 1218- 19 (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."); *Moore v. State,* 1990 OK CR 5, 788 P.2d 387, 399-400.

Since trial counsel did not request a *Daubert* hearing, any basis for Mr. Parrett's opinions was not tested by the trial court although his testimony violated Petitioner's 5th Amendment rights as well as his right to a fair trial.

6. Trial counsel failed to object to improperly excused jurors.

During jury selection, potential jurors were questioned by the Court about whether they could consider all three punishments. Potential juror, Brenda Surnhall, after expressing "[a]ll three, no. ... I cannot consider all three," was summarily excused without the trial court ever clarifying for the record which penalty she could not impose. (03/30/04 Tr. 13-15) Two jurors were removed by the

court for not being able to impose a sentence less than death.[16] In stark contrast, the court summarily excused ten jurors who voiced concerns about their ability to impose the death penalty.[17] Of these ten jurors, defense counsel only questioned one juror, Thieh Trink. (03/29/04 Tr.50-52) Another potential juror, Bennett Ughamadu, who first expressed he didn't "have any problem" with considering all three punishments, was later excused by the court when he expressed he preferred to give something other than the death penalty due to his religious beliefs. Although Mr. Bennett, upon questioning by the State, clarified this did not mean he could not give death as a penalty, was excused by the court, again, without questioning by defense counsel. (03/29/04 Tr. 122 -28) Defense counsel never objected to the their dismissal. Finally, four jurors who strongly favored the imposition of the death penalty sat on Mr. Wood's jury.[18] Defense counsel never challenged these jurors for cause despite the fact they each expressed their preference for the death penalty.

In capital cases, the Supreme Court has set forth certain guarantees to ascertain the imposition of the death sentence is not arbitrary and capricious. "A death sentence cannot be cannot be carried out if the jury that imposed...it was chosen by excluding [prospective jurors] for cause simply because they voiced general objections to the death penalty or expressed conscientious religious scruples against its infliction." *Witherspoon v. Illinois*, 391 U.S. 510, 522, 88 S.Ct. 1770, 1777 (1968); *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). This Court has held that all doubts regarding juror impartiality must be resolved in favor of the defendant. *Hawkins v. State*, 1986 OK CR 58, 717 P.2d 1156.

The trial court's summary dismissal of the string of potential jurors who voiced general

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[16] Potential jurors Daniel Wade (03/29/04 Tr. 66-67) and Robert Abraham (03/29/04 Tr. 225-26).

[17] Potential jurors Theih Trink (03/29/04 Tr. 50-52); Cathleen Lawry (03/29/04 Tr. 63-64); Michael Gilbert (03/29/04 Tr. 95-95); Bennett Ughamadu (03/39/04 Tr. 122-128); Neyoma McAlister (03/29/04 Tr. 150-51); Linda Green (03/29/04 Tr.184); Robert Megehee (03/30/04 Tr. 10); Rodney Bolden (03/30/04 Tr. 61-62); Teresa Terry (03/31/04 Tr. 18); and Demetra Gaddis (03/31/04 Tr. 61).

[18] Jurors Elliott, Burton, Dodson, and Clemenceau. (03/29/04 Tr. 116, 169, 198; 03/31/04 Tr. 24)

dislike for the possibility of having to impose the death penalty without allowing defense counsel an attempt to question them resulted in a violation of Petitioner's rights under the 5th and 14th Amendments, and Okla. Stat. Art. II, §§ 7 and 20.

7. Trial counsel failed to object when jurors moved their vehicles.

As discussed in Proposition V, at the end of first and second stage the trial court allowed the jurors to move their vehicles after they had been sworn but before they had begun deliberations. Additionally, it does not appear from the record the bailiff or a deputy escorted the jurors who moved their vehicles. Unfortunately, trial counsel failed to object to this procedure despite the fact that this Court in *Johnson v. State*, 2004 OK CR 23, 93 P.3d 41, 47, held 22 O.S. § 857 is mandatory and designed to preserve the purity of jury trials. Petitioner submits if it is determined that this error was waived due to the absence of an objection by trial counsel, then trial counsel's failure to object should be indicative of ineffective assistance of counsel.

8. Trial counsel failed to request court to instruct as to life with parole.

Trial counsel failed to ask the 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. *See* 21 O.S. § 13.1 This Court recently held *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273, 278,

> ...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.... [T]he 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.

Although none of the jurors asked specifically how long a life sentence will keep someone in prison, trial counsel did inform several jurors during voir dire that a life sentence meant Petitioner could get out of prison one day. (03/29/04 Tr. 109, 134, 179, 199, 208, 234; 03/30/04 Tr. 22, 32) This statement, without clarification as to how much time Petitioner would have to serve before even

being considered by the pardon and parole board is misleading. There is a great risk that if the jury is not fully informed about its sentencing options, it will choose the death sentence because it does not completely understand the sentencing options. The trial court should have instructed Mr. Wood's jurors that a life sentence according to the Pardon and Parole Board is considered to be forty-five (45) years and that Mr. Wood, 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.

9. Trial counsel failed to request proper jury instructions.

Petitioner had a fundamental right to have his guilt or innocence determined by a jury properly instructed on Oklahoma law. *Hicks v. Oklahoma*, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980). The purpose of jury instructions is to place before the jury a correct and full statement of the law which is applicable to the case. *Ake v. State*, 1989 OK CR 30, 778 P.2d 460, 470. OKLA. STAT. tit. 12 § 577.2 (1991) provides the instructions set forth in the Oklahoma Uniform Jury Instructions should be used when applicable in a particular case. Petitioner submits his jury was not properly instructed since several instructions simply were not given, while others omitted words, and then one instruction submitted to the jury is not even in the Oklahoma Uniform Jury Instructions.

Despite the applicability of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) and *Tison v. Arizona*, 481 U.S. 137, 150-51, 107 S.Ct. 1676, 1684, 95 L.Ed.2d 127 (1987), "that the accused intended to kill or exhibited such reckless disregard that he is adequately culpable to be death eligible," to Mr. Wood's felony murder conviction, defense counsel failed to request the jury be instructed. As a result, Petitioner's jury was never informed of its constitutional obligation to examine his individual culpability prior to imposing the death penalty. Since evidence had been presented by Zjaiton Wood he was the one that stabbed the victim, regardless of a request from counsel, the trial court's failure to *sua sponte* instruct the jury on the constitutional requirements for the imposition of the death penalty on one convicted of felony murder who did not kill in the course of the felony was fundamental error. *Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986). Further, this Court has held Instruction No. 4-71, OUJI-CR(2d) is necessary

in felony murder cases as it enables the jury to give individualized consideration to the defendant's culpability as required by the Supreme Court. *Allen v. State*,1994 OK CR 30, 874 P.2d 60, 64-65; *Williamson v. State*, 1991 OK CR 63, 812 P.2d 384, 402.

Additionally, instructions defining "attempts" were omitted. The jury in Instruction No. 10, was informed attempted robbery was the underlying felony the State used to support felony murder. (*See* O.R. IV 655) The Notes on Use for OUJI CR(2d) 4-65 state "[i]f the predicate felony is an attempted crime, the trial judge should give the appropriate instructions for attempts." The "attempts" instructions, OUJI CR (2d) 2-10 thru 2-15, were not given to the jury. The other instructions omitted address circumstantial evidence. According to Instruction No. 52, the State relied on circumstantial evidence in an attempt to prove Petitioner was a continuing threat. (*See* O.R. IV at 632). The Notes on Use for OUJI-CR(2d) 4-77 require the court to provide the jury with additional instructions that define direct evidence versus circumstantial evidence and the weight to given to each; however these instructions were not provided. *See* OUJI-CR(2d) 9-2, 9-3, and 9-4.

The following jury instructions, although given to the jury, were missing words

-Instruction No. 44 left out "or" and according to OUJI-CR(2d) 4-68 should read "shall be punished by death **or** imprisonment for life..." *See* (O.R. IV at 624).

-Instruction No. 46 left out "with the possibility of parole" and according to OUJI-CR(2d) 4-70 should read "return a sentence of life imprisonment **with the possibility of parole** or life imprisonment without parole." *See* (O.R. IV at 626).

-Instruction No. 47 left out "At the present time there exists" and according to OUJI-CR(2d) 4-72 this language should start the sentence. (O.R. IV at 627).

-Instruction No. 37 left out "or testimony" and according to OUJI-CR(2d) 10-7 should read "In so doing I have not expressed nor intimated in any way the weight or credit to be given any evidence **or testimony** admitted during the trial." (O.R. IV at 682).

Finally, the trial court submitted its own non-OUJI instruction, Instruction No. 5:

If you have a reasonable doubt as to the guilt of the Defendant on any or all such offenses, you must first find him not guilty of that particular crime. The three (3) counts are to be considered separately. By that I mean that each count is to be given separate though and deliberation. (O.R. IV 649)

While the relevant and proper instructions should have been given by the trial court as a

matter of fundamental right, defense counsel still has a duty to request all relevant and proper instructions if he is to function effectively. This error was fundamental because the instructions failed to force the jury's consideration of the evidence into proper legal channels so that it could reach a legally sound verdict. *Kamees v. State*, 1991 OK CR 91, 815 P.2d 1204, 1207; *see also Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Furthermore it deprived Petitioner of due process and a reliable sentencing proceeding in violation of the 8th and 14th Amendments. *Ake v. Oklahoma*, 470 U.S. 68, 74-75, 105 S.Ct. 1087, 1092, 84 L.Ed.2d 53 (1985).

10. Failed to Object to Prosecutorial Misconduct.

Petitioner, in Proposition IV, sets forth the instances of prosecutorial misconduct that occurred in this case and argues in that proposition trial counsel and appellate counsel were ineffective for their failure to develop this legal issue for this Court to consider.

D. Failure of appellate counsel to perform the professional duty owed to Mr. Wood.

Mr. Wood was denied effective assistance of counsel when his appellate defense counsel failed to perform the professional duty owed to him under prevailing professional norms and the mandates of the law. 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 ineffective assistance of appellate counsel claims are properly before this Court only if this Court finds 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. In this case, appellate counsel's performance constituted denial of reasonably competent assistance of counsel under prevailing professional norms. (*See* Rule 1.1 of the Rules of Professional Conduct regarding thoroughness and preparation.) As detailed in all the sub-propositions above, it is clear the required attention and adequate preparation was not provided by appellate counsel. As a result of appellate counsel's failure to perform the professional duty owed to him under prevailing professional norms, Mr. Wood 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. Wood respectfully requests a new trial or a new sentencing trial.

PROPOSITION IV
PROSECUTORIAL MISCONDUCT RESULTED IN UNFAIR PROCEEDINGS.

A. Bad Acts and Evidence of Other Crimes.

1. Prejudicial and Improper Bad Acts Admitted During First Stage.

During first stage the State called Coleman Givens who was staying at a motel across from the Ramada Inn and testified as to the events he observed as they unfolded that night. (O3/31/04 Tr. 224-29) Over defense counsel's objections, the State also elicited improper and irrelevant testimony from Mr. Givens which dealt with the conversations he heard between the co-defendants on the way to Petitioner's preliminary hearing. (*Id.* at 252-55, 256-58) One conversation was if "they didn't say or do like he wanted, he was going to drag them all, you know down with him." (*Id.* at 255-56) They then allegedly questioned him as to what he was going to say. He felt they were trying to make him nervous. Although Givens reported Petitioner asked him what he was going to say; he felt threatened by Zjaiton and expressed he "kind of told me what not to say." (*Id.* at 259, 261)

The State elicited another bad act while cross-examining Zjaiton. The State questioned Zjaiton with "Isn't it true, sir, that on April the 6th of 2002, over in county jail, you and your brother kicked another inmate in the face and injured him, is that right?" (04/02/04 Tr. 112) Defense counsel's objections were overruled. (*Id.* at 112-14)

2. Evidence of Another Crime.

Prior to trial, the Court ruled in the case of co-defendant Bateman the La Franca Pizza Robbery was inadmissible in first stage as *Burks* evidence and the same ruling applied in Petitioner's case. (O.R. 579) Despite this ruling, during first stage, the State forced Zjaiton Wood to testify he and Petitioner had robbed the pizza place earlier that evening. (04/02/04 Tr. 129-30). Again defense counsel's objections were overruled.

3. Legal Argument.

In *Burks v. State*, 1979 OK CR 10, 594 P.2d 771, 774 this Court established a procedure to be followed when the State seeks to introduce other crimes evidence. This procedure was not aimed solely at providing pretrial notice to the defendant but also required a specification of the exception under which the evidence is sought to be admitted; a visible connection between the offense charged and the offense sought to be proved; a showing the evidence is not cumulative and is necessary to support the State's burden of proof; proof of the other crimes by clear and convincing evidence; and an instruction to the jury as to the limited purpose for which the evidence is admitted. 594 P.2d at 774-75. This Court cautioned "[s]uch evidence should not be admitted where it is a subterfuge for showing to the jury that the defendant is a person who deserves to be punished." 594 P.2d at 775.

Here, none of the safeguards of the *Burks*' requirements were established. The State did not file any pre-trial notice it intended to introduce evidence of other crimes or bad acts. The State was never required to specifically identify what evidence it would be sponsoring, was never required to show a legitimate purpose for the introduction of this evidence, was never required to meet a burden of proof with regard to the evidence, and the jury was never instructed it was to use the evidence only for a limited purpose. Therefore, this bad character evidence and "other crimes" evidence, which was intentionally elicited by the State, and improper for the jury to consider resulted in an unfair trial and a violation of due process. U.S. Const. Amend. 8th and 14th and Okla. Const. art. II, § 7 and 9.

Additionally, the introduction of this irrelevant evidence was improper under 12 O.S. §§ 2402 and 2404(B). Even if this Court determines it was arguably relevant, then its probative value was substantially outweighed by the danger of unfair prejudice under 12 O.S. § 2403. The State's intentional admission of this improper character evidence painted Petitioner as a bad person which was not relevant to the charges against him. Further, the admission of this improper, irrelevant evidence for the jury to consider, calls into the question the reliability of Petitioner's trial, and whether Petitioner received a fundamentally fair trial.

B. The Prosecutor Misstated the Law and Demeaned Mitigating Evidence.

Throughout second stage closing, the prosecutor misstated the law and informed the jury a

mitigator had to meet a two-prong test before it could be considered in mitigation. (04/05/04 Tr. 117) The prosecutor stated, " Number one, you must find or you may find that the mitigator is in fact true. And if it is true, then you have a second prong. You have to ask yourself, well, if it is true, does it extenuate or reduce the degree of moral culpability or blame? Once again, don't take my word for it. It is in black and white. It is the law. It's the law." The prosecutor then went over each of the 17 mitigating circumstances listed in Instruction No. 54 and reiterated the alleged two prong test and how each did not meet this test. (04/05/04 Tr. 117-18, 118-19). After addressing the last of the 17 mitigators, the State restated the following:

> So, when you go through these 17 proposed mitigating factors, you go through each one of them yourself. You will think of more things that I didn't to help you know these are not mitigating circumstances. You have to find two things: Number one, are they true? Like the first mitigator is, the defendant is 24-years-old. Well, I give you that, he is. That is true. But the number two prong, did that mitigate? Does that extenuate or reduce the degree of moral culpability or blame. A two-prong test. Go through each and ask yourself, number one, is it true? And number two, does it reduce the degree of moral culpability or blame? I submit to you, you will not find one of those to be mitigating. (*Id.* at Tr. 127)

Petitioner respectfully submits this two-prong test is not the law. As set forth in Instruction No. 53, "Mitigating circumstances are which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame." *See* OUJI CR(2d) 4-78. The jury is allowed to decide which circumstances it finds mitigating, and the jury does not have to unanimously agree on the mitigators. Additionally, the mitigating circumstances do not have to be proven beyond a reasonable doubt. *Id.*

Furthermore, the clear purpose of the prosecutor's comments and application of a two-prong test was to inform the jurors that they could ignore these mitigating circumstances because, based upon the prosecutor's personal opinion, the circumstances were not worthy of consideration. These remarks were made to confuse the jury about its responsibility for evaluating the mitigating evidence in the way it was legally required. Persuading the sentencer to ignore mitigating evidence is error. *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) and *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934,

106 L.Ed.2d 256 (1989). The Supreme Court has held a defendant in a capital case has a constitutional right to consideration of mitigating factors by the sentencer, and the sentencer cannot be precluded from considering mitigating evidence. *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). Misleading the jury about its responsibilities with regard to capital sentencing violates the 8th Amendment. *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

C. Improperly accused Petitioner of lacking remorse.

During second stage closing the State argued Petitioner was not remorseful for these crimes,

> Another thing when Dr. Hand testified, what is even more important is what he didn't say. The one thing that Dr. Ray Hand didn't say about this defendant is that he is remorseful for committing this murder. Or that he was sorry for committing this murder. I submit to you that he is because he is not. And that's what makes him different from people like you and me. That is why he deserves the death penalty on top of everything else we discussed. Ask yourselves if you were driving home last Friday night from this jury service and you accidentally ran over another person, accidentally killed that person, not intending to, you would be devastated. Every one of you would. This person stuck a big knife into the chest of a 19-year-old man. Stuck it in there five inches. And he never said to one person, "I'm sorry about that." He has never said to one person "I'm remorseful about that." What kind of a person is that? Somebody that is different from you and me. And that fact, I submit to you, in addition to all of the others facts is the reason why he deserves the death penalty. How can you kill, intentionally, knowingly kill another human being and not be sorry about it?

(04/05/04 Tr. 133-34) The State also commented, "[w]e have to deal with - - what we have today is this defendant. A man who can kill an innocent victim without mercy and without remorse. I submit to you that Mr. Wood needs to be on death row where he can't hurt anyone." (*Id.* at 139)

Petitioner recognizes this Court has held "lack of remorse" is pertinent to the continuing threat aggravating circumstance. *Pickens v. State*,1993 OK CR 15, 850 P.2d 328, 337; *Sellers v. State*, 1991 OK CR 41, 809 P.2d 676, 689. However, cases in which lack of remorse has been held to be relevant are those in which the defendant admitted committing murder, then expressed a lack of remorse for the deed. There is a huge difference between an individual maintaining he did not commit the offense charged, and one who admits he committed the offense but is not sorry. Under the State's warped theory of criminal justice, a defendant who maintains his innocence throughout

trial should automatically be eligible for the death penalty because he expresses no remorse.

At trial, the defendant is cloaked with the constitutionally protected right to maintain his innocence. It is still the law that a death sentence may not be based on factors that are constitutionally impermissible or irrelevant to the sentencing process. Likewise, a capital sentencing jury may not draw adverse inferences from conduct that is constitutionally protected. *Zant v. Stephens*, 462 U.S. 862, 885, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). It is well settled that to punish a person for exercising a constitutional right is a "due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). Here, the State twisted his constitutional right to claim innocence into evidence he should be executed for exercising this right, unfairly undermining his 8th and 14th Amendment rights to a fair and reliable sentencing.

D. Invoking sympathy and arguing facts outside the record.

Despite the fact no victim impact testimony was presented, the State argued:

> - His [Ronnie Wipf's] mom and dad on his birthday don't get to go to the prison and visit him. They go to a grave up on the hill in Montana. That is where they visit Ronnie. (04/05/04 Tr. 118-19)
>
> - I'll bet that Ronnie Wipf's mom and dad would like to visit him in prison instead of in his grave. (*Id.* at 119)
>
> - Well, once again, you know Ronnie Wipf was 19 years-old. I bet his folks would like to see him grow into a young man and have children and visit him and their grandchildren. That will never happen. He age is going to be 19. (*Id.* at 120)
>
> - There used to be a young man, a 19-year-old young man, Ronnie Wipf, who was loved by his family. (*Id.* at 140)
>
> - Don't get hung up about where our victim is. Whether he is on a hill or in a valley. We don't care about that. But his folks will visit his grave. He is buried. Doesn't make any difference where it is at. (*Id.* at 158)

This Court has held that a prosecutor may not argue and infer facts which were not admitted as evidence. *Howell v. State*, 1994 OK CR 62, 882 P.2d 1086; *McCarty v. State*, 1988 OK CR 271, 765 P.2d 1215, 1220 (Okl.Cr. 1988); *Tobler v. State*, 1984 OK CR 90, 688 P.2d 350. Here, the prosecutor's closing served no other purpose than to prejudice the jury against Petitioner with this proposed evidence about how the victim's family felt. Yet, there was absolutely no evidence

presented to support the State's argument. This Court has held that it is improper for the prosecutor to attempt to distract and inflame the jury with tactics designed to cause the jury to find against the defendant for sympathy for the victim. *See McCarty v. State*, 1988 OK CR 271, 765 P.2d 1215, 1225; *Tobler v. State*, 1984 OK CR 90, 688 P.2d 350, 354; *Williams v. State*, 1983 OK CR 16, 658 P.2d 499, 501; *Dupree v. State*, 1973 OK CR 397, 514 P.2d 425, 427-28.

E. Prosecutor presented inconsistent factual theories as to the victim's murder.

Petitioner's jury trial occurred before his brother Zjaiton Wood's trial. At Petitioner's trial, Zjaiton took the stand and testified he "grabbed the victim by the head and I stabbed him in the chest and told him I was God." (04/02/04 Tr. 94) Zjaiton further testified "I don't want my brother to die for something that he is not guilty of. I mean, if he was guilty of this, you know what I am saying, I would tell him to be a man and face the heat. But he's not guilty." (*Id.* at 97)

Despite this evidence, during first stage closing argument the State argued Petitioner committed this murder, not his brother Zjaiton. (4/04/04 Tr. 5, 6, 7, 8) The State argued Zjaiton did not make Petitioner commit this murder, he had a choice and he knowingly and voluntarily took his life. (*Id.*) The State completely discounted the testimony of Zjaiton with the following,

> -I submit to you ladies and gentlemen, that if that defendant [Zjaiton] tells you the sun comes up in the east, in the morning every day you should get up and look out the window. That is how much credibility that gang banging, dope dealing, confessed murderer should have in this courtroom. When you weigh his testimony and his credibility about turning people's lives loose, you look carefully at someone like that. (*Id.* at 7)

However, at Zjaiton trial, which was before the same judge with the same prosecutors, the State did an about face and argued Zjaiton stabbed the victim, not Petitioner. Although Zjaiton did not take the stand, his prior testimony from Petitioner's trial was presented through Linda Wood and Officer Billy Ricketts.[19] (Linda Wood - Z.Wood 02/22/05 Tr. 221-28; Officer Ricketts - Z. Wood 02/23/05 at 203-09) Petitioner submits the State's presentation of inconsistent theories as to who actually murdered the victim violated his due process rights to a fair trial and his conviction must

[19] Petitioner filed a Motion to Cross Reference with Zjaiton Wood's record before this Court in F-2005-246.

be reversed.

This Court addressed a similar situation in *Littlejohn v. State*, 1998 OK CR 75, 989 P.2d 901. In *Littlejohn* the prosecutor argued inconsistent triggerman theories at each co-defendant's trial to obtain a conviction. Since this was a case of first impression, this Court turned to *Parker v. Singletary*, 974 F.2d 1562 (11th Cir. 1992) for guidance. In *Parker* there were three co-defendants, three separate trials, and three separate arguments as to who was the shooter. The *Parker* court determined, "given the uncertainty of the evidence, the court reasoned it was proper for the prosecutors in the other cases to argue alternative theories as to the facts of the murder. The issue of whether the particular defendant on trial physically committed the murder was an appropriate question for each of the co-defendant's juries." 974 F.2d at 1578. Utilizing this analogy, this Court in *Littlejohn* held it was permissible for the State to argue alternative theories as to who was the shooter when there was no physical evidence demonstrating who had fired the fatal shot, and that the "the evidence was less than conclusive as to the identity of the shooter." *Id.* at ¶ 27.

However, the *Parker* court condemned the use of the State utilizing contradictory evidence to obtain a conviction. In *Littlejohn*, this Court cited to the following analysis in *Parker*,

> ....two defendants were convicted for the same murder in separate trials. The state had contended at the first defendant's trial that the first defendant had actually killed the victim. The first defendant testified at his trial that he did not participate in the murder and accused the second defendant of being the perpetrator. One year later, the state used the testimony of the first defendant to show that the second defendant had actually killed the victim. **The concurrence concludes that the prosecutor had obtained the second conviction through the use of evidence that he could not have believed, given that the prosecutor had disputed the first defendant's testimony in the first trial.** (citations omitted.) *Parker*, 974.F.2d at 1578 (emphasis added).
>
> The Parker court found these two cases distinguishable because Parker's prosecution 'did not involve the use of necessarily contradictory evidence.' *Id.* at ¶ 25.

Here, the prosecutor disputed and ridiculed Zjaiton's testimony to obtain a conviction against Petitioner. Then in Zjaiton's trial his testimony suddenly becomes believable and is used by the State to obtain a conviction against him as well. This involves the use of necessarily contradictory evidence which is not condoned by *Littlejohn* or *Parker*.

If this Court determines that it was not improper for the prosecutors to argue inconsistent contradictory theories as to who stabbed the victim to obtain a conviction, Petitioner submits his case, at a minimum, must be sent back for a new sentencing. Recently, the Supreme Court, in *Bradshaw v. Stumpf*, 545 U.S. 175, 187, 125 S.Ct. 2398, 2407-08, 162 L.Ed.2d 143 (2005), in addressing prosecutorial inconsistencies to obtain convictions held, "[t]he prosecutor's use of allegedly inconsistent theories may have a more direct effect on Stumpf's sentence, however, for it is at least arguable that the sentencing panel's conclusion about Stumpf's principal role in the offense was material to its sentencing determination." *Id.* The Supreme Court remanded the case to determine what effect the prosecutor's conduct claim related to Stumpf's sentence of death.

Petitioner submits the State's conduct clearly impacted his sentence. In support of the especially heinous, atrocious and cruel aggravating circumstance the State argued:

> -Which it is, I submit to you, to murder a man, to stab him with a knife like was done in this case, and stick it five inches into his body. (04/05/04 Tr. 111)
>
> -You have to resort to stabbing him five inches into his body with that knife. I submit to you that that was extremely wicked for them to do that. (*Id.*)
>
> -Well, what was in the minds of these defendants, especially the defendant on trial today, Mr. Termane Wood, when he stuck that big knife into the chest of Ronnie Wipf? (*Id.*)
>
> -I submit to you that the abuse inflicted to Ronnie Wipf in this case was so serious that it caused his death. Look at that knife. Look at that wound and ask yourself whether or not that was serious abuse. (*Id.* at 112)
>
> -Did Ronnie Wipf suffer? He doesn't just - - he didn't lie down and go to sleep. He suffered. That knife was five inches into his chest. He walked around in his own blood. You will have the pictures up there and see that. Even on his feet there is blood that has dripped from his body. That means it came from the wound and it dripped to his feet. He was standing some time after that knife went into his chest, because blood came out of his chest and dripped on to his feet. You will see the bottom of his feet, where after he bled on the floor he walked on that. That is the reason it is on the bottom of his feet. He was alive long enough to walk in his own blood. Long enough for his blood to spill out and drop on his feet. He was alive long enough to remove that knife from his chest and to lay there on the bed and bleed out after he had already bled into his own body a quart and a half of blood. I submit to you he suffered. And he suffered greatly. (*Id.*)

As for the aggravating circumstance of murder to avoid lawful arrest the State argued:

> - They killed this guy for purposes of a trying to avoid lawful prosecution and arrest. They didn't kill the pizza guy. They were in control of that situation. When they lost control in

this room, it was this man [Termane] that said "Shoot the bastard." (*Id.* at 154-55) The State, in arguing against mitigation, states "Zjaiton Wood did not make Termane Wood murder Ronnie Wipf on that night." (*Id.* at 126)

Clearly, this evidence impacted Petitioner's resulting sentence of death. The prosecutor repeatedly argued Petitioner stabbed the victim and explained in great detail how those facts supported the aggravating circumstances alleged and diminished his mitigating circumstances. Therefore, Petitioner's resulting sentence of death is in violation of due process and must be vacated.

F. Prosecutor misled the trial court at the remanded evidentiary hearing.

During the evidentiary hearing, Mr. Albert testified he had tried between 13 to 15 capital cases and only had 3 cases had resulted in a sentence of death. (Vol. II Tr. 260) Although appellate counsel tried to have the court take judicial notice of a handwritten list of 8 cases which had resulted in a death sentence, the trial court denied this request. (Vol. III Tr. 409-12) This denial was based on the State's assertion Mr. Albert had not been the trial counsel on at least 2 of the 8 cases on the list. (*Id.* at 410-11) Prosecutor Smith expressed, "James Fisher is listed on here as one of the people, and I can tell you for sure, I tried that case and John Albert was not involved in that case. And this list is incorrect at this first name." (*Id.* at 410) Prosecutor Smith then states "I tried Terry Lyn Short in this courthouse. And to the best of my recollection, I can't remember who the defense attorney was now because it's been so long, but I don't believe it was Mr. Albert." (*Id.* at 411)

As addressed in Proposition II of this Application, Mr. Albert has been involved in at least 8 capital cases wherein a sentence of death which include James Fisher and Terry Short. This misstatement of fact, which was adamantly argued by the State as fact, undoubtably calls into the question of the reliability of the trial court's Findings.

G. Conclusion.

Although some of the State's commentary and arguments were not met with contemporaneous objection, none of the above instances of misconduct constitute a fair comment on the evidence, and all constitute a complete denial of due process. *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). Lack of an objection does not preclude the Court from reviewing improper comments. *Atterberry v. State*, 1986 OK CR 186, 731 P.2d 420; *Cobbs v. State,* 1981 OK CR 60, 629 P.2d 368. However, if this Court determines these claims are procedurally barred because an objection was not raised by trial counsel nor addressed on direct appeal by his appellate counsel; Petitioner submits the failure of his prior counsel to raise these meritorious issues resulted in ineffective assistance of 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).

The combined effect of the prosecutorial misconduct was so prejudicial as to adversely affect the fundamental fairness and impartiality of the proceedings and resulted in deprivation of the constitutional rights enumerated above. *See McCarty v. State*, 1988 OK CR 271, 765 P.2d 1215, 1221; *Spees v. State*, 1987 OK CR 62, 735 P.2d 571, 576; *Freeman v. State*, 1984 OK CR 60,681 P.2d 84, 85; *Rice v. State*, 92 P.2d 857, 859 (Okl.Cr. 1939) Mr. Wood was denied his 14th Amendment right to a fair trial and fair hearing by the repeated abuses of the prosecutor; therefore, his conviction and sentence mandate reversal.

PROPOSITION V
ERROR OCCURRED WHEN JURORS MOVED VEHICLES AFTER BEING SWORN.

At the end of first stage at approximately 5:53 p.m. on April 2, 2004, the trial court allowed the jurors to move their vehicles after they had been sworn but before they had begun deliberations. Deliberations began at approximately 6:26 p.m. (04/02/04 Tr. 204-11, 213) At the end of second stage at approximately 5:57 p.m. on April 5, 2004, after the jurors were sworn, but before they began deliberations, the trial court once again allowed the jurors to move their vehicles. Deliberations began at approximately 6:23 p.m. (04/05/05 Tr. 159-61, 163). The record is silent as to which jurors left to move their vehicles. Additionally, it does not appear from the record that the bailiff or a deputy escorted the jurors who moved their vehicles.

Oklahoma Statute Title 22, § 857 provides in pertinent part:

> 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 *Johnson v. State*, 2004 OK CR 23, 93 P.3d 41, 47, this Court 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 record is silent as to when and even if the bailiff was sworn after the first and second stage evidence and argument had been presented to the jury. *See Castro v. State,* 1987 OK CR 182, 745 P.2d 394, 406 (holding second stage of a capital jury trial "is more like a separate trial in that it involves new findings of fact.") Thus, the bailiff should have been sworn; it was error not to do so. 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 the bailiff was not sworn after the charge given for first and second stage deliberations combined with the fact the jurors were allowed to move their cars after being sworn 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).

Petitioner's conviction should be overturned, and he should receive a new trial.

PROPOSITION VI
THE CUMULATIVE IMPACT OF ERRORS IDENTIFIED ON DIRECT APPEAL AND POST-CONVICTION PROCEEDINGS RENDERED THE PROCEEDING RESULTING IN THE DEATH SENTENCE ARBITRARY, CAPRICIOUS, AND UNRELIABLE.

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 also Cargle v. Mullin*, 317 F.3d 1196, 1206 -1207 (10th Cir. 2003). In assessing cumulative error, this Court must consider both first and second stage errors.

> 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.

Id. at 1200. 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. Wood substantial statutory and constitutional rights. His death sentence was obtained in violation of the 6th, 8th, and 14th Amendments to the Federal Constitution and Article 2, §§ 7, 9, and 20 of the Oklahoma Constitution. Mr. Wood 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. Wood respectfully requests that this Court enter an order vacating his convictions and sentences and remanding his case for a new trial or new sentencing. In the alternative, Mr. Wood respectfully requests this Court to impose a sentence of life imprisonment or life imprisonment without parole, or to remand this case for a full and fair evidentiary hearing on the issues presented.[20]

---

[20] Mr. Wood's Appendices to the Original Post-Conviction Application, Motion for Discovery, and Motion for Evidentiary Hearing, were filed on December 26, 2006.

Respectfully submitted,

Julie Gardner, OBA #16425
228 Robert S. Kerr, Suite 100
Oklahoma City, OK 73102
(405) 290-7030
Fax: (405) 290-7035
Attorney for Termane Wood

VERIFICATION OF COUNSEL FOR PETITIONER

I, Julie Gardner, state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

Julie Gardner, OBA #16425

Subscribed and sworn to before me this 25h day of April, 2007.

Notary Public

My Commission expires: 1/15/2008
My Commission number: 04000440

CERTIFICATE OF SERVICE

By my signature below, I certify 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 25th day of April, 2007.

Julie Gardner, OBA #16425
228 Robert S. Kerr, Suite 100
Oklahoma City, Oklahoma 73102
(405) 290-7030
Fax: (405) 290-7035
Attorney for Termane Wood

Attachment 2

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TERMANE WOOD	)	
	)	PC Case No.:
Petitioner,	)	
	)	**CAPITAL POST CONVICTION**
vs.	)	**PROCEEDING**
	)	Prior Post Conviction No.: PCD-2005-143
THE STATE OF OKLAHOMA	)	Direct Appeal No.: PCD-2005-143
	)	Oklahoma County
Respondent.	)	District Court Case No: 5:10-cv-00829-HE

SECOND APPLICATION FOR POST CONVICTION RELIEF - DEATH PENALTY

DEATH PENALTY CASE

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ATTORNEY FOR PETITIONER

TREMANE WOOD

July 5, 2011

PART A: PROCEDURAL HISTORY

Petitioner, Tremane[1] Wood, appearing specially through undersigned counsel,[2] submits his second application for post-conviction relief under Section 1089 of Title 22. Pursuant to Rule 9.7(A)(3), a copy of the original amended application for post conviction relief filed April 25, 2007, is appended to this second application as Attachment 1. The addendum and appendix of exhibits have not been attached, but are available should the Court find them necessary for its review of this application. The sentence(s) from which relief is sought are:

Count I - Death
Count II - Life
Count III - Life

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

   (b) Case Number: CF-2002-46 Oklahoma County

2. Date of original sentence: April 2, 2004

3. Terms of sentences:

   Murder in the First Degree - Death
   Robbery with Firearms - Life
   Conspiracy to Commit a Felony - Life

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

---

[1]The state court record incorrectly spells Tremane Wood's first name as "Termane."

[2] Undersigned counsel is appearing specially and on a *pro bono* basis in an effort to get Tremane's claims before the Court. Should this Court grant an evidentiary hearing, undersigned counsel respectfully requests he be appointed to represent Tremane.

5. Petitioner is currently in custody at Oklahoma State Penitentiary, H-Unit.

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

*Tremane has a habeas corpus petition pending in the Western District of Oklahoma under Case No. 5:10-cv-00829-HE. This is actually a civil or quasi-civil matter but Tremane mentions it here for the sake of completeness. More information is provided in the procedural history.

I. CAPITAL OFFENSE INFORMATION

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

Murder in the First Degree

Aggravating factors alleged and found:

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

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

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

Mitigating factors listed in jury instructions:

a. The defendant is only 24 years old.

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

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

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

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

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

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

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

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

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

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

l. The defendant has been employed in the past.

m. The defendant has had prior drug dependencies.

n. The defendant spent time in foster care.

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

p. The defendant is of educational potential.

q. The defendant is of average intelligence.

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

7. Check whether the finding of guilty was made:

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

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

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

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

II. NON-CAPITAL OFFENSE INFORMATION

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

Robbery with Firearms - Life
Conspiracy to Commit a Felony - Life

11. Check whether the finding of guilty was made:

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

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

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

III. CASE INFORMATION

13. Name of lawyer in trial court:

Johnny Albert
3001 NW Classen Blvd.
Oklahoma City, OK 73106

Lance Phillips
7 South Mickey Mantle Dr. Suite 377
Oklahoma City, OK 73104

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

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

To what court or courts? Oklahoma Court of Criminal Appeals, Case Nos. D-2005-171; and PCD-2005-143.

Date Brief in Chief filed: June 28, 2005

Date Response filed: July 22, 2005

Date Reply Brief filed: August 11, 2005

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

Date of Petition for Rehearing: May 21, 2007

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

16. Name and address of lawyers for appeal:

Perry Hudson
1315 N. Shartel Ave.
Oklahoma City, OK 73103

Jason Spanich
805 Northwest 8
Oklahoma City, OK 73106
Was an opinion written by the appellate court? Yes (X) No( )

Wood v. State, 158 P.3d 467 (Okla. Crim. App. 2007).

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

Petition for writ of certiorari to the United States Supreme Court:
Denied: *Wood v. Oklahoma*, 552 U.S. 999 (Mem) (2007).

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

Issues raised in original post-conviction application:

Proposition I: Trial Court Erred by Excluding Testimony from Expert Witness

Proposition II: Newly Discovered Evidence and New Law Renders Mr. Wood's Conviction and Sentence Suspect and Unreliable

Proposition III: Petitioner Received Ineffective Assistance of Appellate and Trial Counsel in Violation of the Sixth, Eighth, and Fourteenth Amendments, and Article II, §§ 7, 9, and 20 of the Oklahoma Constitution

Proposition IV: Prosecutorial Misconduct Resulted in Unfair Proceedings

Proposition V: Error Occurred When Jurors Moved Vehicles after Being Sworn

Proposition VI: The Cumulative Impact of Errors Identified on Direct Appeal and Post-Conviction Proceedings Rendered the Proceeding Resulting in the Death Sentence Arbitrary, Capricious, and Unreliable

Petition for a Writ of Habeas Corpus, Case No. 5:10-cv-00829-HE, United States District Court for the Western District of Oklahoma: Pending.

Issues raised in Habeas Petition:

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

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

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

Claim Four: Because of errors regarding the aggravating factors in Tremane's case, his death sentence is in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment Rights

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

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

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

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

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

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

PART B: GROUNDS FOR RELIEF

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

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

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

22. List propositions raised.

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

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

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

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

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

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

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

PART C: FACTS

Preliminary Matters

References to the record will be made as follows:

1. The Original Record is referred to as (O.R. __, __ using the volume number in roman numerals and the page number).

2. Transcripts of the Preliminary Hearing will be referred to as (PH Tr.__, __ using the volume number in roman numerals and the page number).

3. Transcripts of the jury trial will be referred to in this application as (Tr. ___, ___ using the transcript volume number in roman numerals and the page number).

4. Motion Hearings will be referred to in this application as (M. Tr. Date, ____) setting out the date of the hearing and the page number).

Procedural History

Tremane Wood, along with his older brother Zjaiton ("Jake") Wood, Jake's girlfriend Lanita Bateman, and Tremane's former girlfriend and mother of his child, Brandy Warden, were all charged with first-degree felony murder for the death of Ronnie Wipf that occurred around 3:30am on January 1, 2002. (O.R.1 at 71, 614-16.) Tremane also was charged with one count of robbery with firearms and one count of conspiracy to commit felony (robbery). (*Id.*) A bill of particulars was filed alleging four aggravating circumstances: (1) that during the murder, the defendant knowingly created a great risk of death to more than one person;

(2) that the murder was especially heinous, atrocious, or cruel; (3) that the murder was committed for purposes of preventing lawful arrest or prosecution; and (4) there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society. (*Id.* at 72.)

The jury found Tremane guilty of all charges. (Tr. 4/2/04 at 214-15.) The jury found only three aggravating circumstances, rejecting the circumstance that the murder was committed for purposes of preventing lawful arrest or prosecution; The jury recommended life sentences on the non-capital counts and the death penalty on the capital count. (Tr. 4/5/04 at 163-64.) Tremane was formally sentenced on May 7, 2004.

Tremane appealed his conviction and sentences, which was denied. *Wood v. State*, No. D-2005-171 (Okla. Crim. Ct. App. Apr. 30, 2007).

Tremane's original Application for Post-Conviction Relief was filed on December 26, 2006. An amended application was filed on April 25, 2007. Relief was denied. *Wood v. State*, No. PCD-2005-143 (Okla. Crim. Ct. App. June 30, 2010).

Tremane's Petition for Writ of Habeas Corpus (28 U.S.C. § 2254) was filed in the Western District of Oklahoma on June 30, 2011. *Wood v. Workman*, No. CIV-10-0829-HE (W.D. Okla.).

Tremane now pursues this Second Application for Post-Conviction Relief.

The Record in This Proceeding

The record in this proceeding consists of the direct appeal record, the record in Wood's

original Application for Post-conviction Relief and the Exhibits and Attachments submitted with this Application. An Appendix is filed contemporaneously with this Application containing:

1. Supplementary materials submitted in accordance with subsection OCCA Rule 9.7 A(f) and Rule 9.7 (D) [Attachments 2-17.]

2. Copy of Tremane's original amended Post-Conviction Application, OCCA Rule 9.7A (d) [Attachment 1.]

III. Factual Summary

On December 31,2000, Ronnie Wipf and Arnold Kleinsasser were celebrating New Year's Eve at the Bricktown Brewery in Oklahoma City, Oklahoma. (Tr. 03/31/04 at 118.) While at the Bricktown Brewery the men met and socialized with Brandy Warden and Lanita Bateman. After the Bricktown Brewery closed, the women agreed to accompany these men back to a motel, (*Id.* at 120-24), which they did after talking to Tremane and Jake, (Tr. 4/1/04 at 146-47; Tr. 3/31/04 at 122.)

Once inside the room, the four agreed on $210.00 in exchange for sex. (Tr. 3/31/04 at 125-27.) Lanita pretended to call her mother, but actually called Jake. (Tr. 3/31/04 at 109.)

Jake and Tremane came to the motel room, and Jake banged on the door. (Tr. 3/31/04 at 129; Tr. 4/1/04 at 165-66.) Lanita and Brandy ran out of the room, and Jake and Tremane ran in. (Tr. 4/1/04 at 168.)

Jake approached Arnold with the gun; Tremane approached Ronnie with the knife, and

Ronnie put up a fight. (Tr. 3/31/04 at 133-35.) Jake left Arnold to go assist Tremane who had been struggling with Ronnie. (*Id.* at 135.) After Tremane demanded more money from Arnold, he returned to the struggle and Arnold fld the room. (*Id.* at 139.) Ronnie died from a single stab wound to the chest. (Tr. 04/02/04 at 11-12, 18.) Arnold was unable to identify who stabbed Ronnie. (3/31/04 at 172.)

At trial, Jake testified during the first stage of trial that he and another man named "Alex" committed this crime. (Tr. 04/02/04 at 89, 91-95.) Jake testified he initially had the gun when he and Alex entered the motel room. (*Id.* at 94.) Jake explained that when he saw that the victim was getting the best of Alex, he went over and punched Ronnie in his head and body. (*Id.* at 94.) Jake grabbed the knife and stabbed Ronnie in the chest. (*Id.* at 94.) At the conclusion of first stage, the jury found Tremane guilty on all counts. (*Id.* at 214-15.)

In second stage, the State incorporated all the evidence from first stage. In addition, evidence of a pizza place robbery committed by Tremane, Jake, Lanita, and Brandy, earlier on December 31st, was also presented. (Tr. 04/05/04 at 17-18, 24-26.)

Tremane called his mother Linda Wood, her friend Andre Taylor, and Dr. Ray Hand. At the conclusion of the second stage, the jury recommended death on the murder charge and recommended the maximum sentence of life on the robbery and conspiracy counts. (*Id.* at 163-64.)

B. Facts Supporting Second Application for Post-Conviction Relief

The relevant facts supporting Tremane's Post-Conviction claims are adduced in the

individual propositions raised and in the attachments to the Application referenced in those propositions.

PART D: PROPOSITIONS - ARGUMENTS AND AUTHORITIES

REVIEW PURSUANT VALDEZ v. STATE

This Court has recognized it may grant relief anytime "an error complained of has resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right," regardless of when the claim is presented. *Valdez v. State*, 46 P.3d 703, 710-11 (Okl. Cr. 2002). In *Valdez*, this Court acknowledged that the petitioner's claim was barred from review under 22 O.S. § 1089(D), but held that it could adjudicate the claim in order to prevent a miscarriage of justice, and granted the petitioner relief from his erroneous death sentence. *See Valdez*, 46 P.3d at 710-11.

Following *Valdez*, this Court granted David Brown an evidentiary hearing on a successive post-conviction application, citing *Valdez*. (*See* Attachment 3, Order Extending the Stay of Execution and Granting Motion for Evidentiary Hearing, *Brown v. State*, No. PCD-2002-781.[3] This Court later cancelled the hearing and dismissed the case due to counsel's recalcitrance in conducting the hearing. However, the principle remains: This Court always retains the power to correct substantial denials of statutory or constitutional rights, and such claims may be raised and reviewed on a second or successive post-conviction

[3] Brown ultimately received the hearing under another case number as a result of issues concerning counsel.

application. The Court recently took a compatible approach in *Slaughter v. State*, 108 P.3d 1052 (Okla. Crim. Ct. App. 2005), electing to review the merits of claims in a third post-conviction application.[4]

The same rule should apply here. If this Court finds it cannot reach Tremane's claims or some aspect of them in the ordinary course, the court nevertheless should reach the merits under the *Valdez* principle. This case presents facts congruent with those in *Valdez*.

This Court has wisely retained the power to correct injustices such as those in Tremane's case. Failure to grant review in this case and, upon review, to grant relief would run counter to the rule of law set forth in *Valdez*. *See Hicks v. Oklahoma*, 447 U.S. 343 (1980) (individual has a due process interest in orderly application of procedures provided by a State). This Court therefore should consider Tremane's case on the merits, order any evidentiary hearing it deems necessary, and grant Tremane relief from his convictions and death sentences.

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

The court impermissibly coerced the jury into delivering a dispositive decision when it informed jury that it "had to reach a unanimous decision" and that a "hung jury was not an

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[4] Part of the rationale for applying procedural defaults is apparently the concern that petitioners may "lie behind the log" in hopes of springing a claim late in the case. It would be exceedingly foolish to do so not only because of the potential the claim would not be considered but also because of the value of presenting claims in concert. Tremane is in the unenviable position of having viable claims that were missed or not artfully presented by prior counsel.

option." (*See* Declaration of Michael Colbart, attached as 4, ¶ 2; Declaration of Candelaria Nunez, attached as 5, ¶ 2.) Such coercion was a violation of Tremane's due process rights, and his right to an impartial jury trial and a fair sentencing. *See United States v. McElhiney*, 275 F.3d 928, 937 (10th Cir. 2001); *Jones v. United States*, 527 U.S. 373, 381–82 (1999); *see also* Okla. const. Art. II-19 and II-20.

For more than a century, the United States Supreme Court has warned trial courts that they must be vigilant to instruct a jury in such a way as to not coerce the jury into returning a death sentence. *See, e.g., Lowenfield v. Phelps*, 484 U.S. 231, 238-41 (1988) ("Any criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body."); *Allen v. United States*, 164 U.S. 492, 493, 501 (1896). Instructing a jury in such a way as to eliminate the possibility of a deadlock—particularly during the penalty phase where a deadlock demands the dismissal of the jury and the imposition of life sentence[5]—impermissibly coerces the jury into returning a death sentence. *Jenkins v. United States*, 380 U.S. 445 (1965) (holding that comment, "You have got to reach a decision in this case," during supplemental charge was of itself coercive and therefore ground for reversal). Nevertheless, the court in this case did just that and, in doing so, denied Tremane the basic constitutional protections afforded every capital defendant.[6]

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[5]21 Okla. Stat. Ann. § 701.11 (2004); *see also Davis v. State*, 665 P.2d 1186, 1203 (Okla. Ct. Crim. App. 1983).

[6]This Court recently reversed a conviction where the presiding judge in Tremane's trial (Judge Elliott) made coercive comments to a jury suggesting that they had to reach a verdict. *See Bills v. State*, CF-2009-404, Opinion, May 4, 2011 (attached as Attachment 6).

While it is fundamental to our jury system that a criminal case "may terminate with the failure to reach a verdict," the court in this case repeatedly denied the jurors the option of disunity and, in turn, denied Tremane the possibility of a mistrial. *McElhiney*, 275 F.3d at 935. According to Juror Colbart, the jury was also "told that if we did not reach a unanimous decision, we could not break for the weekend." (Attachment 4, ¶ 2.) Juror Nunez adds that, to the best of her recollection, she and her fellow jurors "were instructed to continue to deliberate until [they] had reached a unanimous decision." [7] (Attachment 5, ¶ 2.) Consistent with the transgressions described in the declarations of Jurors Colbart and Nunez—the trial transcript reveals that the court also instructed the jurors to return "verdicts of either guilty and not guilty" on more than a dozen occasions.[8] A failure to agree during the penalty phase would have been a victory for Tremane and a legitimate end of the trial. *McElhiney*, 275 F.3d at 935.

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[7]That Juror Nunez now attests to being mislead by the court is entirely understandable given, inter alia, the court's affirmative answer to her direct question during voir dire,"when you say unanimous, do you mean all agree?" (Tr. 3/30/04 at 168, 170-71.)

[8]*See, e.g.*, Tr. 3/31/04 at 87- 88 ("You may be in that room, depending on how long you feel it takes to arrive at *one of the two verdicts*." (emphasis added)); Tr. 3/31/04 at 40 ("Every piece of evidence that is admitted, it will be your duty to review to decide *one of two choices, guilty or not guilty*." (emphasis added)); Tr. 3/31/04 at 16 ("It will be the duty of the jury, and you if you sit on the jury, to determine whether the defendant is guilty or not guilty." (addressing prospective jurors)); Tr. 3/30/04 at 166 ("But the verdict on the punishment must be unanimous just as your verdict of either guilty or not guilty." (addressing prospective jurors)); Tr. 3/31/04 at 87. ("You stay in that room without leaving until you arrive at three verdicts of either guilty or not guilty."); Tr. 3/31/04 at 96 ("It is your responsibility . . . to reach verdicts of guilty or not guilty based on the evidence."); Tr. 4/2/04 at 201 ("You just stay up there until you arrive at three unanimous verdicts.").

The declarations of Jurors Colbart and Nunez vividly demonstrate that the court "affirmatively misled" the jury as to its deliberative options and thereby violated Tremane's constitutional rights. *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (holding that a constitutional violation would result from a jury being "affirmatively misled regarding its role in the sentencing process"); *see also Mills v. Tinsley*, 314 F.2d 311, 313 (10th Cir. 1963) ("To compel a jury to agree upon a verdict is a denial of a fair and impartial jury trial, and, hence is a denial of due process."). Such coercion not only resulted in violations of Tremane's Sixth Amendment and due process rights; it also resulted in a violation of his Eighth Amendment right to heightened reliability in death-penalty proceedings. *See Jones*, 527 U.S. at 381-82 (noting that "a jury cannot be 'affirmatively misled regarding its role in the sentencing process.'" (citation omitted)); *see also Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (noting that "the penalty of death is qualitatively different from a sentence of imprisonment" and therefore "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case"). "[S]entences of death must be absolutely, unquestionably fair." *Hain v. State*, 852 P.2d 744, 753 (Okla. Crim. Ct. App. 1993). As to the context and circumstances of Tremane's trial, "the record in this case reveals an ever-rising tide of coercion ultimately resulting in [a] unanimous death sentence[]." *Hooks v. Workman*, 606 F.3d 715, 741 (10th Cir. 2010); *see also Gilbert v. Mullin*, 302 F.3d 1166, 1175 (10th Cir. 2002) ("[C]ourts should be wary of the potentially coercive effect of holding jurors late into the night and even into the early morning hours.").

The taint of coercion is undeniable. *See Goff v. United States*, 446 F.2d 623, 626 (10th Cir. 1971) ("The court must avoid any indicia of coercion."). If even one juror believed trial court was insisting on a unanimous verdict, that would be one juror too many. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 462 (1978) (holding that "the Court of Appeals would have been justified in reversing the convictions solely because of the risk that the foreman believed the court was insisting on a dispositive verdict"). Here there were two. Because Tremane's constitutional rights were violated by the court's improper and coercive comments to the jury, he is entitled to relief.

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

To succeed on a claim of prosecutor misconduct, Tremane must demonstrate either that the prosecutor's misconduct prejudiced a substantive right, *see Donnelly v. DeChristoforo*, 416 U.S. 637 (1974) (*citing Griffin v. California*, 380 U.S. 609 (1965)) (footnote omitted), or that the prosecutor's misconduct rendered the trial fundamentally unfair, *see Berger v. United States*, 295 U.S. 78 (1935). *See also Williams v. State*, 2008 OK CR 19, ¶ 124, 188 P.3d 208, 230; Okla. const. Art. II-7.

Following Tremane's capital trial this Court ordered a hearing on Tremane's claim of ineffective assistance of trial counsel. Familial abuse was a central issue during these proceedings with Linda, Andre, and Jake Wood all offering testimony regarding abuse inflicted on Linda by Tremane's father, Raymond Gross. In cross-examining defense

witnesses, the State created the impression that Linda's claims of abuse were untrue, with particular reference to an absence of medical or hospital records to support Linda's claims. (Tr. 2/23/06 at 170-71; Tr. 2/27/06 at 341.) At that time, the prosecutor had in its position medical records reflecting treatment Linda had received after various incidences of abuse, including contusions, abrasion and a broken tooth (Attachment 7 at 2), and for being hit in the chest and stomach (*Id.* at 1).

In a similar form, the State cross-examined Raymond Gross in a manner designed to suggest he was a law-abiding, non-violent man, who had not inflicted terror and abuse on his family. (*See, e.g.* Tr. 2/23/06 at 23-26.) The State conducted this cross-examination despite having records in its possession that painted a violent picture of Raymond, abusing and threatening his wife and children. (*See* Attachment 8.)

The prosecution's duty to turn over *Brady* material continued after trial. *Smith v. Roberts*, 115 F.3d 818 (820) (10th Cir. 1997) (*citing Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987)). Not only did the prosecution fail to turn over these records, it created the material misrepresentation that the Wood family's testimony regarding the abuse endured by Linda was simply false because it was unsupported by records, and because Raymond denied it. While the State did not present false testimony, the cross-examination it conducted, particularly in light of its knowledge of these medical records and the criminal offenses related to Raymond, created a materially false impression. The State's suppression of this evidence allowed it to effectively neutralize what would have been compelling support for

Tremane's claim of ineffective assistance of trial counsel, and to mislead the trial court (an independent act of misconduct that deprived Tremane of a fair hearing). *See Berger*, 295 U.S. 78. Considering the prosecutorial misconduct cumulatively, Tremane was deprived of his due process rights.

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

In all cases, but more critically in capital cases, counsel has a duty to challenge the State's case against the defendant and, when necessary, employ experts to defend against the State's experts. *See* ABA Guideline 10.7, Commentary (noting that counsel has a duty "to scrutinize carefully the quality of the state's case" and "aggressively re-examine all of the government's forensic evidence"). In the instant case that did not happen. As a result, the testimony regarding the autopsy of the victim in this case went unchallenged. In failing to challenge the forensic testimony, counsel's performance fell below the objective standard of reasonableness—that is, it was outside the "wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 690 (1984). Had the defense presented expert testimony of a forensic pathologist, the jury would have heard evidence that could have ultimately made a difference in the guilt and/or penalty phase of Tremane's trial.

At trial, the jury heard virtually unchallenged testimony from the chief medical examiner Dr. Fred Jordan; he was not the doctor who actually performed the autopsy of the victim. (Tr. 4/2/04 at 6.) Dr. Jordan testified that the cause of death was from a five-inch

deep stab wound. (*Id.* at 14.) Had trial counsel retained an expert and presented such testimony the jury would have learned that Dr. Jordan's testimony was inaccurate. A defense expert could have demonstrated that the width of the wound was not as wide as the width of the knife. (*See* Report of Michael Iliescu, M.D., 6/27/11, Attachment 9, at 3-4.) Therefore, the entire length of the knife could not have been inserted into the victim's body.

Moreover, a defense expert could have attacked the autopsy report in several ways. First, the documentation of the stab wound was made after the body was autopsied. This is against the common practice in forensic pathology of documenting the injuries before the autopsy examination is performed. (*Id.* at 6.) Second, the stab wound should have been documented with the approximation of the edges of the wound (with the wound being closed), which was not done in this case. (*Id.* at 6-7.) Finally, an expert would have criticized the medical examiner for not taking photographs of the body before conducting the autopsy. (*Id.* at 6.)

Another problem with the State's autopsy report involved the toxicology. (*Id.* at 6.) The State's report says Ronnie had no drugs or alcohol in his system at time he died. (Tr. 4/2/04 at 11.) Ronnie's friend Kleinsasser testified that Ronnie was drinking (Tr. 3/31/04 at 121.) Codefendant Lanita Bateman also indicated that Ronnie was drunk. (Declaration of Lanita Bateman, attached as Attachment 10, at 2.) This information lends serious questions to the credibility of the autopsy.

Had this evidence been presented during the guilt phase of Tremane's trial, the State's

case would have been challenged regarding the circumstances surrounding the victim's death. The jury could have determined that the autopsy report was not accurate and that there were problems with Dr. Jordan's testimony. Moreover, the jury could have also discredited the State's argument that the stab wound was five inches, which was repeatedly emphasized in support of the heinous, atrocious or cruel aggravating circumstance. (Tr. 4/5/04 at 8, 111, 112, 133, 157.) The State told the jury that it was "shockingly evil" to stab a man with a knife and "stick it five inches into his body." (*Id.* at 111.) This repeated reference to the depth of the wound portrayed a more graphic image to the jury that could have been discredited.

Here, had counsel performed under prevailing professional norms, the evidence regarding the crime in this case would have been challenged and effectively undermined. This would have impacted both the guilt and penalty phases of Tremane's trial. In particular, the jury may not have found the aggravating circumstance of heinous, atrocious, or cruel. Minimally, the State would not have been able to use these facts to bolster its case for death. (*See, e.g.* Tr. 4/5/04 at 8, 111, 112, 133, 157.) Resultantly, there is a likelihood that Tremane would not have been sentenced to death. In this case, counsel's failures "undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

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

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*, 1997 OK CR 16,934 P.2d 1 100; *see also* OKLA. STAT. tit. 22, 4 1356. Hale recognized the unfairness in providing a lawyer but not requiring that lawyer to be effective. This Court has recognized the right as arising under State law but it also has federal Due Process implications. *Evitts v. Lucev*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *Hicks v. Oklahoma*, 447 U.S. 343,100 S. Ct. 2227,65 L. Ed. 2d (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 1 102. Similarly, in *Spears v. State*, No. PC-99- 1099 (Oct. 13,1999), this Court reached the merits of the petitioner's claim presented in a second post conviction that his first post-conviction counsel was ineffective. (Attachment 11.)

Strickland, 466 U.S. at 686-88, sets forth the standard for assessing ineffective assistance of appellate counsel. *Hale*, 934 P.2d at 1102-03. Tremane must demonstrate deficient performance and prejudice. *See id.* To establish prejudice postconviction counsel's failure to raise certain issues "undermines confidence in the appellate process." *Id.* at 1103.

Tremane's postconviction counsel was ineffective for each instance, considered separately or cumulatively, in which counsel failed to raise the following issues: (1) failure to investigate and present relevant mitigating evidence in support of trial IAC for same; (2) failure to raise a claim of ineffective assistance of direct appeal counsel for failing to raise

trial IAC for not challenging death to two or more people; and (3) failure to hire a forensic pathologist to challenge the autopsy findings. (*See* Attachments 12, 14, 16-17.)

The claims counsel failed to raise were supported by the facts and the law. They were obvious errors counsel should have presented for appellate review:

(1) Postconviction counsel failed to assert appellate IAC for failing to investigate and present relevant mitigating evidence in support of ineffective assistance of trial counsel for same. (*See* Proposition Three.) Counsel indicates she did not collect medical records related to Tremane's mother, or conduct additional background investigation into Tremane's parents' families. She had no strategic reason for this failure. (*See* Declaration of Julie Gardner, 6/24/11, attached as Attachment 12, ¶¶ 7-8.)

(2) Postconviction counsel failed to assert appellate IAC for failing to argue trial counsel's ineffective assistance with respect to the allegation that Tremane knowingly created a knowing risk of great harm to two or more persons. This aggravating factor was not supported by the facts in evidence and was dismissed in Jake Wood's case. (*See* Z. Wood Tr. 2/28/05 at 23, attached as Attachment 13.) PCR counsel Julie Gardner indicates that she was unaware that this same aggravator was dismissed in Jake's case. (*See* Attachment 12, ¶12.)

(3) Postconviction counsel failed to assert trial and appellate IAC failure to hire a forensic pathologist to challenge the autopsy findings. Counsel should have consulted with a neutral forensic expert, which would have led counsel to discover real problems with this forensic evidence as outlined in Proposition Three (incorporated here by reference). Tremane

had a right to effective assistance of postconviction counsel. This right was violated by counsel's omissions.

Postconviction counsel had available compelling claims of IAC of both trial and appellate counsel. Trial and appellate counsel missed obvious errors—had either challenged the great risk of harm aggravator, it would have been successful. (*See* Z. Wood Tr. 2/28/05 at 23, attached as Attachment 13) (trial court dismisses great risk of harm aggravator at Jake's trial). Similarly, there were serious flaws with in Ronnie's autopsy, which led to inaccurate findings—most significantly, that the stab wound was five inches deep. A forensic expert would have revealed these flaws, and allowed Tremane to call into question the medical examiner's testimony. This would have drastically altered the State's repeated cry for the death penalty due to the depth of the wound inflicted on Ronnie.

There was a powerful story to be told in mitigation, and both trial and appellate counsel failed to tell the complete story. Postconviction counsel also could have asserted deficient performance and prejudice for failing to obtain present all relevant mitigation. Linda's medical records, which would have bolstered her claims of abuse, *cf. Skipper v. South Carolina*, 476 U.S. 1, 8 (1986), and additional information available regarding the families would have demonstrated that Tremane found no solace, no help outside of his immediate family—he was met with abuse and neglect inside, and outside, of his home. The additional witnesses available, as well as records created years before the crime would have bolstered Tremane's mitigation case. Prior counsel's failure to investigate and present such evidence

deprived the jury, and later the trial court, of a full understanding of the relevant, compelling mitigating factors.

With one aggravating circumstance gone, the State's graphic language now limited, Tremane's complete case in mitigation of the death penalty would have carried far more power. These failures were deficient performance that prejudiced Tremane, *Strickland*, 466 U.S. at 686-88, depriving Tremane of his due process and effective assistance of counsel rights. U.S. Const. amend. VI, XIV; Okla. Const. art. II-7, II-20. (*See* Attachments 12, 14, 16-17.) Representation which departs from prevailing professional norms constitutes sufficient cause for post conviction review of this claim in a second post conviction application. OKLA. STAT. tit. 22, § 1089(D)(4) (b)(2).

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

Trial counsel John Albert now indicates that, at the time of Tremane's 3.11 hearing, he "was in a very bad place in his life. [He] had hit rock bottom." (Attachment 14, ¶9.) At the time, Albert was "drinking excessively and using drugs." (*Id.* at ¶9.) In addition, Albert faced a pending bar investigation. (*Id.* at ¶10.) Ten days later, Albert entered rehab. (*Id.* at ¶9.) As a result of these circumstances, Albert describes himself as "very defensive" during his testimony at Tremane's 3.11 hearing. (*Id.* at ¶10.) He was "worried about the impact that being found ineffective would have on [his] license to practice law." (*Id.* at ¶10.)

Sober since he entered rehab (*Id.* at ¶9), Albert's declaration demonstrates he rendered deficient performance during Tremane's capital trial. Albert "simply did not have the time

to adequately represent Tremane in his capital trial." (*Id.* at ¶3.) He failed to prepare witnesses, including Dr. Hand. (*Id.* at ¶7, "I did not prepare Dr. Hand for his testimony nor did a I review any documents before providing them to Dr. Hand.") Albert candidly admits to a lack of investigation, "I did not do the necessary investigation and preparation required to defendant a capital client." (*Id.* at ¶11.) And, he offers no strategic reasons for failing to investigate Tremane's background, gather records, conduct relevant interviews or prepare Dr. Hand. (*Id.* at ¶11.) Moreover, Albert believes all of this would have made a difference. (*Id.* at ¶12.)

Albert's defensive testimony deprived the Oklahoma courts of facts necessary to assess Tremane's claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Rule 3.11 plays an important role in the Oklahoma direct appeal process. "As a matter of policy, Rule 3.11 requires criminal defendants to bring their *Strickland* claims on direct appeal rather than in post-conviction proceedings and to lay their evidentiary cards on the table before the OCCA." *Wilson v. Workman* 577 F.3d 1284, 1304 (10th Cir. 2009) (en banc) (Tymkovich, J., dissenting).

Given the important role that Rule 3.11 proceedings play in Oklahoma's direct appeal process, Albert's defensive testimony created a fundamental flaw in the fact finding process, which deprived Tremane of his due process interest in those very proceedings. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *see also* Okla. Const. art. II-7. This is all the more so when the defendant's "life" interest is at stake in the proceedings. *Ohio Adult Parole Auth. v.*

Woodard, 523 U.S. 272 (1998) (five Justices recognized a distinct "life" interest protected by the Due Process Clause in capital cases above and beyond liberty and property interests).

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

Brandy Warden was on probation in Payne County, Oklahoma, at the time these offenses were committed. (Attachment 15; *see also* Exhibit 19B attached to Tremane's First Amended Application for Post-Conviction Relief.) Yet she never faced charges in Payne County, Oklahoma for violating the terms of her probation. Any deal struck that relieved Warden of criminal charges in exchange for her testimony was material and exculpatory. *See Brady v. Maryland*, 373 U.S. 83 (1963). The State's failure to turn over such evidence deprived Tremane of his due process rights. *Brady*, 373 U.S. 83; *Giglio v. United States*, 405 U.S. 150 (1972); *Kyles v. Whitley*, 514 U.S.419 (1995); *see also* Okla. Const. art. II-7.

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

Assuming *arguendo*, any individual error in Tremane's case is deemed insufficient to warrant relief, relief is nonetheless required due to a cumulation of errors. *United States v. Rivera,* 900 F.2d 1462 (10th Cir. 1990)(cumulative error analysis is an extension of the harmless error rule). None of the individual errors in this case can be deemed harmless. This Court should cumulate the errors identified here with each other and with the errors advanced previously on direct appeal and in Tremane's initial post-conviction filing. Further, pursuant the Sixth, Eighth, and Fourteenth Amendments, claims that have equivalent prejudice or harmless error components should be considered together for purposes of prejudice or

harmless error review. *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003).

CONCLUSION

Tremane's convictions and death sentences were obtained in violation of his state and federal rights. This Court should exercise its power to do fundamental justice and grant relief. Alternatively, this Court should grant Tremane's request for discovery and order an evidentiary hearing in order to allow additional fact development.

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jrowan@ramlaw.biz

VERIFICATION OF COUNSEL FOR PETITIONER

I, James Rowan, state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

James T. Rowan
James Rowan

7/6/2011
Date

CERTIFICATE OF SERVICE

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

James T. Rowan

James Rowan

Attachment 3

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TREMANE WOOD,	)	
	)	
Petitioner,	)	**Case No.** _____
	)	
vs.	)	
	)	**Oklahoma County**
STATE OF OKLAHOMA,	)	**Case CF-2002-46**
	)	
Respondent.		

AFFIDAVIT IN FORMA PAUPERIS

I, TREMANE Wood, state that I am a poor person without funds or property or relatives willing to assist me in paying for filing the within instrument. I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

Signed this 20th day of June, 2017 at MCALESTER, PITTSBURG, OK/A
(City, County, State)

KIM A. MARKS NOTARY # 04006555 EXP. 07/20/20 PUBLIC STATE OF OKLAHOMA

Tremane Wood
Signature

TREMANE Wood
Printed name

Signed and subscribed to before me this 20TH day of June, 2017.

Kim A. Marks
Notary # 04006555
Exp: 07-20-2020

AFFIDAVIT IN FORMA PAUPERIS

I, TREMANE Wood, state that I am a poor person without funds or property or relatives willing to assist me in paying for filing the within instrument. I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

Signed this 20TH day of June, 2017 at McAlester, OK, Pittsburg
(City, County, State)

KIM A. MARKS NOTARY # 04006555 EXP. 07/20/20 PUBLIC STATE OF OKLAHOMA

Tremane Wood
Signature

TREMANE Wood
Printed name

Signed and subscribed to before me this 20TH day of June, 2017.

Kim A. Marks
Notary # 04006555
Exp. 07-20-2020

10007341 63

IN THE DISTRICT COURT, SEVENTH JUDICIAL DISTRICT
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
JUL 28 2004
PATRICIA PRESLEY, COURT CLERK
by _____ Deputy

THE STATE OF OKLAHOMA,)
)
PLAINTIFF,)
)
)
vs.)
)
Termane Wood)
)
DEFENDANT,)
)

CF-02-46

ORDER APPOINTING CONFLICT DEFENDER

NOW on this 2nd day of October, 2002, the Court, being fully advised in the premises, finds that a conflict exists between this defendant and the Public Defender and that a contracted Conflict Defender should be appointed for this defendant.

IT IS THEREFORE ORDERED by the Court that John Albert _____ is appointed as the attorney for the defendant Termane Wood.

Ray C. Elliott
District Judge

CERTIFIED COPY
AS FILED OF RECORD
IN DISTRICT COURT
JUN 22 2017
RICK WARREN COURT CLERK Oklahoma County

1000734164

IN THE DISTRICT COURT, SEVENTH JUDICIAL DISTRICT
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
JUL 28 2004
PATRICIA PRESLEY, COURT CLERK
by _____ Deputy

THE STATE OF OKLAHOMA,

PLAINTIFF,

vs.

Termane Wood

DEFENDANT,

CF- 02-46

ORDER APPOINTING CONFLICT DEFENDER

NOW on this 2nd day of October, 2002, the Court, being fully advised in the premises, finds that a conflict exists between this defendant and the Public Defender and that a contracted Conflict Defender should be appointed for this defendant.

IT IS THEREFORE ORDERED by the Court that Lance Phillips _____ is appointed as the attorney for the defendant Termane Wood.

Ray C. Elliott
District Judge

CERTIFIED COPY
AS FILED OF RECORD
IN DISTRICT COURT
JUN 22 2017
RICK WARREN COURT CLERK
Oklahoma County

1000860522

IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
SEP 03 2004
PATRICIA PRESLEY, COURT CLERK
Deputy

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. CF-2002-46
	)	
TERMANE WOOD,	)	
	)	
Defendant.	)	

ORDER

NOW on this 2nd day of Sept., 2004, this matter comes on for consideration of the issue of payment of attorney fees for appointed counsel. The Court, being advised of the premises, finds that attorney of record, John B. Albert, was appointed on the 2nd day of October, 2002, and represented the above named Defendant by Order of the Court.

The Court is further advised that this was a Capital Murder in the First Degree case. Pursuant to contract with the Oklahoma County Public Defender's Office it is hereby ordered that the amount of TEN THOUSAND DOLLARS ($10,000.00) be paid to John B. Albert for his services in the above styled case.

Tom D. Gurich
PRESIDING ADMINISTRATIVE JUDGE

APPROVED:

ROBERT A. RAVITZ
PUBLIC DEFENDER OF OKLAHOMA COUNTY

JOHN B. ALBERT
Attorney for Defendant, Marcus Cargle

CERTIFIED COPY
AS FILED OF RECORD
IN DISTRICT COURT

JUN 22 2017

RICK WARREN COURT CLERK
Oklahoma County

STATE OF OKLAHOMA)
) ss:
COUNTY OF OKLAHOMA)

AFFIDAVIT

I, John B. Albert, of lawful age being first duly sworn upon oath, deposes and states as follows:

1. That I have incurred the following time in the case of State of Oklahoma v. Termane Wood, CF-2002-46, wherein I was appointed as Conflict Defender. The trial in said case was from March 29, 2004 through April 7, 2004, before Judge Ray C. Elliott.

Date:	Legal Work:	Time Spent:
October 2, 2002	Pretrial Conference	2.00
January 7, 2003	Status Conference	1.00
February 12, 2003	Status Conference	1.00
March 3, 2003	Status Conference	1.00
March 19, 2003	Status Conference	1.00
April 16, 2003	Status Conference	1.00
May 28, 2003	Status Conference	1.00
July 16, 2003	Status Conference	1.00
August 6, 2003	Prepare Witness Statement	1.00
August 19, 2003	Motion Hearing	2.00
August 20, 2003	Motion Hearing	2.00
August 27, 2003	Status Conference	2.00
September 3, 2003	Motion to Continue Trial	1.00
February 23, 2003	Motion Hearing	2.00
March 5, 2004	Hearing – Amend Charges	1.00
March 29, 2004	Motion Hearing/Trial	8.00
March 30, 2004	Trial	8.00
March 31, 2004	Trial	8.00
April 1, 2004	Trial	8.00
April 2, 2004	Trial	8.00
April 5, 2004	Trial	8.00
April 6, 2004	2nd Stage Trial	8.00
April 7, 2004	2nd Stage Trial	8.00
May 7, 2004	Sentencing	2.00

FURTHER AFFIANT SAYETH NOT.

JOHN B. ALBERT

Subscribed and sworn to before me this 15th day of July, 2004.

Notary Public

My Commission Expires:

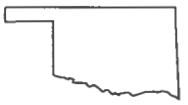
11-25-2004

Comm # 00019289

NOTARY SEAL PUBLIC

MELISSA HOLETZKY
Cleveland County
Notary Public in and for
State of Oklahoma
My commission expires Nov. 25, 2004.

Attachment 4



Appendix IA[1]

Race and Death Sentencing for Oklahoma Homicides, 1990-2012[2]

I. Introduction

In the first 15 years of the 21st century, we have seen several indicators that the use of the death penalty is in sharp decline in the United States. According to the Death Penalty Information Center, between 1996 and 2000 an annual average of 275 new prisoners arrived on America's death rows, but by 2015 this figure had precipitously decreased to 49.[3] The average number of executions per year has fallen nearly fifty percent since the last five years of the twentieth century, from 74 between 1996 and 2000 to 376 in the years 2011-2015.[4] In just the past 10 years, seven states have abolished the death penalty,[5] the Delaware Supreme Court invalidated that state's statute in August 2016,[6] and four more states –Washington, Oregon, Colorado and Pennsylvania – have seen their governors impose moratoria on executions. A September 2016 poll by the Pew Research Center found that slightly less than half of Americans (49 percent) supported the death penalty,[7] the lowest level of support in more than 40 years. A 2015 poll by Quinnipiac indicates that more Americans (48%) now prefer a sentence of Life Imprisonment without Parole (which is available in all death penalty jurisdictions) to a death sentence (45%).[8] Even in Oklahoma, a November 2015 poll found that the majority of the population (52 percent) would prefer a sentence of life plus restitution rather than the alternative of the death penalty.[9] A second poll taken in July 2016 found that 55 percent of the "likely voters" in the state would prefer life

[1] This report is an early draft of an independent study (current through November 1, 2016), submitted to the Oklahoma Death Penalty Review Commission for its review of Oklahoma's capital punishment system. The final study will be published by the Northwestern University School of Law in the fall of 2017. *See* Glenn L. Pierce, Michael L. Radelet, & Susan Sharp, *Race and Death Sentencing for Oklahoma Homicides, 1990-2012*, 107 Nw. U. J. Crim. L. & Criminology. The Commission is grateful to the authors for providing this study for its consideration during its review of Oklahoma's death penalty. **Please note: the Commission did not edit this draft report and any errors should be attributed the authors. Moreover, the views reflected by the authors do not necessarily reflect those of the Commission.** This study is included in the Commission's report as a reference for Appendix I.

[2] This report was authored by Glenn L. Pierce, Michael L. Radelet, and Susan Sharp. Radelet is a Professor of Sociology, University of Colorado-Boulder; Pierce is a Principal Research Scientist, School of Criminology & Criminal Justice, Northeastern University, Boston; Sharp is the David Ross Boyd Professor Presidential Professor Emerita, Department of Sociology, University of Oklahoma. The three authors are listed alphabetically; each made equal contributions to this project. The authors wish to thank Melissa S. Jones and Amy D. Miller for their assistance in helping to build the Oklahoma death row data set.

[3] *Death Sentences in the United States From 1977 by State and by Year*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008.

[4] *Executions by Year*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/executions-year.

[5] New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), and Nebraska (2015).

[6] Eric Eckholm, *Ruling by Delaware Justices Could Deal Capital Punishment in the State a Final Blow*, NEW YORK TIMES, Aug. 2, 2016, at A11.

[7] Baxter Oliphant, *Support for Death Penalty Lowest in More than Four Decades* (Sept. 29, 2016), http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/.

[8] *Quinnipiac University Poll Release Detail*, http://www.quinnipiac.edu/news-and-events/quinnipiac-university-poll/national/release-detail?ReleaseID=2229 (June 1, 2015).

[9] *News9/Newson6: More Oklahomans Oppose Death Penalty If Given Alternative*, SOONERPOLL, http://soonerpoll.com/news9newson6-more-oklahomans-oppose-death-penalty-if-given-alternative/ (Nov. 19, 2015); *News9/Newson6: More Oklahomans Oppose Death Penalty If Given Alternative*, SOONERPOLL, http://soonerpoll.com/news9newson6-more-oklahomans-oppose-death-penalty-if-given-alternative/ (Nov. 19, 2015); Graham Lee Brewer, *New Poll Shows Over Half of Oklahomans Support Life Sentences Over the Death Penalty*, NEWSOK, http://newsok.com/article/5461486.

sentences without parole and mandatory restitution instead of the death penalty.[10] These results document a changing climate around death penalty debates: apparently more Americans now prefer long prison terms rather than the death penalty.

One reason for the decline in support for and the use of the death penalty is growing concerns that the penalty is not reserved for "the worst of the worst." In a nationwide Gallup Poll taken in October 2015, 41 percent of the respondents expressed the belief that the death penalty was being applied unfairly, and a 2009 Gallup Poll found that 59 percent of the respondents believed that an innocent person had been executed in the preceding five years.[11] This concern is undoubtedly on the minds of many Oklahomans, since ten inmates have been released from its death row since 1972 because of doubts about guilt.[12]

In this article, we examine another question that is related to the contention that the death penalty is reserved for the worst of the worst: the possibility that the race of the defendant and/or victim affects who ends up on death row. To do so, we will study all homicides that occurred in Oklahoma from January 1, 1990 through December 31, 2012, and compare those cases with the subset that resulted in the imposition of a death sentence.

Oklahoma is home to some 3.75 million citizens, of whom 75 percent are white, with the black, Native American, and Hispanic population each constituting about eight percent of the population.[13] Racial and ethnic minorities are over-represented among those on death row, which housed 46 men and one woman as of July 1, 2016 (23 white, 20 black, 3 Native American, 2 Latino).[14] Between 1972 and October 31, 2016, Oklahoma conducted 112 executions (with the first occurring in 1990), which ranks second among U.S. states behind Texas and gives Oklahoma the highest per capita execution rate in the U.S.[15]

Of the 112 executed inmates, 67 were white (60 percent), 35 black, 6 Native American, 2 Asian, 1 Latino, and 1 whose race was classified as "Other."[16] The races of the homicide victims in the death penalty cases are also predominately white, with 83 of the 112 executed inmates convicted of killing at least one white victim (74.1 percent), 19 at least one black victim, 7 at least one Asian victim, 5 at least one Latino victim, 1 at least one Native American victim, and 1 who killed two people whose races are classified as "Other" (both the assailant and his two victims were Iraqi).[17]

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[10] Silas Allen, *Majority of Oklahomans Support Replacing Death Penalty with Life Sentences, Poll Shows*, THE OKLAHOMAN, Aug. 6, 2016, http://newsok.com/majority-of-oklahomans-support-replacing-death-penalty-with-life-sentences-poll-shows/article/5512695.

[11] *Gallup Poll Topic: Death Penalty*, GALLUP, http://www.gallup.com/poll/1606/death-penalty.aspx.

[12] These former death row inmates include Charles Ray Giddens (released in 1981), Clifford Bowen (1986), Richard Jones (1987), Greg Wilhoit (1995), Adolph Munson (1995), Robert Miller (1998), Ronald Williamson (1999), Curtis McCarty (2007), Yancy Douglas (2009), and Paris Powell (2009). *See* Death Penalty Information Center, *List of Exonerees Since 1973*, http://www.deathpenaltyinfo.org/innocence-and-death-penalty.

[13] https://suburbanstats.org/population/how-many-people-live-in-oklahoma

[14] DEATH ROW USA, Summer 2016, http://www.naacpldf.org/files/publications/DRUSA_Summer_2016.pdf (current as of July 1, 2016).

[15] http://www.deathpenaltyinfo.org/state-execution-rates. Among the executed are two juveniles (one of whom was just 16 at the time of his crime), three women, and seven inmates who dropped their appeals and asked to be executed. *See also Executions Statistics* available from the Oklahoma Department of Corrections, https://www.ok.gov/doc/Offenders/Death_Row/. There have also been four death sentences commuted to prison terms by Oklahoma governors since 1972: Phillip Smith (2001), Osvaldo Torres (2004), Kevin Young (2008), and Richard Smith (2010). *See* Michael L. Radelet, *Commutations in Capital Cases on Humanitarian Grounds*, available at http://www.deathpenaltyinfo.org/clemency#List.

[16] This does not include Timothy McVeigh, executed under federal authority in June 2001 for murdering 168 people in the explosion of the Alfred P. Murrah Federal Building in Oklahoma City in April 1995.

[17] These tallies were calculated from data provided by Death Penalty Information Center, *Searchable Execution Database*, available at http://www.deathpenaltyinfo.org/views-executions. Because four executed inmates were convicted of killing multiple victims who had different races, one execution can fit two or more of these criteria, giving us a total for these calculations of 116.

II. Previous Research

Concerns about the impact of the defendant's and/or victim's race on death penalty decisions have a long history in the U.S. Soon after the 1976 decision in Gregg v. Georgia that breathed new life into death penalty statutes,[18] researchers led by the late University of Iowa legal scholar David Baldus began to study the possible relationships, with the most comprehensive study by Baldus and his team focusing on Georgia.[19] Those race studies conducted prior to 1990 were reviewed by the U.S. government's General Accounting Office in 1990, which produced a report concluding that in 82 percent of the 28 studies reviewed, "race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty."[20]

In 2005, Baldus and George Woodworth in effect updated and expanded the GAO Report, reviewing 18 race studies that had been published or released after 1990.[21] Their conclusions are worthy of a lengthy quote:

> Overall, their results indicate that the patterns documented in the GAO study persist. Specifically, on the issue of race-of-victim discrimination, there is a consistent pattern of white-victim disparities across the systems for which we have data. However, they are not apparent in all jurisdictions nor at all stages of the charging and sentencing processes in which they do occur. On the issue of race-of-defendant discrimination in the system, with few exceptions the pre-1990 pattern of minimal minority-defendant disparities persists, although in some states black defendants in white-victim cases are at higher risk of being charged capitally and sentenced to death than are all other cases with different defendant/victim racial combinations.[22]

Overall, Baldus and Woodworth concluded that the studies displayed four clear patterns: 1) with few exceptions, the defendant's race is not a significant correlate of death sentencing, 2) primarily because of prosecutorial charging decisions, those who kill whites are significantly more likely than those who kill blacks to be sentenced to death, 3) black defendants with white victims are especially likely to be treated more punitively, and 4) counties with large numbers of cases with black defendants or white victims show especially strong impacts on black defendants or on those with white victims.[23]

Professor Baldus passed away in 2011, but one of his students, Catherine Grosso, has taken the reigns and assembled a team that has continued Baldus's work. Among their publications is one that recently updated the Baldus literature review.[24] Published in 2014, the researchers had by then identified 56 studies that had been completed after the 1990 GAO Report. Their review identified four patterns:

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[18] Gregg v. Georgia, 428 U.S. 153 (1976).

[19] David C. Baldus, George G. Woodworth, & Charles A. Pulaski, Jr. Equal Justice and the Death Penalty: A Legal and Empirical Analysis (1990).

[20] *See* General Accounting office, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities, GAO GGD90-57 (1990), at 5.

[21] David C. Baldus & George Woodworth, G., *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 59 Criminal Law Bulletin 194 (2005).

[22] *Id.*, at 202.

[23] *Id.*, at 214-15.

[24] Catherine M. Grosso, Barbara O'Brien, Abijah Taylor, & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in America's Experiment with Capital Punishment, 3rd ed. (J. R. Acker, R. M. Bohm, & C. S. Lanier, eds. 2014), 525-76.

- Four of the studies did not discover any race effects.
- Four found independent effects of the race of the defendant (that is, effects that remained after statistically controlling for other relevant variables).
- Twenty-four studies in 15 jurisdictions found significant race-of-victim effects.
- Nine found that black defendants with white victims were more harshly treated than other homicide defendants.[25]

Unfortunately, none of these post-1990 studies focused on Oklahoma, and only one credible study has explored the possibility of racial disparities in Oklahoma in the post-*Furman* years.[26] In that study, first published in *Stanford Law Review*,[27] Samuel Gross and Robert Mauro studied all homicides and death sentences in Oklahoma during the 55-month period, August 1976 through December 1980.[28] Thus, these data are almost forty years old. Included were 43 death sentences imposed in 898 cases.[29] Initially the researchers found that death sentences were imposed in 16.7 percent of the cases in which a black was suspected of killing a white (B-W), 6.6 percent of the cases where a white was suspected of killing a white (W-W), and 1.5 percent of the black on black (B-B) cases.[30]

If the homicide was accompanied by other felony circumstances, no cases with black victims resulted in a death sentence, compared to 30.6 percent of the white victim cases. If the victim and defendant were strangers, 21.8 percent of the white Victim cases resulted in a death sentence, compared to 3.4 percent of such cases with black victims.[31]

In 2016 a second study of death sentencing in Oklahoma was published.[32] The paper attempted to look at death sentencing in Oklahoma in a sample of 3,595 homicide cases over a 38-year time span, 1973-2010. Unfortunately, some of the data presented by the authors in that paper is incorrect, so the paper is not useful. For example, in Appendix B we are told that 8 percent of the white-white homicides contained "capital" or "first-degree" (as opposed to "second-degree" murder charges) (137/1,696), compared to 55 percent of the black-black cases (548/659).[33] We are also told that the data set includes 1,050 cases "charged capital" in which whites were accused of killing Native Americans, although the authors also report that there were only 42 white-Native American cases in their sample. In an email to Radelet dated August 18, 2016, lead author David Keys acknowledged that they undoubtedly received bad data from the State of Oklahoma.[34]

---

[25] *Id.*, at 358-59. Because some of the studies reached more than one of these conclusions, the sum of these findings (41) is greater than the total number of studies (56).

[26] SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 88-94 (1989).

[27] Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STANFORD LAW REVIEW 27 (1984).

[28] GROSS & MAURO, *supra* note 26, at 253.

[29] *Id.*, at 255.

[30] *Id.*

[31] *Id.*, at 256.

[32] David P. Keys & John F. Galliher, *Nothing Succeeds Like Failure: Race, Decisionmaking, and Proportionality in Oklahoma Homicide Trials, 1973-2010*, in RACE AND THE DEATH PENALTY: THE LEGACY OF MCCLESKEY V. KEMP 125 (David P. Keys & R. J. Maratea eds. 2016). We mention this study only to show our awareness of it and to alert future students of the death penalty in Oklahoma that its data is fundamentally flawed, from which no conclusions are possible.

[33] *Id.*, at 142.

[34] Email exchange available with the author (Radelet).

III. Methodology

We examined all cases in which the death penalty was imposed for Oklahoma homicides that occurred between January 1, 1990, and December 31, 2012. Using 23 years of homicide data allowed us to use a sample with enough cases in it to detect patterns. We ended with cases in 2012 because we found only one death penalty case for a 2013 murder, and any homicides that occurred in 2013 or later might still be awaiting final disposition. During those 23 years, the state recorded some 5,090 homicides, for an annual average of 221.[35]

A. Homicide Data Set

To begin, we assembled a data set on all Oklahoma homicides with an identified perpetrator over a 23 year period from 1990 to 2012.[36] We obtained these data from the FBI's "Supplemental Homicide Reports," or SHRs. Supplemental Homicide Reports are compiled from data supplied by local law enforcement agencies throughout the United States, who report data on homicides to a central state agency, which in turn reports them to the FBI in Washington for inclusion in its Uniform Crime Reports.[37] While the Reports do not list the suspects' or victims' names (and only the month and year of the offense — not the specific date), they do include the following information: the month, year, and county of the homicide; the age, gender, race,[38] and ethnicity of the suspects and victims; the number of victims; the victim-suspect relationship; weapon used; and information on whether the homicide was accompanied by additional felonies (e.g., robbery or rape).[39] Local law enforcement agencies usually report these data long before the defendant has been convicted, so offender data are for "suspects," not convicted offenders.[40]

The SHRs include information on all murders and non-negligent manslaughters, but they do not differentiate between the two types of homicides. They define murders and non-negligent manslaughters as "the willful (nonnegligent) killing of one human being by another. Deaths caused by negligence, attempts to kill, assaults to kill, suicides, and accidental deaths are excluded."[41]

In addition, the SHRs have a separate classification for justifiable homicides, which are defined as "(1) the killing of a felon by a law enforcement officer in the line of duty; or (2) the killing of a felon, during the commission of a felony, by a private citizen."[42] Because the data come from police agencies, not all the identified suspects are eventually convicted of the homicide.

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[35] Oklahoma Crime Rates 1960-2015, available at http://www.disastercenter.com/crime/okcrimn.htm.

[36] This is similar to the methodology used in other studies that Pierce and Radelet have conducted using information from the Supplemental Homicide Reports. *See* Glenn L. Pierce & Michael L. Radelet, *Death Sentencing in East Baton Rouge Parish, 1990-2008*, 71 LOUISIANA LAW REVIEW 647 (2011); Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-99*, 46 SANTA CLARA LAW REVIEW 1 (2005); Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLORIDA LAW REVIEW 1 (1991); Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina: 1980-2007*, 89 NORTH CAROLINA LAW REVIEW 2119 (2011). The methodology was developed and first used by GROSS & MAURO, *supra* note 26, at 35-42.

[37] *See* http://www.bjs.gov/content/pub/pdf/ntmh.pdf (last visited August 1, 2016). We have used SHR data in other research projects, and an earlier version of this paragraph was included in Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-99*, 46 SANTA CLARA LAW REVIEW 1, 15 (2005).

[38] The racial designations used in the UCR are defined as follows: (1) white. A person having origins in any of the original peoples of Europe, North Africa, or the Middle East. (2) black. A person having origins in any of the black racial groups of Africa. (3) American Indian or Alaskan Native. A person having origins in any of the original peoples of North America and who maintains cultural identification through tribal affiliation or community recognition. (4) Asian or Pacific Islander. A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent. (5) Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa. (6) Unknown). Federal Bureau of Investigation, UNIFORM CRIME REPORTING HANDBOOK 97, 106 (2004).

[39] *See id.*, NAT'L ARCHIVE OF CRIM. JUSTICE DATA.

[40] *Id.*

[41] *See* FEDERAL BUREAU OF INVESTIGATION, *Uniform Crime Reporting Statistics, UCR Offense Definitions*, http://www.ucrdatatool.gov/offenses.cfm (last visited August 1, 2016).

[42] *Id.*

For our project, a total of 4,815 homicide suspects were identified from Oklahoma SHR's for homicides committed during the period 1990 through 2012. Only those SHR cases that recorded the gender of the homicide suspect were included in the sample, effectively eliminating those cases in which no suspect was identified. In other words, for SHR homicide cases where no suspect gender information was recorded, we assumed that the police had not been able to identify a suspect for that particular homicide incident, rendering sentencing decisions irrelevant.

Finally, we constructed one new SHR case and added it to our data when we found a death penalty case with no corresponding case in the existing SHR data. To better pinpoint the race differences, we also dropped 82 cases in which there were multiple victims who were not all the same races, and an additional 64 cases where either the victim or offender was Asian. This resulted in a reduction of 146 homicide cases (three percent of the original sample of 4,815 homicide cases) and one addition, resulting in a final sample size of 4,668 cases.

In addition to the race of the victim, the SHR data include information on the number of homicide victims in each case, and on what additional felonies, if any, occurred at the same time as the homicide. These variables are key to the analysis reported below.

B. Death Row Data Set

Unfortunately, there is no state agency, organization, or individual who maintains a data set on all Oklahoma death penalty cases. We thus had to start from scratch in constructing what we call the "Death Row Data Set."

To do this, we used data compiled by the NAACP Legal Defense and Educational Fund, Inc., and issued in a (usually) quarterly publication called "Death Row USA."[43] This highly-respected source lists (by state) the name, race and gender of every person on America's death rows. Unfortunately, it contains no other information about the defendant (e.g., age), victim (e.g., name, age, race), or crime (e.g., date, location, or circumstances).

Copies of most back issues of Death Row USA are available online,[44] and other issues are available in hard copy in many law libraries, including the University of Colorado's. From these sources we made copies of all the Oklahoma inmates listed in the 85 issues of Death Row USA published in the years 1990-2012. From those we identified the *additions* to the lists, since the additions would give us a preliminary list of those sentenced to death for homicides committed on or after January 1, 1990. We were not interested in the names of inmates who were on death row in the first issue we examined since all of those inmates were convicted of murders from the 1970s or 1980s. We were only interested in the additions, and then only those sent to death row for murders committed on or after January 1, 1990.

With that list, we conducted internet searches for information about the crime – specific date, county of offense, name of victim/s (and age, sex, and race), and the like. All those whose crimes occurred in the 1980s or after December 31, 2012 were deleted. We also used a web site maintained by the Oklahoma Department of Corrections to confirm the inmate's race and gender, as well as the county of conviction and the inmate's date of birth.[45] Because this source provides only the date of the conviction, not the date of the offense, information on the date of offense had to be obtained from other sources (primarily newspaper articles and published appellate decisions in the case).

In the end, we identified 153 death sentences imposed against 151 offenders for homicides committed 1990-2012. Two men, Karl Myers and Darrin Pickens, had two separate death sentences imposed in two separate trials for two separate homicides, so each defendant is counted twice.

[43] DEATH ROW USA, http: www.naacpldf.org death-row-usa.

[44] *See id.*

[45] OKLAHOMA DEP'T OF CORRECTIONS, *Offender Look-Up* Database, https: okoffenderlookup.doc.ok.gov .

On multiple victim homicides, we counted the homicides with at least one female victim as homicides with female victims.

IV. Results

A. Frequencies and Cross-Tabulations

Table 1 displays descriptive statistics from our data. There are a total of 4,668 homicides included, of which 2,060 (44.1 percent) involved both white suspects and white victims, and 1,266 (27.1 percent) involved black suspects and black victims. There are 427 cases with a black suspect and white victim (9.1 percent), and 143 cases with a white suspect and a black victim (3.1 percent).

Table 1: Oklahoma Homicides by Suspect's and Victim's Race/Ethnicity

	Race/Ethnicity of Victim				
	White Only	Black Only	Hisp. Only	Nat. Am. Only	TOTAL
White Suspect	2060	143	38	99	2340
Black Suspect	427	1266	42	30	1765
Hispanic Suspect	65	21	133	8	227
Nat. Am. Suspect	151	15	12	158	336
TOTAL	2703	1445	225	295	4668

Table 2 shows that overall, 143 (3.06 percent) of the homicides with known suspects resulted in a death sentence. Homicides with white victims are the most likely to result in a death sentence. Here 106/2703 resulted in death (3.92 percent), whereas 37/1965 of the homicides with nonwhite victims resulted in death (1.88 percent).[46]

Table 2: Oklahoma Homicides and Death Sentences by Race of Victim

	No. of Suspects	No. of Death Sentences	Percentage Death
White Victim	2703	106	3.92
Black Victim	1445	27	1.87
Hispanic Victim	225	6	2.67
Native American Victim	295	4	1.36
TOTAL	4668	143	3.06

Table 3 looks at only those homicides with male victims. There are a sufficient number of cases to make conclusions only for cases with either white or black victims.[47] Of the white male victim cases 2.26 result in a death sentence, but only .77 of the black male cases result in a death sentence. Thus, homicides with white male victims are 2.94 times more likely to result in death than cases with black male victims (2.26 divided by .77).

Table 4 shows that homicides with at least one female victim are 4.6 times more likely to result in a death sentence (7.21 percent) than the homicides with no female victims shown in Table 3 (1.57 percent). There are 1,235 cases in the data with at least one female victim, and again we focus on differences between cases with white victims and black victims, and do not look at the other race/ethnicity categories that have low sample counts. The data show only small differences in death sentencing rates among cases with at least one female victim between white (7.57 percent) and black (6.67 percent) victims. Clearly, race makes less of a difference when women are killed than when men are killed.

Table 5 examines the percentage of cases that resulted in a death sentence by the race of the defendant. There is virtually no difference in the probability of a death sentence by race of defendant, with 3.2 percent of the white offenders sentenced to death and 3 percent of the nonwhite defendants.

[46] These 37 suspects were implicated in 27 cases with black victims, 6 with Hispanic victims, and 4 with Native American victims. The 1,965 victims included 1,445 cases with black (only) victims, 225 with Hispanic victim only, and 295 with Native American victim only.

[47] That is, there are so few cases with black, Hispanic, or Native American victims that small fluctuations in the number of death sentences will result in large proportional differences.

Table 3: Oklahoma Homicides and Death Sentences by Race of Victim

Cases with No Female Victims

	No. of Suspects	No. of Death Sentences	Percentage Death
White Victim	1857	42	2.26
Black Victim	1175	9	0.77
Hispanic Victim	189	1	0.53
Native American Victim	212	2	0.94
TOTAL	3433	56	1.57

Table 4: Oklahoma Homicides and Death Sentences by Race of Victim

Cases with At Least One Female Victim

	No. of Suspects	No. of Death Sentences	Percentage Death
White Victim	846	64	7.57
Black Victim	270	18	6.67
Hispanic Victim	36	5	13.89
Native American Victim	83	2	2.41
TOTAL	1235	89	7.21

Table 5: Death Sentences by Race of Defendant

		White	Nonwhite	Total
	No	2266	2259	4523
		.968	.970	
Death Penalty Imposed				
	Yes	74	69	143
		.032	.030	
	Total	2340	2328	4668

Chi Square 1.55; 1 df; NS

Table 6: Death Sentences by Race of Victim

		White	Nonwhite	Total
	No	2597	1928	4525
		.961	.981	
Death Penalty Imposed				
	Yes	106	37	143
		.039	.019	
	Total	2703	1965	4668

Chi Square 15.92; 1 df; p<.001

However, there is much more to this story. Table 6 looks at the percentages of death penalty cases by the race of the victim. Here we see that 1.9 percent of those who were suspected of killing nonwhites were ultimately sentenced to death (37 divided by 1965), whereas 3.9 percent (106 divided by 2703) of those suspected of killing whites ended up on death row. The probability of a death sentence is therefore 2.05 times higher for those who are suspected of killing whites than for those suspected of killing nonwhites.

Table 7 combines both suspect's and victim's races/ethnicities.[48] The percentages of nonwhite defendant/nonwhite victim and white defendant/nonwhite victim cases ending with death sentences was 1.9 and 1.8 percent death sentence respectively. In sharp contrast, 3.3 percent of the white-on-white homicides resulted in a death sentence, compared to 5.8 percent of the nonwhites suspected of killing white victims. The gender of the victim also makes a very large difference in who ends up on death row. As Table 8 shows, 1.6 percent of the defendants suspected of killing males (no female victims) were sentenced to death, compared to 7.2 percent of those who were suspected of killing one or more women.

Table 7: Death Sentences by Races of Defendant and Victim

Defendant-Victim Race/Ethnicity

(W= White; NW=Nonwhite)

	NW-W	W-W	NW-NW	W-NW	Total
No	606	1991	1653	275	4525
	.942	.967	.981	.982	.969
Death Penalty Imposed					
Yes	37	69	32	5	143
	.058	.033	.019	.018	.031
Total	643	2060	1685	280	4668

Chi Square 25.48; 3 df; p<.001

Table 9 (on next page) shows the likelihood of a death sentence by the race and gender of the victim. Among those suspected of killing white males, 2.3 percent are sentenced to death, whereas among those suspected of killing nonwhite males, only .8 percent are sent to death row. On the other hand, 7.6 percent of those suspected of killing white females are sentenced to death, as are 6.4 percent of those suspected of killing nonwhite females.

Finally, Table 10 (on next page) displays the percent of death penalty cases broken down by the presence of zero, one, or two "additional legally relevant factors." The factors we included are 1) whether the homicide event also included additional felonies, and 2) whether there were multiple victims. All cases had 0, 1, or 2 of these factors present. Table 10 shows what would be expected: 1.7 percent of the cases with no additional legally relevant factors ended with a death sentence, 6.2 percent of the

Table 8: Death Sentences by Gender of Victim (V=Victim)

		No Female V	1+ Female V	Total
	No	3378	1146	4535
		.984	.928	.969
Death Penalty Imposed				
	Yes	54	89	143
		.016	.072	.031
	Total	3433	1235	4668

Chi Square 97.07; 1 df; p<.001

[48] When the analysis examines the potential effect of more than one independent variable the likelihood of a death sentence, we combine the separate racial/ethnic minority categories (i.e., black, Hispanic, and Native American) into a single minority category. Each of these minority subgroups are recognized as groups that are subject to subject to discrimination.

Table 9: Death Sentences by Race/Gender of Victim

(W= white; NW=Nonwhite)

		W-F	W-M	NW-F	NW-M	Total
	No	782	1815	364	1564	4525
		.924	.977	.936	.992	.969
Death Penalty Imposed						
	Yes	64	42	25	12	143
		.076	.023	.064	.008	.031
	Total	846	1857	389	1576	4668

Chi Square 104.69; 3 df; p<.001

Table 10: Death Sentences by Number of Additional Legally Relevant Factors (ALRF)

		No ALRF	1 ALRF	2ALRF	Total
	No	3510	978	37	4525
		.983	.938	.698	.969
Death Penalty Imposed					
	Yes	62	65	16	143
		.017	.062	.302	.031
	Total	3852	1043	53	4668

Chi Square 187.9; 2 df; p<.001

cases with one factor, and 30.2 percent of the cases with two factors.

We now turn our attention to pinpointing the effects of each of our predictor variables.

B. Multiple Logistic Regression Analysis

Table 11 presents the results from a statistical technique called logistic regression.[49] This is the statistical technique of choice used to predict a dependent variable that has two categories, such as whether or not a death

[49] In logistic regression, the dependent variable is predicted with a series of independent variables, such as gender, income, etc. The model predicts the dependent variable with a series of independent variables, and the unique predictive utility of each independent variable can be ascertained. As we have explained elsewhere:

> Logistic regression models estimate the average effect of each independent variable (predictor) on the odds that a convicted felon would receive a sentence of death. An odds ratio is simply the ratio of the probability of a death sentence to the probability of a sentence other than death. Thus, when one's likelihood of receiving a death sentence is .75 (P), then the probability of receiving a non-death sentence is .25 (1-P). The odds ratio in this example is .75/.25 or 3 to 1. Simply put, the odds of getting the death sentence in this case are 3 to 1. The dependent variable is a natural logarithm of the odds ratio, y, of having received the death penalty. Thus, y=P / 1-P and; (1) $\ln(y) = \hat{a}_o, X\hat{a} + _{is}$ where $\hat{a}_o$ is an intercept, $\hat{a}_i$ are the i coefficients for the i independent variables, X is the matrix of observations on the independent variables, and $_{is}$ is the error term. Results for the logistic model are reported as odds ratios. Recall that when interpreting odds ratios, an odds ratio of one means that someone with that specific characteristic is just as likely to receive a capital sentence as not. Odds ratios of greater than one indicate a higher likelihood of the death penalty for those offenders who have a positive value for that particular independent variable. When the independent variable is continuous, the odds ratio indicates the increase in the odds of receiving the death penalty for each unitary increase in the predictor.

Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988–1997*, 81 OR. L. REV. 39, 59 (2002).

sentence is imposed.[50]

Table 11 shows that there are five variables in our model that are associated with who is sentenced to death in Oklahoma: 1) having a white female victim, 2) having a white male victim, 3) having a female victim from a minority race of ethnicity, 4) having one additional legally relevant factor (a homicide event with more than one victims OR one in which there were additional felony circumstances present, and 5) having two additional legally relevant factors present (a homicide event with more than one victims AND one in which there were additional felony circumstances present. The reference category for the latter two variables is "no additional factors." We also included a variable measuring the race of the defendant (white vs. minority), but that factor was not statistically significant.

Table 11: Logistic Regression Analysis of Victim's Race/Gender and Number of Additional Legally Relevant Factors on the Imposition of a Death Sentence (n=4668)

	β	Sig.	Exp β
Independent Variables			
White Female Victim	2.261	.000	9.592
White Male Victim	1.171	.001	3.225
Minority Female Victim	2.161	.000	8.678
One additional aggravator*	1.235	.000	3.439
Two additional aggravators**	2.553	.000	12.847
Defendant's Race (white vs. minority)	.284	.164	1.328
Constant	5.799	.000	.003

*Either multiple victim homicide or homicide with additional felony circumstances

**Both multiple victim homicide and homicide with additional felony circumstances

It is no surprise that having one or both legally relevant factors increases the odds of a death sentence dramatically. Let's focus on the column labeled Exp β. The Exp β for "one additional aggravator" is 3.459 (rounded to 3.4), which is also the odds ratio. Thus, after controlling for all the other variables in the model, the odds of receiving a death sentence are 3.4 times higher in cases with one additional legally relevant factor (compared to cases with no additional legally relevant factors). When the two additional legally relevant factors are both present, the Exp β tells us that the odds of a death sentence are 12.847 (12.8) times higher than cases where no additional factors are present. This is what would be expected – clearly those cases are highly aggravated.

More interesting are the effects of race and gender. Here the excluded category (the comparison group) includes cases with male victims, minority races (black, Hispanic, or Native American). The Exp β in Table 11 shows that the odds of a death sentence for those with white female victims are 9.59 time higher than in cases with minority male victims. The odds of a death sentence for those with white male victims are 3.22 times higher than the odds of a death sentence with minority male victims. Finally, the odds of a death sentence for those with minority female victims are 8.68 times higher than the odds of a death sentence with minority male victims. And all these race/gender effects are net of our two control variables (multiple murder victims and the presence of additional felony circumstances), and all are statistically significant.

[50] Logistic regression is a statistical method to predict the value of one variable with a series of other variables. The technique is regularly used in studies of race and death sentencing. See, e.g., David C. Baldus, George Woodworth, & Charles A. Pulaski, Jr., *Equal Justice And The Death Penalty* 78 n.55 (1990) (explaining how logistic regression models can be used to calculate the odds of a death sentence); Gross & Mauro, *supra* note 15, at 248–52 (using a logistic regression model to help predict the probability of a death sentence); Raymond Paternoster et al., JUSTICE BY GEOGRAPHY AND RACE: THE ADMINISTRATION OF THE DEATH PENALTY IN MARYLAND, 1978–1999, 4 MARGINS 1, 51–44 (2004) (using logistic regression to address the relationship between victim and offender race).

V. Conclusion

The data show that death sentencing in Oklahoma is not related to the race of the defendant. However, there are rather large disparities in the odds of a death sentence that correlate with the gender and the race/ethnicity of the victim. Controlling for other factors — the presence of additional felony circumstances and the presence of multiple victims — cases with white female victims, cases with white male victims, and cases with minority female victims are significantly more likely to end with a death sentence in Oklahoma than are cases with nonwhite male victims.