CASE NO. 07-5172

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

April Rose Wilkens,

Petitioner-Appellant,

versus

Millicent Newton-Embry, Warden,

Respondent-Appellee.

APPEAL FROM THE JUDGMENT IN FAVOR OF THE RESPONDENT AND AGAINST THE PETITIONER ENTERED BY U.S. DISTRICT JUDGE TERENCE KERN IN THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA IN A HABEAS CORPUS ACTION BROUGHT PURSUANT TO 28 U.S.C. § 2254 AT DISTRICT COURT CASE NUMBER 02-CV-244-TCK-SAJ

APPELLANT'S BRIEF

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25 April 2008

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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	)	
Petitioner-Appellant,	)	
vs.	)	Case No. 07-5172
	)	
MILLICENT NEWTON-EMBRY, Warden,	)	
	)	
Respondent-Appellee.	)	

APPELLANT'S BRIEF

STATEMENT OF JURISDICTION

I, April Wilkens, am the Petitioner-Appellant in this case. I am a state inmate incarcerated at the Mabel Bassett Correctional Center under the control of Respondent-Appellee Warden Millicent Newton-Embry. I brought this habeas corpus action pursuant to 28 U.S.C. §2254 on 2 April 2002 in the U.S. District Court for the Northern District of Oklahoma alleging that I am incarcerated in violation of the United States Constitution. On 5 November 2007, U.S. District Judge Terence Kern denied my petition for a writ of habeas corpus. Pursuant to 28 U.S.C. §1746, I timely submitted my notice of appeal to prison officials for mailing on 20 November 2007, and it was filed on 26 November 2007. The U.S. Court of Appeals for the Tenth Circuit has jurisdiction pursuant to 28 U.S.C. §§1291 and 2253.

STATEMENT OF THE ISSUES

I. Appellant's counsel was ineffective for failing to contact Appellant's former attorneys, U.S. District Judge Claire Eagan and Mike Cooke, and failing to discover and present an audiotape in their possession of Terry Carlton admitting that he beat and raped Appellant

II. Appellant's counsel was ineffective for failing to present adequate testimony from a qualified Battered Woman Syndrome specialist

III. Appellant's trial counsel was ineffective for failing to request a manslaughter jury instruction

STATEMENT OF THE CASE

My case is a Battered Woman Syndrome ("BWS") self-defense case under Oklahoma law. On 28 April 1998, I shot and killed my ex-fiancé, Terry Carlton. On 29 April 1998, I was charged with first-degree murder in the District Court of Tulsa County in the State of Oklahoma in case number CF-98-2173. On 24 April 1999, I was convicted of first-degree murder following a three-week jury trial at which I was represented by attorney Chris Lyons. On 7 July 1999, I was sentenced to life in prison in the custody of the Oklahoma Department of Corrections. On 3 April 2001, the Oklahoma Court of Criminal Appeals ("OCCA") denied my direct appeal in an unpublished summary opinion in case number F-1999-927. On 2 April 2002, a petition for a writ of habeas corpus was filed on my behalf by attorney David Blades in the U.S. District Court for the Northern District of Oklahoma in case number 02-CV-244-TCK-SAJ. On 27 February 2003, my habeas case was stayed pending exhaustion of available state court remedies for my unexhausted claims. On 5 March 2003, appearing *pro se*, I filed an application for post-conviction relief presenting my unexhausted claims in the District Court of Tulsa County in case number CF-98-2173. On 22 August 2003, the District Court of Tulsa County denied my application for post-conviction relief. On 2 August 2004, the OCCA denied my post-conviction appeal in PC-2003-1002. On 18 August 2004, appearing *pro se*, I filed my notice of exhaustion of state court remedies and amended habeas corpus

petition in the U.S. District Court for the Northern District of Oklahoma in case number 02-CV-244-TCK-SAJ. On 12 October 2004, the U.S. District Court lifted the stay in my habeas case. On 5 November 2007, U.S. District Judge Terence Kern denied my petition for a writ of habeas corpus. On 20 November 2007, in compliance with 28 U.S.C. §1746, I timely submitted my notice of appeal to prison officials for mailing to the U.S. District Court, and it was filed on 26 November 2007. I am now appealing to the U.S. Court of Appeals for the Tenth Circuit.

STATEMENT OF THE FACTS

My case is a Battered Woman Syndrome ("BWS") self-defense case under Oklahoma law. Tr.Trans.Vol.I at 6-12. On 28 April 1998, I shot and killed my ex-fiancé, Terry Carlton. Dkt. #65 at 3. Subsequently, I was charged with first-degree murder in the District Court of Tulsa County in the State of Oklahoma in case number CF-98-2173. Id. I was put on trial in April 1999. Tr.Trans.Vol.I at 2.

At my trial, I testified about my history as well as the history of my relationship with Terry Carlton. Dkt. #65 at 26. Aside from my testimony, there was substantial evidence presented at my trial that Terry Carlton physically abused and terrorized me on more than one occasion. Id. at 24. Numerous witnesses—including physicians, nurses, neighbors and friends of both mine and Terry's—testified about incidents they either witnessed or had knowledge of when Terry stalked, harassed, abused, and/or raped me. Id. at 24-26. There was police testimony regarding domestic abuse calls made by me from both my home and Terry's. Id. at 26. Further, Terry's ex-wife, Sherry Blanton, testified about the protective order she filed against Terry and the battering she suffered at Terry's hands.

Dkt. #65 at 26.

I am a college graduate with a post-baccalaureate degree in prosthetics. Dkt. #65 at 2. I met Terry Carlton in the fall of 1995. Id. Terry and I began dating, and on Christmas Eve 1995, Terry asked me to marry him. Id. I said yes, and we planned to get married in April 1996. Id. After we became engaged, however, problems developed in our relationship and escalated to the first instance of physical abuse when Terry grabbed my throat in April 1996. Id. The violence escalated and Terry hit, choked, raped and otherwise abused me on numerous occasions after that. Id. at 26. I made numerous domestic violence calls to the police. Id. at 2. I also filed emergency temporary protective orders against Terry, but I did not appear in court to make those protective orders permanent. Id. Terry told me that I would be dead if I got a permanent protective order, and I was afraid that he meant it. Tr.Trans.Vol.XI at 2004. By 1998, our relationship was over, but Terry continued to harass and threaten me. Dkt. #65 at 3.

One of my neighbors, Glenda McCarley, testified that she witnessed Terry Carlton stalking me and breaking into my home in the early months of 1998. Tr.Trans.Vol.XIV at 2740-48. Ms. McCarley said that the sound of Terry's car woke her up in the "wee hours of the morning" about "five out of seven days" a week. Id. at 2741. Ms. McCarley testified she saw Terry park his car around different corners from my home and sometimes in front of *her* house. Id. at 2746. I testified that on several occasions when Terry broke into my home, he beat in the back doors leading directly into my bedroom. Tr.Trans.Vol.XI at 2046, 2045. Ms. McCarley testified about one incident she witnessed in February or March of 1998, when Terry was trying to break into my home

using what appeared to be a piece of pipe to beat on the back doors and windows. Tr.Trans.Vol.XIV at 2745. Ms. McCarley testified that on that occasion, *she* called the police. Id. at 2746. Ms. McCarley said that Terry left just before the police arrived and, as usual, the police did nothing. Id. Ms. McCarley testified that it "got to be a very common occurrence" for the police to be at my residence, and that the police usually did nothing. Id. Ms. McCarley further testified that Terry left my home so many times just before police arrived that it was "almost a joke" among my neighbors about how Terry had the police officers' timing down. Id. at 2747-48, 2740. Ms. McCarley also testified about an incident of abuse she witnessed late one night when she heard me screaming and saw me running from my home. Id. at 2743-44, 2761. Ms. McCarley testified that she saw Terry Carlton exit my home, run me down, grab me by my hair, and drag me back behind my privacy fence toward the back of my home. Id.; and Dkt. #65 at 26. Ms. McCarley further testified that she never saw me do anything aggressive toward Terry Carlton. Tr.Trans.Vol.XIV at 2762.

Another one of my neighbors, Maxine Callicoat, testified at my trial that I came to her house and said I needed to use her phone because Terry had yanked mine out of the wall or disconnected it somehow. Tr.Trans.Vol.XIV at 2689, 2691-92. Ms. Callicoat, testified at my trial that she could hear arguing and yelling when Terry Carlton was at my home, and I used her phone more than once to call the police because Terry Carlton was threatening me. Dkt. #65 at 25. Ms. Callicoat also said that the distinct, loud sound of Terry's car and of Terry and I arguing would wake her up "four and five and sometimes six times a week," always at 2:30 or 3:00 o'clock in the morning. Tr.Trans.Vol.XIV at

2687. Ms. Callicoat testifed that Terry and the police were at my home "day after day after day." Id. at 2689. Ms. Callicoat said I seemed to be afraid for my life because Terry was threatening me. Id. at 2689-90.

I testified that in mid-February 1998, Terry entered my home uninvited. Tr.Trans.Vol.XI at 2060-62. Terry was armed with a gun, a stun gun, a billy club, and tear gas. Id. Terry attempted to rape me in my bedroom. Id. This is the incident when I retrieved a pistol, pointed it at Terry's head, and tried to shoot Terry to protect myself, but the gun did not fire. Tr.Trans.Vol.XII at 2230-31; and Tr.Trans.Vol.XIII at 2477-78.

On 21 February 1998, Terry attempted to break into my home again. Tr.Trans.Vol.XI at 2063. I called 911, and police officers arrived and found Terry outside of my home with a loaded, chambered Glock 9mm pistol and a stun gun. Id. at 2063, 2067. Terry was arrested. Id. at 2069. Officer Troy Dewitt testified at my trial that I placed a 911 call from my home at around three o'clock in the morning on 21 February 1998. Tr.Trans.Vol.XIV at 2708-2710. Upon arrival, Officer Dewitt found Terry Carlton outside of my home with a loaded gun and a stun gun in his possession. Id. at 2712. Officer Dewitt said that Terry was trying to elude the police, and officers had to stop Terry at gunpoint. Id. at 2711-12. Officer Dewitt arrested Terry. Id. at 2712-13; and Dkt. #65 at 25. Officer Dewitt testified that he had been to my home in response to 911 calls numerous times before, but this was the first time he caught Terry there. Tr.Trans.Vol.XIV at 2714-15. Officer Dewitt said he remembered me wearing a "panic button"—one that signaled my home alarm system—around my neck for protection. Id. at 2720. Officer Dewitt testified that due to the circumstances and what he had found, he

called a judge and obtained an emergency protective order for me on the spot. Id. at 2716. Terry violated that protective order, and Tulsa Police officer Aaron Tallman refused to enforce it. Tr.Trans.Vol.XI at 2089-91.

On 25 March 1998, a bench warrant was issued for Terry Carlton's arrest in Tulsa County District Court case number CM-1998-575 for his failure to appear in court on a gun charge stemming from his arrest outside of my home on 21 February 1998. Dkt. #65 at 26-27. The warrant was not introduced into evidence or ever mentioned at my trial. Id. The warrant was still in effect when I killed Terry. See Appellant's Exhibits at 11 [Aplt. Exhibit 5, Dkt. #12 Exhibit 3 at 2].

In March of 1998, there were so many incidents when Terry Carlton broke into my home that it seemed "constant." Tr.Trans.Vol.XI at 2069. On one occasion, Terry also kicked in my interior bedroom door, leaving his boot prints on the door and damaging the door frame. Id. at 2047-48, 2055. Around this time, Shannon Broyles, whom I have been friends with since high school, stopped by my home unannounced and this is what she testified she saw: "[April's] house had been tore up, it was destroyed. I mean, everything. I saw things smashed, glass broke. I saw her bedroom door, it had been forced in somehow, like it had been knocked in or kicked in. From the back door to the front door to the bathroom, the laundry room, to her bedroom...the whole house was like that." Tr.Trans.Vol.XIV at 2663, 2672-74, 2667.

At about two or three o'clock in the morning on 28 April 1998, I went to Terry Carlton's house to make peace with him. Tr.Trans.Vol.XI at 2123. Terry had just ransacked my home again, and I was afraid he was going to assault and kill me.

Tr.Trans.Vol.XV at 2833. I went to Terry's house to talk to him because I believed he was going to come after me anyway, and I wanted to make peace with him in an attempt to head off the attack. Id. at 2834.

When I arrived at Terry's house, I knocked on the front door. Tr.Trans.Vol.XI at 2129. Terry answered and invited me in. Id. He had a gun with him, apparently because it was late. Id. Terry was glad I was there. Id. at 2130. He wanted to go upstairs to the bedroom, but I did not want to, and we went directly downstairs instead. Id. Terry wanted me to use drugs with him. Id. at 2131-32. Terry and I had used drugs together in the past—I started using drugs with Terry in the spring of 1997. Dkt. #65 at 2. However, on this day, I did not want to use drugs with Terry. Id. at 2131-32. I told Terry that I had come over for a peaceful resolution of our problems so that he could get on with his life and I could feel safe. Id. Then Terry became short-tempered and insisted that I use drugs with him. Id. I made up my own solution using water and a tiny bit of methamphetamine. Tr.Trans.Vol.XII at 2332-33. I persuaded Terry to let me mix it weak by telling him that I wanted to be careful because it was my first time to use that particular kind (or batch) of methamphetamine. Tr.Trans.Vol.XI at 2132-33. I injected the drugs, but I did not do a full injection because I did not want to do drugs with Terry at all. Tr.Trans.Vol.XII at 2335. Terry injected himself with a mixture of methamphetamine and heroin. Id.

After using drugs with Terry that morning, I went upstairs to use the restroom. Tr.Trans.Vol.XI at 2133. When I opened the door to exit the restroom, Terry was standing there in front of me blocking the stairs. Id. at 2134. He had the gun in his hand.

Id. He pointed it at me and said I was never going to come around so he was going to rape me. Id. at 2135. His words to me were something like, "I'm going to take the fuck you owe me." Id. I was scared and shocked. Id. at 2136-37. At gunpoint, Terry took me into his bedroom. Id. Then Terry grabbed me and shoved me toward his bed. Id. Terry had asked me to promise that if he agreed to go to drug rehab, I would commit to him after he got out. Id. at 2138. He became violent when I told him that I could not make a commitment to him. Id. at 2139. At some point, Terry put the gun in the nightstand drawer so that he could grab it quickly. Id. at 2140. He told me he was going to rape me and kill me. Id. Terry ripped off my shoes and threw them across the room. Id. He yanked down my pants, ripping them in the process. Id. at 2141. I begged Terry not to rape me, but he told me that my pleas didn't matter and I was "gonna be a dead bitch." Id. at 2141-42. I asked Terry to please kill me before he raped me. Id. at 2142. Terry forced himself into me, and he already had his fingers inside of me Id. Terry raped me with extreme force, tearing me as he entered. Tr.Trans.Vol.XII at 2343. It was painful. Tr.Trans.Vol.XI at 2142. I begged Terry to please kill me because I didn't want him to rape me anymore, and he told me, "You're a dead bitch." Id. Terry hit me in the head with his fists and reached around my neck to break it. Id. My neck cracked. Id. Terry continued to rape me. Id. at 2143. It seemed like the rape went on forever. Id. I eventually talked Terry into stopping the rape by saying things to him like, "How can you enjoy this?" "How can you be with someone...you know doesn't want to be with you?" Id. at 2143-44. Terry did not ejaculate inside of me. Id. After Terry stopped raping me, he started to masturbate. Id. I was just lying there numb. Id. I don't know

whether or not he ejaculated with his hand. Id. Then Terry made me douche while he watched because he didn't want any evidence left. Id. at 2177-78. See also Tr.Trans.Vol.XII at 2350. Terry discarded the used douche in the wastebasket in the upstairs hall bathroom. Tr.Trans.Vol.XI at 2178. I was scared by the fact that Terry actually had a douche at his house. Id. I was afraid, confused, and nervous. Id. at 2179. I felt like my whole life had come to revolve around appeasing Terry and trying to keep him from hurting me. Id. I wanted Terry to get help, and I wanted to get out. Id. I suggested that Terry get some rest which would give me some lead-time to get away, but Terry decided to go back downstairs with me. Id. at 2145-46.

Once Terry and I were back in the basement, Terry mixed heroin and methamphetamine, and he insisted I inject drugs with him again. Id. at 2147. Terry had difficulty finding a vein to inject himself with the drugs because he had injected a large quantity of drugs recently and because there were no clean syringes. Id. at 2148-49. While Terry was distracted trying to find a vein, I was able to empty the syringe he gave me onto the floor and pretend I had injected the drugs. Id. at 2149. I asked Terry if I could use the telephone, and he told me it was upstairs on the nightstand. Id. at 2150. (Dr. John Call testified that I explained to him how I "used a ruse" to get Terry to let me use the phone: I told Terry that I wanted to call about getting us some better drugs. Tr.Trans.Vol.XV at 2951.) I testified that Terry let me go upstairs alone to get the phone. Tr.Trans.Vol.XI at 2150. While upstairs, I saw the gun in the nightstand while I was looking for the phone. Id. at 2150-51. I also saw Terry's police channel scanner on the nightstand. Id. at 2151. Along with the gun and scanner, I hurriedly gathered

together Terry's keys, cash, and credit cards. Id. I put most everything in the pockets located along the back of my vest. Id. at 2152. (I was wearing a bicycling outfit. Id. at 2123-24). I took Terry's gun because I wanted to make sure Terry could not use it on me and because I wanted to protect myself from him. Tr.Trans.Vol.XI at 2152. I did not have time to get everything because I heard Terry moving downstairs. Id. at 2151.

When I went back downstairs, I had an opportunity to run out the front door of the house, but Terry could outrun me and from where he was at, I didn't think I would get very far. Id. at 2155. Plus, I was conflicted: I was still concerned that even if I escaped, Terry would just come to wherever I was at. Tr.Trans.Vol.XI at 2155. Even if he didn't catch me, he would still find me. Id.

I went back down to the basement, and Terry went upstairs. Id. at 2155-56. He was supposed to lie down and get some rest. Id. at 2156. I could hear him moving around, and I waited for him to settle down so I would know that he had actually gone to bed. Id. I kept thinking Terry would lie down and I would have an opportunity to sneak out. Id. at 2155. But Terry never did lie down. Id. at 2156. He came back down to the basement. Id. Terry was frantic and he handcuffed me while I was sitting in a chair. Id. He grabbed both of my arms and he put the right handcuff on first. Id. at 2157. Then he forced my arms together and put the left handcuff on. Id. Terry asked, "Bitch, where's the gun?" Id. Then he searched my pants. Id. I had placed the gun in the back pocket of my vest located over the small of my back. Id. at 2158, 2163. I was scared Terry would find the gun. Id. at 2158. I knew it was loaded because I checked it after I found it and discovered it was loaded and ready to fire with one bullet in the chamber. Id. at

2158-59. Not finding the gun in my pants, Terry quit searching for the gun and told me that he was going to kill me. Id. at 2160. Terry said he was going to anally sodomize me first. Id. His words to me were: "I'm going to rape you up the ass." Id. Terry yanked me toward the couch. Id. He looked deranged, frightening, and fearless. Id. I remember thinking that when Terry sodomized me, he would find the gun. Id. at 2162. On the way to the couch, Terry let go of me. Id. Still handcuffed, I was able to reach around and quickly pull the gun from the back pocket of my vest. Id. at 2162-63. Terry saw the gun, and he became enraged and charged toward me. Id. at 2165. I felt I had no other option with no more distance between us than to shoot. Id. at 2166. I remember pointing the gun at Terry's head. Id. His head was "right there." Id. I shot the gun and just kept shooting. Id. I thought that if Terry got the gun away from me, he would torture me and then kill me. Id. at 2167. I didn't make any conscious decision to keep shooting, I just kept shooting because I was afraid. Tr.Trans.Vol.XII at 2378. See also Tr.Trans.Vol.XV at 2837. It seemed to happen quickly and I don't recall ever pausing. Tr.Trans.Vol.XIII at 2445. I heard Terry say something after I started shooting, but it didn't register with me what he had said until after I had emptied the gun and stopped shooting: I believe he had said that he was paralyzed and to call an ambulance. Tr.Trans.Vol.X at 2168-69; and Tr.Trans.Vol.XII at 2378. I was in a daze. Tr.Trans.Vol.XI at 2169. At some point, I removed the handcuffs using a hand sanitizer. Tr.Trans.Vol.XI at 2170. I was in shock. Id. at 2171. I covered Terry's body with a blanket and sat near him. Id. at 2172. I told myself that I had done the merciful thing by killing Terry. Tr.Trans.Vol.XII at 2370-71. That was just a thought that went

through my head after I had killed Terry: I did not mean that it was a mercy killing. Id.

Eventually, Terry's phone rang and I answered it. Tr.Trans.Vol.XI at 2175. Carrie Gaston was on the line. Id. I told Carrie what had happened and said that I was afraid to be alone with the police, that I wanted someone with me when the police came, and that I wanted to see my son first before anything. Id. I asked her what I should do because I was confused. Id. at 2175-76. Carrie Gaston testified at my trial that between 9:00a.m. and 10:00a.m. that morning, she called Terry's residence. Trans.Vol.VII at 1307. Carrie testified that to her surprise, I answered the telephone. Id. at 1308-09, 1335. Carrie said I told her that Terry was dead and I had shot him. Id. at 1309-10, 1335. She also testified I told her that Terry had beaten, raped, and handcuffed me that morning. Id. at 1336. Carrie said I told her that I was going to call the police, and I asked her not to call the police at that time. Id. at 1312. She testified I told her that I wanted to hug my son first. Id. at 1312, 1340. According to Carrie, I gave no indication that I was trying to hide or conceal anything. Id. at 1340. After our conversation, Carrie called 911 and told the operator that she believed there may have been a shooting. Id. at 1311-12.

In the early morning hours of 28 April 1998, the Tulsa Police Department received a phone call of a possible shooting at 2278 East 38th Street in Tulsa, Oklahoma. Dkt. #65 at 3. Upon arriving at the scene, the police officers approached the house and observed a female inside the house. Id. I opened the door and acknowledged to the officers that I had shot Terry Carlton. Id. I directed the officers to the basement where Terry was found dead. Id.

Eventually, an officer took me to the police detective division where I was interrogated on videotape. Dkt. #65 at 18. As set forth fully in this Statement of Facts hereinabove, when that videotape was made, I had lived through two years of abuse and violence at Terry Carlton's hands. I had just been beaten and raped. I had just been fighting for my life. I had just killed Terry, a devastating thing in its own right. I had been awake for over 30 hours, and I was thoroughly exhausted and overwhelmed. I was surrounded by a slew of antagonistic police officers. Naturally, all of that was unnerving to me: straightaway, I told the police that I was "shook up" and "scared." See Videotaped Statement, State's Exhibit 69. And while my videotaped statement is consistent with my testimony at trial, the manner in which I spoke on the videotape was erratic and my behavior was downright bizarre. Id. Being painfully scared and insecure, I burst out in fits of anxious laughter. Id. At times I was rambling and incoherent. Id. I was a complete basket case, and that's exactly how I came across. Id. The big question of course was why I had shot Terry so many times, and I kept explaining that with the peculiar statement, "I'm a good shot." Id. I also said that I felt like I had done the merciful thing and the safe thing. Id.

After my taped statement concluded at the police detective division, I was transported to Hillcrest Hospital for a rape examination and medical care. Tr.Trans.Vol.VII at 1435. Sexual Assault Nurse Examiner Coordinator Kathy Bell testified that she treated me that day and documented my injuries, including "an area of tear in two different places" vaginally; bruises on my hands, wrists, arms, and head; and redness on my hands and neck. See Tr.Trans.Vol.VIII at 1679, 1692-93, 1695, 1703-22. Further, Nurse Bell

testified that there was actual physical evidence to support my statement that Terry Carlton had punched me in the left side of my face with his fist. Id. at 1703-04. Nurse Bell also collected my clothing, including a black shirt, vest, and pants. Id. at 1670-71. Nurse Bell testified my pants were torn on the right inner knee. Id. at 1686. She also said that there was a small tear about the size of the head of a pencil in the crotch area of my pants. Id. at 1686-87. Nurse Bell explained that Sexual Assault Nurse Examiners cannot and do not give an opinion in any case about whether or not a rape has actually occurred. Id. at 1684-85, 1721, 1723. See also Tr.Trans.Vol.XIII at 2507-08. Nurse Bell said her job is only to document the patient's history, collect evidence, and treat medically. Tr.Trans.Vol.VIII at 1684-85, 1721, 1723. The rape examination evidence was introduced as "the rape kit," State's Exhibit No. 10. Id. at 1696. My rape exam urinalysis from the morning of the shooting was reportedly negative for all drugs. Dkt. #65 at 28.

Different Tulsa police detectives testified at my trial about additional pertinent things they discovered during a search of Terry Carlton's home on the morning of the shooting. Detective Doug Nordyke identified the handgun on the table in Terry's basement as a Beretta .22-caliber. Tr.Trans.Vol.VIII at 1621. No bullet was in the handgun's chamber, and the handgun's magazine was empty as well. Id. at 1635. Detective Roy Heim noted that handcuffs found in the basement had a residue on them that appeared to be "a dried cream...only clear." Tr.Trans.Vol.X at 1909. A hand soap container was found nearby. Id. A Radioshack Hyperscan Scanner capable of monitoring police dispatch channels was also found in the basement. Id. at 1911-12. Detective Heim also saw a pair of

tennis shoes in the upstairs master bedroom "laid over on the side...apart." Id. at 1903-04. Detective Margaret Lovell testified that the tennis shoes in the master bedroom appeared to be women's tennis shoes. Tr.Trans.Vol.VIII at 1558. Pillows, clothes, and other things were also scattered over the floor in the master bedroom. Id. at 1573-74. Detective Heim did not look in any of the trash receptacles in the upstairs bathrooms. Tr.Trans.Vol.X at 1913. Detective Loveall also did not look in any wastebaskets in the upstairs bathrooms. Tr.Trans.Vol.VIII at 1554-55. (This is important because Terry disposed the douche that he made me use that morning in the upstairs hall bathroom wastebasket. Tr.Trans.Vol.XII at 2350.) Detective Loveall also testified that she found several hand grenades in Terry's basement. Tr.Trans.Vol.VIII at 1541. Further, Detective Loveall said that she found assault rifles and "15 to 20" shotguns upstairs in one of Terry's closets. Id. at 1551-52. Detective Ken Makinson testified that various powdered substances were in Terry's basement. Tr.Trans.Vol.IX at 1818.

Medical Examiner Dr. Ronald Distefano testified at my trial about the autopsy he performed on Terry Carlton. Dr. Distefano testified that Terry Carlton was six feet tall and weighed 188 pounds. Tr.Trans.Vol.VI at 1219. (In comparison, I am about five-and-a-half feet tall and weighed around 105 pounds. Tr.Trans.Vol.X at 1982-83. So, Terry could easily overpower me with his bare hands. Tr.Trans.Vol.XV at 3034) Dr. Distefano testified that Terry was 40 years old at the time of his death. Tr.Trans.Vol.VI at 1231. (I was 28 years old when I killed Terry. See Tr.Trans.Vol.X at 1927.) Dr. Distefano said that Terry had chronic injection sites in various stages of healing along his left arm and both legs Tr.Trans.Vol.VI at 1236, 1253-54. Dr. Distefano confirmed that

Terry's track marks were probably due to long-term intravenous use of illicit drugs. Id. at 1237, 1253. Dr. Distefano testified that Terry's toxicology report indicated the presence of methamphetamine and heroin in his system at the time of his death. Id. at 1246, 1255. Dr. Distefano testified that Terry had been shot eight times. Id. at 1228 Terry was shot in the hand, neck, and head. Id. Dr. Distefano could not determine in which order the bullets struck Terry. Id. at 1228, 1262. Dr. Distefano testified that at least one of the shots was fired within a foot-and-a-half to two feet away from Terry's face. Id. at 1247. Dr. Distefano testified that the gunshot wound to Terry's hand could have been inflicted when Terry was lunging with his hands out. Id. at 1266. That bullet entered the palm of Terry's hand. Id. at 1238. Additionally, Dr. Distefano believes another bullet may have passed through Terry's hand before entering Terry's neck or head. Id. at 1273, 1240. That finding is also consistent with my statement that Terry was coming at me when I shot him. Id. With respect to the gunshot wound in Terry's neck, the path of that bullet indicates a face-to-face confrontation and means that I was almost directly in front of Terry when I fired that shot. Id. at 1271. The trajectory of that bullet is consistent with my testimony that Terry was coming at me when I shot him. Id. at 1244-45, 1268-71. Dr. Distefano said it is possible that Terry was paralyzed by that gunshot wound. Id. at 1243-44, 1267. Other than the gunshot wounds in Terry's hand and neck, the trajectory of the rest of the bullets indicated that they were all fired from the same general area and struck Terry in the left side of his face and head. Id. at 1262, 1226.

My attorney did not request a manslaughter instruction and my jury was not given

the option of returning one. Dkt. #65 at 8-10. At the close of the three-week trial, I was convicted of first-degree murder on 24 April 1999. Id. at 3. On 7 July 1999, I was sentenced to life in prison. Id.

SUMMARY OF THE ARGUMENT

What do I believe went wrong at my trial? First, my attorney failed to adequately investigate my defense and present exculpatory evidence including an audiotape recording of Terry Carlton admitting that he beat me and raped me. This is important evidence because the prosecution essentially accused me of lying about Terry Carlton having ever *really* beaten and raped me. Prosecutors characterized Terry's violence as mutual combat, saying we attacked each other, and the rapes as consensual rough sex. The audiotape was saved by U.S. District Judge Claire Eagan, who represented me in a protective order application against Terry Carlton prior to assuming her responsibilities on the federal bench.

Additionally, my attorney failed to present testimony from a qualified BWS specialist adequately explaining why my belief that I had to use deadly force to protect myself from Terry Carlton could be considered reasonable based on my circumstances and as viewed from my perspective. Instead, my attorney presented a psychologist, Dr. John Call, who testified about BWS and opined that my fear was genuine, but ultimately made a case for manslaughter when he told my jury in no uncertain terms that he believed my thinking was unreasonable and that it was unreasonable for me to use deadly force to protect myself from Terry Carlton.

Finally, after putting on a psychologist who made a case solely for manslaughter, my attorney he failed to request a manslaughter jury instruction. I maintain that was objectively unreasonable because the evidence warranted a manslaughter instruction pursuant to Oklahoma law.

ARGUMENT AND AUTHORITIES

Standard of Review

Because my habeas petition was filed after 24 April 1996, the provisions of the Antiterrorism and Effective Death Penalty Act would ordinarily govern my appeal and this Court would review my appeal under the objectively unreasonable standard. See Dkt. #65 at 7. However, for a number of extraordinary reasons that I cannot detail herein due to the word count limit, I am asking the federal courts to review my case *de novo*. One reason is that Terry Carlton's father, Don Carlton, is friends with the district attorney who prosecuted me. See Dkt.#57-58. Also, Don Carlton is friends with OCCA Judge Charles Johnson, who had a hand in denying one of my appeals. See Dkt. #60. Additionally, I believe the OCCA did not have a quorum when it denied my post-conviction appeal. Id.

I.

APPELLANT'S COUNSEL WAS INEFFECTIVE FOR FAILING TO CONTACT APPELLANT'S FORMER ATTORNEYS, U.S. DISTRICT JUDGE CLAIRE EAGAN AND MIKE COOKE, AND FAILING TO DISCOVER AND PRESENT AN AUDIOTAPE IN THEIR POSSESSION OF TERRY CARLTON ADMITTING THAT HE BEAT AND RAPED APPELLANT.

My trial counsel was ineffective for failing to contact my former attorneys, U.S.

District Judge Claire Eagan and Mike Cooke, and failing to discover and present an audiotape in their possession of Terry Carlton admitting that he beat and raped me. Further, my appellate attorney was ineffective for failing to raise this claim on direct appeal.

It is well established that trial counsel has a duty to properly investigate defenses and present exculpatory evidence on behalf of his client. See *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). My counsel was aware that I sought protective orders against Terry Carlton on three occasions and that the first time, I was represented by the Honorable Claire Eagan before she assumed her responsibilities on the federal bench in Tulsa. In her affidavit on record in this action, Judge Eagan relates that she was never contacted by my counsel. See Appellant's Exhibits at 2 [Aplt. Exhibit 1, Dkt. #2 Exhibit 1 at 2]. At the time, Judge Eagan was serving as a U.S. Magistrate on the federal bench in Tulsa, so there is no reasonable excuse for my attorney's failure to contact her. Had my counsel ever contacted Judge Eagan, he would have discovered that her former law partner, Mike Cooke, also had firsthand information concerning my relationship with Terry Carlton as well as an audiotape recording of discussions between Terry and me wherein Terry admits that he beat me and raped me. Id. at 2. See also Appellant's Exhibits at 3 [Aplt. Exhibit 2, Dkt. #2 Exhibit 3 at 1].

The U.S. District Court opined that Judge Eagan's and Mike Cooke's affidavits, along with the audiotape, were merely cumulative evidence of abuse because several other witnesses corroborated my testimony that Terry abused me. See Dkt. #65 at 24-26. I believe that line of reasoning is objectively unreasonable. First of all, all of the witnesses

who testified at my trial about Terry Carlton abusing me were impeached one way or another by the prosecution. For just a few examples of this, see Tr.Trans.Vol.XII at 2230-32; and Tr.Trans.Vol.XIII at 2387-2389, 2562; and Tr.Trans.Vol.XIV at 2637-38, 2678, 2698, 2755-59, 2761-62; and Tr.Trans.Vol.XV at 3015-16, 3055-56, 3060. Throughout my trial, the prosecution essentially accused me of lying at my trial or to others about Terry Carlton having ever *really* beaten and raped me. Id. The prosecution claimed "it takes two to tango" and characterized Terry's violence as mutual combat, saying we attacked each other, and the rapes as consensual rough sex. See Tr.Trans.Vol.XIV at 2759. See also Tr.Trans.Vol.XII at 2230-32; and Tr.Trans.Vol.XIV at 2755, 2761-62; and Tr.Trans.Vol.XV at 3015-16, 3055-56, 3060. Prosecutors dismissed reports that I was nervous, upset, and behaving strangely after contacts with Terry by asserting that my behavior was due to my drug abuse and mental health problems rather than anything Terry had done. See Trans.Vol. XII at 2230-32; and Tr.Trans.Vol.XIII at 2562; and Tr.Trans.Vol.XIV at 2678, 2698, 2756-58; and Tr.Trans.Vol.XV at 3058, 3060. **During her closing arguments at my trial, the assistant district attorney declared, "[April Wilkens] had sexual intercourse with Terry Carlton that night. It wasn't rape. It was consensual....Terry Carlton did not...rape her that night."** Tr.Trans.Vol.XV at 3016. Then the district attorney summed up the state's case against me during his closing arguments like this:

> If April Wilkens had really been serious about her fear of Terry Carlton, she would have allowed the system to come to her aid. Now, I know you're going to think about cases you've heard, and that's part of your **common sense.** Take it back with you. That's the appropriate thing to do. The State of Oklahoma believes that these were just tactics, manipulative tactics to

screw with her boyfriend. She also likes to cry rape. When in trouble, cry rape. Everybody listens.

Tr.Trans.Vol.XV at 3055-56 (emphasis added). The audiotape is the only piece of evidence that proves definitively that Terry Carlton really did beat me and rape me. It proves that I didn't just "cry rape," as the prosecution alleged. And the tape makes it clear that Terry was the sole perpetrator of violence between the two of us. Additionally, Judge Eagan would have testified about my battered condition when she met me after I returned home from Rome, about how I told her Terry became more violent when I tried to leave him, and about how I told her that he violated the temporary protective order that I had against him and I was afraid to appear for a permanent protective order. See Appellant's Exhibits at 1 [Aplt. Exhibit 1, Dkt. #2 Exhibit 1 at 1]. Judge Eagan's testimony would have been all the more credible and powerful because she is a federal judge and was at the time of my trial.

The audiotape also reveals much more than that Terry and I had a "troubled relationship," as the U.S. District Court put it. To make my point, here are some excerpts from the tape:

APRIL: **Okay, do you not see how maybe it's a little drastic to pounce on someone and choke them and throw them out on their ass naked...?**

TERRY: **Yes. You're right. It is drastic and I admitted it....But did you do anything to help the situation? No....You want to know how you could've helped the situation? I thought I told you. You could have dropped it. You could've gone to bed just like I was trying to do. But no. You wanted to keep me up awake by making calls that you didn't need to make just to fucking punish me, keep me awake, to keep me up that night. You wanted, you wanted to call [your son] Hunter....**

APRIL: I suppose that everybody does things that are aggravating to the

other person. **I just don't understand the need for physical violence.**

TERRY: I see. So it's okay for you to do, to pull out the stops and do everything that you can do to **piss me off**, but, you know, as soon as I, you know, react in the same way and pull out the stops and do **the things I can do to hurt you**, what's the difference, April? You know, what's the difference? **You're fucking with me. I'm fucking with you. You understand?** You know, that's the big fucking lie that it's, you know, it's okay to do whatever the fuck you want to, but it's not okay for me to **do whatever I feel like doing....then whenever I just, you know, I lose my temper and I'm going to throw you outside the room naked.**

APRIL: **And choke me.**

TERRY: **That's when you started resisting. But, you know, is one any better than the other? I mean, do you dummy?** To me it seems like you think it's okay to do those things. I mean, that's what you're telling me: "Oh well, I suppose we all fuck with each other every once in awhile, but you, you broke the rule. You went over, you stepped over the line. You got physical." I'm saying neither one of them is right....I'm not satisfied with this because **what you're going to do is go to a victim's group, okay, and you're all going to sit there and tell each other it's not you're fault that this happened to you and pat each other on the back and feel sorry for each other and, you know, it's going to be what a bastard I am**, okay, and you're not going to be working on your own problems, okay? You're not going to work on why you feel it is necessary to do those petty little things that make me angry. And you would still do them, you know, **if I didn't do the violence thing, if the violence thing was not even a factor....**

APRIL: **The problem is when you do it, you don't apologize, you know (laughs). I mean, I don't remember hearing: "April, I raped you. I know that must've really upset you and I'm sorry" or "April, I know that, you know, that I slammed you against the ground, and I know that must've been really traumatic for you and I'm sorry."**

TERRY: **I have said those things. I have said those things. You just want to hear them over and over again, you know, and I'm, you know, I'll apologize once, but I'm not going to sit there and just have to apologize every fucking day of my life. You either accept the apology or you don't. It sounds to me like you don't. April, I'm not interested in fighting with you....**

APRIL: Yeah, I understand, **I don't want to fight with you either. I guess that's why I was trying to explain that it's best for us to stay apart....**

TERRY: April, until you change there's no reason for me to change. I mean, you know, I don't think that I'm somehow, you know, **I just get the feeling that somehow all this is on me and I'm just this horrible fucking mutant....**

APRIL: I don't know. **Do you think that alcohol and the drugs or anything like that have anything to do with it?**

TERRY: (Sighs) **Uh, well, I'm sure. I mean, yeah, it has something to do with it. I have never taken any drugs so I don't know, but the alcohol, the alcohol is a dis-inhibitor so it makes you do things that you normally wouldn't do or allows you to do things that you don't normally do.** But mainly the thing is I don't allow myself—it's a complicated thing—but I think mainly it's I like build up. These things build up inside me. You know, **my anger just builds and builds** and I don't have any way since we're so bad at communicating, I don't feel like I can communicate those things....Then **it just builds and builds till it explodes** because I can't, there's no way to address an issue with you. I mean, I'm sorry, I'm not trying to, I mean, you don't know what that's like.

APRIL: I don't know, I guess. **I guess what I kind of thought was that you were doing the drugs again** 'cause it kind of scared me and, well, it more than kind of scared me, **it frightened the hell out of me...when you said, "Hey, this is Europe and I can do what I want to you here!" I just thought that was kind of scary—like it was premeditated or something.**

TERRY: No. It wasn't premeditated. **It was just meant to scare you....**

Appellant's Exhibits at 5-7 [Aplt.Exhibit 3, Abridged Dkt. #2 Exhibit 4 at 1-3]; and Audiotape Recording [Dkt. #53 Exhibit 1].

The OCCA procedurally barred this issue because I raised it for the first time in my state post-conviction proceedings and it could have been raised on direct appeal. See Dkt. #65 at 19-29. The U.S District Court adopted the OCCA's procedural bar to this issue. I argue that it was objectively unreasonable for the U.S. District Court to apply the

bar to this issue for a couple of reasons. First of all, the OCCA did not procedurally bar Issue II, *infra,* my BWS expert testimony issue, although I raised it for the first time in my state post-conviction proceedings and it could have been raised on direct appeal as well. Id. at 10-11. I believe the OCCA's selective application of its procedural bar to this issue and not to Issue II, *infra*, should negate the procedural bar altogether in my case because that court applied the procedural bar inconsistently. Secondly, I have consistently argued in state and federal proceedings that my appellate attorney was ineffective for failing to raise this issue on direct appeal. Id. at 22-23. When I wrote to my appellate attorney about the evidence my trial attorney failed to present at my trial, my appellate attorney sent me a letter telling me that factual issues not presented at trial usually cannot be presented on direct appeal. See Appellant's Exhibits at 17 [Aplt. Exhibit 8, NDOK Dkt. #62 Exhibit A]. In Oklahoma, that is not true. Pursuant to Rule 3.11 (b), *Rules of Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (1995), evidence not presented at trial can be presented on direct appeal. Therefore, my appellate counsel's failure to raise this issue on direct appeal was objectively unreasonable and I have demonstrated cause and prejudice sufficient to overcome the OCCA's procedural bar on this issue.

II.

APPELLANT'S COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT ADEQUATE TESTIMONY FROM A QUALIFIED BATTERED WOMAN SYNDROME SPECIALIST.

My trial counsel was ineffective for failing to present adequate testimony from a qualified Battered Woman Syndrome ("BWS") specialist, and my appellate counsel was

ineffective for failing to raise this issue on direct appeal.

When the Oklahoma Court of Criminal Appeals ("OCCA") denied this issue on the merits in 2004, that court declared:

> Contrary to the assertion of the United States Court of Appeals for the Tenth Circuit, this Court, in *Bechtel v. State*, 1992 OK CR 55, 840 P2d 1, did not announce the professional standard in Oklahoma for an attorney representing a battered woman. *See Paine v. Massie*, 339 F.3d 1194, 1202-03. This Court cannot and would not ignore our adversarial system of justice and dictate that trial counsel is required to present a criminal defense in a specified way. Nowhere in the *Bechtel* decision is effectiveness of counsel even discussed.

Appellant's Exhibits at 149 [Aplt. Exhibit 17, Dkt. #47 Exhibit E at 3]; and Dkt. #65 at 11. However, just two years later, in *Smith v. State*, 144 P.3d 159 (Okl.Cr. 2006), the OCCA contradicted its opinion in my post-conviction appeal when it overturned another battered woman's first-degree murder conviction and declared:

> *Bechtel* and *Paine* clearly indicate that when a battered woman presents a defense of self-defense at trial, defense counsel should present the testimony of an expert on BWS in order "to equip the jury to properly assess the reasonableness of [the defendant's] fear." *Paine, 339 F.3d at 1204.*

Smith v. State, 144 P.3d 159, 166 (Okl.Cr. 2006). The OCCA's opinion in *Smith* was written by Judge Gary Lumpkin. Id. at 159. OCCA Judge Charles Johnson "specially concurred" with the *Smith* decision, writing separately that "expert [BWS] testimony is often essential to explaining the reasonableness of the defendant's conduct." Id. at 169-170. Additionally, I'm pretty sure that Judge Charles Johnson wrote the OCCA's opinion to that effect in *Bechtel*. See *Bechtel v. State*, 840 P.2d at 1 (Okl.Cr. 1992). Yet Judge Gary Lumpkin and Judge Charles Johnson both previously voted to deny my post-

conviction appeal in a decision that emphatically asserted the Tenth Circuit Court of Appeals misinterpreted *Bechtel* and got it wrong in *Paine.* See Appellant's Exhibits at 149, 152 [Aplt. Exhibit 17, Dkt. #47 Exhibit E at 3, 6].

The U.S. District Court opined that the psychologist whom my attorney presented, Dr. John Call, gave adequate testimony because he testified "concerning both the symptoms of [BWS] and his assessment of how the experiences of Petitioner, as a battered woman, impacted her state of mind at the time of the killing." Dkt. #65 at 14. I disagree with the U.S. District Court's opinion that Dr. Call gave adequate BWS testimony at my trial.

Under Oklahoma law, the BWS defense is self-defense. See *Bechtel v. State,* 840 P.2d 1 (Okl.Cr. 1992). From the beginning, all sides agreed that my case is a BWS self-defense case under Oklahoma law. See Tr.Trans.Vol.I at 6-12. And in the end, during his closing argument at my trial, my attorney asserted that I shot and killed Terry Carlton in self-defense. See Tr.Trans.Vol.XV at 3051-53. Pursuant to *Paine* and *Bechtel*, my counsel should have presented testimony from a qualified BWS expert who specifically opined that my belief that the use of deadly force was necessary to protect myself from Terry Carlton could be considered reasonable based on my circumstances and viewed from my perspective. Further, a qualified BWS should have explained why that's true. Instead, my attorney put on Dr. Call, who told my jury in no uncertain terms that my fear and actions were **not** reasonable. Specifically, Dr. Call testified:

> I believe that [April Wilkens] was telling what she thought...what her perceptions were. And she...admits that she shot him. Says she feels no shame, no guilt. That she had to do it. She was needing to be safe. **I believe that's what she thought. I don't believe it's reasonable. I don't believe that her...thinking was rational.**

Tr.Trans.Vol.XV at 2836 (emphasis added).

Over and over again during his testimony at my trial, **Dr. Call drummed it into my jurors heads that in his expert opinion, my thinking and actions were "stupid," "unreasonable," "irrational," "illogical," and so forth.** Id. at 2824-25, 2850-51, 2834-36. For instance, when Dr. Call explained **"traumatic bonding"** in battered women, he described it as **"stupid behavior,"** saying:

> One of the questions in these...scenarios, both for mental health professionals as well as anybody else involved, is why doesn't the....woman just leave?...
>
> [A]nd this is something that is seen, frankly, quite frequently in battered women's syndrome, women do not just leave because of this **traumatic bonding**....[T]here is this problem with doing the rational, reasonable thing right away, which is leaving....
>
> I saw [in April Wilkens] the classic pattern of a battered woman who would...complain to friends, to her office manager, I'm not going to see him again, it's horrible, he's beating me up, going to doctors, and then get back together again....of, frankly, **stupid behavior.**

Tr.Trans.Vol.XV at 2824 (emphasis added). Dr. Call went on to give an example of what he deemed was my traumatic bonding behavior, and then he declared, **"I, John Call, Mr. Rational Person, obviously thinks that that's not reasonable."** Id. at 2825 (emphasis added). Then Dr. Call reiterated, "In my opinion, it is **not reasonable.**" Id. at 2826 (emphasis added).

Then, on redirect examination, Dr. Call opined that although Terry Carlton was the "first aggressor" on the morning of the shooting, I ended up being the aggressor. Id. at 2960. Finally, on recross examination, **Dr. Call concluded all of his testimony at my trial by opining that on the morning of the shooting, "the first aggressor was Terry**

Carlton"; but in the end, "[April Wilkens] aggressed." Id. at 2973.

Dr. Call's testimony was catastrophic to my BWS defense of self-defense. During her closing argument at my trial, the assistant district attorney seized on Dr. Call's opinions and reminded my jury that "[t]he Defendant's own expert testified from this witness stand that the Defendant's actions were **stupid and not reasonable**." Id. at 3020 (emphasis added).

Then the district attorney summed up the state's case against me during his closing arguments like this:

> If April Wilkens had really been serious about her fear of Terry Carlton, she would have allowed the [legal] system to come to her aid. Now, I know you're going to think about cases you've heard, and that's part of your **common sense.** Take it back with you. That's the appropriate thing to do. The State of Oklahoma believes that these were just tactics, manipulative tactics to screw with her boyfriend. She also likes to cry rape. When in trouble, cry rape. Everybody listens.

Tr.Trans.Vol.XV at 3055-56 (emphasis added).

In *Bechtel,* the OCCA quoted Dr. Lenore Walker, the definitive BWS expert who coined the term *Battered Woman Syndrome*, as follows:

> Expert testimony on the battered woman syndrome would help dispel the ordinary lay person's perceptions that a woman in a battering relationship is free to leave at anytime. The expert would counter any **'common sense'** conclusions by the jury that if the beatings were really that bad, the woman would have left her husband much earlier. Popular misconceptions about battered women would be put to rest, including the beliefs that the women are masochistic and enjoy the beatings and that they intentionally provoke their husbands into fits of rage. *The Battered Woman Syndrome* (1979).

Id. at 8 Footnote 8 (emphasis added). Thus, the OCCA concluded in *Bechtel* that:

> Dr. Walker's [expert BWS] testimony as to how Appellant's particular

> experiences as a battered woman suffering from the Battered Woman Syndrome affected her perceptions of danger, its imminence, what actions were necessary to protect herself **and the reasonableness of those perceptions** are relevant and necessary to prove Appellant's defense of self-defense.

Id. at 10 (emphasis added). At my trial, instead of explaining the reasonableness of my fear and actions in the context of BWS, Dr. Call made it sound like I shot Terry Carlton because, in his opinion, I was "psychotic." See Tr.Trans.Vol.XV at 2852. Psychotic or not; in spite of all my flaws, and I have many; despite all of my mistakes and bad choices, and I've made some doozies; irrespective of all the hateful things the state has to say about my character, and you're sure to hear plenty; the danger Terry Carlton posed to me was real, not imaginary. And it was wrong for Dr. Call to make it sound like I killed Terry Carlton because there was something inherently wrong with me. I maintain that my fear of Terry was **reasonable** and that I used deadly force to protect myself from Terry because it was reasonable, not because I was **psychotic**.

In *Bechtel,* the OCCA relied heavily on the writings of Dr. Lenore Walker. In this action, I am also relying on the writings of Dr. Walker. I believe Dr. Walker's writings on BWS shed light on why my fear and my belief that I had to use deadly force to protect myself from Terry Carlton could be considered reasonable based on my circumstances and viewed from my perspective. As Dr. Walker explains:

> [I]t would be quite easy to misdiagnose battered women as having a serious mental illness if cautions weren't taken to account for the influence of having to cope with battering. For example, it is **reasonable** for a battered woman to believe she has been betrayed and that someone is out to get her without it being indicative of paranoid ideation. And it is common for battered women to become cognitively confused without having

psychotic ideation.[1]

[M]isguided "experts" play into the court's common misconceptions about pathology...so the truth is that there are dangers, as well as benefits, to using expert witnesses in some cases....

Too often, our courts serve to complete the work of the batterer by continuing to arbitrarily control and then convict the battered woman....Most battered women who kill do so in self-defense. By the time they kill, they are already the most silenced, the most violated women....

None of these women are ruthless killers. All are victims. Their victimization, though, does not end when they kill a brutal spouse or lover. Battered women who kill in self-defense may go from being prisoners of interpersonal abuse to being prisoners of the state. They are not free until a jury returns a verdict of not guilty....

And that is precisely why a battered woman, subject to the methodology of the law, deserves to be represented as well by an expert witness who is knowledgeable and practiced in the methodology of feminist psychology.[2]

Clinical psychology, the branch of psychology in which mental disorders are studied, explains only a very small part of the field of human behavior, although it is this part of psychology with which the general public is most familiar. This fact can be a problem when professionals with no expertise in the field of battered women, but with impressive professional psychological or psychiatric credentials, testify in a court of law, and it is one reason why only a qualified expert witness should testify in any trial involving a battered woman who kills.

The behavior of battered women who kill their abusers needs to be understood as *normal*, not abnormal. Defending oneself from reasonably perceived imminent danger of bodily harm or death ought to be considered a psychologically healthy response. Most battered women who kill do so in self-defense, not because they are mentally disordered. And the expert witness who can provide judges and juries with a genuine understanding of this fact can have a critical role in changing our criminal justice system's inadequate response to the entire problem.

Psychoanalysts who believe that internal mental conditions alone, and not external circumstances, cause mental illness ought to take note of this contradiction. The symptoms of mental illness displayed by many battered women tend to quickly clear up once they are able to live without fear of further violence....

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1 Walker, Lenore, E.A., *The Battered Woman Syndrome*, 2nd Ed. (New York: Springer Publishing Company, 2000), 103 (emphasis added)

2 Walker, Lenore E., *Terrifying Love: Why Battered Women Kill and How Society Responds* (New York: HarperPerennial, 1990), 11-13

A lot of "crazy" ladies aren't so crazy, after all.

A battered woman often adopts behavior that earns her a diagnosis of insanity, of being "crazy." In fact, many of her seemingly bizarre actions may have purpose and logic when **viewed within the context of the violence and terror in which she lives.**

In context, the "crazy" actions of battered women may be effective survival techniques. Diagnoses of mental illness, delivered by uninformed medical personnel and mental health professionals, are often wrong.[3]

It is essential that we learn to recognize Battered Woman Syndrome for what it is: a terrified human being's *normal* response to an abnormal and dangerous situation. Psychiatrists and other helping professionals tend to confuse the effects of domestic abuse with "masochism," "borderline personality disorder," or any number of other inapplicable diagnoses. Those involved in diagnostic procedures must remember that, in the case of battered women, lives depend upon proper, knowledgeable, and accurate evaluations and conclusions.

We must also break through our denial about the severity of the sadistic manipulation and psychological control—amounting in some cases to real brainwashing—that a batterer may exert over a battered woman....

Not enough is said...about the absolutely "crazy-making" behavior of the batterer....

Organized psychiatry, in general, has displayed an appalling ignorance about the psychology...of battered women in particular.[4]

The informed expert witness is the only person...qualified to point out that *the psychological reality of [battered] women justifies their actions.* Their state of mind meets the requirement of reasonable perception. Battered women who kill do so because it is the only remaining way they can see out of a physically life-threatening and emotionally and psychologically untenable circumstance.[5]

In my view, Dr. John Call's opinions are uninformed, chauvinistic, and inclined to favor the prosecution in BWS self-defense cases. When asked to relate his experience working directly with battered women, Dr. Call testified only that he had been "involved in the treatment of battered women and...in the analysis of battered women who kill the

3 Id. at 169-171 (emphasis added)
4 Id. at 180-189
5 Id. at 267

alleged abuser." Dkt. #65 at 13. Dr. Call did not testify about his degree of involvement working directly with battered women. Id. My attorney told me that my case was the first BWS case in which Dr. Call had worked as a consultant for the defense, and Dr. Call himself testified at my trial that he was involved in four BWS cases including mine, and in the the other three cases, he was working for the prosecution. Id. And even Dr. Call's testimony supporting a manslaughter verdict at my trial was discredited when the district attorney pointed out Dr. Call's inexperience this way:

> Dr. Call....How many cases of Battered Woman Syndrome have you done? Four. Four? I just about dropped my pen. Four? Wow. You're going to formulate all these opinions based on four prior cases.

Tr.Trans.Vol.XV at 3064. For the record, my attorney did not inform me of Dr. Call's opinions of me—and of battered women, in general—and I was blindsided by Dr. Call's opinions at my trial. See Tr.Trans.Vol.XII at 2189-90.

The OCCA decided that Dr. Call was a qualified BWS expert. See Dkt. #65 at 11-12. The U.S. District Court agreed. Id. at 12-13. I disagree; however, I understand that by law, it may be that he is considered qualified to present expert BWS testimony. When I first raised this issue back in 2003, I was new at crafting issues and not at all sure how to go about it. I erred by titling this issue based on what I believe was the underlying cause of Dr. Call's inadequate testimony—i.e., that he was not truly a BWS specialist. However, I did get to the heart of the matter in my arguments in both the state and federal courts. The most important thing, as I explained in the body of my arguments, is that Dr. Call failed to opine that my belief that I had to use deadly force to protect myself from Terry Carlton could be considered reasonable based on my circumstances and viewed

from my perspective—and Dr. Call failed to explain why that's true. See Dkt. #65 at 12; and Appellant's Exhibits at 49-52, [Aplt. Exhibit 11, Application for Post-Conviction Relief at 25-28]; and Appellant's Exhibits at 80 [Aplt. Exhibit 14, Post-Conviction Appeal at 8]; and Appellant's Exhibits at 101, 109-112, 117-125, 126-129, 133-139 [Aplt. Exhibit 16, Reply to State's Response to Post-Conviction Appeal at 2, 10-13, 18-25, 27-30, 34-40]; and Dkt. #14 at 3-7; and Dkt. #39 at 19-29; and Dkt. #50 at 18-25, 36.

While Dr. Call opined that my fear and actions were not reasonable, he did opine that my fear was genuine. See Tr.Trans.Vol.XV at 2836. However, that alone is not sufficient. In *Paine v. Massie*, 339 F.3d 1194 (10th Cir. 2003), the Tenth Circuit Court of Appeals noted that Ms. Paine's counsel labored extensively to establish that Ms. Paine's subjective fear was genuine, but counsel failed to provide BWS testimony attempting to establish the reasonableness of that fear in the context of Ms. Paine being a BWS sufferer. Id. at 1202. Accordingly, the Tenth Circuit ruled that "[g]iven the [OCCA's] extensive focus on the 'key' reasonableness component of a self-defense claim in a BWS case, *Bechtel*, 840 P.2d at 10-11, counsel's failure to offer BWS testimony to provide context for the jury on the reasonableness of [the defendant's] fear amounts to objectively unreasonable performance." Id. at 1202, citing *Bechtel v. State*, 840 P.2d 1, 10-11 (Okl.Cr. 1992). **On remand, the Tenth Circuit required Ms. Paine to produce a "qualified BWS expert willing** to testify that Ms. Paine was suffering from BWS at the time of the killing and willing to explain the impact of BWS on her state of mind and, **specifically, to opine Ms. Paine's belief that the use of deadly force was necessary to protect herself from imminent danger of death or great bodily harm could be**

considered reasonable based on her circumstances and viewed from her perspective." Id. at 1204 (emphasis added), citing *Bechtel v. State,* 840 P.2d 1, 6-8 (Okl.Cr. 1992). In my case, there was—and still is—a qualified BWS specialist available to provide that testimony. During the state's pre-sentence investigation conducted prior to my sentencing, Domestic Violence Intervention Services ("DVIS") counselor Lynda Driskell, who was my DVIS counselor, submitted an assessment statement on my behalf. See Appellant's Exhibits at 13-15 [Aplt. Exhibit 6 at 1-3]. Specifically, she wrote:

> As April Rose Wilkens' counselor, I...hope that my assessment of April will assist in your effort to understand April's situation and the abuse related events that led to **what I believe was April's act of self-defense on April 28, 1998**....
>
> I first became familiar with April's case last July when an attorney from the National Clearing House for the Defense of Battered Women in Philadelphia contacted Domestic Violence Intervention Services [("DVIS")] Executive Director, Felicia Collins. Felicia was asked to assist April Wilkens by arranging for the provision of advocacy and counseling services while April awaited trial. At that time, April was incarcerated at ADC [the Adult Detention Center] where she has remained since her arrest in April 1998. Felicia contacted me at my office where I am employed full time as a licensed professional counselor for DVIS....In addition to my work at DVIS I have developed and implemented two graduate courses in Domestic Violence and Sexual Abuse for the University of Oklahoma where I have been employed as an adjunct assistant professor since June, '97. Felicia believed that my knowledge and experience in the field of domestic violence treatment and assessment would naturally prepare me for my role as April's counselor. Before meeting with April, I spoke with her mother, Louise Fitchue, and her public defender, Damon Cantrell, but nothing could have prepared me for the last thirteen months, the dozens of sessions with April which culminated in 35 to 40 hours of face to face contact at ADC [the Adult Detention Center], the three weeks of trial and April's conviction.
>
> My first impression of April was that she told a true and horrific story that paralleled the hundreds of similar stories of domestic violence told to me by female victims and survivors with one exception, that April found

her life to be threatened to the extent that she believed if she did not defend herself she would be raped and murdered by Terry Carlton. **I validate [April Wilkens's] belief that she acted out of a pervasive fear that Terry would, in deed, follow through with this [sic] threats to kill her. During my sessions with April she related symptoms of post-traumatic stress disorder including sleep disturbances, depression compounded by hopelessness, hyper vigilance, elevated levels of anxiety and horrendous grief as a result of taking the life of a man whom she loved. These symptoms are characteristic of the long term impact of violence on victims of abuse....**

April described a whirlwind courtship and seduction by Terry soon after she met him. The relationship gradually changed and April related numerous accounts of emotional abuse, isolation and threats to harm which escalated to physical battering, sexual coercion, sexual assault and drug use. April realized that she might not survive Terry's brutal attacks and her repeated attempts to distance herself from Terry were met by his refusal to let her go. His refusal to accept manifested in his stalking behaviors, harassment, and destruction of her property. April reported Terry's obsession with firearms and his threats to kill her which he used to control, intimidate and instill fear in his victim and it worked. The history of abusive incidents was documented repeatedly by Tulsa Police Officers who responded to numerous 911 calls made by April and medical reports by two SANE [Sexual Assault Nurse Examiner] nurses who examined her after two reported rapes, and by friends and neighbors who witnessed Terry' abuse of April. April described feeling trapped with no hope of escape. She became convinced that she had nowhere to hide where he could not find her. It also became very clear to April that the safety, support and external validation she desperately needed in order to survive was not available to her unless she agreed to follow through with protective orders and to cooperate with prosecutors even though she was being threatened with abuse and murder by Terry Carlton if she turned against him. Thus, April was blamed for failing to utilize all options available to her, options she believed were unsafe and unreasonable.

On April 28, 1999 [sic], she decided to act in what she believed to be her and Terry's best interest by pleading with him to get help. So many women have put their fear aside and placed themselves in danger by returning to the abusers with the mistaken belief that they have the power to help them. April, too, was mistaken but she believed that she had no other choice but to appeal to the reasonable, rational side of Terry she had known in the earlier stages of their relationship. But as we know, April was brutally assaulted physically and sexually on the morning of the shooting and has photographs and medical reports to support the claim that she was beaten, raped, and handcuffed. So, I strongly believe that April's efforts to "calm

him down" have been grossly misinterpreted by those who want us to believe that April premeditated a murder.

Appellant's Exhibits at 13-15 [Aplt. Exhibit 6 at 1-3]. Had my attorney called her to testify, Lynda Driskell would have testified on my behalf at my trial. And Dr. Walker recommends experts like Ms. Driskell, writing:

> A feminist psychologist or one very familiar with the current research on battered women, victimization, Post Traumatic Stress Disorder, and the concept of learned helplessness...can provide the most informative expert witness testimony when a battered woman is on trial. Shelter and task force workers with similar skills can also be good expert witnesses.[6]

Accordingly, my DVIS counselor, Lynda Driskell, who now also holds a PhD degree and is a psychologist, would have made a good expert BWS witness at my trial and my attorney should have called her—instead of Dr. John Call—to testify on my behalf.

III.

APPELLANT'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A MANSLAUGHTER JURY INSTRUCTION

My trial counsel was ineffective for failing to request a manslaughter jury instruction. Oklahoma law establishes that counsel's failure to request a manslaughter instruction when the evidence warrants such an instruction falls below the professional standard for defense attorneys in the state. In cases such as mine, the professional standard as it relates to counsel's conduct in requesting a lesser-included offense instruction has been discussed in a great deal of litigation in Oklahoma. The duty of counsel surrounding lesser-included offense instructions was clearly delineated in *Ballard v. State*, 31 P3d 390

6 Id. at 11.

(Okl.Cr. 2001). In *Ballard,* the defendant was convicted of murder in the first degree. In that case, the trial judge offered a lesser-included offense instruction and trial counsel refused the instruction. The Oklahoma Court of Criminal Appeals ("OCCA") reversed the conviction, finding trial counsel to be ineffective and finding that in order to exclude a manslaughter instruction, the record must show a written waiver *by the defendant.* Id. at 391, citing *Shrum v. State*, 991 P.2d 1032 (Okl.Cr.1999).

Even though defense counsel has a duty to request a manslaughter instruction in a murder case, that duty is only triggered if there is sufficient evidence to support such an instruction. Pursuant to Okla. Stat. Ann. Tit. 21 § 711, homicide is manslaughter in the following cases:

1. When perpetrated without design to effect death by a person while engaged in the commission of a misdemeanor.
2. When perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under such circumstances as constitute excusable or justifiable homicide.
3. When perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed.

Further, under Oklahoma law, "all lesser forms of homicide are necessarily included and instructions on lesser forms of homicide should be administered if they are supported by the evidence." *Shrum v. State*, 991 P.2d 1032, 1036 (Okl.Cr. 1999) In my case, the OCCA determined that my trial counsel was not ineffective for failing to request a jury instruction on first-degree manslaughter, deciding such an instruction was not warranted by the evidence. See Dkt. #65 at 9. In ruling against me on a related manslaughter instruction issue in my direct appeal, the OCCA acknowledged that it was failing to

adhere to its own precedent. See Appellant's Exhibits at page 19 footnote 1 [Aplt. Exhibit 9, Dkt. #48 Exhibit C at page 2 footnote 1]. I believe that the OCCA's failure to adhere to precedent in my case is patently unfair.

In agreement with the OCCA, The U.S. District Court opined that my attorney was not ineffective for failing to request a manslaughter instruction, deciding the evidence did not warrant a manslaughter instruction. See Dkt. #65 at 10. I disagree. I believe that decision is objectively unreasonable in light of the evidence presented at my trial. See Statement of Facts, *supra*. Conspicuously absent from the U.S. District Court's opinion is any mention of the events immediately preceding the shooting. I myself testified that on the morning of the shooting, Terry Carlton raped me, handcuffed me, and was threatening to anally sodomize and kill me. See Tr.Trans.Vol.XI at 2135-71. Terry was enraged and charging toward me when I shot him. Id. at 2165-66. I felt I had no other option with no more distance between us than to shoot. Id. at 2166. I remember pointing the gun at Terry's head. Id. His head was "right there." Id. I shot the gun and just kept shooting. Id. I thought that if Terry got the gun away from me, he would torture me and then kill me. Id. at 2167. I didn't make any conscious decision to keep shooting, I just kept shooting because I was afraid. See Tr.Trans.Vol.XII at 2378. See also Tr.Trans.Vol.XV at 2837. It seemed to happen quickly and I don't recall ever pausing. See Tr.Trans.Vol.XIII at 2445. I heard Terry say something after I started shooting, but it didn't register with me what he had said until after I had emptied the gun and stopped shooting: I believe he had said that he was paralyzed and to call an ambulance. See Tr.Trans.Vol.X at 2168-69; and Tr.Trans.Vol.XII at 2378. I was in a daze. See

Tr.Trans.Vol.XI at 2169. At some point, I removed the handcuffs using a hand sanitizer. See Tr.Trans.Vol.XI at 2170. I was in shock. Id. at 2171. I covered Terry's body with a blanket and sat near him. Id. at 2172. I told myself that I had done the merciful thing by killing Terry. See Tr.Trans.Vol.XII at 2370-71. That was just a thought that went through my head after I had killed Terry: I did not mean that it was a mercy killing Id.

The state's own evidence supported my testimony. For example, law enforcement eventually transported me to Hillcrest Hospital for a rape examination and medical care following the shooting. See Tr.Trans.Vol.VII at 1435. I was examined by Sexual Assault Nurse Examiner Coordinator Kathy Bell. Nurse Bell testified at my trial that she treated me that morning and documented my injuries, including "an area of tear in two different places" vaginally; bruises on my wrists, arms and head; and redness on my hands and neck. See Tr.Trans.Vol.VIII at 1692-93, 1706-15, 1722. Further, Nurse Bell testified that there was actual physical evidence to support my statement that Terry Carlton had punched me in the left side of my face with his fist. Id. at 1703-04. The rape examination evidence was introduced as "the rape kit," State's Exhibit No. 10. Id. at 1696. The only mention of the rape exam in the U.S. District Court's opinion appears briefly on page 18. See Dkt. #65 at 18.

A heat of passion manslaughter instruction was warranted by the evidence at my trial because the elements of heat of passion are: 1) adequate provocation; 2) a passion or emotion such as fear, terror, anger, rage, or resentment; 3) homicide occurred while the passion still existed and before a reasonable opportunity to cool; and 4) a causal connection between the provocation, passion and homicide. See *Powell v. State*, 995

P.2d 510, 534 (Okl.Crim. 2000); and *Charm v. State*, 924 P.2d 754, 760, *cert. denied*, 520 U.S. 1200, 117 S.Ct. 1560, 137 L.Ed.2d 707 (1997). The trial evidence revealed a two-year history of violence by Terry Carlton against me. See Statement of Facts, *supra*. On the day that I killed Terry, he had raped me, handcuffed me, and was threatening to anally sodomize me and kill me. See Tr.Trans.Vol.XI at 2135-71. Terry was enraged and charging toward me when I shot him eight times with his own gun. Id. Certainly, there was adequate provocation coupled with fear, and just because I shot Terry eight times does not mean that I did not act under a heat of passion or that such passion had cooled. In fact, I testified that I kept shooting Terry because I was afraid. See Tr.Trans.Vol.XII at 2378. See also Tr.Trans.Vol.XV at 2837.

Pursuant to Okla. Stat. Ann. Tit. 21 § 711, homicide is also manslaughter "when perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed." The U.S. District Court opined there was no evidence that when I killed Terry, I "was resisting an attempt by [Terry Carlton] to commit a crime or after such an attempt had failed." Dkt. #65 at 10. Aside from the fact that the state's own evidence introduced at my trial supported my testimony that Terry raped me, handcuffed me, and was trying to sodomize me when I shot him eight times, there is another reason I disagree with the U.S. District Court's opinion in this matter. In *Bechtel v. State*, the OCCA noted that introducing evidence of past violent encounters with the deceased "is an established method of proof in self-defense cases, because the law recognizes the fact that future conduct may be reasonably inferred from past conduct." *Bechtel v. State*, 840 P.2d 1, 13 (Okl.Cr. 1992) citing *Roberson v. State*,

218 P.2d 414 (Okl.Cr. 1950). Further, the OCCA acknowledged in Bechtel that for a battered woman, "the threat of serious bodily harm or death is **always** imminent." *Bechtel v. State*, 840 P.2d 1, 12 (Okl.Cr. 1992) (emphasis added). The U.S. District Court noted that there was "substantial evidence at [my] trial that Terry Carlton had physically abused and terrorized [me] on more than one occasion." Dkt. #65 at 24. Further, the U.S. District Court opined that my "jury was presented with ample evidence of battering by Mr. Carlton and police testimony regarding domestic abuse calls...." Id. at 26. Therefore, it is perfectly reasonable to conclude that when I killed Terry, I was resisting an attempt by Terry to commit a crime or after such an attempt had failed. The question as to whether or not the killing was necessary means the difference between self-defense and manslaughter, not first-degree murder. See Dkt. #65 at 8.

Further, while the evidence in my case shows that I fired the gun until it was empty and shot Terry Carlton eight times, that does not preclude a manslaughter instruction in my case. Under Oklahoma law, multiple independently fatal wounds do not preclude a manslaughter instruction. See *Hogan v. Gibson*, 197 F.3d at 1311 (10th Cir. 1999), citing *Williams v. State*, 513 P.2d at 336-39 (Okl.Cr. 1973). Evidence of intent does not negate a manslaughter instruction under Oklahoma law. See *Hogan v. Gibson*, 197 F.3d at 1311 (10th Cir. 1999), citing *Le v. State*, 947 P.2d at 546 (Okl.Cr. 1997).

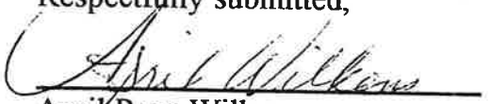
A manslaughter instruction would have allowed my jury to find that my fear of Terry Carlton was genuine while my fear and use of deadly force to protect myself from him was not reasonable. Armed with such an instruction, my jury could have convicted me of manslaughter and sentenced me to considerably less than the life-sentence I am now

serving.

CONCLUSION

WHEREFORE, for all of the foregoing, I pray this Court reverses the district court's decision awarding judgment if favor of the Respondent and against me. I would be thankful for any relief you believe is appropriate in my case.

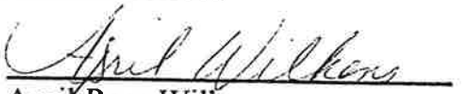
Respectfully submitted,



April Rose Wilkens
M.B.C.C. C1C-218
29501 Kickapoo Road
McLoud, OK 74851

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that the foregoing is true and correct.



April Rose Wilkens

CERTIFICATE OF COMPLIANCE

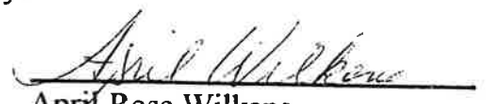
Section 1. Word count

As required by Fed.R.App.P32(a)(7)(C), I certify that this brief is proportionally spaced and contains 13998 words. I relied on a word processor to obtain the count and it is Open Office.

Section 2. Line count

My brief was prepared in monospaced typeface and contains 1116 lines of text.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after reasonable inquiry.



April Rose Wilkens

DECLARATION OF MAILING

In accordance with 28 U.S.C. §1746, I declare under penalty of perjury that I timely submitted the foregoing to M.B.C.C. prison officials for mailing to the Court, with proper postage affixed, on 25 April 2008.

April Rose Wilkens

CERTIFICATE OF SERVICE

I certify that on 25 April 2008, a true and correct copy of the foregoing was mailed, with proper postage affixed, to:

William Holmes, Asst. Attorney General
Oklahoma Attorney General's Office
313 N.E. 21st Street
Oklahoma City, OK 73105

April Rose Wilkens

APPELLANT'S EXHIBITS

(Appellant's exhibits filed separately)

1. Affidavit of U.S. District Judge Claire Eagan, 28 March 2002 [NDOK Dkt. #2 Exhibit 1]

2. Affidavit of Attorney Mike Cooke, 1 April 2002 [NDOK Dkt. #2 Exhibit 3]

3. Abridged Audiotape Transcript of April Wilkens and Terry Carlton [Abridged NDOK Dkt. #2 Exhibit 4]

4. Tulsa Police arrest report of Terry Carlton's 21 February 1998 arrest for transporting a loaded firearm [NDOK Dkt. #12 Exhibit 2]

5. District Court of Tulsa County case report evidencing warrant for Terry Carlton's arrest issued on 26 March 1998 and still outstanding on 28 April 1998 in *Carlton v. State*, case no. CM-1998-575 [NDOK Dkt. #12 Exhibit 3]

6. Pre-sentence Investigation Report Assessment of April Wilkens by licensed Domestic Violence Intervention Services counselor Lynda Driskell, filed in *Wilkens v. State*, District Court of Tulsa County case no. CF 98-2173

7. Newspaper article by unidentified staff writer, "Drug Conviction Adds 2 Years to Woman's Sentence," *Tulsa World*, 11 July 2000: A-10

8. Letter from appellate attorney Bill Zuhdi, 07 February 2000 [NDOK Dkt. #62 Exhibit A]

9. Oklahoma Court of Criminal Appeals' Summary Opinion Affirming Judgment and Sentence in *Wilkens v. State*, OCCA case no. F-99-927, 03 April 2001 [NDOK Dkt. #48 Exhibit C]

10. Marriage Certificate of Don and Shirley Carlton, Oklahoma Court of Criminal Appeals Judge Charles Johnson officiating, filed in Creek County, Oklahoma, 29 May 1996

11. Application for Post-Conviction Relief in *Wilkens v. State*, District Court of Tulsa County case no. CF 98-2173, 05 March 2003

12. Tulsa District Attorney Tim Harris's Response to Application for Post-Conviction Relief in *Wilkens v. State*, District Court of Tulsa County case no. CF 98-2173, 27 March 2003

13. Order Denying Amended Application for Post-Conviction Relief in *Wilkens v. State*, District Court of Tulsa County case no. CF 98-2173, 22 August 2003

14. Post-Conviction Appeal in *Wilkens v. State*, OCCA case no. PC-2003-1002, 9 September 2003

15. Oklahoma Attorney General's Response to Post-Conviction Appeal in *Wilkens v. State*, OCCA case no. PC-2003-1002, 28 May 2004

16. April Wilkens's Reply to State's Response to Post-Conviction Appeal in *Wilkens v. State*, OCCA case no. PC-2003-1002, 17 June 2004

17. Oklahoma Court of Criminal Appeals' Order Affirming Denial of Post-Conviction Relief in *Wilkens v. State*, OCCA case no. PC-2003-1002, 2 August 2004 [NDOK Dkt. #47 Exhibit E]

18. Newspaper article by Ziva Branstetter, "DA's Race Among Most Moneyed," *Tulsa World*, 21 July 2006

19. Newspaper article by Ziva Branstetter, "DA, Law Officers in Feud," *Tulsa World*, 20 July 2003: A-1 [NDOK Dkt. #57 Exhibit B]

20. Opinion and Order by U.S. District Judge Terence Kern in *Wilkens v. Newton-Embry*, NDOK case number 02-CV-244-K (J), 05 November 2007 [NDOK Dkt. #65]

21. Judgment by U.S. District Judge Terence Kern in *Wilkens v. Newton-Embry*, NDOK case number 02-CV-244-K (J), 05 November 2007 [NDOK Dkt. #66]

22. Notice of Appeal in *Wilkens v. Newton-Embry*, NDOK case number 02-CV-244-K (J), 26 November 2007 [NDOK Dkt. #67]

23. Newspaper article by Barbara Hoberock, "Appellate Judge Quits Amid State Investigation," *Tulsa World*, 1 March 2005: A-1 [NDOK Dkt. #60 Exhibits]

FILED
United States Court of Appeals
Tenth Circuit

August 5, 2008

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

APRIL ROSE WILKENS, Petitioner - Appellant, v. MILLICENT NEWTON-EMBRY, Warden, Respondent - Appellee.	No. 07-5172 (N.D. Oklahoma) (D.C. No. 4:02-CV-00244-TCK-SAJ)

ORDER DENYING CERTIFICATE OF APPEALABILITY

Before **BRISCOE**, **MURPHY**, and **HARTZ**, Circuit Judges.

On April 28, 1998, April Rose Wilkens killed her former fiancé, Terry Carlton. At her jury trial for first-degree murder in Oklahoma state court, Ms. Wilkens admitted to shooting and killing Carlton but claimed that she had done so in self-defense. She testified that she had shot him only as he was coming toward her, after he had beaten, raped, and handcuffed her. In support of her defense she put on evidence that she had suffered from battered-woman-syndrome (BWS), introducing evidence of physical abuse throughout her three-year relationship with Carlton and presenting expert testimony.

The jury convicted Ms. Wilkens and she was sentenced on July 7, 1999, to life in prison. The Oklahoma Court of Criminal Appeals (OCCA) affirmed her

conviction. On April 2, 2002, she filed in the United States District Court for the Northern District of Oklahoma an application for relief under 28 U.S.C. § 2254. The district court stayed proceedings to give her an opportunity to exhaust some of her claims. When the OCCA denied her postconviction claims, the district court considered the § 2254 application and denied relief. Ms. Wilkens now seeks a certificate of appealability (COA) to appeal that decision. *See id.* § 2253(c) (requiring COA to appeal denial of application). We deny her request for a COA and dismiss this appeal.

Ms. Wilkens's § 2254 application raised claims of ineffective assistance by both her trial and appellate counsel. She claimed that her trial counsel was ineffective because he failed (1) to conduct a proper investigation to support her BWS defense, (2) to present testimony from a qualified BWS expert, (3) to request a jury instruction for manslaughter, (4) to present evidence to the trial court that she had been coerced into making a statement, (5) to object to the introduction of a statement made before she received *Miranda* warnings, (6) to offer into evidence an unexecuted bench warrant for Carlton's arrest, (7) to present the results of a urinalysis showing that she was free of drugs when arrested for the killing, and (8) to impeach Officer Laura Fadem with a transcript of her in camera testimony. Ms. Wilkens claimed that appellate counsel was ineffective in not raising on appeal her ineffectiveness-of-trial-counsel claims 1, 2, 6, 7, and 8. In this court Ms. Wilkens challenges only the denial of her claims

1, 2, and 3, and the claims of ineffective assistance of appellate counsel associated with claims 1 and 2.

"A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard requires "a demonstration that . . . includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). In other words, an applicant must show that the district court's resolution of the constitutional claim was either "debatable or wrong." *Id.* If the application was denied on procedural grounds, the applicant faces a double hurdle. Not only must the applicant make a substantial showing of the denial of a constitutional right, but he must also show "that jurists of reason would find it debatable . . . whether the district court was correct in its procedural ruling." *Id.* "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of a case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id.* In determining whether to issue a COA, a "full consideration of the factual or legal bases adduced in support of the claims" is not required. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Instead, the decision must be based on "an

overview of the claims in the habeas petition and a general assessment of their merits." *Id.*

The Antiterrorism and Effective Death Penalty Act (AEDPA) establishes deferential standards of review for state-court factual findings and legal conclusions. "AEDPA . . . mandates that state court factual findings are presumptively correct and may be rebutted only by 'clear and convincing evidence.'" *Saiz v. Ortiz*, 392 F.3d 1166, 1175 (10th Cir. 2004) (quoting 28 U.S.C. § 2254(e)(1)). If the federal claim was adjudicated on the merits in the state court,

> we may only grant federal habeas relief if the habeas petitioner can establish that the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

Id. (quoting 28 U.S.C. 2254(d)(1) and (2)). As we have stated:

> Under the "contrary to" clause, we grant relief only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the [Supreme] Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, relief is provided only if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. Thus we may not issue a habeas writ simply because we conclude in our independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Gipson v. Jordan, 376 F.3d 1193, 1196 (10th Cir. 2004) (brackets, citations and internal quotation marks omitted). When claims are adjudicated on the merits in the state court, "AEDPA's deferential treatment of state court decisions must be incorporated into our consideration of a habeas petitioner's request for COA." *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir .2004).

With respect to her first claim, Ms. Wilkens contends that her trial counsel was ineffective for failing to contact her former attorneys and obtaining various evidence that Carlton had abused her, including an audiotape in which Carlton admits to beating and raping her. The OCCA ruled this claim procedurally barred because she had not raised it on direct appeal. *See* Okla. Stat. tit. 22, § 1089(C) ("[t]he only issues that may be raised in an application for post-conviction relief are those that . . . [w]ere not and could not have been raised in a direct appeal."). It also rejected her claim of ineffective appellate counsel, which could be a basis for overcoming the procedural bar. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (applicant can overcome procedural bar if she can demonstrate cause and prejudice, or a fundamental miscarriage of justice). The district court liberally construed Ms. Wilkens's § 2254 application as raising a claim of ineffective assistance of appellate counsel to overcome the procedural bar. After a thorough analysis of the evidence presented at trial, the court concluded:

> The jury was presented with ample evidence of battering by Mr. Carlton and police testimony regarding domestic abuse calls concerning [Ms. Wilkens] and Mr. Carlton. Because trial counsel's

> performance was not deficient, appellate counsel was not ineffective for omitting these claims of ineffective assistance of trial counsel on direct appeal.

Wilkens v. Newton-Embry, No. 02-CV-244-TCK-SAJ, slip op. at 26 (N.D. Okla. Nov. 5, 2007). No reasonable jurist could debate that the district court was correct in this ruling.

Next, Ms. Wilkens contends that trial counsel was ineffective for failing to present adequate testimony from a qualified BWS expert and that appellate counsel was ineffective for failing to raise this ineffectiveness issue on direct appeal. In both her application for postconviction relief before the OCCA and her § 2254 application in federal district court, Ms. Wilkens challenged only the qualifications of defense expert Dr. John Call. Both courts found the claim unfounded. *See Wilkens v. State*, No. PC-2003-1002, slip op. at 5 (Okla. Crim. App. Aug. 2, 2004) (post-conviction order); *Wilkens*, No. 02-CV-244-TCK-SAJ, slip op. at 12–13. Ms. Wilkens now acknowledges in her brief to us that Dr. Call was qualified to present BWS testimony. She maintains, however, that trial counsel was ineffective in putting on an expert who "failed to opine that my belief that I had to use deadly force to protect myself from Terry Carlton could be considered reasonable based on my circumstances and viewed from my perspective." Aplt. Br. at 33–34. And, she adds, appellate counsel was ineffective in not raising this issue on direct appeal. We doubt that this claim has been exhausted (in state court) or preserved (in federal district court). But in any

event, it has no merit. We have reviewed Dr. Call's testimony. If credited by the jury, it would have strongly supported Ms. Wilkens's BWS theory. The problem was that the facts of the case enabled the prosecution to conduct an effective cross-examination of Dr. Call. Trial counsel for Ms. Wilkens was not ineffective in this respect, and appellate counsel had no basis to claim ineffective assistance. No reasonable jurist could debate that the district court's decision regarding the use of Dr. Call was an unreasonable application of clearly established federal law.

Finally, Ms. Wilkens contends that trial counsel was ineffective for failing to request a manslaughter jury instruction. On direct appeal the OCCA held that "trial counsel was not ineffective for failing to request a jury instruction on first degree manslaughter as such an instruction was not warranted by the evidence." *Wilkens v. State*, No. F-99-927, slip op. at 2 (Okla. Crim. App. April 3, 2001). We have no ground for rejecting the OCCA's determination that the proposed instruction was not supported by the evidence. The OCCA is the final arbiter of what Oklahoma law requires. And Ms. Wilkens has not rebutted the factual basis for the OCCA's determination by clear and convincing evidence. *See* § 2254(e)(1). We therefore accept the determination that Ms. Wilkens was not entitled to a manslaughter instruction. Failure of counsel to request that instruction therefore could not be ineffective assistance of counsel. *See United States v. Cook*, 45 F.3d 388, 393 (10th Cir. 1995) (appellate counsel's failure to raise meritless issue on appeal does not constitute ineffective assistance).

FILED
United States Court of Appeals
Tenth Circuit

September 2, 2008

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

APRIL ROSE WILKENS,

Petitioner - Appellant,

v.

MILLICENT NEWTON-EMBRY, Warden,

Respondent - Appellee.

No. 07-5172

ORDER

Before **BRISCOE**, **MURPHY**, and **HARTZ** Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

CASE NO. 07-5172

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

April Rose Wilkens,

Petitioner-Appellant,

versus

Millicent Newton-Embry, Warden,

Respondent-Appellee.

APPEAL FROM THE JUDGMENT
IN FAVOR OF THE RESPONDENT AND AGAINST THE PETITIONER
ENTERED BY U.S. DISTRICT JUDGE TERENCE KERN
IN THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
IN A HABEAS CORPUS ACTION BROUGHT PURSUANT TO 28 U.S.C. § 2254
AT DISTRICT COURT CASE NUMBER 02-CV-244-TCK-SAJ

APPELLANT'S EXHIBITS

April Wilkens, pro se
M.B.C.C. C1C-218
29501 Kickapoo Road
McLoud, Oklahoma 74851

April 2008

Table of Contents

APPELLANT'S EXHIBIT 1

CLAIRE EAGAN IS NOW THE CHIEF FEDERAL JUDGE IN THE COURT WHERE MY HABEAS CASE WAS PENDING.

COUNTY OF TULSA)
) ss.
STATE OF OKLAHOMA)

AFFIDAVIT OF CLAIRE V. EAGAN

I, Claire V. Eagan, of sound mind, and of lawful age, do state upon personal oath the following:

1. In November 1996, I was an attorney licensed to practice in Oklahoma and a shareholder with the law firm of Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C. ("Hall Estill").

2. On or about November 13, 1996, Michael D. Cooke, another shareholder at Hall Estill, requested that I represent a business client of his, April Rose Wilkens, in an attempt to procure a protective order against her then-fiancé, Terry Carlton. Mr. Cooke represented that Ms. Wilkens had been severely beaten by Mr. Carlton while they were in Rome, Italy, and that she was returning from Rome immediately per his advice.

3. On November 15, 1996, I met with April Rose Wilkens in my office. I observed her obvious physical injuries to be: two blackened eyes, numerous bruises on her arms, face, and throat, as well as a red and swollen jaw. She also indicated that she had contusions of her shoulder, back, hip and pelvic area resulting from Mr. Carlton slamming her on the floor, up against the wall and in a door jamb. I accompanied her that afternoon to the Tulsa County Courthouse where we obtained an Emergency Protective Order (Case Number PO 96-3373) from Judge Allen Klein. A hearing date was set for November 26, 1996 for a permanent protective order.

4. On November 18, 1996, I spoke by telephone and met with April Rose Wilkens in my office regarding the upcoming hearing date. We discussed witnesses and documents necessary for the hearing. She gave me a detailed account of the history of her relationship with Mr. Carlton. She indicated that he had been physically violent towards her in the past, that this was aggravated by his use of alcohol and/or drugs, and that the violence would escalate whenever she would attempt to distance herself from him or terminate the relationship.

5. On November 18, 1996, Ms. Wilkens and I reviewed an audio tape recording of several phone conversations which occurred after the beating in Rome, but prior to Mr. Carlton's being served with the emergency protective order. The tape recording contains the following statements and/or admissions by Mr. Carlton regarding the Rome incident:

(a) telling her prior to the beating that "this is Europe and I can do what I want to here";
(b) "strangling the living shit" out of her;
(c) that the beating was "drastic";
(d) choking her, but only after she resisted his attempts to pick her up and throw her, naked, out of the hotel room; and
(e) the possibility that alcohol and/or drugs "aggravated" his violence towards her.

[1]

1

He additionally admitted the following regarding incidents of violence which occurred prior to the Rome incident:

(f) slamming her against the ground;
(g) raping her; and
(h) that obtaining counseling and learning to control his anger "may help the situation", but that his "anger builds and builds" and there is "no other way to address an issue" with her other than through violence.

6. On November 26, 1996, I appeared for the permanent protective order hearing, but Ms. Wilkens did not. I telephoned her to inquire why she was not present and she stated that she did not appear because Mr. Carlton had informed her the evening before, in violation of the existing emergency protective order, that he would be present the next morning with an attorney. Ms. Wilkens stated that she was fearful and too intimidated to appear.

7. The preceding information which I acquired as a result of my representation of Ms. Wilkens was not available from any other source. The tape recording remained in my possession until I left the firm of Hall Estill in January 1998, at which time I left it in Ms. Wilkens' file at the firm.

8. At no time after the April 28, 1998 death of Mr. Carlton was I, Michael Cooke, or to my knowledge, my former employer, Hall Estill, ever contacted by anyone associated with April Rose Wilkens' trial defense team.

9. Had I been contacted by anyone regarding April Rose Wilkens in connection with the criminal charge for first degree murder in CF-98-2173, and trial in April 1999, I would have made myself available and willingly shared all information of which I was aware, including the information contained herein, upon authorization by Ms. Wilkens.

Claire V Eagan

Claire V. Eagan

Subscribed and sworn to before me this 27th day of March, 2002.

Elizabeth Wilson

Notary Public

1-15-05

My Commission Expires

APPELLANT'S EXHIBIT 2

COUNTY OF TULSA)
) ss.
STATE OF OKLAHOMA)

AFFIDAVIT OF MICHAEL D. COOKE

I, Michael D. Cooke, of sound mind, and of lawful age, do state upon personal oath the following:

1. I am a shareholder with the law firm of Hall, Estill, Hardwick, Gable, Golden & Nelson P.C. In 1995, the firm and I were retained by April Rose Wilkens for the purpose of assisting her in the acquisition of a business.

2. I continued in my role as Ms. Wilkens's business attorney over the course of the next two years. During that time we discussed on several occasions her tumultuous relationship with her boyfriend/fiancé, Terry Carlton.

3. On several occasions during 1996, Ms. Wilkens and I specifically discussed problems she was having with Carlton and/or what she described as his attempts to control her. During several of these conversations, Ms. Wilkens became very agitated and appeared to be frightened.

4. On or about November 13, 1996, I was contacted by Ms. Wilkens while she was in Rome, Italy. She said she was there with Carlton and several other people. She was very upset and told me that she had been severely beaten by Carlton, that her injuries had necessitated medical assistance and that the Rome police had been called in. I instructed her to return to the United States immediately and that I would arrange for an attorney in our firm knowledgeable in domestic matters to assist her in obtaining a protective order against Carlton. Upon her return she met with Claire V. Eagan, another Hall, Estill shareholder, regarding obtaining a protective order against Carlton. I did not attend that meeting.

5. I did not hear again from Ms. Wilkens until about the middle of 1997. At that time, she called about several bankruptcy issues. We also spoke about her child. She called a few more times after that mostly to talk about personal matters.

6. In December, 1997, Ms. Wilkens contacted me at home one evening. She was panicked and frantic. She begged me to come to her house. I went to her residence. After I arrived she said that someone or some drug making equipment possibly was locked in her garage. She said it was Terry Carlton or some of his friends from Sapulpa. She appeared to be very upset. We walked together through her house, but we could not get into the garage. I told her I was going to call the police. She said they would do nothing. I then called the police and shortly after met the responding officer in the street outside her residence. I explained to the officer who I was, what I knew about the violent nature and history of the relationship between Ms. Wilkens and Mr. Carlton and of her concern that he or someone else had taken over her garage. The officer indicated that they had been called to her residence "several times before." He asked me several times why she had called a lawyer. I observed the police officer to be fairly dismissive of Ms.

Wilkens's concerns, and to my knowledge, no further action was taken by the police regarding this matter.

7. I have had no further contact with Ms. Wilkens after this December 1997 incident.

8. At no time after the April 28, 1998, death of Terry Carlton was Claire Eagan, I, or to my knowledge, anyone else employed at Hall, Estill, Hardwick, Gable, Golden & Nelson P.C. ever contacted by anyone associated with April Rose Wilkens's defense team.

9. Had I been contacted by anyone regarding April Rose Wilkens in association with the criminal charge for first degree murder brought against her and the subsequent trial in April of 1999 for the same, I would have been available and, with Ms. Wilkens's consent, would have willingly revealed all information of which I was aware.

Michael D. Cooke

Subscribed and sworn to before me this 1st day of April, 2002.

Carol J. Crawford
Notary Public

July 13, 2003
My Commission Expires

APPELLANT'S EXHIBIT 3

TRANSCRIPT OF NOVEMBER 1996 AUDIOTAPE
OF APRIL WILKENS AND TERRY CARLTON

APRIL: I have told you before that I realize in any relationship that certainly both people have to be looking out for each other. (sigh) But **I don't understand what drives you to the point where, like you said, that you want to strangle the living shit out of me**, I mean.

TERRY: Well, if you're interested, I'll tell you...**you do things that you know will piss me off and you do them on purpose. You know, to me that's provoking somebody.** I mean, it really is. And why would you want to do that? You know, I took you to Europe. You know, I was in bed. We had had an argument and I did the right thing. I got up and I removed myself.

APRIL: Yeah, but **you hit me** as you went.

TERRY: Oh, that was an accident. I did not mean to.

APRIL: You didn't mean to flip me with your napkin and shove and push me aside.

TERRY: I was just trying to leave. Leave. So, you know, then I'm in bed. So what do you do? Instead of trying to make the situation better by just going to bed, you know, you deliberately aggravate the situation 'cause **you do something that you know is going to really piss me off and that is wake me up calling Hunter** and talking to Hunter knowing that you're going to keep me up when all I want to do is go to bed....

APRIL: **Okay, do you not see how maybe it's a little drastic to pounce on someone and choke them and throw them out on their ass naked—threaten to throw them out on their ass naked—and, you know, I mean does that not seem a little drastic?**

TERRY: **Yes. You're right. It is drastic and I admitted it....But did you do anything to help the situation? No.**

APRIL: How, you know, I mean (Terry interrupts)

TERRY: **You want to know how you could've helped the situation? I thought I told you. You could have dropped it. You could've gone to bed just like I was trying to do. But no. You wanted to keep me up awake by making calls that you didn't need to make just to fucking punish me, keep me awake, to keep me up that night. You wanted, you wanted to call Hunter....**

APRIL: I suppose that everybody does things that are aggravating to the other person. **I just don't understand the need for physical violence.**

TERRY: I see. So it's okay for you to do, to pull out the stops and do everything that you can do to **piss me off**, but, you know, as soon as I, you know, react in the same way and pull out the stops and do **the things I can do to hurt you**, what's the difference, April? You know, what's the difference? **You're fucking with me. I'm fucking with you. You understand?** You know, that's the big fucking lie that it's, you know, it's okay to do whatever the fuck you want to, but it's not okay for me to **do whatever I feel like doing....then whenever I just, you know, I**

lose my temper and I'm going to throw you outside the room naked.

APRIL: **And choke me.**

TERRY: **That's when you started resisting. But, you know, is one any better than the other? I mean, do you dummy?** To me it seems like you think it's okay to do those things. I mean, that's what you're telling me: "Oh well, I suppose we all fuck with each other every once in awhile, but you, you broke the rule. You went over, you stepped over the line. You got physical." I'm saying neither one of them is right....

APRIL: Why would you, I guess I don't understand is why you would naturally assume that anything that I do is to upset you. I mean that you have a choice to decide how you look at things and you choose to look at them in the most negative way possible and that only creates a lot more aggravation for you.

TERRY: Wait a minute. That's horse shit. It's just psychobabble right there. It's just bullshit psychobabble. We've talked about you calling while I was asleep, but you did it in Amsterdam. You talked to your mother....

APRIL: I have a son. Where else do you suggest I call from?

TERRY: Hey, go down to the lobby. That would be the considerate thing to do.

APRIL: Perhaps you are right.

TERRY: No, but you think it's your God-given right to fucking step on everybody else and I'm tired of being stepped on, okay? I'm tired of being stepped on by you, April, and until you wake up to that fact, me going to all these counselors in the world will not help that, okay? Yeah, you know, I might learn to control my anger, okay? That might help, but it won't make me any less angry, will it? Because you will still be doing the things that make me angry and yeah, I'll do something, but you're going to have to do something. I'm not satisfied with this because **what you're going to do is go to a victim's group, okay, and you're all going to sit there and tell each other it's not you're fault that this happened to you and pat each other on the back and feel sorry for each other and, you know, it's going to be what a bastard I am**, okay, and you're not going to be working on your own problems, okay? You're not going to work on why you feel it is necessary to do those petty little things that make me angry. And you would still do them, you know, **if I didn't do the violence thing, if the violence thing was not even a factor....**

APRIL: **The problem is when you do it, you don't apologize, you know (laughs). I mean, I don't remember hearing: "April, I raped you. I know that must've really upset you and I'm sorry" or "April, I know that, you know, that I slammed you against the ground, and I know that must've been really traumatic for you and I'm sorry."**

TERRY: **I have said those things. I have said those things. You just want to hear them over and over again, you know, and I'm, you know, I'll apologize once, but I'm not going to sit there and just have to apologize every fucking day of my life. You either accept the apology or you don't. It sounds to me like you don't. April, I'm not interested in fighting with you.**

APRIL: **Yeah, I don't want to fight with you either.**

TERRY: I mean, this is the reason that we're in trouble right now.

APRIL: Yeah, I understand, **I don't want to fight with you either. I guess that's why I was trying to explain that it's best for us to stay apart....**

TERRY: April, until you change there's no reason for me to change. I mean, you know, I don't think that I'm somehow, you know, **I just get the feeling that somehow all this is on me and I'm just this horrible fucking mutant....**

APRIL: I don't know. **Do you think that alcohol and the drugs or anything like that have anything to do with it?**

TERRY: (Sighs) **Uh, well, I'm sure. I mean, yeah, it has something to do with it. I have never taken any drugs so I don't know, but the alcohol, the alcohol is a dis-inhibitor so it makes you do things that you normally wouldn't do or allows you to do things that you don't normally do.** But mainly the thing is I don't allow myself—it's a complicated thing—but I think mainly it's I like build up. These things build up inside me. You know, **my anger just builds and builds** and I don't have any way since we're so bad at communicating, I don't feel like I can communicate those things....Then **it just builds and builds till it explodes** because I can't, there's no way to address an issue with you. I mean, I'm sorry, I'm not trying to, I mean, you don't know what that's like.

APRIL: I don't know, I guess. **I guess what I kind of thought was that you were doing the drugs again** 'cause it kind of scared me and, well, it more than kind of scared me, **it frightened the hell out of me...when you said, "Hey, this is Europe and I can do what I want to you here!" I just thought that was kind of scary—like it was premeditated or something.**

TERRY: No. It wasn't premeditated. **It was just meant to scare you....**

END OF TAPE

TRACIS

...34 REGIONAL AUTOMATED CRIMINAL INFORMATION SYSTEM
AND ADOPTED REPORTING FORMAT TUL-1849E

ARREST AND BOOKING DATA CR-1998-515

APPELLANT'S EXHIBIT 4

ORIGINAL

MUG & PRINT
☐ PARTIAL ☐ COMPLETE PHOTO TO _____ TCSO NUMBER 9851 DIVISION 1

☐ CHECKED NCIC

☐ FEDERAL DISTRICT ☒ TULSA DISTRICT ☐ OSAGE DISTRICT ☐ MUNICIPAL ☐ HOLD FOR _____ ☐ JUV ☐ R.O.P.

LOCATION OF ARREST: 1341 E. 35TH ST

LOCATION OF OCCURRENCE: 1341 E. 35TH ST

	MO	DATE	YR	DAY	TIME
OCCURRED	02	21	98	SAT	0304
ARRESTED	02	21	98	SAT	0315
BOOKED	2	21	98	Sat	0551

PID: 226363
SUSPECT NAME (LAST, FIRST, MIDDLE): CARLTON, TERRY
AKA: BERNT
HGT: 600 WGT: 175 HAIR: BLU EYES: BLU SKIN: M1 RACE: W SEX: M
STREET ADDRESS, CITY, STATE: 2272 E. 38TH ST TULSA OK
ZIP CODE: 74105 AGE:
DOB: 020758 SOCIAL SECURITY NUMBER: 444 56 8239
EMPLOYER/SCHOOL: SELF - CAR DEALERSHIP
HOME PHONE: 742-6625
DRIVER'S LICENSE NUM: B6R452 ST: KS CLASS: — END: —
EMPLOYER ADDRESS: N/A
BUSINESS PHONE: N/A
OSBI NUMBER: DISTRICT COURT FILED
FBI NUMBER:
NEXT OF KIN: REFUSED
ADDRESS: —
RELATIONSHIP:
PERSONAL ODDITIES: GOTEE
TATTOOS:
MAR 24 1998
WARNING INDICATORS:
CLOTHING: TAN SWEATER, BLU JEANS, BOOTS
SALLY HOWE SMITH, COURT CLERK STATE OF OKLA. TULSA COUNTY

VEHICLE
DISPOSITION/HOLD: TOWED BY STEELY WRECKER
VIN: JH4NA1156PT000031
TAG STATE: TAG NUMBER: D16529
VEH YR: 93 VEH MAKE: ACURA VEH MODEL: NSX VEH STYLE: 2DR COLOR TOP/BOTTOM: BLK MISC IDENTIFIERS:

ARRESTING OFFICER: T.C. DEWITT ID NUM: D393 DIV: 3 AGENCY: TPD
BACKING OFFICER: S. ALLISON ID NUM: 319 DIV: AGENCY: TPD
JAIL INTAKE: Burch ID NUM: 63560

FED STA MON	FEL MISD	CRIME DESCRIPTION	TITLE	SECT	PARA	DATE OF OFFENSE	WARRANT NUMBER	ORI	BOND	O.R.	UCR
	M1	TRANSPORTING A LOADED FIREARM	21	1289.13		022198			$1000		

ON 022198 AT 0304 HOURS, I WAS DISPATCHED TO 1341 E. 35TH ST. IN REFERENCE TO A DOMESTIC WITH GUN CALL. UPON ARRIVAL I COULD HEAR THE SUSPECT, TERRY CARLTON YELLING BEHIND A LARGE 8' FENCE. AS OFFICERS APPROACHED THE RESIDENCE T. HOWE IN CAR WENT START AND A BLACK FEMALE QUICKLY BACKED OUT INTO THE STREET. C. KELLOGG WAS TOLD TO STOP AND COMPLIED. OFFICERS OBSERVED A STUN GUN AND PART OF A GLOCK PISTOL THAT WERE IN A WHITE BAG. OFF. ALLISON RETRIEVED THE 9MM GLOCK PISTOL FROM THE PASSENGER SIDE FLOORBOARD AND IT WAS CHAMBER LOADED AND FULLY LOADED WITH AMMUNITION. CARLTON STATED IF I WAS BRINGING IT BACK FOR HER THE OTHER DAY AND

WILL SIGN CITY INFORMATION
☐ OFFICER
☐ CITIZEN

WITNESS NAME | ADDRESS/ZIP | TELEPHONE

BREATHALYZER OPERATOR/ID NUM/AGENCY | BREATHALYZER SUPERVISOR/ID NUM/AGENCY | TEST RESULTS 0. %

MEDICAL PROBLEMS

PROPERTY RECEIPT: AJ-2678 | VCR TAPE | PHOTO NUM | LATENT NUM

ARREST DOCKET NUMBER: 201628

RIGHT INDEX

FED STA MUN	FEL MISD	CRIME DESCRIPTION	TITLE	SECT	PARA	DATE OF OFFENSE	WARRANT NUMBER	ORI	BOND	O.R.	UC

I JUST FORGOT IT WAS IN THERE. THIS RESIDENCE HAS A HISTORY OF DOMESTIC VIOLENCE AND THREATS. ALTHOUGH APRIL WICKENS COULD NOT STATE WHETHER OR NOT CARLTON THREATEN HER TONIGHT. WICKENS SAID HE HAD IN THE PAST AND FELT VERY TREATENED. OFFICERS CONTACTED JUDGE HEADSHEAD AND A EMERGENCY TEMPORARY PROTECTIVE ORDER WAS ISSUED. CARLTON WAS ARRESTED TRANSPORTED AND BOOKED. EVIDENCE WAS TURNED IN ON PROPERTY RECEIPT #AJ-2

P.C. AFFIDAVIT.

ON 022198 AT 0304 HOUR OFFICERS WERE ASSIGNED TO A DOMESTIC WITH A GUN AT 1341 E. 35TH ST. UPON ARRIVAL I WOULD HEAR THE SUSPECT, TERRY CARLTON YELLING BEHIND A LARGE 8' FOOT FENCE. AS OFFICERS APPROACHED THE RESIDENCE I HEARD A CAR MOTOR START AND A BLACK FIGURE QUICKLY BACK INTO THE STREET. CARLTON STOPPED THE VEHICLE AND OFFICERS FOUND A LOADED GLOCK 9MM PISTOL IN THE PASSENGER FLOOR BOARD OF THE VEHICLE. CARLTON WAS ARRESTED TRANSPORTED AND BOOKED. EVIDENCE TURNED IN ON PROPERTY RECEIPT # AJ-2178.

THE BELOW SIGNED OFFICER SWEARS AND AFFIRMS THAT THE ABOVE INFORMATION IS TRUE AND CORRECT AND PRAYS THIS HONORABLE COURT TO FIND PROBABLE CAUSE TO DETAIN THE ARRESTEE PENDING FURTHER PROCEEDINGS.

OFFICER'S SIGNATURE

T. L. DEWITT TPD HDSW 516/1C

PRINT OFFICER'S NAME, DEPT, DIVISION, PHONE NUMBER

SUBSCRIBED AND SWORN TO BEFORE ME THIS 21 DAY OF 2 19 98

NOTARY PUBLIC OR COURT CLERK

MY COMMISSION EXPIRES

FOUND THAT THERE (IS) IS NOT PROBABLE CAUSE TO DETAIN THE ARRESTEE PENDING FURTHER PROCEEDINGS.

[illegible] THE DISTRICT COUR

APPELLANT'S EXHIBIT 5

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY, OKLAHOMA

State of Oklahoma vs. CARLTON TERRY BRENT	No. CM-1998-575 (Criminal Misdemeanor) Filed: 02/25/1998 Judge: Unassigned

Parties

CARLTON TERRY BRENT, Defendant
STATE OF OKLAHOMA, Plaintiff
Tulsa Police Department, ARRESTING AGENCY

Attorneys

Attorney	Represented Parties
Phillips, Sharon Kay(Bar # 11690) 1424 TERRACE DRIVE TULSA, OK 74104 USA	CARLTON, TERRY BRENT

Due Dates

Docket Code	Original Due Date	Current Due Date	Description

Events

Event	Party	Docket	Reporter
Wednesday, March 25, 1998 at 10:00 AM JURY TRIAL SOUNDING DOCKET (JTS)		Traffic Court Judge (General)	

Counts

Parties appear only under the counts with which they were charged. For complete sentence information, see the court minute on the docket.

Count # 1. Count as filed: TRANSPORTING LOADED FIREARM, in violation of 21 O.S. 1289 0013

Defendant — Disposition Information

CARLTON, TERRY BRENT — Pending.

Citation Information

Docket

Date	Code	Count	Party	Serial #	Entry Date	User Name		
02/23/1998	BOTRN	-	CARLTON, TERRY BRENT	18105467	Mar 13 1998 12:00:00:000AM	505442\5-31	-	$ 0.00

APPEARANCE BOND(S) TRANSFERRED FROM NF 98-1507, MICRO 3-13-98

CARLTON, TERRY — Mar 13 1998

02/23/1998	BO	-	BRENT	18105468	12:00:00:000AM	|505442|5-31	- $ 0.00

APPEARANCE BOND BY: JERRY LYNN WILLIAMS/CASH 1007.00 [10.00]

02/23/1998	BD$	-	CARLTON, TERRY BRENT	18242803	Dec 7 1998 12:00:00:000AM	|505442|5-31	- $ 0.00

BOND ENDORSED CASH REFUNDED BOND [1007.00]

02/25/1998	INFOM	-	CARLTON, TERRY BRENT	18105465	Feb 26 1998 12:00:00:000AM	|505442|5-31	- $ 0.00

INFORMATION TRANSPORTING LOADED FIREARM

02/26/1998	TEXT	-	CARLTON, TERRY BRENT	18541047	Feb 27 1998 12:00:00:000AM	|505442|5-31	- $ 0.00

CLARKE RICK: ARRAIGNMENT HELD - PLEAD NOT GUILTY. J.T.S.D. SET 3-25-98 AT 10 AM. BOND TO REMAIN. DEFT. PRESENT, REP BY COUNSEL, STATE REP BY DIANA MCKNIGHT.

03/17/1998	TEXT	-	CARLTON, TERRY BRENT	18572318	Mar 17 1998 12:00:00:000AM	|505442|5-31	- $ 0.00

TOTAL AMT. RECVD. - CHECK (# 98-015105) TRNAS BOND FRM NF 98 1507 ; CHECK NO:186063 [1007.00]

03/17/1998	TEXT	-	-	40892566	Nov 16 2000 4:33:23:853PM	AOCrcptWJS	- $ 0.00

CONVERTED RECEIPT FROM AOC MAINFRAME
RECEIPT #199815105
PAYOR: TRNAS BOND FRM NF 98 1507
PAID ON BEHALF OF: CARLTON TERRY BRENT
TOTAL AMOUNT PAID ON CASE # CM-1998-575 : $ 1,007.00
CALCULATED AMOUNT OWED AFTER THIS RECEIPT: $ 10.00

03/24/1998	AFPCA	-	CARLTON, TERRY BRENT	18305522	Mar 25 1998 12:00:00:000AM	|505442|5-31	- $ 0.00

AFFIDAVIT & FINDING OF PROBABLE CAUSE(ARRESTED)

03/25/1998	TEXT	-	CARLTON, TERRY BRENT	18560638	Mar 26 1998 12:00:00:000AM	|505442|5-31	- $ 0.00

CLARKE RICK: BENCH WARRANT ORDERED-FTA-BOND FORF. FAILS TO APPEAR FOR J.T.S.D. BOND $3000

03/26/1998	BWIFA	-	CARLTON, TERRY BRENT	18385264	Mar 26 1998 12:00:00:000AM	|505442|5-31	- $ 0.00

//B E N C H W A R R A N T I S S U E D*FTA*BOND $ 3000.00 [20.00]

05/04/1998	RETRL	-	CARLTON, TERRY BRENT	18298110	May 5 1998 12:00:00:000AM	|505442|5-31	- $ 0.00

RETURN RELEASE

05/13/1998	TEXT	-	CARLTON, TERRY BRENT	18348054	May 13 1998 12:00:00:000AM	|505442|5-31	- $ 0.00

NOTIFIED MINUTE CLERK SUPERVISOR FOR BW & O & J

08/17/1998	O	-	CARLTON, TERRY BRENT	18257474	Aug 17 1998 12:00:00:000AM	|505442|5-31	- $ 0.00

ORDER VACATING BOND FORFEITURE AND EXONERATING BOND (AND REMITTING BOND)

08/25/1998	EXFTO	-	CARLTON, TERRY BRENT	18277675	Aug 25 1998 12:00:00:000AM	|505442|5-31	- $ 0.00

EXCESS FUNDS PAID TO JERRY LYNN WILLIAMS/VO#189632/CASH BOND REFUND [1007.00]

09/09/1998 TEXT - CARLTON, TERRY BRENT 18105447 Sep 9 1998 12:00:00:000AM |505442|5-31 - $ 0.00

CLARKE RICHARD R: BENCH WARRANT ISSUED. BOND EXONERATED.

09/21/1998 TEXT - CARLTON, TERRY BRENT 18105442 Sep 21 1998 12:00:00:000AM |505442|5-31 - $ 0.00

TULSA POLICE DEPARTMENT INCIDENT REPORT #886714

09/21/1998 WRCR - CARLTON, TERRY BRENT 18105444 Sep 21 1998 12:00:00:000AM |505442|5-31 - $ 0.00

WARRANT RECALL/CANCELLATION RETURNED

09/21/1998 RTBW - CARLTON, TERRY BRENT 18105446 Sep 21 1998 12:00:00:000AM |505442|5-31 - $ 0.00

RETURN BENCH WARRANT (FAILURE TO APPEAR) DEFT DECEASED INC#886714

12/07/1998 TEXT - CARLTON, TERRY BRENT 18513463 Dec 7 1998 12:00:00:000AM |505442|5-31 - $ 0.00

TOTAL AMT. TRANSFERRED FROM CASH BOND (# 98-060376) BOND REFUNDED ; CHECK NO: [1007.00]

12/07/1998 TEXT - - 40892572 Nov 16 2000 4:33:23:870PM AOCrcpt\RJA - $ 0.00

CONVERTED RECEIPT FROM AOC MAINFRAME
RECEIPT #199860376
PAYOR: BOND REFUNDED
PAID ON BEHALF OF: CARLTON TERRY BRENT
TOTAL AMOUNT PAID ON CASE # CM-1998-575 : $ 1,007.00
CALCULATED AMOUNT OWED AFTER THIS RECEIPT: $ 30.00

10/20/1999 AC08 - CARLTON, TERRY BRENT 21625884 Oct 20 1999 12:00:00:000AM |505442|5-31 Realized $ 20.00

ACCOUNT BALANCE- AC08. AS OF CONVERSION FROM THE MAINFRAME (10/20/1999), THE TOTAL AMOUNT FOR THIS ACCOUNT (THIS DEFENDANT) IS: $20.00. THE TOTAL PAID ON THIS ACCOUNT IS $ 0.00. THE BALANCE ON THIS ACCOUNT IS $ 20.00.($ 20.00)

10/20/1999 AC01 - CARLTON, TERRY BRENT 21730305 Oct 20 1999 12:00:00:000AM |505442|5-31 Realized $ 10.00

ACCOUNT BALANCE- AC10. AS OF CONVERSION FROM THE MAINFRAME (10/20/1999), THE TOTAL AMOUNT FOR THIS ACCOUNT (THIS DEFENDANT) IS: $10.00. THE TOTAL PAID ON THIS ACCOUNT IS $ 0.00. THE BALANCE ON THIS ACCOUNT IS $ 10.00.($ 10.00)

03/26/2000 AC47 - CARLTON, TERRY BRENT 39101282 Mar 26 2000 12:14:34:930AM |505442|5-31 - $ 0.00

NEW ACCOUNTAC47 --ACCOUNT BALANCE -- PC03 CIVIL = $0.00 AS MF CONVERSION 3/17/2000 TOTAL OWED AC47 = $1007.00 TOTAL PAID AC47 = $1007.00 BALANCE DUE = $0.00

Party	Original Balance	Paid to Date	Cash Bonds	Holding	Current Balance
Tulsa Police Department	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
CARLTON, TERRY BRENT	$ 30.00	$ 0.00	$ 0.00	$ 0.00	$ 30.00
Generic Party	$ 0.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00
BALANCE	$ 30.00	$ 0.00	$ 0.00	$ 0.00	$ 30.00

Report Generated by The Oklahoma Court Information System at October 03, 2002 10:33:06.

APPELLANT'S EXHIBIT 6

PHYSICAL AND MENTAL HEALTH: ***"Cont'd"***

Wilkens reports she first used drugs intravenously in August 1997 and on a regular basis in September of 1997. Wilkens reports she was using .35 grams of methamphetamines on a weekly basis. Prior to her arrest on the Instant Offense. Wilkens reports methamphetamines was her drug of choice. Wilkens has experimented with mushrooms, cocaine and marijuana.

A urinalysis was not conducted due to Wilkens' being in the Tulsa County Jail.

The following is an Assessment statement from Lynda Isorn-Driskell, Family Resource Center, regarding April Wilkens:

"As April Rose Wilkens' counselor, I am writing to you with hope that my assessment of April will assist you in your effort to understand April's situation and the abuse related events that led to what I believe was April's act of self-defense on April 28, 1998.

I first became familiar with April's case last July when an attorney from The National Clearing House for the Defense of Battered Women in Philadelphia contacted Domestic Violence Intervention Services Executive Director, Felicia Collins-Correia. Felicia was asked to assist April Wilkens by arranging for the provision of advocacy and counseling services while April awaited trial. At that time, April was incarcerated at ADC where she has remained since her arrest in April 1998. Felicia contacted me at my office where I am employed full time as a licensed professional counselor for DVIS and coordinator for a consortium of Tulsa United Way agencies including DVIS, Parent Child Center, Youth Services, Credit Counseling and Family and Children's Services. In addition to my work at DVIS I have developed and implemented two graduate courses in Domestic Violence and Sexual Abuse for the University of Oklahoma where I have been employed as an adjunct assistant professor since June, '97. Felicia believed that my knowledge and experience in the filed of domestic violence treatment and assessment would naturally prepare me for my role as April's counselor. Before meeting with April I spoke with her mother, Louise Fitzhue, and her public defender, Damon Cantrell, but nothing could have prepared me for the last thirteen months, the dozens of sessions with April which culminated in 35 to 40 hours of face to face contact at ADC, the three weeks of trial and April's conviction.

My first impression of April was that she told a true and horrific story that paralleled the hundreds of similar stories of domestic violence told to me by female victims and survivors with one exception, that April found her life to be threatened to the extent that she believed if she did not defend herself she would be raped and murdered by Terry Carlton. I validate her belief that she acted out of a pervasive fear that Terry

PHYSICAL AND MENTAL HEALTH: ***"Cont'd"***

would, in deed, follow through with this threats to kill her. During my sessions with April she related symptoms of post-traumatic stress disorder including sleep disturbances, depression compounded by hopelessness, hyper vigilance, elevated levels of anxiety and horrendous grief as a result of taking the life of a man whom she loved. These symptoms are characteristic of the long term impact of violence on victims of abuse and April's symptoms have persisted throughout the last 14 months.

April described a whirlwind courtship and seduction by Terry soon after she met him. The relationship gradually changed and April related numerous accounts of emotional abuse, isolation and threats to harm which escalated to physical battering, sexual coercion, sexual assault and drug use. April realized that she might not survive Terry's brutal attacks and her repeated attempts to distance herself from Terry were met by his refusal to let her go. His refusal to accept that manifested in his stalking behaviors, harassment, and destruction of her property. April reported Terry's obsession with firearms and his threats to kill her which he used to control, intimidate and instill fear in his victim and it worked. The history of abusive incidents was documented repeatedly by Tulsa Police Officers who responded to numerous 911 calls made by April and medical reports by two SANE nurses who examined her after two reported rapes, and by friends and neighbors who witnessed Terry's abuse of April. April described feeling trapped with no hope of escape. She became convinced that she had nowhere to hide where he could not find her. It also became very clear to April that the safety, support and external validation she desperately needed in order to survive was not available to her unless she agreed to follow through with protective orders and to cooperate with prosecutors even though she was being threatened with abuse and murder by Terry Carlton if she turned against him. Thus, April was blamed for failing to utilize all options available to her, options that she believed were unsafe and unreasonable.

On April 28, 1999, she decided to act in what she believed to be her and Terry's best interest by pleading with him to get help. So many women have put their fear aside and placed themselves in danger by returning to the abusers with the mistaken belief that they have the power to help them. April, too, was mistaken but she believed that she had no other choice but to appeal to the reasonable, rational side of Terry she had known in the early stages of their relationship. But as we know, April was brutally assaulted physically and sexually on the morning of the shooting and has photographs and medical reports to support the claim that she was beaten, raped and handcuffed. So, I strongly believe that April's efforts to "calm him down" have been grossly misinterpreted by those who want us to believe that April premeditated a murder.

PHYSICAL AND MENTAL HEALTH: ***"Cont'd"***

I have come to know April Wilkens as a sensitive, intelligent, compassionate young woman who loves her son Hunter and who shares a close relationship with her parents and extended family members. I am also saddened that Terry's family is suffering from grief and loss and that April lives with this tragedy and all of the misery that accompanies remorse and sorrow every single day. As a therapist, I maintain professional boundaries with my clients and keep an emotional distance in order to provide a safe environment for them to disclose their thoughts and feelings, and I must also admit that this case and Apirl's conviction has made a lasting impact on me as a professional counselor and as a human being. I am glad to have known April Wilkens and her family and I am inspired by the impression that her courage has made on victims of domestic violence and spousal rape who know of her case and its outcome.

I hope that a minimum security facility for April is a realistic expectation of her near future so I am asking you to please consider a recommendation for April's placement at Eddie Warrior Correctional Facility in Taft, OK. DVIS counselor, Katherine Levine, facilitates an exemplary program for victims of domestic violence that was implemented there last summer. I believe April would benefit greatly from a program designed to treat her PTSD and the lasting effects of trauma.

Thank you for anything you can do to help April at this time in her life.

Sincerely,

Signed Lynda Isorn-Driskell, MHR,LPC

MILITARY SERVICE RECORD:

The Defendant denied any prior or current enlistment in the United States Armed Forces.

FINANCIAL CONDITION:

Wilkens reports no financial assets. Wilkens states she does not know her current economic status due to being in custody in the Tulsa County Jail for approximately fourteen months.

APPELLANT'S EXHIBIT 7

Drug conviction adds 2 years to woman's murder sentence

11 JULY 2000 TULSA WORLD P.A1D

▶ She will serve the time for the meth possession concurrently.

A woman who already is serving a life prison term for murdering a man who she said had abused her pleaded no contest Monday to possessing methamphetamine weeks prior to the slaying.

April Rose Wilkens received a two-year prison sentence that will run concurrently with the life term imposed when she was convicted of the first-degree murder of Terry Carlton.

Wilkens, 30, was charged on May 26, 1999, with felony possession of a controlled drug and misdemeanor possession of paraphernalia on April 2, 1998.

The misdemeanor was dismissed Monday in a plea agreement.

When the charge was filed more than 13 months ago, District Attorney Tim Harris said it "should have been filed a long time ago. Terry Carlton's life might have been saved."

Testimony at her April 1999 murder trial indicated that Wilkens shot Carlton, 40, eight times with a .22-caliber pistol on April 28, 1998, at his Tulsa home.

Jurors rejected a "battered woman's syndrome" defense.

Filing the drug charge was an act of "meanness," defense attorney Julia O'Connell said. Prosecutors "gain absolutely nothing" with a two-year term that will not add to the prison time Wilkens already faced, she said.

Prosecutor Rebecca Nightingale indicated that if the state Court of Criminal Appeals grants Wilkens a new trial in the murder case, prosecutors could use the drug conviction in an effort to challenge the credibility of her testimony at any retrial.

The life term allows the possibility of parole.

ZUHDI LAW OFFICES
P.O. Box 1077
Oklahoma City, OK 73101
(405) 235-0304

APPELLANT'S EXHIBIT 8

Bill Zuhdi, J.D.
Licensed to practice Law
in Oklahoma and Texas

February 7, 2000

April Rose Wilkens, #282399
L.A.R.C. A-2-C
P.O. Box 876
Lexington, OK 73051

Re: April Rose Wilkens v. State of Oklahoma; Direct Appeal to Oklahoma Court of Criminal Appeals; Appeal No.: F-99-927

Dear Ms. Wilkens:

I have received your recent letters, including the letter you wrote to your pervious attorney, Gail Gunning of the Oklahoma Indigent Defense System. I am presently reviewing your transcripts; the trial was long and there are thirteen volumes to read and review. I anticipate completing the read-through of the trial by the end of February or the first week of March. Your appeal brief will be filed at the Oklahoma Court of Criminal Appeals no later than April 3, 2000. Until I finish the read-through of your transcripts, I will not have a good handle on the meritorious issues that should be presented for your appeal. Please note that factual issues should have been resolved at the trial level and are not usually able to presented on direct appeal.

I will contact you as soon as I have completed reading the transcripts. If, in the interim, you have any questions, please contact me. Also, if you get transferred to Mabel Basssett or some other facility, please let me know as soon as possible.

Sincerely,

ZUHDI LAW OFFICES

Bill Zuhdi

BZ/db

APPELLANT'S EXHIBIT 9

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

APRIL ROSE WILKENS,)
)
Appellant,)
v.)
)
STATE OF OKLAHOMA)
)
Appellee.)

NOT FOR PUBLICATION

Case No. F-99-927

SUMMARY OPINION

LUMPKIN, PRESIDING JUDGE:

Appellant April Rose Wilkens was tried by jury and convicted of First Degree Murder (21 O.S.1991, § 701.7), Case No. CRF-98-2173, in the District Court of Tulsa County. The jury recommended life imprisonment. The trial court sentenced accordingly. It is from this judgment and sentence that Appellant appeals.

Appellant raises the following propositions of error in support of her appeal:

> I. The evidence was insufficient to sustain Appellant's conviction of Murder in the First Degree.
>
> II. The trial court committed reversible error in failing to submit a jury instruction on manslaughter.
>
> III. The jury should have received an instruction for manslaughter consequently trial counsel was ineffective for failing to submit the written jury instruction on manslaughter.
>
> IV. Appellant received ineffective assistance of trial counsel when trial counsel failed to object to a statement made by Appellant prior to her Miranda warnings being read to her by law enforcement.

V. The trial court erred in finding that Appellant has waived her rights and that her confession was freely and voluntarily made and trial counsel was ineffective in failing to present to the trial court at trial the fact that Appellant had been coerced into making the statement.

VI. The trial errors complained of herein cumulatively denied Appellant's right to a fair trial under the United States and Oklahoma Constitution and therefore, her conviction and sentence must be reversed.

After a thorough consideration of these propositions and the entire record before us on appeal including the original record, transcripts, and briefs of the parties, we have determined that neither reversal nor modification is warranted under the law and the evidence. In Proposition I, we find the State's evidence was sufficient to support a conviction for first degree malice murder. *Spuehler v. State*, 709 P.2d 202, 203-204 (Okl.Cr.1985). In Proposition II, the trial court did not err in failing to *sua sponte* instruct on first degree manslaughter as such an instruction was not warranted by the evidence. *Shrum v. State*, 991 P.2d 1032, 1036 (Okl.Cr.1999).[1] *See also Le v. State*, 947 P.2d 535, 546 (Okl.Cr.1997). In Proposition III, we find trial counsel was not ineffective for failing to request a jury instruction on first degree manslaughter as such an instruction was not warranted by the evidence. *Workman v. State*, 824 P.2d 378, 383 (Okl.Cr.1991).

In Proposition IV, Appellant has failed to show a reasonable probability that, but for counsel's failure to object to the admission of her initial statements

[1] While I disagree with this Court's failure to adhere to precedent in *Shrum*, I accede to its application in this case based upon the doctrine of *stare decises*. *Shrum*, 991 P.2d at 1037-39 (Lumpkin, V.P.J. concurring in result).

made to police at the murder scene, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Fisher v. State*, 736 P.2d 1003, 1012 (Okl.Cr.1987). Assuming arguendo, Appellant's initial statements made at the murder scene were subject to *Miranda* any error in admitting those statements was harmless beyond a reasonable doubt as other admissions made after the giving of the *Miranda* warning and the waiver of those rights were properly admitted. *See Bartell v. State*, 881 P.2d 92, 99 (Okl.Cr.1994). Consequently, any failure by trial counsel to object to the admission of those initial statements did not prejudice Appellant and therefore is not indicative of ineffective assistance. *Phillips v. State*, 989 P.2d 1017, 1044 (Okl.Cr.1999). In Proposition V, sufficient evidence was presented to show that Appellant's statements made during the videotaped interview were made knowingly, voluntarily and freely. Therefore, the trial court properly admitted the statements. *Gilbert v. State*, 951 P.2d 93, 111 (Okl.Cr.1997). Further, trial counsel was not ineffective for failing to object to the admissibility of Appellant's statements on the grounds her statements were coerced by the failure of the police to immediately provide her with a rape examination and medical treatment. Finally, in Proposition VI, Appellant was not denied a fair trial by the accumulation of error. *Short v. State*, 980 P.2d 1081, 1109 (Okl.Cr.1999). Accordingly, this appeal is denied.

DECISION

The Judgment and Sentence is **AFFIRMED.**

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE J. MICHAEL GASSETT, DISTRICT JUDGE

APPEARANCES AT TRIAL

CHRISTOPHER B. LYONS
P.O. DRAWER 1046
PRYOR, OK 74362
COUNSEL FOR APPELLANT

TIMOTHY H. HARRIS
DISTRICT ATTORNEY
REBECCA BRETT NIGHTINGALE
ASSISTANT DISTRICT ATTORNEY
500 S. DENVER, RM. 406
TULSA, OK 74103
COUNSEL FOR THE STATE

APPEARANCES ON APPEAL

BILL ZUHDI
P.O. BOX 1077
OKLAHOMA CITY, OK 73101
COUNSEL FOR APPELLANT

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
DIANA L. SLAYTON
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL
OKLA. CITY, OK 73105
COUNSEL FOR APPELLANT

OPINION BY: LUMPKIN, P.J.
JOHNSON, J.: RECUSE
CHAPEL, J.: CONCUR IN RESULT
STRUBHAR, J.: CONCUR
LILE, J.: CONCUR

RA

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APPELLANT'S EXHIBIT 10

413

Marriage Record 89

ML-96-141

S.Adv. 104 (1989) Mid-West Printing, Sapulpa, OK

APPLICATION FOR MARRIAGE LICENSE

STATE OF OKLAHOMA, County of Creek, ss. In District Court

We, the undersigned, hereby apply for the issuance of a Marriage License and certify as to our ages and places of residence as follows:

Name Don Henry Carlton Age 63 OF Tulsa
County of Tulsa, State of Oklahoma
Name Shirley Anne Bettis Age 41 OF Kingfisher
County of Kingfisher, State of Oklahoma and for the purpose of procuring same, we do solemnly swear that the names, ages and places of residence as set out above are true and correct, as evidenced by documents described in particular as follows: (First Party) ok. dl. 008- 10-13-32:
(Second Party) ok. dl. 008- 11-4-54 and that we are not disqualified or incapable under the law of entering into the marriage relation, nor are we related to each other within the degree prohibited by law.

Don Henry Carlton Applicant — Shirley Anne Bettis Applicant

Subscribed and sworn to before me this 29 day of May A.D. 19 96.

(Judge or Clerk) By Marie Kendall (Deputy)

NOTE-In the event one or both of the parties to be married are under age, such application shall have been on file in the Court Clerk's office for a period of not less than seventy-two hours, prior to the issuance of the license, unless at the time of application, at least one parent, guardian or custodian of the minor child, has signed the consent waiving the 72 hour waiting period.

Consent Affidavit - In Person (1)

I, the undersigned, state that I am the _____ of _____ named in the above application as being of the age of _____ years, and in the presence of the issuing official, I do hereby consent to _____ marriage to _____
Signed this _____ day of _____, 19____.

_____ (Signature)

I hereby waive the seventy-two (72) hour waiting period between the application and issuance of the license. 43 O. S. Supp. 1989, §5.

_____ (Signature)

_____ (Judge or Clerk)

_____ (Deputy)

Consent Affidavit - In Person (2)

I, the undersigned, state that I am the _____ of _____ named in the above application as being of the age of _____ years, and in the presence of the issuing official, I do hereby consent to _____ marriage to _____
Signed this _____ day of _____, 19____.

_____ (Signature)

I hereby waive the seventy-two (72) hour waiting period between the application and issuance of the license. 43 O. S. Supp. 1989, §5.

_____ (Signature)

_____ (Judge or Clerk)

_____ (Deputy)

MARRIAGE LICENSE

STATE OF OKLAHOMA, County of Creek, ss. In District Court

To Any Person Authorized to Perform or Solemnize the Marriage Ceremony-GREETING:

You are hereby authorized, upon delivery of this marriage license within ten days from the date of its issue to you, to join in marriage Mr. Don Henry Carlton, of Tulsa, County of Tulsa, State of Oklahoma, age 63 years, and M Shirley Anne Bettis, of Kingfisher, County of Kingfisher, State of Oklahoma, age 41 years, and by the command of the statute you shall make due return of this license to my office within five days succeeding the performance of the marriage herein authorized.

Issued under my hand and official seal, and recorded in my Marriage Record before delivery, at Sapulpa Oklahoma, this 29 day of May, 19 96.

(SEAL) By Marie Kendall Pat Hobbs, Court Clerk Deputy

ENDORSEMENT: By this endorsement to the within and foregoing Marriage Licenses, I hereby verify, and truly certify, that the Application for said License was accompanied by proper credentials under the circumstances indicated by the word "filed" opposite one or more of the applicable provisions of Statute indicated below, according to 43 O.S. 1981, §§ 31, 32, and 33 and 43 O.S. Supp. 1989, § 3.

✓ (1) Physician's and laboratory technician's statements required by statute, relative to the examination and health of either or both of the parties.
_____ (2) An order of the District Court with memoranda of reasons for the order dispensing with statutory requirements relative to the examination and health of either or both of the parties.
_____ (3) An order of the District Court with accompanying memoranda of reasons for the order, extending the 30 day period following the examination to 90 days or less, together with papers complying with the requirements of number (1) above.
_____ (4) Affidavits of consent to marriage of an under-age person by parent or guardian, in lieu of personal appearance as provided by Statute.
_____ (5) Affidavits of consent to marriage of an under-age person by parent or guardian, residing in another county of this State or outside the State and acknowledged as provided by Statute.
_____ (6) Affidavits of three persons authorizing marriage of under-age person when parents are deceased or otherwise incapable of giving consent as provided by Statute.

Witness my hand and official seal this 29 day of May, 19 96.

Pat Hobbs, Court Clerk By Marie Kendall Deputy

All the above and foregoing recorded on this 29 day of May A.D., 19 96, and thereafter said License delivered according to Law.

Pat Hobbs, Court Clerk By Marie Kendall Deputy

CERTIFICATE OF MARRIAGE

STATE OF OKLAHOMA, County of Creek, ss.

I, Charles A. Johnson (Name), Judge (Official Designation), Court of Criminal Appeals (Court or Congregation), Oklahoma City (Town)

In Oklahoma County, State of Oklahoma, do hereby certify that I joined in marriage the persons named in and authorized by this License to be married, on the 29th day of May A.D., 19 96, at Tulsa, in Tulsa County, State of Oklahoma, in the presence of Carry Caffin of Tulsa, Oklahoma and Kelley M Root of Tulsa, Oklahoma.

My Credentials of authority are recorded in Ministers' Credentials Book _____, at page _____

of _____ County, Oklahoma, in accordance with 43 O.S. Supp. 1986, §7.

Charles A. Johnson (Person Performing Ceremony)

Judge (Official Designation)

License returned, and Certificate of Marriage recorded subjoining the record of License issued and recorded in Marriage Record Book 89 at page 413 on this the 26 day of August, 19 96.

Pat Hobbs, Court Clerk By Mary Bennett Deputy

APPELLANT'S
EXHIBIT 11

IN THE DISTRICT COURT OF TULSA COUNTY

STATE OF OKLAHOMA

CASE NO. CF-98-2173

APRIL ROSE WILKENS

Petitioner,

versus

THE STATE OF OKLAHOMA

Respondent.

APPLICATION FOR POST-CONVICTION RELIEF

April Rose Wilkens, Pro Se
D.O.C. No. 282399
C.O.C.F. C1B-118
29501 Kickapoo
McLoud, Oklahoma 74851

TABLE OF CONTENTS

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IN THE DISTRICT COURT OF TULSA COUNTY
STATE OF OKLAHOMA

APRIL ROSE WILKENS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**Case No. CF-98-2173**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent	)	

APPLICATION FOR POST-CONVICTION RELIEF

PART A

I, APRIL ROSE WILKENS, whose present address is the Central Oklahoma Correctional Facility (C1B-118), 29501 Kickapoo, McLoud, Oklahoma 74851, hereby apply for relief under the Post-Conviction Procedure Act, Section 1080 et seq. of Title 22.

The conviction and sentence for which I seek relief are as follows:

1. (a) Court in which sentence was rendered: the District Court of Tulsa County, State of Oklahoma
   (b) Case Number: CF-98-2173
2. (a) Date of conviction: 24 April 1999
   (b) Date of sentence: 07 July 1999
3. Term of sentence: life imprisonment
4. Name of Presiding Judge: the Honorable Michael Gassett
5. Petitioner is now in custody serving this life sentence at the Central Oklahoma Correctional Facility, 29501 Kickapoo, McLoud, Oklahoma

4 4 25

6. Petitioner was convicted of first-degree murder
7. Finding of "guilty" was made after plea of "not guilty"
8. Finding of "guilty" was made by a jury
9. Petitioner was represented at jury trial by attorney Christopher B. Lyons, P.O. Drawer 1046, Pryor, Oklahoma 74362
10. Petitioner's jury trial counsel was hired by her family
11. Petitioner appealed this conviction to the Court of Criminal Appeals, State of Oklahoma
12. Petitioner was represented on direct appeal by attorney Bill Zuhdi, P.O. Box 1077, Oklahoma City, Oklahoma 73101
13. An unpublished "Summary Opinion" was written by the Court of Criminal Appeals, State of Oklahoma, in appellate case number F-99-927
14. On 02 April 2002, Petitioner filed a Petition for Writ of Habeas Corpus seeking relief from her conviction and sentence in the United States District Court. Petitioner submitted a total of six claims demonstrating that her right to a fair trial was violated in that she was denied effective assistance of counsel pursuant to the Sixth Amendment to the Constitution of the United States. On 06 February 2003, United States District Court Chief Judge Terry Kern filed an "Order," including "Background" and "Analysis," (Document Number 15) in Petitioner's federal case number 02-CV-244-K (J). In this "Order," the Honorable Judge Kern declares:

> Before the Court is Respondent's motion to dismiss petition for writ of habeas corpus for failure to exhaust available state remedies....
>
> ....Although this Court is authorized by statute to deny relief on an unexhausted claim, see 28 U.S.C. §2254(b)(2), habeas corpus relief cannot be granted unless the claim has been exhausted in the state courts, see 28 U.S.C. § 2254(b)(1)....
>
> ....After carefully reviewing the record in this case, the Court finds that Petitioner has presented her second claim to the OCCA on direct appeal but has not presented either her first claim concerning

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counsel's failure to investigate, or any of the claims asserted in her supplemental pleadings. In addition, the Court agrees with Respondent that Petitioner has an available state remedy, an application for post-conviction relief, for those claims. Therefore, the instant petition is a "mixed petition," containing both exhausted claims and unexhausted claims, and is subject to dismissal without prejudice. Rose v. Lundy, 455 U.S. 509 (1982) (holding that a federal district court must dismiss a habeas corpus petition containing exhausted and unexhausted grounds for relief)....

However, should the instant action be dismissed without prejudice, Petitioner would be required to commence a new habeas action in this Court in the event she fails to obtain relief in the state courts....filing of a new petition would clearly be impacted by § 2244(d), imposing a one-year limitations period on habeas corpus petitions. In fact, because the pendency of this federal action does not serve to toll the one-year limitations period, see Duncan v. Walker, 533 U.S. 167 (2001), any effort by Petitioner to return to federal court after exhausting her claims may be precluded by the § 2244(d) limitations period. Under the facts of this case, the Court finds that in the interest of justice, this action should not be dismissed without prejudice but instead held in abeyance pending exhaustion of available state remedies by Petitioner.

Petitioner has indicated in her response to the motion to dismiss that the Court should afford her the opportunity to amend her petition to omit her unexhausted claims. See #8 and 10. As noted by Respondent in the brief in support of motion to dismiss, "Counsel for Petitioner has raised some serious allegations about trial counsel's performance and has even obtained an affidavit of Federal District Judge Claire Eagan." (#7 at 5). The Court agrees with Respondent that Petitioner's allegations concerning trial counsel's performance are serious and should be presented to the state courts. Nonetheless,

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should Petitioner wish to proceed at this time with only her exhausted claim (the one claim identified in the instant petition that was presented on direct appeal), she may, within twenty (20) days of the entry of this Order, submit an Amended Petition raising only the exhausted claim and deleting all unexhausted claims....

If Petitioner does not file an amended petition within twenty days of the entry of this order, the Court will enter an order holding this action in abeyance. Should this action be held in abeyance, the Court will require counsel for Petitioner to provide status reports, to be filed every sixty (60) days, outlining the steps he has taken to exhaust state court remedies and the progress of the matter in the state courts. At such time as the state court remedies have been exhausted, Petitioner shall so notify the Court immediately, and the Court will reactivate consideration of Petitioner's § 2254 petition.

In light of today's Order, the Court finds Respondent's motion to dismiss mixed petition has been rendered moot and should be denied on that basis.

Accordingly, Petitioner opted not to file an Amended Petition for Writ of Habeas Corpus in federal court; and her entire Petition for Writ of Habeas Corpus is now being held in abeyance in the United States District Court for the Northern District of Oklahoma pending exhaustion of her available state remedies.

PART B

I believe that I have six propositions for relief from the conviction and sentence described in PART A. Propositions One through Six are attached.

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STATEMENT OF FACTS

The history between the Petitioner and Terry Carlton ("Carlton") was shared by Petitioner during her testimony at her April 1999 jury trial. Petitioner testified that she met Carlton in the fall of 1995 while looking for an automobile. Petitioner had been introduced to Carlton on her second or third visit to the Acura of Tulsa auto dealership, where Carlton presented himself to Petitioner as the owner of the dealership (Vol. X, Tr. 1944). Carlton had Petitioner's telephone number, and he began to call her (Vol. X, Tr. 1941, 1942, 1943, 1944). Eventually, Petitioner and Carlton began dating. Their dates included flying to Dallas to meet Carlton's friends, and a trip to Jamaica in early December 1995. Petitioner and Carlton became engaged on Christmas Eve of 1995. The two intended to be married in April 1996 (Vol. X, Tr. 1947, 1948).

Petitioner and Carlton did not get married. Things began to change after the engagement. There was serious incompatibility, and Petitioner decided not to marry Carlton (Vol. X, Tr. 1949). Petitioner began to see another side of Carlton, such as unpredictable fits of anger. Carlton became very critical of Petitioner (Vol. X, Tr. 1950-1952). Petitioner thought that Carlton seemed like "Dr. Jeckyll and Mr. Hyde." One minute everything was fine, and the next minute it was not (Vol. X, Tr. 1952, 1953).

The first time that Carlton abusively laid his hands on Petitioner was at his house in Tulsa on 25 April 1996, her 26th birthday. Carlton came at the Petitioner with his hands and grabbed her throat (Vol. X, Tr. 1954, 1955). In the summer of 1996, the Petitioner and Carlton were on a trip to Amsterdam. While in the hotel room, Carlton attacked her (Vol. X, Tr. 1958, 1959). Carlton hit Petitioner with a ball cap and pushed her back on the bed. Carlton ripped off Petitioner's underpants, held her down, and then had very rough sex with her. Petitioner was crying and felt like she had been raped, but couldn't say that she was raped (Vol. X, Tr. 1960, 1961).

In November 1996, while on a trip to Rome, Italy, Carlton became enraged at Petitioner. Petitioner had awakened Carlton when she attempted to call her son from the hotel room. Carlton attacked Petitioner on the bed, placed his elbow into her eye socket, hit her on her side and twisted her arms. Carlton stopped when he heard pounding on the door (Vol. X, Tr. 1964, 1969). (Steve Hatchett, who knew Carlton from the car business and was also on the trip to Rome, testified at Petitioner's trial that he and his wife heard

angry yelling and sounds of somebody being hit in the room next to theirs. Mr. Hatchett got out of bed, went to the room where he heard the violence, and started pounding on the door. The door opened, and it was Carlton. Carlton was very, very angry and emotional (Vol. XI, Tr. 1877-1881, 1885, 1889).) While still in Rome, Petitioner reported the attack to the police, and she was treated by a physician there (Vol. X, Tr. 1972, 1974, 1975, 1976). Upon returning to the United States, Petitioner sought a protective order and court assistance (Vol. X, Tr. 1980, 1993). (The affidavit of the Honorable Claire V. Eagan, attached herein in the Appendix of Supporting Documents, fully sets out Petitioner's condition shortly after her return from Rome.)

(Petitioner also shared her drug use history during her testimony at her trial. Prior to meeting Carlton, and for over one year thereafter, Petitioner did not use drugs. Petitioner's drug use history consisted entirely of having used marijuana a few times in and around the time of her college years. Petitioner has never smoked tobacco, and only consumed beverages containing alcohol rarely and lightly. Carlton was a heavy smoker and a very long-term, very heavy alcohol and intravenous illegal narcotic drug user. In early 1997, Petitioner used methamphetamine with Carlton for the first time. This was also Petitioner's first time ever using any illegal narcotic.) In the spring of 1997, on a trip to Greece, Carlton brought cocaine with him. Carlton attacked Petitioner when he became agitated because he ran out of cocaine (Vol. XI, Tr. 1999). Carlton threatened to rape Petitioner (Vol. XI, Tr. 2000). Petitioner again filed for a protective order when they returned to Tulsa (Vol. XI, Tr. 2001). Petitioner was very frightened of Carlton (Vol. XI, Tr. 2003). Carlton threatened to kill Petitioner (Vol. XI, Tr. 2004). Petitioner had numerous confrontations with Carlton (Vol. XI, Tr. 2006, 2008, 2009).

In August of 1997, Petitioner used intravenous drugs with Carlton for the first time. This was Petitioner's first time ever using intravenous drugs (Vol. XI, Tr. 2014). Around this time, Carlton raped Petitioner and threatened to beat or kill her (Vol. XI, Tr. 2016). In December 1997, Carlton raped Petitioner and shoved Valium down her throat (Vol. XI, Tr. 2024, 2028). Carlton had also kicked in the bedroom door (Vol. XI, Tr. 2030-2032, 2046, 2047). Petitioner called 911, and police responded. (One Tulsa Police officer testified at Petitioner's trial that on this occasion, Carlton admitted to her that he had forced Valium down Petitioner's throat.) As a result of the rape, Petitioner was taken to the Tulsa Police Department's Sexual Assault Nurse Examination ("S.A.N.E.") Center

for a rape examination (Vol. XI, Tr. 2033, 2297). Photographs were taken, and a report was completed of the rape exam (Vol. XI, Tr. 2034, 2035, 2038). Carlton was not arrested, but was very concerned about rape charges being filed against him (Vol. XI, Tr. 2039, 2041).

(Very early in 1998, the harassment, stalking and violence that Carlton visited upon Petitioner began to escalate rapidly as Petitioner became strong, firm and absolute in her refusal to have anything to do with Carlton.) In February of 1998, Carlton entered Petitioner's home uninvited, and he attempted to rape her there (Vol. XI, Tr. 2060, 2062, 2063). On 21 February 1998, Carlton attempted to break into Petitioner's home. Petitioner called 911, and the police arrived and found Carlton with a stun gun and a loaded Glock 9mm pistol. Carlton was arrested (Vol. XI, Tr. 2065, 2067). On another occasion, Carlton cut all of Petitioner's phone lines before breaking into her home and attacking her (Vol. XI, Tr. 2074). (On 02 April 1998, Petitioner escaped from Carlton while he was again breaking into her home. Police arrived on the scene to which Petitioner had fled one block away. Police refused to arrest Carlton even though, by this time, Carlton had an outstanding Tulsa County bench warrant for his arrest. This warrant was issued for Carlton's arrest when he failed to appear in court after being arrested at Petitioner's home with the loaded Glock 9mm pistol. Instead of enforcing this warrant for Carlton's arrest, police transported Petitioner to Parkside Hospital for a mental health evaluation. Petitioner was involuntarily hospitalized, and her fear of Carlton was treated as a paranoid delusion. Details of the bench warrant for Carlton's arrest and of officers' failure to enforce this warrant are given in Proposition Two of this Application.) Subsequently, in early April 1998, Carlton entered Petitioner's home stealthily and used a gun to force Petitioner to go to his house (Vol. XI, Tr. 2080). Petitioner escaped from Carlton's house after he had again attempted to rape her there and threatened to kill her. Carlton had told Petitioner that he would slice her throat and kill himself. (Vol. XI, Tr. 2081-2085, 2095). Petitioner called a domestic violence agency's number from Carlton's neighbors' home, and police arrived shortly thereafter (Vol. XI, Tr. 2085). (Again, police transported Petitioner to Parkside Hospital, and did not arrest Carlton although there was still an outstanding Tulsa County bench warrant for his arrest. Petitioner was later transferred to Eastern State Hospital.) On 26 April 1998, while Petitioner was at Eastern State Hospital, Carlton approached her there and pressured her into saying that she was in

love with someone else, Luke Draffin, with whom Carlton was also acquainted. Carlton became enraged at Petitioner. (Vol. XI, Tr. 2102, 2104, 2105). The next day, on 27 April 1998, Petitioner was released from Eastern State Hospital into the "12 & 12" drug rehabilitation program in Tulsa. Petitioner had been at Eastern State Hospital for four or five days. Petitioner walked away from the "12 & 12" program, and returned to her home to find it ransacked and pillaged (Vol. XI, Tr. 2101, 2102). Sometime around dark, Petitioner went in-line skating to get out of her house and to get some exercise (Vol. XI, Tr. 2102, 2104, 2105). Petitioner tried to see Mr. Draffin at the Tulsa hotel where he was staying. Petitioner had sought Mr. Draffin's protection from Carlton on numerous occasions previously; but on this night, for the first time, he would not see her. (During his testimony at Petitioner's trial, Mr. Draffin admitted that just prior to this incident, Carlton had offered him a very large sum of money—*thousands* of dollars—to stay away from Petitioner.) Petitioner was upset, and she threw her backpack on his car and hung his hotel room keys on the visor (Vol. XI, Tr. 2121). Petitioner left the hotel, and was able to flag down Officer Jane Masek to get a ride home (Vol. XI, Tr. 2121). Petitioner did not stay at her home long (Vol. XI, Tr. 2122). At about 2:00 a.m. or 3:00 a.m. on the morning of 28 April 1998, Petitioner went to Carlton's house to make peace with him because she wanted a peaceful resolution to the months and months of conflict (Vol. XI, Tr. 2123). (This testimony is consistent with an audiotape recording of conversations between Carlton and the Petitioner wherein this dynamic is clearly seen. This audiotape recording was available to the Petitioner's trial counsel, but he failed to procure the tape from the Petitioner's previous counsel. A transcript of this tape is attached herein in the Appendix of Supporting Documents.)

When Petitioner arrived at Carlton's home, she knocked on the front door. Carlton answered and invited her in. Carlton had a gun with him, apparently because it was so late (Vol. XI, Tr. 2129). Carlton was glad Petitioner was there. Carlton wanted Petitioner to go upstairs, but the two of them went directly downstairs instead (Vol. XI, Tr. 2130).

While in the basement, Carlton wanted the Petitioner to do drugs with him (Vol. XI, Tr. 2131, 2132). Petitioner told Carlton that she had come over for a peaceful resolution of their problems so that she could feel safe and he could get on with his life; but Carlton became short-tempered, so Petitioner did drugs with Carlton. Petitioner made

recently, and because there were no clean syringes (Vol. XI, Tr. 2149). This time, Petitioner was able to empty the drugs that Carlton had insisted she use onto the floor while Carlton was distracted. Petitioner told Carlton that she was going to use the telephone, and then went upstairs alone to use the phone (Vol. XI, Tr. 2150). While upstairs, Petitioner saw the gun in the nightstand when she was looking for the telephone. Along with the gun, Petitioner quickly gathered together Carlton's credit cards, cash and keys because she wanted to take away Carlton's means to quickly track her down if she was successful in escaping. Petitioner took the gun because she wanted to make sure that Carlton could not use it on her. Petitioner also wanted to protect herself from Carlton (Vol. XI, Tr. 2151, 2152, 2153).

When Petitioner went back downstairs, she had an opportunity to run out of the front door of the house, but Carlton could outrun her and she feared that she could not get away safely (Vol. XI, Tr. 2155). (There was testimony at Petitioner's trial from Carlton's neighbor, Dr. Brent Laughlin, and also from the Petitioner's neighbor, Glenda McCarley, about different instances that they witnessed when Petitioner did try to run from Carlton; and Carlton ran Petitioner down, catching up with her right as she got into her car and then smashing out the windows or grabbing Petitioner by her hair and dragging her back into the house.) Subsequently, Carlton handcuffed Petitioner (Vol. XI, Tr. 2156, 2157). Carlton asked Petitioner where the gun was, then searched Petitioner's pants. Petitioner had placed the gun in the back pocket of her vest in the small of her back (Vol. XI, Tr. 2158, 2163), and was scared that Carlton would find the gun. Earlier, Petitioner had checked to see if the gun was loaded, and the gun was loaded and ready to fire with one bullet in the chamber (Vol. XI, Tr. 2158, 2159). Not finding the gun in Petitioner's pants, Carlton quit searching for the gun and then told Petitioner that he was going to kill her and rape her "up the ass." Carlton yanked Petitioner toward the couch. Carlton looked deranged, frightening and fearless (Vol. XI, Tr. 2160). On the way to the couch, Carlton let go of Petitioner. Still handcuffed, Petitioner was able to reach around and pull the gun from the back pocket of her vest. Carlton saw the gun. He became enraged and went toward Petitioner. Petitioner felt that she had no other option with no more distance between her and Carlton than to shoot. Petitioner shot the gun and just kept shooting. Carlton's head was "right there." Petitioner does not remember aiming the gun. Petitioner thought that if Carlton got the gun away from her, he would continue to torture

her and then kill her (Vol. XI, Tr. 2164-2168). Petitioner recalled Carlton told her he was paralyzed and to call an ambulance. Petitioner was in a daze (Vol. XI, Tr. 2169, 2171). At the time of the shooting, Petitioner believed that she was in danger and that her use of force was justified.

Carrie Gaston testified at Petitioner's trial that between 9:00 a.m. and 10 a.m. that morning, she called Carlton's residence to check on Petitioner's whereabouts. (Ms. Gaston and Petitioner had been friends since they were both age 13 (Vol. VII, Tr. 1303), and from June through December 1997, Ms. Gaston had worked as the Office Manager of Petitioner's business, Snyder Prosthetic & Orthotic Center (Vol. VII, Tr. 1305).) To Ms. Gaston's surprise, Petitioner answered the telephone (Vol. VII, Tr. 1307, 1308). Petitioner told Ms. Gaston that Carlton was dead, and that she had shot him (Vol. VII, Tr. 1309, 1310, 1311, 1335). Thereupon, Gaston called 911, and told the operator that she believed that there may have been a shooting (Vol. VII, Tr. 1311, 1312). According to Gaston, Petitioner also told her at some point during their conversation that she was going to call the police, but asked Gaston not to call the police at that time (Vol. VII, Tr. 1312). Petitioner had told Gaston that she wanted to hug her son first. Petitioner gave no indication that she was trying to hide or conceal anything. (Vol. VII, Tr. 1340).

Tulsa Police officers testified at Petitioner's trial about their response to Ms. Gaston's 911 call that morning. At approximately 9:25 a.m., the dispatcher assigned Officer H.G. Lawson ("Lawson") a call in reference to a shooting at a house at 2272 East 38th Street in Tulsa County, Oklahoma (Vol. VII, Tr. 1344, 1345, 1346, 1359). Officer Joe Gann ("Gann") heard the dispatch, and had arrived at the location (Vol. VII, Tr. 1345, 1376, 1377, 1378, 1392, 1393). Officer Laura Fadem ("Fadem") and Officer Forester also arrived on the scene, and approached the house with Officers Lawson and Gann (Vol. VII, Tr. 1374, 1348, 1414). The officers knocked on the front door, and observed a female on the stairwell through the window of the door (Vol. VII, Tr. 1348, 1349, 1361, 1380, 1397, 1415). The female, the Petitioner, came to the door and opened the door. The Petitioner looked ragged (Vol. VII, Tr. 1367). Officer Gann told the Petitioner that they were there in response to a shooting; and at that point, Officer Lawson asked Petitioner, "Did you shoot him?" Petitioner responded that she had. In response to Officer Lawson's questions, Petitioner also told the officer that the gun and Carlton were downstairs (Vol. VII, Tr. 1349, 1351, 1402, 1416, 1457). Petitioner did not

attempt to conceal or hide anything (Vol. VII, Tr. 1360, 1407). Officer Lawson told Officer Fadem to take custody of Petitioner; then Officers Lawson, Gann and Forester went downstairs to a game room where they observed a blue blanket covering a body. A gun was on a table. Narcotic paraphernalia, a spoon, and syringes were also on the table (Vol. VII, Tr. 1352, 1353, 1354, 1355, 1384, 1385). Officer Lawson checked the body, which was ice-cold and deceased (Vol. VII, Tr. 1355, 1356, 1369, 1383, 1406). Officer Gann saw a chair with handcuffs on it (Vol. VII, Tr. 1406). Petitioner told Officer Fadem that there was no one else in the house (Vol. VII, Tr. 1417). When the officers came back upstairs, Officer Fadem, on the suggestion of Officer Forester, read Petitioner her rights under ***Miranda*** (Vol. VII, Tr. 1418, 1419). Petitioner was very cooperative (Vol. VII, Tr. 1420).

Officer Fadem eventually took Petitioner to Hillcrest Hospital for a rape exam. Officer Fadem testified that Petitioner told her that when Carlton and she were upstairs, Carlton told Petitioner that "now you're really going to see a beating," and then hit Petitioner a few times and cracked her neck. Carlton then pulled Petitioner's pants down and had sex with her on the bed. It sounded to Officer Fadem like the sex was forcible (Vol. VII, Tr. 1424, 1487). Carlton then asked Petitioner to go to the bathroom and douche because he didn't want any evidence left. (Carlton made Petitioner douche in front of him (Vol. XI, Tr. 2350).) Petitioner had also told Officer Fadem that when Carlton and she were later downstairs and Carlton had handcuffed her, Carlton was going to rape her again. Officer Fadem recalled observing some type of possible red marks on the side of Petitioner's face (Vol. VII, Tr. 1436). The rape exam evidence was introduced as "the rape kit," State's Exhibit No. 10 (Vol. VII, Tr. 1439). The rape exam revealed numerous injuries, including "an area of tear in two different places" on Petitioner's vagina (Vol. VI, Tr. 1692, 1693).

PROPOSITION ONE

The Petitioner was denied her Sixth Amendment Right to Counsel because Trial Counsel's failure to investigate the Petitioner's defenses Constituted ineffective assistance of counsel

The right of a defendant to effective assistance of counsel is necessary to conduct a fair trial in the adversarial system. The right is driven by the rationale that the effective assistance of counsel is necessary to safeguard the right to a fair trial. Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have. ***Fisher v. Gibson WL 382892 (10th cir 2002) quoting*** ***Federalism & State Criminal Procedures, 70 HARV. L. REV. 1, 8 (1956).***

It is well established that trial counsel has an obligation to properly investigate and present reasonable defenses on behalf of his client when she is charged with criminal conduct. The seminal case outlining the importance of a defendant's Sixth Amendment right to counsel observed:

> The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. ***Strickland v. Washington, 466 US 688, 104 S. Ct. 2052 citing*** ***Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S. Ct. 236, 240, 87 L. ed. 268 (1942); see Powell v. Alabama, supra, 287 U.S. at 68-69, 53 S. Ct. 63-64.***

It is not enough for the defendant to merely have counsel, but counsel must play an effective role to ensure that the adversarial system provides just results. In that regard, the Court in ***Strickland*** held that defense counsel had a duty to make reasonable investigations into all defenses. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all of the circumstances, applying a heavy measure of deference to counsel's judgments. With the luxury of hindsight, the court must be mindful not to merely second guess trial counsel if his

decisions and investigations were reasonable at the time they were made. The court must determine if counsel's actions were deficient looking at the totality of the circumstances using professional norms in the community as a guide.

Petitioner asserts that her trial counsel was ineffective for failing to investigate her defense in a number of ways. Petitioner's defense of self-defense focused on whether the Petitioner, on the morning of the shooting, had a reasonable belief that Carlton was threatening her with death or serious bodily harm thereby justifying the killing. Petitioner's counsel was aware of a long history of beatings visited upon the Petitioner by Carlton. Further, counsel was aware that the Petitioner had on three prior occasions sought protective orders against Carlton. In the protective order proceedings dated November 1996, the Petitioner was represented by the Honorable Claire Eagan prior to Judge Eagan's assuming the responsibilities of the federal bench. In her attached affidavit (located herein in the Appendix of Supporting Documents), Judge Eagan notes that Petitioner's trial counsel never contacted her. Also, had counsel ever spoken to Judge Eagan, he would have discovered that her former law partner, Michael Cooke, also had first-hand information concerning the Petitioner's relationship with Carlton. What's more, had Petitioner's trial counsel contacted Mr. Cooke, he would have discovered an audiotape recording of frank discussions between the Petitioner and Carlton about the severe abuse Petitioner experienced at Carlton's hands—including a discussion about the violence that Carlton ~~visit~~ VISITED upon the Petitioner during a trip to Rome, Italy (a transcript of this audiotape recording is attached herein in the Appendix of Supporting Documents). Finally, trial counsel was deficient for failing to procure from the state tapes of the numerous 911 calls made to police by the Petitioner from the Petitioner's own home and her neighbors' homes wherein she is complaining of Carlton's violence.

The Petitioner can satisfy the prejudice prong of the ***Strickland*** test by showing that the evidence trial counsel overlooked had an effect on the fairness of the trial. For example, the Petitioner testified at her April 1999 jury trial about a history of Carlton physically attacking her that led her to have a reasonable fear of Carlton. One of the instances for which there was testimony concerned a trip to Rome, Italy, with a group of people including Carlton and the Petitioner. The Petitioner testified that during this trip, she was subjected to a beating at Carlton's hands. This evidence was of such importance that the state called Shirley Carlton in rebuttal to testify that she was also present on this

trip to Rome; and that shortly after this incident of abuse by Terry Carlton, she saw the Petitioner. It was Shirley Carlton's testimony that she saw the Petitioner in the bathroom of her hotel room; that the Petitioner was completely naked; and that there were no marks on the Petitioner's body. (Vol. XV, Tr. 2975). Judge Eagan would testify that the Petitioner called her upon her return from Rome to seek a protective order; and Judge Eagan would also testify as to how the Petitioner had bruises and lacerations immediately following her return from overseas. This evidence contradicts the testimony of Shirley Carlton, who is Terry Carlton's mother-in-law; and given the black eyes suffered by Petitioner, as described by Judge Eagan in her attached affidavit, this evidence goes a long way to negate the prosecution's conjecture that any violence between Carlton and the Petitioner was mutual combat.

The audiotape in possession of Michael Cooke contains conversations between the Petitioner and Carlton during which they are also discussing the violence in Rome. This audiotape would be the only evidence that is in Carlton's own voice admitting to and flagrantly discussing the brutal violence that he visited upon the Petitioner. Additionally, there were professionals in the fields of psychology and psychiatry at the Petitioner's trial that testified as to whether or not the Petitioner was suffering from Battered Woman Syndrome. The audiotape is the only evidence of direct interaction between the Petitioner and Carlton. It would have been critical for these professionals to have this audiotape in order to do a proper analysis of this abusive relationship.

The failure of counsel to request the 911 tapes was also prejudicial to the Petitioner. The Petitioner informed trial counsel that she had called 911 concerning Carlton's violence numerous times from her own home and from her neighbors' homes. These calls evidence the fear that the Petitioner felt, and they go directly to the Petitioner's defense of self-defense. Because these tapes were not sought as evidence by trial counsel, they are almost certainly not in existence; and trial counsel's failure to procure and present these tapes has therefore subjected the Petitioner to harm that probably cannot be overcome. The Petitioner has tried diligently but unsuccessfully to obtain these tapes herself from her trial counsel and from 911 records.

PROPOSITION TWO

Petitioner was denied her Sixth Amendment Right to Counsel Because Trial Counsel's failure to enter An outstanding Tulsa County bench warrant for Terry Carlton's arrest Into evidence at her jury trial constituted ineffective assistance of counsel

On 21 February 1998, at approximately 3:00 a.m., Terry Carlton ("Carlton") was armed with a gun and attempting to break into Petitioner's home. Petitioner called 911, and Tulsa Police officers responded. Officers, including Officer Troy Dewitt, found Carlton outside of Petitioner's home with a chambered and fully loaded Glock 9mm pistol and a stun gun.[1] Carlton was arrested and subsequently charged in Tulsa County District Court in CM-1998-575 with transporting a loaded firearm. On 25 March 1998, Carlton failed to appear in court on this gun charge; consequently, Tulsa County District Court Judge Richard Clarke ordered a bench warrant for Carlton's arrest. On 26 March 1998, a bench warrant was thus issued in Tulsa County for Carlton's arrest, and this bench warrant was still in effect at the time of Carlton's death over one month later on 28 April 1998.[2]

At Petitioner's April 1999 jury trial, Petitioner testified about two separate incidents involving other Tulsa Police officers, Carlton and herself that occurred in April 1998—after the bench warrant for Carlton's arrest was issued in Tulsa County on 26 March 1998. On 02 April 1998, and again on 11 April 1998, Petitioner asked different Tulsa Police officers to protect her from Carlton immediately after she had escaped from Carlton; yet on both of these dates, Tulsa Police officers did not arrest Carlton even though Carlton had this outstanding Tulsa County bench warrant for his arrest. Instead, Tulsa Police officers transported Petitioner to Parkside Hospital, a mental health facility, both times—while Carlton remained free despite this bench warrant for his arrest.[3]

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[1] A copy of Officer Troy Dewitt's arrest and booking report is included herein in the Appendix of Supporting Documents.

[2] A copy of the O.C.I..S. case report for Terry Carlton's District Court of Tulsa County criminal case no. CM-1998-575 is included herein in the Appendix of Supporting Documents.

[3] Petitioner's affidavit further elucidating the 02 April 1998 and 11 April 1998 incidents is included herein in the Appendix of Supporting Documents.

Petitioner testified at her April 1999 jury trial that while she was involuntarily hospitalized at Parkside Hospital and later at Eastern State Hospital, Carlton ransacked and pillaged her unprotected home; and continued to stalk, harry and threaten her. There was even testimony at Petitioner's trial by Eastern State Hospital employees regarding Petitioner's extreme reluctance to see Carlton when he showed up at the hospital; and also about Carlton's strange behavior and hostile outbursts at Petitioner there on 26 April 1998.

Tulsa Police Officers Aaron Tallman and James Bennett also testified at Petitioner's trial about the 02 April 1998 and 11 April 1998 incidents, respectively. Officer Bennett even testified about being with Carlton at Carlton's home on 11 April 1998, in response to a plea for help made by Petitioner. It was Officer Bennett's testimony that after he arrived at Carlton's home on 11 April 1998, Carlton walked out of his house holding a guitar and seemed "fairly relaxed for having guns pointed at him." Bennett testified that Petitioner seemed "confused and disheveled," and that "it seemed Mr. Carlton was not the threat; Ms. Wilkens was." No mention of the outstanding bench warrant for Carlton's arrest and Officer Bennett's failure to enforce the bench warrant on this occasion was ever made at Petitioner's trial.

During the closing arguments at Petitioner's April 1999 jury trial, the Tulsa County District Attorney told the jury that if Petitioner had allowed authorities to assist her, Carlton "might have been punished, and he might still be alive." Besides serving to impeach the testimonies of Tulsa Police Officers Bennett and Tallman, this outstanding Tulsa County bench warrant for Carlton's arrest goes a long way to validate Petitioner's testimony that she could not rely on authorities, including Tulsa Police officers, to protect her from Carlton. This is especially so given the fact that on two separate occasions occurring only a few weeks prior to Carlton's death, different Tulsa Police officers failed to enforce this Tulsa County bench warrant for Carlton's arrest and thereby failed to protect Petitioner from Carlton as outlined hereinabove. Petitioner submits that this claim is evidenced by her April 1999 jury trial transcript in conjunction with the supporting documents attached to this Petition in the Appendix of Supporting Documents.

PROPOSITION THREE

Petitioner was denied her Sixth Amendment Right to Counsel Because Trial Counsel's failure to enter the results of her 28 April 1998 urinalysis Into evidence at her jury trial constituted ineffective assistance of counsel

Petitioner testified at her April 1999 jury trial that prior to shooting Terry Carlton ("Carlton") on the morning of 28 April 1998, Carlton insisted that she use illegal drugs with him. Because Carlton had forcibly administered mind-altering drugs to Petitioner in the past[4]—and because Carlton had become agitated and menacing after Petitioner at first refused to use drugs with him—Petitioner testified that she used a small amount of what she believed to be the drug methamphetamine in Carlton's presence. Petitioner wanted to calm Carlton, and hoped to prevent him from hurting her and again physically forcing drugs into her himself. Subsequently, Carlton beat and raped Petitioner. After Tulsa Police officers arrived at Carlton's house on the morning of 28 April 1998, Petitioner told officers that Carlton had beaten and raped her that morning. Petitioner then asked officers for an immediate rape examination and medical care for her injuries; but instead—in opposition to police protocol for assault and rape victims—officers transported Petitioner to the police station first, where she was made to give a tape-recorded statement before she could receive the rape exam and medical care that she needed. Consequently, it was not until the *afternoon* of 28 April 1998 that Petitioner was finally transported by police to the Tulsa Police Department's Sexual Assault Nurse Examination ("S.A.N.E.") Center at Hillcrest Hospital. S.A.N.E. Nurse Kathy Bell performed Petitioner's rape examination, and documented and treated Petitioner's injuries. Nurse Bell also testified at Petitioner's April 1999 jury trial about Petitioner's

[4] For instance, one Tulsa Police officer testified at Petitioner's April 1999 jury trial that on 07 December 1997, Carlton admitted to her that he had physically forced Valium down Petitioner's throat. Petitioner also testified that prior to calling 911 on this date, 07 December 1997, Carlton had raped her and shoved Valium down her throat. Responding Tulsa Police officers also found illegal drugs and paraphernalia inside of Carlton's home on this date. Petitioner was transported by police directly to the Tulsa Police Department's Sexual Assault Nurse Examination ("S.A.N.E.") Center at Hillcrest Hospital, and a rape examination was performed. S.A.N.E. Nurse Karen Morgan testified at Petitioner's April 1999 jury trial that on 07 December 1997, Petitioner's documented injuries included vaginal bruising, redness and tearing. Carlton was not arrested, and no charges were ever filed against him regarding the 07 December 1997 incident.

28 April 1998 injuries.[5] Blood and urine samples were also taken from Petitioner during her 28 April 1998 rape examination, yet no testimony was ever requested or presented regarding the results of these tests. In Petitioner's affidavit in support of this claim (located herein in the Appendix of Supporting Documents), Petitioner explains that her trial counsel told her during her April 1999 jury trial that her 28 April 1998 urine sample tested negative for all drugs. Petitioner also states in her affidavit that her trial counsel told her that he did not have the results of her 28 April 1998 blood sample analysis. Petitioner goes on to say that although she expected her trial counsel to present the results of her 28 April 1998 urinalysis at her April 1999 jury trial, he rested her defense without ever doing so.

Throughout Petitioner's April 1999 jury trial, the prosecution claimed that the Petitioner's drug use with Carlton on the morning of 28 April 1998 was heavy, voluntary and ultimately the primary cause of Carlton's death later that morning; yet, prosecutors never presented any conclusive evidence to support these conjectures. Also, noticeably, prosecutors did not present the results of Petitioner's 28 April 1998 urine and blood analyses into evidence at her April 1999 jury trial; and according to Petitioner's trial counsel, Petitioner's urine sample—collected on the *afternoon* of 28 April 1998—tested negative for all drugs. This is consistent with Petitioner's testimony that very early that morning, under duress, she used a small amount of what she thought was the drug methamphetamine in Carlton's presence in order to appease Carlton. Additionally, while the results of Petitioner's 28 April 1998 urine and blood analyses were not presented at her April 1999 jury trial by either the prosecution or her defense counsel, Carlton's toxicology results were: Carlton's toxicology results indicated the considerable presence of both methamphetamine and heroin in his system on 28 April 1998. Indeed, it was also Petitioner's testimony that Carlton had used both heroin and methamphetamine on the morning of 28 April 1998.[6]

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[5] S.A.N.E. Nurse Kathy Bell testified at Petitioner's April 1999 jury trial that Petitioner's 28 April 1998 injuries included: two vaginal tears; arm, wrist and head bruising; and redness on Petitioner's neck, hands, and knuckles.

[6] Petitioner testified at her April 1999 jury trial that on the morning of 28 April 1998, Carlton later again insisted that she use both methamphetamine and heroin with him; but the second time she was able to empty the drugs onto the floor while Carlton was momentarily distracted.

Petitioner has tried painstakingly but unsuccessfully to obtain her own 28 April 1998 blood and urine test results from her previous counsel, Hillcrest Hospital and the Tulsa Police Department.[7] Petitioner submits that these test results, along with the transcript of her April 1999 jury trial, would support this claim. As noted hereinabove, Petitioner has also included her affidavit in support of this claim in the Appendix of Supporting Documents attached to this Petition.

[7] Petitioner's letters to Hillcrest Hospital and the Tulsa Police Department along with their responses are attached in the Appendix of Supporting Documents.

PROPOSITION FOUR

Petitioner was denied her Sixth Amendment Right to Counsel
Because Trial Counsel's failure to enter
A transcript of Tulsa Police Officer Laura Fadem's previous *in camera* testimony
Into evidence before Petitioner's jury at Petitioner's April 1999 jury trial
Constituted ineffective assistance of counsel;
And therefore, Petitioner's Appellate Counsel's failure to raise this claim
On direct appeal Constituted ineffective assistance of appellate counsel

Tulsa Police Officer Laura Fadem ("Fadem") testified for the prosecution at Petitioner's April 1999 jury trial. Fadem testified that she arrived on the scene of the shooting on the morning of 28 April 1998, and approached the residence of Terry Carlton ("Carlton") along with other Tulsa Police officers including Officer H.G. Lawson ("Lawson"). The officers knocked on the door, and Petitioner opened the door. In the presence of Petitioner's jury, it was Fadem's testimony that she did not know what officers said to Petitioner at that point. However, during a hearing held *in camera* prior to Fadem's testimony in the presence of Petitioner's jury, Fadem had already given an altogether different and strikingly contradictory testimony. During the *in camera* hearing, Fadem had testified under oath that after Petitioner opened the door for officers, Lawson then asked Petitioner—prior to Petitioner being informed of her ***Miranda*** rights—if Petitioner had shot Carlton. Although no objection to this *in camera* testimony was made and Fadem's entire *in camera* testimony was ruled admissible, this particular *in camera* testimony of Fadem's had drawn an openly alarmed reaction from Petitioner's trial counsel; and subsequently, Fadem changed her testimony when Petitioner's jury was present. Petitioner's jury was completely unaware that Fadem had previously testified differently *in camera*. It is noteworthy here that Lawson also testified in the presence of Petitioner's jury at her April 1999 jury trial; and Lawson himself admitted that just after Petitioner opened the door for officers—prior to Petitioner being informed of her ***Miranda*** rights—he did in fact ask Petitioner if she had shot Carlton.

Fadem was a key witness for the prosecution at Petitioner's April 1999 jury trial. Fadem is a Tulsa Police officer with all of the inherent credibility in the eyes of a jury that typically accompanies such status. The whole of Fadem's account of the events of 28 April 1998 was not entirely consistent with the Petitioner's testimony about what happened that morning. It would have been crucial for the Petitioner's jury to know that not only was Fadem's testimony not consistent with the Petitioner's testimony, but that Fadem's testimony blatantly contradicted her very own testimony given *in camera* not long before she testified in the presence of Petitioner's jury. Petitioner submits that her April 1999 jury trial transcript will prove this claim.

PROPOSITION FIVE

Petitioner was denied her Sixth Amendment Right to Counsel
Because Trial Counsel's failure to present testimony
From a Battered Woman Syndrome expert at Petitioner's April 1999 jury trial
Constituted ineffective assistance of counsel;
And therefore, Petitioner's Appellate Counsel's failure to raise this claim
On direct appeal Constituted ineffective assistance of appellate counsel

In her book, ***The Battered Woman Syndrome, 2nd Edition,*** Dr. Lenore Walker[8] writes:

> One of the major changes in the criminal law is to allow battered women to present evidence of the cumulative effects of abuse in courts through the testimony of a psychologist using what the courts refer to as battered woman syndrome....in fact, the legal system has thoroughly embraced the concept and uses it to assist battered women in criminal and civil cases.[9]

At Petitioner's April 1999 jury trial, Petitioner's defense counsel did not present testimony from an expert in the field of Battered Woman Syndrome. Instead, Petitioner's defense counsel called Dr. John Call to testify as an expert witness, even though Dr. Call is a forensic psychologist with virtually no background working with battered women. Dr. Call was not qualified to serve as a Battered Woman Syndrome expert at Petitioner's April 1999 jury trial. In ***Terrifying Love: Why Battered Women Kill and How Society Responds,*** Dr. Walker explains:

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[8] Dr. Lenore Walker is the clinical and forensic psychologist who first named the "Battered Woman Syndrome" from the landmark research program she conducted with battered women in the early 1980's. She is the definitive authority cited by many courts, including the Oklahoma Court of Criminal Appeals in its landmark Battered Woman Syndrome decision in ***Bechtel v. State,*** 1992 OK CR 55, 840 P.2d 1.

[9] Walker, Lenore E.A., ***The Battered Woman Syndrome, 2nd ed.*** (New York: Springer Publishing Company, 2000), 203.

Clinical psychology, the branch of psychology in which mental disorders are studied, explains only a very small part of the field of human behavior, although it is this part of psychology with which the general public is most familiar. This fact can be a problem when professionals with no expertise in the field of battered women, but with impressive professional psychological or psychiatric credentials, testify in a court of law, and it is one reason why only a qualified expert witness should testify in any trial involving a battered woman who kills.

The behavior of battered women who kill their abusers needs to be understood as *normal*, not abnormal. Defending oneself from reasonably perceived imminent danger of bodily harm or death ought to be considered a psychologically healthy response. Most battered women who kill do so in self-defense, not because they are mentally disordered. And the expert witness who can provide judges and juries with a genuine understanding of this fact can have a critical role in changing our criminal justice system's inadequate response to the entire problem.

Psychoanalysts who believe that internal mental conditions alone, and not external circumstances, cause mental illness ought to take note of this contradiction. The symptoms of mental illness displayed by many battered women tend to quickly clear up once they are able to live without fear of further violence. Given the facts that 70 percent of out-patient psychotherapy clients are women and that the majority of clinical psychiatrists are men, maybe it's true that women have been "bamboozled" into thinking they are insane for men's economic gain.

A lot of "crazy" ladies aren't so crazy after all.

A battered woman often adopts unusual behavior that earns her a diagnosis of insanity, of being "crazy." In fact, many of her seemingly bizarre actions may have purpose and logic when viewed within the context of the violence and terror in which she lives.

In context, the "crazy" actions of battered women may be effective survival techniques. Diagnoses of mental illness, delivered by uninformed

> medical personnel and mental health professionals, are often wrong. And....these women usually abandon their abnormal behavior when they are finally free of the insane, terrifying circumstances that produced the behavior in the first place.[10]

Because Dr. Call is not a Battered Woman Syndrome expert, a significant amount of his testimony at Petitioner's April 1999 jury trial served to perpetuate the harmful myths about battered women as outlined by Dr. Walker hereinabove. What's more, what little testimony that Dr. Call gave that might have been useful to the Petitioner's defense was impeached by the prosecution on the factual basis that Dr. Call is not a Battered Woman Syndrome expert.

Because Battered Woman Syndrome is outside the ken of the average juror, Petitioner was inexcusably harmed by the fact that a Battered Woman Syndrome expert did not testify at her trial. As Dr. Walker also makes clear in ***Terrifying Love: Why Battered Women Kill and How Society Responds:***

> A feminine psychologist or one very familiar with the current research on battered women, victimization, Post Traumatic Stress Disorder, and the concept of learned helplessness....can provide the most informative expert witness testimony when a battered woman is on trial. Shelter and task force workers with similar skills can also be good expert witnesses. It is a sad fact that, at present, some traditional mental health professionals frequently misinterpret test data, as well as misdiagnose, simply because they are unfamiliar with the pertinent research, its applications, and its implications vis-à-vis male and female sex-role socialization patterns. Such misguided "experts" play into the court's common misconceptions about pathology, too; so the truth is that there are dangers, as well as benefits, to using expert witnesses in some cases....

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[10] Walker, Lenore E., *Terrifying Love: Why Battered Women Kill and How Society Responds* (New York: HarperPerennial, 1990), 169-171.

Hopefully, those of us involved with reform will be able to educate experts and lawmakers alike so that eventually there will be sufficient judicial reform enacted to allow women to testify for themselves. Until then, each case must be decided on its own merits; thus if there is any doubt as to the defendant's credibility—if critical information cannot otherwise be brought before jurors, and if her ostensibly "abnormal" but self-protective behavior needs to be explained—then an expert witness should be called....

Ideally, widespread reeducation will some day promote judicial reform, changing the rules to allow women to testify successfully on their own behalf. Until then, an expert witness must speak for them. Too often, our courts serve to complete the work of the batterer by continuing to control and then convict the battered woman....Most battered women who kill do so in self-defense. By the time they kill, they are already the most silenced, the most violated of women....None of these women are ruthless killers. All are victims. Their victimization, though, does not end when they kill a brutal spouse or lover. Battered women who kill in self-defense may go from being prisoners of interpersonal abuse to being prisoners of the state. They are not free until a jury returns a verdict of not guilty....And that is precisely why a battered woman, subjected to the methodology of the law, deserves to be represented by an expert who is knowledgeable and practiced in the methodology of feminist psychology.

Eventually, special legal procedures for battered women defendants must be legitimized: procedures that recognize and validate the world view of women as well as men, procedures that ultimately will allow battered women's voices to be heard. Once battered women are allowed to speak, they will be able to tell their own stories. And to know a battered woman's story is to understand, without a doubt, why she has killed. Until such time as special legal procedures are legitimized, however, it is imperative that qualified expert witness testimony be ruled

admissible in our courts of law, in every case in which a battered woman is the defendant.[11]

At her April 1999 jury trial, Petitioner's trial counsel did not have a *qualified* Battered Woman Syndrome expert testify on Petitioner's behalf: Petitioner had no voice. To illustrate and further support this claim and her entire Application for Post-Conviction Relief, Petitioner submits the following excerpts from the 08 July 1999 *Tulsa World* newspaper article reporting on her 07 July 1999 sentencing:

ABUSED WOMAN GETS LIFE SENTENCE

► The case causes an outcry from those who say she acted because of battered woman syndrome

A 29-year-old Tulsa woman was formally sentenced Wednesday to life in prison with parole possible for killing her alleged abuser, and the outcry from domestic violence victims' advocates is deafening.

A jury convicted April Rose Wilkens in April of first-degree murder for the shooting death of Terry Carlton, 40. The jury recommended the sentence that District Judge Mike Gassett handed down Wednesday.

The case drew immediate attention because Wilkens' defense, battered woman syndrome, is fairly new and virtually untested in Oklahoma courts.

Wilkens shot Carlton, who was unarmed, eight times on April 28, 1998, at his Tulsa home.

She said he had raped and handcuffed her that morning and was coming at her with "fury in his eyes" when she shot him, according to records.

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[11] Walker, Lenore E., *Terrifying Love: Why Battered Women Kill and How Society Responds* (New York: HarperPerennial, 1990), 11-15.

But the explanation didn't satisfy the jury, and the resulting guilty verdict stunned local domestic violence activists who fear that the trial's outcome may have set a harsh precedent for cases involving abused women.

"They are sending a clear message to the abuser that it's OK to abuse us," said a domestic violence survivor who says Wilkens' case mirrors her own....

"It's not that we don't believe in the battered woman syndrome," said First Assistant District Attorney Sharon Ashe. "It is accepted in the law in this state. But if we feel it is a valid defense, we are not filing the case at all."

And April Wilkens is not a classic case of a battered woman, Ashe said....

....Tulsa County prosecutors contended that Wilkens was anything but a classic example of a battered woman. They say drug abuse, not domestic abuse, made Wilkens snap and pull the trigger.

"She didn't act in self-defense," Ashe said. "She was not in a relationship where she was a battered woman. She was in a relationship where there was violence perpetrated by both parties, and she was the worst offender."....[12]

Petitioner steadfastly maintains that she was a battered woman; that the violence between the Petitioner and Carlton was not mutual combat; and that she did not kill Carlton because of drug use (please see Proposition Three of this Application for Post-Conviction Relief). Petitioner also respectfully submits to this Court that she is *actually* ***innocent*** of the crime of first-degree murder in the death of Terry Carlton; that Carlton was in reality an ***incessantly imminent*** threat to Petitioner's mind and body—indeed to her life—such as could not be remedied for her by relying on others, including Tulsa Police officers, for protection (please see Proposition Two of this

[12] Ashley Parish, "Abused Woman Receives Life Sentence," *Tulsa World*, 08 January 1999: A11.

Application for Post-Conviction Relief);[13] that based on her perception as a battered woman, she had a ***reasonable*** belief in the necessity of killing Carlton in self-defense;[14] and that her conviction at her April 1999 jury trial and continuing incarceration are ***fundamental miscarriages of justice*** in violation of the United States and the State of Oklahoma Constitutions.[15] As expressed earlier hereinabove, Petitioner also respectfully submits that because Battered Woman Syndrome is outside the ken of the average juror, Petitioner was obviously and inexcusably harmed by the fact that a Battered Woman Syndrome expert did not testify at her trial.[16] Petitioner believes that her April 1999 trial transcript will also support this claim.

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[13] Please see ***Bechtel v. State***, 1992 OK CR 55, 840 P.2d 1, 11-13.
[14] Please see ***Bechtel v. State***, 1992 OK CR 55, 840 P.2d 1, 10-11.
[15] In further support of this claim and her entire Application for Post Conviction Relief, Petitioner also cites the 2002 Oklahoma Court of Criminal Appeals' case of ***Medlin vs. State***. On 16 May 2002, the Oklahoma Court of Criminal Appeals unanimously **OVERTURNED AND DISMISSED** Saundra Kaye Medlin's felony manslaughter conviction in the shooting death of her abusive husband. Ms. Medlin admittedly shot her abusive husband five times while he slept. Petitioner has tried diligently but unsuccessfully to obtain the Oklahoma Court of Criminal Appeals' opinion in Ms. Medlin's appellate case.
[16] Please see ***Bechtel v. State***, 1992 OK CR 55, 840 P.2d 1, 6-10.

PROPOSITION SIX

The claims presented in Propositions One through Six cumulatively Denied Petitioner her Sixth Amendment Right to Effective Assistance of Counsel In violation of the United States and Oklahoma Constitutions, And therefore her conviction and sentence should be reversed

The Oklahoma and United States Constitutions provide that a person accused of a crime is entitled to effective assistance of counsel. The claims presented in Propositions One through Six cumulatively denied Petitioner her Sixth Amendment right to effective assistance of counsel. Accordingly, Petitioner's conviction and sentence should be reversed, vacated and/or modified.

Material facts exist in Petitioner's case that were not previously presented at her April 1999 jury trial, and these material facts cumulatively mandate Post-Conviction Relief in the interest of justice. Petitioner respectfully submits to this Court that she is *actually **innocent*** of the crime of first-degree murder in the death of Terry Carlton; that Carlton was in reality an ***incessantly imminent*** threat to Petitioner's mind and body—indeed to her life—such as could not be remedied for her by relying on others, including Tulsa Police officers, for protection; [17] that based on her perception as a battered woman, she had a ***reasonable*** belief in the necessity of killing Carlton in self-defense;[18] that her conviction at her April 1999 jury trial and continuing incarceration are ***fundamental miscarriages of justice*** in violation of the United States and the State of Oklahoma Constitutions; and that her conviction and sentence should be ***reversed and dismissed*** in the interest of justice. [19]

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[17] Please see *Bechtel v. State*, 1992 OK CR 55, 840 P.2d 1, 11-13.
[18] Please see *Bechtel v. State*, 1992 OK CR 55, 840 P.2d 1, 10-11.
[19] In further support of this claim and her entire Application for Post Conviction Relief, Petitioner also cites the 2002 Oklahoma Court of Criminal Appeals' case of ***Medlin** vs. State*. On 16 May 2002, the Oklahoma Court of Criminal Appeals unanimously **OVERTURNED AND DISMISSED** Saundra Kaye Medlin's felony manslaughter conviction in the shooting death of her abusive husband. Ms. Medlin admittedly shot her abusive husband five times while he slept. Petitioner has tried diligently but unsuccessfully to obtain the Oklahoma Court of Criminal Appeals' opinion in Ms. Medlin's appellate case.

PART C

I understand that I have an absolute right to appeal to the Court of Criminal Appeals from the trial court's order in this case; but unless I do so within thirty (30) days after the entry of the trial judge's order, I will have waived my right to appeal as provided by Section 1087 of Title 22.

PART D

I have read the foregoing application and assignment(s) of error and hereby state under oath that there are no other grounds upon which I wish to attack the judgment and sentence under which I am presently convicted. I realize that I cannot later raise or assert any reason or ground known to me at this time or which could have been discovered by me by the exercise of reasonable diligence. I further realize that I am not entitled to file a second or subsequent application for post-conviction relief based upon facts within my knowledge or which I could discover with reasonable diligence at this time.

STATE OF OKLAHOMA)
) **ss.**
COUNTY OF POTTAWATOMIE)

I, April Rose Wilkens, being first sworn under oath, state that I have signed the above application and that the statements therein are true to the best of my knowledge and belief.

April Rose Wilkens

Subscribed and sworn before me this 25 day of February, 2003.

Notary Public
Jackie Perryman

6/7/05
My Commission Expires

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APPELLANT'S EXHIBIT 12

DISTRICT COURT
FILED
MAR 2 7 2003
SALLY HOWE SMITH, COURT CLERK
STATE OF OKLA. TULSA COUNTY

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

APRIL ROSE WILKENS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. CF 98-2173
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

RESPONSE TO
APPLICATION FOR POST-CONVICTION RELIEF

COMES NOW the State of Oklahoma, by and through its duly elected District Attorney, Tim Harris, through his Assistant District Attorney, Fred J. Morgan, and in response to Petitioner's Application for Post-Conviction Relief states:

HISTORY OF PETITIONER'S CASE

Petitioner was charged on April 29, 1998, with the felony offense of Murder First Degree. On May 7, 1998, an Application was filed on Petitioner's behalf to determine her competency. On June 15, 1998, a hearing was held regarding Petitioner's competency where Petitioner was found competent to proceed. On July 27, 1998, a preliminary hearing was held in the matter. At the close of evidence Petitioner was bound over for trial. On April 5, 1999, a jury trial was commenced in the matter. Petitioner was represented at trial by privately retained counsel, Chris Lyons. The three week jury trial concluded on April 23, 1999, when Petitioner was found guilty. The jury recommended a life sentence. On July 7, 1999, Petitioner was formally sentenced to life in prison. Petitioner was advised of her right to appeal. Petitioner perfected a direct appeal of her conviction where the following issues were raised on her behalf:

I. The evidence was insufficient to sustain Appellant's conviction of Murder in the First Degree.
II. The trial court committed reversible error in failing to submit a jury instruction on manslaughter.
III. The jury should have received an instruction for manslaughter, consequently trial counsel was ineffective for failing to submit the written jury instruction on manslaughter.
IV. Appellant received ineffective assistance of trial counsel when trial counsel failed to object to a statement made by Appellant prior to her Miranda warnings being read to her by law enforcement.
V. The trial court erred in finding that Appellant has waived her rights and that her confession was freely and voluntarily made and trial counsel was ineffective in failing to present to the trial court at trial the fact that Appellant had been coerced into making the statement.
VI. The trial errors complained of herein cumulatively denied Appellant's right to a fair trial under the United States and Oklahoma Constitution and therefore, her conviction and sentence must be reversed.

On June 6, 2001, Petitioner's conviction was affirmed by the Court of Criminal Appeals in an unpublished summary opinion. (See *St. v. Wilkens*, F99-927)

Petitioner has now filed this Application for Post-Conviction-Relief where she has alleged as grounds for relief.

1. Petitioner was denied her Sixth amendment right to counsel because trial counsel's failure to investigate the Petitioner's defenses constituted ineffective assistance of counsel.

2. Petitioner was denied her Sixth Amendment right to counsel because trail counsel's failure to enter an outstanding bench warrant for Terry Carton's arrest into evidence at her jury trial constituted ineffective assistance of counsel.

3. Petitioner was denied her Sixth Amendment right to counsel because trial counsel's failure to enter the results of her 28 April 1998 urinanalysis into evidence at her jury trial constituted ineffective assistance of counsel.

4. Petitioner was denied her Sixth Amendment right to counsel because trial counsel's failure to enter a transcript of Tulsa Police Officer Laura Fadem's previous in camera testimony into

evidence before Petitioner's jury at Petitioner's April 1999, jury trail constituted ineffective assistance of counsel; and therefore, Petitioner's Appellate counsel's failure to raise this claim on direct appeal constituted ineffective assistance of appellate counsel.

5. Petitioner was denied her sixth amendment right to counsel because trial counsel's failure to present testimony from a battered woman syndrome expert at Petitioner's April 1999 jury trial constituted ineffective assistance of counsel; And therefore, Petitioner's appellate counsel's failure to raise this claim on direct appeal constituted ineffective assistance of appellate counsel.

6. The claims presented in propositions one through six cumulatively denied Petitioner her Sixth Amendment right to effective assistance of counsel in violation of the United States and Oklahoma Constitutions, and therefore her conviction and sentence should be reversed.

ARGUMENTS AND AUTHORITIES

PROPOSITION I

THE RULE OF RES JUDICATA BARS REVIEW OF THOSE GROUNDS WHICH WERE RAISED ON DIRECT APPEAL.

Petitioner's only issue in this Application for Post-Conviction-Relief concerns the effectiveness of her trial counsel. This issue was raised by the Petitioner in the direct appeal of her case. The Court of Criminal Appeals has held that unless an issue was inadequately raised on direct appeal, the doctrine of res judicata bars review of that issue on direct appeal. *See Castleberry v. State*, 590 P.2d 697 (Okla. Cr. 1979), *Grimes v. State*, 512 P. 2d 231 (Okl.Cr. 1973), *Harrell v. State*, 493 P.2d 461 (Okla. Cr. 1972), *McClesky v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, (1991) and *Johnson v. State*, 823 P. 2d 370, (Okl.Cr. 1991).

In the present case, the Petitioner has failed to indicate that these issues were inadequately

presented on direct appeal; therefore, the Petitioner is now barred from raising these issues on Post-Conviction Relief. It is important to note that the appeals court carefully reviewed the allegations of ineffectiveness of trial counsel. Three of the six propositions raised by Petitioner in her direct appeal involved ineffectiveness of trial counsel. The Court of Criminal Appeals stated in their summary opinion:

> "In Proposition II, the trial court did not err in failing to sua sponte instruct on first degree manslaughter as such an instruction was not warranted by the evidence. Shrum v. State, 991 P.2d 1032, 1036 (Okl.Cr.1999).1 See also Le v. State, 947 P.2d 535, 546 (Okl.Cr.1997). In Proposition III, we find trial counsel was not ineffective for failing to request a jury instruction on first degree manslaughter as such an instruction was not warranted by the evidence. Workman v. State, 824 P.2d 378, 383 (Okl.Cr.1991). In Proposition IV, Appellant has failed to show a reasonable probability that, but for counsel's failure to object to the admission of her initial statements made to police at the murder scene, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); Fisher v. State, 736 P.2d 1003, 1012 (Okl.Cr.1987). Assuming arguendo, Appellant's initial statements made at the murder scene were subject to Miranda any error in admitting those statements was harmless beyond a reasonable doubt as other admissions made after the giving of the Miranda warning and the waiver of those rights were properly admitted. See Bartell v. State, 881 P.2d 92, 99 (Okl.Cr.1994). Consequently, any failure by trial counsel to object to the admission of those initial statements did not prejudice Appellant and therefore is not indicative of ineffective assistance. Phillips v. State, 989 P.2d 1017, 1044 (Okl.Cr.1999). In Proposition V, sufficient evidence was presented to show that Appellant's statements made during the videotaped interview were made knowingly, voluntarily and freely. Therefore, the trial court properly admitted the statements. Gilbert v. State, 951 P.2d 98, 111 (Okl.Cr.1997). Further, trial counsel was not ineffective for failing to object to the admissibility of Appellant's statements on the grounds her statements were coerced by the failure of the police to immediately provide her with a rape examination and medical treatment. Finally, in Proposition VI, Appellant was not denied a fair trial by the accumulation of error. Short v. State, 980 P.2d 1081, 1109 (Okl.Cr.1999). Accordingly, this appeal is denied."

The State would submit that Petitioner is barred by res judicata from raising the issue of the effectiveness of trial counsel and that the Court should deny the Petitioner's Application for Post-Conviction Relief for that reason.

PROPOSITION II

ISSUES NOT RAISED ON APPEAL ARE BARRED BY RES JUDICATA FROM BEING RAISED BY POST-CONVICTION RELIEF.

The Court in *Harrell v. State*, 493 P.2d 461 (Okla. Cr. 1972), and more recently in *Jones v. State*, 704 P.2d 1138 (Okla. Cr. 1985), has held if an issue is bypassed on direct appeal it may not be asserted an Application for Post-Conviction Relief. 22 O.S. 1981 §§ 1080, 1086. See also *McClesky v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991) and *Johnson v. State*, 1991 OK CR 124, 823 P.2d 370. In this case Petitioner raised the issue of the effectiveness of her trial counsel on direct appeal. She attempts, in this Application to Post-Conviction-Relief, to raise the issue again regarding specific actions and inactions of her trial counsel which were not specifically raised on direct appeal.

The Oklahoma Court of Criminal Appeals has held that "[t]he mere fact that counsel fails to recognize the factual or legal basis for a claim, or fails to raise the claim despite recognizing it, is not sufficient to preclude enforcement of a procedural default. *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). *See Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977)." *Webb v. State*, 835 P.2d 115 (Okl.Cr. 1992).

Petitioner's issues of error could have been raised during trial or on appeal. They were not raised and should now be barred by res judicata.

PROPOSITION III

PETITIONER WAS PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL. COUNSEL'S PERFORMANCE AT TRIAL WAS SUFFICIENT TO PRODUCE A RELIABLE JUST RESULT. APPELLATE COUNSEL IS NOT REQUIRED TO ADVANCE EVERY ARGUMENT, REGARDLESS OF MERIT.

Petitioner's error alleges she was denied effective assistance of counsel during at trial and on direct appeal. The proper standard to measure assistance of counsel is "reasonably effective assistance". In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Court set out the proper standards for measuring effective assistance of counsel in a two-tier test. First, Petitioner is required to show that counsel's performance was deficient under prevailing professional norms, and that but for the deficient performance the outcome of his case would be different. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed a defendant under the Sixth Amendment. Second, Petitioner must show that the deficient performance prejudiced his defense. This requires showing that counsel's errors were so serious as to deprive a defendant of a fair trial, a trial whose result is reliable. See also *Workman v. State*, 824 P. 2d. 378 (Okl.Cr. 1991). Furthermore, a defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound strategy because this court will indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

Examination of the record reveals that Petitioner's arguments fail to overcome the first tier of the *Strickland* test. Petitioner's trial counsel acted as a reasonable competent attorney under the facts and circumstances of this case. A competency hearing was held regarding Petitioner. He obtained discovery materials from the State. He filed a Motion to Quash. He ordered a transcript of the preliminary hearing. He filed a Motion to Produce, or Examine or Inspect all tapes taken during the investigation of the case and to take copies of all physical evidence to be used at trial.

Jury selection at trial lasted one week. Eight jurors were excused for cause. Petitioner's Attorney exercised eight peremptory challenges. Forty witnesses were sworn for the trial. Petitioner's attorney cross-examined witnesses. Petitioner's attorney called numerous witnesses including an expert in the field of the Battered Woman Syndrome. A reviewing court should indulge "a strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance", *Strickland.*

Petitioner's argument regarding the effectiveness of her trial counsel also fails the second element of *Strickland,* the prejudice element. Petitioner's identification of deficiencies in trial counsel's performance without addressing the prejudice element is fatal to her claim of ineffective counsel. (See *Douglas v. State,* 1997 Ok CR 79, 108 P.2d 651. If each of the *Strickland* prongs are not proven, it is fatal to the claim of ineffective assistance of counsel. *Thornburg v. State*, 199 Ok CR 32, 985 P.2d 1234, 1245. In *Turrentine v. State,* 1998 OK CR 33, 955 P.2d 955, 970 & 971, the Oklahoma Court of Criminal Appeals stated that "when a claim of ineffectiveness of counsel can be disposed of on the ground of lack of prejudice, that course should be followed. Concerning the prejudice prong, the U. S. Supreme Court stated in *Strickland,*

> [An appellant] alleging prejudice must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trail whose result is reliable. "The essence of an effective-assistance claims is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and verdict suspect"

Appellate counsel is also held to the *Strickland* test of reasonably effective assistance. The Oklahoma Court of Criminal Appeals further defined the test in *Cartwright v. State*, 708 P.2d 592 (Okla. Cr. 1985). The Court held that counsel is not required to advance every argument, regardless

of merit. *See also Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), and *Webb v. State*, 835 P.2d 115 (Okl.Cr. 1992). In fact, appellate counsel's refusal to raise non-frivolous allegations may be evidence of effectiveness. *Banks v. State*, 810 P.2d 1286, 1290 (Okl.Cr. 1991), and *Nguyen v. State*, 844 P.2d 176, 178 (Okl.Cr. 1992).

Petitioner's appellate counsel carefully selected legal issues to be raised on appeal. The Appeals Court denied relief. In *Taylor v. State*, 659 P.2d 362, 365 (Okla. Cr. 1983), the Court held "lack of success is not the proper measure for determining the adequacy of legal representation". Petitioner's appellate counsel was reasonably competent. Further, petitioner has failed to show that there is a reasonable probability that, but for counsel's error the results of the direct appeal or the jury verdict of guilt beyond a reasonable doubt would have been changed.

There comes a point in the legal process, be it at the trial or appeal level, that a defendant/appellant has to assume responsibility for his own acts. An attorney's role is to aid or assist a defendant and in this capacity is in a somewhat servient role. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Lawyers merely advise whereas judges decide issues. Any client that abdicates his right to make his own choices and leaves it to his attorney does so at his own peril. In this case, Petitioner has failed to show he was denied an appeal through no fault of his own.

Respectfully submitted,

TIM HARRIS
DISTRICT ATTORNEY

By: Fred J Morgan

FRED J. MORGAN OBA # 6386
ASSISTANT DISTRICT ATTORNEY
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103-3832
(918) 596-4875

CERTIFICATE OF MAILING

I certify that on the 27th day of March, 2003, a true and correct copy of the above and foregoing Response was placed in the United States Mail with sufficient postage affixed thereto,
addressed to:

APRIL ROSE WILKENS
#282399
C.O.C.F. C1B-118
29501 KICKAPOO
MCLOUD, OK 74851

Fred J Morgan
FRED J. MORGAN

Appellant's Exhibit 13

DISTRICT COURT
FILED
AUG 22 2003
SALLY HOWE SMITH, COURT CLERK
STATE OF OKLA. TULSA COUNTY

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

APRIL ROSE WILKENS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. CF 98-2173
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER DENYING
AMENDED APPLICATION FOR POST-CONVICTION RELIEF

This matter coming on for consideration of the Petitioner's Application for Post-Conviction Relief and Amended Application for Post-Conviction-Relief. The Court has reviewed both of Petitioner's Applications, (the State has waived any response to Petitioner's Amended Application for Post-Conviction-Relief) the State's Response, the docket sheet, the contents of the court file, the Appellant's Brief in Chief and the brief of Appellee. The court has a memory of the conduct of the three week trial of this matter and the conduct of counsel. The Court being fully advised in the premises and concerns finds as a matter of facts and conclusions of law as follows:

That the matter under consideration does not present any genuine issue of material fact requiring a formal hearing with the presentation of witnesses and the taking of testimony. *Johnson v. State*, 1991 OK CR 124, 823 P.2d 370. Nor does the Court need to appoint counsel for the Petitioner; nor is her presence required. The matter will therefore be decided on the basis of the pleadings and the court records.

HISTORY OF THE PETITIONER'S CASE

Petitioner was charged on April 29, 1998, with the felony offense of Murder First Degree. On May 7, 1998, an Application was filed on Petitioner's behalf to determine her competency. On June 15, 1998, a hearing was held regarding Petitioner's competency where Petitioner was found competent to proceed. On July 27, 1998, a preliminary hearing was held in the matter. At the close of evidence Petitioner was bound over for trial. On April 5, 1999, a jury trial was commenced in the matter. Petitioner was represented at trial by privately retained counsel, Chris Lyons. The three week jury trial concluded on April 24, 1999, when Petitioner was found guilty. The jury recommended a life sentence. On July 7, 1999, Petitioner was formally sentenced to life in prison. Petitioner was advised of her right to appeal. Petitioner perfected a direct appeal of her conviction where the following issues were raised on her behalf:

> I. The evidence was insufficient to sustain Appellant's conviction of Murder in the First Degree.
> II. The trial court committed reversible error in failing to submit a jury instruction on manslaughter.
> III. The jury should have received an instruction for manslaughter, consequently trial counsel was ineffective for failing to submit the written jury instruction on manslaughter.
> IV. Appellant received ineffective assistance of trial counsel when trial counsel failed to object to a statement made by Appellant prior to her Miranda warnings being read to her by law enforcement.
> V. The trial court erred in finding that Appellant has waived her rights and that her confession was freely and voluntarily made and trial counsel was ineffective in failing to present to the trial court at trial the fact that Appellant had been coerced into making the statement.
> VI. The trial errors complained of herein cumulatively denied Appellant's right to a fair trial under the United States and Oklahoma Constitution and therefore, her conviction and sentence must be reversed.

On June 6, 2001, Petitioner's conviction was affirmed by the Court of Criminal Appeals in an unpublished summary opinion. (See *Wilkens v. State*, F99-927)

Petitioner has now filed this Application for Post-Conviction-Relief where she has alleged as grounds for relief.

1. Petitioner was denied her Sixth amendment right to counsel because trial counsel's failure to investigate the Petitioner's defenses constituted ineffective assistance of counsel. Petitioner has amended her Application for Post-Conviction-Relief to add ineffective assistance of Appellate Counsel with respect to this claim.

2. Petitioner was denied her Sixth Amendment right to counsel because trail counsel's failure to enter an outstanding bench warrant for Terry Carton's arrest into evidence at her jury trial constituted ineffective assistance of counsel. Petitioner has amended her Application for Post-Conviction-Relief to add ineffective assistance of Appellate Counsel with respect to this claim.

3. Petitioner was denied her Sixth Amendment right to counsel because trial counsel's failure to enter the results of her 28 April 1998 urinanalysis into evidence at her jury trial constituted ineffective assistance of counsel. Petitioner has amended her Application for Post-Conviction-Relief to add ineffective assistance of Appellate Counsel with respect to this claim.

4. Petitioner was denied her Sixth Amendment right to counsel because trial counsel's failure to enter a transcript of Tulsa Police Officer Laura Fadem's

previous in camera testimony into evidence before Petitioner's jury at Petitioner's April 1999, jury trail constituted ineffective assistance of counsel; and therefore, Petitioner's Appellate counsel's failure to raise this claim on direct appeal constituted ineffective assistance of appellate counsel.

5. Petitioner was denied her sixth amendment right to counsel because trial counsel's failure to present testimony from a battered woman syndrome expert at Petitioner's April 1999 jury trial constituted ineffective assistance of counsel; And therefore, Petitioner's appellate counsel's failure to raise this claim on direct appeal constituted ineffective assistance of appellate counsel.

6. The claims presented in propositions one through six cumulatively denied Petitioner her Sixth Amendment right to effective assistance of counsel in violation of the United States and Oklahoma Constitutions, and therefore her conviction and sentence should be reversed.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

I

Petitioner's Application for Post-Conviction-Relief alleges she was denied effective assistance of counsel during at trial and on direct appeal. The proper standard to measure assistance of counsel is "reasonably effective assistance". *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In *Strickland* the Court set out the proper standards for judging effective assistance of counsel in a two-tier test. First, Petitioner is required to show that counsel's performance was deficient under prevailing professional norms and that but for the deficient performance the outcome of his case

would have been different. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed a defendant under the Sixth Amendment. Second, Petitioner must show that the deficient performance prejudiced his defense. This requires showing that counsel's errors were so serious as to deprive a defendant of a fair trial, a trial whose result is reliable. Furthermore, a defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound strategy because this court will indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. See also *Workman v. State*, 824 P. 2d. 378 (Okl.Cr. 1991).

Examination of the record reveals that Petitioner's arguments fail to overcome the first tier of the *Strickland* test. Petitioner's trial counsel acted as a reasonably competent attorney under the facts and circumstances of this case. A competency hearing was held regarding Petitioner. He obtained discovery materials from the State. He filed a Motion to Quash. He ordered a transcript of the preliminary hearing. He filed a Motion to Produce, or Examine or Inspect all tapes taken during the investigation of the case and to take copies of all physical evidence to be used at trial. Jury selection at trial lasted one week. Eight jurors were excused for cause. Petitioner's Attorney exercised eight peremptory challenges. Forty witnesses were sworn for the trial. Petitioner's attorney cross-examined witnesses. Petitioner's attorney called numerous witnesses including an expert in the field of the Battered Woman

Syndrome. A reviewing court should indulge "a strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance", *Strickland.*

The Oklahoma Court of Criminal Appeals elaborated further on the test in *Cartwright v. State*, 708 P.2d 592 (Okla. Cr. 1985). The Court held that counsel is not required to advance every argument, regardless of merit. *See also Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), and *Webb v. State*, 835 P.2d 115 (Okl.Cr. 1992). In fact, appellate counsel's refusal to raise even non-frivolous allegations is evidence of effectiveness. *Banks v. State*, 810 P.2d 1286, 1290 (Okl.Cr. 1991). Petitioner's allegations of error fail to establish that the results of petitioner's direct appeal or the jury verdict of guilt beyond a reasonable doubt would have been changed.

Petitioner's appellate counsel carefully selected legal issues to be raised on appeal. The Appeals Court denied relief. In *Taylor v. State*, 659 P.2d 362, 365 (Okla. Cr. 1983), the Court held "lack of success is not the proper measure for determining the adequacy of legal representation". Petitioner's appellate counsel was reasonably competent.

As the trial judge in this matter, based upon my observations of the conduct of trial counsel I find as a matter of law that the performance of trial counsel in this matter exceeded the requirements enunciated by the Supreme Court in *Stirckland* of "reasonably effective assistance". Furthermore, I have examined the Appellant's Brief in Chief, filed June 9, 2000, and I find as a

matter of law that the performance of Appellate counsel exceeded the requirements of *Strickland.*

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Petitioner's Application for Post-Conviction Relief is hereby denied.

On July 14, 2003, Petitioner filed her Motion for Summary Disposition of Amended Application for Post-Conviction-Relief. Said Motion is denied.

SO ORDERED this 22 day of Aug., 2003.

MICHAEL GASSETT
DISTRICT COURT JUDGE

CERTIFICATE OF MAILING

I certify that on the 22 day of August, 2003, a true and correct copy of the above and foregoing Order was placed in the United States Mail with sufficient postage affixed thereto, addressed to:

APRIL ROSE WILKENS
#282399
C.O.C.F. C1B-118
29501 KICKAPOO
MCLOUD, OK 74851

Via US Mail

Fred Morgan
Assistant District Attorney
500 S. Denver
Tulsa, OK. 74103

Via interoffice mail

SALLY HOWE-SMITH
TULSA COUNTY COURT CLERK

BY: Alisa Austin

DEPUTY

APPELLANT'S EXHIBIT 14

PRESCRIBED FORM TO BE USED BY PETITIONERS IN CONFINEMENT

IN THE COURT OF CRIMINAL APPEALS

THE STATE OF OKLAHOMA

APRIL ROSE WILKENS
PETITIONER

VS.

STATE OF OKLAHOMA
RESPONDENT

Case No. PC 2003-1002

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
SEP - 5 2003
MICHAEL S. RICHIE
CLERK

PETITION FOR:(Indicate Which)

____Writ of Habeas Corpus

____Appeal Out Of Time

____Mandamus

__X__Other POST-CONVICTION APPEAL

Instructions-Read Carefully

This application form is for use by persons in State Custody filing without assistance of counsel.

Indicate the purpose of this petition. Habeas Corpus is for release because the Court Order restraining Petitioner is illegal. If Petitioner had no appeal,she may be entitled to an appeal out of time,if denied some right relating to the right to appeal. If Petitioner is for other relief,so indicate.

In order for this Petition to receive consideration by the Court of Criminal Appeals,it shall be signed by the Petitioner and verified(notarized, and it shall set forth in concise for the answer to each applicable question. If necessary,Petitioner may finish her answer to a particular question on the reverse side of the page or on an additional blank page. Any such additional pages shall be incorporated into the Petition, as being a part thereof. Petitioner shall make it clear to which question and such continued answer refers.

Since every petition must be sworn to under oath, any false statement of material fact therein may serve as the basis of prosecution and conviction of perjury. Petitioner should therefore exercise care to assure that all answers are true and correct.

If the petition is taken in Forma Pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that Petitioner will be unable to pay the fees and cost. When the petition is complete, the original and one copy shall be mailed to the Clerk of the Court of Criminal Appeals, State Capitol Building, Oklahoma City, Oklahoma 73105.

1. Name in full, including alias and any prison number: APRIL ROSE WILKENS
D.O.C. No. 282399

2. Place of Detention: M.B.C.C. (C1B-118), 29501 Kickapoo, McLoud, OK 74851

3. Reason for detention: I am serving the sentence imposed in this case.

Judgment & Sentence on Conviction:

Court DISTRICT COURT OF TULSA COUNTY Case No. CF-98-2173

County TULSA Term of Sentence Life

Crime First-degree murder Date of Sentence 07 July 1999

Criminal Charges Pending: NONE

Court _____ Case No. _____

County _____ Date Imprisoned _____

Crime Charged _____

4. If you are not attacking the legality of the authority by which you are incarcerated as described above (Question 3) describe the custody or judgment which is the subject of this application.

5. Plea Entered:

a. Before Committing Magistrate: Guilty ____ Not Guilty X

b. At Preliminary Hearing: Guilty ____ Not Guilty X

c. At Arraignment: Guilty ____ Not Guilty X

d. At Trial: Guilty ____ Not Guilty X

6. if you were found guilty after a plea of not guilty, that finding was made by:

Jury X Judgment Without Jury _____

7. If you were sentenced on a plea of guilty, did you seek to withdraw your plea of guilty after judgment and sentence was rendered against you and to enter a plea of Not Guilty? N/A

Yes____ No____ Request Granted: Yes____ No____

8. Attorney: Indicate below when you were represented by Counsel:

a. Committing Magistrate:

No Attorney____ Court Appointed__X__ Retained____

b. Preliminary Hearing:

No Attorney____ Court Appointed__X__ Retained____

c. Arraignment:

No Attorney____ Court Appointed__X__ Retained____

d. Trial:

No Attorney____ Court Appointed____ Retained__X__

e. Sentencing:

No Attorney____ Court Appointed____ Retained__X__

f. Appeal:

No Attorney____ Court Appointed__X__ Retained____

g. Name and Address of Attorney(s) Representing You:

CHRIS LYONS, P.O. Box 1046, Pryor, OK 74362

BILL ZUHDI, P.O. Box 1077, OKC, OK 73101

DAVID BLADES, 1861 E. 15th, Tulsa, OK 74104

9. Appeal:

a. Did you serve notice of intention to appeal and request preparation of a case made or record within 10 days after date of judgment and sentence was imposed.

Yes__X__ No____

b. Did you request preparation of case made or record at public expense in trial court and offer proof of inability to pay?

Yes__X__ No____

c. Was this request granted?

Yes__X__ No____

d. Did you request the trial court to appoint counsel to assist you on appeal?

Yes__X__ No____

75

e. Was this request granted?

Yes X No____

f. Did the trial court or your attorney advise you of your right to appeal the judgment and sentence?

Yes X No____

g. Did the trial court or your attorney advise you of your right to appointment of counsel and preparation of a casemade at state expense if you were indigent?

Yes X No____

h. Was as appeal perfected of the conviction?

Yes X No____

10. Application to other courts: If you have applied to other courts for the same relief as requested in this petition give the following information:

Court DISTRICT COURT OF TULSA COUNTY Case No. CF-98-2173

Location TULSA, OKLAHOMA Date Filed 05 March 2003

Court's Action Denied Date 22 August 2003

(If more than one such application has been made,give the same information for each such request.) SEE OTHER SIDE

11. Prior applications to this Court: If you have made applications before this one to this Court for relief,give the following information:

Case Number F-99-927 Date Filed 09 June 2000

Relief Requested Direct Appeal -- Reverse & Dismiss or Modify Conviction/Sentence

Court's Final Action Denied Date 03 April 2001

(If more than one such application has been made give the same information for each such request.)

12. Check the relief now requested:

X Immediate Release

____Appeal Out Of Time ____Reduction Of Bond

____Release On Bond ____Correction Of Prison Record

X Other (Specify) Reverse & Dismiss Conviction/Sentence

13. Of what legal right or privilege do you believe you were deprived that would support your request for relief? (Use back of page or extra sheets if necessary.) I was denied my Sixth Amendment right to effective assistance of counsel at trial and on direct appeal in violation of the United States and Oklahoma Constitutions.

14. What happened to deprive you of that legal right or privilege? Who made the error of which you complain? What did he/she do wrong?

My trial counsel failed to investigate my defenses and present critical exculpatory evidence as outlined in Propositions One through Six of my Amended Application for Post-Conviction Relief. My appellate counsel failed to raise these claims on direct appeal.

15. How do you think you could prove the facts you have stated in answer to question 14?

I attached several documents to my original Application for Post-Conviction Relief. These documents, along with the transcript of my jury trial, prove my claims.

(continued on next page)

16. List by name and Citation any case or statute you think is very close factually or would be applicable to your case.

Bechtel v. State, 840 P2.d 1 (Okla. Crim. App. 1992)

Paine v. Massie, ____ F.3d ____ (10th Cir. 2003)

Strickland v. Washington, 466 U.S. 668 (1984)

Okla. Stat. tit. 22, Section 1080(a)(d)

15. (continued from previous page) I am innocent of first-degree murder. I shot Terry Carlton, my abusive and violent ex-fiancé, while defending myself from another brutal attack. Terry had already raped and beaten me that morning; and at the time of the shooting, he was trying to sodomize me and threatening to kill me. Because I was so scared and in such danger and had been for so long, I could not stop shooting until the gun was empty. It was not a conscious decision to keep shooting: it was instinctive survival. Terry was assaulting and otherwise terrorizing me relentlessly, and I know in my heart that he meant to kill me.

Since the shooting, I have steadfastly claimed at trial, on direct appeal, and in collateral litigation that I am innocent and that my use of deadly force to protect myself was reasonable and justified based on my perception as a battered woman and under the totality of the circumstances. My claims are proven by the facts of my case and supported by the law.

The Oklahoma Court of Criminal Appeals has declared, "For the battered woman, if there is no escape or sense of safety, then the next attack, which could be fatal or cause serious bodily harm, is imminent...." Bechtel v. State, 840 P2.d 1, 12 (Okla. Crim. App. 1992). Further, the OCCA established that to a battered woman, "[T]he threat of serious bodily harm or death is always imminent...." Bechtel v. State, 840 P2.d 1, 12 (Okla. Crim. App. 1992) (emphasis added).

As also noted by the OCCA, "imminent danger" is defined as:

> "IMMINENT DANGER. In relation to homicide in self-defense, this term means immediate danger, such as must be instantly met, such as cannot be guarded against by calling for the assistance of others or the protection of the law. Or, as otherwise defined, such an appearance of threatened and impending injury as would put a reasonable and prudent man to his instant defense." Bechtel v. State, 840 P2.d 1, 12 (Okla. Crim. App. 1992) quoting Black's Law Dictionary, 5th ed. 1979 (emphasis added).

15. (continued from previous page) The material facts presented in my propositions for post-conviction relief prove beyond any doubt that I was a battered woman and that Terry Carlton was an incessantly imminent threat to my life that could not be remedied for me by calling on others, including law enforcement officers, for protection. However, if the Court is still not convinced, then requiring testimony from a qualified battered woman syndrome expert is crucial because my attorneys failed to present testimony from a qualified battered woman syndrome expert at my trial and on direct appeal. See Bechtel v. State, 840 P2.d 1 (Okla. Crim. App. 1992) and also Paine v. Massie, ___ F.3d ___ (10th Cir. 2003).

On 11 August 2003, the Tenth Circuit United States Court of Appeals filed a decision in Paine v. Massie, an Oklahoma battered woman syndrome case similar to my case. In Paine, the Tenth Circuit wrote in part:

> The record reflects that counsel offered just one expert, Dr. Edith King, to testify on Ms. Paine's behalf. Dr. King was an expert primarily specializing in assessing a defendant's competency to stand trial. Dr. King was not particularly experienced working with battered women....In fact, counsel chose an expert that was not even qualified to render BWS testimony....
>
> Given the OCCA's extensive focus on the "key" reasonableness component of a self-defense claim in a BWS case, Bechtel, 840 P2d at 10-11, counsel's failure to offer expert BWS testimony to provide context for the jury on the reasonableness of Ms. Paine's subjective fear amounts to objectively unreasonable performance....
>
> Simply put, counsel failed to do something that the OCCA said was necessary to mount an effective self-defense claim given the jury's likely misconceptions about BWS. Paine v. Massie, ___ F3d. ___ (10th Cir. 2003) (emphasis added).

Unlike the trial attorney in Paine, my trial counsel went so far as to erroneously represent a forensic psychologist as an expert

qualified to render battered woman syndrome testimony. Like the expert in Paine, the expert in my defense was not a battered woman syndrome expert. The expert in my defense was a forensic psychologist who was not particularly experienced working with battered women, and he was not qualified to render battered woman syndrome testimony. See Paine v. Massie, ___F3d. ___ (10th Cir. 2003). As outlined in Proposition Five of my Amended Application for Post-Conviction Relief, this expert in the field of forensic psychology testified erroneously about battered woman syndrome and erroneously about me: his testimony was inaccurate and, as a result, disastrous.

In my Amended Application for Post-Conviction Relief, I have presented overwhelming evidence of my innocence that was not presented at my trial or on direct appeal. Likewise, this evidence was not presented to the different professionals in the fields of psychology and psychiatry who have testified about my case. Before any expert could perform a reliable analysis of my case, (s)he would need to have this evidence in hand: (s)he would need to understand the truth about my circumstances and viewpoint before (s)he could help others understand. And in all fairness, in accordance with the law, only a qualified battered woman syndrome expert could testify on my behalf. See Paine v. Massie, ___ F3d. ___ (10th Cir. 2003).

In closing, I continue to maintain that I am innocent and that my conviction and sentence are fundamental miscarriages of justice. Considering the facts of my case and clearly established state and federal law, the District Court of Tulsa County's denial of my Amended Application for Post-Conviction Relief was grievously unreasonable. I ask the Oklahoma Court of Criminal Appeals to grant my request for post-conviction relief, and to vacate and dismiss my conviction and sentence and release me from custody.

STATE OF OKLAHOMA)
)
) ss:
)
COUNTY OF POTTAWATOMIE)

AFFIDAVIT OF APRIL ROSE WILKENS

I, April Rose Wilkens, being first sworn under oath, state that I have signed the foregoing petition and that the statements therein are true to the best of my knowledge and belief.

April Rose Wilkens
April Rose Wilkens

Subscribed and sworn before me, a Notary Public within and for the State of Oklahoma on this 2nd day of September, 2003.

12/31/06
My Commission Expires

Eugene G. Colbert
Notary Public

Commission No. 02019492

CERTIFICATE OF MAILING

I, April Rose Wilkens, certify that on the 8th day of September, 2003, a true and correct copy of the foregoing was mailed via the Court Clerk of the Oklahoma Court of Criminal Appeals, certified mail with return receipt, to:

Drew Edmondson, Attorney General
112 State Capitol
2300 N. Lincoln Blvd.
Oklahoma City, OK 73105

April Rose Wilkens

April Rose Wilkens

APPELLANT'S EXHIBIT 15

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

APRIL ROSE WILKENS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. PC-2003-1002
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

RESPONSE TO APPLICATION FOR POST-CONVICTION RELIEF

STATEMENT OF THE CASE

On April 28, 1998, the Petitioner, April Rose Wilkens, shot and killed Terry Carlton. She was convicted of First Degree Murder, in Tulsa County District Court Case No. CRF-98-2173. The Petitioner received a sentence of life imprisonment. Her direct appeal, this Court's case no. F-1999-927, was denied.

OVERVIEW

Each of Petitioner's six propositions set forth reasons which purportedly show she received ineffective assistance of counsel. Though these arguments will be addressed separately, the standard for evaluating ineffective assistance claims is governed by one standard. This Court established in ***Robinson v. State***, 1995 OK CR 25, 900 P.2d 389, that claims of ineffective assistance of counsel are to be judged in light of the Supreme Court's guidelines established in ***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The ***Strickland*** test requires the Petitioner to show: 1) that counsel's representation fell below an objective standard of reasonableness, and 2) the reasonable

probability that, but for counsel's errors, the results of the proceedings would have been different. ***Robinson***, at ¶ 51 and 403.

The Petitioner's first four claims deal with the trial attorney's decision to omit cumulative evidence, or evidence that even if introduced, would not have changed the outcome of the trial. The fifth claim is an alleged failure to provide expert testimony in support of her battered woman syndrome ("BWS") defense. This claim is specious, as the record is replete with expert testimony offered for this very purpose. The Petitioner sets forth a detailed Statement of Facts, even though the first six pages contains **only** citations to Petitioner's trial testimony. (***Application***, at 5-12) Additional facts relevant to this Response will be set forth in the body of the discussion below.

ARGUMENT AND AUTHORITY

In her first proposition, the Petitioner alleges her attorney erred by not calling as witnesses the attorneys she sought assistance from in filing three victim protection orders ("VPO's") against the decedent, Terry Carlton. She specifically says that attorney Claire Eagan should have been subpoenaed, as Ms. Eagan could have testified to seeing bruises on Petitioner after she and the decedent returned from Rome. (***Application***, at 14-15) The fact that Petitioner says she was beaten during the Rome trip was already established in the record. (Tr.10 at 1968-71) Furthermore, there was a large amount of evidence of prior physical altercations and mutual antagonism between the Petitioner and the decedent throughout their relationship. (*See* citations below) That an attorney

she went to for a VPO saw bruises on her sometime **after** her trip, is not evidence that she suffered abuse from the **decedent**, or that it occurred **during** the trip.

Moreover, bringing in an attorney who helped her obtain a VPO would allow the prosecutor to remind the jury that she abandoned the same a short time later. The Petitioner readily admitted that the three times she sought VPO's, she never followed up and the orders were dismissed. (Tr.11 2283 & 2285) Her trial attorney's choice to not burden the record with cumulative evidence that did not directly support points already established, seems to be sound trial strategy. As noted in ***Camron v. State***, 1992 OK CR 17, ¶ 45, 829 P.2d 47, 55, the Petitioner "[m]ust overcome the presumption that the challenged action might be considered strategy under the circumstances." As there were 21 prosecution witnesses and 20 defense witnesses encompassing fifteen (15) volumes of trial transcript, limiting cumulative testimony was a necessary and reasonable strategy.

In her first proposition, the Petitioner also contends that her attorney was ineffective for failing to try to introduce an audio-taped phone conversation she had with the decedent. (***Application***, at 14) Reading the rambling transcript of the conversation, one realizes this is simply cumulative evidence of the couples mutual antagonism; a point repeatedly made in the record. (*See also*, S.E. 69 at 35 minutes and citations herein) That the police were called out, or that she sought their assistance to initiate protection (later refused), is also part of the record. Furthermore, there were likely compelling calls the decedent made to

seek protection from the Petitioner, such as the April 11, 1998 incident, where the police took the Petitioner away after she pointed a loaded gun at Mr. Carlton and pulled the trigger. (Tr.9 1769; Tr.11 at 2085-2086 & S.E. 69 at 40 minutes) Luckily for Carlton, the gun misfired. ***Id.*** Another example of Petitioner physically assaulting Carlton came in the cross-examination of Dr. Call, who knew of the incident where Tom King and Brenda Fritz saw Petitioner kick decedent in the groin with such force that he doubled over in pain. (Tr.15 2882)

Likewise, the Petitioner derides her attorney's failure to locate or use 911 calls she made during disturbances with the decedent. In addition to the April 11 incident, there was apparently a 911 call made to the police seeking protection **from** the Petitioner, like the time she was beating on the car of new boyfriend, Luke Draffin, because he would not let her in his house. (Tr.7 at 1281-1285, & 1501) Not only would the 911 tapes have been cumulative, like much of the other evidence, it could actually have been turned by the prosecution to show the Petitioner's propensity to resort to violence. Therefore, not only was there no gross incompetence displayed (first prong of ***Strickland***), there was also no prejudice (second prong) from omitting these points. *See* ***Robinson***, *supra.*

The arguments in Petitioner's second proposition suffer the same infirmity. The Petitioner complains that in April of 1998 the police did not arrest Mr. Carlton on an outstanding misdemeanor bench warrant, and instead twice carted her away. Salient facts were omitted which explain this apparent anomaly. First, it was the police who arrested Carlton in February of 1998 for the misdemeanor

transporting a loaded firearm charge. (Tr.13 2716) That same night, the police went to great lengths to obtain a VPO for Petitioner before daybreak. (Tr.13 2716) As with the other two VPO's, the Petitioner simply let the matter drop. The bench warrant, of which the officer's were likely unaware, was later issued for the decedent for failure to appear in court on the transporting firearm charge.

Other salient facts omitted are the nature of the April encounters and why the Petitioner was taken away by the police. During the first April incident (April 2nd), witness Shawn Blankenship testified to having to file an EOD on the Petitioner because of her violent and erratic behavior, which included a claim that the son of God had broken into her home and was beating her. (Tr.15 2982-86) Her complaint regarding the second April incident (April 11th) was that the police were called out for a "domestic disturbance", yet she ended up in a psychiatric hospital and the police did nothing to the decedent. (S.E. 69 at 37 minutes) This is indicative of how the Petitioner uses half-truths to distort the record. She fails to admit that the "domestic disturbance" which led to her being taken to Eastern State was the incident where she held a loaded gun to the decedent's head and pulled the trigger. (Tr.9 1769; Tr.11 at 2085-2086 & S.E. 69 at 40 minutes) Far from being the helpless victim in this situation, she was the unlawful aggressor. Additionally, she does not advise the Court that the decedent was also sent to Eastern State after this incident, but he was discharged after one day. (Tr.10 2086) If the Petitioner replies and claims that this showed favoritism, she should be reminded that the record showed she received a longer commitment, because

when she was at a different rehabilitation hospital she as combative and had to be placed in seclusion and restraints. (Tr.10 2196).

The Petitioner admitted that the police were helpful to her and even obtained a VPO for her in the middle of the night. (Tr.11 2278; Tr.13 2716) One specific example of the police treating her well occurred the night of the shooting, when Officer Masek found her roller-skating late at night and chose to give her a ride home. Masek said the Petitioner seemed mad, but in control of her facilities. (Tr.11 at 1285 & 1288) A second example occurred in February of 1998 when, despite having evidence sufficient to make a felony drug arrest, Officer Tallman chose not to arrest Petitioner, but instead took her to a place that rendered psychiatric help. (Tr.13 at 2590-2603) A third example occurred when an officer picked up the Petitioner after she assaulted Luke Draffin's car, and rather than arrest her, she was instead driven home. (Tr.15 2950)

Importantly, even her own expert witness, Dr. Call, conceded that in this case, the police took the Petitioner seriously and says the legal system did not fail to protect her; the failure was her own choice not to follow up. (Tr.15 2862-63) Finally, even the Petitioner admitted that she was her own worst enemy when it came to enlisting police assistance. "I understand how it looks to them, you know, 14 times I called the police and they're like, why is she still with him?" (S.E. 69, at 36 minutes) There is a great deal of evidence in the record which establishes that the Petitioner was not treated unfairly by the local police.

Clearly, the arguments mentioned in the first two propositions that her trial attorney forsook, were cumulative or minor points which likely would have been turned by the prosecutor to Petitioner's detriment. As a result, the decision to exclude this evidence appears to be sound trial strategy. This Court has stated that it will not second guess matters concerning trial strategy if there is a reasonable basis for counsel's actions. *See* ***Roberts v. State***, 1996 OK CR 7, ¶ 20, 910 P.2d 1071, 1080. Alternatively, the first prong of ***Strickland*** is not met in that most of the evidence was cumulative in this two-and-one-half week long jury trial. Finally, even if this Court finds these arguments showed gross incompetence on the part of the trial attorney, the argument is fatally flawed as to the second prong of the ***Strickland*** test. There is no reasonable probability, given the evidence in the record, that this additional evidence would have affected the outcome of the proceeding. *See* ***Robinson***, *supra.*

The Petitioner's third claim is somewhat difficult to fathom. She appears to be suggesting that her attorney erred by failing to seek the admission of what the Petitioner says is a negative urinalysis test taken the evening of April 28th. However, the same would not have advanced her argument that she used reasonable force based on having suffered from BWS. Moreover, if such a test existed, it would contradict her own statement to police (S.E. 69 at 15 minutes), and would be inapposite to other testimony of her frequent drug use. (Tr.12 2200; Tr.13 at 2590-97 and Tr.15 2818). There is no case law that indicates a BWS defense is unavailable to someone under the influence of an intoxicant.

There is also nothing in the record to suggest the State argued her voluntary intoxication increased her culpability or helped prove any element of the crime. As noted in ***Smith v. State***, 1998 OK CR 20, ¶ 8, 955 P.2d 734, 738: "Conclusory allegations, standing alone, will never support a finding that an attorney's performance was deficient." Finally, as with the first two propositions, this argument fails to meet the second prong of the ***Strickland*** test. There is no reasonable likelihood that a test result proving she was more sober than believed, would have influenced the jury to render an acquittal.

In her fourth proposition, the Petitioner says that Officer Laura Fadem's in camera testimony was "altogether different and strikingly contradictory". (***Application***, at 21) "During the in camera hearing, Fadem testified under oath that after Petitioner opened the door for officers, Lawson then asked Petitioner - prior to Petitioner being informed of her Miranda rights - if Petitioner had shot Carlton." ***Id***. The applicable in camera testimony went as follows:

> Q. Upon opening the front door, describe for the Court what happened.
>
> A. The front door is a single front door, and Officer Gann and Officer Lawson were standing behind them. And as the front door opened, Officer Gann said something to the - - to the - - to the - - to April, something to the effect of - -
>
> MR. LYONS: Your Honor.
>
> Q. Without telling us what he said - -
>
> A. Okay.
>
> Q. - - just tell us what happened.

> A. Okay. I heard April say, "I shot him, he's in the basement." We went inside the door, I stood with April while Officer Gann and Officer Lawson went down the hallway and down into the basement.

(Tr.6 at 1102-03).

During the in camera cross-examination, Officer Fadem admitted that because she was behind the first line of three officers that entered when Petitioner opened the door, one of them could have asked a question which elicited the "I shot him" response. (Tr.6 at 1126-28) Officer Fadem's trial testimony was virtually identical. (Tr.7 at 1455-57) Petitioner incorrectly states that no objection was made to the testimony, as the transcript quoted above shows otherwise. (***Application***, at 21)

She concludes this short proposition by saying that Fadem was a key witness and that her "blatantly contradictory testimony" needed to be revealed. (***Application***, at 22) Though Fadem was somewhat uncertain of the chronology of the Petitioner's statement that she shot Carlton, or if the same was in response to a question, these difference do not alter the admissibility of the prodigious amount of explanation the Petitioner offered. Officer Fadem said: observed that, "From the moment I was standing with Ms. Wilken she was talking." (Tr.7 1417) Almost immediately after entry, Officer Fadem read Petitioner her ***Miranda*** rights, and upon doing so, Fadem said Petitioner remained very talkative, "telling me everything" and continuing to be "very cooperative". (Tr.7 1419)

Within this fourth proposition, the Petitioner says Officer Lawson asked her if she shot Mr. Carlson and she said "yes". This preliminary question was a reasonable inquiry for the sake of officer safety, since a negative answer would have required immediate action to protect the officers and the public. Because the initial inquiry was not in a custodial context, the ***Miranda*** argument is inapplicable. ***Little v. State***, 1981 OK CR 46, ¶ 5, 627 P.2d 445, 448. Furthermore, the Petitioner never stopped talking and was clearly determined to tell anyone who would listen exactly what occurred. (Tr.7 1417 & S.E. 69) Even her trial testimony filled over two volumes of transcript. (*See* Volumes 10-12, pages 1927-2381) That the first sentence of this flood of words may have been prompted by a question is clearly irrelevant. There is no error for Petitioner's attorney to fail to pursue a meritless claim. ***Cantley v. State***, 1988 OK CR 87, ¶ 8, 755 P.2d 96, 97. Finally, even if the initial "I shot him" response had been stricken, the additional statements indicates that the outcome of the trial would have been the same and the second prong of ***Strickland*** was not established.

In her fifth proposition, the Petitioner claims that her attorney erred by failing to introduce expert BWS testimony from a qualified witness. The Petitioner's expert witness, Dr. John Call, told the jury that he is a board certified forensic psychologist, one of only 175 in the United States. (Tr.15 2803) When he was asked to relate his "training and education or experience relating to battering or battered individuals," the following colloquy occurred:

A. Well, first off, as a state officer, and as a member of the Board of Directors of the Department of Mental Health, I and six other members of the Board are directly responsible for all state certified and contracted domestic violence facilities in the State of Oklahoma. Next, I have personally been involved in the treatment of battered women, and have also been involved in the analysis of battered women who killed the alleged batterer. And right no I'm involved in four cases of an individual - - of individuals where there's a battering women's syndrome issue: this case for the defense, two other cases where there was a homicide, where I am consultant with the prosecution, the district attorneys, and then another case where I'm working with the district attorneys where there was an individual who was kidnapping a battered woman.

Q. All right. And, Dr. Call, in relation to the battered women's experiences that you've had, have you diagnosed those situations as well, sir?

A. Yes. Do you mean diagnose in terms of using our diagnostic measures?

Q. Yes.

A. Yes.

(Tr.15 2807)

Even the prosecutor stipulated that Dr. Call was an expert in this field. (Tr.15 2808) Petitioner's expert witness carefully explained BWS and how she exhibited signs thought to be symptomatic of the syndrome. (Tr.15 at 2815-22) Dr. Call also told the jury about "traumatic bonding" and how the same explained some of Petitioner's actions. (Tr.15 2823-24) The Petitioner's expert told the jury: "I saw a classic pattern of a battered woman who would - would complain to friends, her office manager, I'm not going to see him again, it's horrible, he's

beating me up, going to doctors, and then getting back together." (Tr.15 2824) Finally, Dr. Call explained that Petitioner's subjective fear, as well as several behaviors "meshed in with the idea of that - - of a battered women syndrome, of that battered woman killing the assailant...". (Tr.15 2840) Dr. Call's final conclusion clearly supported the BWS defense. He said that the Petitioner had been in a long-term battering relationship with the decedent and concluded:

> The defendant's descriptions of the events of the early morning of April 28, 1998, are consistent with other similar reports about the couple's battering relationship, and it's my opinion that the balance of the data supports the conclusion that the defendant was psychotic at the time of the shooting, believed she was in danger, and believed that her use of force was justified.

(Tr.15 at 2851-52)

What damaged Dr. Call's conclusions were the numerous instances in cross-examination where the prosecutor received begrudging admissions that Petitioner's actions were atypical of one suffering BWS. Dr. Call had to admit, for example, that since one of the symptoms of BWS is passiveness and feeling of helplessness, the Petitioner's acts of physically assaulting the decedent at times was inconsistent with passive acts associated with BWS. (Tr.15 at 2928-29) This same admission was garnered based on Petitioner's extremely provocative action of placing a loaded gun to the decedent's head and pulling the trigger, which occurred on April 11, 1998. (Tr.15 2928) The expert also said the Petitioner's admission to the police that, rather than going out the front door she was going to "stay on course", was not indicative of a BWS sufferer, but showed

that she knew she had options. (Tr.15 2931-32) Dr. Call found it significant that the defendant had read books on BWS and he pointed out that killing was not a symptom of BWS; that very few battered women kill. (Tr.15 2940 & 2936). Additionally, the Petitioner was financially independent of the decedent, she had her own home, and she was highly educated, holding a bachelor's degree in science and a master's degree in prosthetics. (Tr.15 2872-72) She and the decedent had no children and owned no joint property. Also atypical was the fact that the Petitioner had a new boyfriend and was admittedly just trying to break up "peacefully" with the decedent. (S.E. 69 at 29 minutes)

In summary, the Petitioner's assertion that her trial attorney failed to "present testimony from a BWS expert" (***Application***, at 23), is patently false and a gross distortion of the trial record. The person she devotes three pages of her Brief to quoting, Dr. Lenora Jordan, is a **psychologist**. (Tr.15 2876-77) Ironically, her expert, Dr. John Call is the only board certified forensic **psychologist** practicing in Oklahoma. (Tr.15 2803) He explained to the jury that he had extensive experience with BWS. (Tr.15 at 2815-22) Petitioner's attorney presented a great deal of BWS expert testimony which, if believed, would have led to a not guilty verdict.

The jury also heard testimony from Dr. Theresa Farrow, the Petitioner's personal psychiatrist, who treated her through a series of twenty (20) sessions. (Tr.15 2994) Dr. Farrow testified that she had personally treated over 100 patients who suffered from BWS and had evaluated several hundred more. ***Id.***

When asked if she had formulated an opinion as to whether the Petitioner showed symptoms she considered consistent with BWS, she stated: "I do not believe she did." (Tr.15 2995) Saying that the Petitioner had probably suffered domestic abuse, Dr. Farrow indicated that not all abused persons fit into a BWS diagnosis, and the Petitioner was one that clearly did not. (Tr.15 at 2996-97)

As if her own personal psychiatrist were not enough to sink her BWS claim, the actions the Petitioner admitted to taking when she shot Mr. Carlton also showed that she was not suffering from BWS. Watching Petitioner's videotaped statement is a chilling reminder that her maniacal desire to 'peacefully' end the relationship bore no semblance to the desperate straits of a battered woman who cannot escape from the clutches of an abusive mate. Petitioner stated, for example, that although she understood people were puzzled that she kept going back to Mr. Carlton, she explained: "But what they don't understand is I tried to make a clear break with him..." (S.E. 69, at 36 minutes) It seems clear that Petitioner's desire to go back to Carlton's home was not rooted in dependence or entrapment, but rather to end this former relationship on 'her terms'.

Petitioner explained further: "My intention was to resolve it [the relationship]." ***Id.***, at 29 minutes. She further stated that she made a choice to shoot him, that she could have left Carlton's home, but staying was the only was she could be sure the relationship end 'peacefully'. ***Id.*** Petitioner said she was there because she thought she could make peace with Carlton; that she could "help him." ***Id.***, at 10 minutes. Asked why did she not just leave, her response

was: "Every time I left before there was no resolution; this time I thought I could make peace with the man." ***Id.***, at 28 minutes. Petitioner also stated that her intention was, that if he got violent with me, "to shoot." ***Id.***, at 17 minutes.

The Petitioner's failure to persuade the jury that gunning down Mr. Carlton was reasonable, was not a result of her attorney failing to put on expert BWS evidence. Rather, it was the overwhelming evidence that the shooting was calculated and intentional. It did not help Petitioner's veracity that she was caught making patently untruthful statements. For example, the Petitioner told police that this was the first time she had used meth, which was proven at trial to be untrue when the defendant said she was a severe drug user and had been since she was a teenager. (Tr.11 2200) In fact, the Petitioner admitted to Dr. Call that she called her drug supplier hours before the shooting, seeking "better dope". (Tr.15 2868) (Other examples of untruthful statements are contained in the State's Response Brief, filed on direct appeal in case number F-1999-927).

In her sixth and final proposition the Petitioner claims that the cumulative evidence of ineffective counsel should persuade this Court to give her relief. However, as there was no error, there can be no accumulation of error. ***Clayton v. State***, 1995 OK CR 3, ¶ 27, 892 P.2d 646, 657. Furthermore, the strong evidence of guilt indicates that even had the attorney acted differently, it clearly would not have changed the outcome of the trial. *See,* ***Robinson****, supra.* In conclusion, for the reasons given herein, the Respondent respectfully requests that this Court deny the Petitioner's Application for Post-Conviction relief.

Respectfully Submitted

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CERTIFICATE OF MAILING

On this 28th day of May, 2004, a true and correct copy of the foregoing was mailed postage prepaid to:

April Rose Wilkens, # 282399
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McLoud, OK 74851-8339

WILLIAM R. HOLMES

APPELLANT'S
EXHIBIT 16

IN THE COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APRIL ROSE WILKENS, PETITIONER,	)	
VS.	)	CASE NO. PC-2003-1092
THE STATE OF OKLAHOMA, RESPONDENT.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JUN 17 2004

MICHAEL S. RICHIE
CLERK

MOTION FOR PERMISSION TO FILE PETITIONER'S REPLY TO STATES RESPONSE TO APPLICATION FOR POST-CONVICTION RELIEF

I ASK THE O.C.C.A. TO PLEASE ALLOW ME TO FILE THE ATTACHED REPLY. ALSO, PLEASE EXCUSE ITS LENGTH BECAUSE I WROTE IT BY HAND AND IT CONTAINS A CONSIDERABLE AMOUNT OF PERTINENT BATTERED WOMAN SYNDROME AUTHORITY.

RESPECTFULLY SUBMITTED,

April Wilkens

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JUN 17 2004
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IN THE COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

APRIL ROSE WILKENS, PETITIONER,	)	
VS.	)	CASE NO. PC-2003-1002
THE STATE OF OKLAHOMA, RESPONDENT.	)	

PETITIONER'S REPLY TO STATE'S RESPONSE TO APPLICATION FOR POST-CONVICTION RELIEF

IN BECHTEL V. STATE, 840 P2d. 1 (OKLA. CRIM. APP. 1992), THE O.C.C.A. HELD THAT EXPERT TESTIMONY AS TO HOW A WOMAN'S "PARTICULAR EXPERIENCES AS A BATTERED WOMAN SUFFERING FROM THE BATTERED WOMAN SYNDROME AFFECTED HER PERCEPTIONS OF DANGER, ITS IMMINENCE, WHAT ACTIONS WERE NECESSARY TO PROTECT HERSELF AND THE REASONABLENESS OF THOSE PERCEPTIONS [IS] RELEVANT AND NECESSARY TO PROVE [HER] DEFENSE OF SELF-DEFENSE." BECHTEL, 840 P2d. AT 10. "MISCONCEPTIONS REGARDING BATTERED WOMEN ABOUND," THE O.C.C.A WROTE, "MAKING IT MORE LIKELY THAN NOT THAT THE AVERAGE JUROR WILL DRAW FROM HIS OR HER OWN EXPERIENCE OR COMMON MYTHS, WHICH MAY LEAD TO A WHOLLY INCORRECT CONCLUSION. THUS, WE BELIEVE THAT EXPERT TESTIMONY ON THE SYNDROME IS NECESSARY TO COUNTER THESE MISCONCEPTIONS." BECHTEL, 840 P2d AT 8. I MAINTAIN THAT MY ATTORNEY DID NOT PRESENT THIS ESSENTIAL EXPERT TESTIMONY AT MY TRIAL; AND THAT THE EXPERT IN MY DEFENSE, DR. JOHN CALL, WAS NOT A BATTERED WOMAN SYNDROME SPECIALIST.

WEBSTER'S DEFINES AN "EXPERT" AS "ONE WITH SPECIAL SKILL OR KNOWLEDGE REPRESENTING MASTERY OF A PARTICULAR SUBJECT," AND EXPOUNDS THAT "EXPERT IMPLIES EXTRAORDINARY PROFICIENCY AND OFTEN CONNOTES KNOWLEDGE AS WELL AS TECHNICAL SKILL." TO BE SURE, DR. CALL'S CREDENTIALS SOUND IMPRESSIVE: HE TESTIFIED TO HIS BEING A MEMBER OF THE BOARD OF DIRECTORS OF THE DEPARTMENT OF MENTAL HEALTH THAT IS RESPONSIBLE FOR ALL STATE CERTIFIED AND CONTRACTED DOMESTIC VIOLENCE FACILITIES IN THE STATE OF OKLAHOMA, AND HE SAID THAT HE HAD BEEN INVOLVED IN THE TREATMENT OF BATTERED WOMEN AND THE ANALYSIS OF BATTERED WOMEN WHO KILLED THE ALLEGED ABUSER. THE TRUTH IS THAT DR. CALL'S DEGREE OF INVOLVEMENT IN THE TREATMENT OF BATTERED WOMEN DOES NOT AMOUNT TO EXPERTISE IN THE FIELD OF BATTERED WOMAN SYNDROME. DR. CALL WAS NOT ESPECIALLY EXPERIENCED WORKING WITH OR STUDYING BATTERED WOMEN, AND HE WAS SIMPLY NOT REGARDED AS A BATTERED WOMAN SYNDROME EXPERT.

BECAUSE DR. CALL DID NOT POSSESS A TRUE EXPERT'S EXTRAORDINARY UNDERSTANDING OF BATTERED WOMEN AND OF THE BATTERED WOMAN SYNDROME, HE WAS UNABLE TO

EFFECTIVELY COUNTER THE STATE'S NUMEROUS EFFORTS TO USE COMMON MISCONCEPTIONS ABOUT BATTERED WOMEN AGAINST ME. FOR INSTANCE, THE STATE ALLEGED THAT I WAS NOT A TYPICAL BATTERED WOMAN BECAUSE I WAS FINANCIALLY INDEPENDENT OF TERRY, HAD MY OWN HOME, AND WAS COLLEGE-EDUCATED. IN THE BATTERED WOMAN SYNDROME, DR. LENORE WALKER, THE FOREMOST AUTHORITY ON BATTERED WOMAN SYNDROME, WRITES:

> IT IS INTERESTING TO NOTE THAT MANY OF THESE WOMEN WERE WELL-EDUCATED, HELD RESPONSIBLE JOBS, AND CAME FROM FINANCIALLY STABLE FAMILIES.... IT WAS LIKELY THAT THE BATTERER HAD THE POWER IN SOCIAL AND FINANCIAL AREAS, WHETHER OR NOT THE WOMAN HAD HER OWN ACCESS TO MONEY. WALKER, LENORE E.A., THE BATTERED WOMAN SYNDROME, 2ND. ED. (NEW YORK: SPRINGER PUBLISHING COMPANY, 2000), 35-36.

THE STATE ALSO ASSERTED THAT MUTUAL COMBAT EXISTED BETWEEN TERRY AND ME. IT IS MYSTIFYING THAT THE STATE CONTINUES TO PURSUE THIS ARGUMENT EVEN IN THE FACE OF INDISPUTABLE EVIDENCE TO THE CONTRARY — i.e., THE AUDIOTAPE RECORDING OF CONVERSATIONS BETWEEN TERRY AND ME. THE FOLLOWING IS AN EXCERPT FROM THAT AUDIOTAPE:

> APRIL: "I SUPPOSE THAT EVERYBODY DOES THINGS THAT ARE AGGRAVATING TO THE OTHER PERSON. I JUST DON'T UNDERSTAND THE NEED FOR PHYSICAL VIOLENCE."

TERRY: "I SEE, SO IT'S OKAY FOR YOU.. TO PULL OUT THE STOPS AND DO EVERYTHING THAT YOU CAN DO TO PISS ME OFF BUT YOU KNOW AS SOON AS I YOU KNOW REACT IN THE SAME WAY AND PULL OUT THE STOPS AND DO THE THINGS I CAN DO TO HURT YOU WHAT'S THE DIFFERENCE, APRIL? YOU KNOW, WHAT'S THE DIFFERENCE? YOU'RE FUCKING WITH ME. I'M FUCKING WITH YOU. YOU UNDERSTAND?..."

THE AUDIOTAPE RECORDING CLEARLY PROVES THAT MUTUAL COMBAT DID NOT EXIST BETWEEN TERRY AND ME, AND THAT TERRY PHYSICALLY ASSAULTED ME. HERE IS ANOTHER EXCERPT:

TERRY: "....I'M NOT SATISFIED WITH THIS BECAUSE WHAT YOU'RE GOING TO DO IS GO TO A VICTIMS GROUP, OKAY, AND YOU'RE ALL GOING TO SIT THERE AND TELL EACHOTHER IT'S NOT YOUR FAULT THAT THIS HAPPENED TO YOU AND PAT EACHOTHER ON THE BACK AND FEEL SORRY FOR EACHOTHER AND, YOU KNOW, IT'S GOING TO BE WHAT A BASTARD I AM, OKAY, AND YOU'RE NOT GOING TO BE WORKING ON YOUR OWN PROBLEMS, OKAY? YOU'RE NOT GOING TO WORK ON WHY YOU FEEL IT IS NECESSARY TO DO THOSE PETTY LITTLE THINGS THAT MAKE ME ANGRY AND YOU WOULD STILL DO THEM, YOU KNOW, IF I DIDN'T DO THE VIOLENCE, IF THE VIOLENCE THING WAS NOT EVEN A FACTOR...."

TERRY CARLTON WAS A BATTERER AND A RAPIST WITH A LONG HISTORY OF ABUSING WOMEN INCLUDING ME AND HIS EX-WIFE, SHERRY, WHO ALSO OBTAINED A VICTIM'S PROTECTIVE ORDER AGAINST HIM. WHAT'S MORE, TERRY REPEATEDLY LIED TO OR OTHERWISE MANIPULATED AUTHORITIES, AND HE WENT TO ASTONISHING LENGTHS TO AVOID RESPONSIBILITY FOR HIS VIOLENT BEHAVIOR.

IN SPITE OF TERRY'S WELL DOCUMENTED HISTORY OF VIOLENCE AGAINST WOMEN AND IN DEFIANCE OF AUDIOTAPE RECORDED EVIDENCE WHEREIN TERRY FLAGRANTLY ADMITS THAT HE BEAT AND RAPED ME — AND THAT HE ALONE WAS THE PERPETRATOR OF VIOLENCE AND AGGRESSION BETWEEN THE TWO OF US — THE STATE SHAMELESSLY PERSISTS IN ITS OWN ASTONISHING EFFORTS TO NEGATE TERRY'S VIOLENT BEHAVIOR. EVEN WORSE, THE STATE WOULD HAVE THIS COURT BELIEVE THAT TERRY WAS AN UNFORTUNATE VICTIM OF DOMESTIC VIOLENCE WHO SOUGHT PROTECTION FROM ME.

THE STATE ARGUES THAT MY ATTORNEY'S FAILURE TO INVESTIGATE AND PRESENT EVIDENCE OF THE NUMEROUS CALLS TO 911 THAT I MADE SEEKING PROTECTION FROM TERRY WAS STRATEGIC BECAUSE "THERE WERE LIKELY COMPELLING CALLS THE DECEDENT MADE TO SEEK PROTECTION FROM THE PETITIONER, SUCH AS THE APRIL 11, 1998 INCIDENT, WHERE THE POLICE TOOK THE PETITIONER AWAY AFTER SHE POINTED A LOADED GUN AT MR. CARLTON AND PULLED THE TRIGGER." RESPONSE AT 3-4. THIS ARGUMENT IS GROSSLY MISLEADING AND IS JUST ONE EXAMPLE OF THE STATE'S COPIOUS USE OF MISSTATED FACTS AND DISTORTED TRUTHS IN ITS RESPONSE. MY TRIAL TRANSCRIPTS REFLECT THAT IT IS UNCONTROVERTED THAT I — NOT TERRY — MADE THE CALL FOR

15 FACTORS THAT STAND OUT AS ADDING TO THE HIGH RISK OF LETHALITY":

LETHALITY CHECKLIST

- FREQUENCY OF VIOLENT INCIDENTS IS ESCALATING
- FREQUENCY OF SEVERITY OF VIOLENCE IS ESCALATING
- MAN THREATENS TO KILL WOMAN OR OTHERS
- FREQUENCY OF ALCOHOL AND OTHER DRUG ABUSE IS INCREASING
- MAN THREATENS TO KIDNAP OR HARM CHILDREN
- MAN FORCES OR THREATENS SEX ACTS
- SUICIDE ATTEMPTS
- WEAPONS AT HOME OR EASILY ACCESSIBLE
- PSYCHIATRIC IMPAIRMENT OF MAN OR WOMAN
- CLOSE TO EACHOTHER AT WORK AND AT HOME
- MAN'S NEED FOR CONTROL AROUND CHILDREN
- CURRENT LIFE STRESSES
- MAN'S PRIOR CRIMINAL HISTORY
- MAN'S ATTITUDE TOWARDS VIOLENCE
- NEW RELATIONSHIP FOR MAN OR WOMAN

WALKER, LENORE E.A., THE BATTERED WOMAN SYNDROME, 2nd ED. (NEW YORK: SPRINGER PUBLISHING COMPANY, 2000), 48-49, ALSO CITING SONKIN, D.J., & WALKER, L.E.A. (1995). JURIS MONITOR STABILIZATION AND EMPOWERMENT PROGRAMS. DENVER, CO: ENDOLOR COMMUNICATIONS.

THIS LETHALITY CHECKLIST IS ALMOST A PERFECT PICTURE OF MY RELATIONSHIP WITH TERRY.

"PSYCHOTIC" OR NOT. "MENTALLY ILL" OR NOT. IRRESPECTIVE OF HOWEVER ANYONE LABELED ME, TERRY WAS A VERY REAL AND INTERMINABLE THREAT TO MY LIFE. WHEN I SHOT TERRY, I HAD EVERY REASON TO BELIEVE THAT I WAS IN IMMINENT DANGER AND THAT I HAD TO SHOOT HIM TO PROTECT MYSELF (PLEASE NOTE: ALTHOUGH THE STATE MAINTAINS THAT I SHOULD NOT HAVE SHOT TERRY BECAUSE HE WAS UNARMED, TERRY WAS 6' TALL AND WEIGHED 185 POUNDS, WHEREAS I AM 5'7" TALL AND I WEIGH 110 POUNDS). DR. CALL DID NOT EXPLAIN THE REASONABLENESS OF MY POINT OF VIEW AT THE TIME OF THE SHOOTING TO MY JURY. I MAINTAIN THAT DR. CALL FAILED

TO EXPLAIN THE REASONABLENESS OF MY POINT OF VIEW BECAUSE HE HIMSELF DID NOT UNDERSTAND IT, AND I ASSERT THAT HE DID NOT UNDERSTAND BECAUSE HE WAS NOT TRULY A QUALIFIED EXPERT ON BATTERED WOMAN SYNDROME. IN FACT, IT IS MY UNDERSTANDING THAT MY CASE WAS THE FIRST BATTERED WOMAN SYNDROME CASE IN WHICH DR. CALL HAD EVER WORKED AS A CONSULTANT FOR THE DEFENSE.

MY DEFENSE IS SELF-DEFENSE. THE KEY TO MY DEFENSE IS THE REASONABLENESS OF MY POINT OF VIEW AT THE TIME OF THE SHOOTING; WHICH, BECAUSE I WAS A BATTERED WOMAN SUFFERING FROM BATTERED WOMAN SYNDROME, CAN ONLY BE UNDERSTOOD WITHIN THE FRAMEWORK OF THE SYNDROME. IN BECHTEL, THIS COURT SAID THAT EXPERT TESTIMONY AS TO HOW A WOMAN'S "PARTICULAR EXPERIENCES AS A BATTERED WOMAN SUFFERING FROM THE BATTERED WOMAN SYNDROME AFFECTED HER PERCEPTIONS... AND THE REASONABLENESS OF THOSE PERCEPTIONS [IS] RELEVANT AND NECESSARY TO PROVE [HER] DEFENSE OF SELF-DEFENSE." BECHTEL V. STATE, 840 P.2d. 1, 10 (OKLA. CRIM. APP. 1992). (EMPHASIS ADDED). SO, ALTHOUGH AN EXPERT CANNOT SPECIFICALLY TESTIFY TO THE ULTIMATE FACT OF WHETHER A BATTERED WOMAN'S FEAR WAS REASONABLE, EXPERT TESTIMONY EXPLAINING THE REASONABLENESS OF HER FEAR IS ESSENTIAL TO PROVE HER DEFENSE OF SELF-DEFENSE; AND THE POINT IS, ULTIMATELY, THAT THIS DID NOT HAPPEN AT MY TRIAL.

IN THE END, WHETHER OR NOT THIS COURT DETERMINES IF DR. CALL WAS A QUALIFIED EXPERT ON BATTERED WOMAN SYNDROME, MY ATTORNEY FAILED TO PROVIDE EXPERT TESTIMONY EXPLAINING THE REASONABLENESS OF MY FEAR AT THE TIME OF THE SHOOTING; AND THEREBY, LIKE THE ATTORNEY IN PAINE V. MASSIE, HE "FAILED TO DO SOMETHING THAT THE OCCA SAID WAS NECESSARY TO MOUNT AN EFFECTIVE SELF-DEFENSE CLAIM GIVEN THE JURY'S LIKELY MISCONCEPTIONS ABOUT BWS." PAINE V. MASSIE, 339 F.3d 1194 (10th CIR. 2003). IN PAINE, THE 10th CIRCUIT COURT OF APPEALS HELD:

> GIVEN THE OCCA'S EXTENSIVE FOCUS ON THE "KEY" REASONABLENESS COMPONENT OF A SELF-DEFENSE CLAIM IN A BWS CASE, BECHTEL, 840 P.2d AT 10-11, COUNSEL'S FAILURE TO OFFER EXPERT BWS TESTIMONY TO PROVIDE CONTEXT FOR THE JURY ON THE REASONABLENESS OF MS. PAINE'S SUBJECTIVE FEAR AMOUNTS TO OBJECTIVELY UNREASONABLE PERFORMANCE. PAINE V. MASSIE, 339 F.3d 1194 (10th CIR. 2003) (EMPHASIS ADDED).

LIKEWISE, I BELIEVE THAT MY ATTORNEY'S PERFORMANCE WAS OBJECTIVELY UNREASONABLE; AND THAT IF NOT FOR HIS ERRORS, THERE EXISTS AT THE VERY LEAST A REASONABLE PROBABILITY THAT THE OUTCOME OF MY TRIAL WOULD HAVE BEEN DIFFERENT.

REGARDING MY TRIAL ATTORNEY'S FAILURE TO PRESENT TESTIMONY FROM CLAIRE EAGAN, THE STATE WRITES IN ITS RESPONSE THAT "BRINGING IN AN ATTORNEY WHO HELPED [ME] OBTAIN A VPO WOULD ALLOW THE PROSECUTOR TO REMIND THE JURY THAT [I] ABANDONED THE SAME A SHORT TIME LATER." RESPONSE AT 3. IN REALITY, HAD

MY ATTORNEY EVER CONTACTED CLAIRE EAGAN OR MIKE COCKE, HE WOULD HAVE DISCOVERED NOT ONLY THE AUDIOTAPE BUT ALSO THAT THEIR TESTIMONY WOULD COUNTER SUCH MISCONCEPTIONS— OFTEN EXPLOITED BY THE PROSECUTION — THAT: 1) IF THE ABUSE HAD BEEN THAT BAD AND I HAD REALLY BEEN IN DANGER, I WOULD HAVE FOLLOWED THROUGH WITH THE VICTIM'S PROTECTIVE ORDERS; 2) THE ORDERS WOULD HAVE DETERRED TERRY; AND 3) THE POLICE COULD AND WOULD HAVE PROTECTED ME FROM TERRY.

JUST AS THE STATE DOES IN ITS RESPONSE, THE PROSECUTION AT MY TRIAL MADE MUCH OF THE FACT "THAT THE THREE TIMES [I] SOUGHT VPO'S, [I] NEVER FOLLOWED UP AND THE ORDERS WERE DISMISSED." RESPONSE AT 3. DURING CLOSING ARGUMENTS, THE PROSECUTION TOLD MY JURY THAT IF I HAD ALLOWED AUTHORITIES TO ASSIST ME — BY FOLLOWING THROUGH ON COURT ACTION NEEDED TO MAKE THE EMERGENCY PROTECTIVE ORDERS PERMANENT — TERRY "MIGHT HAVE BEEN PUNISHED, AND HE MIGHT STILL BE ALIVE." (MIND YOU, THIS WAS SAID TO MY JURY EVEN THOUGH TERRY HAD THE BENCH WARRANT FOR HIS ARREST AT THE TIME OF THE SHOOTING, AND POLICE HAD PREVIOUSLY FAILED TO ENFORCE IT — AS OUTLINED IN PROPOSITION TWO, MY JURY NEVER KNEW ABOUT THIS WARRANT.) RATHER THAN ALLOWING THE PROSECUTORS TO EXPLOIT THE FACT THAT

I DID NOT FOLLOW THROUGH WITH THE PROTECTIVE ORDER— SOMETHING THE PROSECUTORS DID REPEATEDLY ANYWAY— BRINGING IN CLAIRE EAGAN TO TESTIFY WOULD HAVE GIVEN JURORS PRECIOUS INSIGHT AS TO THE REAL REASON WHY I DID NOT PURSUE THE PROTECTIVE ORDER: I WAS AFRAID TO. AS MS. EAGAN WRITES IN HER AFFIDAVIT, SHE APPEARED FOR THE PERMANENT PROTECTIVE ORDER HEARING, BUT I DID NOT. WHEN SHE CALLED ME TO ASK WHY, I TOLD HER HOW TERRY HAD CALLED ME THE NIGHT BEFORE — IN VIOLATION OF THE EXISTING EMERGENCY PROTECTIVE ORDER — AND LET ME KNOW THAT HE WOULD BE AT THE HEARING. I WAS JUST AFRAID, AS MS. EAGAN RELATES THAT I TOLD HER.

MY FEAR WAS NOT UNFOUNDED OR UNUSUAL. WHENEVER I SOUGHT HELP FROM AUTHORITIES — INCLUDING THE THREE TIMES I OBTAINED EMERGENCY PROTECTIVE ORDERS AND THE ONE TIME THAT TERRY WAS ARRESTED AT MY HOME WITH THE LOADED PISTOL — TERRY ONLY BECAME MORE ANGRY AND THREATENING. AS DR. WALKER EXPLAINS, THIS IS NOT AT ALL UNCOMMON:

> SOME [BATTERED WOMEN] HAVE FEARED THAT THE BATTERER WILL BECOME MORE VIOLENT IF ARRESTED AND CHARGES ARE FILED. RESEARCH SHOWS THAT MOST ABUSERS DO LEAVE THE WOMAN ALONE, AT LEAST WHILE CHARGES ARE PENDING, ONCE THEY KNOW THEY HAVE NO POWER TO INFLUENCE THE STATE ATTORNEY (SHERMAN & BERK, 1984). RESTRAINING ORDERS ARE PROTECTION FOR MOST WOMEN WHO GET THEM (MELOY, COWETT, (PARKER, HOFLAND, & FRIEDLAND, 1997) ALTHOUGH

OBVIOUSLY THOSE WHO ENGAGE IN STALKING BEHAVIOR WON'T BE DETERRED BY COURT ORDERS (BURGESS ET. AL, 1997; DEBECKER, 1997; MELOY ET AL., 1997; WALKER & MELOY, 1998)....

IT IS A REAL NO-WIN SITUATION FOR SOME BATTERED WOMEN. THEY WILL CONTINUE TO BE BATTERED IF THEY DO NOT GET HELP AND THEY WILL BE HURT WORSE IF THEY DO! THIS IS CRITICAL FOR THOSE WHO WORK WITH BATTERED WOMEN TO UNDERSTAND!

WALKER, LENORE E.A., THE BATTERED WOMAN SYNDROME, 2nd ED., (NEW YORK: SPRINGER PUBLISHING COMPANY, 2000), 198; ALSO CITING SHERMAN, L.W., & BERK, R.A. (1984) "THE SPECIFIC DETERENT EFFECTS OF ARREST FOR DOMESTIC ASSAULT." THE SOCIOLOGICAL REVIEW, 49, 261-271; BURGESS, A.W. ET.AL. (1997). "STALKING BEHAVIORS WITHIN DOMESTIC VIOLENCE." JOURNAL OF FAMILY VIOLENCE, 12, 389-403; MELOY, J.R. ET AL. (1997) "DOMESTIC PROTECTIVE ORDERS AND THE PREDICTION OF CRIMINALITY AND VIOLENCE TOWARDS PROTECTEES." PSYCHOTHERAPY. 34; AND WALKER, L.E.A., & MELOY, J.R. (1998). "STALKING AND DOMESTIC VIOLENCE." IN J.R. MELOY (ED.), THE PSYCHOLOGY OF STALKING: CLINICAL AND FORENSIC PERSPECTIVES (PP. 139-162). SAN DIEGO, CA: ACADEMIC PRESS. (EMPHASIS ADDED).

TERRY WAS ESPECIALLY DANGEROUS BECAUSE HE HAD A SENSE OF ENTITLEMENT — THAT HE WAS ABOVE THE LAW — AND BECAUSE HE WAS A STALKER. WHEN ONE OF MY NEIGHBORS, CARL HUGHES, CAUGHT TERRY TRYING TO SNEAK INTO MY HOUSE IN THE MIDDLE OF THE NIGHT, MR. HUGHES TESTIFIED THAT TERRY REBUFFED HIM WITH THE QUESTION "DO YOU KNOW WHO I AM.?!" ANOTHER NEIGHBOR, GLENDA McCARLEY, TESTIFIED TO WITNESSING SO MANY OCCASIONS WHEN TERRY LEFT MY HOME "JUST IN TIME" TO AVOID OFFICERS THAT "IT WAS ALMOST A JOKE AMONG THE NEIGHBORS ABOUT HOW HE HAD THE TIMING DOWN." THE OFFICER WHO ARRESTED TERRY AT MY HOME WITH THE LOADED GUN TESTIFIED THAT HE HAD BEEN TO MY HOUSE

ABOUT FOUR TIMES BEFORE AND THAT WAS THE FIRST TIME HE HAD FOUND BOTH OF US THERE. EVEN ON THAT OCCASION, 21 FEBRUARY 1998, OFFICER TROY DEWITT TESTIFIED THAT HE CAUGHT TERRY WHILE HE WAS TRYING TO LEAVE AND THAT TERRY WAS UPSET ABOUT BEING ARRESTED. AS OUTLINED IN PROPOSITION TWO, TERRY HAD SO LITTLE REGARD FOR THE LAW THAT HE DID NOT SHOW UP IN COURT ON THE FEBRUARY 1998 GUN CHARGE, A WARRANT WAS ISSUED FOR HIS ARREST, AND HE SOMEHOW MANAGED TO CIRCUMVENT BEING ARRESTED ON THE WARRANT AT LEAST TWICE JUST WEEKS BEFORE THE SHOOTING.

SO, WHILE THERE WERE TIMES THAT AUTHORITIES DID HELP ME — SUCH AS THE 21 FEBRUARY 1998 INCIDENT — THERE WERE ALSO NUMEROUS INCIDENTS WHEN THEY DID NOT — SUCH AS THE TWO TIMES IN APRIL 1998 WHEN DIFFERENT OFFICERS DID NOT ENFORCE THE BENCH WARRANT FOR TERRY'S ARREST. PLEASE SEE APPLICATION AT 16-17. THE STATE CLAIMS THAT THE OFFICERS WERE "LIKELY UNAWARE" OF THE WARRANT, AND THAT MY ATTORNEY'S FAILURE TO PRESENT THE WARRANT AT MY TRIAL "APPEARS TO BE SOUND TRIAL STRATEGY." RESPONSE AT 5, 7. THIS ARGUMENT IS ABSURD, BECAUSE THE ISSUE IS NOT SO MUCH WHAT THE OFFICERS WERE OR WERE NOT AWARE OF AS HOW IT LOOKED TO ME AND WHETHER OR NOT MY PERSPECTIVE

WAS REASONABLE. THE WARRANT FOR TERRY'S ARREST — AND THE FACT THAT OFFICERS TWICE FAILED TO ENFORCE IT — IS ABSOLUTELY ESSENTIAL TO PROVE THAT MY BELIEF THAT I COULD NOT RELY ON LAW ENFORCEMENT TO PROTECT ME FROM TERRY WAS REASONABLE. THIS WAS SUCH A BIG ISSUE AT MY TRIAL, AND HERE AGAIN DR. CALL'S UNINFORMED TESTIMONY HURT MY DEFENSE. AS THE STATE WRITES IN ITS RESPONSE, "IMPORTANTLY, EVEN HER OWN EXPERT WITNESS, DR. CALL, CONCEDED THAT IN THIS CASE, THE POLICE TOOK THE PETITIONER SERIOUSLY AND SAYS THE LEGAL SYSTEM DID NOT FAIL TO PROTECT HER; THE FAILURE WAS HER OWN CHOICE NOT TO FOLLOW UP. (TR. 15, 2862-63)." RESPONSE AT 6. MY PURPOSE IN RAISING THIS ISSUE IS NOT TO ASSIGN BLAME; IT IS TO PROVIDE PERSPECTIVE — MY PERSPECTIVE — AND ESTABLISH THE REASONABLENESS OF THAT PERSPECTIVE. IN TRUTH, AT THE TIME OF THE SHOOTING, I FELT JUST LIKE MOST BATTERED WOMEN DO ABOUT CALLING THE POLICE FOR HELP. AS DR. WALKER WRITES:

> [A]LMOST ALL OF THE WOMEN WHO HAD CALLED [THE POLICE] STATED THAT THE POLICE HAD PROVIDED ABSOLUTELY NO HELP AT ALL. IN FACT THEY OFTEN MADE THINGS WORSE; ONCE THEY WERE GONE, AFTER SOME FEEBLE AND INEFFECTIVE ATTEMPTS TO PLACATE THE BATTERER AND AFTER THE BATTERER SAW THAT NOTHING HAD BEEN DONE TO STOP HIM, HE OFTEN CONTINUED HIS ABUSE WITH RENEWED VIOLENCE. WALKER, LENORE E. TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS (NEW YORK: HARPERPERENNIAL, 1990), 63. (EMPHASIS ADDED).

IN MY MIND, THE POLICE SHOULD HAVE ARRESTED TERRY WHEN THEY ENCOUNTERED US IN APRIL 1998. THAT TERRY REALLY DID HAVE THE BENCH WARRANT FOR HIS ARREST AT THAT TIME PROVES THAT I WAS RIGHT. TRUE OR NOT, NONE OF THE UGLY THINGS THAT THE STATE HAS TO SAY ABOUT ME IN IT'S RESPONSE — e.g. ABOUT DRUGS, MENTAL HEALTH, ALLEGED MUTUAL COMBAT, ETC. — EXCUSE THOSE OFFICERS' FAILURE TO ENFORCE THE WARRANT FOR TERRY'S ARREST.

ATTORNEY MIKE COOKE'S TESTIMONY WOULD ALSO HAVE SUPPORTED THE REASONABLENESS OF MY BELIEF THAT I COULD NOT RELY ON LAW ENFORCEMENT TO PROTECT ME FROM TERRY. IN HIS AFFIDAVIT, MR. COOKE RELATES A DECEMBER 1997 INCIDENT INVOLVING TERRY. MR. COOKE WRITES THAT ON THIS OCCASION, I WAS "PANICKED AND FRANTIC" WHEN I CALLED HIM FOR HELP. AFTER HE ARRIVED AT MY HOME, HE TOLD ME THAT HE WAS GOING TO CALL THE POLICE, AND I TOLD HIM THAT THEY "WOULD DO NOTHING." JUST AS I SAID THEY WOULD, THE POLICE ARRIVED AND DID NOTHING — EVEN AFTER MR. COOKE EXPLAINED TO AN OFFICER WHAT HE "KNEW ABOUT THE VIOLENT NATURE AND HISTORY" OF TERRY'S AND MY RELATIONSHIP. AS MR. COOKE WRITES, THIS IS HOW THAT OFFICER RESPONDED:

> THE OFFICER INDICATED THAT THEY HAD BEEN CALLED TO HER RESIDENCE "SEVERAL TIMES BEFORE." HE ASKED ME SEVERAL TIMES WHY SHE HAD CALLED A LAWYER. I OBSERVED THE POLICE OFFICER TO BE FAIRLY DISMISSIVE OF MS. WILKENS'S CONCERNS, AND TO MY KNOWLEDGE, NO FURTHER ACTION WAS

TAKEN BY THE POLICE REGARDING THIS MATTER. Michael Cooke, Affidavit in Appendix of Supporting Documents, Application at 34.

NOW, I WILL ADDRESS THE STATE'S LAST-DITCH EFFORT TO PERSUADE THIS COURT — AS IT DID MY JURY — THAT EVEN THOUGH I "HAD PROBABLY SUFFERED DOMESTIC ABUSE, ... NOT ALL ABUSED PERSONS FIT INTO A BWS DIAGNOSIS, AND [I] WAS ONE THAT CLEARLY DID NOT." RESPONSE AT 14. THE STATE WRITES IN ITS RESPONSE:

> THE JURY ALSO HEARD TESTIMONY FROM DR. THERESA FARROW, THE PETITIONER'S PERSONAL PSYCHIATRIST.... WHEN [DR. FARROW WAS] ASKED IF SHE HAD FORMULATED AN OPINION AS TO WHETHER THE PETITIONER SHOWED SYMPTOMS SHE CONSIDERED CONSISTENT WITH BWS, SHE STATED: "I DO NOT BELIEVE SHE DID." RESPONSE AT 13-14.

WHAT THE STATE DOES NOT TELL YOU — EVEN THOUGH IT IS IN THE TRIAL RECORD — IS THAT FIRST AND FOREMOST, DR. FARROW WAS TERRY'S PSYCHIATRIST. TERRY WAS SEEING DR. FARROW FOR DEPRESSION, AND HE DEVELOPED SUCH A GOOD RAPPORT WITH HER THAT HE EVENTUALLY WANTED ME TO SEE HER, TOO. AND SO I DID, BUT ALWAYS WITH THE UNDERSTANDING THAT TERRY CAME FIRST. WHEN I BEGAN TO SERIOUSLY DRAW AWAY FROM TERRY, I STOPPED SEEING DR. FARROW AS WELL; AND DR. FARROW HAD NO CONTACT WITH ME AT ALL DURING THE MONTHS OF MY FINAL SEPARATION FROM TERRY. AT ANY RATE, FOR THE RECORD IN THIS APPEAL, I WAS ABSOLUTELY ASTONISHED BY DR. FARROW'S TESTIMONY AT MY TRIAL BECAUSE I VIVIDLY RECALL HER TELLING ME DURING ONE OF OUR SESSIONS THAT I WAS A "CLASSIC BATTERED WOMAN." BUT WHO WOULD BELIEVE ME?!

AND THAT BRINGS ME BACK TO THE AUDIOTAPE: THIS RECORDING OF CONVERSATIONS BETWEEN TERRY AND ME IS THE ONLY EVIDENCE THAT PROVES — BEYOND ANY DOUBT WHATSOEVER — THAT I TOLD THE TRUTH; BUT EVEN THOUGH I TOLD THE TRUTH, MY DEFENSE COULD NOT WITHSTAND THE PROSECUTION'S MISGUIDED ATTACKS ON MY CREDIBILITY. THIS IS WHY I ALSO RAISED THE ISSUE OF EXPERT TESTIMONY.

IN EVERY RESPECT, THE EXCULPATORY EVIDENCE THAT I PRESENTED IN MY APPLICATION IS NOTHING SHORT OF EXTRAORDINARY; BUT BECAUSE THIS EVIDENCE WAS NOT PRESENTED AT MY TRIAL, THE PROSECUTION WAS ABLE TO EXPLOIT VIRTUALLY EVERY MISCONCEPTION GOING ABOUT BATTERED WOMEN TO OBTAIN A CONVICTION IN MY CASE — AND PROSECUTORS USED MY OWN SO-CALLED BATTERED WOMAN-SYNDROME EXPERT TO DO THIS. IN PLAIN, UNVARNISHED ENGLISH, WHAT THE PROSECUTION DID WAS PAINT ME UP AS A VIOLENT, SADOMASOCHISTIC, SOCIOPATHIC, DRUG-ADDLED, WORTHLESS, LYING, COLD-BLOODED, CALCULATING MURDERER. THAT IS WHAT HAPPENED AT MY TRIAL, IT WAS A TERRIBLE INJUSTICE, AND THERE CAN BE NO MINIMIZING IT OR GLOSSING IT OVER WITH ELOQUENT DISCOURSE.

THE TRUTH IS THAT I WAS A BATTERED WOMAN.

IN BECHTEL, THIS COURT RECOGNIZED THAT "[M]ISCONCEPTIONS REGARDING BATTERED WOMEN ABOUND,..." AND SAID, "[W]E BELIEVE THAT EXPERT TESTIMONY ON THE SYNDROME IS NECESSARY TO COUNTER THESE MISCONCEPTIONS." BECHTEL, 840 2d. AT 8. IN MY CASE, YOU CAN SEE AGAIN HOW RIGHT YOU ARE; YOU CAN SEE HOW FAR THE PROSECUTION WILL GO TO EXPLOIT THOSE MISCONCEPTIONS, MAKING EXPERT TESTIMONY ALL-THE-MORE ESSENTIAL; AND YOU CAN SEE WHY THAT EXPERT TESTIMONY NEEDS TO BE GIVEN BY SOMEONE WHO IS TRULY A BATTERED WOMAN SYNDROME EXPERT. A BATTERED WOMAN DEFENDANT NEEDS TO BE REPRESENTED BY AN EXPERT WITH TRULY EXTENSIVE EXPERIENCE WORKING WITH BATTERED WOMEN — AN EXPERT WHO GENUINELY UNDERSTANDS THE COMPLICATED REALITY OF BATTERED WOMEN. AS DR. WALKER EXPLAINS:

> IT IS ESSENTIAL THAT WE LEARN TO RECOGNIZE BATTERED WOMAN SYNDROME FOR WHAT IT IS: A TERRIFIED HUMAN BEING'S NORMAL RESPONSE TO AN ABNORMAL AND DANGEROUS SITUATION. PSYCHIATRISTS AND OTHER HELPING PROFESSIONALS TEND TO CONFUSE THE EFFECTS OF DOMESTIC ABUSE WITH "MASOCHISM," "BORDERLINE PERSONALITY DISORDER," OR ANY NUMBER OF OTHER INAPPLICABLE DIAGNOSES. <u>THOSE INVOLVED IN DIAGNOSTIC PROCEDURES MUST REMEMBER THAT, IN THE CASE OF BATTERED WOMEN, LIVES DEPEND UPON PROPER, KNOWLEDGEABLE, AND ACCURATE EVALUATIONS AND CONCLUSIONS.</u>
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> WE MUST ALSO BREAK THROUGH OUR DENIAL ABOUT THE SEVERITY OF THE SADISTIC MANIPULATION AND PSYCHOLOGICAL CONTROL — AMOUNTING, IN SOME CASES, TO REAL BRAINWASHING — THAT A BATTERER MAY EXERT OVER A BATTERED WOMAN....
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> WHEN FREE, ONCE AND FOR ALL, OF THE BATTERING CIRCUMSTANCES, MOST OF THESE WOMEN CEASE TO MANIFEST ANY SO-CALLED BEHAVIORAL

DISTURBANCES OR PERSONALITY DISORDERS, A FACT THAT PROVES, TO THIS PROFESSIONAL, AT ANY RATE, THAT THEIR PREVIOUSLY ABNORMAL BEHAVIOR WAS DIRECTLY CAUSED BY THEIR VICTIMIZATION. WHEN THEY ARE NO LONGER VICTIMIZED, THE BIZARRE BEHAVIOR DISAPPEARS....

NOT ENOUGH IS SAID...ABOUT THE ABSOLUTELY "CRAZY-MAKING" BEHAVIOR OF THE BATTERER....

ORGANIZED PSYCHIATRY, IN GENERAL, HAS DISPLAYED AN APPALLING IGNORANCE ABOUT THE PSYCHOLOGY OF WOMEN IN GENERAL, AND OF BATTERED WOMEN IN PARTICULAR. WALKER, LENORE E., TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS (NEW YORK: HARPERPERENNIAL, 1990), 188-189. (EMPHASIS ADDED).

CLINICAL PSYCHOLOGY, THE BRANCH OF PSYCHOLOGY IN WHICH MENTAL DISORDERS ARE STUDIED, EXPLAINS ONLY A VERY SMALL PART OF THE FIELD OF HUMAN BEHAVIOR, ALTHOUGH IT IS THIS PART OF PSYCHOLOGY WITH WHICH THE GENERAL PUBLIC IS MOST FAMILIAR. THIS FACT CAN BE A PROBLEM WHEN PROFESSIONALS WITH NO EXPERTISE IN THE FIELD OF BATTERED WOMEN, BUT WITH IMPRESSIVE PROFESSIONAL PSYCHOLOGICAL OR PSYCHIATRIC CREDENTIALS, TESTIFY IN A COURT OF LAW, AND IT IS ONE REASON WHY ONLY A QUALIFIED EXPERT WITNESS SHOULD TESTIFY IN ANY TRIAL INVOLVING A BATTERED WOMAN WHO KILLS. WALKER, LENORE E., TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS (NEW YORK: HARPERPERENNIAL, 1990), 169. (EMPASIS ADDED).

* THE INFORMED EXPERT WITNESS IS THE ONLY PERSON, IN THESE CASES, QUALIFIED TO POINT OUT THAT THE PSYCHOLOGICAL REALITY OF THESE WOMEN JUSTIFIES THEIR ACTIONS. THEIR STATE OF MIND MEETS THE REQUIREMENT OF REASONABLE PERCEPTION. BATTERED WOMEN WHO KILL DO SO BECAUSE IT IS THE ONLY REMAINING WAY THEY CAN SEE OUT OF A PHYSICALLY LIFE-THREATENING AND EMOTIONALLY AND PSYCHOLOGICALLY UNTENABLE CIRCUMSTANCE. WALKER, LENORE E., TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS (NEW YORK: HARPERPERENNIAL, 1990), 267. (EMPHASIS ADDED)

* AT MY TRIAL, RATHER THAN POINT OUT THAT THE PSYCHOLOGICAL REALITY OF BATTERED WOMEN JUSTIFIES THEIR ACTIONS, "DR. CALL... POINTED OUT THAT KILLING WAS NOT A SYMPTOM OF BWS; THAT VERY FEW BATTERED WOMEN KILL (TR. 15 2940 & 2936)." RESPONSE AT 13 (EMPHASIS ADDED).

EVEN IF, IN THE EYES OF THE LAW, THIS COURT DETERMINES THAT DR. CALL WAS QUALIFIED TO RENDER EXPERT TESTIMONY ON THE BATTERED WOMAN SYNDROME, IT WOULD BE HARD TO SAY THAT HE DID SO EFFECTIVELY; AND I AM SAYING THAT IN ORDER FOR MY ATTORNEY TO HAVE REPRESENTED ME EFFECTIVELY, A BATTERED WOMAN SYNDROME EXPERT NEEDED TO EXPLAIN THE SYNDROME EFFECTIVELY. CLEARLY, THAT DID NOT HAPPEN AT MY TRIAL.

THE STATE ARGUES IN ITS RESPONSE THAT DR. CALL IS A PSYCHOLOGIST LIKE DR. WALKER. PLEASE SEE RESPONSE AT 13. BUT I SAY THAT THAT NO MORE MAKES DR. CALL A BATTERED WOMAN SYNDROME EXPERT THAN, BY THE SAME LINE OF REASONING, AN ATTORNEY WOULD BE CONSIDERED AN APPELLATE EXPERT SIMPLY BECAUSE HE IS AN ATTORNEY (EVEN IF HE HAS BEEN "INVOLVED IN" APPEALS). AN EXPERT MUST DEMONSTRATE HIS EXPERTISE, AND HE MUST DO SO EFFECTIVELY— TIME AND TIME AGAIN.

AT MY TRIAL, "DR CALL... POINTED OUT THAT KILLING WAS NOT A SYMPTOM OF BWS; THAT VERY FEW BATTERED WOMEN KILL. (Tr. 15 2940 & 2936)." RESPONSE AT 13. BY COMPARISON, HERE IS WHAT DR. WALKER EXPLAINS ABOUT BATTERED WOMEN WHO KILL AND THOSE WHO DO NOT:

> BATTERED WOMEN WHO KILL CAN PERHAPS BE SET APART FROM THOSE WHO DO NOT KILL IN TERMS OF THE PERCEIVED DANGER OF THEIR SITUATIONS, AND THE SEVERITY AND BRUTALITY OF THE VIOLENT PHYSICAL,

SEXUAL, AND PSYCHOLOGICAL ABUSE THEY HAVE ENDURED. SEXUAL ABUSE PLAYS A BIG PART, AS DOES ALCOHOL AND/OR DRUG ABUSE ON THE PART OF THE BATTERER...

THERE ARE FAR MORE INTRINSIC SIMILARITIES THAN DIFFERENCES BETWEEN BATTERED WOMEN WHO KILL AND THOSE WHO DO NOT. THERE ARE ALSO MANY MORE SIMILARITIES THAN DIFFERENCES IN OUR SOCIETY BETWEEN BATTERED WOMEN AND WOMEN IN GENERAL. AND IT IS MY CONTENTION THAT DEATH AND MURDER ALWAYS LURK AS POTENTIALS IN VIOLENT RELATIONSHIPS.

BATTERED WOMEN COME FROM ALL TYPES OF ECONOMIC, CULTURAL, RELIGIOUS, AND RACIAL BACKGROUNDS. THEY ARE MILLIONAIRES, AND THEY ARE WOMEN ON WELFARE; THEY ARE UNEDUCATED WOMEN, AND THEY ARE PRACTICING PROFESSIONALS WITH J.D.'S AND PH.D.'S; THEY ARE MOTHERS, AND THEY ARE CHILDLESS.... THEY ARE WOMEN LIKE YOU. LIKE ME. LIKE THOSE WHOM YOU KNOW AND LOVE.

WHETHER WE LIKE IT OR NOT, AND WHETHER WE ARE AWARE OF IT OR NOT, WE ALL LIVE IN VIOLENT SOCIETIES. SOME KIND OF PHYSICAL ASSAULT OCCURS IN NEARLY ONE-HALF OF ALL AMERICAN FAMILIES. FOR OUR PURPOSES IN DRAWING A GENERALIZED PICTURE OF <u>THE "TYPICAL" BATTERED WOMAN</u> (AND LATER OF <u>THE "TYPICAL" BATTERED WOMAN WHO KILLS</u>), WE CONSIDER A WOMAN TO BE BATTERED IF SHE IS SUBJECTED REPEATEDLY TO COERCIVE BEHAVIOR (PHYSICAL, SEXUAL, AND/OR PSYCHOLOGICAL) BY A MAN ATTEMPTING TO FORCE HER TO DO WHAT HE WANTS HER TO DO, REGARDLESS OF HER OWN DESIRES, RIGHTS, OR BEST INTERESTS; IF SHE IS INTIMATELY INVOLVED WITH THIS MAN BUT NOT NECESSARILY MARRIED, ALTHOUGH SHE OFTEN IS; AND IF, AS A COUPLE, THEY HAVE EXPERIENCED AT LEAST TWO ACUTE BATTERING INCIDENTS, OFTEN GOING THROUGH THE CYCLE OF VIOLENCE AT LEAST TWICE.

THE TYPICAL BATTERED WOMAN HAS POOR SELF-IMAGE AND LOW SELF-ESTEEM, BASING HER FEELINGS OF SELF-WORTH ON HER CAPACITY TO BE A GOOD WIFE AND HOMEMAKER, WHETHER OR NOT SHE ALSO HAS A SUCCESSFUL CAREER OUTSIDE OF THE HOME.... SHE MAY BELIEVE THAT SHE IS THE ONE AT FAULT FOR NOT STOPPING HER BATTERER'S VIOLENT BEHAVIOR; CONSEQUENTLY, SHE SUFFERS GREAT GUILT. CAUGHT BETWEEN THE PILLARS OF GUILT AND VIOLENCE, SHE LIVES IN GREAT DENIAL OF HER OWN FEAR AND RAGE; THIS DENIAL ENABLES HER TO FUNCTION DAY TO DAY. SHE MAY APPEAR TO BE PASSIVE, BUT THE TRUTH IS THAT SHE CAN BE STRONG, OFTEN MANIPULATING THE PEOPLE AND OBJECTS IN HER ENVIRONMENT EXTENSIVELY, AT LEAST ENOUGH TO AVOID BEING KILLED.

AS A RESULT OF ALL THESE FACTORS, SHE SUFFERS FROM CONTINUAL STRESS AND IS PARTICULARLY SUBJECT TO PSYCHOSOMATIC AILMENTS AND DEPRESSION. AN EXTREMELY

ISOLATED INDIVIDUAL — BECAUSE SHE OFTEN AVOIDS EXPOSING THE TERRIBLE SECRET OF HER HUSBAND'S UNPREDICTABLY VIOLENT BEHAVIOR TO OTHERS, AND BECAUSE HIS DOMINEERING AND JEALOUS NATURE OFTEN PREVENTS HER FROM SEEKING THE FRIENDSHIP OF OTHERS — SHE BELIEVES THAT SHE ALONE IS THE ONLY PERSON CAPABLE OF CHANGING HER PREDICAMENT; IF SHE CAN'T, SHE THINKS, NO ONE WILL. AND SHE BELIEVES THAT IF SHE CAN ONLY FIND THE RIGHT FORMULA, HER BATTERER'S "BAD" SIDE WILL DISAPPEAR, AND SHE WILL BE LEFT WITH THE WONDERFUL, KIND, SENSITIVE MAN SHE REMEMBERS FROM THE PAST.

IN TRYING TO DIFFERENTIATE THOSE BATTERED WOMEN WHO KILL FROM THOSE WHO DO NOT, WE CAN LOOK FOR SPECIAL CHARACTERISTICS COMMON TO THIS PARTICULAR GROUP.

DR. ANGELA BROWNE, WHO IN 1979 BEGAN WORKING ON OUR RESEARCH PROJECT THAT INVOLVED FOUR HUNDRED BATTERED WOMEN, COMPARED THE FORTY HOMICIDE CASES WE HAD COMPLETED BY 1983 WITH A SUBSAMPLE OF ONE HUNDRED BATTERED WOMEN WHO HAD BEEN LIVING OUT OF THE BATTERING RELATIONSHIP FOR LESS THAN A YEAR. THE ONLY REAL DIFFERENCES SHE FOUND WERE IN THE WOMEN'S PERCEPTIONS OF VIOLENCE. WOMEN WHO KILLED, SHE FOUND, PERCEIVED THEIR MEN AS USING GREATER VIOLENCE, MORE FREQUENTLY, RESULTING IN MORE AND IN GRAVER INJURIES TO THEM, THAN DID THOSE BATTERED WOMEN WHO DID NOT KILL. THE ONES WHO KILLED DESCRIBED THEMSELVES AS GROWING INCREASINGLY MORE DESPERATE IN THEIR ATTEMPTS TO STAY AS PHYSICALLY SAFE AS POSSIBLE.

THEY DESCRIBED THEIR MEN AS MAKING MORE DEATH THREATS. THEIR MEN WERE ALSO MORE LIKELY TO USE WEAPONS TO TERRORIZE THEM. THEY TENDED TO ABUSE ALCOHOL MORE FREQUENTLY AND SEEMED TO BE GROWING CONTINUALLY MORE DANGEROUS TOWARD THE WOMEN, TOWARD THEIR CHILDREN, AND TOWARD OTHERS.

BATTERED WOMEN WHO DO AND DO NOT KILL ARE ESSENTIALLY A HETEROGENEOUS GROUP....

EACH AND EVERY WOMAN IN OUR STUDY HAD ENDURED EXTRAORDINARY BRUTAL AND TERRIFYING ABUSE BEFORE KILLING IN SELF-DEFENSE. TO KNOW THEIR STORIES IS TO UNDERSTAND WHY THEY DID IT.

LIKE OTHER BATTERED WOMEN, THOSE WHO KILLED COULD NEVER PREDICT EXACTLY WHEN AN ACUTE INCIDENT WOULD OCCUR OR HOW BAD THE VIOLENCE WOULD BE. ALL MENTIONED THE FACT THAT THEIR BATTERERS WERE EXTREMELY JEALOUS OF EVERY OTHER PERSON IN THEIR LIVES, INCLUDING FAMILY, FRIENDS, PEOPLE AT WORK, AND ESPECIALLY CHILDREN. THEIR MEN WERE UNUSUALLY SUSPICIOUS AND POSSESSIVE, AND OFTEN THREATENED TO KILL THE WOMAN'S RELATIVES OR FRIENDS.

ALL OF THE BATTERED WOMEN WHO KILLED WERE SUBJECTED TO VERBAL ABUSE AND CRITICISM THAT OFTEN AMOUNTED TO ACUTE PSYCHOLOGICAL TORTURE.

WHILE THEY OFTEN LATER REMARKED ON THE UNUSUAL SENSITIVITY AND SENSUALITY OF THE BATTERER WHEN HE WAS ON HIS "GOOD" BEHAVIOR, MANY ALSO NOTED HIS UNUSUAL SEXUAL BEHAVIOR: TENDENCIES TOWARD ACTIVELY VIOLENT PERVERSITY....

NEARLY ALL OF THEM NOTED THAT THEIR MEN HAD DIFFICULTY CONTROLLING INTAKE OF ALCOHOL. EVERY ONE OF THEM HAD BEEN THREATENED WITH GUNS, KNIVES, OR OTHER WEAPONS. AND EVERY ONE OF THEM WAS AWARE THAT THE BATTERER TRULY WAS CAPABLE OF KILLING EITHER HER OR HIMSELF.

WHEN A BATTERED WOMAN KILLS, SHE MOST LIKELY SENSES AN INCREASED LOSS OF CONTROL IN THE BATTERER AND IN THE LEVEL OF VIOLENCE. SHE SENSES, TOO, THAT SHE IS SOMEHOW LESS ESSENTIAL TO HIM THAN SHE HAS BEEN BEFORE; THAT THIS TIME HE MAY GO ALL THE WAY (AND COMMIT MURDER. SOMETIMES SHE KNOWS THIS, SOMETIMES MERELY INTUITS IT; IN ALL CASES, A SENSE OF ABSOLUTE HORROR IS PRESENT. AS THE VIOLENCE ESCALATES OUT OF CONTROL, THE WOMAN'S PERCEPTIONS OF IT CHANGE."

AT A CERTAIN POINT IN A BATTERING SITUATION, THE VIOLENCE HAS ACCELERATED TO SUCH A LEVEL THAT IT WILL NOT DIMINISH AGAIN AS IT HAS DONE IN THE PAST, IN LINE WITH THE PREVIOUSLY ESTABLISHED PATTERN OF THE CYCLE OF VIOLENCE; CONSCIOUSLY OR NOT, THE BATTERED WOMAN WHO KILLS SENSES THIS. ONCE THIS POINT IS REACHED, THE PHYSICAL BRUTALITY APPEARS TO SPIN WILDLY OUT OF CONTROL. BATTERED WOMEN WHO KILL HAVE ALMOST INVARIABLY DONE SO AFTER HAVING EXPERIENCED SUCH AN UNCONTROLLABLY SAVAGE ACUTE INCIDENT, OR AFTER THE RECURRENT ONSET OF TENSION-BUILDING PHASE BEHAVIOR, IN ORDER TO PREVENT SUCH AN ACUTE INCIDENT FROM HAPPENING AGAIN. EACH WOMAN SEEMS TO FEEL THAT SHE JUST CANNOT COPE WITH THE IMPENDING BRUTALITY OR THE PSYCHOLOGICAL TENSION ANY LONGER. FEW STATE LATER THAT THEY EVER INTENDED TO KILL; ALL SAY THAT THEY SIMPLY WANTED TO STOP HIM FROM HURTING THEM LIKE THAT AGAIN. (ALMOST EVERY BATTERED WOMAN) TELLS OF WISHING, AT SOME POINT, THAT THE BATTERER WERE DEAD, MAYBE EVEN FANTASIZING HOW HE MIGHT DIE. THESE WISHES AND FANTASIES (ARE NORMAL, CONSIDERING THE EXTRAORDINARY INJUSTICE THESE WOMEN SUFFER AT THEIR MEN'S HANDS. BUT IT IS EQUALLY TRUE THAT THE SMALL NUMBER OF WOMEN WHO KILL THEIR BATTERERS DO NOT NECESSARILY WANT THEM TO DIE AT THE TIME; RATHER, THEY ARE SEEKING ONLY TO PUT AN END TO THEIR PAIN (AND TERROR....

(M)IDDLE-CLASS (AND UPPER-INCOME WOMEN REALIZE (TRUTHFULLY, IN MANY INSTANCES) THAT OTHERS IN THE COMMUNITY WILL NOT COME TO THEIR AID BECAUSE THOSE OTHERS MAY HAVE FINANCIAL, POLITICAL, (AND SOCIAL TIES TO THE BATTERER; SHOULD HE SUFFER DISGRACE OR EXPOSURE,

THEY STAND TO LOSE AS WELL. THUS, POWERFUL MEMBERS OF THE WOMAN'S COMMUNITY, RATHER THAN HELPING HER, MAY COLLUDE IN COVERING UP THE BATTERER'S CRIMINAL BEHAVIOR. THIS RESPONSE SUPPORTS THE COMMONLY HELD VIEW OF BATTERED WOMEN... THAT THEIR HUSBANDS ARE NEARLY OMNISCIENT AND CERTAINLY MUCH MORE POWERFUL THAN ANYONE WHO MIGHT EXPOSE THEM....

[B]EYOND THE SHADOW OF A DOUBT... THE ECONOMICALLY PRIVILEGED BATTERED WOMAN CAN HAVE JUST AS MUCH, IF NOT MORE, TROUBLE SEPARATING FROM THE BATTERER AS THE BATTERED WOMAN WHO LIVES IN POVERTY.

WALKER, LENORE E., <u>TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS</u> (NEW YORK: HARPERPERENNIAL, 1990), 101-107, (ALSO CITING BROWN, ANGELA, <u>WHEN BATTERED WOMEN KILL</u> (FREE PRESS - MACMILLAN)) (EMPHASIS ADDED).

IN 1990, TWO YEARS BEFORE THIS COURT HANDED DOWN ITS HIGHLY PRAISED LANDMARK DECISION IN BECHTEL ALLOWING EXPERT TESTIMONY ON THE BATTERED WOMAN SYNDROME, DR. WALKER, WHO WAS THE EXPERT IN THAT CASE, DESCRIBED THE SECOND TRIAL OF DONNA BECHTEL, BECHTEL'S NAMESAKE, LIKE THIS:

> [I]N APRIL 1988, IN OKLAHOMA CITY, BATTERED WOMAN SYNDROME TESTIMONY WAS RULED INADMISSIBLE BY THE JUDGE PRESIDING OVER [DONNA BECHTEL'S] SECOND TRIAL. NOR WAS DONNA HERSELF ALLOWED TO TESTIFY TO MUCH OF THE ABUSE SHE HAD EXPERIENCED....
>
> THE ENTIRE TRIAL WAS A SHAM, A MOCKERY, ONE OF THE WORST TRAVESTIES OF JUSTICE I HAVE EVER BEEN UNFORTUNATE ENOUGH TO WITNESS. THE DEFENSE BELIEVED THAT EVIDENCE WAS RULED ADMISSIBLE OR NOT ACCORDING TO THE TRIAL JUDGE'S WHIMS. IN THE END, DONNA WAS FOUND GUILTY AND RETURNED TO COMPLETE HER LIFE SENTENCE IN PRISON. WALKER, LENORE E. TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS (NEW YORK: HARPER PERENNIAL, 1990), 278.

THAT WAS NOT THE END, AS YOU KNOW. IN 1992, APPARENTLY IN GALLANT OPPOSITION TO WHAT DR. WALKER CALLED "POWERFUL POLITICAL FORCES IN OKLAHOMA CITY," THIS COURT REVERSED DONNA BECHTEL'S SECOND CONVICTION, SAYING IN ESSENCE THAT EXPERT TESTIMONY ON BATTERED WOMAN SYNDROME IS BOTH LAWFUL AND NECESSARY — AND THEREFORE ADMISSIBLE — **TO PROVE A BATTERED WOMAN'S DEFENSE OF SELF-DEFENSE.** PLEASE SEE BECHTEL, 840 2d AT 10. IT WAS A THOUGHTFUL DECISION THAT HAS SINCE BEEN MUCH APPLAUDED FOR ITS GROUNDBREAKING SENSITIVITY TO DOMESTIC VIOLENCE VICTIMS. OTHER COURTS, INCLUDING THE TENTH CIRCUIT COURT OF APPEALS, HAVE ISSUED RULINGS IN AGREEMENT WITH THE O.C.C.A.'S DECISION IN BECHTEL. IMPORTANTLY, THE ONLY MEMBER OF THIS COURT WHO DISAGREED WITH THE MAJORITY OPINION IN BECHTEL DID SO NOT BECAUSE HE WAS UNSYMPATHETIC

TO DOMESTIC VIOLENCE VICTIMS; BUT RATHER, JUDGE GARY LUMPKIN WROTE IN HIS DISSENTING OPINION, BECAUSE "[T]HE FACTS OF [DONNA BECHTEL'S] CASE DO NOT PRESENT THE EVIDENTIARY PREDICATE WHICH IS REQUIRED TO ADOPT THE CHANGES PROPOSED BY THE COURT." BECHTEL, 848 2d AT 16. AND ALTHOUGH JUDGE LUMPKIN DISSENTED IN BECHTEL, HE NEVERTHELESS DID EXPRESS THAT "[D]OMESTIC VIOLENCE IS APPALLING AND EACH MEMBER OF THIS COURT EMBATHIZES WITH THE VICTIMS OF THIS DEGRADING CONDUCT." BECHTEL, 848 2d AT 16.

IN MARCH 1998, NEARLY SIX YEARS AFTER THE OCCA HANDED DOWN ITS DECISION IN BECHTEL, TERESA PAINE, PAINE'S NAMESAKE, WAS CONVICTED IN OKLAHOMA OF FIRST-DEGREE MURDER FOR THE KILLING OF HER HUSBAND; AND SHE, LIKE DONNA BECHTEL, WAS SENTENCED TO LIFE IN PRISON. SINCE HER CONVICTION, MS. PAINE HAS CONSISTENTLY MAINTAINED THAT SHE WAS DENIED HER SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HER ATTORNEY FAILED TO PRESENT EXPERT TESTIMONY ON THE BATTERED WOMAN SYNDROME. THE O.C.C.A. DENIED MS. PAINE'S INEFFECTIVE ASSISTANCE CLAIM, AS DID THE FEDERAL DISTRICT COURT. MS. PAINE THEN APPEALED TO THE TENTH CIRCUIT COURT OF APPEALS; AND IN AUGUST 2003, THAT COURT RULED IN HER FAVOR. IN PAINE V. MASSEY, 339 F.3d 1194 (10TH CIR. 2003), THE TENTH CIRCUIT COURT WROTE:

> SIMPLY PUT, COUNSEL FAILED TO DO SOMETHING THAT THE OCCA SAID WAS NECESSARY TO MOUNT AN EFFECTIVE SELF-DEFENSE CLAIM GIVEN THE JURY'S LIKELY MISCONCEPTIONS

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ABOUT BWS. IN BECHTEL, THE OCCA ESTABLISHED THE PROFESSIONAL STANDARD IN OKLAHOMA FOR AN ATTORNEY REPRESENTING A BATTERED WOMAN CLAIMING SELF-DEFENSE, i.e., THE ATTORNEY MUST PUT ON AN EXPERT TO EXPLAIN BWS TO THE JURY.... FOR THESE REASONS, WE HAVE LITTLE TROUBLE CONCLUDING THAT COUNSEL'S PERFORMANCE FELL SHORT OF THE PROFESSIONAL STANDARD AND WAS OBJECTIVELY UNREASONABLE. PAINE V. MASSEY, 339 F.3d. 1194 (10th CIR. 2003), ALSO CITING BECHTEL V. STATE, 840 P2d. 1 (OKLA. CRIM. APP. 1992).

NOW, IN THIS POST-CONVICTION APPEAL IN MY CASE, I AM CLAIMING INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE MY ATTORNEY FAILED TO INVESTIGATE AND PRESENT EXCULPATORY EVIDENCE, AND ALSO BECAUSE MY ATTORNEY FAILED TO PRESENT TESTIMONY FROM A QUALIFIED BATTERED WOMAN SYNDROME EXPERT. WITH RESPECT TO THE EXPERT TESTIMONY CLAIM, I HAVE CITED BOTH DONNA BECHTEL'S AND TERESA PAINE'S CASES; AND THIS COURT IS QUESTIONING WHETHER OR NOT BECHTEL REALLY DID ESTABLISH THE PROFESSIONAL STANDARD IN OKLAHOMA FOR AN ATTORNEY REPRESENTING A BATTERED WOMAN CLAIMING SELF-DEFENSE — AND IF SO, HOW? FURTHER, THE O.C.C.A. IS QUESTIONING THE PROPRIETY OF AN APPELLATE COURT ATTEMPTING TO ESTABLISH A SPECIFIED WAY IN WHICH DEFENSE COUNSEL IS REQUIRED TO PRESENT A CRIMINAL DEFENSE. I AM SURE NOT QUALIFIED TO ARGUE THE LAW ON THESE MATTERS, BUT I WILL DO MY BEST TO ADDRESS THEM.

IN BECHTEL, THIS COURT DECIDED "TO ALLOW TESTIMONY ON THE BATTERED WOMAN SYNDROME IN APPROPRIATE CASES..." BECHTEL, 840 2d AT 11. IN REACHING THIS DECISION, THE COURT POINTED OUT THAT

IN ORDER FOR EXPERT TESTIMONY TO BE ADMISSIBLE IN OKLAHOMA, IT MUST BE — AT THE VERY LEAST — HELPFUL. THEN, THE O.C.C.A. WENT ONE STEP FURTHER AND SAID THAT EXPERT TESTIMONY ON BATTERED WOMAN SYNDROME WAS UNECESSARY TO PROVE A BATTERED WOMAN'S DEFENSE OF SELF-DEFENSE. PLEASE SEE BECHTEL, 840 2d AT 8, 10. GIVEN THAT THE O.C.C.A IS THE HIGHEST CRIMINAL COURT IN OKLAHOMA, I BELIEVE THAT IT IS REASONABLE TO EXPECT AN ATTORNEY HERE TO PRESENT EXPERT TESTIMONY ON THE SYNDROME BECAUSE THIS COURT SAID IT WAS UNECESSARY IN BECHTEL. THE O.C.C.A. DID NOT COME RIGHT OUT AND SAY THAT THIS IS SOMETHING AN ATTORNEY MUST DO, BUT IT IS CERTAINLY REASONABLE TO CONCLUDE THAT COUNSEL MUST DO WHATEVER THIS COURT SAYS IS UNECESSARY TO PROVIDE AN EFFECTIVE CRIMINAL DEFENSE.

AS TO WHETHER OR NOT IT IS PROPER FOR AN APPELLATE COURT TO ATTEMPT TO ESTABLISH A SPECIFIED WAY IN WHICH DEFENSE COUNSEL IS REQUIRED TO PRESENT A CRIMINAL DEFENSE, I BELIEVE THAT IF A CASE DEMONSTRATES THE NEED FOR SUCH REFORM, THEN IT IS THE RIGHT THING TO DO. THAT MAY SOUND SIMPLE OR FOOLISH, BUT IT'S WHERE I STAND.

THE LAW IS NOT STATIC: IT EVOLVES. RULES CHANGE AND SO DO THE WAYS THAT JUDGES INTERPRET THEM.

IN DONNA BECHTEL'S CASE, THIS COURT BELIEVED THAT THERE WAS A NEED FOR CHANGE AND IT TOOK A STAND. PERHAPS THAT IS WHAT HAPPENED WITH THE TENTH CIRCUIT COURT OF APPEALS IN TERESA PAINE'S CASE, TOO. FROM MY PERSPECTIVE, IT IS EASY TO SEE WHY.

I AGREE WITH JUDGE LUMPKIN THAT DOMESTIC VIOLENCE IS APPALLING AND DEGRADING. IT IS ALSO RAMPANT — ESPECIALLY IN OKLAHOMA — AND ITS INSIDIOUS EFFECTS PERVADE VIRTUALLY EVERY ASPECT OF OUR SOCIETY. WORSE, DOMESTIC VIOLENCE IS FAR MORE TOLERATED IN OUR LEGAL SYSTEM THAN MANY PEOPLE WANT TO BELIEVE OR ACKNOWLEDGE.

OKLAHOMA HAS ONE OF THE HIGHEST RATES OF DOMESTIC VIOLENCE IN THE NATION. OKLAHOMA ALSO INCARCERATES MORE WOMEN PER CAPITA THAN ANY OTHER STATE, AND THE VAST MAJORITY OF THE WOMEN IN PRISON HERE HAVE BEEN DOMESTIC VIOLENCE VICTIMS AT SOME POINT IN THEIR LIVES. THIS STATE HAS A CRISIS OF PHENOMENAL PROPORTIONS ON ITS HANDS.

HERE IS WHAT I SEE IN PRISON: I SEE WOMEN WHO HAVE BEEN BEATEN DOWN AND OPPRESSED, CAST OFF AND FORGOTTEN; I SEE MOTHERS, GRANDMOTHERS, DAUGHTERS, SISTERS, AND WIVES BRANDED AS OUTCASTS AND WAREHOUSED IN CONCRETE BOXES; I SEE HUMAN BEINGS, NOT INMATE NUMBERS AND CASES, BULLIED AND DEGRADED DAY-IN

AND DAY-OUT; I SEE HOPELESSNESS, SORROW, AND INTENSE, PROTRACTED PAIN AND SUFFERING. AND I SEE ALL OF THESE INJUSTICES UNFOLD, IRONICALLY, IN THE NAME OF JUSTICE.

IN MY EYES, OKLAHOMA'S JUSTICE SYSTEM IS HORRIBLY BROKEN. IF YOU WON'T ENDEAVOR TO FIX IT, THEN WHO WILL ?!

RESPECTFULLY SUBMITTED,

April Wilkens

APRIL WILKENS, PRO SE
D.O.C. NO. 282399
MABEL BASSETT CORRECTIONAL CENTER
CIB-118
29501 KICKAPOO
McLOUD, OKLAHOMA 74851

STATEMENT OF MAILING

I GAVE THE FOREGOING "REPLY" TO MABEL BASSETT CORRECTIONAL CENTER OFFICIALS ON 15 JUNE 2004, WITH PROPER POSTAGE (AFFIXED), FOR MAILING TO THE O.C.C.A. COURT CLERK.

April Wilkens
APRIL WILKENS

Appellant's Exhibit 17

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

APRIL ROSE WILKENS,	)	
	)	
Petitioner,	)	
	)	
-vs-	)	No. PC-2003-1002
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF

The Petitioner has appealed to this Court from an order of the District Court of Tulsa County denying her application for post-conviction relief in Case No. CF-1998-2173. In that case, Petitioner was convicted by a jury of Murder in the First Degree and was sentenced to Life imprisonment. Petitioner appealed to this Court and her Judgment and Sentence was affirmed. *Wilkens v. State*, No. F-99-927 (Okl.Cr. April 3, 2001) (summary opinion, not for publication).

In her original and amended applications for post-conviction relief filed in the District Court, Petitioner's propositions of error included claims she was denied the right to effective assistance of trial and appellate counsel. Petitioner claimed trial counsel was ineffective for failing to investigate her defenses, for failing to introduce into evidence an outstanding arrest warrant against the victim, for failing to introduce into evidence her urinalysis, for failing to introduce into evidence the *in camera* testimony of a police officer, for failing to introduce

into evidence the testimony of an expert on battered woman syndrome, and for the cumulative effect of these failures. Petitioner claimed appellate counsel was ineffective for failing to assert or adequately raise on direct appeal these claims relating to trial counsel's performance. The District Court found Petitioner had not overcome the first tier of the test in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In this appeal, Petitioner contends she was denied effective assistance of both trial and appellate counsel. Petitioner complains her trial counsel failed to investigate her defenses and present critical exculpatory evidence as outlined in her post-conviction application filed in the District Court. Petitioner complains her appellate counsel failed to raise these claims on direct appeal. Petitioner primarily challenges the District Court's finding relating to battered woman syndrome ("BWS"). Petitioner complains her trial attorney failed to present testimony from a qualified BWS expert, and went so far as to erroneously represent a forensic psychologist as a BWS expert. She claims appellate counsel's failure to assert this issue amounts to ineffective assistance of counsel as found in *Paine v. Massie*, 339 F.3d 1194 (10th Cir. 2003).

Initially, this Court directed the State to respond to Petitioner's post-conviction appeal. The State has filed a response, and Petitioner has filed a reply to the response. Records and transcripts designated by the parties have also been filed in this matter.

Petitioner has failed to establish entitlement to relief in a post-conviction proceeding. With the exception of her claim of ineffective appellate counsel, the

propositions of error asserted by Petitioner in this post-conviction proceeding, including her claim of ineffective trial counsel, either were raised or could have been raised during trial or on direct appeal. All issues which were previously asserted are barred as *res judicata*, and all issues which could have been previously asserted are waived. Such issues may not be the basis of a post-conviction application. 22 O.S.2001, § 1086; *Fowler v. State*, 1995 OK CR 29, ¶2, 896 P.2d 566, 569.

To support a claim of ineffective appellate counsel, Petitioner must establish appellate counsel's performance was deficient under prevailing professional norms, and that but for the deficient performance the outcome of the appeal would have been different, or she must establish that she is factually innocent. *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 2064, 2068, 80 L.Ed.2d 674, 693, 698 (1984). Petitioner's claim that her appellate counsel was ineffective is without merit. Petitioner's reliance on *Paine* to support her claim of ineffective appellate counsel with regard to her BWS claim is misplaced.

Contrary to the assertion of the United States Court of Appeals for the Tenth Circuit, this Court, in *Bechtel v. State*, 1992 OK CR 55, 840 P.2d 1, did not announce the professional standard in Oklahoma for an attorney representing a battered woman. *See Paine v. Massie*, 339 F.3d 1194, 1202-03. This Court cannot and would not ignore our adversarial system of justice and dictate that trial counsel is required to present a criminal defense in a specified way. Nowhere in the *Bechtel* decision is effectiveness of counsel even discussed.

In *Bechtel*, this Court decided the case or controversy presented, and the decision must be read within that context, to-wit: whether the trial court erred in refusing to allow ***any*** expert testimony on the battered woman syndrome. *Bechtel*, 1992 OK CR 55 at ¶1, ¶¶14-27, 840 P.2d at 4, 6-10; Okla. Const, art. VII, §§ 1, 4; *see also* U.S. Const. art. III.[1] The *Bechtel* decision was written so that, on remand, the new trial in that case would be conducted in a manner consistent with the opinion. *Bechtel*, 1992 OK CR 55 at ¶46, 840 P.2d at 15. The standards of reasonableness discussed in the opinion were established to assist "the finder of fact" in measuring the accused's perceptions of danger, its imminence, and what actions are necessary to protect herself. *Bechtel*, 1992 OK CR 55 at ¶31, 840 P.2d at 10. Such standards may be used to prepare for an appropriate BWS case, but were not meant to be ABA Guidelines or other professional standards by which an attorney's performance is measured. *Cf. Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

Petitioner's complaint that appellate counsel failed to raise issue on direct appeal does not establish ineffectiveness. *Walker v. State*, 1997 OK CR 3, ¶14, 933 P.2d 327, 334. Petitioner makes one specific complaint that her appellate counsel's performance was deficient under prevailing professional norms. She claims appellate counsel was ineffective for not asserting a challenge to the credentials of the witness presented as an expert on BWS by her retained trial counsel. Petitioner contends the witness was not an expert because his

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[1] This Court held that the trial court erred by refusing to allow any expert testimony on BWS. *Bechtel* is not directly applicable if a trial court does not exclude proffered evidence on BWS.

testimony was not consistent with writings by Dr. Lenore Walker in her book *The Battered Woman Syndrome*, 2nd Ed. (New York: Springer Publishing Company, 2000).

At trial, both counsel for Petitioner and the prosecutor acknowledged that the witness was an expert. The witness is a board certified psychologist in Oklahoma, and testified that he had extensive experience with BWS. As the District Court found, Petitioner has not established that any failure by her appellate counsel, to raise or adequately challenge the status of the witness as an expert in this case, caused counsel's performance to be deficient under prevailing professional norms. *Strickland, supra.*

Finally, Petitioner has not established that she is factually innocent. *Strickland, supra.* Petitioner's jury found beyond a reasonable doubt that Petitioner's use of deadly force was not necessary to protect herself from imminent danger of death or great bodily harm. As the State notes, the record contains overwhelming evidence that the shooting was calculated and intentional.

IT IS THEREFORE THE ORDER OF THIS COURT that the order of the District Court of Tulsa County denying Petitioner's application for post-conviction relief in Case No. CF-1998-2173 should be, and is hereby, **AFFIRMED**.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 2nd day of August, 2004.

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CHARLES A. JOHNSON, Presiding Judge

STEVE LILE, Vice Presiding Judge

GARY L. LUMPKIN, Judge Concur in Results based on Steve decision and my separate writing in Docket I.

NOT PARTICIPATING

CHARLES S. CHAPEL, Judge

RETA M. STRUBHAR, Judge

ATTEST:

Clerk

APPELLANT'S EXHIBIT 18

Click here for complete Oklahoma election results

DA's race among most moneyed

By ZIVA BRANSTETTER World Projects Editor
7/21/2006

View in Print (PDF) Format

Harris, Swab have raised $227,000 combined in prosecutorial contest

District Attorney Tim Harris and his challenger, Brett Swab, have raised a combined $227,000 for their campaigns and have spent three-fourths of it.

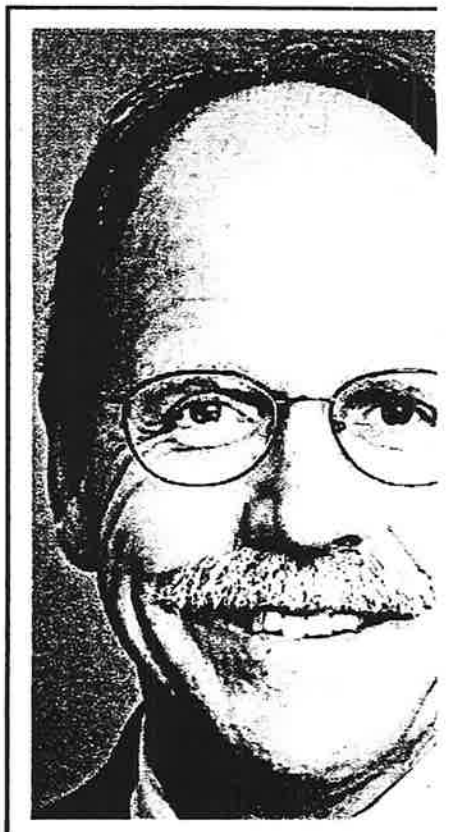
The amount does not eclipse the total raised in a 1998 district-attorney race, but that campaign featured four candidates, including one who loaned himself $152,000.

Harris won that race and was not opposed for re-election in 2002.

Since Jan. 1, Harris has raised $109,406, including $22,700 that was transferred from his 2002 campaign, according to records on file with the state Ethics Commission. He has spent about $67,000.

During the same period, Swab raised $117,829 and spent $101,200.

Names from some of the city's well-known and influential families populate the donor lists of both Harris and Swab.



Harris

Click on a thumbnail above to view phe

Brothers Jeff and John Davis of U.S. Beef each gave to Harris. Other Harris contributors in University of Tulsa football coach Steve Kragthorpe, auto dealers Jim Norton and Don Carlton and oilman W.H. Helmerich.

Swab contributors include former Tulsa Mayor Robert LaFortune, oilman W.K. Warren and park owner Robert Bell. Also contributing to Swab's campaign was Larry Wheeler. The slay father, Roger Wheeler, by New England mobsters in 1981 is one of Tulsa's most notorious

cases.

Bill Jackson, an oil and gas attorney, gave $5,000 to Swab's campaign. Jackson said he ha to many political campaigns in the past but never to the Tulsa County district attorney's rac

Jackson said he gave the maximum amount to Swab because he believes that it is time for

"It's just that his (Harris') prosecution rate, I thought, had fallen precariously," he said. "I thi Harris has become too comfortable in the job."

Carlton contributed to Harris' campaign and hosted a reception for him. The Tulsa auto dealer said he met Harris eight years ago after Carlton's son, Terry Carlton, was shot to death.

Harris and Rebecca Nightingale, a former assistant district attorney who now is a judge, handled the prosecution of April Rose Wilkens, whose battered-woman syndrome defense resulted in a life sentence in the murder case.

"They (the prosecutors) did a spectacular job, and we've become personal friends as well as supporters," Don Carlton said.

"He's just totally dedicated to that job," he said of Harris. "I'm sure he could go out and make a heck of lot more money someplace else."

Ziva Branstetter 581-8378
ziva.branstetter@tulsaworld.com

For more

To see the complete list of campaign contributions from April 1 through July 10 for Tulsa C Attorney Tim Harris and challenger Brett Swab, go online to **www.tulsaworld.com/DAcontributions.asp**.

Campaign donors of $500 or more

Brett Swab

These people have contributed at least $500 to Brett Swab's campaign since Jan. 1, accor Ethics Commission records. All contributors are from Tulsa unless otherwise noted:

$5,000: Thomas R. Brett; Kimberlee S. Jordan; Nancy Swab Vaughn; Tom Fee; Wi Jackson.

$2,500: Gregory Wallace; Mike and Carol Henry, Sand Springs; Noble Sokolosky, (Patterson; Doug Pielsticker.

$2,000: Boo Roberts, Bixby; Joseph Mueller; Hillary and Carlo VonSchroeter, Welle

$1,500: Robert J. LaFortune.

$1,000: David and Trisha Nigh, Bixby; Travis and Joann Frizell, Owasso; Michael F Springs; Randy Rankin; Dawn and R.A. Dampf; Larry Wheeler; Nancy Meining; Ala Robert Biolchini; Jeff and Dianne K. Glendening; Roger Wheeler; Phil Long; Robert Kathy and Ford Brett; William and Janice Chavalier; W.K. Warren; Josephine B. Sie Stephen J. Rodolf; John Warren; Burt Holmes.

$750: Stuart F. Deselms; Susan Flint Seay.

$600: Fred Demier; Martha Roberts.

$500: Mary Quinn Cooper; Dale Williams; Michael B. Tolson; Terry Todd, Sapulpa; Salisbury; Bill Grant; Charles and Evelyn Hatfield; Paul Brignac, Broken Arrow; Joe Wohlgemuth; Gayla Lynn Tolk, Aspen, Colo.; Sara Bovaird; Rick and Sharon Donn Deborah Hale; Amal Aktah; Leanne K. Helmerich; James Ronk; Anderson Craig; Ji Crews; Ana Maria Lloyd Jones; B.P. Loughridge; King and Lee Kirchner; Robert Sv Sullivan; Doug and Ladonna Kirkpatrick; John and Jennifer LaFortune; Alen and Va Fuller; Tom Hughes; Buddy and Rosie LaFortune; Herb Reed, Owasso; Luci and Jc Patty and Joe Cappy; Rick and Sharon Donnelly; Andrea Schlanger; Ray and Shell Bartlett; Todd and Kelley Singer; Luke and Tisha Wallace; William John Patterson; Connor; Joe Moran; Patricia Wheeler; George B. Anderson.

Tim Harris

These people have contributed at least $500 to Tim Harris' campaign since Jan. 1, accordi Ethics Commission records. All contributors are from Tulsa unless otherwise noted:

$5,000: Genevieve H. Harris, Sun City, Ariz.

$2,500: Don Carlton; James Brandon; Jim Norton; Jeff Davis; John Davis.

$1,500: Ronny Altman.

$1,250: W. Atherton.

$1,000: John A. Baker; Brenda and John Bruton; Karl N. Detwiler; Philip Faubert; D Hentschel; Steven and Laura Kragthorpe; Stephen T. Lester; Gordon and Michele I Millspaugh; Robert Nelson; Larry and Kay Payton; Donny and Sarah Gay Perkins; , Lee and Mary Stidham, Checotah; Nancy and W. Kirk Turner; Jim and Julie Wilson Arrow; Paul Woodul; David and Kay Wulf; Lee Levinson.

$750: Richard O'Carroll.

$700: Joseph and Karen Hidy; Christine Kunzweiler and D.C. Smith.

$500: D.A. Abston; Harel Bennett; Brian Carpenter; Ann Shannon Cassidy; Thoma and B.L. Cooley; Barbara Cooley; Richard H. Dixon; Craig and Shari Dolinsky; W.K Dunbar; W.H. Helmerich; Thomas G. Hilborne Jr.; Sam and Norma Hollinger, Bixby Jorga Johnson; Martin Keating; Kevin and Deborrah Leitch; J. Thomas Mason; Rich Diane Mills; James and Deborah Mizell; William and Martha Morgan; Thomas Naug Norton; John and Jane Phillips; Bill Powers; Matt and Renee Pride; John Reaves; C Allen Smallwood; Bob Stuart; Kurt Glassco; John Weldman.

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Sunday, 29 July 2003, A-1

DA, law officers in feud

Photos by STEPHEN HOLMAN / Tulsa World

Tulsa County District Attorney Tim Harris says his office's policy on filing criminal charges is not different from those of his predecessors.

Appellants' Exhibit 19

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Harris accused of putting budget over prosecutions

Tulsa County District Attorney Tim Harris says his policies "are not any different" from the policies of former district attorneys David Moss, Chuck Richardson and Bill LaFortune.

By Ziva Branstetter
World Projects Editor

Sunday, 20 July 2003, A-1

A simmering feud between Tulsa County District Attorney Tim Harris and law enforcement agencies has boiled over with allegations that Harris' policies are endangering the public.

Police say Harris looks for reasons to reject their cases while complaining about his budget. Harris says his policies are no different from those of past prosecutors.

Police aren't the only ones complaining.

The son of slain Tulsa businessman Roger Wheeler said Harris' office suggested that the family should help pay for the cost of prosecuting that 1981 murder case. In another case, the son of a murder victim says Harris' office failed to return his calls and letters and to explain why the district attorney declined to file charges.

For more

At a time when other government agencies are losing ground financially, money from a variety of sources continues to flow into Harris' office, records show. A-7.

Two policies in Harris' new criminal charging policy manual, effective May 1, have been the focus of criticism by law enforcement.

One policy, "Charging Authorization Standard," discusses the burden of proof necessary for prosecutors to file a charge.

"The charging standard can be anywhere from probable cause to beyond a reasonable doubt. This office requires that the fact and evidence viewed in the light most favorable to the state be beyond a reasonable doubt," it states.

Harris said the standard is "adaptable" and not meant to be an inflexible rule. In cases involving violent crimes, the standard may be lower, he said.

Harris said the policies "are not any different" from the policies of former district attorneys David Moss, Chuck Richardson and Bill LaFortune.

However, Richardson and Police Chief Dave Been said the charging standard is a definite change.

"It obviously makes our job tougher," said Been, "but the

SEE DA A-6

Police Chief Dave Been

"Obviously, conviction rates are better if you only take to trial those slam-dunk cases."

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DA:

A key officer alleges policy changes make it easier for criminals to be back on the street.

FROM A-1

SUNDAY, 20 July 2003 A16

big issue is it makes things less safe for the citizens. Obviously, conviction rates are better if you only take to trial those slam-dunk cases."

Sgt. Mike Huff, supervisor of the Police Department's Homicide Unit, said criminals are aware that standards have changed.

"We get people that get turned back on the street and continue violence, so we're hearing criminals on the street say, 'Hey, I'll be out in a few days.'"

Since May, police have held two meetings with Harris to discuss a variety of concerns, including the charging standard and the process for reviewing shootings by police officers.

Richardson, appointed district attorney when LaFortune resigned in 1998, said the standard for arrests and at preliminary hearings in criminal court is probable cause. Richardson lost the election for the district attorney's position to Harris in November 1998.

"You don't typically have enough information to decide something is provable beyond a reasonable doubt when you first get it into your office."

Jerry Truster, a former chief prosecutor under longtime Tulsa District Attorney Buddy Fallis, said Harris' attitude toward prosecutions is "180 degrees different" from Fallis' attitudes. Truster also worked as an assistant under LaFortune, Richardson and Harris before leaving eight months into Harris' tenure.

"The thing that bothered me most about Tim's administration was a comment he made in a staff meeting that I couldn't believe I was hearing. Tim says to his staff, 'We file way too many criminal charges, and from now on the standard of proof in the office of filing a charge is proof beyond a reasonable doubt.'"

Those in law enforcement said they noticed the change.

"We've learned that the bar has been raised for us," said Jenks Police Detective Don Selle. "They won't file a charge unless it's trial-ready, and we have to live with that."

Selle investigated the drowning of 10-year-old Rachel Clayton of Jenks. No charges have been filed in that case.

Crime in Tulsa has increased about 6 percent since Harris took office in 1999. The number of felony cases filed initially increased but has declined to the same level as 1999: 6,500 last year, according to figures provided by the Court Clerk's Office.

Only about 1 percent of criminal defendants face jury trials in Tulsa County — less than the 4 percent national average. Last year, 88 jury trials were held in Tulsa County District Court, down from 102 in 1999. No reliable statistics exist on what happens to the other 99 percent of defendants.

Harris said alternatives to incarceration, such as Drug Court and DUI Court, have led to fewer trials. He said his policies ensure that those cases the office takes to trial can be won.

"Over the years, our conviction rate at jury trial has always been 80 percent or above. Last year, it was 85 percent."

However, such figures depend heavily on how cases are counted. A trial database kept by the District Attorney's Office contained no reference to at least seven trials since 1999 that resulted in not guilty verdicts, meaning they didn't figure into Harris' conviction rates.

Two trials were counted as guilty verdicts but their results were arguably losses for prosecutors. A defendant who was tried in 1999 on first-degree rape and domestic assault and battery charges was acquitted of the rape charge but sentenced to six months on the assault and battery charge. In another case, a defendant was acquitted of drug possession but given 30 days in jail for two traffic offenses. The database recorded both cases as guilty verdicts.

Policy bans advice: A second Harris policy, "Giving Legal Opinion and Advice," has also come under fire.

"None of the law enforcement agencies work for us or at our direction," it states. "We do not tell them when they have 'probable cause to arrest' or 'probable cause to search and seize.' Those are police decisions. We do not answer hypothetical questions for the police or give legal opinions based upon hypothetical factual situations."

The policy concludes by stating that officers who want to know what the law states must write a request to Harris "precisely detailing the legal question to be answered."

It cites court rulings that found that prosecutors who engage in police functions lose their civil immunity in court and could be held liable.

"That's crap," said Truster when informed of the policy. "My attitude is that if they want to sue me civilly, have at it, because I'm there to serve the law enforcement and get on down the road with this thing."

Been said the policy is a very significant change.

"We need their advice," Been said. "We're not attorneys. I've always considered that was one of their primary functions."

Huff said the advice policy has made it difficult for police officers to do their jobs.

"We're out there in the middle of the night trying to make decisions, and I can't wait for somebody to ponder it and put it in writing. It's an issue sometimes of 'analyze and paralyze.'"

Harris said the Tulsa Police Department and other law enforcement agencies have their own legal advisers to tell them when probable cause to arrest or search and seize exists. Nevertheless, he said he and his assistants do spend a lot of time meeting with law enforcement officials to help guide their investigations.

"The criticism that we don't discuss cases with law enforcement I don't think holds any validity whatsoever."

Tulsa County Sheriff Stanley Glanz said he has no problems so far with the policy. Glanz, a fellow elected Republican county official, relies on Harris' civil staff to defend his office in lawsuits.

"I think it's good that he's put something in writing. For many years we have worked kind of on handshakes," Glanz said. "If there's any questions, I personally go to Tim myself. He's always been open to me."

Cases go unfiled: Authorities say Harris is often unwilling to make tough calls on cases that should be filed but might not be a sure win in court.

"There's been an increasing reluctance on the part of the DA's Office to file cases that our detectives think should be filed," Been said.

Those cases include a key suspect in one of Tulsa's most notorious murders. In late 2001, Huff presented an affidavit seeking charges against H. Paul Rico and others in the 1981 slaying of Wheeler, who owned the Tulsa-based Telex Corp. Rico, a retired Boston FBI agent, was head of "security for" World Jai Alai, which Wheeler had bought.

Since then, Huff has presented two additional affidavits with

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Police officers and others wait for court appearances in the law enforcement area of the District Attorney's Office's Victim-Witness Center.

AARON SHOWALTER/ Tulsa World

new information relating to Wheeler's death, but Harris has not filed charges against Rico. The most recent affidavit is a 28-page document written May 28. It alleges that Rico provided confessed hit man John V. Martorano with details on Wheeler's appearance, whereabouts and a vehicle description.

Harris filed murder charges in 2001 against Martorano and two other figures in the case: James Joseph "Whitey" Bulger and Stephen "The Rifleman" Flemmi.

Flemmi is awaiting trial in a string of New England killings and has not appeared in a Tulsa courtroom. Bulger remains a fugitive.

Martorano struck a plea agreement that allows him to serve no time in an Oklahoma prison in exchange for testifying against his co-defendants.

Wheeler's son, David Wheeler, said Harris and others in his office often discussed how expensive the Wheeler case would be to prosecute. Wheeler said that at one point, Assistant District Attorney Larry Edwards asked him whether the Wheeler family would be willing to pay for costs associated with prosecuting the case.

"He said, 'Has Tim asked you for money yet? Well, if he does, just turn him down.'" Wheeler said he was offended by the implication that his family should pay for prosecution.

"You can't give somebody money to prosecute. Everybody should be afforded equal protection under the law. . . . They wanted money. We didn't pay, and the result is obvious."

Edwards, who recently left the District Attorney's Office, said, "I can't remember whether that statement was made or not. . . . I do not think I've ever had that discussion."

When asked whether he thinks charges should have been filed against Rico, Edwards said, "I'm not going to answer that question."

Harris adamantly denied that his office asked the Wheeler family to pay for prosecution costs.

"There's not a scintilla of truth in that," Harris said. "I would never ask a private citizen . . . to assist in the financial costs of prosecution."

David Wheeler said he has asked Harris to turn the Rico case over to the state Attorney General's Office.

"After fighting impossible odds to help bring my father's killers to justice, ultimately winning the battle against both organized crime and a corrupted Boston FBI, it is ironic to find ourselves stopped cold by our own district attorney."

Harris said he is considering Wheeler's request that the Attorney General's Office intervene. He said he could not discuss whether charges would be filed against other people in the case.

"There are other individuals who are being investigated," Harris said.

The son of another Tulsa homicide victim also expressed concerns about his family's treatment by Harris' office. A burglar beat 79-year-old Betty Jo Martin to death in January 1999, stealing a VCR and a few collectible coins.

Police presented their case to Harris, but prosecutors wanted more evidence.

"We thought it was a workable case," Huff said. "Their issue was proof beyond a reasonable doubt, and we didn't meet their standard."

Ken Martin said turnover in the District Attorney's Office resulted in the case being handled by three assistants, one of whom knew nothing about the case.

"Is my mother not important?" Martin asked Harris in a letter dated Aug. 3, 2000. "Here was a truly good person who was savagely beaten to death for no reason. No, she was not famous. No, she was not wealthy. Is that what it takes?"

Martin said Harris did not respond to the letter. Calls after that to an assistant district attorney were unreturned, he said.

"With about 50 murders a year in the city of Tulsa, I would think they could find time to talk to the family of murder victims."

First Assistant District Attorney Doug Drummond said he believed that a detective assigned to the case had been communicating with the family.

"One of our highest priorities in this office is to communicate and answer questions for the families of victims of violent crimes. If that did not happen in this case, it was my responsibility," he said.

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APPELLANT'S EXHIBIT 20

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

APRIL ROSE WILKENS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**Case No. 02-CV-244-TCK-SAJ**
	)	
MILLICENT NEWTON-EMBRY, Warden,	)	
	)	
	)	
Respondent.	)	

OPINION AND ORDER

This is a 28 U.S.C. § 2254 habeas corpus proceeding. Petitioner is a state inmate appearing *pro se*. Before the Court is Petitioner's petition for writ of habeas corpus, as amended (Dkt. ## 1, 39). Respondent has filed a response to the amended petition (Dkt. # 45). Respondent has also provided a partial trial transcript and copies of state court documents for the Court's use in evaluating Petitioner's claims (Dkt. ## 46, 47, 48, 52). Petitioner has filed a reply (Dkt. # 50) to Respondent's response, and amendments and supplements to her petition and brief (Dkt. ## 12, 13, 14, 35, 39). Also pending before the Court are the following motions filed by Petitioner: motions to supplement (Dkt. ## 59, 60), and motion to file second amendment to petition for writ of habeas corpus (Dkt. # 62). Petitioner provided her proposed supplements and "second amendment" along with her motions. Respondent filed an objection to the motion to supplement docketed as document # 59. See Dkt. # 61. In the proposed second amendment, Petitioner asserts additional facts and argument in support of the ineffective assistance of appellate counsel claims raised as ground one. Accordingly, the claims asserted in the second amendment shall be adjudicated as supplements to the ineffective assistance of counsel claim raised in ground one.

For the reasons discussed below, the Court finds the petition, as amended and supplemented,

shall be denied. In addition, Petitioner's motions to supplement and amend her habeas corpus petition shall be granted. To the extent they are relevant to disposition of the issues before the Court, the supplements (Dkt. ## 59, 60) and second amendment, adjudicated as a supplement, (Dkt. # 62) have been considered by the Court in analyzing Petitioner's claims.

BACKGROUND

Petitioner, a college graduate with a post-graduate degree in prosthetics, met Terry Carlton sometime in September or October, 1995, while shopping for an automobile at the dealership owned by Mr. Carlton's family. They began dating in October, 1995, and became engaged two months later on Christmas eve. According to Petitioner, the couple traveled frequently to Dallas and also took trips to Jamaica and the Bahamas in the early months of the engagement. Problems in the relationship developed soon after the engagement, and escalated to the first instance of physical abuse when Mr. Carlton grabbed Petitioner by the throat in April, 1996. Further instances of physical abuse occurred during the following months, including attacks by Mr. Carlton on Petitioner while they were on vacations to Europe. The relationship and the engagement were "off and on" during 1996. On Valentines Day, 1997, another physical attack occurred, causing Petitioner to call 911 and seek assistance from the police. Although the engagement was off, the parties once again took a vacation together to Europe in the Spring of 1997. Both parties were using drugs at this time, but Mr. Carlton became abusive to Petitioner at the hotel in Greece when he ran out of cocaine. Over the next year, there were numerous incidents of abuse and contention between the parties. Petitioner filed documentation in the Tulsa County District Court for emergency protective orders on three different occasions, but never appeared at the hearings to obtain a protective order. In addition, domestic violence calls were placed to the police on numerous occasions from both Petitioner's

home and Mr. Carlton's home. By the Spring of 1998, the parties were no longer engaged or dating, but they were still fighting. Petitioner admits that she tried to shoot Mr. Carlton during a violent episode on April 11, 1998, but the gun misfired. Further, Petitioner reports that Mr. Carlton continued to harass and threaten her.

In the early morning hours of April 28, 1998, the Tulsa Police Department received a call of a possible shooting at 2278 East 38th Street in Tulsa, Oklahoma. Upon arriving at the scene, the police officers approached the house and observed a female inside the house. Petitioner opened the door and acknowledged to the officers that she had shot her former fiancé, Terry Carlton. Petitioner directed the officers to the basement where the deceased victim was found. She was charged with first degree murder for the homicide of Terry Carlton. Petitioner was convicted by a jury in Tulsa County District Court, Case No. CF-98-2173, of First Degree Murder. The jury recommended that Petitioner be sentenced to life imprisonment. On July 7, 1999, the trial judge sentenced Petitioner in accordance with the jury's recommendation. Petitioner was represented at trial by attorney Chris Lyons.

Petitioner appealed her convictions and sentences to the Oklahoma Court of Criminal Appeals ("OCCA"). On appeal, Petitioner was represented by attorney Bill Zuhdi. He raised six (6) propositions of error as follows:

Proposition 1: The evidence was insufficient to sustain April's conviction of murder in the first degree.

Proposition 2: The trial court committed reversible error in failing to submit a jury instruction on manslaughter.

Proposition 3: The jury should have received an instruction for manslaughter and consequently, trial counsel was ineffective for failing to submit the written jury instruction on manslaughter.

Proposition 4: April received ineffective assistance of trial counsel when trial counsel failed to object to a statement made by April prior to her Miranda warnings being read to her by law enforcement.

Proposition 5: The trial court erred in finding that April had waived her rights and that her confession was freely and voluntarily made and trial counsel was ineffective in failing to present to the trial court at trial the fact that April had been coerced into making the statement.

Proposition 6: The trial errors complained of herein cumulatively denied April's right to a fair trial under the United States and Oklahoma Constitution and therefore, her conviction and sentence must be reversed.

(Dkt. # 47, Ex. A). In an unpublished summary opinion, filed April 3, 2001, in Case No. F-1999-927, the OCCA affirmed Petitioner's conviction (Dkt. # 48, Ex. C). Nothing in the record suggests Petitioner filed a petition for writ of *certiorari* in the United States Supreme Court.

Next, Petitioner, represented by attorney David R. Blades,[1] filed the instant habeas corpus action on April 2, 2002 (Dkt. # 1), raising five (5) grounds of error. Because not all of the errors raised had been exhausted in state court, the Court entered an Order on February 27, 2003, staying this matter pending the exhaustion of state remedies by Petitioner (Dkt. # 18).

On September 9, 2003, Petitioner, appearing *pro se*, filed an application for post-conviction relief in the state district court. See Dkt. # 39, attachments. She identified the following six (6) grounds of error, all relating to ineffective assistance of counsel claims:

Ground 1: Petitioner was denied her Sixth Amendment right to counsel because trial counsel's failure to investigate the Petitioner's defenses constituted ineffective assistance of counsel. Further, her appellate counsel was ineffective for failing to raise this issue on direct appeal.

Ground 2: Petitioner was denied her Sixth Amendment right to counsel because trial counsel's failure to enter an outstanding bench warrant for Terry Carlton's

[1] By Order filed May 22, 2003, attorney Blades was allowed to withdraw as attorney of record, and Petitioner's motion to proceed *pro se* was granted (Dkt. # 24).

arrest into evidence at her jury trial constituted ineffective assistance of counsel. Further, her appellate counsel was ineffective for failing to raise this issue on direct appeal.

Ground 3: Petitioner was denied her sixth Amendment right to counsel because trial counsel's failure to enter the results of her 28 April 1998 urinanalysis into evidence at her jury trial constituted ineffective assistance of counsel. Further, her appellate counsel was ineffective for failing to raise this issue on direct appeal.

Ground 4: Petitioner was denied her Sixth Amendment right to counsel because trial counsel's failure to enter a transcript of Tulsa Police Officer Laura Fadem's previous in camera testimony into evidence before Petitioner's jury at Petitioner's April 1999, jury trial constituted ineffective assistance of counsel. Further, her appellate counsel was ineffective for failing to raise this issue on direct appeal.

Ground 5: Petitioner was denied her Sixth Amendment right to counsel because trial counsel's failure to present testimony from a battered woman syndrome expert at Petitioner's April 1999 jury trial constituted ineffective assistance of counsel. Further, her appellate counsel was ineffective for failing to raise this issue on direct appeal.

Ground 6: The claims presented in propositions one through six [sic] cumulatively denied Petitioner her Sixth Amendment right to effective assistance of counsel in violation of the United States and Oklahoma Constitutions, and therefore her conviction and sentence should be reversed.

(Dkt. # 39, attachment). The state district court denied post-conviction relief, finding that Petitioner's ineffective assistance of trial counsel claims failed because her trial counsel "acted as a reasonably competent attorney under the facts and circumstances of the case." Id. The district court also found that appellate counsel's representation was not ineffective. Id. Petitioner appealed. By Order filed August 2, 2004, in Case No. PC-2003-1002, the OCCA affirmed the denial of post-conviction relief. See Dkt. # 47, Ex. E.

On August 18, 2004, Petitioner filed her notice of exhaustion of state court remedies and an amended habeas corpus petition, alleging the following grounds of error:

Ground 1: Petitioner was denied her Sixth Amendment right to counsel because trial counsel's failure to properly investigate her defense constituted ineffective assistance of counsel. Further, appellate counsel was ineffective for failing to raise this claim on direct appeal.

Ground 2: Petitioner was denied her Sixth Amendment right to counsel because trial counsel's failure to request a jury instruction for manslaughter rose to the level of ineffective assistance of counsel.

Ground 3: Petitioner was denied her Sixth Amendment right to counsel because trial counsel's failure to present an outstanding Tulsa County bench warrant for Terry Carlton's arrest constituted ineffective assistance of counsel. Further, appellate counsel was ineffective for failing to raise this claim on direct appeal.

Ground 4: Petitioner was denied her Sixth Amendment right to counsel because trial counsel's failure to present the results of her 28 April 1998 urinalysis constituted ineffective assistance of counsel. Further, appellate counsel was ineffective for failing to raise this claim on direct appeal.

Ground 5: Petitioner was denied her Sixth Amendment right to counsel because trial counsel's failure to present a transcript of Tulsa Police Officer Laura Fadem's previous in camera testimony constituted ineffective assistance of counsel. Further, appellate counsel was ineffective for failing to raise this claim on direct appeal.

Ground 6: Petitioner was denied her Sixth Amendment right to counsel because trial counsel's failure to present testimony from a qualified battered woman syndrome expert constituted ineffective assistance of counsel. Further, appellate counsel was ineffective for failing to raise this claim on direct appeal.

Ground 7: Petitioner was denied her Sixth Amendment right to counsel because trial counsel's failure to object to a statement made by her prior to her Miranda warnings being read to her constituted ineffective assistance of counsel.

Ground 8: Petitioner was denied her Sixth Amendment right to counsel because trial counsel's failure to present to the trial court the fact that she had been coerced into making a statement constituted ineffective assistance of counsel.

(Dkt. ## 34, 39). Respondent filed a response to the petition, as amended (Dkt. # 45), contending that grounds 1, 3, 4 and 5 are procedurally barred. Respondent also argues that Petitioner is not

entitled to relief on any of her claims of ineffective assistance of trial and appellate counsel. Petitioner filed a reply (Dkt. # 50), and has supplemented her arguments with briefs, supplements and amendments (Dkt. ## 12, 13, 14, 35, 39, 59, 60, 62).

ANALYSIS

A. Exhaustion/Evidentiary Hearing

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Respondent concedes (Dkt. # 45 at 2), and the Court agrees, that the exhaustion requirement of 28 U.S.C. § 2254(b) is satisfied in this case.

In addition, the Court finds that Petitioner is not entitled to an evidentiary hearing. See Michael Williams v. Taylor, 529 U.S. 420 (2000).

B. Claims adjudicated by OCCA

The Antiterrorism and Effective Death Penalty Act ("AEDPA") provides the standard to be applied by federal courts reviewing constitutional claims brought by prisoners challenging state convictions. Under the AEDPA, when a state court has adjudicated a claim a petitioner may obtain federal habeas relief only if the state decision "involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." See 28 U.S.C. § 2254(d); Williams v. Taylor, 529 U.S. 362, 402 (2000); Neill v. Gibson, 278 F.3d 1044, 1050-51 (10th Cir. 2001). When a state court applies the correct federal law to deny relief, a federal habeas court may consider only whether the state court applied the federal law in an objectively reasonable manner. See Bell v. Cone, 535 U.S. 685, 699 (2002); Hooper v.

Mullin, 314 F.3d 1162, 1169 (10th Cir. 2002). Furthermore, the "determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). In this case, the OCCA adjudicated Petitioner's claims on direct appeal or in post-conviction proceedings. Therefore, to the extent Petitioner's claims are not procedurally barred, those claims shall be reviewed pursuant to § 2254(d).

1. Omission of jury instruction for manslaughter (ground 2)

In her ground two claim, Petitioner contends that her trial counsel was constitutionally ineffective because he did not request an instruction allowing the jury to find her guilty of manslaughter (Dkt. # 2 at 14). This issue was rejected by the OCCA on direct appeal.[2] Oklahoma's manslaughter statute provides:

> Homicide is manslaughter in the first degree in the following cases:
>
> 1. When perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor.
>
> 2. When perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under such circumstances as constitute excusable or justifiable homicide.
>
> 3. When perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed.

Okla. Stat. Ann. tit. 21, § 711. Further, under Oklahoma law, "all lesser forms of homicide are necessarily included and instructions on lesser forms of homicide should be administered if they are

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[2] Petitioner raised two related issues on direct appeal: (1) the trial court committed reversible error in failing to submit a jury instruction on manslaughter (proposition two); and (2) the jury should have received an instruction for manslaughter and consequently, trial counsel was ineffective for failing to submit the written jury instruction on manslaughter (proposition three). See Dkt. # 47, Ex. A.

supported by the evidence." Shrum v. State, 991 P.2d 1032, 1036 (Okla. Crim. App. 1999). Citing Shrum, the OCCA found that "the trial court did not err in failing to *sua sponte* instruct on first degree manslaughter as such an instruction was not warranted by the evidence." See Dkt. # 48, Ex. C at 2. The OCCA further determined that trial counsel was not ineffective for failing to request a jury instruction on first degree manslaughter "as such instruction was not warranted by the evidence. Workman v. State, 824 P.2d 378, 383 (Okl.Cr. 1991)." Id.

Petitioner is not entitled to habeas corpus relief on her claim of ineffective assistance of counsel unless she establishes that the OCCA's adjudication of this claim was an unreasonable application of Supreme Court precedent. The Court notes that the Supreme Court has not recognized a constitutional right to a lesser-included offense instruction in a non-capital case.[3] Furthermore, to establish that her counsel was constitutionally ineffective for failing to request a lesser-included offense at her trial, Petitioner must show that her counsel's performance was deficient and that the deficient performance was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); Osborn v. Shillinger, 997 F.2d 1324, 1328 (10th Cir. 1993). Petitioner must establish the first prong by showing that her counsel performed below the level expected from a reasonably competent attorney in criminal cases. Strickland, 466 U.S. at 687-88. There is a "strong presumption that counsel's conduct falls within the range of reasonable professional assistance." Id. at 688. In making this determination, a court must "judge . . . [a] counsel's challenged conduct on

[3] The Tenth Circuit Court of Appeals has held that the failure of a state court to instruct on a lesser included offense in a noncapital case never raises a federal constitutional question. Lujan v. Tansy, 2 F.3d 1031, 1036 (10th Cir. 1993). Tenth Circuit precedent establishes a rule of "automatic non-reviewability" for claims based on a state court's failure, in a non-capital case, to give a lesser included offense instruction. Dockins v. Hines, 374 F.3d 935, 938 (10th Cir. 2004) (stating that neither the Tenth Circuit nor the United States Supreme Court has ever recognized a federal constitutional right to a lesser included offense instruction in non-capital cases).

the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. Moreover, review of counsel's performance must be highly deferential. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id. at 689. To establish the second prong, Petitioner must show that this deficient performance prejudiced the defense, to the extent 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; see also Sallahdin v. Gibson, 275 F.3d 1211, 1235 (10th Cir. 2002); Boyd v. Ward, 179 F.3d 904, 914 (10th Cir. 1999). Failure to establish either prong of the Strickland standard will result in denial of relief. Id.; Hatch v. Oklahoma, 58 F.3d 1447, 1457 (10th Cir.1995).

In this case, the failure of Petitioner's trial counsel to request a first degree manslaughter instruction was neither objectively unreasonable nor prejudicial to Petitioner under the first and second prongs of Strickland, because no evidence was introduced at trial supporting a first degree manslaughter instruction. There was no evidence that, when she killed Terry Carlton, Petitioner was committing a misdemeanor, acting in the heat of passion but without a design to cause death, or was resisting an attempt by the victim to commit a crime or after such an attempt failed. The OCCA's adjudication of this claim was neither contrary to, nor an unreasonable application of Supreme Court law, see 28 U.S.C. § 2254(d)(1), when it concluded that trial counsel was not ineffective because the jury instruction was not warranted by the evidence. Accordingly, Petitioner is not entitled to habeas corpus relief on her ground two claim.

2. Failure to present qualified battered woman syndrome expert (ground 6)

In her sixth ground for relief Petitioner asserts that her trial counsel's failure to present

testimony from a qualified battered woman syndrome ("BWS") expert constituted ineffective assistance of counsel. She further claims that her appellate counsel was ineffective for failing to raise this claim on direct appeal. This claim was raised for the first time in post-conviction proceedings. After reviewing the merits, the state district court specifically found that Petitioner did not overcome the first prong of the Strickland standard. On post-conviction appeal, the OCCA stated:

> In this appeal, Petitioner contends she was denied effective assistance of both trial and appellate counsel. . . . Petitioner primarily challenges the District Court's finding relating to battered woman syndrome ("BWS"). Petitioner complains her trial attorney failed to present testimony from a qualified BWS expert, and went so far as to erroneously represent a forensic psychologist as a BWS expert. She claims appellate counsel's failure to assert this issue amounts to ineffective assistance of counsel as found in *Paine v. Massie*, 339 F.3d 1194 (10th Cir. 2003). . . .
>
> Petitioner has failed to establish entitlement to relief in a post-conviction proceeding. With the exception of her claim of ineffective appellate counsel, the propositions of error asserted by Petitioner in this post-conviction proceeding, including her claim of ineffective trial counsel, either were raised or could have been raised during trial or on direct appeal. . . .
>
> Petitioner's claim that her appellate counsel was ineffective is without merit. Petitioner's reliance on *Paine* to support her claim of ineffective appellate counsel with regard to her BWS claim is misguided.
>
> Contrary to the assertion of the United States Court of Appeals for the Tenth Circuit, this Court, in *Bechtel v. State*, 1992 OK CR 55, 840 P.2d 1, did not announce the professional standard in Oklahoma for an attorney representing a battered woman. *See Paine v. Massie*, 339 F.3d 1194, 1202-03. This Court cannot and would not ignore our adversarial system of justice and dictate that trial counsel is required to present a criminal defense in a specified way. Nowhere in the *Bechtel* decision is effectiveness of counsel even discussed. . . .
>
> Petitioner's complaint that appellate counsel failed to raise [this] issue on direct appeal does not establish ineffectiveness. *Walker v. State*, 1997 OK CR 3, ¶ 14, 933 P.2d 327, 334. Petitioner makes one specific complaint that her appellate counsel's performance was deficient under prevailing professional norms. She claims appellate counsel was ineffective for not asserting a challenge to the credentials of the witness presented as an expert on BWS by her retained trial counsel. Petitioner contends the witness was not an expert because his testimony was not consistent with writings by Dr. Lenore Walker in her book *The Battered Woman Syndrome,* 2nd Ed.

(New York: Springer Publishing Company, 2000).

> At trial, both counsel for Petitioner and the prosecutor acknowledged that the witness was an expert. The witness is a board certified psychologist in Oklahoma, and testified that he had extensive experience with BWS. As the District Court found, Petitioner has not established that any failure by her appellate counsel, to raise or adequately challenge the status of the witness as an expert in this case, caused counsel's performance to be deficient under prevailing professional norms. *Strickland, supra.*

Dkt. # 47, Ex. E at 3-5.

Relying on Paine v. Massie, 339 F.3d 1194 (10th Cir. 2003), Petitioner asserts that her trial attorney was ineffective because the "expert" he presented in her defense was a forensic psychologist and not qualified to render BWS testimony. She contends that the expert's testimony was erroneous about BWS and inaccurate about Petitioner. Further, he was not a qualified BWS expert "because his degree of experience working with and studying battered women does not amount to expertise." Dkt. # 50 at 45. Petitioner asserts that he did little to educate her jury about her circumstances. Id. at 36-50. To support her position, Petitioner quotes extensively from the writings of Dr. Lenore Walker,[4] the "definitive battered woman syndrome authority cited by many courts." Dkt. # 39 at 21-25. Respondent contends that trial counsel committed no error because he did provide a meaningful BWS defense.

A review of the record reveals that Petitioner's claim is without merit. Petitioner's trial attorney presented Dr. John Call, a board certified forensic psychologist, as an expert witness to support Petitioner's BWS claim. Dr. Call described his training, education and experience relating to BWS, as follows:

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[4] Although Petitioner challenges her attorney's use of a forensic psychologist as an expert, the Court notes that, according to Petitioner, Dr. Walker is also a forensic psychologist as well as a clinical psychologist. See Dkt. # 39 at 21 n. 2.

Q: Can you give us a brief history of your involvement with that area of your clinical practice and training and education in that area, please, sir.

A: Well, first off, as a state officer, and as a member of the Board of Directors of the Department of mental Health, I and six other members of the Board are directly responsible for all state certified and contracted domestic violence facilities in the State of Oklahoma.

Next, I have personally been involved in the treatment of battered women, and have also been involved in the analysis of battered women who kill the alleged batterer.

And right now I'm involved in four cases of an individual -- of individuals where there's a battering women's syndrome issue; this case for the defense, two other cases where there was a homicide, where I am consultant with the prosecution, the district attorneys, and then another case where I'm working with the district attorneys where there was an individual who was kidnapping a battered woman.

Q: All right. And, Dr. Call, in relation to the battered women's experiences that you've had, have you diagnosed those situations as well, sir?

A: Yes. Do you mean diagnose in terms of using our diagnostic manuals?

Q: Yes.

A: Yes.

Tr. Trans. Vol. 15 at 2806-07. Dr. Call also testified that he has been certified in various courts as an expert in the areas discussed. Id. at 2808. Without objection from the State, the trial court accepted Dr. Call as an expert. Id.

Dr. Call provided the jury with a detailed explanation of BWS. See Tr. Trans. 15 at 2815-17. He further testified that Petitioner exhibited the following BWS symptoms: (1) actual physical evidence of being battered; (2) evidence of physical trauma over a period of time; (3) fear and apprehension regarding the battering; (4) increasing isolation from friends, family, and work with resulting loss of support from those outside sources; (5) difficulty in following through with protective orders; (6) traumatic bonding; and (7) classic BWS pattern of complaining to friends and

others but not leaving the batterer. Id. at 2819-26. Dr. Call concluded his direct examination testimony by opining that, "The defendant's descriptions of the events of the early morning of April 28th, 1998, are consistent with other similar reports about the couple's battering relationship, and it's my opinion that the balance of the data supports the conclusion that the Defendant was psychotic at the time of the shooting, believed she was in danger, and believed that her use of force was justified." Id. at 2852.

The jury did not accept the BWS defense. However, the jury's finding of guilt was not a result of trial counsel's failure to present an expert in support of her BWS claim. In the Paine case, the defendant's trial attorney failed to ask his defense psychologist expert to explain BWS, and did not attempt to present the witness as a BWS expert. Paine, 339 F.3d at 1200-02. Accordingly, the Tenth Circuit found, "[C]ounsel's failure to offer BWS testimony to provide context for the jury on the reasonableness of Ms. Paine's subjective fear amounts to objectively unreasonable performance." Id. at 1202. Contrary to defense counsel's performance in the Paine case, Petitioner's defense counsel presented Dr. Call as a BWS expert and elicited testimony concerning both the symptoms of BWS and his assessment of how the experiences of Petitioner, as a battered woman, impacted her state of mind at the time of the killing. This Court finds that trial counsel's performance in presenting Dr. Call as a BWS expert witness was not constitutionally deficient performance under the mandate of Strickland. Accordingly, her appellate counsel was not ineffective for failing to raise this issue on direct appeal. The OCCA's finding was not an unreasonable application of Supreme Court law, and Petitioner is not entitled to relief on this issue.

3. Failure to object to admission of statements made prior to Miranda[5] warnings

[5] Miranda v. Arizona, 384 U.S. 436 (1966).

(ground 7)

In her seventh claim for habeas relief, Petitioner contends that her trial counsel was ineffective because he failed to object to the admission into evidence of a statement she made to police upon their arrival at the crime scene. At issue is the admission of the following testimony by Tulsa police Officer Lawson, describing the investigating officers' initial contact with Petitioner upon arriving at the crime scene:

> Q: At the time that you saw the female on the inside on the stairs, what did you all do?
>
> A: We yelled, "Police officers. Open the door."
>
> Q: What happened?
>
> A: She came down and opened the door. And when she opened the door, we was all standing there looking at the person for a second, and then I believe it was Officer Gann said, "We're responding here to a shooting." And she was standing there nodding her head. And at that point I asked her, "Did you shoot him?" She said, "Yes." I said, "Where is the gun?" She said, "It's downstairs." Then I asked her, I said, "Where is he?" And she said, "Downstairs."

Tr. Trans. Vol. VII at 1349. It is uncontested that Petitioner had not been read her Miranda rights before she responded to the above described questions from Officer Lawson. Petitioner maintains that her statements were improperly admitted because Miranda warnings should have been given before any questioning by law enforcement, and that her trial attorney was ineffective for failing to object to their admission. She also claims that any statements made by her following the "unlawfully obtained response," including statements made after being given a Miranda warning, should have been quashed. See Dkt. # 39 at 31. Rejecting this claim on direct appeal, the OCCA found:

> In Proposition IV, appellant has failed to show a reasonable probability that, but for counsel's failure to object to the admission of her initial statements made to police at the murder scene, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 686, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Fisher v. State*, 736 P.2d 1003, 1012 (Okl. Cr. 1987). Assuming arguendo, Appellant's initial

> statements made at the murder scene were subject to *Miranda* any error in admitting those statements was harmless beyond a reasonable doubt as other admissions made after the giving of the *Miranda* warning and the waiver of those rights were properly admitted. *See Bartell v. State*, 881 P.2d 92, 99 (Okl. Cr. 1994). Consequently, any failure by trial counsel to object to the admission of those initial statements did not prejudice Appellant and therefore is not indicative of ineffective assistance. *Phillips v. State*, 989 P.2d 1017, 1044 (Okl.Cr. 1999).

Dkt. # 48, Ex. C at 2-3.

Miranda warnings are due only when a suspect being interrogated by police is "in custody." See Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (officer's obligation to administer Miranda warnings attaches "only where there has been such a restriction on a person's freedom as to render him 'in custody'"). Police failure to honor Miranda rights does not result in suppression of a voluntary statement made in a noncustodial setting. Respondent contends that Petitioner was not in custody at the time she made the statements at issue (Dkt. #45 at 31-2). Accordingly, their admission was not a violation of Miranda, and Petitioner's trial attorney was not ineffective for failing to challenge admission of the statements. The Court agrees. The initial questioning by police officers upon arriving at the door of the victim's home fell short of placing Petitioner "in custody" for purposes of triggering Miranda. Custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S. 436, 444 (1966). The police were investigating a phone report of a possible shooting, and did not yet know if a crime had been committed when Petitioner answered the door.

In Missouri v. Seibert, 542 U.S. 600 (2004), a case relied upon by Petitioner,[6] the defendant

[6] In her amended brief in support of the habeas corpus petition (Dkt. # 39), Petitioner incorporates by reference the authority cited and arguments made in her supplement to Petitioner's reply filed in the OCCA. See Dkt. # 39 at 32. Although the referenced supplement to Petitioner's

was arrested and taken to the police station where she was questioned for 30 to 40 minutes before being given a Miranda warning. Seibert, 542 U.S. at 604-05. The Supreme Court found that the late recitation of warnings, after interrogation and an "unwarned" confession, did not comply with Miranda's warning requirement, thus rendering the postwarning statements inadmissible. Id. at 601. The Seibert case is easily distinguishable from Petitioner's case. In Seibert, the police intentionally employed the technique of interrogating in successive, unwarned and warned phases. The officers conducted a two-stage interrogation, purposely obtaining a confession pre-warning, then reading the Miranda warning and asking Seibert to repeat the incriminating statements. Further, all questioning took place at the police station after Seibert was arrested for the murder of her son. In Petitioner's case, the officers were not certain that a crime had occurred when they approached Mr. Carlton's home and Petitioner answered the door. Petitioner was not in custody when she initially told the police officers that she had shot the victim. Shortly after police entered the house, Petitioner was read her Miranda rights and continued telling her version of the facts.

This Court finds that the initial statement by Petitioner that she shot the victim was not made during a custodial interrogation and was admissible even though made prior to a Miranda warning. Petitioner's counsel was not ineffective for failing to challenge the admissibility of the statement, and the OCCA's ruling was not an unreasonable application of Supreme Court law. 28 U.S.C. § 2254. Accordingly, no habeas relief is available on this claim.

4. Failure to object to coerced statements to police (ground 8)

In her eighth ground for relief, Petitioner claims her trial counsel was ineffective for failing

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reply does not contain a specific citation to the Seibert case, it is clear she was referring to Seibert as the June 28, 2004, United States Supreme Court case reported in the Tulsa World article attached to the pleading. Dkt. # 39, attachment.

to object to the admission of her videotaped statement to police. Although her statement was made following a Miranda warning, Petitioner contends it was coerced because the police would not take her for a rape exam until she taped her statement (Dkt. # 39 at 33-34). Rejecting this claim on direct appeal, the OCCA stated:

> In Proposition V, sufficient evidence was presented to show that Appellant's statements made during the videotaped interview were made knowingly, voluntarily and freely. Therefore, the trial court properly admitted the statements. *Gilbert v. State*, 951 P.2d 98, 111 (Okl.Cr.1997). Further, trial counsel was not ineffective for failing to object to the admissibility of Appellant's statements on the grounds her statements were coerced by failure of the police to immediately provide her with a rape examination and medical treatment.

See Dkt. # 48, Ex. C at 3.

The state appellate court's finding that Petitioner's videotaped interview was made "knowingly, voluntarily and freely" is entitled to a presumption of correctness under the standards of 28 U.S.C. § 2254(e)(1). Petitioner bears the burden of overcoming the presumption by clear and convincing evidence. See Trice v. Ward, 196 F.3d 1151, 1169-70 (10th Cir. 1999). Petitioner has not produced clear and convincing evidence to rebut the finding that her videotaped statement was voluntary. Courts look to the totality of circumstances to determine whether a confession was voluntary, including factors such as the length of the interrogation, its location, its continuity, the defendant's maturity, physical condition and mental health and the possible failure of police to advise the defendant of her Miranda rights.[7] See Withrow v. Williams, 507 U.S. 680, 693-94 (1993) and cases cited therein; see also Mitchell v. Gibson, 262 F.3d 1036, 1059 (10th Cir. 2001). The taped

[7] The record contains a copy of the Tulsa Police Department's written notification of Miranda rights and Petitioner's signed waiver of such rights indicating she was willing to answer questions. See Dkt. # 52, State's Ex. 68. In addition, the videotape begins with Petitioner acknowledging that she waives her Miranda rights. See Dkt. # 46, State's Ex. # 69.

interrogation itself reveals no action by the interviewing police officer that would support a finding of coercion sufficient to overcome Petitioner's understanding of her Miranda warnings. A review of the entire record and the totality of the circumstances also convinces this Court that the videotaped statement was not coerced. Accordingly, Petitioner's trial counsel was not ineffective for failing to challenge the admission of the videotaped statement at trial. Further, the OCCA's findings on this issue were not based on an unreasonable determination of the facts in light of the evidence presented, nor did they involve an unreasonable application of clearly established federal law, as determined by the Supreme Court. 28 U.S.C. § 2254(d). Habeas relief shall not be granted on this issue.

C. Procedural Bar (grounds 1, 3, 4, and 5)

The record confirms that the issues raised in Petitioner's first, third, fourth and fifth grounds were not presented to the OCCA on direct appeal. These claims were raised for the first time in Petitioner's post-conviction proceedings. In its order affirming the district court's denial of post-conviction relief, the OCCA stated:

> Petitioner has failed to establish entitlement to relief in a post-conviction proceeding. With the exception of her claim of ineffective appellate counsel, the propositions of error asserted by Petitioner in this post-conviction proceeding, including her claim of ineffective trial counsel, either were raised or could have been raised during trial or on direct appeal. All issues which were previously asserted are barred as *res judicata*, and all issues which could have been previously asserted are waived. Such issues may not be the basis of a post-conviction application. 22 O.S. 2001, § 1086; *Fowler v. State*, 1995 OK CR 29, ¶2, 896 P.2d 566, 569.

Dkt. # 47, Ex. E at 2-3.

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state's highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider

the claim[ ] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "'in the vast majority of cases.'" Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991)). The Tenth Circuit has recognized that, "Oklahoma's procedural rule barring post-conviction relief for claims petitioner could have raised on direct appeal constitutes an independent and adequate ground" barring federal habeas corpus review. Sherrill v. Hargett, 184 F.3d 1172, 1175 (10th Cir. 1999).

Applying the principles of procedural bar to this case, the Court concludes that Petitioner's first, third, fourth and fifth grounds for relief are procedurally barred. The OCCA's procedural bars, based on Petitioner's failure to raise grounds one, three, four and five on direct appeal are "independent" state grounds because state law provided "the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bars imposed on these four claims were based on "adequate" state grounds sufficient to bar the claims on federal habeas corpus review. See Steele v. Young, 11 F.3d 1518, 1522 (10th Cir. 1993) The OCCA routinely bars claims that could have been but were not raised on appeal.

When the underlying claim is ineffective assistance of counsel, the Tenth Circuit Court of Appeals has recognized that countervailing concerns may justify an exception to the general rule of procedural default. Brecheen v. Reynolds, 41 F.3d 1343, 1363 (citing Kimmelman v. Morrison, 477 U.S. 365 (1986)). The unique concerns are "dictated by the interplay of two factors: the need for additional fact-finding, along with the need to permit the petitioner to consult with separate counsel

on appeal in order to obtain an objective assessment as to trial counsel's performance." Id. at 1364 (citing Osborn v. Shillinger, 861 F.2d 612, 623 (10th Cir. 1988)). The Tenth Circuit explicitly narrowed the circumstances requiring imposition of a procedural bar on ineffective assistance of counsel claims first raised collaterally in English v. Cody, 146 F.3d 1257 (10th Cir. 1998). In English, the circuit court concluded that:

> Kimmelman, Osborn, and Brecheen indicate that the Oklahoma bar will apply in those limited cases meeting the following two conditions: trial and appellate counsel differ; and the ineffectiveness claim can be resolved upon the trial record alone. All other ineffectiveness claims are procedurally barred only if Oklahoma's special appellate remand rule for ineffectiveness claims is adequately and evenhandedly applied.

Id. at 1264 (citation omitted).

After reviewing the record in the instant case in light of the factors identified in English, the Court concludes that the procedural bar imposed by the state courts is based on adequate grounds to preclude federal habeas review. Petitioner was represented at trial by attorney Chris Lyons. On appeal, Petitioner was represented by Bill Zuhdi. For purposes of the first requirement identified in English, the Court finds that Petitioner had the opportunity to confer with separate counsel at trial and on appeal. The second English factor requires that the claims could have been resolved either "upon the trial record alone" or after adequately developing a factual record through some other procedural mechanism. Id. at 1263-64. Even if Petitioner's claims in this case could not all be resolved on the trial record alone, Petitioner has not alleged that the Oklahoma remand procedure, as provided by Rule 3.11 of the Oklahoma Court of Criminal Appeals, was inadequate to allow her to supplement the record on her ineffective assistance of counsel claims. See Hooks v. Ward, 184 F.3d 1206, 1217 (10th Cir. 1999) (once the state pleads the affirmative defense of an independent and adequate state procedural bar, the burden shifts to the petitioner to make specific allegations as to the inadequacy

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of the state procedure). Although Respondent has alleged an independent and adequate procedural bar, Petitioner has not put the adequacy of Oklahoma's remand procedure at issue. As a result, she cannot demonstrate that Oklahoma's procedural bar is inadequate and her claims of ineffective assistance of trial counsel are procedurally barred.

This Court may not consider Petitioner's procedurally barred claims unless she is able to show "cause and prejudice" for the default, or demonstrate that a fundamental miscarriage of justice would result if her claim is not considered. See Coleman, 501 U.S. at 750; Demarest v. Price, 130 F.3d 922, 941-42 (10th Cir. 1997). The cause standard requires a petitioner to "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Cause and Prejudice

In both state post-conviction proceedings and this habeas corpus matter, Petitioner combines her ineffective assistance of trial counsel claims in grounds one, three, four and five with a statement that, "Appellate counsel was ineffective for failing to raise claims I, III, IV, V, and VI[8] on direct appeal." See Dkt. # 34 at 2. The Court will construe Petitioner's succinct mention of appellate

[8] Claim Six was addressed on the merits by the state appellate court, and the OCCA's decision was analyzed in Section B.2. above.

counsel liberally, and interpret the statement as an argument that her procedural default is attributable to ineffective assistance of appellate counsel.

It is well established that, in certain circumstances, counsel's ineffectiveness can constitute "cause" sufficient to excuse a state prisoner's procedural default. See Murray v. Carrier, 477 U.S. 478, 488-89 (1986). However, the assistance provided by appellate counsel must rise to the level of a constitutional violation under the two-pronged standard established in Strickland. Petitioner must demonstrate that her counsel's performance was deficient and that the deficient performance was prejudicial. Strickland, 466 U.S. at 687; Hickman v. Spears, 160 F.3d 1269, 1273 (10th Cir. 1998). In assessing an ineffective assistance of appellate counsel claim, the Tenth Circuit Court of Appeals has held that "the relevant questions are whether appellate counsel was 'objectively unreasonable' in failing to raise these . . . claims on direct appeal and, if so, whether there is a 'reasonable probability that, but for his counsel's unreasonable failure' to raise these claims, [Petitioner] 'would have prevailed on his appeal.'" Neill v. Gibson, 278 F.3d 1044, 1057 (10th Cir. 2001); Cargle v. Mullin, 317 F.3d 1196, 1202 (10th Cir. 2003). In analyzing an appellate ineffectiveness claim based upon failure to raise an issue on appeal, the Court must examine the merits of the omitted issue. Neill, 278 F.3d at 1057; Cargle, 317 F.3d at 1202. If the issue is meritless, its omission will not constitute deficient performance. Id.

1. Ineffective assistance of trial counsel for failure to properly investigate her defense, and ineffective assistance of appellate counsel for failing to raise this claim on direct appeal (ground 1)

In this claim, Petitioner asserts that her trial counsel was ineffective for failing to investigate

before Petitioner responded, "I shot him." Tr. Trans. Vol VII at 1456-57. Officer Fadem's *in camera* testimony and trial testimony were substantially the same. Failure to challenge her on the minor differences certainly does not rise to the level of constitutionally ineffective trial counsel. Appellate counsel was not ineffective for failing to raise this claim on direct appeal, and Petitioner's procedural bar is not excused on this issue.

Fundamental Miscarriage of Justice

Having failed to establish cause and prejudice for her procedural bar, Petitioner also argues that her default should be excused because a fundamental miscarriage of justice would result. The fundamental miscarriage of justice exception to the doctrine of procedural bar is applicable only when a petitioner asserts a claim of actual innocence. Herrera v. Collins, 506 U.S. 390, 403-04 (1993); Sawyer v. Whitley, 505 U.S. 333, 339-341 (1992); see also Schlup v. Delo, 513 U.S. 298 (1995). Under Schlup, a showing of innocence sufficient to allow consideration of procedurally barred claims must be "so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error . . . ." Id. at 316. Petitioner has the burden of persuading this Court "that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." Id. at 329.

In this case, Petitioner fervently argues that she is actually innocent of the first degree murder of Terry Carlton. See Dkt. # 37. On April 28, 1998, Petitioner removed a gun she had hidden in her vest and fatally shot Terry Carlton. Petitioner plead not guilty, asserting that the killing was done in self-defense and that she was the victim of BWS. She argues in this habeas matter that the shooting was "instinctive survival" and was reasonable and justified based on her perception as a battered woman (Dkt. # 39 at 19). She believes she has established her innocence under Oklahoma law (Dkt.

37 at 2). However, Petitioner's jury found her guilty. Petitioner's assertion of actual innocence is not supported by any new evidence which was not presented at trial. See Schlup v. Delo, 513 U.S. 298, 324 (1995) ("To be credible, [a claim of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence ... that was not presented at trial."). In fact, she does not claim that new evidence shows she is factually innocent of shooting Terry Carlton. Rather, she asserts that she is legally innocent because her conduct was justified by the doctrines of self-defense and BWS. The miscarriage of justice exception, however, only applies to claims of factual innocence. Beavers v. Saffle, 216 F.3d 918, 923 (10th Cir. 2000). Therefore, the Court finds that Petitioner has failed to demonstrate that she falls within the fundamental miscarriage of justice exception to the procedural bar doctrine.

As a result of Petitioner's failure to demonstrate either "cause and prejudice" or that a fundamental miscarriage of justice would occur if her claims are not considered, this Court is procedurally barred from considering Petitioner's claims of ineffective assistance of trial and appellate counsel asserted in grounds one, three, four and five.

CONCLUSION

After careful review of the record in this case, the Court concludes that the Petitioner has not established that she is in custody in violation of the Constitution or laws or treaties of the United States. Her petition for writ of habeas corpus, as amended and supplemented, shall be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Petitioner's motions to supplement (Dkt. ## 59, 60), and motion to file second amendment to petition for writ of habeas corpus (Dkt. # 62) are **granted**. The claims made in the "second

amendment" have been adjudicated as supplements to the ineffective assistance of counsel claim raised as ground one in the amended petition. The Court has considered the supplements and the "second amendment" attached to Petitioner's motions in analyzing Petitioner's claims herein.

2. The petition for a writ of habeas corpus (Dkt. # 1, 39), as amended and supplemented (Dkt. ## 12, 13, 14, 35, 59, 60, and 62) is **denied**.

3. A separate Judgment shall be entered in this case.

DATED THIS 5th DAY of NOVEMBER, 2007.

Terence Kern

TERENCE KERN
UNITED STATES DISTRICT JUDGE

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her defense in three ways: (1) failure to contact an attorney[9] who represented her in protective order proceedings in 1996; (2) failure to contact an attorney[10] who had "first hand information" concerning Petitioner's relationship with Mr. Carlton and who had an audiotape evidencing the abusive relationship between Petitioner and Mr. Carlton; and (3) failure to procure tapes of various 911 calls made to police by Petitioner. See Dkt. # 12 at 11-12.

Regarding trial counsel's failure to contact or subpoena attorney Claire Eagan, the Court notes that there was substantial evidence at Petitioner's trial that Terry Carlton had physically abused and terrorized Petitioner on more than one occasion. Dr. Joseph Schlect testified that he examined Petitioner in December, 1996, and found bruises "compatible with [her] report of domestic abuse." Tr. Trans. Vol. XIII at 2384-85. A sexual assault nurse examiner for St. Francis Hospital testified that her examination of Petitioner in December, 1997, revealed redness, bruising, tearing and lacerations consistent with Petitioner's statement that she had been raped by Mr. Carlton. Id. at 2486. Riza Johnson, a mental health aide at Eastern State Hospital in Vinita, Oklahoma, testified that when Terry Carlton visited Petitioner at the hospital, he was agitated and was "hollering at April from the car." Id. at 2517. Betty Cantrell, a nurse at Eastern State Hospital, testified that Mr. Carlton was hostile and cursing when he visited Petitioner. Id. at 2529. Tulsa Police Officer Kimberly Presley testified that she passed Terry Carlton on the lawn when she was responding to a domestic abuse call. When Officer Presley asked him if Petitioner was hurt, he replied, "I don't know. She's one big bruise." Id.

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[9] Petitioner was represented by the Honorable Claire Eagan, prior to Judge Eagan assuming her responsibilities on the federal bench in this Northern District of Oklahoma. See Dkt. # 47, Ex. D attachment.

[10] An affidavit from Michael Cooke, an attorney who represented Petitioner in certain business matters, sets forth Mr. Cooke's knowledge of the situation. See Dkt. # 47, Ex. D attachment.

at 2550. Tulsa Police Officer Paul Fields testified about being dispatched to domestic abuse calls from Petitioner at Mr. Carlton's house where he observed multiple bruises on Petitioner. Id. at 2569. Neva Lathrop, a nurse's aide at Eastern State Hospital, testified that Terry Carlton was yelling, jumping up and down and flopping his arms during a visit to see Petitioner at the hospital. Tr. Trans. Vol. XIV at 2614. A neighbor of Mr. Carlton, Dr. Brent Laughlin, testified that he heard a window breaking, observed Petitioner in a car with a broken window and noted that Mr. Carlton had taken the car keys away and gone into his house while yelling at Petitioner. Id. at 2625-26. Dr. Charles Teter testified that an examination of Petitioner on approximately May 6, 1997, revealed several areas of fresh bruising consistent with Petitioner's indication that Terry Carlton caused the injuries. Id. at 2632-33. A sales clerk at QuikTrip related his observations of an incident when Petitioner came into the convenience store seeming upset. Shortly thereafter Mr. Carlton arrived and the parties were arguing because Petitioner did not want to leave with Mr. Carlton. The clerk was concerned enough to call 911 and lock the doors when Mr. Carlton left the store. Petitioner also left before the police arrived. Id. at 2647-57. Petitioner's friend, Cheryl Broyles, testified that Petitioner was afraid of Mr. Carlton and wanted to borrow her dog for protection against him. Id. at 2670. Petitioner's neighbor, Maxine Callicoat, testified that she could hear arguing and yelling when Mr. Carlton was at Petitioner's home. Id. at 2686-88. She also stated that Petitioner had used her phone on occasion to call the police because Mr. Carlton was threatening her. Id. at 2688. Officer Troy Dewitt testified that Petitioner placed a domestic abuse call from her house. Upon arrival the officer stopped Terry Carlton outside Petitioner's home. Mr. Carlton had a loaded gun and a taser in his possession, and was arrested for transporting a loaded firearm. Id. at 2712-13. Another of Petitioner's neighbors, Carl Hughes, testified that he observed Mr. Carlton trying to break into Petitioner's driveway gate. Id. at

2730. Neighbor Glenda McCarley testified that she had let Petitioner use her phone to call the police when she was afraid of Terry Carlton. Id. at 2739. She also testified that she heard screaming from Petitioner's home late at night and observed Mr. Carlton dragging Petitioner by the hair around to the back of her house. Id. at 2744. Sherry Blanton, former wife of Terry Carlton, testified about the protective order she had against him and the battering she suffered from Mr. Carlton. Id. at 2789-90. Finally, Petitioner testified herself about the numerous incidents when Mr. Carlton hit, choked, raped and otherwise abused her.

The Court finds that trial counsel's failure to contact attorney Claire Eagan and to present further cumulative testimony about Terry Carlton's abuse did not rise to the level of a constitutional violation under the standards established in Strickland. Likewise, trial counsel's failure to contact attorney Mike Cooke and obtain a copy of the audiotape referenced by Petitioner did not constitute ineffective assistance of counsel. Although the audiotape reveals that both Petitioner and Mr. Carlton acknowledged a troubled relationship existed between them, there were many other witnesses who testified that the relationship was abusive and contentious, as noted above. Finally, the Court does not agree that trial counsel's failure to obtain and present 911 tapes in support of her theory of self defense was prejudicial to her defense. The jury was presented with ample evidence of battering by Mr. Carlton and police testimony regarding domestic abuse calls concerning Petitioner and Mr. Carlton. Because trial counsel's performance was not deficient, appellate counsel was not ineffective for omitting these claims of ineffective assistance of trial counsel on direct appeal.

2. Ineffective assistance of trial counsel for failure to present an outstanding Tulsa County bench warrant for Terry Carlton's arrest, and ineffective assistance of appellate counsel for failing to raise this claim on direct appeal (ground 3)

Terry Carlton was arrested outside Petitioner's home on February 21, 1998, for transporting

a loaded firearm. See Dkt. # 47, Ex. D attachment. On March 25, 1998, a bench warrant was issued for Mr. Carlton in Tulsa County District Court Case No. CM-1998-575, for his failure to appear in court on this charge. Id. Petitioner claims in ground three that her trial attorney should have presented evidence of the outstanding bench warrant to the jury because it could have been used to impeach the testimony of two police officers and would have validated Petitioner's claim that she could not rely on the police to protect her from Mr. Carlton. See Dkt. # 47, Ex. D at 17. Because the OCCA found this issue procedurally barred, the Court will review the merits of the omitted issue to determine whether appellate counsel's ineffectiveness would excuse her procedural default.

Petitioner must overcome the presumption that trial counsel's failure to present the outstanding bench warrant was within the wide range of reasonable professional assistance and might be considered sound trial strategy. Strickland, 466 U.S. at 689. Petitioner has failed to convince the Court that omission of the bench warrant information was critical to Petitioner's defense, or that its omission was unreasonable. Contrary to Petitioner's assertions, the record reflects that police officers took her numerous 911 calls seriously and responded promptly to her calls for help. Petitioner failed to follow through and did not appear at the hearings on her requests for protective orders. Further, the Court is not convinced that, but for omission of the bench warrant information to the jury, there is a reasonable probability that the result of the proceeding would have been different. Id. at 694. Petitioner has failed to establish either prong of the Strickland standard in claiming her trial counsel was ineffective for failing to present the outstanding arrest warrant information. Accordingly, her appellate counsel was not ineffective for failing to raise the issue on direct appeal, and Petitioner cannot rely on ineffective assistance of appellate counsel to excuse her procedural bar of this issue.

3. Ineffective assistance of trial counsel for failure to present results of urinalysis, and ineffective assistance of appellate counsel for failing to raise this claim on

direct appeal (ground 4)

Next, Petitioner argues that her trial counsel was ineffective for failing to present the results of her April 28, 1998, urinalysis to the jury. Both blood and urine samples were taken from Petitioner during the rape exam she requested following her arrest. The results of the tests were not presented to the jury, although Petitioner alleges her trial counsel told her the urine sample tested negative for all drugs. Petitioner does not explain how the negative drug test would have affected the outcome of her murder case. Admission of the test results would not prove that she did not pull the trigger and kill Terry Carlton. Nor does the Court believe that the test results would have advanced Petitioner's BWS defense in any way. Petitioner's allegations do not support an ineffective assistance of trial counsel claim. Thus, her appellate counsel was not ineffective for failing to raise this issue. Petitioner has not demonstrated cause for the procedural bar of this issue.

4. Ineffective assistance of trial counsel for failure to present a transcript of Officer Fadem's previous testimony, and ineffective assistance of appellate counsel for failing to raise this claim on direct appeal (ground 5)

In her ground five claim, Petitioner alleges that her trial counsel was ineffective for failing to impeach Officer Fadem's testimony with a transcript of previous *in camera* testimony offered by that witness. During an *in camera* hearing, Officer Fadem testified that after Petitioner opened the door for the officers, she heard Petitioner say, "I shot him, he's in the basement." Officer Fadem did not say exactly what question prompted the response from Petitioner, but she said that Officer Gann and Officer Lawson were there, and started to explain what Officer Gann said when Petitioner's attorney objected. Tr. Trans. Vol. VI at 1102-03. During the trial, Officer Fadem testified that she was behind Officers Gann and Lawson, and heard them say something to Petitioner when she opened the door. Officer Fadem couldn't remember the exact wording of the question posed to Petitioner

APPELLANT'S EXHIBIT 21

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

APRIL ROSE WILKENS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**Case No. 02-CV-244-TCK-SAJ**
	)	
MILLICENT NEWTON-EMBRY, Warden,	)	
	)	
	)	
Respondent.	)	

JUDGMENT

This matter comes before the Court on Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus. The issues having been duly considered and a decision having been rendered in accordance with the Opinion and Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for Respondent and against Petitioner.

DATED THIS 5th day of November, 2007.

Terence Kern

TERENCE KERN
UNITED STATES DISTRICT JUDGE

APPELLANT'S EXHIBIT 22

IN THE UNITIED STATES COURT FOR THE NORTHERN DISTIRCT OF OKLAHOMA

APRIL ROSE WILKENS,)
Petitioner,)
vs.) Case No. 02-CV-244-TCK-SAJ
MILLICENT NEWTON-EMBRY,)
Warden,)
Respondent.)

NOTICE OF APPEAL

Notice is hereby given that April Rose Wilkens, Petitioner in the above named case, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the judgment entered in this action on 5 November 2007.

Respectfully submitted,

April Wilkens
April Rose Wilkens
M.B.C.C. C1C-117
29501 Kickapoo Road
McLoud, OK 74851

DECLARATION OF MAILING

I declare under penalty of perjury that on 20 November 2007, I submitted the foregoing to M.B.C.C. staff, with prepaid first-class postage affixed, for mailing to the Court.

April Wilkens
April Rose Wilkens

CERTIFICATE OF MAILING

I certify that on 20 November 2007, a true and correct copy of the foregoing was mailed, with prepaid first-class postage affixed, to:

Diane Slayton and William Holmes, Assistant Attorney Generals
Oklahoma Attorney General's Office
313 N.E. 21st Street
Oklahoma City, OK 73105

April Wilkens
April Rose Wilkens

TULSA WORLD, Fri. 11 MARCH 2005 : A-1

APPELLANTS EXHIBIT 23

Judge Stephen Lile

He allegedly allowed his former assistant, Dawn M. Lukasik, to be paid for work that she did not perform. A state audit criticized him for claiming travel costs related to a Corrections Department program in which he had no official role

Appellate judge quits amid state investigation

The Attorney General's Office was reviewing allegations of questionable spending, criticized in a state audit.

By Barbara Hoberock
World Capitol Bureau

OKLAHOMA CITY — Embattled Judge Stephen Lile of the Oklahoma Court of Criminal Appeals submitted his resignation Monday to Gov. Brad Henry's office.

"My respect for this office and this Court compels me to tender my resignation as judge for the 5th District, effective March 1," Lile's letter said.

Lile, who was paid $106,700 a year, did not return a call seeking comment.

Henry accepted the resignation.

"Given the serious and troubling nature of the circumstances surrounding his office, Judge Lile without question made the right decision in stepping down from the bench," Henry said. "Our judiciary must be held to the highest of ethical standards. I do not believe the conduct detailed in the state audit report and other accounts was consistent with that standard."

Henry said he would move quickly in conjunction with the Oklahoma Judicial Nominating Commission to appoint Lile's replacement.

Lile was under investigation by Oklahoma Attorney General Drew Edmondson's office following allegations of questionable spending, allowing his former assistant, Dawn M. Lukasik, to be paid for work that she did not perform and intervention in

SEE LILE A-3

LILE:

With his departure, the investigation of him ends.

FROM A-1

a case involving Lukasik's son.

An audit released last week by State Auditor and Inspector Jeff McMahan was critical of Lile for billing the state for trips involving the Department of Corrections' Regimented Inmate Discipline Program and questionable spending on furniture and other items. Corrections officials said Lile had no official role with the program, which Lukasik's son completed in June.

The audit called into question about $3,000 in questionable spending by Lile.

When the Tulsa World filed an Open Records Act request for his travel records, Lile reimbursed the state $1,523.64 later that day for travel in connection with the RID program, saying he wanted to avoid a conflict of interest. He also reimbursed the state $1,560 for furniture and other items after an internal audit determined that his claims were filed improperly.

"I am pleased Judge Lile has accepted responsibility for his actions and tendered his resignation," Edmondson said. "This action concludes our examination of the judge's activities, although there are still elements of our work involving other personnel that are ongoing."

Charlie Price, a spokesman for Edmondson, said Lile and Edmondson did not make a deal.

"This attorneys approached our office to inquire as to our position should their client tender his resignation," Price said. "We responded that his resignation would end our investigation. He resigned within the hour."

Lile was an assistant district attorney in Comanche and Cotton counties from 1973 until 1977 and was in private practice from 1977 until 1994, when then-Gov. Frank Keating appointed him to the Oklahoma Court of Criminal Appeals.

Presiding Judge Charles S. Chapel of the Court of Criminal Appeals said Lile did the right thing for himself, the court and the state judiciary. The Oklahoma Court of

Barbara Hoberock (405) 528-2465
barbara.hoberock@tulsaworld.com

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COUNTY OF POTTAWATTOMIE)
) **ss.**
STATE OF OKLAHOMA)

AFFIDAVIT OF APRIL ROSE WILKENS

I, April Rose Wilkens, of sound mind and of lawful age, do state upon personal oath that to the best of my knowledge, all exhibits presented herein are authentic, including:

1. Affidavit of U.S. District Judge Claire Eagan,
   28 March 2002 [NDOK Dkt. #2 Exhibit 1]

2. Affidavit of Attorney Mike Cooke,
   1 April 2002 [NDOK Dkt. #2 Exhibit 3]

3. Abridged Audiotape Transcript of April Wilkens and Terry Carlton
   [Abridged NDOK Dkt. #2 Exhibit 4]

4. Tulsa Police arrest report of Terry Carlton's 21 February 1998 arrest
   for transporting a loaded firearm [NDOK Dkt. #12 Exhibit 2]

5. District Court of Tulsa County case report evidencing warrant
   for Terry Carlton's arrest issued on 26 March 1998
   and still outstanding on 28 April 1998 in *Carlton v. State,*
   case no. CM-1998-575 [NDOK Dkt. #12 Exhibit 3]

6. Pre-sentence Investigation Report Assessment of April Wilkens
   by licensed Domestic Violence Intervention Services counselor Lynda Driskell,
   filed in *Wilkens v. State,* District Court of Tulsa County case no. CF 98-2173

7. Newspaper article by unidentified staff writer,
   "Drug Conviction Adds 2 Years to Woman's Sentence,"
   Tulsa World, 11 July 2000: A-10

8. Letter from appellate attorney Bill Zuhdi,
   07 February 2000 [NDOK Dkt. #62 Exhibit A]

9. Oklahoma Court of Criminal Appeals' Summary Opinion
   Affirming Judgment and Sentence in *Wilkens v. State,*
   OCCA case no. F-99-927, 03 April 2001 [NDOK Dkt. #48 Exhibit C]

10. Marriage Certificate of Don and Shirley Carlton,
    Oklahoma Court of Criminal Appeals Judge Charles Johnson officiating,
    filed in Creek County, Oklahoma, 29 May 1996

11. Application for Post-Conviction Relief in *Wilkens v. State,*
District Court of Tulsa County case no. CF 98-2173, 05 March 2003

12. Tulsa District Attorney Tim Harris's Response
to Application for Post-Conviction Relief in *Wilkens v. State,*
District Court of Tulsa County case no. CF 98-2173, 27 March 2003

13. Order Denying Amended Application for Post-Conviction Relief in *Wilkens v. State,*
District Court of Tulsa County case no. CF 98-2173, 22 August 2003

14. Post-Conviction Appeal in *Wilkens v. State,*
OCCA case no. PC-2003-1002, 9 September 2003

15. Oklahoma Attorney General's Response
to Post-Conviction Appeal in *Wilkens v. State,*
OCCA case no. PC-2003-1002, 28 May 2004

16. April Wilkens's Reply to State's Response to
Post-Conviction Appeal in *Wilkens v. State,*
OCCA case no. PC-2003-1002, 17 June 2004

17. Oklahoma Court of Criminal Appeals' Order
Affirming Denial of Post-Conviction Relief in *Wilkens v. State,*
OCCA case no. PC-2003-1002, 2 August 2004 [NDOK Dkt. #47 Exhibit E]

18. Newspaper article by Ziva Branstetter,
"DA's Race Among Most Moneyed," *Tulsa World*, 21 July 2006

19. Newspaper article by Ziva Branstetter,
"DA, Law Officers in Feud," *Tulsa World*,
20 July 2003: A-1 [NDOK Dkt. #57 Exhibit B]

20. Opinion and Order by U.S. District Judge Terence Kern
in *Wilkens v. Newton-Embry,* NDOK case number 02-CV-244-K (J),
05 November 2007 [NDOK Dkt. #65]

21. Judgment by U.S. District Judge Terence Kern
in *Wilkens v. Newton-Embry,* NDOK case number 02-CV-244-K (J),
05 November 2007 [NDOK Dkt. #66]

22. Notice of Appeal in *Wilkens v. Newton-Embry,*
NDOK case number 02-CV-244-K (J), 26 November 2007 [NDOK Dkt. #67]

23. Newspaper article by Barbara Hoberock,
"Appellate Judge Quits Amid State Investigation," *Tulsa World*,
1 March 2005: A-1 [NDOK Dkt. #60 Exhibits]

31st MAR 08
Date

April Rose Wilkens

Subscribed and sworn to before me, a notary public within and for the state of Oklahoma on this 31st day of March, 2008.

8-3-09
My Commission Expires

05007092
Commission Number

Notary Public

CERTIFICATE OF SERVICE

I certify that on the 7 day of April, 2008, a true and correct copy of the foregoing was mailed, with prepaid first-class postage affixed, to:

William Holmes, Asst. Attorney General
Oklahoma Attorney General's Office
313 N.E. 21st Street
Oklahoma City, OK 73105

April Rose Wilkens