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

Case No. CF-1998-2173

APRIL ROSE WILKENS,
Petitioner,

vs.

STATE OF OKLAHOMA,
Respondent.

APPLICATION FOR POST CONVICTION RELIEF

Seeking Relief From
A Jury Verdict of First Degree
Murder Before the Honorable Michael Gassett
On April 23, 1999.

Leslie Briggs OBA # 33845
Briggs Law, PLLC
Colleen McCarty OBA # 34410
Oklahoma Appleseed Center for Law and Justice
110 S. Hartford, Suite 1008
Tulsa, OK 74120
918-288-0068

ATTORNEYS FOR APRIL WILKENS

September 30th, 2022

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

TABLE OF CONTENTS

INTRODUCTION

April Rose Wilkens is currently serving her twenty-fifth year of a life sentence. She was convicted of first-degree murder by a jury on April 23, 1999, in Tulsa County case number CF-1998-2173. April has consistently and fervently maintained she was lawfully defending her life the night she shot Terry Carlton. April now seeks an order preserving discovery in her case and an examination of egregious violations of her due process rights under the United States Constitution.

On April 28th, 1998, April was a twenty-eight-year-old woman with a Masters' degree in Prosthetics from Northwestern University in Chicago. She had no prior criminal history. She lived alone in the Brookside neighborhood of Tulsa. She had relinquished custody of her only son, Hunter, in order to protect him from the abuse of her ex-fiance, Terry Carlton.

At trial, the State alleged in the early morning hours of April 28th, 1998 April mercilessly and with malice aforethought murdered Terry Carlton. The State alleged April plotted out his murder, walked up to him in his basement, and opened fire. In actuality, April shot Carlton eight times in self-defense after he handcuffed her and began to drag her to the couch, telling her he was going to sodomize and kill her. The state's star witness was Tulsa Police Officer Laura Fadem.

Officer Fadem was one of four responding officers to the scene of the shooting on April 28, 1998. Officer Fadem questioned April at the scene before mirandizing her. Fadem continued to question April after mirandizing her, drove April to the police station, questioned her at the station along with Detective Ken Makinson, and - finally - drove April to her Sexual Assault Nurse Exam (SANE) exam at Hilcrest Hospital – several hours after she initially alerted Officer Fadem that she had been sexually assaulted.

Prior to becoming a Tulsa Police Officer, Laura Fadem filed a civil lawsuit against her mother's divorce attorneys. In her Petition, Officer Fadem stated she offered coached testimony and knowingly, willingly perjured herself during her parents' divorce trial. Exhibit 1, The Fadem Lawsuit,

p. 3. Laura Fadem's admission of perjury was not produced by the State in discovery, despite the State having a constitutional obligation to do so. Exhibit 2, Colleen McCarty Affidavit.

Fadem's testimony in April's murder trial served a singular purpose: to impugn April's credibility to overcome her claim of self-defense. Fadem offered some of the most damaging testimony against April. She contradicted April's otherwise consistent account of the events culminating in Mr. Carlton's death. Despite Fadem being a crucial witness for the State, her prior perjury was never disclosed to the defense. As a result, Fadem's character for truthfulness was never challenged at April's trial.

Since April's trial, social science relied on by expert witnesses in the field of Battered Womens' Syndrome has evolved significantly. The methods used to treat and analyze April – institutionalization, psychotropic drugs, and psychological evaluations – are now recognized to be contra-indicated to victims of domestic violence. In their place, experts today use trauma informed care, lethality assessments, as well as theories of post-separation abuse and "coercive control." These scientific methods are now well settled and relied on by experts in the field. These scientific tools present new evidence in April's case that were not available at the time of trial.

STATEMENT OF THE CASE[1]

Petitioner, April Wilkens, seeks relief from the life sentence delivered in Tulsa County District Court Case number CF-1998-2173, entered by the Honorable Judge Michael Gassett. Petitioner is presently incarcerated at the Mabel Bassett Correctional Center, 29501 Kickapoo Road, McLoud, Oklahoma 74851.

April pleaded not guilty to the crime of murder in the first degree. Attorney Chris Lyons represented her at trial. She timely appealed her conviction to the Oklahoma Court of Criminal

[1] This statement contains all the information required by the Court of Criminal Appeals' form 13.11, also attached as Exhibit 3.

Appeals (OCCA) in Case no. F-1999-927. Attorney Bill Zuhdi represented April on her direct appeal. She raised the following propositions of error: 1) there was insufficient evidence to sustain April's conviction for first degree murder, 2) the trial court erred in failing to submit a jury instruction on manslaughter, 3) trial counsel was ineffective for not requesting a manslaughter instruction, 4) trial counsel was ineffective for not objecting to the admission of a statement April made prior to being mirandized, 5) trial counsel was ineffective for not arguing April's confession was coerced, 6) all the errors above cumulatively deprived April of a fair trial. The OCCA upheld April's conviction in an unpublished summary opinion. *Wilkens v. Oklahoma*, Case No. F-1999-927.

April then petitioned for a Writ of Habeas Corpus in the United States District Court for the Northern District of Oklahoma. *Wilkens v. Newton-Embry*, No. 02-CV-244-TCKSAJ, 2007 WL 3308858 (N.D. Okla. Nov. 5, 2007). She was represented by Attorney David Blades on the first proposition of error: that April was denied her 6th Amendment right to competent counsel because her attorney failed to conduct an adequate investigation, and her appellate counsel was ineffective for not raising this issue. At this stage Mr. Blades withdrew from the case.

The Court allowed April – proceeding pro se – to supplement the claim with the following grounds for relief: 2) failure to request a jury instruction for manslaughter amounted to ineffective assistance of counsel, 3) failure to introduce Terry Carlton's bench warrant for carrying a loaded firearm in front of April's house constituted ineffective assistance of counsel and April's appellate counsel was ineffective for not raising the same, 4) failure to introduce the clean drug test April took the day of the shooting constituted ineffective assistance of counsel, and appellate counsel's failure to raise the issue constituted the same, 5) failure to impeach Officer Laura Fadem with prior inconsistent statements from the *Jackson v. Denno* hearing constituted ineffective assistance of counsel, and failure of appellate counsel to raise the issue constituted the same, 6) failing to call a qualified Battered Women's Syndrome expert constituted ineffective assistance of counsel and

failure of appellate counsel to raise the issue constituted the same, 7) failure to object to a statement April made prior to being mirandized amounted to ineffective assistance of counsel, 8) failure to present evidence showing her confession had been coerced constituted ineffective assistance of counsel. Initially, the Northern District found that April had not exhausted all of her state remedies and stayed the Writ until all state appeals could be concluded. *Id.* at *2.

April filed a motion for Post-Conviction Relief (PCR) on March 5th, 2003 in Tulsa County District Court. See CF-1998-2173. She represented herself. The grounds raised in the Post-Conviction Relief motion were the same as the grounds raised in *Wilkens v. Newton-Embry* (above), except failure to request jury instruction for manslaughter, failure to object to introduction of her statement before being mirandized, and coercion of the confession were not raised.

April argued that all of these errors cumulatively denied her of her right to a fair trial. The district court affirmed April's conviction. April appealed the PCR to the OCCA on the same grounds. The OCCA denied her appeal and affirmed her conviction. See *Wilkens v. Oklahoma*, Case No. PC-2003-1002. April returned to federal court to lift the stay on *Wilkens v. Newton-Embry*. The Northern District denied relief. *Wilkens v. Newton-Embry*, No. 02-CV-244-TCKSAJ, 2007 WL 3308858 (N.D. Okla. Nov. 5, 2007).

April appealed to the 10th Circuit Court of Appeals on the same grounds. The 10th Circuit denied relief. *Wilkens v. Newton-Embry*, 288 F. App'x 526 (10th Cir. 2008). The Supreme Court of the United States denied certiorari.

April again applied for PCR to the Tulsa County District Court on August 10, 2009. See CF-1998-2173. The grounds for this PCR application were: 1) April was denied due process before a fair and impartial court due to the victim's father, Don Carlton, being a major financial supporter of the District Attorney Tim Harris's election campaigns, 2) April was denied due process before a fair and impartial court due to the victim's father, Don Carlton, being friends with Justice Charles

Johnson who sat on the OCCA at the time of her appeals and applications for post-conviction relief. Judge Johnson recused from April's direct appeal, but later voted to deny both of her PCR appeals, and 3) the OCCA did not have quorum when the PCRs and direct appeal were reviewed because one judge should have recused based on personal relationships, another judge resigned from the OCCA and was disbarred for corruption subsequent to her appeal,[2] and one other justice abstained. The second application for PCR was denied September 15, 2009. See CF-1998-2173. This application was appealed to the OCCA and denied. *Wilkens v. Oklahoma,* PC-2009-873. The Supreme Court of the United States denied certiorari. *Wilkens v. Oklahoma,* Sup. Ct. Case No. 09-9086. Counsel is not aware of any other appeals attacking this conviction and sentence.

RELIEF REQUESTED

Petitioner is seeking the following relief in order of priority:

- An immediate order to preserve all discovery and evidence in this case;
- A full and fair hearing on these issues which affords Ms. Wilkens subpoena power and the right to confront; and
- Vacation of the conviction or;
- Modification of her sentence to time served or;
- Remand for a new trial which does not violate Petitioner's constitutional rights to due process and a fair trial.

[2] Debra Cassens Weiss, "Ex Oklahoma Appeals Court Judge Disbarred for False Expense Reports," American Bar Association Journal, https://www.abajournal.com/news/article/ex_okla_appeals_judge_disbarred_for_false_expense_reports

STATEMENT OF FACTS

I. Background

In 1989, Laura Grossich Fadem perjured herself in her parents' divorce trial by offering coached, false testimony about the size of her father's assets. In 1990, Fadem filed a civil lawsuit for outrage and intentional infliction of emotional distress against her mother's lawyers. The basis for her lawsuit was her admission that she perjured herself at their direction and they attempted to have her prosecuted. Ex. 1, p. 3. The petition states,

> At a time shortly before the trial, [Fadem's] sister, Gail Shallcross, and Clark O. Brewster both **rehearsed Plaintiff on false testimony** regarding specific fictional assets which her father had supposedly shown her. Neither Clark O. Brewster nor Richard Shallcross explained to Plaintiff the **possible consequences for giving false testimony.** At a later time these Defendants attempted to have Plaintiff prosecuted for the **false testimony they induced her to give.**

Id.

In 1996, Laura Grossich Fadem was hired as a police officer with the Tulsa Police Department. Exhibit 4, Original Trial Transcripts, Vol. VII, p. 1410:8. It is unknown to counsel whether she disclosed her prior perjury during her hiring process with the Department.

II. The Wilkens-Carlton Relationship and Abuse

In September of 1995, April Wilkens, a then twenty-four-year-old prosthetist and business owner, met Terry Carlton, thirty-seven-year-old son of Don Carlton, while purchasing a vehicle at Acura of Tulsa. Terry's father, Don Carlton, owned the dealership. Ex. 4, Vol. X, pp. 1942:25-1943:1. April agreed to lunch with him and the pair began dating. Ex. 4, Vol. X, p. 1945:5-15. In October and November of that year, Carlton took April on lavish dates, trips to Dallas via first class

flights, and trips to Jamaica and the Bahamas. Ex. 4, Vol. X, p. 1946:22-25, p. 1947:1-22, p. 1949:3-14. On Christmas Eve 1995, while on vacation in the Bahamas, Carlton proposed to April and the two agreed to marry in April 1996. Ex. 4, Vol. X, p. 1949:3-9.

Shortly after the engagement, the relationship deteriorated and the two broke off their engagement. Ex. 4, Vol. X, p. 1949:16-22. On April's 25th birthday (April 25, 1996), Carlton attacked April in his home, choking her in a violent rage. Ex. 4, Vol. X, p. 1954:1-24. From May to October, April and Terry's relationship was on-again, off-again. Ex. 4, Vol. X, p. 1953:17. In November of 1996, Carlton invited April on a trip to Rome. Ex. 4, Vol. X, p. 1953:9-14. He attacked her in their hotel room after becoming infuriated she was talking to her young son, Hunter, while he was trying to sleep. Ex. 4, Vol. X, p. 1967:2-12, p. 1968:13-16. The attack was interrupted by Steve Hatchett, another car dealer on the trip, who could hear Carlton beating April. Ex. 4, Vol. X, p. 1969:1-21. Hatchett later testified to the abuse he witnessed at trial. Ex. 4, Vol. IX, p. 1875:5.

April sought a Protective Order against Carlton with the help of attorney Claire Eagan. Exhibit 5, Claire Eagan Affidavit; Ex. 4, Vol. XI, p. 2002:10-21. Eagan was able to obtain an Emergency Protective Order (EPO) for April. Ex. 4, Vol. XI, p. 2088:14-24; Ex. 5. Carlton violated the EPO and threatened to end April's life if she went forward with a Permanent Protective Order (PPO). Ex. 4, Vol. XI, p. 2004:7-8. Out of fear, she did not seek a PPO. Ex. 4, Vol. XI, p. 2005:1-3. Eagan was never contacted by April's attorney and she was not called as a witness for the defense to substantiate Carlton's abuse. Ex. 5.

In February, 1997, Carlton manipulated April into visiting his home on Valentine's Day, telling her he had a present for her. Ex. 4, Vol. X, p. 1984:2-8. April brought her then six-year-old son, Hunter, with her to pick up the gift. Ex. 4, Vol. X, p. 1984:20-22. When she arrived and became frustrated with Carlton, she tried to leave the upstairs bedroom. Ex. 4, Vol. X, p. 1986:4-12. Hunter was waiting downstairs. Ex. 4, Vol. X, p. 1984:25. Carlton tackled April and pinned her to the

ground. Ex. 4, Vol. X, pp. 1990:24-1991:3. She screamed and Hunter came running upstairs. Ex. 4, Vol. X, p. 1991:4, p. 1992:17. Carlton backed off and April called the police to make a report. Ex. 4, Vol. X, p. 1992:20-23, p. 1993:1-2.

From June to July of 1997, April's prosthetics clinic started to fail due to the chaos in her personal life. Ex. 4, Vol. XI, p. 2094:3-4. She turned to Carlton for financial, business, and legal help. Ex. 4, Vol. XI, p. 2015:14-17. In August of 1997, Carlton convinced April to try methamphetamine with him. Ex. 4, Vol. XI, p. 2014:4-7. He had been a secret intravenous meth user for many years. *Id.* After they used meth together, Carlton accused her of stealing a valuable guitar neck and held her captive for three days. Ex. 4, Vol. XI, p. 2016:5-9, 17-21. He threatened to kill her if she did not produce the guitar neck. Ex. 4, Vol. XI, p. 2016:24-25. While being held captive, Carlton raped her. Ex. 4, Vol. XI, p. 2016:22-25, p. 2017:1-2. Carlton called police and reported April for stealing. Ex. 4, Vol. XI, p. 2018:1-6. When April explained to the police what happened, they told her she wasn't making sense and she should go home. Ex. 4, Vol. XI, p. 2018:7-10. After this incident, April stopped speaking to Carlton and changed her phone number. Ex. 4, Vol. XI, p. 2018:25-2019:3. Once she began to ignore him, she experienced multiple break ins and prowler events at her home. Ex. 4, Vol. XI, p. 2022:14-20. She called the police frequently, but they never caught the prowler. Ex. 4, Vol. XI, p. 2022:14-17.

In December 1997, April's childhood friend, Carrie Gaston, called April pleading for financial help. Ex. 4, Vol. XI, p. 2022:23-25. April turned to Carlton for financial help for her friend. Ex. 4, Vol. XI, p. 2023:1-3. Carlton gave April a check with instructions to cash it, give all but $2,000 to Carrie, bring him the $2,000 cash, and use his credit card to purchase food and other items for him at Walmart. Ex. 4, Vol. XI, p. 2025:23-2026:3. April did as instructed, using Carlton's car and credit card with permission. Ex. 4, Vol. XI, p. 2026:4-7.

As April attempted to purchase Carlton's groceries, the store called Carlton to find out if he had given April permission to use the card. Ex. 4, Vol. XI, p. 2026:24-25. Carlton told the store April stole the card and described her as his crazy ex-girlfriend. Ex. 4, Vol. 11, p. 2018:1-6. Carlton arrived at Walmart with the police, told them he wouldn't be making a report, and that he would drive April home in his car. Ex. 4, Vol. XI, p. 2027:1-6. Rather than take April to her home, Carlton kidnapped her and raped her violently in his home. Ex. 4, Vol. XI, p. 2028:6-21. He forced Valium down her throat. Ex. 4, Vol. XI, p. 2028:20-21. When she woke up, she couldn't move. Ex. 4, Vol. XI, p. 2038:1-3. She was terrified and asked Carlton to call an ambulance. Ex. 4, Vol. XI, p. 2037:18-23. April reported the rape. Ex. 4, Vol. XI, p. 2033:22-25. The police initially handcuffed Carlton, but then Sgt. Rick Helberg ordered Carlton released and directed officers to simply file a report. Exhibit 6, December 6, 1998 Police Report; Ex. 4, Vol. XIII, p. 2564:16-21. Terry told the police April was "one big bruise." Ex. 4, Vol. XIII, p. 2550:15-18.

Following the December 1997 rape, Carlton harassed April into refusing to cooperate with the police in pursuing the rape charge. Ex. 4, Vol. XI, p. 2039:2-4, 16-19. The rape charges were ultimately dismissed. Ex. 4, Vol. XI, p. 2059:1-3. April broke things off with Carlton and began spending time with Luke Draffin. Ex. 4, Vol. XI, pp. 2042:9-15. Carlton continued to break into her home. Ex. 4, Vol. XI, p. 2046:20-23, p. 2047:8-10, 23-24, p. 2048:12-15. He broke the doorknobs on the french patio doors leading to her bedroom. Ex. 4, Vol. XI, p. 2045:6-9. He obtained a key to her changed locks. Ex. 4, Vol. XI, p. 2009:22-25, p. 2010:1-3. He broke her interior bedroom door. Ex. 4, Vol. XI, p. 2045:10-14. He cut her phone lines. Ex. 4, Vol. XI, p. 2070:20-23. He bugged her house with a phone tapping device from Radio Shack. Ex. 4, Vol. XI, p. 2068:6-23. He continually threatened her life. Ex. 4, Vol. XI, p. 2004:16-17, p. 2013:20-21, p. 2062:13-14, p. 2093:20-21, p. 2102:5-6.

In early February, 1998, Draffin let Carlton into April's home. Ex. 4, Vol. XI, p. 2061:10-11. Draffin later testified that Mr. Carlton offered him $5,000.00 to stay away from April and that eventually he and Terry reached a deal. Ex. 4, Vol. VII, p. 1510:16-25, 1511:1-7. Carlton was armed with a .22 pistol, a stun gun, a billy club, and pepper spray. Ex. 4, Vol. XI, p. 2061:4-6. He attempted to rape April. Ex. 4, Vol. XI, p. 2062:8-11. April escaped, grabbed the gun Draffin had given her for protection, and tried to shoot Carlton to defend herself against the rape. Ex. 4, Vol. XIII, p. 2477:19-22, 25, p. 2478:1-2. The gun did not fire. Ex. 4, Vol. XI, p. 2088:14-24. Carlton told April, "I'm god and I'm satan." Ex. 4, Vol. IX, p. 1766:5-6.

Carlton again came to April's home on February 21st, 1998, with a loaded 9mm pistol. Ex. 4, Vol. XI, p. 2061:4-6, p. 2063:7-10. April called the police and Carlton was arrested for the first time since his abuse began. Ex. 4, Vol. XI, p. 2063:11-12, p. 2069:9. Officer Troy Dewitt called Judge Hogshead and April received an Emergency Protective Order (EPO) against Carlton. Ex. 4, Vol. XI, p. 2090:3-8. Carlton violated the order the very same day. Ex. 4, Vol. XI, p. 2090:18-21. April called the police again. Ex. 4, Vol. XI, p. 2091:6-12. Responding Officer Aaron Tallman refused to take any action against Carlton for violating the EPO. Ex. 4, Vol. XI, p. 2091:13-17, 20-23.

April 2nd of 1998, April fled her home after Carlton had arrived again, threatening her. Ex. 4, Vol. XIII, p. 2395:17-19, p. 2396:1, 9-23. She ran to a church parking lot and began to pray out loud. Ex. 4, Vol. XIII, p. 2393:6-25, p. 2394:1-4. Officer Aaron Tallman was dispatched and called Shawn Blankenship from the Mobile OCS Unit. Ex. 4, Vol. XIII, p. 2592:9-10. The two decided April was delusional because she was praying to a being that was not there. Ex. 4, Vol. XIII, p. 2589:22-25. Blankenship transferred April to Parkside Mental Hospital. Ex. 4, Vol. XIII, p. 2593:10-11. April did not allow Carlton to attend her civil commitment hearing. Ex. 4, Vol. XI, p. 2081:10-15. He was angry. Ex. 4, Vol. XI, p. 2081:9.

On April 9th, 1998, April escaped from Parkside Mental Hospital by taking a nurse's keys. Ex. 4, Vol. XI, p. 2080:1-6. After she arrived home, Carlton entered her house with a key and he was holding the gun Draffin had given her for protection. Ex. 4, Vol. XI, p. 2080:16-24. Carlton took April to his house at gunpoint and held her there for three days, assaulting and raping her. Ex. 4, Vol. XI, p. 2080:24-25, p. 2082:4-14, 18-21, p. 2083:14-18.

On April 11th, 1998, April escaped Carlton's house, taking three guns and several needles Carlton used to administer intravenous drugs. Ex. 4, Vol. XIII, p. 2395:21, p. 2396:17-23. She ran to his neighbors, the Laughlin's house. Ex. 4, Vol. XIII, p. 2396:22-23, p. 2397:1-2. From there she called Domestic Violence Intervention Services (DVIS) and told them Carlton was on drugs, suicidal and that he had a gun. Ex. 4, Vol. XIII, p. 2397:3-4. DVIS called Tulsa Police. Ex. 4, Vol. IX, p. 1762:19-25. Responding Officer James Bennett determined April was homicidal and the "true threat," after seeing the guns and learning she had escaped from Parkside. Ex. 4, Vol. IX, p. 1769:8-9, 19-23. The other responding officer decided to have both Carlton and April admitted to Parkside due to claims he was suicidal. Ex. 4, Vol. XIII, p. 2397:1-8.

Carlton was released from Parkside the same day. Ex. 4, Vol. XII, p. 2196:3-5. April was transferred from Parkside to Eastern State Mental Health Hospital in Vinita, Oklahoma (ESH), where Carlton continued to visit her against her will, causing her to become agitated. Ex. 4, Vol. XII, p. 2212:1-3. On April 27th, 1998, April was released to 12&12 drug rehab facility, where she immediately went AWOL. Ex. 4, Vol. XII, p. 2211:9-12, p. 2319:13-14. April hitchhiked home from 12&12 to find her home completely destroyed by Carlton. Ex. 4, Vol. XII, p. 2319:13-15, p. 2321:2-4. April spent the day thinking about her situation and attempted to get help from several friends to get away from Carlton. Ex. 4, Vol. XII, p. 2319:23-25, p. 2320:1-7. She was unsuccessful in receiving any aid. Ex. 4, Vol. XII, p. 2320:10-18. At 2 am she decided to walk to Carlton's house to try to make peace and convince him to leave her alone. Ex. 4, Vol. XII, p. 2328:23-25. April

believed Carlton would either listen to her and let her go live her life in peace or he would murder her. Ex. 4, Vol. XIII, p. 2440:8-10, p. 2475:24-25, p. 2476:1.

After opening the door with a gun in hand, Carlton raped and beat April and attempted to break her neck. Ex. 4, Vol. XI, p. 2142:16-24, p. 2143:3-5. Carlton raped her upstairs in his bedroom. Ex. 4, Vol. XI, p. 2140:1-5. He placed the gun in the bedside table drawer. *Id.* April asked to put her shoes back on, but Terry refused, telling her she "might try to run." Ex. 4, Vol. XI, p. 2146:6-7. April tried to get Terry to go to sleep in his bed so that she could escape without fear of being followed or caught. Carlton continued getting in and out of bed, restless. Ex. 4, Vol. XI, p. 2146:8-11.

Eventually, Terry decided to shoot up a mixture of heroin and meth. Ex. 4, Vol. XI, p. 2147:17-18. He demanded April shoot up from the same batch as him. Ex. 4, Vol. XI, p. 2147:12-14. April squeezed her syringe on the floor and asked to use the upstairs phone. Ex. 4, Vol. XI, p. 2149:2-3, p. 2150:7-8. April went back upstairs and continued to make ready for her escape by gathering items from the upstairs bedroom. Ex. 4, Vol. XI, p. 2150:24-25, p. 2151:16. April saw the .22 Beretta in the nightstand and placed it in her back pocket. Ex. 4, Vol. XI, p. 2151:21-22, p. 2152:15. Her instinct was to prevent Terry from using it on her. Ex. 4, Vol. XI, p. 2152:1-2. April returned to the basement and continued to press Terry to go to sleep. Ex. 4, Vol. XI, p. 2146:19-20. Carlton was continually returning to the basement and then going back upstairs to bed. Ex. 4, Vol. XI, p. 2146:11-14. Terry went upstairs for a short period before returning to the basement in a fit of rage. Ex. 4, Vol. XI, p. 2156:4-13.

III. The Shooting

When back in the basement, Terry handcuffed April and furiously demanded to know where the gun was. Ex. 4, Vol. XI, p. 2156:17-18, p. 2157:17. He threatened to "rape her up the ass" and kill her. Ex. 4, Vol. XI, p. 2160:10-11. Despite being restrained by the handcuffs, April was

able to grab the gun she had placed in the back pocket of her biking vest, and shot Carlton as he was lunging at her, threatening to kill her. Ex. 4, Vol. XI, p. 2160:9-10. April testified in her own defense that she, "[h]ad no choice. There wasn't a choice." Ex. 4, Vol. XII, p. 2378:10-12.

After the shooting, April waited at Carlton's house, in shock and unsure of what to do. She wanted to hug her son, Hunter, before calling the police Ex. 4, Vol. XI, p. 2175:22-25. She covered Carlton's body with a blanket and held his hand for a while. Ex. 4, Vol. XI, pp. 2172:15-2173:1. The phone rang and it was her childhood friend, Carrie Gaston, calling to check on April's status at ESH. Ex. 4, Vol. XI, p. 2175:10-15. April was traumatized and in shock. Ex. 4, Vol. XI, p. 2171:12-15. She told Gaston she had shot Carlton, but asked her not to call police until she could hug her son. Ex. 4, Vol. XI, p. 2175, l. 18-25. Gaston called police, and four officers descended on Carlton's house. Ex. 4, Vol. VII, p. 1311, l. 10.

Officers Fadem, Forrester, Gann and Lawson came into the house prepared to encounter an active shooter situation. Ex. 4, Vol. VII, p. 1413:l-25, p. 1414:1-6. Fadem stayed with April while the other officers secured the rest of the house. Ex. 4, Vol. VII, p. 1432:8-9. Fadem questioned April at the scene. Ex. 4, Vol VII, p. 1417:13. April told Officer Fadem exactly what she had experienced, including shooting a weak mixture of meth [Ex. 4,Vol. VII, p. 1423:24-25]; Carlton raping, beating, and attempting to murder her [Ex. 4,Vol. VII, p. 1424:7-12]; squeezing a second syringe of drugs onto the floor [Ex. 4,Vol. VII, p. 1425:7-8]; Carlton handcuffing her [Ex. 4,Vol. VII, p. 1426:22-23]; and Carlton threatening to sodomize and kill her in the moment before she shot him. Ex. 4, Vol. VII, p. 1487:1-3.

IV. Wilkens' Arrest by Officer Fadem

Fadem ultimately placed April under arrest and took her to the police station where she began her homicide interview. Ex. 4, Vol. VII, pp. 1430:22-23, p. 1432:7-8. Detective Makinson left the crime scene to go to the station to assist with the interview because Fadem was conducting a

homicide interview alone. Ex. 4, Vol. IX, p. 1810:7-11. During the interview, April told them they would find the handcuffs on the side table with the gun and hand sanitizer which she had used to free herself from the cuffs following the shooting. Ex. 4, Vol. VII, p. 1427:6-10. April reported to Makinson that she had been raped. Ex. 4, Vol. IX, p. 1828:4-6. She also told Officer Fadem she did not shoot up the heroin and meth concoction and instead shot the syringe into the floor. Ex. 4, Vol. VII, p. 1425:3-8. This was later confirmed by her toxicological screen, which was not introduced at trial. Ex. 4, Vol. XII, p. 2200:24.

Fadem then took April to a Sexual Assault Nurse Exam, which was administered by Kathy Bell at Hillcrest Hospital. Ex. 4, Vol. VII, p. 1435:19-20. The exam showed April had bruising on her head, neck, jawline, hip, side and that her pants had been ripped in the knee and upper thigh area. Ex. 4, Vol. VIII, p. 1706-07:15-24. Bell also testified that April had vaginal tears in two places. Ex. 4, Vol. VIII, p. 1718:1-4. Bell did not perform a bluelight test to determine if there was semen on her body or her clothes. No DNA from the rape kit was ever tested. Ex. 4, Vol. IX, p. 1818:19-22. At trial, Detective Makinson testified that he thought SANE Nurse Kathy Bell was going to test the kit, so he did not. Ex. 4, Vol. IX, p. 1818:17-22.

V. The Trial

The State of Oklahoma filed First Degree Murder charges on April Wilkens the day after the shooting, on April 29th, 1998. During his opening statement, District Attorney Tim Harris stated, "She [April] finally gives in, she says [to going upstairs with Carlton], because he had a violent nature in the past," Ex. 4, Vol VI, p. 1201:10-12., Mr. Harris also stated, purportedly quoting April, "I had made up my mind if he [Carlton] turned around with an angry look on his face, I was going to shoot him," Ex. 4, Vol VI, p. 1115:12-14., Finally, Mr. Harris told the jury, and "not only does she [April] make a statement to Officer Fadem, that you'll be able to tell that if she really wanted to get away, she had multiple opportunities to leave that home." Ex. 4, Vol VI, p. 1207:9-12.

These statements came directly from Laura Fadem's anticipated testimony. In some cases, they match her anticipated testimony nearly verbatim. Ex. 4, Vol. VI, p. 1114:7-10, p. 1114:13-16. At closing, Assistant District Attorney Rebecca Nightingale restated, "She [April] told Officer Fadem that initially, when she was downstairs, she finally gave in because of their past relationship," Ex. 4, Vol. XV, p. 3015:22-24, and "she checks it [the gun], makes sure it's loaded and ready to go," Ex. 4, Vol. XV, p. 3016:19-20, which further relied upon Fadem's trial testimony. District Attorney Rebecca Nightingale also told the jury, in her closing arguments, "He just wouldn't die. It seemed like the merciful thing to do." These statements are also derived from Officer's Fadem's testimony. Fadem testified that April said these things to her when she was alone with April after the shooting. Ex. 4, Vol. XV, p. 3019:16-17.

During April's case-in-chief, her attorney called Dr. John Call to the stand as an expert witness for Battered Women's Syndrome (BWS). Ex. 4, Vol. XV, p. 2802:9-11. Even though April exhibited classic signs of Post-Traumatic Stress Disorder (PTSD) and BWS, Dr. Call misdiagnosed her as psychotic and bipolar. Ex. 4, Vol. XV, p. 2851:13-14, 20-21. He also administered a personality test–the Minnesota Multiphasic Personality Inventory (MMPI), which showed she was manipulative, grandiose, hostile, resentful, and strong willed. Ex. 4, Vol. XV, p. 2869:18-21, p. 2870:12-17, p. 2927:18-22. From the stand he stated numerous times April acted, "stupid" and "unreasonable." Ex. 4, Vol. XV, p. 2824:20-25, p. 2825:9-13.

Ultimately, April's case went to the jury and they convicted her of First-Degree Malice Aforethought Murder with a recommended sentence of life imprisonment. The Honorable Judge Michael Gassett sentenced her in accordance with the jury's recommendation on July 7th, 1999.

It is from these facts that April seeks relief.

ARGUMENTS AND AUTHORITIES

I. THE DISTRICT ATTORNEY VIOLATED APRIL WILKENS' DUE PROCESS RIGHTS BY SUPPRESSING OFFICER LAURA FADEM'S PRIOR PERJURY.

Brady v. Maryland, and the line of cases that follow, establish that the State must turn over all exculpatory or impeachment evidence favorable to the defense. 373 U.S. 83 (1963); *United States v. Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley*, 514 U.S. 419 (1995). There are three components of a *Brady* violation: "[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; [3] and prejudice must have ensued." *Strickler v. Greene*, 537 U.S. 263, 281-282 (1999).

As set forth *infra*, there was critical impeachment evidence available at the time of trial regarding the State's indispensable witness - Laura Fadem. Officer Fadem played a paramount role in the criminal investigation underlying Ms. Wilkens' conviction. Fadem took April's statement at the scene and station, transported her, and accompanied her to her SANE exam. Officer Fadem provided testimony at Wilkens' trial, which played an indispensable role in attacking April's credibility. And yet, the State failed to disclose material impeachment evidence to Defense counsel regarding Officer Fadem's perjury. As a result, April was denied the Sixth Amendment right to confront witnesses against her and denied her due process right to a fair trial under the Fifth and Fourteenth Amendments.

A. THE DISTRICT ATTORNEY VIOLATED PETITIONER'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS BY FAILING TO DISCLOSE EVIDENCE OF OFFICER FADEM'S PRIOR PERJURY.

April Wilkens was denied the constitutional right to a fair trial under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. *Brady v. Maryland,* 373 U.S. 83 (1963), *United States v. Giglio,* 405 U.S. 150 (1972), *United States v. Bagley,* 473 U.S. 667 (1985), *Kyles v. Whitley,* 514 U.S. 419 (1995). The prosecution is required to turn over all exculpatory and impeachment evidence to the defense in a criminal trial. *Kyles* at 419. Failure to do so results in a due process violation that–depending on the materiality of the evidence–requires vacation of the conviction or a new trial. *Id.* Prior perjury of a witness is always material impeachment evidence because of the impact perjury has on the fairness of the proceeding. *United States. v. Cullie*, 80 F.3d 514, 518 (D. C. Cir. 1996).

In 1990, Laura Fadem–a key witness in the State's prosecution of April Wilkens–filed a civil lawsuit in the Tulsa County District Court. Exhibit 1, The Fadem Lawsuit, p. 3, ¶ VIII. In the lawsuit, Laura Fadem admits to having perjured herself as well as having offered "coached" testimony during her parents' divorce proceeding. *Id.* Despite Fadem's admission of perjury being public record and reported in the Tulsa World,[3] it was never turned over to the defense in April's trial. The fact that the impeachment evidence was public record is separate and distinct from the prosecutor's duty to turn over the evidence to the defense. *Fontenot v. Crow*, 4 F.4th 982 (10th Cir. 2021) (denied *cert.*

[3] Bill Braun, "Grossich daughter sues 2 Lawyers, Sister over Mothers' Divorce Case," Tulsa World (Sept. 5, 1990). Available at: https://tulsaworld.com/archive/grossich-daughter-sues-2-lawyers-sister-over-mothers-divorce-case/article_14a6bc92-ae8e-5009-b91d-f88ff9c1af8b.html

June 6, 2022) (holding that evidence that could have been known to the defense at the time of trial did not absolve the state of its duties under *Brady*).

The State's failure to disclose resulted in an egregious denial of Petitioner's constitutional rights which can only be remedied by vacating the conviction or granting a new trial. *Brady,* 373 U.S. 83. It is appropriate to handle due process deprivations under *Brady* through the post-conviction relief process if the issues were not raised on direct or subsequent appeals. *Castleberry v. State*, 1979 OK CR 16. The issue of Laura Fadem's prior perjury was recently discovered by present counsel and has not been addressed in any prior challenges to this conviction.

The Supreme Court has found where the prosecution withholds impeachment evidence favorable to the defense, the remedy is either to vacate the conviction or grant a new trial if "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Banks v. Dretke*, 540 U.S. 668, 673 (2004), (quoting *Kyles* at 435). This is true because when exculpatory or impeachment evidence is withheld from defense counsel there is no chance of a fair trial, and the due process rights of the defendant are violated. *Brady,* 373 U.S. 83, *Kyles*, 514 U.S. 419. Prior perjury is always material when there is a reasonable probability that, had the evidence been disclosed to the defense, the result of proceeding would have been different. *Strickler,* 527 U.S. at 280 (citing *Bagley* 473 U.S. at 676). Prior perjury has a significant impact on the fairness of the trial. *Cullie*, 80 F.3d at 518.

Officer Fadem spent almost the entire day with April in the aftermath of the shooting. She was one of four responding officers to the scene. She was left alone with April at the scene where she spoke to April prior to mirandizing her and took her statement after mirandizing her. Officer Fadem transported April to the station and aided Detective Ken Makinson in taking a video and audio recorded statement from April. Finally, Officer Fadem transported April to her SANE exam and was present for the duration of the exam. Officer Fadem's testimony was critical to the

prosecution's ability to introduce seemingly inconsistent statements made by April at the scene and then with Detective Makinson.

Without Officer Fadem, the State would have been unable to introduce the narrative that April lied about being raped. Fadem's testimony is inconsistent with April's statements that she revealed the rape to Fadem at the scene. Thus, Officer Fadem served a singular purpose for the State - to inject doubt into April's credibility. April's credibility was essential to proving her claim of self-defense, and Officer Fadem gave the state the only opportunity to put on a witness who could call her credibility into question. April never had the opportunity to confront Officer Fadem with her prior perjury to raise doubts about Fadem's own character for truthfulness because that impeachment evidence was not disclosed by the District Attorney.

There is no doubt that Officer Fadem's character for truthfulness and evidence of her prior perjury are material when her testimony is often directly at odds with April's, thus calling into question April's own character for truthfulness, which–again–is critical to proving her claim of self-defense. The District Attorney had an affirmative duty to turn over this impeachment evidence and did not do so, thereby depriving April of the right to confront and the right to a fair trial.

In *Brady v. Maryland*, the United States Supreme Court held that a prosecutor has an affirmative duty to turn over material favorable to the defense, whether it is exculpatory or impeachment evidence. *Brady,* 373 U.S. 83; *Kyles,* 514 U.S. 419; *Giglio,* 405 U.S. 150. *United States v. Bagley,* subsequently held that the duty of the prosecutor is an affirmative one that applies absent a good or bad faith inquiry. 473 U.S. 667 (1985); *Brady*, 373 U.S. at 83, 87, (suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution.") Finally, the Supreme Court held in *Kyles* v. *Whitley* that the constitutional duty of the prosecutor to turn over exculpatory evidence extends to impeachment evidence. *Kyles,* 514 U.S. at 438. *Kyles* was decided four years before April's trial.

Specifically, regarding the affirmative duty of the individual prosecutor, the Supreme Court stated:

> "While the definition of Bagley materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, **it must also be understood as imposing a corresponding burden. ...This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.**"

Kyles, 514 U.S. at 437-438 (emphasis added).

The Court in *Kyles* rejected the state's argument that it cannot be expected to disclose what it did not know at the time of trial. *Id.* at 438. The state argued it should not be held accountable for what "is known only to police investigators." *Id.* The Supreme Court rejected this argument entirely, stating:

> "In the State's favor it may be said that no one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that 'procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it.' *Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). Since, then, the prosecutor has the means to discharge the government's *Brady* responsibility if he will, **any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a**

> **plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials."**

Kyles, 514 U.S. at 438 (emphasis added).

The principles of the *Brady* line of cases lie in fairness: *Brady* and its progeny are "not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Brady,* 373 U.S. at 87(discussing *Mooney v. Holohan,* 294 U.S. 103 (1935)).

Giglio stands for the principle that evidence that could have been used to impeach a witness at trial–even if that evidence is in regard to a law enforcement witness–should be turned over to the defense. 405 U.S. 150 (1972). Such impeachment evidence can include: incentives to fabricate testimony, *see Douglas v. Workman,* 560 F.3d 1156 (10th Cir. 2009) (DA promises to witnesses for a lesser sentence in exchange for cooperation with the State must be disclosed);trustworthiness of the witness, *see Cuffie,* 80 F.3d 514 (State must disclose a witness' history of lying, internal investigations, perjury, or crimes of moral turpitude)(;and prior inconsistent statements, *see Smith v. Secretary of New Mexico Department of Corrections,* 550 F. 3d 801 (10th Cir. 1995) (differing accounts from reports or other documentation than what is stated at trial must be disclosed).

In *United States v. Cuffie,* Cuffie's conviction was overturned and remanded for a new trial because one of the officers who testified against him perjured himself at another person's expungement hearing in relation to the same drug conspiracy. *Cuffie,* 80 F.3d 514. The perjury was made obvious by police department time clock records. Cuffie appealed his conviction based on the prosecution's withholding of the perjury as impeachment evidence under *Brady.* By the time of the appeal, the State conceded that the withholding of the perjury was a *Brady* violation, but instead

posited that the suppression of the perjury did not meet the *Brady* standard for materiality. In response to this argument the Court reasoned, "Cuffie's case for materiality is even stronger . . . because the undisclosed evidence does not involve merely a witness' cooperation with the government but a **witness' prior perjury**. In light of the axiomatic importance of truthful testimony for the integrity of judicial proceedings, **undisclosed evidence of a witness' prior perjury has a significant impact on the fairness of the trial.**" *Id.* at 518 [emphasis added].

Turning over *Brady* material is an essential part of training for prosecutors. In fact, pertinent prosecutor training materials in Oklahoma rely on the standards laid out in the United States Attorneys' Manual.[4] The relevant section of the manual states:

> "Agency witnesses and Agency Officials should make broad disclosures of potential impeachment information to the prosecutor so that the prosecutor can assess the information in light of the role of the agency witness, the facts of the case, and known or anticipated defenses, among other variables . . . potential impeachment information relating to agency employees may include, but is not limited to, the categories listed below:
>
> i) any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during a criminal, **civil**, or administrative inquiry or proceeding."

United States Attorneys' Manual § 9- 5.100(5)(c)(i) (emphasis added).

[4] Travis White, District Attorney for Oklahoma's District 21, "Criminal Discovery in Oklahoma, Part 4" Slide 20 (2019) available at: https://www.ok.gov/dac/documents/Brady%20Giglio%202019%20Part%204.pdf *citing* United States Attorneys' Manual § 9– 5.100(5)(c).

This section of the United States Attorneys' Manual was presented as a best practice during a Continuing Legal Education class for Oklahoma District Attorneys and prosecutors as recently as 2019.

To summarize, prior confirmed perjury of a witness is no small matter. *Brady* and *Kyles* require material impeachment evidence be turned over to the defense in a criminal trial. This requirement includes any evidence which could call the witness's credibility into question. There are few things which would call a witness's credibility into question more seriously than documented prior perjury. Laura Fadem's prior perjury should have been turned over to the defense. The Constitution demands it. April Wilkens was denied it.

B. OFFICER LAURA FADEM'S PRIOR PERJURY IS MATERIAL EVIDENCE.

The Court need not engage in the full materiality analysis under *Brady* because prior perjury of a witness "has a significant impact on the fairness of a trial." *Cullie*, 80 F.3d at 514. Yet even under the scrutiny of the full materiality analysis, Officer Laura Fadem's prior perjury rises to the level of material evidence. Materiality is evaluated in the context of the entire record. *Moore v. Gibson*, 195 F.3d 1152, 1182 (10th Cir. 1999); *LeBere v. Trani*, 746 Fed. Appx. 727 (10th Cir. 2018). "[A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." *Kyles* 514 U.S. at 434. Instead, material evidence is that which "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435.

1. Admissibility

The first hurdle to overcome in a materiality assessment is whether or not the evidence would have been admissible in the original proceeding. Fadem's prior perjury *would* be admissible for the purposes of impeaching her "character for truthfulness." 12 O.S §2608.

Evidence of a witness's prior bad act or dishonesty is admissible under the trial court's discretion if the acts concern the witness's character for truthfulness or untruthfulness, regardless of whether they resulted in a criminal conviction. 12 O.S. 2608(B); *Wilson v. State*, 1987 OK CR 86 (allowing defense to inquire of state's law enforcement witness regarding his suspension and investigation for misappropriation of funds at the time of trial.); *State v. Dodd*, 2004 OK CR 31, ¶70. In *Dodd*, the Court admitted testimony regarding the defendant's prior criminal history, not under 12 O.S. 2404, but under 12 O.S. 2608 because the details of the criminal history tended to show he was being dishonest. The Court's decision to allow the impeachment testimony was upheld.

But *see, Jones v. State*, 2006 OK CR 5. In Jones's trial, an FBI agent went on to plead guilty in a misdemeanor for false testimony, wherein the false testimony occurred just before Jones's trial. The court rejected his *Brady* and *Bagley* arguments because the perjury had not yet come to light at the time of trial, and he would not have been able to impeach her on something that had not yet happened. This is not the case with Laura Fadem's perjury because it happened nine years before April's proceeding and was in the public record.

In April's case, Fadem is often the only witness to many of the most incriminating statements made by April. She is the only source who can attack April's credibility regarding statements made at the scene about the rape. She is also the only witness the State asked about April's demeanor and whether her reaction to the shooting was "appropriate." Laura Fadem was a compelling witness and the singular source for much of the State's case, unlike the FBI Agent in *Jones.*

Laura Fadem's prior perjury would have been admissible pursuant to 12 O.S. 2608 for the purposes of showing Laura Fadem's character for truthfulness and to ensure April was entitled to her Sixth Amendment right to confrontation.

2. Materiality

The standard for materiality of impeachment evidence in the Tenth Circuit is set forth in *Douglas v. Workman*. There the Court stated, "evidence insignificantly impacting the degree of impeachment may not be sufficient to meet the *Kyles* materiality standard, **while evidence significantly enhancing the quality of the impeachment evidence usually will.**" *Douglas* 560 F.3d.at 1174 (emphasis added). *Douglas* dealt with impeachment evidence relating to the prosecution's deal for a known gang member's release from prison in exchange for cooperating as an eye witness. *Id.* at 1160. In *Douglas,* the Tenth Circuit found the eyewitness's deal for a lesser sentence was material impeachment evidence subject to *Brady* because it tended to cast doubt on the credibility and motivations of a key state witness. *Id.* at 1174. The Court compared impeachment evidence of the state's eye witness in *Douglas* to impeachment evidence in *Nuckols v. Gibson*, 233 F.3d 1261 (10th Cir. 2000).

In *Nuckols*, the deputy sheriff and the accused differed in their testimony as to whether the accused was coerced into a confession. *Id.* 233 F.3d at 1264. Critical impeachment evidence about the deputy's credibility was suppressed by the state. *Id.* at 1264-65. After the deputy sheriff, Ware, coerced the accused's initial confession, a recorded confession was taken by Sheriff Birks with Ware present. *Id.* Later it was discovered by the defense that Ware was involved in selling stolen guns of Roy Maxwell, the homicide victim the accused confessed to murdering, to fund a murder for hire scheme by the victim's wife. *Id.* at 1264-67. Ware had also been fired before the trial after being implicated in several thefts from the Pott County Sheriff's Department. *Id.*

Deputy Sheriff Ware and the accused's testimony were at odds with one another regarding his voluntary waiver of his Miranda rights. *Id.* The state did not disclose Ware's implication in both the Maxwell murder or the thefts. *Id.* The Tenth Circuit overturned Nuckols's conviction and remanded for new trial. *Id.* at 1267. Specifically, the Court found suppression of impeachment evidence regarding Deputy Sheriff Ware was material pursuant to *Bagely*. *Id.* The Court held,

> "[t]he prosecution withheld evidence that would have allowed defense counsel the means to test Ware's credibility in the crucible of cross-examination. Indeed, in Bagley, 473 U.S. at 677, 105 S.Ct. 3375, (quoting Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972)), the Court reiterated, "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within th[e] general rule [of Brady]."

Nuckols, 233 F.3d. at 1267.

The Tenth Circuit held that impeachment evidence of both witnesses was material under *Brady* due to their indispensable, paramount testimony in support of the State's case. *Id.* at 1256; *Douglas* at 1175;. It is without question that being truthful under oath is a fundamental underpinning of our justice system. See *Napue v. Illinois*, 360 U.S. 264, 269 (1969). Prior evidence that someone perjured themselves is rare, and substantially calls into question their character for truthfulness and honesty.

Like Sheriff Ware in *Nuckols*, Fadem's testimony was indispensably relied upon by the prosecution to build their case against April. Fadem was called to testify during the *Jackson v. Denno* hearing at the outset of the trial and her testimony proved critical to introducing April's statements to the police on the day of the shooting. Ex. 4,Vol. VI, pp. 1098-1141. Without Fadem, the admissibility of April's entire confession at the scene and then at the station is called into question. The indispensable nature of Fadem's testimony is also evident in the fact that Fadem's statements about April's behavior and purportedly inconsistent details the day of Carlton's death are used nearly verbatim in opening and closing arguments by the prosecution. Fadem's statements are the only source for this information.

During the closing argument, ADA Rebecca Nightengale stated, "this wasn't rape, members of the jury, this was consensual sex," speaking about the rape Carlton perpetrated on April before he was shot. In her testimony, Fadem stated that April "finally gave in to him [Carlton], and they went upstairs." Ex. 4,Vol. VII, p. 1424:5-6. But that she hadn't wanted to "become intimate" with Carlton because they had a violent history. *Id.* at 1423:16-17. Fadem would not use the word "rape" from the stand, even though April had told every officer she came into contact with that night that she was raped by Carlton.

Fadem, when pressed by April's attorney, told him that she "guessed" the sex was "forcible." Ex. 4,Vol. VII, p. 1424:5-17. Her character for truthfulness could not be effectively attacked, given the suppression of her prior perjury. See *Douglas,* 560 F.3d.at 1174-75. Fadem also testified that April told her "she had let him [Carlton] break into her house numerous times." Ex. 4,Vol. VII, p. 1473:25, p. 1474:1. This is not consistent with April's testimony that Carlton repeatedly stalked and terrorized April by relentlessly breaking into April's home against her will, and she was at a loss for how to make him stop since the police would not intervene. It was a joke between the neighbors how often Carlton would be at April's house "five nights out of the week," and he always drove away just before the police would arrive. Ex. 4,Vol. XIV p. 2695:5-8, 20-21.

At trial, Fadem spent a great deal of time opining to the jury about April's demeanor after the shooting and in the hours Fadem spent with April taking her to the station and to the hospital. First she testified, "considering the situation, she was quite calm." Ex. 4,Vol. VII, p. 1420:5. Then later states, "she was just excited." Ex. 4,Vol. VII, p. 1462:8. She repeats again, "she was just excited," and "talking fast." Ex. 4,Vol. VII, p. 1462:7. There is no doubt that the jury began to formulate their opinion of April and her actions following the defense of her life from Fadem's testimony. Yet there are no subtle or overt attempts to impeach Fadem's credibility for truthfulness during her cross examination.

If given the opportunity, it would have made a substantial difference for April's attorney to be able to impeach Fadem before the jury on her character for truthfulness due to her prior perjury. This is especially true considering how much of Fadem's testimony cannot be corroborated by other officers or witnesses. The whole time April was with Fadem at the scene of the shooting, in Fadem's patrol car, and while the SANE exam was performed, April and Fadem were alone.

Much of the state's case was based on the confession given by April. These statements were given to Officer Fadem at the scene and again at the station and with inconsistencies raised solely by her. There was no forensic evidence presented in the case that suggested April gunned down Carlton in cold blood. His body placement and the blood spatter were both consistent with April's testimony that Carlton was lunging at her at the time she fired the gun. The State did not do a crime scene reconstruction or test any theories against the crime scene evidence that could have proven or disproven self-defense. The state hinged its entire case on destroying April's character and credibility and Officer Fadem was paramount to that effort.

C. THE PROSECUTION HAS A DUTY TO LEARN OF AND DISCLOSE POTENTIAL EXCULPATORY OR IMPEACHING EVIDENCE.

The prosecution's knowledge (or lack thereof) of Officer Laura Fadem's prior perjury is not relevant to a *Brady* inquiry. In *Smith v. Secretary of New Mexico Department of Corrections*, the Tenth Circuit held that a prosecutor's knowledge of the suppressed evidence is irrelevant where the evidence "was known to the police." 550 F. 3d 801. Therefore the police's knowledge of exculpatory or impeachment evidence is imputed to the prosecutor. See *Moore* , 195 F.3d at 1164 ("Knowledge of police officers or investigators will be imputed to the prosecution."); *Kyles,* 514 U.S. at 421 . It is without question that Officer Fadem had knowledge of her own prior perjury, especially considering she admitted to it in a legal filing nine years prior to April's trial. Ex. 3, The Fadem Lawsuit.

Here, it is unknown whether the Tulsa Police Department knew about Laura Fadem's prior perjury, but it should have been disclosed upon her hiring and should have been in her personnel file to be turned over to any defendants in cases where she was testifying. It is unknown to counsel whether this perjury has ever been disclosed. Regardless, the knowledge of the police is imputed upon the prosecution. See *Kyles*, 514 U.S. 419; *Moore*, 195 F.3d at1164

D. THE FACT THAT THE PERJURY WAS PUBLIC RECORD IS SEPARATE AND DISTINCT FROM THE PROSECUTOR'S DUTY TO DISCLOSE *BRADY* AND *GIGLIO* MATERIAL.

In some circuits it is the controlling position that the evidence is only suppressed if "the evidence was not otherwise available to the defendant through the exercise of reasonable diligence." See *United States v. O'Hara,* 301 F.3d 563, 569 (7th Cir. 2002). In these jurisdictions, the defense's failure to discover evidence which would have been apparent to him upon exercise of due diligence is not considered to be suppressed. See *United States v. LeRoy,* 687 F.2d 610, 618 (2d Cir. 1982) (citations omitted).

That is *not* the law in the 10th Circuit. As recently as *Fontenot v. Crow*, the 10th Circuit reiterated its standard for *Brady* material. *Fontenot*, 4 F.4th at 1066. The Court rejected the standard requested by the state in *Banks v. Reynolds*, "that *Brady* only requires the prosecution to disclose information which is otherwise unknown to the defendant." 54 F.3d 1508, 1516-17 (10th Cir. 1995). Instead, the Court held,

> "the prosecution's obligation to turn over the evidence in the first instance ***stands independent of the defendant's knowledge***. . . **the fact that defense counsel 'knew or should have known' about the [pertinent] information, therefore, is irrelevant to whether the**

prosecution had an obligation to disclose the information. The only relevant inquiry is whether the information was 'exculpatory.'"

Banks, 54 F.3d. at 1517 (internal quotation marks and citations omitted) (emphasis added); see also *United States v. Quintanilla*, 193 F.3d 1139, 1149 (10th Cir. 1999). The Supreme Court has always held the state's duty under *Brady* and its progeny to be broad. See *Kyles* 514 U.S. 419; *Bagley,* 473 U.S. 667. In fact, the duty "has never required a defendant to exercise due diligence to obtain Brady material." *Lewis v. Conn. Comm'r of Corr.*, 790 F.3d 109, 121 (2d Cir. 2015).

Thus, the fact that Officer Laura Fadem's perjury is public record does not divest the state from its duty to disclose it. Even so, court records were not digitized at the time of the trial in 1999 and it is possible that April's defense may not have been able to find the lawsuit where Fadem admits to her perjury through an exercise of reasonable diligence at that time.

E. SUPPRESSION OF FADEM'S PRIOR PERJURY CALLS INTO QUESTION OTHER POTENTIALLY EXCULPATORY EVIDENCE NOT PROVIDED TO THE DEFENSE

There are two other potential *Brady* violations called into question by the state's suppression of Fadem's impeachment material. First, one of the state's material witnesses, Luke Draffin, was facing four felony charges for drug and firearm possession after conviction of a felony at the time of April's trial. Exhibit 7, OSCN Docket Sheet, CF-1998-5588. Two months after testifying, Mr. Draffin received two deferred sentences and the other charges were dismissed. Ex. 7. While Mr. Draffin received a deferred sentence for unlawful possession of a controlled substance, his co-defendant received 10 years in prison. Ex. 7. Mr. Draffin was also known as a criminal informant in the community prior to the events that unfolded in this case. Exhibit 8, April Wilkens Affidavit. Given the nature of Mr. Draffin's relationship to the police, the timing of the resolution of his criminal charges, and the stark difference in resolution between Mr. Draffin and his co-defendant,

there is a legitimate question as to whether Mr. Draffin received leniency or some other agreement from the State in exchange for his testimony against April. Any such agreement would be material impeachment evidence as discussed *supra*. Any arrangement or deal with Mr. Draffin was not disclosed to the defense. Ex. 2.

There also exists a tape of April Wilkens cited by Don Carlton in his Pre-Sentencing Report which was not provided to the Defense. Exhibit 9, Don Carlton Pre-Sentencing Letter to the Court. Mr. Carlton states that the State "did not include in its evidence" a covertly recorded audio tape of April and an unidentified male discussing April being unable to take Mr. Carlton's life because she is just "too fucking nice." Ex. 9. Counsel does not believe this tape was ever produced in discovery, per Mr. Don Carlton's statement, and potentially includes exculpatory statements by Ms. Wilkens describing an inability to defend herself with lethal force against Mr. Carlton's abuse. Counsel believes the tape was recorded on a device Terry Carlton bought at Radio Shack, and placed in April's house for the purposes of surveilling her. Evidence of this tape was never disclosed to the defense. Ex. 2.

For the reasons outlined above, this evidence is both material and exculpatory and should have been turned over to the defense. Failure to do so constitutes a violation of April's constitutional rights and requires her sentence be vacated, modified, or remanded for a new trial.

F. PROCEDURAL DEFENSES OF RES JUDICATA, WAIVER, & LACHES ARE UNAVAILABLE TO THE STATE BECAUSE THE PRIOR PERJURY (AND OTHER POTENTIALLY EXCULPATORY EVIDENCE) WAS RECENTLY DISCOVERED BY PRESENT COUNSEL.

Since the prior perjury was recently uncovered by present counsel, the typical procedural bars that often apply in post-conviction relief efforts do not apply.

a. RES JUDICATA DOES NOT APPLY.

Res Judicata bars claims for relief when an issue has been ruled on by an appellate court. This doctrine prevents the reassertion of claims which have already been examined and decided. *Fowler v. State*, 1995 OK CR 29. In prior appeals the following claims have already been ruled on:

1) there was **insufficient evidence to sustain April's murder conviction,**

2) the trial court erred in **failing to submit a jury instruction on manslaughter,**

3) trial counsel was ineffective for **not requesting a manslaughter instruction,**

4) trial counsel was ineffective for **not objecting to the admission of a statement April made prior to being mirandized,**

5) trial counsel was ineffective for not arguing **April's confession was coerced,**

6) cumulative error,

7) that April was denied her 6th Amendment right to competent counsel because her attorney failed to investigate, and her appellate counsel was ineffective for not raising this issue,

8) **failure to request a jury instruction for manslaughter** amounted to ineffective assistance of counsel,

9) **failure to introduce Terry Carlton's bench warrant for carrying a loaded firearm in front of April's house** constituted ineffective assistance of counsel and April's appellate counsel was ineffective for not raising the same,

10) **failure to introduce the clean drug test April submitted to the day of the shooting** constituted ineffective assistance of counsel, and appellate counsel's failure to raise the issue constituted the same,

11) **failure to impeach Officer Laura Fadem with prior inconsistent statements** from the *Jackson v. Denno* hearing constituted ineffective assistance of counsel, and failure of appellate counsel to raise the issue constituted the same,

12) **failing to call a qualified Battered Women's Syndrome expert** constituted ineffective assistance of counsel and failure of appellate counsel to raise the issue constituted the same,

13) **failure to object to a statement April made prior to being mirandized** amounted to ineffective assistance of counsel,

14) April was denied due process before a fair and impartial court due to the **victim's father, Don Carlton, being a major financial supporter of the District Attorney Tim Harris's election campaigns**,

15) April was denied due process before a fair and impartial court due to the **victim's father, Don Carlton, being friends with Justice Charles Johnson who sat on the OCCA at the time of her appeals** and applications for post-conviction relief. Judge Johnson recused from April's direct appeal, but later voted to deny both of her subsequent appeals before the court, and

16) the **OCCA did not have quorum** when the PCR and appeals were reviewed because Judge Johnson should have recused and Justice Steve Lile resigned from the OCCA and was disbarred for corruption subsequent to her appeal, and one other justice abstained.

While these grounds have all been denied, April has never claimed a violation of her Fifth and Fourteenth Amendment rights to a fair trial under *Brady v. Maryland*, because the evidence of Laura Fadem's prior perjury was unknown to April and any of her subsequent attorneys. Because this is a new ground for relief, *Res Judicata* does not apply.

b. WAIVER DOES NOT APPLY

The doctrine of waiver applies when an issue *could have* been raised on direct or subsequent appeals, but it was not, unless there is a showing of previous counsel being ineffective for having failed to raise it. 22 O.S. §1086; *Mann v. State*, 93 OK CR 32; *Stouffer v. State*, 91 OK CR 106. Here, the issue of Fadem's prior perjury is novel and was not discovered by prior counsel. As discussed above, the prosecutor's duty to disclose exculpatory or impeachment evidence stands

separate and distinct from the defense's duty to investigate. *Fontenot*, 4 F.4th 982 . There is no issue of waiver when the duty rested with the prosecutor to disclose the evidence. See *Kyles*, 514 U.S. 419. Ms. Wilkens has been waiting twenty-five years for that disclosure.

Courts have interpreted Section 1086 to require "due diligence" by the defendant to uncover claims, otherwise they are waived. *Williams v. Trammell*, 782 F.3d 1184 (10th Cir. 2015); *Cummings v. Sirmons*, 506 F.3d 1211 (10th Cir. 2007). No amount of due diligence will necessarily lead to the discovery of a *Brady* violation. See *Kyles* , 514 U.S. 419. Specifically, in this case, Tulsa County did not begin to digitize court records until 2011.[5] The Tulsa World articles discussing Fadem's perjury were not digitized until 2019.[6] Both digitization efforts occurred *after* April's last appeal was denied certiorari at the Supreme Court in 2009. Even if prior counsel or defendant herself had the means to search non-digitized records for a nugget of information they did not know existed, the Tenth Circuit has clearly stated the duty lies with the State to uncover and disclose exculpatory or impeaching information and there can be no burden of due diligence on the Defendant to uncover a *Brady* violation or risk its waiver given that "the prosecution alone knows what it did not disclose." *Kyles,* 514 U.S. at 437; See *Brady,* 373 U.S. 83; *; Giglio,* 405 U.S. 150

Recently, the Oklahoma Court of Criminal Appeals reversed a grant for post-conviction relief and remanded for further proceedings in *State v. Ward*, 2022 OK CR 16. The Court noted, "A claim which **could have** been raised on direct appeal, but was not, is waived." *Fowler*, 1995 OK CR 29, ¶ 2. See also, *Fox v. State*, 1994 OK CR 52, ¶ 2; *Johnson v. State*, 1991 OK CR 124, ¶ 4. The focus in Mr. Ward's reversal was the fact that he and his co-defendant had access to the documents from Oklahoma State Bureau of Investigation (OSBI) and Oklahoma Indigent Defense

[5]https://tulsaworld.com/news/local/tulsa-county-begins-posting-court-documents-online/article_fa570c3a-8a59-5c31-bf5f-e0072a205359.html

[6]https://tulsaworld.com/archive/daughter-sues-in-grossich-feud-lawsuit-cites-undue-influence/article_a58ac2f7-0fa1-53de-89c9-4cd295ae529d.html

System (OIDS) after they were turned over in 1994 to the co-defendant's legal team, and in 2003 to Ward. A fourteen year inaction on Ward's part caused the Court to find his claim for review was forfeited (waived). As noted above, April's case is patently distinguishable. Brady violations inherently involve the obscuring of information as a ground of relief in and of itself. April could not raise these claims on direct appeal due to the nondisclosure by the District Attorney. *Ward*, 2022 OK CR 16.

The jurisprudence on waiver is clear: an issue is only waived where the litigant *could have* raised an issue and failed to. Waiver is not an appropriate procedural bar where the litigant *could not have* raised the issue. The Fadem Lawsuit was never digitized. It is currently stored on microfilm. Ex. 2. The article from the Tulsa World discussing the perjury was not digitized until 2019. Without disclosure of the perjury by the State, due diligence would not have uncovered this matter earlier.

Even so, as stated *supra*, the duty of disclosure under Brady lies with the State, regardless of what due diligence efforts were made by the Defendant. *Fontenot* at 1036; *Banks* at 1517. Common sense dictates that unless and until any such disclosure or discovery is made, a defendant cannot raise a claim for a *Brady* violation. Thus, April's claim of a *Brady* violation has not been waived.

c. LACHES DOES NOT APPLY

The doctrine of *Laches* does not apply as a procedural bar to the post-conviction relief sought here. *Laches* may be invoked when a long period of time has passed since the original proceeding, and - due to the petitioner's inaction - the relief is not granted. The doctrine of *laches* requires two inquiries: whether too much time has passed, and whether the time has passed as a result of the Petitioner's inactions. *Fontenot,* 4 F.4th 982.

As to question one, there is no doubt that substantial time has passed since April's trial. The trial lasted for three weeks in April of 1999. Even more time has passed since the original perjury that is the catalyst of this ground for relief. However, as observed in the tortured appellate history

and the arguments above, the time did not pass due to petitioner's inaction. April has been extremely proactive in pursuing her legal remedies for relief, timely appealing all potentially actionable claims. Because this evidence of perjury is newly discovered, *laches* will not apply. Ex. 2.

II. NEW EVIDENCE IN THE FIELD OF BATTERED WOMENS' SYNDROME CONSTITUTES NEW MATERIAL FACTS UNAVAILABLE AT THE TIME OF TRIAL UNDER 22 O.S. 1080 (D)

Cases across the country have been overturned due to advancements in scientific evidence. These cases are being overturned and vacated because the scientific basis upon which the expert witness based their opinion are now flawed and outdated. Thus, they no longer represent opinions based on "scientifically valid principles," and a "reliable" basis to form an expert opinion. "[T]he Rules of Evidence—especially Rule 702—do assign the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands." *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 597 (1993)) See also, *Taylor v. State*, 1995 OK CR 10 (expressly adopting the *Daubert* standard for reliability in Oklahoma).

New scientific evidence has formed the basis for exonerations both here in Oklahoma and across the country. See *Williamson v. Reynolds*, 904 F. Supp. 1529, 1554 (E.D. Okla. 1995) (abrogated on other grounds by *Nguyen v. Reynolds*, 131 F.3d 1340 (10th Cir. 1997)), aff'd sub nom (hair comparison evidence). *Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997), (hair comparison evidence); See *Ex parte Chaney*, 2018 WL 6710279 (Tex. Dec. 19, 2018) (bite mark evidence); *In re Richards*, 371 P.3d 195 (Sup. Ct. Cal.2016) (bite mark evidence); and see *Miller v. Jones*, 92 F.3d 1196, (10th Cir. 1996) (DNA evidence).

Social science evidence can also provide the basis for expert opinions. Dr. Call's opinion in April's case rested entirely on accepted social science principles regarding battered women. Just as

the sciences that inform hair comparison evidence, bite mark evidence, and DNA evidence have evolved in the last twenty-three years–so too has the social science evidence surrounding domestic violence and intimate partner violence. Anytime the science which underlies an expert opinion advances to new discoveries which create a "culture change"[7] within the field and cause the field to progress past old ideas and commonly accepted beliefs–the modern bases for expert testimony should be considered newly discovered evidence under 22 O.S. §1080(d).

A. ADVANCES IN THE FIELD OF DOMESTIC VIOLENCE SOCIAL SCIENCE QUALIFY AS NEW EVIDENCE.

Post-conviction relief may be based on the discovery of "material facts, not previously presented and heard, that require vacation of the conviction or sentence in the interest of justice." 22 O.S. § 1080(d). These facts must have been undiscoverable for trial or original appeal despite the exercise of due diligence. *Brecheen v. State*, 1992 OK CR 42.

A defendant must prove "there is a reasonable probability that the newly discovered evidence would have changed the result of the trial." *Taylor v.* 1955 OK CR at ¶25, (citing *Tobler v. State*, 87 OK CR 25). A defendant must also show that the new evidence could not have been discovered with the exercise of due diligence. *Taylor*, 1955 OK CR at ¶25 (citing *Armstrong v. State*, 61 OK CR 352; *Henderson v. State*, 94 OK CR 45; *Isom v. State*, 1955 OK CR 173.

An oft used test for determining if after-discovered evidence rises to the level of providing relief is the *Berry* test. *Berry v. State*, 10 Ga. 510 (Ga. S. Ct. 1851), adopted by the 10th Circuit in *United States v. Perea,* 458 F.2d 535 (10th Cir. 1972). The *Berry* test is known as a four-part test. Under this rule, a defendant seeking a new trial on newly discovered evidence must show the following:

---

[7] Joshua Wilson, Jenny Fauci, & Lisa Goodman, "Bringing Trauma-Informed Practice to Domestic Violence Programs: A Qualitative Analysis of Current Approaches," Vol. 85, No. 6 Am. J.l of Orthopsychiatry 587 (2015).

1. The evidence was newly discovered and unknown to a defendant at the time of the trial;
2. The failure to detect the evidence was not a result of lack of due diligence by the defendants;
3. The evidence is material, not merely cumulative or impeaching; and
4. The evidence will probably produce an acquittal.

New scientific evidence in the field of intimate partner violence and battered women's syndrome meets each of these requirements for the *Berry* test. 1) New evidence in the field of Domestic and Intimate Partner Violence (DIPV) and trauma has emerged since the trial in 1999, 2) there was no lack of due diligence since the evidence did not yet exist, 3) the evidence is not merely impeaching or cumulative because the entire issue of April's defense turns on her showing of Battered Women's Syndrome (BWS), 4) the evidence is thus material to her defense of BWS, 5) the new evidence would probably produce an acquittal: if April's expert were allowed to testify to her state of mind, and her terror as a result of Post-Traumatic Stress Disorder she was suffering from on April 28th, 1998, a jury would likely understand why lethal force was justified. See e.g. *Ex parte Henderson*, 384 S.W.3d 833 (Tex. Crim. App. 2012) (granting a new trial to a woman convicted of capital murder where petitioner presented evidence that developments in biomechanics could show that the instant death was the result of an accident); *Han Tak Lee v. Glunt*, 667 F.3d 397 (3d Cir. 2012) (holding that advances in the field of fire science warranted new discovery and evidentiary hearings to determine if State's original fire science evidence was unreliable in the wake of new advances in the field).

The final requirement of the *Berry* test is that the evidence would need to be admissible. Here, expert testimony on the subject of battering evidence and its effects would be admissible under *Daubert* and 12 O.S. § 2702.

B. THE EVIDENCE PRESENTED AT APRIL'S TRIAL WAS BASED ON NOW-OUTDATED THEORIES AND INCORRECT UNDERSTANDINGS OF SURVIVOR BEHAVIOR

At the time of April's trial, the theory of Battered Womens' Syndrome was still in its legal infancy in Oklahoma. The flagship case, *Bechtel v. State*, was decided by the OCCA in 1992. *Bechtel v. State*, 1992 OK CR 55. Battered Womens' Syndrome is a legal defense which bolsters a defendant's claim of self-defense by eliminating the objectively reasonable component of self-defense and replacing it with a subjectively reasonable component. *Id.* at ¶¶28-35.

In *Bechtel*, defendant Donna Bechtel suffered from approximately 23 battering episodes prior to shooting her husband, Ken Bechtel. On the night of his death, Ken Bechtel was intoxicated, "As [Donna] got ready to smoke the cigarette, she heard a gurgling sound, looked up and saw the contorted look and glazed eyes of the deceased with his arms raised. [Donna] reached for the gun under the bed and shot the deceased as she tried to get up and run." *Id* at ¶11. The OCCA remanded Donna Bechtel's case to the trial court and ordered a new trial where the defense would be allowed to have an expert witness testify about Battered Womens' Syndrome.

The social science underlying Domestic Intimate Partner Violence (DIPV) has changed profoundly since the *Bechtel* case. Exhibit 10, *Angela Beatty Affidavit.* April was allowed to have an expert witness testify about Battered Womens' Syndrome, and the battering relationship between herself and Terry Carlton. The social science relied on by her expert was fundamentally unreliable in the wake of advances to the field of DIPV. The very concept of "battered women's syndrome" is not used by experts in the field today Ex. 10. Since 1999, the social science evidence has left Battered

Womens' Syndrome behind. The theories of loss of control,[8] learned helplessness,[9] and cycle of violence[10] have been found inadequate to explain a person's response to DIPV.[11] *Id.*

Both the cycle of violence theory and learned helplessness theory were the fundamental underpinnings of April's expert opinion Ex. 4, Vol. XV, p. 2823:21-25, p. 2824:1-2, p. 2835:5-20. These concepts were first developed by Dr. Lenore Walker in 1978.[12] Walker studied women who remained in violent relationships. She concluded that women stay in abusive relationships because constant abuse strips them of the will to leave.[13] This is where the concept of "learned helplessness" originated.[14]

Today, experts do not use the learned helplessness theory. This is due to the fact that it does not account for the social, economic and cultural reasons a woman could choose to stay in an abusive relationship. Ex. 10. People often have very reasoned bases for staying in an abusive relationship. For example, they may fear retaliation against themselves or their children. They may not be able to financially support themselves or their children. They may be ostracized by their family and community if they leave. The theory of learned helplessness is inconsistent with the fact that women surviving in abusive relationships attempt to leave many times and routinely act in very conscious, proactive ways to try to minimize the abuse directed at them and to protect their children . *Id.*

Today, experts call this "post-separation abuse."[15] Exhibit 11, Post Separation Abuse Wheel. "[W]omen are usually persistent and often tenacious in their attempts to seek help, but pursue such

---

[8] Ethel Klein et al., Ending Domestic Violence: Changing Public Perceptions/Halting the Epidemic 6 (1997).
[9] R. Emerson Dobash & Russel P. Dobash, Women, Violence and Social Change 222-23, 225, 229-32 (1992).
[10] *Id.*
[11] Michael Paymar, Building a Coordinated Community Response to Domestic Violence: An Overview of the Problem 3-4 (1994).
[12] Lenore Walker, The Battered Woman Syndrome (1984).
[13] Id.
[14] Walker, *supra* at note 10.
[15] Hardesty, J., & Chung, G. (2006). Intimate partner violence, parental divorce, and child custody: Directions for intervention and future research. Family Relations, 55(2), 200–210.

help through channels that prove to be most useful and reject those that have been found to be unhelpful or condemning."[16] People who are abused do not live their lives in a state of "learned helplessness." Conversely, many times they are stuck in a hypervigilant cycle of "staying, leaving and returning."[17] During this process,

> "[w]omen make active and conscious decisions based on their changing circumstances: they leave for short periods in order to escape the violence and to emphasize their disaffection in the hope that this will stop the violence. In the beginning, they are generally not attempting to end the relationship, but are negotiating to reestablish the relationship on a non-violent basis."[18]

In addition, the learned helplessness theory was based on perceived characteristics commonly shared by battered women. These traits included: low self esteem, a tendency to withdraw, or perceptions of loss of control. Experts who proposed the theory did not consider that these "characteristics" were probably, in fact, the physical and psychological manifestations of the abuse.[19]

It is now widely accepted that "learned helplessness" does not accurately explain victim behavior in the context of intimate partner violence. These modern understandings of victim behavior were not available in 1999 at the time of April's trial. As such, they constitute new evidence warranting an evidentiary hearing. 22 O.S. §1080(d). See e.g. *Ex parte Henderson*, 384 S.W.3d 833; *Han Tak Lee*, 667 F.3d 397.

---

[16] R. Emerson Dobash & Russel P. Dobash, Women, Violence and Social Change 222-23, 225, 229-32 (1992).
[17] *Id.*
[18] *Id.*
[19] C. Warshaw, "Thinking about trauma in the context of domestic violence: An integrated framework." 1 Synergy, A Newsletter of the Resource Center on Domestic Violence Child Protection and Custody 2-8 (2014).

C. APRIL'S BEHAVIOR IS CLEARLY EXPLAINED AND LEGALLY EXCUSABLE WHEN ASSESSED THROUGH NEWLY ACCEPTED SOCIAL SCIENCE, DEVELOPED AFTER HER TRIAL.

a. NEW TRAUMA-INFORMED PRACTICES IN THE DIPV FIELD EXPLAIN APRIL'S MENTAL HEALTH IN A MANNER THAT BOLSTERS HER CLAIM OF SELF DEFENSE UNDER BWS, RATHER THAN MISDIAGNOSING HER AS BI-POLAR OR PSYCHOTIC.

Understanding of trauma, in particular Post-traumatic Stress Disorder, has swept each academic research field in the last two decades. There is a concerted effort to push all fields–medical, social work, domestic violence treatment, addiction treatment, and even carceral settings–to be trauma-informed, especially those actors who respond to and treat the after effects of violence. Unfortunately, the law has been one of the slowest fields to respond to this evidence-based approach. So many of the symptoms and behaviors of people in these systems can be explained and mitigated by a trauma-informed approach. This approach is colloquially referred to as Trauma-Informed Care (TIC).

TIC was first articulated by Harris and Fallot in 2001.[20] Trauma is defined as:

> "any disturbing experience that results in significant fear, helplessness, dissociation, confusion, or other disruptive feelings intense enough to have a long-lasting negative effect on a person's attitudes, behavior, and other aspects of functioning. Traumatic events include those caused by human behavior (e.g., rape, war, industrial accidents)

[20] Maxine Harris, & Roger D. Fallot, "Using trauma theory to design service systems." (Eds.) (2001).

as well as by nature (e.g., earthquakes) and often challenge an individual's view of the world as a just, safe, and predictable place."

American Psychological Association, Dictionary of Psychology; 'trauma.'

After Harris and Fallot's landmark paper on trauma, the Substance Abuse and Mental Health Services Administration (SAMHSA) began investing in understanding trauma and trauma-informed approaches. In the early 2000s, SAMHSA led the first large-scale effort to design, implement, and evaluate a trauma-informed approach to mental health and substance use services through a study titled: Women, Co-Occurring Disorders, and Violence Study. Since that study, TIC has become a best practice across multiple disciplines. In 2005, "SAMHSA formed the National Center for Trauma-Informed Care, which called TIC a critical 'culture change' in our approach to healing and justice."[21]

Since it became recognized as a best practice, TIC has become so ingrained in the understanding and delivery of domestic violence services that many national accreditation agencies have embedded TIC into their requirements. This means that these organizations could lose their federal funding if they do not incorporate TIC into their service delivery and understanding of domestic violence. SAMHSA has prioritized developing a "comprehensive public health approach to trauma" by identifying TIC as the necessary shift that all mental health service systems must undergo to adhere to federal standards of best practices.[22]

On April 2nd, 1998, (25 days before the shooting) April was taken to Parkside Mental Health Facility by the MOCS unit of the Tulsa Police Department. Ex. 4, Vol XIII, p. 2593:10-11. She was recommended to be admitted by Shawn Blankenship, who stated she seemed to be hallucinating a deity that was not there after he saw her praying. Ex. 4, Vol XIII, p. 2592: 10-14, p. 2589:22-24. She

---

[21] Wilson, Fauci, & Goodman, *supra* at note 5.
[22] *Id.*

told Officer Aaron Tallman that she believed Terry Carlton was "god and Satan," and Officer Tallman saw Carlton sitting in April's driveway. Ex. 4, Vol. IX, p. 1766:5-6. At Parkside, she was placed on a 51/50 hold and diagnosed as bipolar with psychotic tendencies. Ex. 4, Vol. XV, p. 2813:11-12. She was placed on a mandatory dose of Lithium. Ex. 4, Vol XII, p. 2205:17-24. April escaped from Parkside by taking the keys of a nurse while she was playing Uno. Ex. 4, Vol. XII, p. 2199:21-24. Looking back now through a trauma-informed lens, April was clearly exhibiting signs of suffering from PTSD or C-PTSD. Not one actor within the system treated her as someone who was undergoing extensive emotional and physical trauma.

On April 11th, 1998, (17 days before the shooting) April was returned to Parkside. Ex. 4, Vol. XII, p. 2198:12. She was punished for escaping and placed in restraints. Ex. 4, Vol. XII, p. 2196:21-25. Being placed in restraints triggered a PTSD response and she resisted the orderlies. Ex. 4, Vol. XII, p. 2196:22-25, p. 2197:4-7. This action caused her to be labeled "combative," and transferred to Eastern State Hospital in Vinita, Oklahoma. Ex. 4, Vol. XII, p. 2196:17-25. She was again placed on a mandatory dose of Lithium. Ex. 4, Vol. XII, p. 2190:1-2191:4. After spending five days at Eastern State Hospital, April was released with no follow up instructions or care-only that she needed substance use treatment. Ex. 4, Vol. XII, p. 2211:10-15.

April was not able to avail herself of any TIC from any law enforcement agency or domestic violence agency she reached out to, as it did not exist as an approach to treatment at the time. In addition, her expert was not able to 1) give her access to trauma-informed tools that would help the jury understand her mindset the night of the shooting, and 2) administer trauma-informed assessment tools that would show April's true state of mind and diagnoses as someone suffering from Complex Post Traumatic Stress Disorder (C-PTSD). Her misdiagnosis by mental health professionals formed the basis for her expert's unreliable opinion of her mental state. April must be afforded the opportunity to present newly discovered evidence in the field of DIPV. See 22 O.S.

1080, *et seq.* This evidence has a reasonable probability of producing an acquittal as it establishes explanations for April's behavior that do not indicate a design or plan to murder. See *Perea,* 458 F.2d 535.

b. NEW SOCIAL SCIENCE STANDARDS NO LONGER RECOMMEND PSYCHOLOGICAL EVALUATIONS FOR VICTIMS OF INTIMATE PARTNER VIOLENCE.

There has been a reckoning within agencies and organizations that treat victims of domestic violence within the last two decades. Experts who treat victims and who often work with women who exhibit symptoms of trauma have called for a moratorium on psychological evaluations being used within the context of a domestic violence victim. One example is evident in the Oklahoma Department of Human Services training materials for child welfare workers that respond to homes which may be experiencing domestic violence: "psychological evaluations are 'generally...not appropriate in domestic violence situations.'[23] A psychological evaluation will not determine if domestic violence is currently or has ever occurred. Psychological evaluations will not distinguish a batterer from an adult victim and may 'misdiagnose the non-abusive parent's normal response to the abuse or violence as demonstrating mental illness, effectively shifting the focus away from the assaultive and coercive behaviors of the abusive parent.'[24] Psychological evaluations are appropriate when they have been determined to be relevant and necessary following interviews and a review of third party collateral information."[25]

---

[23] American Psychological Association. (2016). Understanding Psychological Testing and Assessment. Retrieved from http://www.apa.org/helpcenter/assessment.aspx

[24] Dalton, C., Drozard, L.M. & Wong, F. (2006). Navigating Custody & Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide. National Council of Juvenile and Family Court Judges (NCJFCJ): Reno, NV, (p. 20).

[25] Oklahoma Department of Human Services, Child Welfare Services, Pub. No.12-36 "Domestic Violence Manual for Child Welfare Workers, A Desk Reference Guide" (Revised 2018). Excerpted Portion available in Exhibit 12.

Unfortunately, these approaches to treating victims of domestic abuse did not exist in 1998 or 1999. As a result, April Wilkens was subjected to involuntary commitment, where she was misdiagnosed by mental health professionals using faulty and outdated assessments which do not adequately evaluate victims of domestic violence. These mental health evaluations formed the basis of Dr. Call's unreliable expert opinion. April must be afforded the opportunity to present this new evidence. 22 O.S. §1080(d).

c. TRAINING MATERIALS FOR STATE EMPLOYEES INDICATE THAT LETHALITY ASSESSMENTS-NOT PSYCHOLOGICAL EVALUATIONS-ARE CALLED FOR IN RESPONDING TO DOMESTIC VIOLENCE.

Several new critical tools for assessing and understanding domestic violence and its effects have been developed in the past two decades. As recently as 2014, state agencies and law enforcement have begun training on an assessment tool called a "lethality assessment," for people reporting domestic violence situations. Exhibit 13, Oklahoma's Current Lethality Assessment. This assessment indicates to the responder or provider the level of risk the reporting person faces from the domestic violence offender.

The assessment tool shows the likelihood of reoffending and the likelihood that the reporting person will face further danger or threat of physical violence. This assessment is also used by expert witnesses in evaluating defendants who are being charged by the state, but who have been victims of domestic abuse. The lethality assessment is a primary consideration and best practice to administer to all people experiencing domestic violence. April never received a lethality assessment as they had not yet been created or adopted in Oklahoma. 21 O.S. § 142A.

d. DR. CALL GAVE APRIL A PSYCHOLOGICAL TEST-THE MINNESOTA MULTIPHASIC PERSONALITY INVENTORY (MMPI)-WHICH IS CONTRA-INDICATED TO VICTIMS OF DOMESTIC VIOLENCE.

Research now shows that personality assessments like the MMPI will incorrectly diagnose victims of domestic violence with schizo-affective tendencies, bi-polar disorders, or other personality disorders which frequently get mis-typed for people who have endured high levels of trauma.[26]

During his testimony, Dr. Call states that he gave April the MMPI and it showed she was: bipolar, psychotic, and that she had schizo-affective tendencies. Ex. 4, Vol. XV, p. 2813:12-13. These diagnoses are derived from questions on the test which ask the participant if they are being followed, if someone is listening to them, or if they believe someone is stalking them. In the case of someone suffering from domestic abuse and intimate terrorism, the answers to these questions will be yes, but not because of a mental illness-rather because of the overt, violent, and obsessive acts being perpetrated on them by their abuser.[27]

It is, in part, because of these types of further harm caused by assessments and other theoretical frameworks that the entire field of domestic violence research underwent a shift to trauma-informed care and practices.

III. CONCLUSION

[26] "Battered women, however, based on the results of the MMPI-2, may appear to be suffering from various psychopathologies, including but not limited to borderline personality disorder, paranoia, histrionic personality disorder, or even schizophrenia. . . . An "alternative conceptualization" is that the woman's psychological presentation is a reaction to the abuse she has suffered (a reactive 'state.')." Nancy Erickson, "Use of the MMPI-2 in Child Custody Evaluations Involving Battered Women: What Does the Psychological Research Tell Us," 39 Fam. L. Qtrly. 87-88 (Spring 2005).

[27] A survey of twelve studies of battered women's MMPI scores revealed they presented overall elevated on the following scales: paranoia, schizophrenia, and psychopathic deviate. All three of these scales were high on April's MMPI results. Erickson, *supra* at 97.

April did not receive a fair trial. Her proceeding was rife with error, and now there is a clear showing of exculpatory impeachment evidence that was withheld from the defense. In addition, new evidence in the field of Battered Womens' Syndrome self defense shows she would likely be acquitted were this evidence given to the jury to consider through a qualified expert. April is legally innocent. She has spent 25 years behind bars. She is praying for a fair review of the record and relief as provided by law.

WHEREFORE, the Petitioner prays that she be granted the above requested relief.

Respectfully submitted,

Colleen McCarty, OBA # 34410
Leslie Briggs, OBA # 33845
110 S. Hartford Ave, Suite 1008
Tulsa, OK 74120
ATTORNEYS FOR APRIL WILKENS

VERIFICATION

I, Colleen McCarty, being duly sworn and deposed do hereby state that I have investigated the facts and conclusions referenced herein and I can provide evidence of every material fact and conclusion alleged. I further state that I have done due diligence on all the exhibits referenced herein and the exhibits are true and correct to the best of my knowledge and belief.

FURTHER SAYETH NOT.

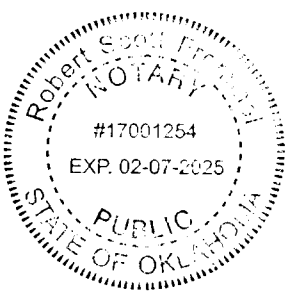
Colleen McCarty

Petitioner's Acknowledgment

I hereby certify that I have informed Ms. April Wilkens of her absolute right to appeal to the Court of Criminal Appeals from the trial court's order entered in this case, but unless she does so within thirty (30) days after the entry of the trial judge's order, this right is forever lost. Further I have read the foregoing application and assignments of error to Ms. Wilkens and informed her there are no other grounds upon which she may wish to attack the judgment and sentence under which she is presently convicted. I further informed her that she cannot later raise or assert any reason or ground known to me at this time or which could have been discovered by her by the exercise of reasonable diligence. I further informed her that she is not entitled to file a second or subsequent application for post-conviction relief based upon facts within her knowledge or which she could discover with reasonable diligence at this time. Upon my oath, Ms. Wilkens agreed to these conditions. I further verify that the facts in this application are true and correct to the best of my knowledge and belief.

Colleen McCarty

Subscribed and Sworn before me on this 30th day of September, 2022.



Notary Public

My Commission Expires:

Certificate of Service

A true and correct copy of the foregoing was delivered to the District Attorney of Tulsa County on September 30, 2022.

Colleen McCarty

LIST OF EXHIBITS FOR APRIL WILKENS'S PCR ON ZIP DRIVE

1. Laura Fadem Lawsuit
2. Colleen McCarty Affidavit
3. Completed OCCA Form 13.11
4. Excerpts from Original Trial Transcripts
5. Judge Claire Eagan's Affidavit
6. December 6th, 1998 Police Report for Rape
7. Luke Draffin OSCN Docket Sheet
8. April Wilkens Affidavit
9. Don Carlton's Pre-Sentencing Letter to the Court
10. Angela Beatty Affidavit
11. Post Separation Abuse Wheel
12. Domestic Violence Manual for Child Welfare Professionals (Excerpted pages 1, 56-58)
13. Oklahoma's Current Lethality Assessment